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Effets Internationaux des Jugements Répressifs et Communautés Européennes

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EXTRAIT DE LA
REVUE DE DROIT PENAL ET DE CRIMINOLOGIE
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Effets Internationaux des Jugements Répressifs et Communautés Européennes*

Introduction

1. - Je pense que la solution réaliste et efficace des questions qui nous sont aujourd'hui posées, doit être recherchée en fonction de deux considérations qui me paraissent fondamentales, et, chose curieuse, d'allure contraire.

D'une part, on ne saurait contester que la création des Communautés Européennes exige, de façon urgente, la *révision* de nos conceptions traditionnelles à propos des jugements répressifs étrangers.

Mais, d'autre part, on s'habitue difficilement à l'idée d'un droit pénal qui ne serait pas, sinon essentiellement, du moins principalement *territorial*.

2. - Des aménagements importants à la doctrine classique doivent être envisagés. Nous ne vivons plus en vase clos. Nous devons prendre conscience de ce que *l'Europe des Six* constitue un fait nouveau dans l'évolution des relations internationales. C'est une *création* originale, spécifique ; il s'agit d'un ensemble unifié, ayant ses institutions et ses buts propres, plutôt régi par un droit *interne* élargi que par les principes du droit international.

Les *Traités Européens* (1) accordent aux ressortissants des six Etats, les libertés d'établissement, de circulation et de prestation de services. L'équivalence des diplômes universitaires est acquise en principe. Le commerce s'unifie. Le crédit s'élargit. Le progrès social se généralise uniformément. La coopération militaire s'étend. Le formalisme international tend à disparaître. L'unité

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* Rapport présenté au Colloque franco-belge de l'Union Internationale des Magistrats, le 29 avril 1961 à Liége.

(1) Voy. aussi *Traité Benelux* du 3 février 1958, art. 1 à 5.

des conceptions rend possible la lutte en commun contre la criminalité.

3. - Peut-on, dans ces conditions, s'en tenir à l'application d'une théorie fondée sur une conception purement territoriale, voire nationaliste, sur l'idée périmée du contrat social et la notion de plus en plus abandonnée de souveraineté de l'Etat ?

Comment admettre, par exemple, qu'une personne déchue par un tribunal français du droit de conduire un véhicule, puisse impunément voyager au volant de sa voiture dans cinq pays de la Communauté ?

Comment admettre que la récidive pénale ne soit pas juridiquement réalisée quand la condamnation antérieure résulte d'un jugement rendu dans l'un des autres pays de la Communauté ?

C'est Monsieur le Procureur Général Cornil qui écrivait récemment (2) : « On fait souvent grief aux généraux des pays pa-
» cifiques de ne préparer la défense que comme si l'attaque
» qu'ils auraient à repousser ne devait être que la continuation
» des opérations de la guerre précédente ; il ne faudrait pas que
» l'on puisse adresser aux juristes le même reproche de regarder
» exclusivement en arrière et de demeurer indifférents aux bou-
» leversements récents ».

Comme disait P.H. Simon : « la nécessité, en histoire, n'est-
» ce pas une idée, devenue mûre dans la conscience humaine, et
» qui exige le renversement d'une situation ? » (3).

D'ailleurs le législateur européen a lui-même montré la voie à suivre. L'article 22 du Traité C.E.E. prescrit aux Etats d'engager des négociations en vue d'assurer la simplification des formalités auxquelles sont subordonnées la reconnaissance et l'exécution réciproque des décisions judiciaires.

4. - Mais — et c'est l'autre considération soulignée au début de cet exposé — il y aurait un danger évident à vouloir élaborer un vaste et audacieux programme *d'internationalisation du droit pénal,* conclusion d'une vue de l'esprit purement théorique, correspondant à un idéal international élevé mais pratiquement irréalisable. L'assimilation avec le droit international privé, notamment, serait artificielle.

On ne saurait contester que le *Droit pénal international* présente de sérieuses difficultés en raison de ses aspects politiques, des susceptibilités nationales dont, malgré tout, on doit tenir compce, et des différences encore essentielles, suivant nos pays, concernant le fondement du droit de punir (Italie, Allemagne notamment), le régime pénitentiaire, l'organisation judiciaire (question du jury par exemple), et la nature même des mesures de répression et de sûreté.

(2) Les possibilités du Droit International Pénal, *Bulletin de l'Académie Royale de Belgique*, 1955, pp. 244 et suiv.
(3) P.H.SIMON, *Portrait d'un officier*, p. 144.

Soyons certains qu'un échec soulignerait exagérément la vocation nationaliste de nos législations répressives, et favoriserait ainsi l'immobilisme. Mieux vaut un progrès limité, mais effectif, qui, lui-même, suscitera rapidement un nouveau pas en avant...

Serions-nous prêts à admettre, par exemple, qu'un citoyen belge condamné par une juridiction étrangère à la déchéance de la *puissance paternelle,* soit, d'office, déchu de ses droits de père sur ses enfants restés en Belgique, alors que, peut-être, pareille sanction ne lui aurait pas été infligée pour le même fait en Belgique ?

Ou qu'un citoyen belge frappé *d'interdiction professionnelle* à l'étranger, pour infraction à l'organisation locale, soit *ipso jure,* déchu du droit d'exercer telle profession dans tous les pays de la Communauté ?

Ne reste-t-il pas légitime, même à l'intérieur de la Communauté, que chaque Etat désire exercer un certain *contrôle* sur les effets des condamnations étrangères sur son territoire ?

Mais *quel* contrôle ? Suivant quelle procédure ? Et dans quels cas exactement ?

5. - On voit donc que le problème est délicat, qu'il est soumis à des tendances contradictoires, et que, dans ces conditions il convient de procéder non d'une manière empirique ou dialectique, mais suivant la *méthode expérimentale :* en somme, comme disaient les Anciens, en dégageant la *regula* du *jus quod est.*

Ainsi notre méthode est toute tracée : examen objectif et critique du *droit positif,* pour en souligner, certes, les insuffisances, mais aussi pour y chercher un *programme* : réformes que suggèrent ces insuffisances mêmes, profit qu'on peut tirer de quelques législations timides et expériences isolées, et, surtout, enseignement qui se dégage du droit comparé et des tendances générales du Droit pénal international.

I. Le Droit Positif

6. - Je n'ai aucunement l'intention de faire l'*historique* de notre question. Mais je pense qu'il n'est tout de même pas inutile de souligner que le problème des effets internationaux n'est pas nouveau et qu'il a été étudié avec soin depuis des siècles.

On trouve chez Bartole notamment (4) une doctrine précise qui reprend la distinction, devenue classique, entre *la force exécutoire du jugement étranger :* dans quelle mesure peut-on exécuter les condamnations qu'il prononce ; *son autorité négative de chose jugée :* met-il obstacle à de nouvelles poursuites ; et enfin *son autorité positive de chose jugée :* dans quelle mesure réalise-t-il ses effets, notamment au point de vue récidive (5), incapacités et déchéances (6).

Donnedieu de Vabres cite un arrêt de la *Chambre de la Tournelle* du 24 mars 1631, qui déclare non-recevable une action en dommages-intérêts contre un meurtrier absous en pays étranger ; et un arrêt de la *Chambre de l'Edit* du 31 août 1634, qui déclare, dans le cas d'une infraction commise à Genève, l'action publique éteinte en raison du jugement déjà rendu par le Conseil de Genève (7).

On pourrait multiplier les exemples. Et même *la doctrine classique* du XIXe siècle, devenue essentiellement territoriale sous l'influence des philosophes du contrat social et de l'exaltation du sentiment national, avait dû accepter certains aménagements de ses conceptions doctrinaires.

La question qui nous occupe a fait l'objet de deux congrès importants de l'*Association Internationale de Droit pénal :* à Bucarest en 1929 (8) et à Fribourg-en-Brisgau en 1960 (9).

A Bucarest fut adopté le vœu suivant : « Que toute sentence » pénale, prononcée régulièrement par le juge compétent, suivant » la loi normalement applicable, soit admise à produire à l'étran-

(4) DONNEDIEU de VABRES, *Introduction à l'Etude du Droit Pénal International*, Paris 1922, p. 146.
(5) Le *fur famosus* notamment.
(6) P. ex. : Infamie, excommunication...
(7) DONNEDIEU de VABRES, *Introduction...* pp. 151 et 253.
(8) *Rev. Int. Dr. Pén.* 1929, nos 3 et 4.
(9) R. LEGROS, Fribourg-Lisbonne, *Rev. Dr. Pén. et Crim.* 1960, juillet.
Le colloque de Fribourg fut la réunion préparatoire du prochain Congrès de Lisbonne pour l'une des questions mises au programme de ce Congrès : *l'application de la loi pénale étrangère par le juge national.*

» ger sous le contrôle de l'autorité judiciaire locale, les effets que » nécessite la coopération internationale lorsqu'ils sont conformes » à l'ordre public du pays où ils doivent se réaliser ».

Formule progressiste, certes, mais combien générale et prudente ; et qui ne resta cependant qu'une vaine déclaration sans résultats pratiques.

Il semble que les travaux de Fribourg, qui seront poursuivis en septembre prochain à Lisbonne, seront plus efficients, en raison précisément de l'évolution internationale récente, et des objectifs limités, mais possibles, donnés aux rapporteurs.

7. - C'est l'article 13 de la *loi du 17 avril 1878* contenant le titre préliminaire du Code de procédure pénale, qui règle, en Belgique, la matière des effets des jugements répressifs étrangers.

« Sauf en ce qui concerne les crimes et délits commis en temps » de guerre, les dispositions précédentes (c'est-à-dire celles rela- » tives aux crimes et délits commis hors du territoire du Royaume) » ne seront pas applicables lorsque l'inculpé, jugé en pays étran- » ger du chef de la même infraction, aura été acquitté ou lorsque, » après avoir été condamné, il aura subi ou prescrit sa peine ou » aura été grâcié. Toute détention subie à l'étranger par suite de » l'infraction qui donne lieu à la condamnation en Belgique, sera » toujours imputée sur la durée des peines emportant privation » de liberté ».

Application particulière, en droit pénal international, de la règle fondamentale : *non bis in idem* (10). Application limitée cependant.

8. - *Deux limites.* En ce qui concerne les crimes et délits commis *en temps de guerre* tout d'abord : les poursuites sont alors toujours possibles, quelle que soit la décision déjà intervenue à l'étranger (11).

Prépondérance de l'intérêt politique sur l'idée de justice, méfiance à l'égard de décisions qui auraient subi l'influence de la propagande ennemie.

(10) Application qu'on retrouve d'ailleurs avec diverses modalités dans la plupart des droits étrangers. Voy. par exemple *C. Pén. Allemand*, art 3 à 7 ; *C. Pén. danois*, art. 10 ; *C. Pén. polonais*, art. 11.
(11) A.L. 5 août 1943 — Cass. 27 novembre 1950, *Pas.*, 1951, I, 180 ; et les conclusions de M. HAYOIT de TERMICOURT, Premier avocat général.
L'ordonnance française du 9 novembre 1944 prévoit le cas spécial des décisions rendues au cours de la guerre par des tribunaux allemands ou italiens.

Par ailleurs, l'article 13 n'est pas applicable lorsqu'il s'agit d'un crime ou d'un délit *commis en Belgique* et *déjà jugé à l'étranger* en vertu des règles de la compétence internationale : compétence personnelle, compétence universelle...

Il ne vise que l'hypothèse de l'infraction *commise et jugée* à l'étranger : il y a à cet égard une jurisprudence bien établie (12).

La jurisprudence anglo-saxonne est en sens contraire (13) ; c'est plus juridique, plus logique et plus juste.

9. - *Deux principes.* Aux termes de l'article 13, la poursuite n'aura pas lieu :

1° dans le cas d'acquittement à l'étranger pour la même *infraction*, c'est-à-dire, en vertu des principes généraux du droit pénal, pour le même fait (14) ;

2° dans le cas de condamnation à l'étranger, si la peine a été subie ou prescrite, ou grâciée (15).

10. - *Deux précisions* : 1° le non-lieu est assimilé à l'acquittement (16).

2° la prescription de la peine se calcule selon la loi belge, ce qui est une conception assez artificielle, une décision étrangère ne pouvant logiquement subir l'effet d'une prescription prévue par la *lex fori* ; en droit allemand et en droit suisse, on a égard à la prescription de la loi étrangère.

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(12) Cass. 23 septembre 1907, *Pas.*, 1907, I, 356 ; 16 décembre 1919 *Pas.*, 1920, I, 10 ; 15 décembre 1952 *Pas.*, 1953, I, 262. *Contra,* DONNEDIEU de VABRES, *Traité de Droit Criminel*, n° 1861.

(13) *Supreme Court of California* 23 avril 1948, Clunet, 1950, 952 : la loi californienne interdit les poursuites lorsque l'inculpé, pour le même délit, commis en Californie, a déjà été condamné en Grèce en vertu de la compétence personnelle.

(14) Cass. 4 septembre 1959, *Rev. Crit. de Jurisprudence Belge*, 1960, 132, et notre note.

(15) Un cas spécial : l'art. 12 de la loi du 12 mars 1858 concernant les crimes et délits qui portent atteinte aux relations internationales (attentat ou complot contre la personne du chef d'un gouvernement étranger, complot contre un gouvernement étranger, outrages et violences à l'égard des agents diplomatiques accrédités près du gouvernement belge) stipule que ces incriminations ne seront pas retenues lorsque l'inculpé aura été poursuivi et jugé contradictoirement en pays étranger.

(16) Voy. cependant Cass. 27 septembre 1907 *Rev. Dr. Pén.* 1907 p. 307.

11. - *Deux observations.* Il faut noter, tout d'abord, le caractère *empirique* de l'article 13. Il reconnaît à la décision étrangère une certaine autorité négative de chose jugée, justifiant le moyen d'exception de chose jugée, mais, en réalité, dans le cas de condamnation, il prescrit d'avoir égard non à la chose jugée comme telle, mais à *l'exécution* du jugement.

Par ailleurs, on observera que l'article 13 peut être utilement invoqué dans la *controverse* sur la question de savoir si les poursuites sont possibles en Belgique lorsqu'un belge a commis à l'étranger, dans les conditions prévues par la loi du 17 avril 1878, un fait punissable en Belgique mais non punissable dans le pays où le fait a été commis. Théoriquement les poursuites sont possibles : c'est la loi belge qui est indiscutablement applicable, en vertu de l'article 14 de la loi du 17 avril 1878. La Cour de Cassation s'est cependant prononcée en sens contraire (17), et sa doctrine (18) trouve précisément appui dans l'article 13 : car si le prévenu avait été poursuivi à l'étranger, il aurait été acquitté, et n'aurait pu, par conséquent, être à nouveau poursuivi en Belgique.

12. - Telle est donc la théorie en droit belge, des effets des décisions répressives étrangères. C'est la théorie admise dans la plupart des pays. En ce qui concerne le *droit francais*, les principes sont les mêmes, sauf qu'ici rien n'est prévu concernant la déduction de la détention subie à l'étranger ; mais dans la pratique, on arrive, à cet égard, au même résultat, par la voie de la grâce (19). La nouvelle *loi russe* du 25 décembre 1958 contenant les principes de base de la législation criminelle de l'U.R.S.S. et des Républiques de l'Union, stipule en sa section 5, que les citoyens russes et les apatrides qui ont subi leur peine à l'étranger pour les crimes commis par eux en dehors du territoire soviétique *peuvent* voir leurs peines réduites ou même complètement remises (20) ; l'acquittement à l'étranger est sans effet.

Il convient de citer encore, et tout particulièrement, les dispositions du *Code Pénal suisse* sur la matière, parce qu'on y trouve

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(17) Arrêt VANDERHAEGEN du 15 juillet 1907. *Pas.*, 1907, I. 334. Ainsi le droit belge rejoint par la voie prétorienne la doctrine du code français de procédure pénale.

(18) Approuvée par DONNEDIEU de VABRES, *Principes modernes du Droit Pénal International*, p. 172 ; critiquée par contre dans les *Novelles, Procédure Pénale*, I, 1.

(19) Voy. les articles 689 à 696 du nouveau Code de procédure pénale. La loi française prévoit expressément l'exception des attentats contre la sûreté et le crédit de l'Etat.

une extension, mitigée il est vrai, mais remarquable de la force exécutoire du jugement répressif étranger.

Ce sont les articles 3 et 5 qui prévoient que, dans certains cas qu'ils précisent, la peine, ou le reste de la peine prononcée à l'étranger, sera *exécutée* en Suisse. Par contre l'art. 4 stipule, pour d'autre cas, que le juge suisse imputera la peine subie sur la peine à prononcer.

Les prescriptions des articles 3 et 5 supposent évidemment un contrôle par le juge suisse, donc une sorte *d'exequatur* pénal, et un tableau d'équivalence entre les peines du droit suisse et celles des Codes étrangers.

13. Les décisions répressives étrangères ont-elles en Belgique *d'autres effets* que ceux prévus par l'article 13 ?

Ont-elles, à côté de cette autorité négative de chose jugée, une certaine *autorité positive*, une certaine *force exécutoire*, une autorité de fait, une valeur internationale ?

On doit bien constater que notre législateur s'est montré, jusqu'à présent, assez timide dans ce domaine.

Les condamnations étrangères sont *sans effet* au point de vue récidive, concours, sursis, application des mesures de sûreté, incapacités civiles et politiques.

Il n'existe *pas d'exequatur pénal*, sauf, bien entendu, pour les condamnations *civiles*, portées dans les jugements répressifs.

La décision répressive étrangère n'a même pas d'autorité sur *l'action civile ou à fin civile* intentée en Belgique. Une condamnation étrangère ne peut servir de base à une demande en *divorce* ou à une action en déclaration *d'indignité successorale*. En principe, en tout cas. Mais en pratique, on imaginerait mal que ne soit pas exclu de la succession (art. 727, 1° du C. civil), celui qui aurait été condamné par un tribunal étranger pour avoir donné ou tenté de donner la mort au défunt (21).

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(20) Par ailleurs la loi pénale russe est seule applicable aux infractions commises par des russes ou des apatrides à l'étranger, et punissables en Russie.

En ce qui concerne les étrangers, est prévue la réserve de l'arrangement international.

(21) Avec cette circonstance encore qu'une *poursuite* dans le pays s'avèrera le plus souvent impossible.

En ce qui concerne la valeur d'un jugement étranger de condamnation du chef *d'adultère*, voy. Gand 19 mars 1924, *B.J.* 1925, 207 et 5 novembre 1924, *B.J.* 1925, 212.

La condamnation du chef *d'abandon de famille* (C. pén. art. 391*bis*) n'aura pas lieu si la décision relative à la pension alimentaire est une sentence étrangère qui n'a pas reçu l'*exequatur* (22). En cette matière essentiellement urgente, il semble que la procédure d'*exequatur* pourrait être supprimée, ou tout au moins simplifiée, dans les relations entre pays de la Communauté européenne. (23).

Enfin, la règle que *le criminel tient le civil en état* n'est pas d'application dans les relations internationales (24).

Par contre, en droit *suisse* (art. 72), l'exécution à l'étranger d'une peine privative de liberté suspend la prescription (25).

14. Evidemment, les décisions étrangères ont une certaine *autorité de fait* : le juge national peut les prendre en considération en ce qui concerne notamment le taux de la peine, le bénéfice du sursis, l'octroi des circonstances atténuantes, la faveur de la réhabilitation ; au civil : comme élément de preuve en matière de divorce, d'indignité successorale (art. 727, 2°, C. civ.), de révocation pour ingratitude (art. 955 C. civ.).

C'est d'ailleurs à cet effet que sont publiées au *casier judiciaire* les condamnations rentrant dans les catégories prévues pour les condamnations prononcées en Belgique, et résultant de décisions rendues par des tribunaux étrangers, à charge des Belges, dans

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(22) Constitue un problème différent la question de l'application des règles du droit international privé lorsque le litige pénal est mêlé de questions civiles : appréciation de l'âge de la majorité, de la validité du mariage, des liens de filiation, de la validité d'un chèque (Voy. sur ces questions : Corr. Brest 18 octobre 1949 *Rev. de Sc. Crim.* 1950, 415, observ. L. HUGUENEY ; Tribunal supérieur de Madrid, 7 novembre 1915, cité par DONNEDIEU de VABRES, *Principes*... p. 194 ; Paris 28 mars 1952 *Gaz. Pal.* 1952, I, 423, Clunet 1952, 880).

Un autre problème encore : celui de la loi applicable dans la détermination de la « minorité pénale ».

(23) Il convient de signaler, à cet égard, qu'une convention signée à Vienne le 25 octobre 1957 entre la Belgique et l'Autriche, approuvée par la loi belge du 22 avril 1960, a simplifié la reconnaissance et l'exécution des décisions judiciaires et des actes authentiques en matière d'obligations alimentaires.

(24) DONNEDIEU de VABRES, Les rapports de la sanction pénale et de la sanction civile, *Rev. de Sc. Crim.*, 1937, p. 391.

(25) En ce qui concerne le problème assez proche des effets de la *détention à l'étranger* sur les poursuites en Belgique, Voy. PHILONENKO, Le prévenu ou l'accusé détenu en pays étranger, peut-il être poursuivi par défaut ou par contumace, *J.T.*, 1950, p. 103 ; P. FORIERS, Le respect des droits de la défense et la force majeure, *J.T.* 1950, p. 405.

le cas où ces condamnations sont notifiées au gouvernement belge en vertu des traités d'extradition.

15. Tels sont les principes. Mais il y a quelques *exceptions,* quelques applications de tendances plus réalistes. Il y a des cas où la décision pénale étrangère a, de façon exceptionnelle ou limitée, une certaine autorité *positive,* voire une certaine force *exécutoire.* Il est intéressant de les passer en revue car non seulement ils seraient susceptibles de montrer la voie à suivre, dans le cadre des communautés européennes notamment, mais encore parce qu'ils constituent la preuve convaincante du caractère *relatif* de la règle prétendûment sacro-sainte de la territorialité du droit pénal, qui, comme beaucoup d'« absolus » n'a, en somme, que la valeur de routine des adages.

Le caractère territorial du droit pénal n'est pas une fin *en soi.* Il est la conséquence organique d'un système existant de relations internationales. Or, celles-ci n'ont pas seulement évolué, elles se sont fondamentalement transformées dans les communautés européennes.

16. *Force exécutoire* tout d'abord. Il y a évidemment l'exemple de *l'extradition* qui peut être cité. L'extradition apparaît en effet comme étant un acte d'exécution de la décision étrangère. Cela a été décidé en jurisprudence tant en Belgique (26) qu'en France (27) à propos de la question de savoir si l'arrestation opérée à l'étranger à la demande du gouvernement belge interrompt la prescription de la condamnation. Il a été décidé que oui ; de même, il y a lieu de déduire de la peine définitive, la durée de la détention préventive subie sur le territoire de l'Etat requis.

D'une part : exécution à l'étranger d'une sentence rendue en Belgique ; d'autre part : exécution à l'étranger de la peine prononcée en Belgique.

C'est par un effet direct reconnu aux actes judiciaires répressifs étrangers, que le droit extraditionnel — législatif et conventionnel — admet l'arrestation provisoire, en pays requis, du prévenu ou condamné, réclamé par l'Etat étranger requérant (28).

Si la demande, adressée à la Belgique, est accompagnée d'un jugement de condamnation ou d'un acte de renvoi, l'étranger est

(26) Cass., 23 septembre 1907, *Pas.*, 1907, I, 360.

(27) Cass., 3 août 1888 *Sir.* 1889, I, 489 ; *D.P.* 1889, I, 173.

(28) L'art. 2 al. 2 de la loi suisse sur l'extradition prévoit les garanties à échanger entre Etat requérant et Etat requis pour assurer la répression et éviter les doubles exécutions.

écroué après que l'acte produit lui ait été signifié (loi du 15 mars 1874, art. 3 al. 1er).

Si la demande est accompagnée seulement d'un mandat d'arrêt, cette pièce doit être signifiée et rendue exécutoire par la chambre du conseil ; celle-ci a pour mission de constater si le fait énoncé est prévu par la loi belge, et rentre dans la catégorie de ceux qu'énumère le traité d'extradition (29). Donc un certain contrôle de l'autorité locale d'une part ; constatation de la double incrimination d'autre part (même loi, art. 3 al. 2).

L'article 5 de la loi de 1874 prévoit également l'arrestation provisoire en vue d'extradition, sur simple avis officiel des autorités requérantes, dans les cas d'urgence (30) ; l'article 4, l'extradition en transit ; les articles 5 et 11 règlent la question des perquisitions et saisies, des Commissions rogatoires, qui, sauf le cas d'urgence, doivent être rendues exécutoires par la chambre du conseil (31), et, enfin, de certaines restitutions.

17. L'article 139 de la loi du 18 juin 1869 stipule que les juges peuvent adresser des *lettres rogatoires* même aux juges étrangers ; mais ils ne peuvent obtempérer aux commissions rogatoires émanées de juges étrangers qu'autant qu'ils y sont autorisés par le Ministre de la Justice, et, dans ce cas, ils sont tenus d'y donner suite.

La question des *relations internationales entre les autorités judiciaires* est de celles qui mériteraient d'urgentes réformes dans le cadre de la Communauté européenne. Le formalisme actuel de la voie diplomatique apparaît vraiment désuet. A tel point que des procédures officieuses, en marge de la loi, sont pratiquées entre certains pays, notamment, pour la eBlgique, avec la France. la Hollande et l'Allemagne ; mais elles offrent des difficultés d'application et ne sont pas suffisamment rapides.

Des accords, arrangements, simples échanges de correspon-

(29) La détention en pays requis met l'étranger à la disposition, non du pouvoir judiciaire, mais du pouvoir exécutif.

Rappelons que le statut de l'étranger est régi en Belgique par la loi du 28 mars 1952 et les arrêtés d'exécution, la Convention de Genève du 28 juillet 1951 sur les réfugiés (loi du 26 juin 1953), la Convention Benelux du 11 avril 1960 (loi du 30 juin 1960) et la Convention de New-York du 28 septembre 1954 sur les apatrides (loi du 12 mai 1960).

(30) Avis transmis par la poste, le télégraphe, le téléphone... Dans chaque cas, il faut se référer à ce que prescrit le traité d'extradition : p. ex., art. 6 du traité franco-belge.

(31) Voy. sur ce point : HUYBRECHTS, *Rev. Dr. Pén. et Crim.*, 1953, p. 185.

dances existent entre la Belgique et certains pays, en vue d'améliorer la situation à cet égard.

En ce qui concerne les *pays limitrophes,* la communication directe est admise entre parquets pour les demandes de renseignements, convocations, devoirs d'information, remise de pièces à conviction, et, en cas d'urgence, même pour les Commissions rogatoires adressées par les juges d'instruction ; mais, dans ce dernier cas, un double est, en principe, transmis par la voie diplomatique ordinaire ; l'original revient également par la voie normale (32).

La question est actuellement réglée par les *accords* suivants : franco-belge de 1927 (circulaire ministérielle du 21 octobre 1927), hollando-belge du 11 juillet 1904, belgo-luxembourgeois du 24 juin 1948, et par la Convention entre la Belgique et l'Allemagne du 11 juillet 1958 (Moniteur du 19 juin 1959) qui organise l'acheminement des commissions rogatoires par l'intermédiaire du Ministre de la Justice, et la communication directe, en cas d'urgence, des commissions rogatoires sans la formalité du double, et avec retour par la voie normale (Ministres de la Justice).

Notons par ailleurs que cette convention établi le principe de l'*entr'aide judiciaire* réciproque la plus large possible, à l'exclusion toutefois de l'assistance pour *l'exécution* réciproque des décisions en matière pénale, et pour les infractions purement militaires. L'entr'aide pourra être refusée en cas d'infractions considérées par l'Etat requis comme des infactions politiques ou comme des infractions qui y sont connexes, ainsi que dans les cas où l'exécution de la demande est de nature à porter atteinte aux intérêts généraux de l'Etat requis, plus spécialement à sa souveraineté ou à sa sécurité, ou n'est pas compatible avec sa législation ; tout refus d'entr'aide sera, dans chaque cas, motivé.

On voit immédiatement le très grand intérêt de cette convention au point de vue de l'évolution des conceptions dans les relations pénales internationales, tout spécialement au sein de l'Europe.

18. - Il existe aussi des dispositions spéciales, notamment à propos des relations directes entre autorités judiciaires dans certaines *conventions pénales internationales :* conventions sur le faux-monnayage (art. 16), sur le trafic des stupéfiants (art. 13), sur la traite des femmes (art. 6), sur les publications obscènes (art. 3) ; mais les améliorations ainsi apportées sont souvent restées sans effets pratiques, certains pays n'ayant pas fait les communications prévues pour rendre sur ce point les conventions

(32) *Novelles, Procédure Pénale,* T. I., 1e partie, nº 271 et page 207.

efficaces ; c'est notamment le cas, pour la Belgique, en ce qui concerne le faux-monnayage (33) et le trafic des stupéfiants.

Signalons cependant qu'un progrès a été réalisé récemment, dans ce domaine, à propos de *l'assistance judiciaire* entre les forces des Etats de l'Atlantique-Nord (34) : les relations entre autorités militaires étrangères sont très suivies ; des accords sont établis notamment en ce qui concerne l'opportunité des poursuites, les principes de compétence, les décisions de « sans-suite » dans les cas où les intérêts civils ont été réglés, ou sous la réserve de poursuites disciplinaires etc...; la question, plus délicate, de la remise des déserteurs étrangers a fait également l'objet de certains arrangements.

19. *En Suisse,* le projet de révision du Code pénal, en son article 372 § 2 al. 2, sanctionne la pratique suivie par les Juges des enfants français et suisses, pour l'application aux jeunes délinquants de leur loi nationale au lieu de la loi territoriale : acoord officieux entre magistrats pour le transfert du jeune délinquant par les soins du Consulat.

Il serait souhaitable qu'une telle pratique fût légalisée, organisée par conventions, et étendue aux adolescents, voire aux adultes en ce qui concerne notamment certaines mesures de sûreté.

20. Mais des *conventions internationales* récentes ont apporté des éléments nouveaux en ce qui concerne même la *force exécutoire* des décisions répressives étrangères.

La convention entre les Etats parties au Traité de l'Atlantique-Nord sur le statut de leurs forces, déjà citée, et qui règle les rapports et les conflits de juridiction entre l'Etat d'origine et l'Etat de séjour, stipule que si l'Etat d'origine a usé de son droit de priorité au point de vue compétence, et qu'il ait ainsi condamné un membre de ses forces à une peine d'emprisonnement, l'Etat de séjour examinera avec bienveillance la demande qui lui serait adressée en vue de l'*exécution* dans ses établissements pénitentiaires de la peine prononcée.

Système qui n'avait pu voir le jour précédemment que dans

(33) RIGAUX et TROUSSE, *Les crimes et les délits du Code pénal,* 2e partie, T. II, p. 277.

(34) Convention de Londres du 19 juin 1951, approuvée par la loi du 9 janvier 1953, art. VII, 6, a.

des hypothèses exceptionnelles ou en cas d'annexion (35).

21. En ce qui concerne l'exécution, sur les biens du condamné situés sur le territoire local, des *condamnations pécuniaires* prononcées par un jugement étranger, il y a longtemps qu'on en réclame la possibilité. L'article 11 du Code Rocco la prévoyait expressément. Le Congrès de Bucarest avait émis un vœu dans ce sens, sous la réserve cependant de l'organisation d'une procédure d'*exequatur* (36). Une réforme dans ce sens pourrait être heureusement envisagée dans le cadre de l'Europe des Six. A cet égard un rapprochement peut être fait : le *Traité Benelux* du 3 février 1958 (art. 83) et le *protocole Benelux* du même jour (art. 7) organisent l'assistance mutuelle entre les trois Etats pour tout ce qui concerne la perception et le recouvrement des droits, impôts, taxes et prélèvement ainsi que pour la prévention et la répression des infractions fiscales (art. 83) et commerciales (art. 76) et pour la communication des statistiques (art. 90) ; mais rien pour les amendes *pénales.*

Les auteurs signalent que *la pratique* s'est ingéniée parfois à assurer, par des procédés indirects, le payement d'amendes prononcées par des juridictions étrangères (37). C'est une solution boiteuse, qu'on ne saurait facilement approuver.

22. Il existe aussi un projet de *Règlement d'assistance mutuelle des pays de Benelux,* relatif au payement volontaire et à l'exécution des amendes pénales, infligées par jugement, et à l'acceptation des propositions d'amende transactionnelle.

Le projet transmis aux Ministres compétents par la Commission Benelux pour l'étude de l'unification du droit, envisage uniquement le payement *volontaire* des amendes et l'exécution *volontaire* des offres de transaction. La Commission a émis l'avis que,

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(35) Loi fédérale suisse sur l'extradition de 1892, art. 30 ; convention franco-monégasque du 10 avril 1912 ; accord franco-espagnol sur le Maroc du 29 décembre 1916 ; accord franco-italien du 29 décembre 1960 ; accord franco-allemand du 11 décembre 1871 et du 5 mai 1920 ; traité franco-allemand du 27 octobre 1956 sur le règlement de la question sarroise.

(36) Voy. Rapport du professeur GARRAUD, *Rev. Int. Dr. Pén.*, 1929. pp. 328 et suiv., spécialement p. 353. Il existe actuellement un projet de convention européenne sur la circulation routière retenant le principe de l'exécution internationale des amendes.

(37) DONNEDIEU de VABRES, *Traité...* nº 1851, qui cite M. TRAVERS, Les effets internationaux des jugements répressifs, p. 20.

compte-tenu de l'objet limité du projet, celui-ci pourrait être réalisé par *instructions* à donner simultanément par les trois ministres de la Justice aux officiers du ministère public. Un projet de circulaire a déjà été établi dans ce sens.

La Commission ne s'est-elle pas montré *trop réservée* lorsqu'elle a estimé que l'opinion n'était pas mûre pour accepter dès maintenant l'exécution par voie de contrainte, dans un des trois pays de Benelux, d une décision d'un des deux autres pays prononçant une peine d'amende ?

Ce qui est certain, c'est que l'évolution des idées et des faits est ex rêmement rapide dans la question de l'intégration européenne, et, pour ma part, je crois que, dans le cadre de l'Europe des Six, on peut envisager sans crainte, pour les amendes pénales, le principe de *l'exécution extraterritoriale* (38).

23. Toujours concernant la force exécutoire, on peut encore citer celle qui s'attache aux sanctions, amendes et contraintes, prononcées et appliquées par la *Haute Autorité de la C.E.C.A.* en application notamment des articles 47, 50, 54, 58, 59, 64, 65 § 5, 66 § 5, 68 § 6, 91 du Traité, et qui peuvent faire l'objet d'un recours de pleine juridiction devant la Cour (art. 36).

Ces *sanctions* sont *exécutoires* sur le territoire des Etats membres par le Ministre compétent, qui ne peut que vérifier l'authenticité de la décision (art. 44 et 92), minimum d'*exequatur* (39).

On comparera utilement les dispositions correspondantes des Traités *C.E.E.* (art. 187 et 192) et *Euratom* (art. 18, 159 et 164) (40).

Notons encore comme exemple de collaboration judiciaire internationale, la disposition de l'article 90 du Traité de la *C.E.C.A.* qui prévoit la prise en considération par la Haute Autorité, de la procédure et de la sanction intervenues dans les pays dont l'entreprise relève, ainsi que la communication des documents y relatifs.

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(38) Quant à cette évolution, on peut regretter, peut-être, que le public n'y soit pas plus attentif. Mais se préoccupe-t-on suffisamment de son information ?

Un seul exemple : dans son arrêt HUMBLET du 16 décembre 1960, la Cour de Justice a déclaré une taxation belge contraire au droit communautaire, obligeant ainsi l'Administration belge à rapporter la taxation et à en réparer les effets. Décision impensable il y a à peine quelques années...

(39) Précisons que la Cour de Justice n'est pas à proprement parler une juridiction étrangère.

(40) Voy. DUMON et RIGAUX, la Cour de Justice des Communautés Européennes et les Juridictions des Etats Membres, *Annales de Droit et de Sciences Politiques*, 1959, T. XVIII et XIX.

24. Se rapportent aussi, bien qu'indirectement, à notre sujet, les dispositions des *Traités Européens* relatives au rapports entre la Cour de Justice et les autorités judiciaires locales.

L'article 28 du protocole sur les statuts de la Cour de Justice de la *C.E.C.A.* habilite la Cour Internationale à saisir, des fausses dépositions de témoins ou d'experts, le Ministre de la Justice de l'Etat dont le témoin ou l'expert est le ressortissant, en vue de lui voir appliquer les sanctions prévues dans chaque cas par sa loi nationale. Les dispositions correspondantes des protocoles de la *C.E.E.* (art. 27 — *Adde* : art. 24, 25 et 26) et de *l'Euratom* (art. 28) vont plus loin encore : chaque Etat membre regarde toute violation des serments des témoins et des experts comme le délit correspondant commis devant un tribunal national en matière civile ; sur dénonciation de la Cour, il poursuit les auteurs de ce délit devant la juridiction nationale compétente.

L'article 194 du *Traité de l'Euratom* applique la même conception aux violations du secret par les fonctionnaires et agents internationaux, la poursuite se faisant ici sur requête de tout Etat membre ou de la Commission.

Dispositions analogues dans la Convention sur les Forces stationnant en Allemagne (notamment art. 12).

On citera encore la *Convention Benelux* du 11 avril 1960 approuvée par la loi du 30 juin 1960, sur le contrôle, l'entrée et la circulation des *étrangers,* et dont plusieurs dispositions offrent un intérêt considérable. Elle précise tout d'abord en son art. 1er qu'elle entend par « étranger », toute personne qui n'est pas un ressortissant de l'un des Etats de Benelux. Elle s'institue en son art. 4 un visa valable pour le territoire Benelux. Mais ce qui nous intéresse plus directement ce sont les articles 10 et 11 de la Convention. L'art 10 permet de considérer comme indésirable dans le territoire de Benelux, l'étranger considéré comme indésirable dans un des trois pays à la suite d'une *condamnation* encourue par cet étranger pour un crime ou un délit pouvant donner lieu à extradition, ou pour le motif d'ordre public. L'article 11 vise l'*unification* du droit et des mesures administratives en la matière, ainsi que *la communication* des renseignements notamment en ce qui concerne les infractions commises ou les faits qui tendent à faire croire qu'une infraction est ou sera commise en la matière.

Les mêmes tendances se retrouvent dans la *Convention des Droits de l'Homme* signée à Rome le 4 novembre 1950 et approuvée par la loi du 13 mai 1955. dont l'article 53 dispose que les

Hautes Parties contractantes s'engagent à se conformer aux décisions de la Cour européenne des Droits de l'Homme dans les litiges auxquels elles sont parties ; et dont l'article 50 règle les modalités de l'exécution par les Hautes Parties contractantes des décisions de la Cour.

25. Voilà donc une série d'exemples qui constituent la preuve certaine d'une *évolution considérable* dans les conceptions sur l'exécution internationale des décisions et actes judiciaires, et qui apportent des indices et des éléments pour les solutions d'ensemble à rechercher.

Les progrès assez soudains et assez rapides réalisés dans la *Communauté Européenne* sont aussi la preuve qu'en cette matière, toute action novatrice importante ne peut être efficacement réalisée qu'au profit d'une communauté aux conceptions et idéaux communs.

C'est d'ailleurs dans le même esprit qu'a été conclue, en 1948, entre les *pays scandinaves,* Norvège, Suède et Danemark, une Convention, la première du genre, sur la reconnaissance mutuelle de leurs jugements répressifs.

Le monde anglo-saxon, par contre, paraît vouloir s'en tenir aux conceptions traditionnelles, ce qui peut s'expliquer d'une part, par l'unité du bloc américain, d'autre part par la tendance historique de l'Angleterre à l'isolement et la situation insulaire du pays : tendance qui se réflète également dans la question de la compétence pénale internationale, dans la pratique anglaise de l'extradition, et, peut-on ajouter, dans l'importance accordée à la loi du domicile dans le système anglais du conflit des lois (41).

26. Nous passerons maintenant à l'examen de la question de *l'autorité positive des jugements étrangers.*

A cet égard on doit citer tout d'abord le cas du *Jugement de Nuremberg* dont l'autorité sur les juridictions nationales s'est

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(41) Robert PERRET, La reconnaissance et l'exécution des jugements étrangers aux Etats-Unis, Lausanne 1951 ; *Kenny's Outlines of Criminal Law*, Cambridge 1958, nos 641 et suiv.

Un incident récent très caractéristique : La chambre des Communes s'est préoccupée il y a quelques mois du cas d'un britannique poursuivi pour exhibitionnisme par la Justice française et qui niait les faits. L'opinion anglaise avait été choquée que le *Foreign Office* ait prêté son concours à la police française en lui fournissant une photo aux fins d'identification Scotland Yard avait conseillé de ne pas produire la photographie.

manifestée non seulement par une réserve et une priorité de compétence, mais par des déclarations de criminalité et des recommandations.

Les *tribunaux militaires de zône,* créés par la loi N° 10 du Conseil de Contrôle ont appliqué les principes du jugement de Nuremberg, et étaient liés, sauf preuve contraire, par les faits déclarés constants par ce jugement.

La *loi française* du 15 septembre 1948 punit tous les individus ayant appartenu à une organisation déclarée criminelle par le Tribunal de Nuremberg, sauf preuve de l'incorporation forcée et non participation au crime. Cette législation qui aboutit à un renversement des principes en matière de preuve, a été critiquée au nom de la Déclaration des Droits de l'Homme, et a donné lieu à une jurisprudence complexe.

27. Mais c'est dans le domaine des *peines accessoires ou complémentaires,* qui ont pour objet des *incapacités* civiles ou politiques et des *déchéances* d'ordre divers, qu'un certain mouvement législatif se dessine dans de nombreux pays, et qu'aussi, il faut y insister, une réforme apparaît la plus souhaitable, surtout à l'intérieur des communautés européennes.

Car si l'on veut voir les choses pratiquement, il est bien évident que l'intérêt réel de *l'exécution forcée* d'une décision répressive étrangère est assez exceptionnel, en raison de la pratique courante de l'extradition ; quant au problème de *l'autorité négative,* il paraît résolu de manière assez satisfaisante dans les diverses législations nationales ; par ailleurs ont peu résumer qu'en fait les condamnations étrangères sont *prises en considération* par les juges dans l'appréciation du taux de la peine, dans l'octroi du sursis et des circonstances atténuantes.

Par contre, il paraît inadmissible, qu'à l'intérieur de la Communauté Européenne, la divergence des législations nationales fasse obstacle à un régime uniforme concernant les déchéances, civiles ou professionnelles, et les interdictions.

Le problème est délicat. Il se pose sous *deux* aspects.

Tout d'abord — question *du statut* international — est-ce que la déchéance ou l'interdiction prononcée par une autorité (judiciaire, voire administrative) doit être étendue aux autres pays de la Communauté ; question qui se subdivise en deux branches selon que la législation locale connaît ou non la même mesure ?

D'autre part — question de l'effet *supplémentaire* — on peut songer à donner à la condamnation étrangère certains effets non

prévus par la législation étrangère ou non retenus par le juge étranger mais que la *lex fori* attache à la condamnation qu'aurait prononcée le juge local pour le même fait (42).

Quel sera, dans les hypothèses envisagées, le contrôle à exercer par le juge local ?

Quel juge sera saisi ? D'après quelle procédure ? Pourra-t-il apprécier l'opportunité de la mesure, ou devra-t-il la prononcer obligatoirement ?

On doit avoir égard, pour résoudre tous ces problèmes, à diverses considérations : autorité de la chose jugée à l'étranger, notamment dans le cas de déchéance facultative ; irait-on jusqu'à admettre que le juge national puisse prononcer des sanctions non prévues par sa loi dans le cas envisagé ; par contre danger évident de voir s'établir dans un des six pays les étrangers interdits dans les autres ou certains autres ; exceptions à prévoir pour certaines incapacités d'ordre politique, et les déchéances à caractère purement national...

Par ailleurs, on n'envisagera l'extension des déchéances qu'à l'égard des personnes séjournant dans le Royaume.

28. En Belgique, nous n'avons, en ce domaine, que des *dispositions isolées,* mais elles offrent un intérêt certain. Il s'agit tout d'abord des A.R. des 24 octobre 1934 et 9 juillet 1935, et de la loi du 9 juillet 1957.

Ces textes portent interdiction, pour certains condamnés, et pour les faillis, de participer à l'*administration et à la surveillance* des *sociétés par actions,* des *sociétés coopératives* et des *unions du crédit,* d'exercer la profession *d'agent de change,* de *banquier, gérant, administrateur, directeur* ou *fondé de pouvoirs de banque,* et de pratiquer habituellement, de manière directe ou indirecte, la *vente à tempérament.* Ils prévoient que dans le cas de condamnations prononcées *par une juridiction étrangère* à une peine privative de liberté de trois mois au moins, même conditionnelle, pour l'une des infractions spécifiées (43) l'interdiction ne produira ses effets qu'après que la *chambre des mises en accusation* du domicile de l'intéressé ou, si celui-ci n'a pas de domicile en Belgi-

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(42) Un problème délicat : est-ce que les incapacités civiles portant atteinte au statut personnel (incapacité de faire partie d'aucun conseil de famille, d'être tuteur, subrogé-tuteur, déchéance de la puissance paternelle) vont, suivant les principe du Droit international *privé* s'attacher d'office à la personne, indépendamment de tout *exequatur* ou contrôle ?

que, la chambre des mises en accusation de Bruxelles, aura, à la requête du Procureur Général et l'intéressé régulièrement cité quinze jours au moins à l'avance, *constaté* que la condamnation s'applique à un fait qui constitue d'après la loi belge, une de ces infractions et qu'elle est coulée en force de chose jugée (44).

L'article 15 § 4 des lois coordonnées sur la *milice* (2 septem- 1957) exclut du service, celui qui a été condamné à l'étranger pour un crime ou un délit punissable par les lois pénale belges qui excluent du service, après *contrôle* de la légalité et de la régularité de la condamnation par le tribunal de première instance, saisi par le ministère public ; l'extrait du jugement étranger est transmis par le Gouverneur de la Province au Procureur Général (art. 9 de l'A.R. du 3 septembre 1957 sur l'application des lois sur la milice).

Signalons enfin que la loi du 28 mars 1952 sur la *police des étrangers*, stipule en son article 4 que le Roi peut expulser l'étranger qui a obtenu le permis d'établissement dans le Royaume, notamment s'il fait l'objet de poursuites ou a été condamné même hors du Royaume, pour crimes ou délits pouvant donner lieu à extradition.

Il y a là, évidemment une tendance nouvelle extrêmement intéressante et dont divers facteurs méritent d'être soulignés : on ne retient que les condamnations d'une *certaine gravité ;* on organise un *contrôle* par le juge national, on *limite l'effet* de la décision étrangère, on sauvegarde les droits de la défense (45).

29. Dans les *législations étrangères*, cette tendance se retrouve, souvent même avec plus d'ampleur.

En France on a procédé aussi par voie de dispositions particulières, au fur et à mesure des nécessités, mais les cas prévus sont plus nombreux : il s'agit de l'exercice de la médecine (ordonnance du 24 septembre 1945 et article 317 du c. pén.), de toute profession dans une maison d'accouchement (décret-loi du 29 juillet 1939), de la profession de banquier ou d'administrateur

(43) Fausse monnaie, faux, usage de faux, corruption, vol, extorsion, détournement, abus de confiance, escroquerie, recel, banqueroute, circulation fictive, chèque sans provision...

(44) L'infraction à l'interdiction est, évidemment, punissable.

(45) Apparaît, ici, immédiatement, la nécessité d'organiser la communication entre pays, de certains renseignements judiciaires, voire un casier judiciaire international. Se pose aussi la question des incapacités et déchéances résultant de sanctions *disciplinaires*.

de société (loi du 19 juin 1930), du recrutement de l'armée (loi du 31 mars 1928), de certaines professions commerciales et industrielles (lois du 30 août 1947).

En règle générale le tribunal français, saisi par le ministère public, n'a pas l'obligation, mais seulement *la faculté* de prononcer l'incapacité, après vérification de la régularité et de la légalité de la condamnation étrangère ; l'interdiction d'exercer aucun emploi dans une maison d'accouchement, par contre est prononcé *obligatoirement*.

30. L'idée d'attacher aux condamnations étrangères certaines incapacités a été retenue plus largement encore dans d'autres pays. Notamment en *Italie* (art. 12) où le principe est admis de façon générale sous certaines conditions (art. 672 et suiv. du code de proc. pén.) et un certain contrôle (reconnaissance à la requête du Ministre de la Justice), mais toujours sous la réserve que, *suivant la loi italienne*, la peine accessoire aurait été prononcée.

L'article 32 du *code pénal norvégien* prévoit que celui qui a été condamné à l'étranger pour un acte punissable, qui peut d'après la loi norvégienne, avoir pour conséquence la perte d'un des droits mentionnés au § 29, *pourra* être privé de ces droits sur la demande du ministère public par décision du tribunal d'enquête ; et l'art. 11 du *code pénal danois* comporte une dispositions semblable pour les personnes de nationalité danoise ou domiciliées sur le territoire du Danemark qui ont été condamnées à l'étranger (46).

L'article 11 du *code pénal grec* de 1950 stipule que si un ressortissant hellénique est condamné à l'étranger pour un acte qui, en vertu des lois helléniques, entraîne des peines accessoires, le tribunal correctionnel compétent *peut* infliger ces peines ; il *peut* aussi appliquer les mesures de sûreté prévues par les lois helléniques à celui qui a été condamné ou acquitté à l'étranger.

Disposition analogue dans le *code pénal polonais* (art. 11 § 2).

On voit que « l'extension » internationale n'est jamais prévue que dans la mesure où elle est *accueillie* par la loi locale : l'effet

(46) R. SCREVENS, L'interdiction professionnelle en droit pénal, Bruxelles 1957, nº 127. Voy. également : DONNEDIEU de VABRES, La valeur internationale des jugements répressifs d'après le mouvement législatif actuel, *R.D.P. et C.*, 1930, pp. 32 et suiv ; HERZOG, Les effets extraterritoriaux des jugements étrangers, dans *Etudes de Droit Comparé*, Paris 1955, p. 173 ; ALLEGRA, Les effets extraterritoriaux des jugements répressifs, *Rev. Int. Dr. Pén.*, 1955, 425.

de la décision étrangère ne joue que si la *lex fori* comporte la sanction accessoire.

Faut-il aller plus loin dans le cadre de l'Europe ? Faut-il par ailleurs envisager le « statut » unique ?

31. En *droit italien* les décisions étrangères *peuvent* être prises en considération non seulement en vue d'établir la récidive, la qualification de délinquant d'habitude, de profession ou par tendance mais encore d'appliquer, même en cas d'acquittement, certaines mesures de sûreté (art. 12) ; en *droit allemand* (art. 20), en vue de fonder la qualification de délinquant d'habitude.

En *Suisse*, une condamnation subie à l'étranger compte pour la récidive si elle a été prononcée à raison d'une infraction pouvant, d'après le droit suisse, donner lieu à extradition (art. 67 al. 2) (47).

Le *projet de code pénal français*, art. 18, dispose qu'il *pourra* être fait état des sentences pénales étrangères au point de vue de la récidive, du sursis, des mesures de sûreté, des incapacités et déchéances, des restitutions, dommages-intérêts et autres effets civils, lorsqu'elles auront été rendues à propos de faits qualifiés crimes ou délits par la loi française ; cette réforme était liée à celle de la procédure de reconnaissance de la sentence étrangère, qui n'a pas été envisagée dans le nouveau code de procédure pénale, à défaut précisément de l'adoption de l'art. 18 du projet (48).

Citons enfin le cas du *Code pénal brésilien* qui admet la « reconnaissance », sorte d'*exequatur* du jugement pénal étranger après contrôle par le juge, et pour certains effets : restitutions, mesures de sûreté et peines accessoires (art. 7 du code).

32. Cet examen du droit positif indique suffisamment qu'il existe une tendance de plus en plus marquée vers la *reconnaissance*

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(47) La récidive internationale est prévue aussi dans certaines conventions internationales : voy. notam. : art. 6 de la Convention de Genève sur les drogues nuisibles du 21 juin 1936.

(48) Il faut souligner — nous en verrons l'importance plus loin — le caractère *facultatif* de la reconnaissance des sentences étrangères dans les codes italien, norvégien, danois, dans le projet français etc...

La doctrine italienne s'est occupée de manière approfondie de la reconnaissance des sentences pénales étrangères. Voy. spécialement ANTOLISEI, *Manuale di Diritto Penale*, nos 47 et suiv. ; et BORGHESE, *Il Codice Penale Italiano*, art. 12.

des effets internationaux des décisions répressives, sous le contrôle des juridictions nationales.

Cette tendance n'est d'ailleurs pas isolée. Elle s'intègre harmonieusement et logiquement dans une évolution très nette vers une *collaboration internationale* de plus en plus développée en matière répressive, et que nous avons déjà soulignée à propos de *l'exécution internationale des jugements* et de *l'entr'aide judiciaire*.

Cette collaboration est fondée sur la communauté d'intérêts et d'idéal dans la lutte contre la criminalité ; sur la recherche d'une justice plus élevée et, aussi, sur les nécessités de l'ordre public interne.

Elle se manifeste notamment dans les domaines de la *police judiciaire*, des *conventions pénales internationales* (49) et des *conventions d'extradition*.

On observe même, d'une manière encore timide il est vrai, mais assez remarquable, une tendance à admettre la prise en considération de la *loi pénale étrangère* spécialement dans le domaine des infractions matérielles.

On citera, à cet égard, l'exemple caractéristique de la loi belge du 27 février 1958, devenue l'art. 57*bis* du code pénal militaire, qui punit les militaires et personnes assimilées, de peines correctionnelles, lorsqu'ils ont contrevenu, sur le territoire d'un Etat étranger, à la législation de cet Etat en matière forestière, rurale, de chasse, pêche, circulation routière, douanes, change, etc... ; en ce qui concerne la circulation routière, la déchéance du droit de conduire peut être encourue (50).

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(49) Notamment à propos de la communication des renseignements décisions, signalements... et de l'organisation des Bureaux centraux nationaux. *Adde :* convention européenne du 13 décembre 1957 sur l'extradition, la convention européenne d'entr'aide judiciaire en matière pénale du 20 avril 1959, la convention européenne relative à l'assurance obligatoire du 20 avril 1959. Pour la France, *adde :* décret du 28 décembre 1950, portant publication de l'accord conclu avec la Sarre, relatif à l'aide mutuelle judiciaire et contenant diverses dispositions pénales, ainsi que le décret du 24 mars 1953 portant publication d'un accord analogue avec la Principauté de Monaco et relatif notamment à la transmission des actes, l'extension des Commissions rogatoires et l'échange des casiers judiciaires.

(50) Cette législation posera un problème nouveau en ce qui concerne le contrôle de la Cour de Cassation.

En vertu du Traité Franco-Allemand du 27 octobre 1956 sur la Sarre, la Cour régionale allemande a pu être amenée à appliquer le droit français.

De même, l'art. 101 de la *loi suisse sur la circulation routière* du 19 décembre 1958 stipule que les infractions, en cette matière, commises à l'étranger peuvent être poursuivies en Suisse si elles sont punissables dans les deux pays. Le juge appliquera le droit suisse mais n'infligera pas de peine privative de liberté lorsque la loi étrangère n'en prévoit pas.

II. Perspectives d'Avenir

22. Si l'on veut essayer de tirer du droit positif et des tendances qu'il manifeste, un projet précis de *réformes* du droit pénal international au sein de la Communauté Européenne des Six, spécialement en ce qui concerne l'autorité des jugements, il faut, je pense, partir des considérations suivantes :

a) Le droit pénal est resté, en principe, *territorial* ; mais l'évolution internationale récente montre que la prise en considération des décisions répressives, et même des lois étrangères, n'est plus actuellement considérée *a priori* comme hérésie doctrinale.

b) La nécessité urgente de *réformes* s'est fait sentir sur des points précis, en raison du développement de plus en plus rapide des relations européennes notamment, et de la communauté d'intérêts moraux et matériels de l'Europe.

c) Il faut procéder *progressivement*, sans se laisser tenter par des réformes d'ensemble audacieuses.

d) Notamment il ne saurait être question d'envisager actuellement un système généralisé d'*exequatur pénal*. Tout au plus : possibilité de faire *exécuter*, par une procédure simple et rapide, les décisions étrangères portant condamnations à des amendes.

D'ailleurs l'utilité de prévoir l'*exécution* des peines prononcées par une sentence étrangère, apparaît réduite, compte-tenu des possibilités de poursuites nouvelles en cas de non-exécution de la sentence à l'étranger (art. 13 de la loi de 1878).

En ce qui concerne le payement *volontaire* des amendes transactionnelles, les mesures à prendre paraissent facilement réalisables.

e) Tout progrès efficace du Droit pénal international est conditionné par une meilleure organisation des *relations judiciaires* entre pays et des *échanges* internationaux de documentation

et renseignements, et par la création d'un *casier judiciaire international*.

f) Des dispositions urgentes doivent être prises, pour des raisons majeures d'ordre public, concernant certaines matières spéciales, comme la *police du roulage*, et, d'une manière plus générale, en ce qui concerne les *interdictions et déchéances*.

g) En raison de l'importance du facteur politique des événements locaux, et je dirai volontiers du caractère « sentimental » du droit pénal, qui atteint directement la personne humaine, et intéresse l'opinion publique, et aussi en considération des incidences inattendues que provoqueraient des réformes trop radicales, il s'impose de légiférer actuellement dans les six pays européens *sur le mode facultatif*. Pas encore de dispositions *impératives*, en principe. Comment pourrait-on imposer par exemple la reconnaissance de certains verdicts de Cour d'assises, qui, dans leur propre pays, n'ont qu'une autorité relative dans l'instance civile ultérieure ?

h) Ce système de dispositions facultatives faciliterait l'adoption de mesures plus progressistes dans la matière délicate des déchéances et interdictions non prévues par la législation locale. Ainsi le médecin déchu du droit d'exercer en France à la suite d'une condamnation pour avortement *pourrait* se voir déchu en Belgique alors que la législation belge ne prévoit pas cette sanction accessoire pour une telle condamnation. Dans le cadre de la Communauté Européenne, cela pourrait apparaître indispensable en raison de la liberté d'établissement : *ordre public européen*.

Après quelque temps, l'évolution de la jurisprudence montrera si un nouveau pas en avant peut être envisagé.

D'ailleurs, d'une manière générale, le Droit pénal international à une vocation beaucoup plus marquée que le droit interne, à laisser au juge un large pouvoir d'appréciation : en droit extraditionnel, en matière de compétence (*pourront* être poursuivis...) notamment.

Le droit pénal international est moins légaliste, moins réglementaire, tenant compte plus largement des droits de l'homme, tendant vers une justice plus élevée, et s'appuyant plus largement sur la jurisprudence (51).

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(51) Voy mon étude « Domaine et Méthode du Droit pénal international », *R.D.P. et C.*, 1954, juillet.

i) La reconnaissance des décisions répressives étrangères ne saurait être admise qu'après *contrôle de l'autorité locale :* l'extension internationale des déchéances, même civiles, résultant de condamnations répressives étrangères, qu'après une action devant le juge local, à la requête du ministère public. Comme nous avons eu l'occasion de le souligner, c'est un facteur constant en droit positif et comparé.

j) Peut-être aussi faudra-t-il envisager les mesures susceptibles d'enrayer au sein de la Communauté les *fraudes possibles à la loi pénale* (52).

34. En ce qui concerne l'organisation du *Casier Judiciaire international,* il y a deux possibilités. Soit développer le système de l'échange des renseignements déjà organisé par certaines Conventions internationales comme celles sur la répression du faux monnayage ou sur le trafic des stupéfiants, soit, comme l'a préconisé le professeur Donnedieu de Vabres dans plusieurs publications (53), l'unification en faveur du système français qui centralise au greffe du tribunal du lieu de naissance tous les renseignements relatifs à un même individu. En ce qui concerne l'Europe des Six, ce système, facilement réalisable, pourrait être complété par rapport aux personnes nées en dehors des frontières de la Communauté, par un casier international tenu par la Commission Internationale de Police criminelle à Paris (Interpol), et ne concernant que les cas graves. Doit être également prévu, l'échange obligatoire de renseignements.

35. Quel pourrait être le *fondement* de l'application par le juge de la *loi étrangère* en certaines matières spéciales comme la police de la circulation ?

Si l'on veut créer l'Europe sur des bases concrètes il ne faut pas hésiter à lui donner une unité dont ses habitants auront conscience.

Il faut faire appel au *civisme européen.*

On ne saurait nier qu'actuellement encore, les automobilistes en pays étranger croient pouvoir compter sur l'impunité, et sont moins attentifs au respect du Code de la route.

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(52) Par exemple, on s'est ému, en France, des « voyages en Suisse » de certaines jeunes françaises qui désiraient se faire avorter dans des conditions admises par le droit suisse. Voy. : MERLE, *Droit Pénal Général Complémentaire,* 1957, p. 65.

(53) Voy. notamment Rapport au IV^me^ Congrès International de Droit Pénal, *Rev. Int. Dr. Pén.* 1937, pp. 104 et suivantes

La répression par le juge national, en application du droit étranger répondrait non seulement à des nécessités de sécurité, mais développerait chez tous les citoyens ce sentiment d'attachement à un groupe plus vaste, et la conscience de devoirs internationaux.

L'essentiel n'est-ce pas finalement de travailler au développement heureux des relations internationales, à la création de l'esprit international ?

36. La question du *contrôle de la décision étrangère* par le juge national n'a pas une importance essentielle dans un système de reconnaissance *facultative* (54).

Mais si ce contrôle devait être établi il ne devrait en tout cas, s'exercer que sur la légalité, à l'exclusion de tout jugement du fond de l'affaire.

Par ailleurs, il apparaît essentiel d'admettre, sans préalable, dans les affaires d'abandon de famille, les condamnations *alimentaires* étrangères, mais, ici encore, sans obligation absolue.

37. Compte tenu de ces considérations, voici *le texte* qui, pour la Belgique, pourrait être proposé, et que pourraient reprendre *mutatis mutandis* les autres pays de la Communauté (55).

On pourrait, à cet égard, envisager l'adoption d'une *loi uniforme.*

La proposition est limitée au cadre de l'Europe des Six.

Le mot « étranger » se rapporte, dans le texte, aux cinq autres pays de la Communauté (56).

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(54) Sans quoi la référence, comme en droit suisse, à la *loi d'extradition* nous paraît une méthode offrant des garanties suffisantes. Le caractère *facultatif* de la prise en considération de la sentence étrangère oblige le juge national à exercer un contrôle. Rappelons que nous avons relevé plus haut, dans plusieurs lois étrangères, ce principe de la reconnaissance *facultative :* Norvège, Danemark, projet français...

(55) Rien n'est prévu dans ce texte concernant l'organisation d'un *casier judiciaire international,* question très spéciale, qui ne pourra être résolue que par une convention internationale. La communication des extraits des casiers judiciaires nationaux constituera déjà un grand progrès. En outre on dispose actuellement déjà des renseignements d'Interpol.

(56) Au lieu de la « loi uniforme », une convention européenne pourrait également être proposée.

Avant-projet de Loi

Art. 1 : Dans tous les cas où le juge est compétent pour les infractions commises à l'étranger, ou lorsqu'il juge un étranger pour des faits commis en Belgique, l'inculpé sera poursuivi et jugé d'après les dispositions des lois belges, sauf la faculté réservée au juge, à charge de motiver spécialement sa décision à cet égard, de prendre la loi étrangère en considération sur certains points particuliers à celle-ci.

Art. 2 : Le juge peut faire état des sentences pénales étrangères tant en ce qui concerne l'application de la loi pénale que lorsqu'il statue sur l'action civile ou à fin civile ; dans les poursuites du chef d'abandon de famille le juge peut avoir égard aux condamnations alimentaires étrangères.

Art. 3 : Le juge pourra être saisi par le ministère public, et avec l'accord de l'autorité étrangère, des infractions commises à l'étranger à la législation sur la police du roulage, et des délits d'imprudence qui s'y rapportent ; il appliquera, dans ce cas, la loi étrangère en ce qui concerne les dispositions réglementaires.

Art. 4 : Toute personne, qui aura été condamnée à l'étranger pour un fait qui, d'après la loi belge, aurait entraîné une peine accessoire, peut être condamnée à cette peine, sur la poursuite du ministère public, par le tribunal qui aurait été compétent pour prononcer la peine principale.

Art. 5 : Les déchéances, interdictions, retraits d'autorisation, de nature civile ou professionnelle, prononcées par des sentences judiciaires, administratives ou professionnelles étrangères, auront effet en Belgique s'ils sont rendus exécutoires par la Chambre des mises en accusation saisie sur requête du Procureur Général, et l'intéressé entendu ou dûment convoqué quinze jours avant l'audience ; la chambre des mises en accusation statuera uniquement sur la légalité ; elle pourra néanmoins, pour des raisons d'ordre public européen, prononcer la peine accessoire infligée par l'autorité étrangère, quoique non prévue par la loi belge.

Art. 6 : Les condamnations étrangères à des amendes pénales seront exécutoires en Belgique après vérification de l'authenticité des copies des décisions par le Ministre de la Justice ou son délégué, et apposition de la formule exécutoire par le greffier en chef de la Cour d'appel de Bruxelles.

Art. 7 : Les autorités judiciaires peuvent, dans l'exercice de leurs fonctions, et sous le contrôle du Procureur Général près la Cour d'appel, communiquer directement avec les autorités judiciaires étrangères.

Les bulletins de renseignements, de condamnations et extraits du casier judiciaire seront délivrés sur simple demande écrite, aux autorités judiciaires étrangères.

Art. 8 : Avec l'accord de l'autorité judiciaire étrangère et celui de l'inculpé, de son représentant légal ou de son conseil, l'autorité judiciaire peut se déssaisir des procédures à charge de mineurs, au profit du juge national ou de celui du domicile ; le transfert de l'inculpé se fera sans formalités.

Art. 9 : Pour l'application de la présente loi, les actes de l'autorité étrangère auront devant la juridiction belge, la force probante que leur attache en la matière la législation étrangère.

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RECUEILS
de la
SOCIETE INTERNATIONALE DE DROIT PENAL MILITAIRE
ET DE DROIT DE LA GUERRE

II

DEUXIEME CONGRES INTERNATIONAL
FLORENCE
17-20 MAI 1961

L'Aéronef Militaire
et
le Droit des Gens

Subordination
et
Coopération Militaire Internationale

STRASBOURG
1963

Le deuxième volume des Recueils de la Société internationale de droit pénal militaire et de droit de la guerre vient de paraître. Il reproduit les rapports et communications présentés au 2me Congrès international de droit pénal militaire et de droit de la guerre, réuni à Florence, en 1961.

L'ouvrage se présente en un volume de plus de 400 pages, du format 24 x 16 imprimé sur papier édition blanc. Il comporte deux parties, correspondant aux deux thèmes du congrès.

La première partie traite de « l'Aéronef militaire et le droit des Gens », cette matière ayant fait l'objet de cinq rapports principaux et de nombreuses communications.

La deuxième partie est consacrée à l'étude du problème de la subordination militaire au sein des formations armées internationales. On y trouve des études sur la subordination et la répression de l'insubordination en droit comparé, le commandement militaire international et un important rapport de synthèse suivi de projets de textes conventionnels visant à résoudre les problèmes posés.

Chacun des rapports et communications est publié dans la langue qu'a employée son auteur. avec, pour les rapports, des résumés bilingues.

Ce recueil, au contenu duquel ont collaboré d'éminents représentants des milieux judiciaire, universitaire et militaire, appartenant à quatorze pays, trouvera sa place non seulement dans toutes les bibliothèques juridiques, mais aussi parmi les ouvrages traitant des problèmes d'organisation militaire et du droit de la guerre.

Son prix est fixé à 24 **FF** (ou 240 FB, 20 DM, 22 F suisses, 4 dollars 80, 290 pesetas, 3.000 lires, 1£ 14 sh., 19 florins). Il est réduit à 18 **FF** (ou 180 FB, 15 DM, 16 F suisses, 3 dollars 60 ct., 215 pesetas, 2.250 lires, 1 £ 5 sh., 14 florins) pour les membres de la Société.

Les commandes doivent être adressées, de préférence au moyen de la carte ci-jointe, au secrétariat général de la Société, Faculté de droit de l'Université de Strasbourg, (Compte courant postal n° 1158-71 - Strasbourg, compte courant banque n° 116/11/5382 C — Crédit Industriel d'Alsace et de Lorraine — Strasbourg).

Pour la Belgique, le paiement peut être effectué au C.C.P. n° 9 410.70 du Séminaire de Droit Pénal Militaire, Bruxelles 1.

The second volume of the Collected Articles of the International Society for Military Law and Law of War has just been published. It contains the reports and studies presented in the course of the Second International Congress of the Society which met in Florence in 1961.

The work consists of a volume of over 400 pages, 24 x 16 in size, printed on white paper. There are two parts, corresponding to the two topics of the Congress.

The first part deals with « Military Aircraft and the Law of Nations ». There were five principal reports on this subject, followed by several studies.

The second part is devoted to the problems of « Subordination in the Framework of International Military Cooperation ». It contains studies on subordination and the repression of insubordination in comparative law, international military command and an important synthesis which contains a proposal for a regulating agreement.

The French, English, Italian, German and Spanish languages are used, either in the main text, or in summaries thereof.

This collection, to which eminent representatives of legal, university and military fields of fourteen countries contributed, belongs not only in all legal libraries but also in collections dealing with the problems of military organization and the law of war.

The cost is 24 French francs (or 240 Belgian francs, 20 DM, 22 Swiss-francs, $ 4. 80, 290 pesetas, 3 000 lire, 1 £ 14 shillings, 19 gulden). The price is reduced to 18 French francs (or 180 Belgian francs, 15 DM, 16 Swiss francs, $ 3.60, 215 pesetas, 2 250 lire, 1 £ 5 shillings, 14 gulden) for members of the Society.

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E' stato pubblicato il secondo volume dei « Recueils de la Société Internationale de droit militaire et de droit de la guerre ».

In esso sono raccolte le relazioni e le comunicazioni presentate nel corso del II Congresso internazionale della Società, riunito a Firenze nel 1961.

L'opera si presenta in un volume di più di 400 pagine, formato 24 per 16, stampato su carta pesante bianca ed è divisa in due parti, corrispondenti ai due temi del congresso.

La prima parte tratta de « L'aeromobile militare nel diritto delle genti », materia che ha fatto l'oggetto di cinque rapporti principali è seguito da varie comunicazioni.

La seconda parte è dedicata ai problemi de « La subordinazione nel quadro di una cooperazione militare internazionale ». Vi si trovano le relazioni sulla subordinazione militare e la repressione dell'insubordinazione, in diritto comparato, il comando militare internazionale e una importante relazione di sintesi, seguita da progetti di testi disciplinanti la questione.

Le lingue francese, inglese, italiana, tedesca e spagnola sono state usate, sia nei testi principali, sia nei riassunti che li accompagnano.

Questa pubblicazione, alla quale hanno collaborato eminenti rappresentanti del mondo giudiziario, universitario e militare di quattordici paesi, troverà posto non solo in tutte le biblioteche giuridiche, ma anche tra le opere che trattano problemi di organizzazione militare e del diritto di guerra.

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Der zweite Band der Berichtssammlung der Internationalen Gesellschaft für Militärstrafrecht und Kriegsrecht ist soeben erschienen. Er enthält Berichte und Entschliessungen des 2. Internationalen Kongresses für Militärstrafrecht und Kriegsrecht in Florenz 1961.

Das Werk umfast mehr als 400 Seiten im Format 24 cm x 16 cm auf weissem Buchpapier. Entsprechend den beiden Themen des Kongresses gliedert es sich in zwei Teile.

Der erste Teil behandelt das Thema Militärluftfahrzeuge und Völkerrecht. Diese Thematik wird in fünf Grundsatzreferaten und zahlreichen Entschliessungen dargestellt.

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Adolphe TOUFFAIT
Premier président
de la cour d'appel de Paris

Jacques Bernard HERZOG
Docteur en droit, Procureur général
près la cour d'appel de Besançon

Les conflits entre le droit international pénal et la loi pénale interne dans la répression des crimes de guerre

INTRODUCTION

Les crimes de guerre sont aussi anciens que la guerre, mais leur répression judiciaire constitue une phénomène juridique récent. On a, depuis quelques années, longuement épilogué sur la préhistoire de cette répression (1). Son histoire a commencé au milieu du siècle dernier, et dès l'origine, elle s'est située sur le double plan de l'évolution des droits internes et des progrès du droit international.

Elle a eu, en droit interne, son germe dans les dispositions des Codes de justice militaire qui ont spécialement incriminé les infractions commises sur les territoires ennemis. Le précédent le plus intéressant est celui de l'*Instruction de campagne pour l'armée des Etats-Unis*. Rédigé en 1863, en pleine guerre de Sécession, ce document a, dans ses divers articles, déterminé les violations du droit de la guerre susceptibles d'être assorties de sanctions pénales applicables aussi bien aux nationaux qu'aux sujets ennemis (2). On a dit de l'*Instruction de 1863* qu'elle avait constitué la première réglementation systématique des coutumes de la guerre (3). Mais elle n'est pas demeurée isolée et, sans parler des Codes de justice militaire français, il est utile de rappeler que le *Manuel de guerre allemand*, publié en 1902 par l'état-major de l'armée et traduit en français sous le titre *Les lois de la guerre continentale*, a déclaré que les atteintes aux droits des pays occupés étaient aussi punissables que celles dont pouvaient être victimes les ressortissants de l'armée d'occupation (4). La notion d'une répression interne des crimes de guerre a si bien pénétré l'esprit juridique du XIX^e^ siècle que des poursuites éparses ont été entreprises, de ce chef, au lendemain de la guerre de 1870. La

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(1) Les fondateurs du droit international, VITTORIA, SUAREZ et GROTIUS, ont dégagé les premiers principes de la responsabilité découlant des actes de guerre qui ont été, au XVIII^e^ siècle, exprimés comme suit par le jurisconsulte allemand Johan Jacob MOSER : « Les soldats coupables d'atteinte aux prescriptions du droit international doivent être traités comme des criminels et non pas comme des prisonniers de guerre ». V. à ce propos DONNEDIEU DE VABRES, *Introduction au droit pénal international*, p. 264 ; GRAVEN, *Les crimes contre l'humanité*, Paris, Sirey, 1950, p. 5 et suiv. ; CARRO, *Los criminales de guerra segun los teologos juristas espanoles*, Valladolid, 1946.

(2) DONNEDIEU DE VABRES, *Le procès de Nuremberg*, Paris, Domat-Monchrestien, 1947, p. 18 ; Antonio QUINTANO RIPOLLES, *Tratado de derecho penal internacional e internacional penal*, Madrid, 1955, t. I, p. 532 ; WINTHROP, *Military Law and Precedents*, New York, 1920.

(3) Antonio QUINTANO RIPOLLES, *op. cit.*, t. I, p. 532.

(4) DONNEDIEU DE VABRES, *Le procès de Nuremberg*, *op. cit.*, p. 19.

chambre criminelle a, le 15 décembre 1871, rejeté un pourvoi dirigé contre un arrêt de la cour d'appel de Rouen, posant en principe que la soustraction frauduleuse de vins et de liqueurs effectuée, en dehors de toute réquisition, par des militaires ennemis, agissant isolément, constituait des faits de pillage « réprouvés et condamnés par les lois de toutes les nations civilisées » (5).

Mais c'est essentiellement sur le plan international que le problème de la réglementation du droit de la guerre s'est posé à l'époque considérée. L'humanisme juridique qui en a inspiré l'élaboration progressive s'est d'abord manifesté au lendemain de la guerre d'Italie. Sur l'initiative du médecin genevois Henry DUNANT, le gouvernement helvétique a réuni une conférence internationale dont les travaux ont permis de conclure la Convention de Genève du 22 août 1864, sur l'amélioration du sort des blessés et des malades dans les armées en campagne, et de donner naissance à la *Croix-Rouge internationale* (6). On a souvent dit que s'il n'y avait eu, à l'origine de la Convention de 1864, l'émotion ressentie par DUNANT au spectacle de la bataille de Solferino (7), ce sont les souffrances endurées par les soldats russes au cours de la campagne de Crimée qui ont incité le tsar Alexandre II à convoquer la conférence de Saint-Pétersbourg, dont est issue une convention internationale en date du 11 décembre 1868, portant prohibition de l'emploi de certaines armes.

Les progrès qui ont ainsi été réalisés par le droit international de la guerre ont permis d'en systématiser les principes dans un document, publié en 1880 par l'Institut de droit international sous le titre *Manuel des lois de la guerre terrestre*, et connu sous le nom de *Manuel d'Oxford* (8). Cet ouvrage a préparé la voie aux réalisations essentielles qui, indépendamment de la revision, le 6 juillet 1906, de la Convention de 1864, ont été constituées par les conventions internationales conclues à la Haye en 1899 et en 1907. Inspirés par un projet élaboré en 1874, au cours d'une Conférence internationale tenue sans succès à Bruxelles, les accords du 29 juillet 1889 ont notamment comporté une « Convention sur les lois et les coutumes de la guerre terrestre », qui a constitué, avec son règlement annexe, une véritable codification du droit de la guerre (9). Cette codification

(5) Crim., 15 décembre 1871, B. 18, Tables analytiques 1857-1873, V° *Vol*, n° 17 ; S. 1872.I.44.

(6) Sur cet historique, WRIGHT, *A Study of War*, 1942, t. II, et Antonio QUINTANO RIPOLLES, *op. cit.*, p. 549 et suiv.

(7) DUNANT, *Souvenir de Solferino*, cité par Antonio QUINTANO RIPOLLES, *op. cit.*, p. 549.

(8) DONNEDIEU DE VABRES, *De la piraterie au génocide. Les nouvelles modalités de la répression universelle*, in Le droit privé français au milieu du XX^e^ siècle. Etudes offertes à Georges RIPERT, t. I, p. 226.

(9) BASDEVANT, *Recueil des Traités*, t. IV, p. 306.

a été reprise et développée dans la IV^e^ Convention du 18 octobre 1907 et dans son règlement annexe, adoptés à l'issue de la deuxième Conférence de la paix (10).

La convention et le règlement de 1907 ont, à la fois, marqué les progrès du droit international de la guerre et son insuffisance par rapport aux droits internes. Les acquits d'une réglementation tendant à se préciser et à se généraliser ont été rendus stériles par le défaut de sanctions pénales internationales (11). L'expérience de la guerre de 1914-1918 en a fourni l'évidente démonstration.

Il est curieux de constater que, mue par un sentiment qui n'était peut-être qu'un pressentiment, une commission hollandaise a, au mois de juin 1914, demandé au gouvernement des Pays-Bas de proposer que soit institué à La Haye un « juge criminel international » compétent pour constater « les injustices ou les crimes des Etats commis en violation d'un traité postérieur à 1889 » (12). On sait que les articles 227 à 230 du Traité de Versailles, rédigés sur la proposition de la commission chargée de rechercher les responsabilités de la guerre de 1914-1918 ont, d'une part, déféré Guillaume de Hohenzollern à un Tribunal international pour « offense suprême contre la morale internationale et l'autorité sacrée des traités » et, d'autre part, reconnu aux puissances alliées et associées le droit de traduire devant leurs tribunaux militaires les personnes « accusées d'avoir commis des actes contraires aux lois et coutumes de la guerre » (13).

Il est d'un intérêt relatif de rappeler les circonstances dans lesquelles les clauses du Traité de Versailles sont demeurées pratiquement inappliquées. Le gouvernement hollandais n'a pas consenti à extrader l'ancien empereur d'Allemagne. Les puissances alliées ont délégué, en ce qui concerne le jugement des criminels de guerre, leur pouvoir juridictionnel au Sénat criminel du Tribunal suprême de Leipzig, dont l'action répressive s'est soldée par un échec volontaire, qui n'a pas été compensé par les rares poursuites exercées

(10) Loi du 8 septembre 1910, *J.O.* 1910, p. 7601 et suiv. ; décret du 2 décembre 1910, *J.O.* 1910, p. 9919 et suiv.

(11) RENAULT, *De l'application du droit pénal aux faits de guerre*, Clunet, 1915, p. 313 et suiv.

(12) SALDANA, *La justice criminelle internationale*, in Rapports préparatoires au Premier Congrès international de droit pénal, Paris, Marchal et Billard, I, p. 186 ; FRANÇOIS, *Règles générales du droit de la paix*, Recueil Cours Acad. La Haye, 1938, t. LXVI, p. 240.

(13) *Historique du problème de la juridiction criminelle internationale*, Publications des Nations Unies, 1949, p. 7 et 51 à 56.

devant les juridictions territoriales (14). Mais il est important de souligner que, dès 1919, il a été envisagé de situer la répression des crimes commis à l'occasion de la guerre de 1914-1918 par rapport aux normes complémentaires du droit international pénal et des lois pénales internes.

L'entre-deux-guerres a été marqué par un bouillonnement d'idées particulièrement intense auquel est en France demeuré attaché le nom du professeur DONNEDIEU DE VABRES, futur juge français au Tribunal militaire international des grands criminels de guerre (15). Toutes les organisations scientifiques intéressées au développement du droit pénal international, notamment l'*International Law Association* (16), l'*Union interparlementaire* (17) et l'*Association internationale de droit pénal* (18), ont uni leurs efforts pour promouvoir l'idée d'une répression des crimes contre l'ordre public international (19). Plutôt que d'évoquer ce mouvement doctrinal, il est utile de rappeler les données de fait susceptibles d'avoir contribué à mettre en place un système de répression des infractions aux lois et coutumes de la guerre et au droit des gens.

La première de ces données est, bien que dépourvue de tout contenu pénal, la renonciation à la guerre en tant qu'instrument de

(14) DONNEDIEU DE VABRES, *Le procès de Nuremberg, op. cit.*, p. 30 et suiv. ; DANIEL, *Le problème du châtiment des crimes de guerre d'après les enseignements de la deuxième guerre mondiale,* Le Caire, 1946, p. 16 et suiv. ; DESCHEEMAKER, *Le Tribunal militaire international des grands criminels de guerre,* Paris, Pedone, 1947, p. 5 et suiv., et notamment les statistiques citées p. 6. Sur la répression exercée directement par les juridictions françaises, voir Crim., 13 janvier 1921, B. 18 ; 4 février 1921, B. 60 ; 10 février 1921, B. 69 ; V. également Crim., 9 février 1922, B. 59, S. 1922.I.144, qui concerne des faits commis au Liban.

(15) *La Cour permanente de justice internationale et sa vocation en matière criminelle, Rev. intern. droit pénal,* 1924, p. 174 ; V. HERZOG, *Henri Donnedieu de Vabres et le droit pénal international,* Rev. science crim., 1953, p. 1.

(16) V. le projet de statut de la Cour internationale criminelle adopté à Vienne, en 1926, à l'issue de la 34e conférence de cette association ; V. *Historique du problème de la juridiction criminelle internationale,* op. cit., p. 12 et 66 ; HERZOG, *De la création d'une juridiction pénale internationale permanente,* Rev. intern. droit pénal, 1950, p. 395.

(17) V. la résolution votée par cette association, en 1925, sur la criminalité de la guerre d'agression et l'organisation d'une répression internationale. *Historique du problème de la juridiction criminelle internationale,* op. cit., p. 14 et 75 à 79 ; HERZOG, *De la création d'une juridiction pénale internationale permanente,* op. cit., p. 395.

(18) PELLA, *L'Association internationale de droit pénal et la protection de la paix,* Rev. intern. droit pénal, 1946, p. 185 ; BOUZAT, *L'Association internationale de droit pénal et son œuvre en faveur de la paix,* Rev. droit intern., Genève, 1948, p. 134 et suiv. ; GRAVEN, *Pour la défense de la justice internationale, de la paix et de la civilisation par le droit pénal,* Rev. intern. droit pénal, 1964, p. 7.

(19) PELLA, *La guerre crime et les criminels de guerre,* Paris, Pedone, 1946 ; SALDANA, *La justice pénale internationale,* Paris, 1927.

politique nationale, proclamée dans divers accords internationaux, et notamment dans le pacte Briand-Kellog du 27 août 1928 (20). La seconde a, par voie de conséquence, été constituée par une tendance générale à l'incrimination, par les législations internes, des délits de propagande à la guerre d'agression (21). La troisième manifestation positive des progrès du droit pénal international pendant l'entre-deux-guerres a été la révision des conventions de 1864 et de 1906 sur les blessés et les malades et la conclusion, le 27 juillet 1929, d'une nouvelle Convention dont l'article 29 a invité les gouvernements signataires à prendre les mesures nécessaires pour réprimer, en temps de guerre, les actes contraires aux dispositions de la loi internationale (22).

Enfin, au lendemain de l'assassinat du roi de Yougoslavie et du ministre français Barthou, deux conventions internationales ont été signées à Genève le 16 novembre 1937. L'une d'entre elles a prévu l'engagement des Hautes Parties contractantes d'introduire, dans leur droit interne, l'incrimination des actes de terrorisme, considérés comme des faits criminels (23). La seconde convention de 1937 a institué une Cour pénale internationale à laquelle les Etats signataires avaient la faculté de déférer les auteurs d'actes de terrorisme, s'ils n'entendaient pas les traduire devant leurs propres juridictions (24). La conclusion de ces conventions, qui a été saluée comme « un événement historique dans l'évolution du droit contemporain » (25), a constitué la dernière des convulsions de la doctrine juridique avant l'ouverture des hostilités en 1939. Elle a laissé la répression sur la voie dualiste qu'elle avait originairement empruntée, imposant ainsi la nécessité d'une conciliation entre les droits internes et le droit international pénal.

La guerre 1939-1945 a été marquée par des événements dont les hommes de notre génération ont, dans leur corps ou dans leur cœur, trop subi l'empreinte pour qu'il soit nécessaire de les rappeler. Les

(20) DONNEDIEU DE VABRES, *Le procès de Nuremberg,* op. cit., p. 57 ; V. *Procès des grands criminels de guerre, Texte officiel en langue française,* t. I, p. 229.

(21) IIIe Conférence pour l'unification du droit pénal, Bruxelles, 1930 ; DONNEDIEU DE VABRES, *Rapport au Congrès international de droit pénal de Palerme,* Actes du Congrès, 1933 ; *De la piraterie au génocide,* op. cit., p. 242.

(22) DONNEDIEU DE VABRES, *Le procès de Nuremberg,* op. cit., p. 14.

(23 et 24) *Historique du problème de la juridiction pénale internationale, op. cit.,* p. 16 et 94.

(25) PELLA, *La guerre crime et les criminels de guerre,* op. cit., p. 28, note 19 ; DONNEDIEU DE VABRES, *La répression internationale du terrorisme,* Rev. intern. législation comparée, 1938, p. 37 ; JIMENEZ DE ASUA, *Terrorisimo,* El Criminalista, Buenos Aires, 1950, t. IX ; Antonio QUINTANO RIPOLLES, *op. cit.,* t. I, p. 297 et suiv.

méthodes de la guerre totalitaire ont entraîné de graves excès qui ont, très tôt, soulevé l'indignation et retenu l'attention des gouvernements légitimes des pays ennemis de l'Allemagne hitlérienne, et notamment de ceux dont ses armées occupaient les territoires nationaux. Des mises en garde solennelles ont été adressées aux dirigeants nationaux-socialistes (26), et des organismes officiels ou semi-officiels ont étudié les conditions dans lesquelles une juridiction internationale pourrait, au lendemain de la capitulation allemande, assurer le juste châtiment des criminels de guerre (27). L'étape essentielle a été franchie par la *Déclaration de Moscou* du 30 octobre 1943, dans laquelle il était indiqué, d'une part, « que les officiers et soldats allemands responsables de crimes de guerre seraient, lors de l'armistice, renvoyés dans les pays où ils avaient perpétré leurs forfaits afin d'y être jugés et punis conformément aux lois de ces pays » et, d'autre part, que cette décision était prise « sous réserve du cas des grands criminels dont les crimes étaient sans localisation géographique précise et qui seraient punis par une décision commune des gouvernements alliés » (28).

Ce sont, en effet, les principes posés par la déclaration de Moscou qui ont, à partir de 1944, été progressivement mis en application. La distinction entre les grands criminels de guerre, dont les crimes n'étaient pas localisés, et les exécutants, qui s'en étaient rendus coupables dans une zone géographique déterminée, a servi de critère au partage des compétences entre la juridiction internationale et les juridictions internes.

Le 8 août 1945, les gouvernements des Etats-Unis d'Amérique, de la France, du Royaume-Uni et de l'Union Soviétique ont signé un accord prévoyant qu'un Tribunal militaire international serait créé à

(26) Déclaration de M. Churchill en date du 25 octobre 1941 ; déclaration dite de *Saint James Palace* du 13 janvier 1942 souscrite par le Comité national français et les gouvernements des pays alliés réfugiés à Londres ; Réponses américaine (24 août 1942) et soviétique (14 octobre 1942) à la déclaration de *Saint James Palace* ; DONNEDIEU DE VABRES, *Le procès de Nuremberg,* op. cit., p. 79 et suiv.

(27) *L'Assemblée internationale de Londres,* organisme semi-officiel dont les membres étaient désignés par les gouvernements alliés installés en Angleterre, a publié, le 21 juin 1943, un projet de Cour criminelle internationale. La *Commission internationale pour la réforme et le développement du droit pénal,* comité privé, a discuté le problème en cause sans formuler de propositions précises. La *Commission des Nations Unies pour les crimes de guerre,* constituée officiellement le 20 octobre 1943, a établi un projet de Convention portant création d'un Tribunal de Nations Unies pour les crimes de guerre. Le général de Gaulle a été représenté au sein de cette commission par les professeurs CASSIN et GROS. *Historique du problème de la juridiction criminelle internationale,* op. cit., p. 18 et suiv., et 104 et suiv.

(28) Le texte, plusieurs fois reproduit, de la *Déclaration de Moscou* se trouve dans *Le Statut et le Jugement du Tribunal de Nuremberg,* Publications des Nations Unies, 1949, p. 94.

l'effet de juger les grands criminels de guerre des puissances européennes de l'Axe (29). Le Statut de la juridiction a été annexé à cet accord. Un acte d'accusation détaillé a, en date du 18 octobre 1945, renvoyé devant le tribunal vingt-quatre accusés sous la quadruple prévention de complot, de crimes contre la paix, de crimes de guerre et de crimes contre l'humanité, et lui a demandé de déclarer « criminelles » six organisations nationales-socialistes (30). Le Tribunal militaire international des grands criminels de guerre a tenu ses audiences au Palais de Justice de Nuremberg et, à l'issue de ce qu'on a appelé « le plus grand procès pénal de l'histoire » (31), il a rendu, le 1er octobre 1946, un jugement dont les fondements juridiques ont prétendu renouveler le droit international (32).

En même temps, tous les pays sur le territoire desquels des crimes de guerre avaient été commis, ou dont des nationaux et ressortissants avaient été victimes de tels crimes, ont entrepris de procéder à la répression que la déclaration de Moscou les avait engagés à situer sur

(29) Le Tribunal militaire international pour l'Extrême-Orient a, de même, été créé le 19 janvier 1946 par une proclamation spéciale du général MacArthur ; *Le Statut et le Jugement du Tribunal de Nuremberg,* op. cit., p. 24.

(30) *Procès des grands criminels de guerre,* op. cit., t. I, p. 29.

(31) GRAVEN, *De la justice internationale à la paix, Les enseignements de Nuremberg,* Rev. droit intern., Genève, 1946, p. 183, et 1947, p. 1.

(32) *Procès des grands criminels de guerre,* op. cit., t. I, p. 181. La bibliographie sur le procès de Nuremberg est particulièrement fournie. On citera tout spécialement, en langue française, les œuvres de DONNEDIEU DE VABRES : *Le procès de Nuremberg,* op. cit. ; *Le procès de Nuremberg,* Rev. science crim., 1947, p. 171 ; *Le procès de Nuremberg,* Rev. droit pénal et crim., 1946-1947, p. 480 ; *Le procès de Nuremberg devant les principes modernes du droit pénal international,* Recueil Cours Acad. La Haye, 1947, p. 577 ; *Le jugement de Nuremberg et le principe de légalité des délits et des peines,* Rev. droit pénal et crim., 1946-1947, p. 813 ; *Crime de guerre,* Cahiers des hommes de bonne volonté, III, Le crime, p. 34 ; GRAVEN, *De la justice internationale à la paix,* op. cit. ; *En assistant au procès des criminels de guerre,* Genève, 1946 ; *Le châtiment des crimes de guerre,* Alma Mater, Genève, 1947, p. 147 ; MERLE, *Le procès de Nuremberg et le châtiment des criminels de guerre,* Paris, Pedone, 1949 ; LA PRADELLE, *Le procès des grands criminels de guerre et le développement du droit international,* Nouv. Rev. droit intern. privé, 1947, p. 1 ; TEITGEN, *Le jugement de Nuremberg,* Rev. droit intern., Genève, 1946, p. 161 ; REUTER, *Le jugement du Tribunal de Nuremberg,* D. 1946, chr. p. 77 ; *Nuremberg 1945 : le procès,* La Vie intellectuelle, décembre 1946 ; GLASER, *Les lois de Nuremberg et le droit international,* Rev. pén. suisse, 1953, p. 321 ; HERZOG, *Le message de Nuremberg,* Politique, 1946, p. 299. Parmi les ouvrages dont les auteurs ne sont pas des juristes, il y a lieu de retenir COOPER, *Le procès de Nuremberg, Histoire d'un crime,* Paris, Hachette, 1947 ; Didier LAZARD, *Le procès de Nuremberg, Récit d'un témoin,* Paris, E.N.F., 1947 ; CARTIER, *Les secrets de la guerre dévoilés par Nuremberg,* Paris, Fayard ; GILBERT, *Journal de Nuremberg,* Paris, 1947 ; Dominique AUCLÈRES, *Mes quatre vérités,* Paris, Vent du Large, p. 174 et suiv.

le plan de la loi pénale interne (33). Une législation spéciale est intervenue, non seulement dans les diverses zones d'occupation de l'Allemagne (34), mais surtout dans les différents pays antérieurement envahis par les troupes hitlériennes (35).

En France, elle a eu son siège dans une ordonnance du 28 août 1944, qui a déféré aux tribunaux militaires français « les nationaux ennemis ou agents non français au service de l'administration ou des intérêts ennemis, coupables de crimes ou de délits commis, depuis l'ouverture des hostilités, soit en France ou dans un territoire relevant de son autorité, soit à l'encontre d'un national ou d'un protégé français, d'un militaire servant ou ayant servi sous le drapeau français, d'un apatride résidant sur le territoire français avant le 17 juin 1940 ou d'un réfugié sur un territoire français, soit au préjudice des biens de toutes les personnes physiques visées ci-dessus et de toutes les personnes morales françaises, lorsque ces infractions, même accomplies à l'occasion ou sous le prétexte de l'état de guerre, n'étaient pas justifiées par les lois et coutumes de la guerre » (36). L'ordonnance du 28 août 1944 a été complétée par une loi du 15 septembre 1948 (37) qui, destinée à aligner la loi pénale interne sur le droit international concernant la

(33) BOISSIER, *La répression des « petits » crimes de guerre,* Rev. intern. droit pénal, 1948, p. 293. Il convient d'être en garde contre les opinions de cet auteur qui, dans son ouvrage intitulé *L'épée et la balance* (Genève, 1953), n'a pas craint de définir les crimes de guerre comme « étant, en règle générale, des contre-mesures militaires en soi nécessaires et légitimes, rendues criminelles par une outrance injustifiable, provenant le plus souvent d'improvisations à chaud en l'absence d'instructions préalables », et constituant des « taches sombres de la guerre » plus que des « crimes » au sens juridique du terme !

(34) Loi n° 10 du Conseil de contrôle du 20 décembre 1945 ; ordonnances américaines du gouvernement militaire des 18 octobre 1946 et 17 février 1947 ; *Royal Warrants* britanniques des 14 juin et 4 août 1945, etc. Sur les procès intentés en zone américaine, TELFORD TAYLOR, *Les procès de Nuremberg,* Paris, Carnegie, 1949 ; *Les jugements du Tribunal militaire américain de Nuremberg,* Rev. droit pénal et crim., 1949-1950, p. 845, 992 et 1082.

(35) V. Belgique, loi du 20 juin 1947 ; GREVY, *La répression des crimes de guerre en droit belge,* Rev. droit pénal et crim., 1947-1948, p. 806 ; Luxembourg, loi du 2 août 1947, HAMMES, *Le crime de guerre en droit pénal luxembourgeois, ibidem,* 1946-1947, p. 242 ; Norvège, ordonnance du 4 mai 1945, SUND, *Les criminels de guerre en Norvège,* ibidem, 1946-1947, p. 719 ; Pologne, décrets-lois des 12 octobre 1944 et 22 janvier 1946, MUSZKAT, *La répression des crimes commis en Pologne,* ibidem, 1947-1948, p. 719 ; ANCEL, *Un procès de criminel de guerre en Pologne,* Rev. science crim., 1947, p. 171 ; *La répression des crimes de guerre en Grèce,* Rev. droit pénal et crim., 1950-1951, p. 358. Sur l'ensemble du problème, voir, outre BOISSIER, précité, Antonio QUINTANO RIPOLLES, *op. cit.,* t. I, p. 437 à 456.

(36) J.O. 1944, p. 780. B.L.D. 1944, p. 221 ; décret du 6 décembre 1944, modifié le 6 août 1945, instituant un service de recherche des crimes de guerre ennemis, Rev. science crim., 1946, p. 275 ; TOUFFAIT, *Crimes de guerre et recherche des crimes de guerre,* Rec. droit pénal, 1947, p. 5.

(37) J.O. 1948, p. 9138, B.L.D. 1948, p. 825.

déclaration de criminalité des organisations hitlériennes, a été abrogée le 30 janvier 1953 (38) après avoir suscité de graves difficultés d'application.

Tel est le cadre dans lequel la répression des crimes de guerre a été assurée au lendemain de la guerre de 1939-1945 (39). Il a fait apparaître dans leur permanence l'unité et la dualité du droit pénal de la guerre. Son unité découle de la constatation qu'il s'agit toujours d'assurer la répression de faits attentatoires à l'ordre public universel, et sa dualité tient à ce que les modalités de son développement ont été différentes suivant que les infractions visées ont été commises par des exécutants, relevant des lois pénales internes, ou par des gouvernants, responsables, au regard du droit international pénal, des crimes dont ils ont, par leurs instructions, commandé ou toléré l'exécution (40). Mais il y a nécessairement eu des points de rencontre, sinon de friction, entre le droit international pénal et la loi pénale interne. L'objet de cette étude est précisément de dégager les conflits que la chambre criminelle de la Cour de cassation a résolus, lorsqu'elle a été saisie de l'application de l'ordonnance du 28 août 1945 et de la loi du 15 septembre 1948 sur les crimes de guerre ennemis. Cette expression doit être entendue dans son sens le plus strict. Il est ici sans grand intérêt de dégager un critère de distinction entre le crime de guerre et le crime contre l'humanité et de poser la question de savoir si, dans la conception de l'ordonnance de 1944, le premier n'a pas partiellement englobé le second (41). La confrontation des options du droit international pénal avec les données de la loi pénale interne

(38) J.O. 1953, p. 898. B.L.D. 1953, p. 56. Sur les débats parlementaires ayant précédé le vote de la loi du 30 janvier 1953, J.O. Déb. parl., Ass. nat., 1953, p. 461.

(39) PATIN, *La France et le jugement des crimes de guerre,* Rev. science crim., 1951, p. 393 ; *Chronique de jurisprudence sur l'application de l'ordonnance du 28 août 1944,* ibidem, 1949, p. 352 ; HERZOG, *Les principes juridiques de la répression des crimes de guerre,* Rev. pén. suisse, 1946, p. 277 ; *Crimes de guerre,* dans Encyclopédie juridique Dalloz, Rép. droit crim. et proc. pén. ; DE JUGLART, *Répertoire méthodique de la jurisprudence militaire,* Paris, 1946, p. 232 et suiv. ; *Les crimes de guerre devant les tribunaux militaires français,* J.C.P. 1946.I.499 ; MAUNOIR, *La répression des crimes de guerre devant les tribunaux français et alliés,* thèse, Genève, 1956 ; CHAPAR, *La répression des crimes de guerre,* Rev. droit pénal et crim., 1947-1948, p. 793 ; EISELE, *Réflexions sur les procès des criminels de guerre en France,* ibidem, 1950-1951, p. 405 ; Nouveau Répertoire de droit Dalloz, 2e éd., *Atteinte à la sûreté de l'Etat, annexe 2* ; Jurisclasseur de droit pénal, Lois pénales annexes, t. I, *Crimes de guerre.*

(40) DONNEDIEU DE VABRES, *De la piraterie au génocide,* op. cit., p. 254.

(41) GRAVEN, *Les crimes contre l'humanité,* op. cit. ; *La répression des crimes contre l'humanité,* Rev. droit intern., Genève, 1948, p. 1 ; HERZOG, *Contribution à l'étude de la définition du crime contre l'humanité,* Rev. intern. droit pénal, 1947, p. 155 ; Actes officiels de la VIIIe Conférence pour l'unification du droit pénal, Paris, Pedone, 1949 ; ARONEANU, *Responsabilités pénales pour crime contre l'humanité,* Rev. droit intern., Genève, 1948, p. 144 et suiv.

peut, en revanche, mettre en évidence la valeur de la contribution apportée, de 1946 à 1955, par la chambre criminelle de la Cour de cassation au renouvellement de la théorie des délits du droit des gens.

I. — LES CONFLITS DE JURIDICTION

L'article 5 de l'ordonnance du 28 août 1944, modifié par la loi du 15 septembre 1948, a donné compétence aux tribunaux militaires pour connaître des crimes de guerre, en décidant que les juridictions devaient être constituées selon les dispositions du Code de justice militaire, sous réserve que la majorité des juges militaires comprît, sauf impossibilité dûment constatée, des militaires appartenant ou ayant appartenu aux Forces Françaises de l'Intérieur, ou à des organisations de résistance (42).

Les conflits auxquels l'application de cette disposition a donné naissance n'ont donc pas porté sur la compétence des juridictions militaires à juger les criminels de guerre, mais sur la composition que ces juridictions devaient recevoir selon la qualité des accusés.

Certaines difficultés sont nées du fait que la distinction entre les crimes de guerre et les atteintes à la sûreté extérieure de l'Etat, parfois difficile à établir (43), était susceptible d'avoir une incidence directe sur la formation des tribunaux, aux termes de l'article 10, dernier alinéa, du Code de justice militaire. La Cour de cassation a jugé, par un arrêt rendu, toutes chambres réunies, le 1er août 1949, que les dispositions concernant le jugement des personnes étrangères aux armées, en matière de crimes et délits contre la sûreté extérieure de l'Etat, n'étaient pas applicables à des civils de nationalité allemande recherchés sous l'accusation de crimes de guerre (44). La solution inverse a, logiquement, prévalu à propos d'un civil de nationalité française qui était poursuivi, concurremment avec des ressortissants allemands, sous la prévention d'intelligences avec l'ennemi, en même

(42) Sur la condition d'appartenance à la Résistance ou aux Forces Françaises de l'Intérieur, la Cour de cassation a admis la validité des formules générales de référence à l'article 5 ; Crim., 11 juillet 1946, B. 159 ; 8 janvier 1947, B. 11 ; 3 janvier 1951, B. 3. V. obs. PATIN, Rev. science crim., 1949, p. 352.

(43) V. ci-après les problèmes posés en ce qui concerne l'espionnage en droit pénal international et en droit pénal interne.

(44) Chambres réunies, 1er août 1949, B. 267, G. P. 1949.II.175, D. 1950, 241, note DONNEDIEU DE VABRES, J.C.P. 1949.II.5034, note BROUCHOT, Rev. science crim., 1952, p. 122, obs. P. HUGUENEY.

temps que du chef de crimes de guerre (45), et à propos de criminels de guerre allemands poursuivis en même temps que des nationaux français accusés de crimes connexes d'atteinte à la sûreté extérieure de l'Etat (46).

Mais ces conflits juridictionnels n'ont eu d'intérêt que dans la mesure où ils ont traduit les conflits de qualification par lesquels ils étaient provoqués. Plus caractéristiques en eux-mêmes et plus lourds de conséquences juridiques ont été les conflits entraînés par la nécessité de concilier la double qualité de criminels de guerre et de prisonniers de guerre, souvent revendiquée par les nationaux allemands traduits devant les tribunaux militaires. La Cour de cassation a, à cet égard, affronté et surmonté un problème juridique délicat, dont il convient de rappeler les données avant d'en analyser les solutions.

A. — LES DONNÉES DU PROBLÈME

La Convention de Genève du 27 juillet 1929 sur le traitement des prisonniers de guerre, promulguée par décret du 10 décembre 1935, contient un article 63 aux termes duquel « un jugement ne peut être prononcé à la charge d'un prisonnier de guerre que par les mêmes tribunaux et suivant la même procédure qu'à l'égard des personnes appartenant aux forces armées de la puissance détentrice » (47). Cette garantie juridictionnelle est reprise par un des alinéas de l'article 10 du Code de justice militaire, disposant que les tribunaux appelés à juger les prisonniers de guerre sont composés comme pour le jugement des militaires français, d'après les assimilations de grade.

Aucune difficulté n'a donc été suscitée par ces textes lorsque les nationaux allemands poursuivis pour crimes de guerre n'avaient pas, civils ou militaires, la qualité de prisonniers de guerre. Reprenant un principe qu'elle avait posé, au lendemain de la guerre 1914-1918, dans un arrêt du 27 février 1925 (48), la chambre criminelle a affirmé qu'en cette hypothèse le Tribunal militaire devait, dans les conditions

(45) Crim., 3 janvier 1951, B. 3, Rev. science crim., 1952, p. 122. La Cour de cassation a par ailleurs jugé, dans son arrêt du 3 août 1950, B. 227, D. 1950, 701, note DONNEDIEU DE VABRES, S. 1951.I.66, rapport PATIN et note DUCOM, que les dispositions de l'art. 2 du Code de justice militaire déclarant les tribunaux militaires incompétents pour juger des inculpés âgés de moins de 18 ans ne pouvaient pas être invoquées par de jeunes Alsaciens incorporés dans l'armée allemande, en raison des termes généraux de l'art. 3 de la loi du 15 septembre 1948. V. les observations de DONNEDIEU DE VABRES qui, sans méconnaître le bien-fondé de l'argumentation de la chambre criminelle, en déduit que la loi du 15 septembre 1948 apparaît, dans « toute la portée traditionnelle de ce terme », comme un droit « odieux » (D. 1950, 705).

(46) Crim., 18 avril 1953, B. 124.

(47) J.O. 1935, p. 13631. B.L.D. 1935, p. 1193.

(48) Crim., 27 février 1925, B. 79 ; DE JUGLART, *Répertoire méthodique*, *op. cit.*, p. 233.

prescrites par l'article 5 de l'ordonnance du 28 août 1944, recevoir la composition prévue pour le jugement des civils ou des hommes de troupe, sans qu'il fût, éventuellement, tenu compte du grade des accusés dans l'armée ennemie. Elle a rappelé ce principe dès le 24 juillet 1946, dans le très important arrêt concernant les poursuites engagées contre le gauleiter d'Alsace Wagner, et a noté que ce dernier n'avait pas été renvoyé devant les juridictions répressives en *qualité de prisonnier de guerre* (49). Cette formule a été reprise dans plusieurs décisions postérieures. Elle n'a donné lieu à aucune observation (50). Mais elle a laissé entier le problème posé par l'application de l'article 63 de la Convention de Genève et par la conciliation, en ce qui concernait les criminels de guerre prisonniers de guerre, de l'article 5 de l'ordonnance du 28 août 1944 avec l'article 10 du Code de justice militaire.

B. — Les solutions du problème

Les premières décisions qui ont été rendues en la matière ont témoigné d'une certaine hésitation de la jurisprudence. Alors que la tendance des tribunaux militaires de cassation a, d'abord, manifesté la préférence de ces juridictions envers l'application aux prisonniers de guerre des dispositions de l'article 10 du Code de justice militaire (51), quelques arrêts de la chambre criminelle ont paru consacrer la thèse inverse et poser en principe que les règles de l'article 5 de l'ordonnance du 28 août 1944 étaient seules applicables aux criminels de guerre, parce que ces derniers n'étaient pas jugés en tant que prisonniers de guerre (52).

1° Fallait-il en déduire que, selon la haute juridiction, il y avait une incompatibilité juridique entre le statut du criminel de guerre et celui du prisonnier de guerre ? Cette conclusion a été, un peu rapidement, avancée par une partie de la doctrine. Le doyen Pierre Hugueney a, par exemple, écrit que la règle posée par l'article 10 du Code de justice militaire était « étrangère » aux criminels de guerre parce que les criminels de guerre, considérés comme indignes d'un traitement impliquant un hommage rendu à l'armée ennemie, devaient tous être jugés par le tribunal militaire le plus « humblement » composé (53).

(49) Crim., 24 juillet 1946, B. 170, Rev. science crim., 1947, p. 271 ; Voir Crenesse, *Le procès de Wagner, bourreau de l'Alsace,* Office français d'édition, 1946.

(50) Crim., 28 juillet 1948, B. 210.

(51) Trib. milit. Cass. Paris, par de Juglart, *Répertoire méthodique,* op. cit., p. 256.

(52) Crim., 30 décembre 1948, B. 310 ; 25 mai 1949, B. 187, D. 1949, 346, Rev. science crim., 1950, p. 229, obs. P. Hugueney ; 16 février 1950, B. 58.

(53) Obs. précitées, Rev. science crim., 1950, p. 229.

Cette théorie est, actuellement encore, défendue par un professeur de l'Université de Liège, M. Stefan Glaser, qui a consacré deux articles à tenter de démontrer que la violation des lois de la guerre enlevait à ceux qui s'en rendaient coupables tout statut de prisonnier de guerre et que « le caractère du criminel de guerre primait et absorbait celui du prisonnier de guerre » (54).

Mais cette théorie ne pouvait pas être celle de la chambre criminelle ! Le flottement de sa jurisprudence avait une tout autre cause. Ce n'était pas un préjugé passionnel mais un scrupule juridique qui animait la haute juridiction : celui de savoir si les dispositions de la Convention de Genève étaient applicables aux prisonniers de guerre jugés pour des faits antérieurs à leur capture ou si elles ne devaient recevoir application qu'en ce qui concernait les crimes et les délits commis au cours de la captivité (55).

Les juridictions américaines ont eu le même problème à résoudre et elles ont, sans ambiguïté, opté en faveur de la seconde solution. Dans le procès d'un général allemand accusé d'avoir fait fusiller, sans jugement préalable, un commando ennemi, le tribunal militaire a rejeté le moyen de défense tiré de l'article 63 de la Convention de Genève, en déclarant que ce texte était applicable aux seules infractions commises par des prisonniers de guerre pendant leur captivité. La juridiction américaine a ainsi suivi une jurisprudence admise, en dépit de l'opinion dissidente d'un de ses membres, par la Cour suprême des Etats-Unis, statuant, le 4 février 1946, sur un recours du général japonais Yamashita (56).

Il est démontré, par l'intervention des chambres réunies de la Cour de cassation, que la chambre criminelle a penché pour cette solution restrictive. Mais il est permis de se demander si le président Patin n'était pas d'un avis différent. Traitant, en 1949, de la question dans une chronique de jurisprudence, il s'est en effet contenté d'écrire que l'article 10 du Code de justice militaire était applicable aux « accusés prisonniers de guerre », sans se référer à l'incidence de la date des faits par rapport à celle de la capture.

2° Toujours est-il que les chambres réunies ont, en 1950, rendu deux arrêts conçus exactement dans les mêmes termes. Ces arrêts, en

(54) Stefan Glaser, *La protection internationale des prisonniers de guerre et la responsabilité pour les crimes de guerre,* Rev. droit pénal et crim., 1950-1951, p. 897 et suiv. ; *La convention de Genève et les criminels de guerre,* ibidem, 1951-1952, p. 517.

(55) Le problème a été posé par Travers en termes très précis. *Le droit pénal international et sa mise en œuvre en temps de paix et en temps de guerre,* Paris, 1921, t. II, n° 340, p. 442.

(56) *United Nations War Crimes Commission, Law Reports of Trials of War Criminals,* vol. I, Londres, 1946, analysé dans Rev. science crim., 1947, p. 307.

date des 26 juillet et 13 décembre 1950, ont constaté que l'article 63 de la Convention internationale de Genève du 27 juillet 1929 s'appliquait « sans équivoque possible même lorsque les prisonniers comparaissaient pour des faits antérieurs à leur captivité » (57).

La solution ne s'imposait pas avec évidence et elle a été critiquée. Certains annotateurs (58) ont souligné que les arrêts des chambres réunies rompaient avec une jurisprudence fortement établie, aux termes de laquelle la compétence *ratione personae* était déterminée par la qualité du prévenu au jour de l'infraction et non à celui de la poursuite (59). Fallait-il en conclure que les chambres réunies avaient obéi à une préoccupation d'équité supérieure plus qu'à une conviction de logique juridique ? (60). C'était oublier que la solution adoptée avait pour conséquence de soumettre les criminels de guerre à un traitement différent selon qu'ils avaient été faits prisonniers au cours des hostilités ou capturés après la capitulation allemande !

S'il en était ainsi, la solution des arrêts de 1950 trouvait son fondement essentiel dans le fait que l'article 63 de la Convention de La Haye n'établissait aucune distinction suivant que le prisonnier de guerre comparaissait devant les tribunaux ennemis pour des faits antérieurs ou postérieurs à sa capture. La Cour de cassation a, en l'espèce, appliqué une disposition du droit international formulée par une convention régulièrement promulguée en France. Elle n'a fait, en cela, que se conformer aux principes généraux du droit international public et du droit constitutionnel français (61).

3° La chambre criminelle a adopté la solution des chambres réunies, mais, usant d'une méthode qui n'est pas particulière à la

(57) Chambres réunies, 26 juillet 1950, B. 218, J.C.P. 1950.II.5808, note BROUCHOT, Rev. science crim., 1951, p. 110, obs. P. HUGUENEY, *ibidem,* 1953, p. 334, obs. P. HUGUENEY ; 13 décembre 1950, B. 284.

(58) V. la note précitée de M. BROUCHOT.

(59) V., en ce qui concerne l'âge, Crim., 21 mai 1947, B. 88, et la qualité de militaire, 15 janvier 1948, B. 15, S. 1948.I.77, J.C.P. 1949.II.4370, note MAGNOL ; 7 juin 1951, B. 165, Rev. science crim., 1952, p. 285. V. BOUZAT et PINATEL, *Traité de droit pénal et de criminologie,* t. II, n° 1160, avec la jurisprudence complémentaire citée p. 898, note 1.

(60) Note BROUCHOT précitée.

(61) NIBOYET, *La Constitution nouvelle et certaines dispositions de droit international,* D. 1946, chr. 89 ; Jacques DONNEDIEU DE VABRES, *La Constitution de 1946 et le droit international,* D. 1948, chr. 50. Il est curieux de noter que l'arrêt du 26 juillet 1950 a été commenté à deux reprises par le doyen P. HUGUENEY, dans ses chroniques de droit pénal militaire de la Rev. science crim. Inadvertance ou revirement, il a, en 1951 (p. 110), vivement critiqué l'arrêt « inquiétant » pour les juristes « attardés » pour qui la Cour de cassation est et doit rester la « gardienne suprême du droit » et n'a pas hésité, en 1953 (p. 335), à affirmer que la solution émanant de « notre plus haute juridiction » lui paraissait devoir être « pleinement approuvée ».

matière considérée, elle a multiplié les efforts pour procéder à une application limitative des arrêts de 1950. On peut résumer sa jurisprudence en observant qu'elle a tendu à exclure tout recours à l'article 10 du Code de justice militaire lorsque les criminels de guerre déférés aux juridictions répressives ne présentaient pas la double qualité de membres d'une formation militaire ennemie et de prisonniers de guerre.

La chambre criminelle a, dans une première perspective, évité de placer sous la protection de la Convention de Genève les criminels de guerre, même prisonniers de guerre, qui n'étaient pas des militaires au sens strict de ce terme. Elle a refusé tout privilège juridictionnel à ceux que le doyen HUGUENEY a appelé les para-militaires (62). Cette solution a prévalu à l'égard d'accusés qui, tels Oberg et Knochen, prétendaient être assimilés à des officiers généraux, mais n'appartenaient pas à l'armée allemande au moment des faits incriminés (63). Elle a également été adoptée à propos des membres de la Gestapo, considérés comme relevant d'une force de police (64), et des chefs de la S.I.P.O. et du S.D., dont la juridiction suprême a estimé que le rang de préséance dont ils bénéficiaient ne leur conférait pas, *ipso facto,* un grade d'officier de la Wehrmacht (65).

La Cour de cassation n'a, par ailleurs, appliqué les dispositions de la Convention de Genève qu'aux prisonniers de guerre proprement dits. Elle a cassé une décision se bornant à constater que les accusés n'avaient à aucun moment été capturés par les forces françaises au cours d'opérations de guerre, parce que cette formule générale laissait incertain le point de savoir si les intéressés n'avaient pas été faits prisonniers au cours des combats par des forces armées alliées de la France (66). Mais sa jurisprudence s'est, pour le surplus, avérée restrictive en ce qu'elle a, par exemple, fondé sur les constatations souveraines des juges du fait le rejet de pourvois dirigés contre des arrêts refusant de considérer comme prisonniers de guerre un général

(62) *Chronique de droit pénal militaire,* Rev. science crim., 1955, p. 347.

(63) Crim., 10 février 1955, B. 96. Dans cette espèce, le pourvoi invoquait non seulement la violation de l'art. 63 de la Convention de 1929, mais également celle de la Convention de 1949 promulguée en France le 12 août 1952 ! La chambre criminelle a, sur ce dernier point, jugé que la Convention de 1949 n'était pas applicable aux accusés de crimes de guerre pour des faits commis par eux au cours d'un conflit dans lequel la partie belligérante était le III[e] Reich allemand et non pas la République fédérale allemande, signataire des accords de 1949, et alors que ce conflit ne pouvait être régi que par la Convention du 27 juillet 1929.

(64) Crim., 27 juillet 1954, B. 278.

(65) Crim., 8 novembre 1951, B. 287 (Dunkern, chef de la S.I.P.O. et du S.D. de Lorraine).

(66) Crim., 27 juin 1951, B. 185.

des Waffen SS arrêté après la capitulation de l'Allemagne (67), et des officiers détenus au titre des poursuites du chef de crimes de guerre (68).

Un des derniers arrêts rendus par la Cour de cassation en matière de crime de guerre a résumé, à cet égard, la position de la juridiction suprême. La chambre criminelle a observé que, loin de contenir des dispositions contraires aux engagements internationaux de la France, l'ordonnance du 28 août 1944 n'avait fait que les mettre en application en les combinant avec les règles du droit français, son article 5 s'appliquant d'une manière générale à tous les auteurs, coauteurs et complices des infractions, *prisonniers de guerre ou non,* sous la réserve des modifications résultant, éventuellement, en ce qui concernait les prisonniers de guerre, de leur grade, suivant les distinctions établies par l'article 10 du Code de justice militaire (69).

4° Les solutions apportées par la chambre criminelle aux conflits qui se sont élevés entre le droit international pénal et la loi pénale interne sur le plan de la compétence juridictionnelle, ont ainsi fait leur place aux obligations internationales de la France. Un esprit identique a animé la haute juridiction lorsqu'il lui a fallu résoudre des problèmes inhérents aux conditions d'exercice des poursuites du chef de crimes de guerre (70). La question a été essentiellement soulevée par le procès d'Abetz, dont le pourvoi soutenait qu'étant ambassadeur accrédité par le gouvernement allemand auprès du gouvernement français, il était couvert par l'immunité diplomatique et ne pouvait pas être poursuivi, en France, sans l'autorisation de son gouvernement. La chambre criminelle a rejeté le pourvoi du représentant d'Hitler auprès des autorités françaises et les considérations qui ont inspiré sa décision ont été exposées dans le *Recueil Sirey,* dans une note signée des quatre initiales familières aux pénalistes de l'après-guerre (71).

La Cour de cassation n'a pas nié que la coutume internationale, parfois exprimée par des traités ou par des lois, accordait une immunité de poursuites aux agents diplomatiques (72). Mais elle a jugé qu'Otto Abetz ne pouvait pas bénéficier de cette immunité pour deux raisons complémentaires.

(67) Crim., 24 mars 1953, B. 117.

(68) Crim., 2 décembre 1954, B. 370, D. 1955, Somm. 41.

(69) Crim., 17 mars 1955, B. 159 ; 8 janvier 1947, B. 11.

(70) Crim., 29 novembre 1951, B. 328.

(71) Crim., 28 juillet 1950, B. 221, S. 1950.I.185, note M.R.M.P., *Rev. droit intern. privé,* 1951, p. 477, obs. DONNEDIEU DE VABRES.

(72) V. BOUZAT et PINATEL, *op. cit.,* t. II, n° 1720 ; CHOUCKROUN, *L'immunité,* Rev. science crim., 1959, p. 29.

En fait, Abetz avait été chargé de garder « un contact permanent avec le gouvernement de Vichy ». Mais, en admettant même que ce dernier représentât la France, aucun rapport diplomatique n'avait pu s'instaurer entre deux pays qui, nonobstant l'armistice, demeuraient en guerre. Abetz, qui n'avait pas été muni de lettres de créance, n'avait jamais été agréé par les autorités françaises en qualité d'ambassadeur, mais leur avait été imposé, en tant que fonctionnaire allemand chargé de la direction politique des services d'occupation. Ce n'était pas un agent diplomatique susceptible d'être couvert par l'immunité au sens de la coutume internationale ! (73).

La chambre criminelle a consolidé cette argumentation en soulignant que l'ordonnance du 28 août 1944 excluait, par son objet même, l'application de toute disposition de droit interne ou international dont l'objet serait de subordonner la poursuite des criminels de guerre à l'autorisation de leur gouvernement. Mais cette observation ne prend son véritable sens que si elle est replacée dans le contexte général qui lui a servi de support. L'ordonnance du 28 août 1944 a mis en œuvre, sur le plan français, un système de répression qui a, sur le terrain international, précisément abouti à l'accusation et à la condamnation, en tant que grands criminels de guerre, des membres du gouvernement allemand. Cette circonstance suffisait à empêcher tout recours de l'ordre interne à l'ordre étranger.

On est ainsi conduit à la conclusion que la chambre criminelle n'a pas seulement, dans son arrêt du 28 juillet 1950, fondé sa décision sur l'interprétation de la loi française. Elle a également, par un raisonnement *a contrario,* pris en considération l'esprit général du droit international résultant des conventions et des accords auquels la France a adhéré.

II. — LES CONFLITS DE QUALIFICATION

Les crimes de guerre ont, à l'origine, donné lieu à une énumération descriptive plus qu'à une qualification juridique, et c'est une méthode analytique qui a, d'abord, été mise en œuvre pour en élaborer la définition (74). Mais lorsqu'en 1944 l'étape de la construction doctrinale a laissé place à celle de l'action judiciaire, la nécessité de donner aux crimes de guerre un fondement normatif a conduit à dégager les critères de leur incrimination au regard de la justice pénale internationale et des répressions nationales.

(73) *Contra* TRAVERS, selon lequel la juridiction saisie n'a pas qualité pour rechercher si l'agent a été régulièrement nommé dès lors qu'elle constate qu'il est reconnu par le gouvernement français comme exerçant une fonction diplomatique, *op. cit.,* t. II, p. 313, note 2.

(74) REY, *Violations du droit international commises par les Allemands en France pendant la guerre de 1939,* Rev. gén. droit intern. privé, 1941-1945.II., p. 1.

Le Statut du Tribunal militaire de Nuremberg a, dans son article 6, érigé les crimes de guerre en infractions internationales constituées par la violation des lois et coutumes de la guerre, et le jugement du 1er octobre 1946 a précisé que les faits incriminés dans l'article 6 tenaient du droit international leur qualification de crimes de guerre, notamment parce qu'ils étaient prévus par les articles 46, 50, 52 et 56 de la Convention de La Haye et par les articles 2, 3, 4, 46 et 51 de la Convention de Genève, dont la violation constituait des infractions entraînant des châtiments (75).

Mais ces châtiments, en l'absence de dispositions répressives de caractère international, n'ont pu se fonder que sur les principes généraux du droit criminel (76), et les législateurs des divers Etats, qui ont poursuivi les criminels de guerre devant leurs propres juridictions, ont précisément eu la préoccupation de combler, dans leurs droits internes, les lacunes du droit international.

L'idée a été soutenue que la logique juridique eût voulu que les crimes de guerre commis par les membres des forces armées hitlériennes fussent poursuivis par application de la loi pénale allemande (77). Ce procédé aurait, en effet, trouvé sa justification dans la règle traditionnelle dite de la *loi du drapeau,* qui, constituant une exception personnelle du principe de la territorialité, assujettit à leur loi nationale les militaires ou les personnes assimilées coupables d'infractions commises sur un territoire étranger, soumis à une occupation pacifique ou guerrière (78). Mais il paraissait illogique de fonder la répression des crimes de guerre sur la législation d'un Etat que son gouvernement avait doté d'un « ordre public assassin » (79). Les législateurs nationaux ont été conduits à introduire la notion de crime de guerre dans leurs droits internes et, pour ce faire, ils ont employé deux méthodes de qualification très différentes.

Dans la plupart des pays, les crimes de guerre ont été définis comme constituant des « infractions aux lois et coutumes de la guerre »

(75) *Procès des grands criminels de guerre,* op. cit., t. I, p. 12 et 266.

(76) Acte d'accusation, *Procès des grands criminels de guerre,* op. cit., t. I, p. 47. V. également LACCONIA, *Les crimes de guerre, Normes juridiques et tribunaux pénaux internationaux,* Rev. droit pénal et crim., 1947-1948, p. 605.

(77) BOISSIER, *La répression des « petits » crimes de guerre,* op. cit., p. 294.

(78) TRAVERS, *op. cit.,* t. I, n° 419, p. 542. En France, on peut trouver l'origine de cette tradition dans un décret du 21 février 1808 (DUVERGIER, t. XVI, p. 245) et dans un arrêt de la Cour de cassation du 22 janvier 1818 (B. 10). Les problèmes posés par le stationnement actuel de troupes étrangères en France, dans le cadre de l'OTAN, sont résolus par la Convention du 19 juin 1951, publiée par décret du 11 octobre 1952 ; V. LEVASSEUR, *Droit pénal général complémentaire,* Les Cours de droit, 1960, p. 202.

(79) BOISSIER, *La répression des « petits » crimes de guerre,* op. cit., p. 295.

assorties de sanctions pénales du fait de leur incrimination par le droit interne. Aucune divergence ne s'est donc élevée entre la formule du Statut de Nuremberg et celle des lois nationales qui ont directement sanctionné les crimes de guerre en tant qu'infractions internationales (80).

Mais cette méthode n'a été suivie ni en Belgique ni au Luxembourg ni en France, où les crimes de guerre ont été incriminés par rapport aux normes du droit interne et considérés comme des infractions de droit commun, commises en violation des lois et coutumes de la guerre. Cette formule est à peu près celle de la loi belge de 1947. L'ordonnance du 28 août 1944 a employé une méthodologie différente. Elle a qualifié les crimes de guerre « d'infractions commises à l'occasion ou sous le prétexte de l'état de guerre sans être justifiées par les lois et coutumes de la guerre ».

Cette définition a été critiquée par une partie de la doctrine. On a prétendu, avec condescendance, que la formule de l'ordonnance du 28 août 1944 n'était pas « pleinement satisfaisante » (81). On a observé, avec scepticisme, qu'elle engendrait un dualisme des normes nationales et internationales, constituant une source continuelle de complications de tous ordres (82). On a objecté, avec vigueur, qu'elle mettait le droit français en contradiction avec le droit international, en incriminant des actes ignorés du droit de la guerre et qu'à tout le moins elle reléguait les lois et coutumes de la guerre à une place secondaire, parce que ces dernières énonçaient rarement des justifications et des permissions expresses (83).

La réplique à ces diverses argumentations peut être trouvée dans la jurisprudence de la chambre criminelle. La haute juridiction a, en effet, résolu les conflits de qualification qui lui ont été déférés en posant des principes généraux dont les applications particulières ont réalisé une conciliation entre les dispositions de la loi pénale interne et les normes du droit pénal international de la guerre.

(80) Le système a été adopté par les Etats-Unis, l'Angleterre, la Hollande et, dans une certaine mesure, par la Norvège, le Danemark, la Grèce. V. BOISSIER, *La répression des « petits » crimes de guerre,* op. cit., p. 295 ; et Antonio QUINTANO RIPOLLES, *op. cit.,* t. I, p. 532 et suiv.

(81) CHAUVEAU, obs. sous Tribunal militaire de cassation, Paris, 21 septembre 1945, *Rev. droit intern. privé,* 1946, p. 261.

(82) Antonio QUINTANO RIPOLLES, *op. cit.,* p. 569.

(83) BOISSIER, *La répression des « petits » crimes de guerre,* op. cit., p. 302 ; Luis JIMENEZ DE ASUA, *Tratado de derecho penal,* t. II, n° 902, p. 1041, écrit, au contraire, que les crimes de guerre sont des crimes commis en temps de guerre « qualifiés par les normes de la législation pénale de chaque Etat ». La formule française est reproduite dans l'ordonnance luxembourgeoise du 2 août 1947.

A. — Les principes généraux

La chambre criminelle, loin d'avoir négligé le caractère international des crimes de guerre, a sciemment articulé sa jurisprudence sur l'incidence de l'élément injuste sur leur qualification juridique. Elle a dégagé les deux principes complémentaires selon lesquels la définition interne des crimes de guerre ne contredisait aucune donnée essentielle du droit international pénal intégré à l'incrimination par la technique du fait justificatif.

1° La conception selon laquelle le crime de guerre est essentiellement une infraction de droit commun peut être considérée comme une tradition de la doctrine française et les formules de l'ordonnance du 28 août 1944 ont eu le mérite de la fidélité plus que celui de l'originalité ! C'est un auteur aujourd'hui oublié, Achille Morin, qui a, le premier, soutenu la thèse selon laquelle les meurtres et les blessures, qui n'étaient pas justifiés par le droit international de la guerre, constituaient des actions coupables, appelées à être considérées comme telles par tous les belligérants, et à donner lieu à une application *normale* du droit pénal (84). Cette théorie a été développée avec éclat, au cours de la guerre 1914-1918, par les professeurs Renault et Garçon (85), et elle a été récemment invoquée par certains interprètes de l'ordonnance du 28 août 1944 (86). Contrairement à ce qu'on a pu prétendre, elle a eu le grand mérite de la simplicité. Elle a répondu à deux idées fondamentales. Sans parler des faits commis au préjudice de l'intérêt public, les atteintes à l'intégrité corporelle et aux biens des particuliers sont des infractions incriminées par le droit pénal de tous les Etats civilisés et, pour reprendre l'expression de Garçon, il convient, pour les réprimer, de « faire appel au droit qui s'impose à tous », c'est-à-dire au droit commun (87). Mais il a toujours été admis, en doctrine comme en jurisprudence, qu'un belligérant peut accomplir impunément certains actes qui, en temps normal, sont punissables, dès lors qu'en les commettant il s'est soumis aux lois de la guerre déterminées par les traités et par les usages internationaux (88).

(84) Achille Morin, *Les lois relatives à la guerre,* Paris, Marchal et Billard, 1872, t. II, p. 456.

(85) Renault, *De l'application du droit pénal aux faits de guerre,* op. cit., p. 313 et suiv. ; Garçon, *Rapport à la Société des prisons sur l'application du droit pénal aux faits de guerre,* Rev. pénit., 1945, p. 406 et suiv. ; 1916, *passim* ; Dumas, *Les sanctions pénales des crimes allemands,* Paris, 1916. Roux, dans son *Cours de droit criminel français,* Paris, 1927, range la qualité de belligérant au nombre des faits justificatifs, t. I, p. 54.

(86) Herzog, *Les principes juridiques de la répression des crimes de guerre, op. cit.,* p. 277.

(87) Garçon, *op. cit.,* 1916, p. 21.

(88) de Juglart, *Répertoire méthodique,* op. cit., p. 245 ; Roux, *op. cit., loc. cit.* p. 85.

L'ordonnance du 28 août 1944 n'a fait que donner une forme légale à ces concepts théoriques. Si on compare ses définitions aux termes du jugement de Nuremberg, dont il résulte que les lois de la guerre se sont progressivement dégagées de coutumes issues de la doctrine des juristes et *de la jurisprudence des tribunaux militaires* (89), la conclusion s'impose ! la qualification interne des crimes de guerre n'a contredit aucun des principes du droit international.

Il a été donné à la chambre criminelle de l'affirmer. Elle s'est d'abord placée sur un plan général, au regard du système répressif mis en œuvre par l'ordonnance du 28 août 1944, et elle a observé que ses dispositions n'étaient contraires à aucun des engagements internationaux pris par la France, notamment à la Déclaration universelle des Droits de l'Homme du 10 octobre 1948 (90), dont aucun article n'a infirmé les règles concernant la sanction des crimes de guerre (91).

La Cour de cassation est, par ailleurs, située dans la perspective particulière des assimilations auxquelles l'article 2 de l'ordonnance du 28 août 1944 a procédé par voie d'interprétation. Un raisonnement analogue l'a conduite à la même solution (92). Un arrêt caractéristique a été rendu en ce sens en matière de pillage. Le chef de la section économique de l'état-major allemand en France a soutenu qu'il ne pouvait pas être condamné pour crime de guerre sous cette prévention, parce que les lois et coutumes de la guerre étaient « en perpétuelle évolution » et que les conventions de La Haye n'avaient pas prévu l'hypothèse de la guerre économique. Son pourvoi a été rejeté, au motif que l'ordonnance du 28 août 1944 ne contenait aucune disposition contraire aux obligations internationales de la France et que l'arrêt attaqué n'avait violé aucun texte du droit pénal français en se référant, à propos du pillage économique, aux conventions internationales relatives aux lois et coutumes de la guerre en vigueur lors de la perpétration des faits (93).

(89) *Procès des grands criminels de guerre,* op. cit., p. 233.

(90) *J.O.* du 19 février 1949, D. 1949.L.133.

(91) Crim., 24 juillet 1946, B. 170, *Rev. science crim.,* 1947, p. 271 ; 21 avril 1950, D. 1950, 313, rapport Pepy ; 3 juin 1950, D. 1950, 521, rapport Pepy, note Donnedieu de Vabres, S. 1951.I.109, rapport Pepy, note Merle ; Clunet 1951, p. 572.

(92) Crim., 24 juillet 1946, B. 170, *Rev. science crim.,* 1947, p. 271, en ce qui concerne la réquisition et la déportation des civils et des prisonniers de guerre ; 3 juillet 1947, B. 176, en ce qui concerne le recrutement illégal ; 26 février 1948, B. 69, *Rev. science crim.,* 1948, p. 581, en ce qui concerne le pillage ; 4 août 1948, B. 221, en ce qui concerne la séquestration.

(93) Crim., 3 juillet 1952, B. 174.

Il apparaît avec évidence, à la lecture de ces diverses décisions, que la chambre criminelle a eu, comme pensée directrice, de constater la similitude des principes généraux du droit pénal international et des normes fondamentales de la loi pénale interne.

2° Elle a également obéi à la préoccupation complémentaire de déterminer la place revenant aux lois et coutumes de la guerre dans la définition légale des infractions. L'absence de justification par les lois et coutumes de la guerre était, pour employer une formule du président PATIN, une condition essentielle de l'accusation dont il convenait de dégager la portée juridique (94).

A l'origine, les tribunaux militaires de cassation ont considéré que le défaut de justification du crime de guerre par le droit international était un élément constitutif de l'infraction dont il devait être fait état dans les questions posées aux juges (95). Un arrêt de la chambre criminelle a paru consacrer la même conception en décidant que la non-justification par les lois et coutumes de la guerre était « une *circonstance matérielle constitutive* du crime de guerre » (96). Mais cette décision, concernant le droit de la complicité, a eu pour seule portée de préciser que l'élément international de l'infraction était inhérent au fait principal punissable et engageait la responsabilité de tous les participants, dans les termes des articles 59 et 60 du Code pénal (97).

En fait, la Cour a systématiquement rejeté la jurisprudence des tribunaux militaires de cassation. Elle a jugé que la justification des crimes de guerre par les lois et coutumes de la guerre était un fait justificatif exclusif de criminalité, affectant ainsi l'élément injuste de l'infraction et inclus, par voie de conséquence, dans la question générale de culpabilité. Plusieurs arrêts de la haute juridiction ont, en effet, posé en principe que, si l'arrêt de renvoi devait spécifier que les infractions commises à l'occasion ou sous le prétexte de la

(94) PATIN, *Chronique de jurisprudence,* op. cit., p. 353.

(95) Trib. milit. cass. Paris, 13 septembre 1945, J.C.P. 1945.II.2880, note P.E.C., *Rev. science crim.,* 1946, p. 155 ; Trib. milit. cass. Paris, 21 septembre 1945, *Rev. droit intern. privé,* 1946, p. 261, note CHAUVEAU ; V. également les décisions des 28 septembre et 26 octobre 1945 et celles du Trib. milit. de Lyon citées par DE JUGLART, *Les crimes de guerre devant le tribunal militaire,* J.C.P. 1946.I.499.

(96) Crim., 8 février 1951, B. 44.

(97) Sur l'application des règles générales de la complicité, voir Crim., 3 juillet 1947, B. 176 ; 17 janvier 1951, B. 19, D. 1951, Somm. 27 ; 28 février 1952, B. 65.

guerre n'étaient pas justifiées par les lois et coutumes de la guerre (98), il n'était pas nécessaire de poser aux juges une question distincte à ce propos (99).

Il serait sans grande utilité d'attirer l'attention sur cette jurisprudence si, au-delà de son caractère technique, elle n'avait pas revêtu une importance théorique. Son intérêt a tenu au fait qu'elle a souligné comment la chambre criminelle a englobé l'élément international des crimes de guerre dans leur qualification de droit interne et sa portée a été mise en évidence par les solutions particulières qu'elle a tirées des données générales ainsi dégagées.

B. — LES APPLICATIONS PARTICULIÈRES

La Cour de cassation a, en effet, déduit les conséquences logiques des prémisses qu'elle avait posées et certaines de ses décisions peuvent être tenues pour essentiellement significatives.

1° La chambre criminelle a jugé qu'un vol commis dans un intérêt personnel par un soldat allemand agissant individuellement, et portant sur des objets cachés par leur propriétaire dans une villa servant de siège à la Kommandantur locale, ne constituait pas un crime de guerre mais une infraction de droit commun, étrangère aux dispositions de l'ordonnance du 28 août 1944 (100). Le fait ne se rattachait pas à la conduite de la guerre et ne permettait pas d'envisager la justification par les lois et coutumes de la guerre. C'est donc le défaut d'élément international qui a retiré à l'infraction son caractère de crime de guerre pour la placer sous l'empire exclusif du droit commun.

2° Une jurisprudence, plus confuse en apparence qu'en réalité, a eu pour fin de distinguer le crime de guerre du crime d'espionnage (101).

A l'origine, le tribunal militaire de cassation de Lyon a, par une décision du 13 juin 1945, émis l'avis que l'espionnage n'était

(98) Crim., 31 mars 1949, B. 128.

(99) Crim., 24 juillet 1946, B. 170, *Rev. science crim.,* 1947, p. 271 ; 8 janvier 1947, B. 11, *Rev. science crim.,* 1949, p. 353, obs. PATIN ; 3 juillet 1947, B. 176, *ibidem.*

(100) Crim., 8 mai 1952, B. 121.

(101) DONNEDIEU DE VABRES, *Les relations du droit interne et du droit international dans la répression de l'espionnage,* D. 1948, chr. 103 ; *La qualification et la répression en droit interne et en droit international de l'espionnage commis par des étrangers appartenant à l'armée ennemie,* note sous Crim., 6 février 1947 et 29 juillet 1948, D. 1949, 193 ; DE JUGLART, *Espionnage et crimes de guerre,* J.C.P. 1946.I.508 ; *La compétence respective des tribunaux militaires et des cours de justice pour la répression des rapports avec l'ennemi,* G.P. 1946, 1, p. 51.

Il apparaît avec évidence, à la lecture de ces diverses décisions, que la chambre criminelle a eu, comme pensée directrice, de constater la similitude des principes généraux du droit pénal international et des normes fondamentales de la loi pénale interne.

2° Elle a également obéi à la préoccupation complémentaire de déterminer la place revenant aux lois et coutumes de la guerre dans la définition légale des infractions. L'absence de justification par les lois et coutumes de la guerre était, pour employer une formule du président PATIN, une condition essentielle de l'accusation dont il convenait de dégager la portée juridique (94).

A l'origine, les tribunaux militaires de cassation ont considéré que le défaut de justification du crime de guerre par le droit international était un élément constitutif de l'infraction dont il devait être fait état dans les questions posées aux juges (95). Un arrêt de la chambre criminelle a paru consacrer la même conception en décidant que la non-justification par les lois et coutumes de la guerre était « une *circonstance matérielle constitutive* du crime de guerre » (96). Mais cette décision, concernant le droit de la complicité, a eu pour seule portée de préciser que l'élément international de l'infraction était inhérent au fait principal punissable et engageait la responsabilité de tous les participants, dans les termes des articles 59 et 60 du Code pénal (97).

En fait, la Cour a systématiquement rejeté la jurisprudence des tribunaux militaires de cassation. Elle a jugé que la justification des crimes de guerre par les lois et coutumes de la guerre était un fait justificatif exclusif de criminalité, affectant ainsi l'élément injuste de l'infraction et inclus, par voie de conséquence, dans la question générale de culpabilité. Plusieurs arrêts de la haute juridiction ont, en effet, posé en principe que, si l'arrêt de renvoi devait spécifier que les infractions commises à l'occasion ou sous le prétexte de la

(94) PATIN, *Chronique de jurisprudence,* op. cit., p. 353.

(95) Trib. milit. cass. Paris, 13 septembre 1945, J.C.P. 1945.II.2880, note P.E.C., *Rev. science crim.,* 1946, p. 155 ; Trib. milit. cass. Paris, 21 septembre 1945, *Rev. droit intern. privé,* 1946, p. 261, note CHAUVEAU ; V. également les décisions des 28 septembre et 26 octobre 1945 et celles du Trib. milit. de Lyon citées par DE JUGLART, *Les crimes de guerre devant le tribunal militaire,* J.C.P. 1946.I.499.

(96) Crim., 8 février 1951, B. 44.

(97) Sur l'application des règles générales de la complicité, voir Crim., 3 juillet 1947, B. 176 ; 17 janvier 1951, B. 19, D. 1951, Somm. 27 ; 28 février 1952, B. 65.

guerre n'étaient pas justifiées par les lois et coutumes de la guerre (98), il n'était pas nécessaire de poser aux juges une question distincte à ce propos (99).

Il serait sans grande utilité d'attirer l'attention sur cette jurisprudence si, au-delà de son caractère technique, elle n'avait pas revêtu une importance théorique. Son intérêt a tenu au fait qu'elle a souligné comment la chambre criminelle a englobé l'élément international des crimes de guerre dans leur qualification de droit interne et sa portée a été mise en évidence par les solutions particulières qu'elle a tirées des données générales ainsi dégagées.

B. — LES APPLICATIONS PARTICULIÈRES

La Cour de cassation a, en effet, déduit les conséquences logiques des prémisses qu'elle avait posées et certaines de ses décisions peuvent être tenues pour essentiellement significatives.

1° La chambre criminelle a jugé qu'un vol commis dans un intérêt personnel par un soldat allemand agissant individuellement, et portant sur des objets cachés par leur propriétaire dans une villa servant de siège à la Kommandantur locale, ne constituait pas un crime de guerre mais une infraction de droit commun, étrangère aux dispositions de l'ordonnance du 28 août 1944 (100). Le fait ne se rattachait pas à la conduite de la guerre et ne permettait pas d'envisager la justification par les lois et coutumes de la guerre. C'est donc le défaut d'élément international qui a retiré à l'infraction son caractère de crime de guerre pour la placer sous l'empire exclusif du droit commun.

2° Une jurisprudence, plus confuse en apparence qu'en réalité, a eu pour fin de distinguer le crime de guerre du crime d'espionnage (101).

A l'origine, le tribunal militaire de cassation de Lyon a, par une décision du 13 juin 1945, émis l'avis que l'espionnage n'était

(98) Crim., 31 mars 1949, B. 128.

(99) Crim., 24 juillet 1946, B. 170, *Rev. science crim.,* 1947, p. 271 ; 8 janvier 1947, B. 11, *Rev. science crim.,* 1949, p. 353, obs. PATIN ; 3 juillet 1947, B. 176, *ibidem.*

(100) Crim., 8 mai 1952, B. 121.

(101) DONNEDIEU DE VABRES, *Les relations du droit interne et du droit international dans la répression de l'espionnage,* D. 1948, chr. 103 ; *La qualification et la répression en droit interne et en droit international de l'espionnage commis par des étrangers appartenant à l'armée ennemie,* note sous Crim., 6 février 1947 et 29 juillet 1948, D. 1949, 193 ; DE JUGLART, *Espionnage et crimes de guerre,* J.C.P. 1946.I.508 ; *La compétence respective des tribunaux militaires et des cours de justice pour la répression des rapports avec l'ennemi,* G.P. 1946, 1, p. 51.

pas susceptible de poursuites en tant que crime de guerre, parce que, « étant de tous les temps et de toutes les guerres », il était justifié par les lois et coutumes de la guerre (102). C'était oublier que l'espionnage est régi par l'article 29 de la Convention de La Haye, qualifiant d'espion l'individu agissant clandestinement ou sous de faux prétextes, à l'effet de recueillir ou de chercher à recueillir des informations dans la zone d'opération d'un belligérant avec l'intention de les communiquer à la partie adverse. C'était également oublier qu'en droit interne coexistent deux conceptions de l'espionnage, dont l'une a repris, dans l'article 238 du Code de justice militaire, les prévisions essentielles de la Convention de La Haye, et dont l'autre a défini, dans les articles 70 à 73 du Code pénal (anciens art. 75 à 77), une infraction dont les éléments matériels sont beaucoup plus larges.

Aussi la question a-t-elle, au lendemain de la guerre, donné lieu à une abondante jurisprudence, qui a été caractérisée par plusieurs arrêts de règlement de juges (103). On peut négliger les considérations relatives au conflit entre le droit pénal interne et le droit international en matière d'espionnage. En ce qui concerne les crimes de guerre, il est possible de tirer de l'enchevêtrement de la jurisprudence les enseignements suivants.

L'application de l'ordonnance du 28 août 1944 à l'espionnage n'a pas été écartée parce qu'il s'agit d'une infraction contre la chose publique. L'arrêt Andersen, qui a consacré cette thèse, a été diversement apprécié par la doctrine (104). Mais l'espionnage n'a pas pu être retenu comme crime de guerre lorsqu'il a été qualifié dans les termes des anciens articles 75 et suivants du Code pénal, incriminant des comportements justifiés par la réglementation des articles 29 à 31 de la Convention de La Haye. L'ordonnance du 28 août 1944 n'a pu être invoquée qu'en l'éventualité, certaine dans l'arrêt Nogara (105) et douteuse dans l'arrêt Wuistaz (106), où les faits d'espionnage proprement dits ont été accompagnés d'actes entrant dans ses prévisions, par exemple de sévices envers les personnes. Et l'hypothèse

(102) DE JUGLART, *Répertoire méthodique,* op. cit., p. 233 et 270.

(103) Crim., 24 janvier 1946, B. 31 et 32 ; D. 1946, 169 ; S. 1946.I.66 et 1947.I.101, note ROUX ; J.C.P. 1946.II.2963, note BROUCHOT ; Paris, 22 novembre 1946, D. 1948, 440, note DONNEDIEU DE VABRES ; Crim., 6 février 1947, B. 49, D. 1949, 193, note DONNEDIEU DE VABRES ; 17 avril 1947, B. 105, D. 1947, 333, J.C.P. 1947.II.3643, note BROUCHOT, S. 1948.I.1, note NIBOYET ; 11 décembre 1947, B. 255 ; 29 juillet 1948, B. 220, D. 1949, 193, note DONNEDIEU DE VABRES, S. 1950.I.37, note DUNNENBERGER, J.C.P. 1949.II.4654, note COLOMBINI.

(104) Crim., 24 janvier 1946, B. 32, précité ; sur la doctrine, voir DE JUGLART, J.C.P. 1946.II.508, les diverses notes de M. BROUCHOT, et celle de ROUX, S. 1947. I.101.

(105) Crim., 24 janvier 1946, B. 31, précité.

(106) Crim., 6 février 1947, B. 49, précité.

a pu être avancée d'un cumul idéal entre l'espionnage et le crime de guerre, dans le cas où l'agent ennemi a agi clandestinement dans les conditions prohibées à la fois par la loi pénale interne, énoncée en l'article 238 du Code de justice militaire, et par le droit international de la guerre, issu de l'article 29 de la Convention de La Haye (107).

3° La chambre criminelle a abordé, dans son arrêt du 23 octobre 1947, le problème du statut international des francs-tireurs (108). Poursuivis pour avoir pris part à l'exécution sans jugement de civils rencontrés au cours d'une reconnaissance, deux militaires allemands invoquaient la justification des lois et coutumes de la guerre. Ils prétendaient qu'ils avaient pu, sans engager leur responsabilité pénale, participer à une action dirigée contre les membres d'une milice auxquels la Convention de La Haye n'accordait pas la protection reconnue aux combattants des armées régulières. La Cour de cassation s'est fondée sur les éléments de fait énoncés par la chambre d'accusation pour rejeter le pourvoi dont elle était saisie. Relevant qu'il résultait de ces constatations que les victimes n'avaient commis aucune agression et s'étaient rendues sans violence ni tentative de fuite, l'arrêt en a conclu qu'elles n'avaient pas participé à un combat et n'étaient donc pas visées par les dispositions des conventions internationales. La chambre criminelle a, par là, implicitement admis *a contrario* que la loi internationale n'assurait pas la protection des francs-tireurs. Cette conclusion a été, en termes explicites, consacrée par le tribunal américain de Nuremberg dans le procès du maréchal List, auquel l'accusation reprochait, notamment, d'avoir fait mettre à mort, en Grèce et en Yougoslavie, des partisans capturés par ses troupes (109). La haute juridiction française et le tribunal américain ont, en l'espèce, appliqué le droit international formulé par la Convention de La Haye dans un esprit identique, insensible à la différence des techniques d'incrimination fondant leur action répressive.

4° Il convient enfin de signaler qu'un arrêt du 29 décembre 1948 (110) a décidé que la destruction d'un phare ne constituait

(107) V. les obs. de M. DE JUGLART, J.C.P. 1946.II.508.

(108) Crim., 23 octobre 1947, B. 203.

(109) Le jugement américain contient la formule suivante : « Combattre n'est légitime que pour le personnel combattant d'un pays. Ce groupement est le seul qui puisse prétendre au traitement de prisonniers de guerre et n'encourt aucune responsabilité au-delà de la détention, après capture ou reddition. » M. TELFORD TAYLOR, *op. cit.,* p. 105 et 106, a dit de ce jugement qu'il était « remarquable à la fois par l'excellence de sa technique et par son conservatisme ». La question est actuellement résolue par l'art. 4 de la III[e] Convention de Genève du 12 août 1949.

(110) Crim., 29 décembre 1948, B. 300, G.P. 1949.I.132, *Rev. science crim.,* 1949, p. 594, obs. P. HUGUENEY ; *Rev. Touring-Club de France,* avril 1949, p. 65.

pas un crime de guerre, parce que les articles 1 et 2 de la Convention de La Haye autorisaient le bombardement des ouvrages militaires ou navals, des dépôts d'armes ou de matériel de guerre et des installations propres à être utlisées pour les besoins de l'armée ou de la flotte ennemies. Il était évidemment impossible de soutenir qu'un phare ne constituait pas, en temps de guerre, une installation susceptible d'être mise à profit par des navires de guerre ennemis, et il s'ensuivait que sa destruction, justifiée par les lois et coutumes de la guerre, n'entrait pas dans les prévisions de l'ordonnance du 28 août 1944.

Il est permis de déduire de cette jurisprudence que la chambre criminelle a, sur le terrain des qualifications, obéi à la préoccupation de caractériser l'élément injuste du crime de guerre par rapport au fait justificatif tiré des lois et coutumes de la guerre. Elle lui a, par là, donné un contenu international. DONNEDIEU DE VABRES ne s'y est pas trompé lorsqu'il a écrit qu'au-delà de sa technique d'incrimination l'ordonnance du 28 août 1944 avait sanctionné, en droit interne, des obligations engendrées par le droit international pénal, et notamment par les conventions de La Haye (111).

III. — LES CONFLITS DE RESPONSABILITE

Simple en apparence, le problème de l'imputabilité des crimes de guerre est peut-être celui dont les données de droit interne et de droit international ont été les plus contradictoires et dont les solutions ont fait apparaître les divergences les plus accusées.

La raison en est que les crimes de guerre ont mis en jeu deux responsabilités concurrentes: celle des exécutants et celle des gouvernants qui en ont ordonné ou toléré la commission. Et de même qu'il est difficile d'isoler l'acte criminel de ses facteurs humains, de même il est malaisé de ne pas tenir compte, sur le plan international, de la fonction représentative de ses auteurs. Il n'est pas nécessaire de faire appel à la théorie des actes d'Etat pour constater que la responsabilité pénale des gouvernants n'a pas, en droit international, le même caractère que celle des exécutants en droit interne.

La criminalité de guerre a, par ailleurs, souvent été une criminalité grégaire, mise en œuvre par des groupements qui ont été constitués à cet effet ou qui ont mis leur existence à profit pour poursuivre des entreprises criminelles. On a pu se poser la question de savoir si la responsabilité de ces groupes, insérés entre les individus et l'Etat, n'absorbait pas celle de leurs membres, et si il n'y avait pas un crime d'appartenance aux organisations nationales-socialistes, responsables de la criminalité de guerre.

(111) Note sous Crim., 1er août 1949, D. 1950, 241.

La répression des crimes de guerre a ainsi soulevé deux problèmes, proches et distincts, dont on peut dire que le premier a été celui de la responsabilité individuelle au regard du droit international pénal et le second, celui de la responsabilité collective en droit interne.

A. — L'INDIVIDU, SUJET DE DROIT INTERNATIONAL PÉNAL

La doctrine a, depuis l'origine, discuté avec opiniâtreté la question de savoir si le sujet actif de l'infraction internationale était l'Etat, susceptible d'être soumis à des mesures de sûreté d'ordre politique, ou l'individu, que sa qualité de gouvernant ne dispensait pas de répondre des conséquences criminelles de ses actes d'Etat et dont, de ce fait, la responsabilité pénale personnelle pouvait être sanctionnée par des peines. Les théories les plus diverses et les plus complexes ont été émises à ce propos. Il est sans intérêt de revenir, dans cette étude, sur les controverses qui ont opposé les partisans de la responsabilité de l'individu aux défenseurs de la théorie classique selon laquelle l'Etat est le seul sujet de droit international et aux théoriciens de la responsabilité « cumulative » de l'individu et de l'Etat (112). L'accord de Londres du 8 août 1945 a tranché le débat, en prévoyant que les grands criminels de guerre devaient être accusés soit *individuellement,* soit à titre de membres de groupements ou d'organisations, sans aucune référence au problème de la responsabilité de l'Etat (113), et l'acte d'accusation du 18 octobre 1945 a relevé, dans son premier appendice, les responsabilités incombant, à titre *personnel,* à chacun des inculpés (114). Mais M. JIMENEZ DE ASUA a sans doute eu raison d'écrire que le problème de la responsabilité pénale en droit international posait des questions insolubles au regard de la logique juridique (115). Le jugement du Tribunal de Nuremberg a,

(112) Actes du Premier Congrès international de droit pénal, Paris, 1947, p. 418 ; DAUTRICOURT, *Le droit pénal dans l'ordre public universel,* Rev. science crim., 1948, p. 481 ; *Nature et fondement du droit pénal universel,* Rev. droit pénal et crim., 1950-1951, p. 1023 ; DONNEDIEU DE VABRES, *Principes modernes du droit pénal international,* Paris, 1928, p. 428 et suiv. ; *De la piraterie au génocide,* op. cit., p. 238 et suiv. ; *Les leçons de l'histoire et le progrès du droit international,* Rev. science crim., 1951, p. 387 ; *Rapport à l'Institut de droit international de Sienne,* Genève, 1951 ; GRAVEN, *Les crimes contre l'humanité,* op. cit., p. 140 et suiv. ; GLASER, *Introduction à l'étude du droit international pénal,* Paris, 1954, p. 56 et suiv. ; *L'Etat en tant que personne morale est-il responsable ?* Rev. droit pénal et crim., 1948-1949, p. 425 ; *L'acte d'Etat et le problème de la responsabilité individuelle,* ibidem, 1950-1951, p. 9 ; *La responsabilité de l'individu devant le droit international,* Rev. pén. suisse, 1949, p. 283 ; SPIROPOULOS, *L'individu et le droit international,* Rec. Cours Acad. de La Haye, 1929, p. 195 ; DE SOTO, *L'individu comme sujet du droit des gens,* in Techniques et principes de droit public, Paris, Pedone, 1950.

(113) *Procès des grands criminels de guerre,* op. cit., t. I, p. 8.

(114) *Ibidem,* p. 72.

(115) JIMENEZ DE ASUA, *Politique criminelle internationale,* in Les principaux aspects de la politique criminelle moderne, Paris, Cujas, 1960, p. 52.

en effet, formulé à ce propos des principes dont il convient de se demander s'ils n'ont pas eu pour conséquence de créer une discordance entre le droit international et les droits internes.

1° Chargé de juger des gouvernants auxquels il était reproché d'avoir commis des actes criminels dans la conduite politique de l'Etat, le Tribunal de Nuremberg est allé jusqu'à l'extrême limite du raisonnement qui lui a permis de retenir les accusés dans les liens de la prévention.

Il a développé une double argumentation.

Il s'est d'abord expliqué sur la théorie des actes d'Etat, qu'il a réfutée dans les termes suivants : « On a fait valoir que le droit international ne vise que les actes des Etats souverains et ne prévoit pas de sanctions à l'égard des délinquants individuels. On a prétendu que, lorsqu'un acte incriminé est perpétré au nom de l'Etat, les exécutants n'en sont pas personnellement responsables et sont couverts par la souveraineté de l'Etat. Le Tribunal ne peut accepter ni l'une ni l'autre de ces thèses, parce qu'il est admis, depuis longtemps, que le droit international impose des devoirs et des responsabilités aux personnes physiques » (116).

Le Tribunal international a, ensuite, poussé la logique de son système jusqu'à l'affirmation que les « obligations internationales imposées aux individus *primaient* le devoir d'obéissance envers l'Etat dont ils étaient les ressortissants » (117).

Cette formule audacieuse, dont on a dit qu'elle était « révolutionnaire » (118), n'a pas seulement érigé l'individu en sujet du droit international. Elle a posé en principe qu'il pouvait être sujet du droit international avant d'être sujet de droit interne, en lui dictant ce que DONNEDIEU DE VABRES n'a pas hésité à qualifier un « devoir de désobéissance » (119). Mais il y a une antinomie entre la notion de révolution et le concept de droit ! On peut se demander si le jugement du Tribunal de Nuremberg n'a pas, à cet égard, créé un conflit *insoluble* entre le droit international pénal et la loi interne.

2° La doctrine a ressenti la difficulté et les auteurs allemands ont, en particulier, eu l'habileté de centrer sur ce thème leurs études critique du procès de Nuremberg. Le professeur JECHECK, qui a toujours

(116) *Procès des grands criminels de guerre,* op. cit., t. I, p. 234.

(117) *Ibidem,* p. 235.

(118) LA PRADELLE, *Une révolution dans le droit pénal international,* Nouv. Rev. droit intern. privé, 1946, p. 310 ; Le mot est employé par GRAVEN, *Les crimes contre l'humanité,* op. cit., p. 140, et par Antonio QUINTANO RIPOLLES, op. cit., t. I, p. 429.

(119) *Le procès de Nuremberg,* op. cit., Rev. science crim., 1947, p. 181.

su allier la modération de la forme à la force du raisonnement, a résumé la pensée de ses compatriotes en écrivant que la thèse de la priorité du droit pénal international par rapport aux droits nationaux « suscitait des réserves, parce qu'elle correspondait difficilement à la pratique des Etats contemporains » (120).

Elle n'a, en fait, pas été admise par les jurisprudences internes, et les observations suivantes sont, à cet égard, susceptibles de retenir l'attention.

Le principe de priorité de l'ordre international impliquait que l'effet justificatif tiré de l'ordre de la loi et du commandement de l'autorité légitime fût privé de sa force juridique. Mais ni la loi internationale, ni les lois internes, ne sont allées jusqu'à l'extrême de cette logique inéquitable (121). Le Statut du Tribunal militaire international a, en son article 8, admis que le fait d'avoir agi conformément aux instructions de leur gouvernement pouvait constituer un motif de diminution de la peine encourue par les grands criminels de guerre et, plus libérale, l'ordonnance du 28 août 1944 a permis, par son article 3, aux tribunaux militaires de considérer les lois, décrets ou règlements émanant de l'autorité ennemie, soit comme des circonstances atténuantes, soit comme des excuses absolutoires (122). Force est donc de constater qu'en dépit de la suprématie de la conscience universelle, la loi pénale interne n'a pas exigé que « toutes les baïonnettes soient intelligentes » (123) et qu'elle a, par la technique exceptionnelle d'une excuse absolutoire facultative, admis le caractère relatif de la souveraineté internationale.

La chambre criminelle a fait application de l'article 3 de l'ordonnance du 28 août 1944. Elle a, certes, voulu que la question de l'excuse absolutoire soit posée aux tribunaux militaires par la voie de conclusions régulières ou sur l'initiative de leurs présidents (124). Mais elle n'a pas exigé que l'accusé formule la question dans les termes de la loi, et a cassé les jugements entachés d'irrégularités pour avoir omis de répondre à des conclusions dont le sens était clair, même

(120) *Etat actuel et perspectives d'avenir des projets dans le domaine du droit international pénal,* Rev. intern. droit pénal, 1964, p. 102, avec la bibliographie citée, notamment DAHM, *Volkerrecht*, t. I, p. 56.

(121) Paul COSTE-FLORET, *La répression des crimes de guerre et le fait justificatif tiré de l'ordre supérieur,* D. 1945, chr. 21 ; GLASER, *L'ordre hiérarchique en droit international pénal,* Rev. droit pénal et crim., 1952-1953, p. 283 ; DONNEDIEU DE VABRES, *Le procès de Nuremberg devant les principes modernes du droit pénal international,* op. cit., p. 568 ; DANIEL, *Le châtiment des criminels de guerre,* op. cit., p. 152 et suiv.

(122) L'art. 3 de la loi belge du 20 juin 1947 reproduit les termes du Statut de Nuremberg et n'envisage que l'hypothèse des circonstances atténuantes.

(123) BOUZAT et PINATEL, *op. cit.*, t. I, n° 276.

(124) Crim., 29 janvier 1948, B. 37 ; 12 février 1948, B. 50 ; *Rev. science crim.*, 1949, p. 354, obs. PATIN.

si la rédaction en était défectueuse (125). Elle a, au surplus, précisé que la question de l'excuse absolutoire ne pouvait être résolue contre l'accusé qu'à la majorité légale de cinq voix contre deux, prévue par l'article 90 du Code de justice militaire (126). Ainsi a-t-elle, en dépit de la formule abrupte du jugement de Nuremberg, utilisé, dans la mesure du possible, le jeu de l'excuse absolutoire pour faire prévaloir la loi interne sur la loi internationale.

Ces remarques particulières peuvent être confirmées par des réflexions d'ordre général. L'écart entre la théorie formulée par le Tribunal de Nuremberg et la pratique suivie par les tribunaux nationaux n'est pas demeurée propre à la jurisprudence concernant la répression des crimes de guerre.

La chambre criminelle est, en France, restée fidèle à la doctrine aux termes de laquelle les relations internationales sont nouées entre les Etats, au-delà des individus soumis à la souveraineté étatique. Elle n'a en rien modifié la jurisprudence traditionnelle selon laquelle les traités d'extradition ne créent d'obligations qu'aux puissances entre lesquelles ils sont intervenus et n'ouvrent pas aux individus le droit d'exciper de leurs dispositions devant la justice française (127). Récemment saisie de la question de savoir si un délinquant pouvait valablement invoquer, devant une juridiction nationale, l'éventuelle violation de la souveraineté territoriale d'un pays étranger, elle n'a pas hésité à affirmer formellement que la mise en jeu des responsabilités internationales n'intéressait que les rapports entre Etats, et que les individus ne pouvaient pas prétendre y intervenir (128).

Il est significatif de constater que la réaction de la jurisprudence française a été celle de nombreux tribunaux et, notamment de certaines juridictions américaines. Le 10 juillet 1947, par exemple, la *Circuit Court of Appeals* de l'Etat de New York a jugé qu'en dépit de ce que les faits de spoliation envers les Israélites allemands eussent été déclarés criminels par le Tribunal de Nuremberg, une juridiction américaine n'avait pas qualité pour apprécier leur validité, en tant qu'actes officiels d'un gouvernement étranger (129).

On peut en conclure que l'idée selon laquelle l'individu est un sujet de droit international, dégagé par ce dernier de son devoir d'obéissance envers l'Etat, s'est, en l'état des principes qui gouvernent actuellement le fonctionnement de la société internationale, heurtée à la réalité des ordres publics internes. Malgré les tendances qui cherchent à permettre à l'individu d'accéder directement aux prétoires internationaux, le particularisme du droit pénal a entravé, sur ce plan, l'évolution du droit international pénal et a estompé la formule du Tribunal de Nuremberg, parce qu'il est apparu dangereux de dissocier la priorité juridique de la force publique ! (130).

(125) Crim., 12 juin 1947, B. 153, *Rec. droit pénal,* 1947.II.241 ; 26 avril 1955, B. 204.

(126) Crim., 26 mai 1948, B. 142. Sur l'incidence réelle de l'art. 3 et sur les cas d'absolution qui en ont effectivement découlé, voir CATRICE, *De l'excuse de l'ordre reçu dans les affaires de crimes de guerre,* in Third International Conference of the Legal Profession, La Haye, Martinus Nijlhoff, 1952, p. 101 et suiv.

(127) Crim., 20 décembre 1951, B. 348, J.C.P. 1952.II.7014, note BLIN.

(128) Crim., 4 juin 1964, B. 192, J.C.P. 1964.II.13806, rapport COMTE.

(129) Clunet, 1950, p. 229, avec l'opinion dissidente de l'un des juges.

B. — LA RESPONSABILITÉ COLLECTIVE EN DROIT INTERNE

Six organisations nationales-socialistes ont été déférées au Tribunal de Nuremberg afin d'y être déclarées criminelles (131). Leur procès s'est déroulé en marge de celui des gouvernants hitlériens (132) et le jugement du 1er octobre 1946 a pris, en ce qui les concerne, des décisions qu'il a délibérément équilibrées.

La juridiction internationale a posé en principe que le pouvoir discrétionnaire dont elle était investie étant un pouvoir judiciaire (133), il ne lui était pas possible de se retrancher derrière la nouveauté de la théorie de la criminalité des groupes pour se refuser à en faire une application raisonnée (134). Définissant les organisations criminelles en fonction des buts qu'elles avaient poursuivis, elle a considéré comme telles, au sein des associations hitlériennes, les groupements répondant à la triple condition d'avoir manifesté leur activité par la commission de crimes entrant dans sa compétence et de réunir une

(130) La Commission de droit international des Nations Unies a, dès 1947, évité d'affirmer que l'individu était un sujet de droit international, « afin de ne pas ériger cette idée en principe universellement admis ». V. GRAVEN, *Les crimes contre l'humanité,* op. cit., p. 98, et HERZOG, *Vingt ans après,* Rev. intern. droit pénal, 1964, p. 59. Sur les tendances contraires, voir JEANTET, *L'individu devant les juridictions internationales dans la pratique actuelle,* in Etudes de droit contemporain, 1962, p. 487.

(131) Art. 9 du Statut, second appendice de l'Acte d'accusation ; *Procès des grands criminels de guerre,* op. cit., t. I, p. 13 et 82.

(132) Le Tribunal a nommé une commission d'enquête chargée de recueillir les témoignages relatifs aux organisations. 101 témoins ont été entendus à la demande de la défense ; 1809 dépositions écrites ont été fournies et 6 rapports ont résumé le contenu d'un grand nombre d'autres dépositions écrites : 38.000 dépositions, signées par 155.000 personnes, ont été produites en ce qui concerne les chefs politiques, 136.213 les S.S., 10.000 les S.A., 7.000 le S.D., 3.000 l'état-major général et l'O.K.W. et 2.000 la Gestapo. *Procès des grands criminels de guerre,* op. cit., t. I, p. 188. DONNEDIEU DE VABRES, *Le procès de Nuremberg devant les principes du droit pénal international,* op. cit., p. 543. HERZOG, *Les organisations nationales-socialistes devant le Tribunal de Nuremberg,* Rev. intern. droit pénal, 1946, p. 343. NEAVE, *Le procès des S.S. à Nuremberg,* ibidem, p. 277. ROUX, *La responsabilité pénale des collectivités,* Rev. droit intern., Genève, 1948, p. 38.

(133) V. le débat instauré à ce propos à l'audience publique du 1er mars 1946, *Procès des grands criminels de guerre,* op. cit., t. VIII, p. 435.

(134) *Procès des grands criminels de guerre,* op. cit., t. I, p. 270 et suiv.

majorité de volontaires, conscients du caractère criminel de cette activité. Autrement dit, le Tribunal a voulu que la formation des groupements criminels ne s'identifie pas nécessairement avec la composition officielle des organisations et que le délit d'appartenance à de tels groupements ne soit pas tenu pour un délit matériel mais pour une infraction intentionnelle (135).

La modération du jugement concernant les organisations nationales-socialistes a été la conséquence des craintes éprouvées par les membres du Tribunal, soucieux d'éviter que les déclarations internationales de criminalité des groupement entraînent une répression interne de l'appartenance formelle à ces derniers (136). Les décisions prises à ce propos par le Tribunal militaire international ont, en effet, été dotées de l'autorité définitive de la chose jugée. L'article 10 du Statut a permis aux puissances signataires de traduire devant leurs propres tribunaux les membres des organisations déclarées criminelles, en raison de leur affiliation à ces groupements, sans que le caractère criminel des organisations, considéré comme établi, puisse être contesté par les accusés devant les juridictions nationales.

Les législations qui ont pris des mesures destinées à tirer, en droit interne, les conséquences de la reconnaissance, par la juridiction internationale, du caractère criminel des groupements hitlériens ont été peu nombreuses (137). Mais au premier rang d'entre elles a figuré

(135) C'est en partant de ces principes que le jugement a exonéré de toute responsabilité collective le Haut Etat-Major allemand, le Cabinet du Reich et l'organisation des S.A., tandis qu'il a déclaré criminelles, au sens du Statut, l'organisation des S.S. (à l'exclusion de sa division de cavalerie), celle de la Gestapo et du S.D. (sauf en ce qui concerne leurs services techniques) et le corps des chefs du parti national-socialiste (sous réserve de ses cadres inférieurs et des individus ayant cessé d'exercer leurs fonctions avant le 1er septembre 1939). V. l'opinion dissidente du juge soviétique, in *Procès des grands criminels de guerre,* op. cit., t. I, p. 384 et suiv.

(136) Ces craintes ont été publiquement exposées, au lendemain du jugement, par deux des juges internationaux. DONNEDIEU DE VABRES, *Le procès de Nuremberg,* op. cit., Rev. science crim., 1947, p. 180 ; BIDDLE, *Le procès de Nuremberg,* Rev. intern. droit pénal, 1948, p. 14.

(137) Anticipant sur le jugement du Tribunal militaire international, le Conseil interallié de contrôle a, en date du 20 décembre 1945, édicté une loi n° 10 dont l'article 2 a fait de l'affiliation aux organisations déclarées criminelles une infraction punie d'une sanction indéterminée pouvant aller, selon les cas, de la privation des droits civiques à la peine de mort. Le Tribunal militaire international a eu connaissance de ces dispositions, qui lui sont apparues comme « susceptibles de faire naître de grandes injustices », et, à l'effet d'y remédier, il a inclus dans son jugement la recommandation qu'à défaut d'une modification de la loi n° 10 les puissances occupantes soumettent les membres des organisations criminelles à un traitement uniforme inspiré par la loi allemande du 5 mars 1946 sur la libération du nazisme et du militarisme. V. TELFORD TAYLOR, *Les procès de Nuremberg,* op. cit., p. 38 et 15. Sur les pays de langue anglaise, voir JIMENEZ DE ASUA, *Politique criminelle internationale,* op. cit., p. 48.

la France, qui a complété l'ordonnance du 28 août 1944 par une loi du 15 septembre 1948, dont les dispositions exorbitantes du droit commun ont donné lieu à un débat doctrinal animé et à une jurisprudence nuancée de la chambre criminelle.

1° La loi du 15 septembre 1948 a eu pour origine la perpétration sur le territoire français de crimes atroces, tels que les massacres d'Ascq (138) et d'Oradour-sur-Glane (139), commis par des formations organisées dans des conditions laissant craindre que la responsabilité individuelle de leurs auteurs ne puisse pas être recherchée dans les termes du droit commun. C'est pourquoi la loi du 15 septembre 1948 s'est inspirée de l'exemple du Statut du Tribunal international pour prendre des dispositions légales destinées à faciliter la poursuite des crimes collectifs. Ces dispositions, qui figurent aux articles premier et 2 de la loi, ont prévu :

— d'une part, qu'au cas où un crime défini par l'ordonnance du 28 août 1944 serait imputable à l'action collective d'une formation ou d'un groupe faisant partie d'une organisation déclarée criminelle par le Tribunal international, tous les individus appartenant à cette formation ou à ce groupe pourraient en être considérés comme les co-auteurs, à moins d'apporter eux-mêmes la double preuve de leur incorporation forcée ou de leur non-participation aux faits ;

— d'autre part, que devraient être considérés comme imputables à l'action collective de la formation ou du groupe envisagé les crimes de guerre commis par ses membres dans une même région, même isolément ou de leur propre initiative, lorsque, par leur importance, leur gravité, leur répétition, ou le nombre de leurs victimes, ces actes constitueraient les éléments d'un tout.

On peut résumer ces dispositions en exposant qu'elles ont créé, à la charge des membres des organisations déclarées criminelles par le jugement du Tribunal de Nuremberg, une présomption de culpabilité individuelle dont il ne leur était possible de s'exonérer qu'en rapportant la *double* preuve de leur incorporation forcée aux groupements considérés et de leur non-participation personnelle aux crimes dus à l'action collective de ces derniers. Il y avait évidemment là un bouleversement des principes concernant la détermination de la responsabilité pénale et la charge de la preuve, qui était de nature à inquiéter les auteurs et à embarrasser les juges.

2° Le débat doctrinal qui s'est instauré s'est, à la fois, poursuivi sur le plan du droit interne et sur celui du droit international, mais, à vrai dire, il n'y a pas eu d'autre question *fondamentale* que celle de

(138) Raymond DE LA PRADELLE, *L'affaire d'Ascq,* Paris, 1949.

(139) LAVAUX, *Le procès d'Oradour dépassait-il la justice des hommes ?* Journ. Trib., 1953, p. 629.

savoir si la France n'avait pas, par la loi du 15 septembre 1948, mis sa législation nationale en conflit avec des dispositions impératives du droit international (140).

a) Une première thèse a dégagé l'existence de ce conflit des considérations suivantes (141).

Les dispositions du jugement du Tribunal de Nuremberg concernant la criminalité des organisations hitlériennes ne pouvaient pas être dissociées de l'accord du 8 août 1945 qui avait donné mandat à la juridiction internationale de définir leur caractère criminel. Cette définition devait être considérée comme incorporée à l'accord de Londres et, ayant même valeur juridique que ce traité, elle devait, en l'état du droit international public et du droit constitutionnel français, l'emporter sur la loi interne.

Or les dispositions de la loi du 15 septembre 1948 contredisaient les principes posés par le jugement du Tribunal de Nuremberg. Selon ce jugement, la déclaration de criminalité des groupements ne s'appliquait pas aux organisations proprement dites, mais seulement aux groupes formés par ceux de leurs membres qui avaient donné ou maintenu leur adhésion en connaissance de leurs activités criminelles ou avaient participé personnellement, ès qualité d'affidés, aux crimes définis par le Statut du 8 août 1945. Les termes employés par la juridiction internationale indiquaient, par ailleurs, qu'elle entendait imposer, à l'accusation, la charge traditionnelle de la preuve de l'adhésion consciente aux organisations ou de la participation personnelle aux crimes commis par ces dernières.

Il y avait donc, entre le jugement de Nuremberg incorporé à un traité international et la loi interne, une oppostion qui obligeait le juge français à faire prévaloir les dispositions du droit international conventionnel sur son droit national. La loi du 15 septembre 1948 ne pouvait pas l'emporter sur le jugement de Nuremberg et, dans la mesure où elle s'en écartait, elle ne pouvait pas recevoir d'application.

b) Mais cette thèse a été combattue par une argumentation qu'il est possible de résumer comme suit (142). Il n'existait aucun conflit entre la loi du 15 septembre 1948 et les règles générales du droit

(140) PATIN, *La France et le jugement des crimes de guerre,* op. cit., p. 395 et suiv. ; rapport sous Crim., 3 août 1950, S. 1951.I.66 ; PEPY, rapports sous Crim., 21 avril 1950 et 3 juin 1950, D. 1950.313 et 521, S. 1951.I.110 ; DONNEDIEU DE VABRES, notes sous Crim., 3 juin 1950 et 3 août 1950, D. 1950, 528 et 704 ; DUCOM, note sous Crim., 3 août 1950, S. 1951.I.65 ; MERLE, note sous Crim., 3 juin 1950, S. 1951.I.109 ; GRAVEN, *Les crimes contre l'humanité,* op. cit., p. 151, note 2.

(141) V. les rapports PEPY et les notes DONNEDIEU DE VABRES précités.

(142) V. article et rapport PATIN précités et, dans une certaine mesure, note DUCOM précitée.

international parce qu'aucun document conventionnel ayant force obligatoire ne traitait de la question. Il n'était possible d'évoquer ni la Déclaration universelle des Droits de l'Homme, dépourvue de valeur contraignante, ni l'accord interallié du 8 août 1945 qui, loin de limiter la liberté législative des puissances signataires, leur réservait la faculté de poursuivre les crimes de guerre selon les prévisions de leur propre législation !

Restait à savoir s'il y avait une contradiction entre la loi du 15 septembre 1948 et le jugement de Nuremberg.

Pour en décider, trois considérations étaient valables.

La seule règle internationale qui s'imposât aux droits internes, aux termes du Statut du 8 août 1945, était celle qui concernait la qualification des organisations criminelles, considérée comme ayant acquis autorité de chose jugée par l'effet du jugement de Nuremberg. Or la loi du 15 septembre 1948 ne mettait pas en cause le caractère criminel des organisations et il n'y avait à cet égard aucune antinomie entre l'ordre international et l'ordre interne.

Il était, d'autre part, factice de soutenir qu'il y avait une opposition entre la définition internationale et la définition interne des groupements criminels. La loi du 15 septembre 1948 n'avait pas dénaturé les conclusions du jugement de Nuremberg, en estompant la distinction entre les associations elles-mêmes et les groupes formés par ceux de leurs adhérents qui s'y étaient affiliés volontairement et en connaissance de cause ou qui avaient participé aux crimes. Point n'était besoin de réunir une juridiction internationale pour déclarer criminels des groupes d'individus dont il était démontré qu'ils avaient, volontairement et consciemment, adhéré à des organisations dont le but était de commettre des crimes, ou qu'ils avaient participé à ces forfaits. En dépit des formules réservées du jugement, le Tribunal de Nuremberg avait constaté que certaines organisations nationales-socialistes avaient un caractère criminel. Il n'y avait, à cet égard, aucune discordance fondamentale entre la loi internationale et la loi interne.

Il était, en revanche, évident que la loi du 15 septembre 1948 avait institué une présomption de responsabilité étrangère aux prévisions du jugement de Nuremberg. Mais, valable ou critiquable, cette innovation ne créait pas de conflit entre l'ordre international et l'ordre interne, parce qu'il s'agissait d'une règle de procédure dépendant de la seule volonté du législateur français.

L'argumentation rejoignait ainsi le droit interne. Mais il suffisait, à cet égard, de constater que la loi du 15 septembre 1948 émanait de la souveraineté française pour considérer comme inopérantes les objections tenant au fait que les dispositions légales dérogeaient aux principes généraux du droit et attentaient à la règle de la non-rétroactivité.

La loi du 15 septembre 1948 devait, en définitive, s'appliquer, parce que, sans contredire aucune disposition impérative du droit international, elle avait été valablement délibérée par les assemblées législatives et promulguée par le pouvoir exécutif. Elle contenait toutefois des dispositions trop exceptionnelles pour que son application ne fût pas maintenue dans des limites rigoureuses.

3° Cette thèse est celle que le président PATIN a fait adopter par la chambre criminelle. Il s'est un jour défini lui-même comme un « magistrat au service d'une législation qui, la première au monde, a été fondée sur le principe de la légalité » (143). C'est pourquoi il n'a pas voulu entendre la pathétique adjuration de DONNEDIEU DE VABRES, implorant la Cour de cassation « d'envelopper ce rejeton déchu de la souveraineté française dans le linceul de pourpre où dorment les dieux morts » (144). Et, serviteur réfléchi de la loi, le président PATIN a eu la préoccupation d'en respecter les impératifs et d'en éviter les excès. Le relevé chronologique de la jurisprudence concernant la loi du 15 septembre 1948 est, à cet égard, particulièrement significatif.

a) La chambre criminelle a, dans un premier stade de l'évolution, cherché à éluder l'application de la loi du 15 septembre 1948, en constatant que les accusés étaient retenus dans les liens de la prévention dans les termes de l'ordonnance du 28 août 1944. Elle a pu le faire sans difficulté dans son arrêt du 21 avril 1950 (145). Mais dans son arrêt du 3 juin 1950, concernant l'affaire d'Ascq, elle a décidé que la prévention était fondée sur les incriminations du droit commun, contre l'avis fortement motivé de son rapporteur qui, hostile à l'application de la loi du 15 septembre 1948, jugée par lui contraire aux données suprêmes du droit international conventionnel, concluait à la cassation de la décision entreprise (146). L'arrêt du 3 juin 1950 a donc, malgré la solution qu'il a consacrée, marqué un tournant de la jurisprudence relative à la loi du 15 septembre 1948.

b) C'est le 3 août 1950 que, dans le premier de ses arrêts relatifs à l'affaire d'Oradour, la Cour de cassation a, sur le rapport du président PATIN, énoncé les règles concernant l'application de la loi du 15 septembre 1948 (147). Elle a rendu une décision de

(143) *La place des mesures de sûreté dans le droit pénal positif moderne,* Rev. science crim., 1948, p. 416.

(144) Note sous Crim., 3 août 1950, D. 1950.708.

(145) B. 122, D. 1950.313, rapport PEPY.

(146) B. 179, D. 1950.521, rapport PEPY, note DONNEDIEU DE VABRES, S. 1951.I.110, rapport PEPY, note MERLE, Clunet 1951, p. 572.

(147) B. 227, D. 1950.701, note DONNEDIEU DE VABRES, S. 1951.I.65, rapport PATIN, note DUCOM, Clunet 1951, p. 580.

cassation sur des moyens de procédure soulevés d'office, mais elle a posé en principe que la loi du 15 septembre 1948 devait recevoir application parce qu'elle ne dérogeait à aucune disposition du droit international et émanait de la souveraineté française. Cette formule a été reprise dans tous les arrêts des années de 1950 et 1951 concernant la responsabilité collective (148).

c) Mais, une fois admis qu'il appartenait aux tribunaux militaires d'appliquer la loi du 15 septembre 1948, la chambre criminelle a multiplié ses efforts pour maintenir cette loi d'exception dans d'étroites limites d'application. On peut essentiellement noter à cet égard que sa jurisprudence :

— a encouragé la tendance de certains tribunaux à retenir sous la qualification d'association de malfaiteurs les faits susceptibles de tomber sous l'inculpation de la loi de 1948 (149) ;

— a tenu à donner à la responsabilité individuelle le pas sur la responsabilité collective, en exigeant qu'indépendamment de l'incrimination générale résultant de l'application de la loi du 15 septembre 1948, les faits portés à la charge personnelle des inculpés, dans les termes de l'ordonnance du 28 août 1944, soient expressément relevés par l'arrêt de renvoi et constatés par les juridictions de jugement dans des questions distinctes (150) ;

— a imposé aux magistrats instructeurs de faire connaître aux accusés qu'ils entendaient leur faire application de la loi du 15 septembre 1948 et leur accorder « le temps et les moyens » d'apporter la double preuve susceptible de renverser la présomption de leur culpabilité, toujours irréfragable, et laissant entier le principe de l'intime conviction du juge (151) ;

— a veillé à ce que les questions posées aux tribunaux militaires précisent les éléments légaux de l'incrimination, plus particulièrement en ce qui concerne le caractère criminel des associa-

(148) Crim., 26 octobre 1950, B. 241 ; 4 janvier 1951, B. 11 ; 16 février 1951, B. 54 ; 7 avril 1951, B. 96, D. 1951, Somm. 27.

(149) Crim., 24 janvier 1951, B. 29 ; 7 avril 1951, B. 92 ; 7 mai 1951, B. 129.

(150) Crim., 3 août 1950, B. 227 précité ; 26 octobre 1950, B. 241 ; 7 août 1950, B. 234 ; 4 janvier 1951, B. 8 ; 4 janvier 1951, B. 11 ; 16 février 1951, B. 54 ; 7 avril 1951, B. 96, précité ; 7 mai 1951, B. 185. Cet arrêt a déclaré que les deux ordres d'accusation n'étaient pas indivisibles et qu'en cas de cassation sur les responsabilités individuelles, la déclaration de non-culpabilité du chef de la loi du 15 septembre 1948 restait acquise aux accusés.

(151) Crim., 3 août 1950, B. 227, précité ; 3 août 1950, B. 231 ; 7 août 1951, B. 234 ; 4 janvier 1951, B. 8 ; 4 janvier 1951, B. 11 ; 16 février 1951, B. 54 ; 7 avril 1951, B. 96, précité.

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(147) B. 227, D. 1950.701, note DONNEDIEU DE VABRES, S. 1951.I.65, rapport PATIN, note DUCOM, Clunet 1951, p. 580.

cassation sur des moyens de procédure soulevés d'office, mais elle a posé en principe que la loi du 15 septembre 1948 devait recevoir application parce qu'elle ne dérogeait à aucune disposition du droit international et émanait de la souveraineté française. Cette formule a été reprise dans tous les arrêts des années de 1950 et 1951 concernant la responsabilité collective (148).

c) Mais, une fois admis qu'il appartenait aux tribunaux militaires d'appliquer la loi du 15 septembre 1948, la chambre criminelle a multiplié ses efforts pour maintenir cette loi d'exception dans d'étroites limites d'application. On peut essentiellement noter à cet égard que sa jurisprudence :

— a encouragé la tendance de certains tribunaux à retenir sous la qualification d'association de malfaiteurs les faits susceptibles de tomber sous l'inculpation de la loi de 1948 (149) ;

— a tenu à donner à la responsabilité individuelle le pas sur la responsabilité collective, en exigeant qu'indépendamment de l'incrimination générale résultant de l'application de la loi du 15 septembre 1948, les faits portés à la charge personnelle des inculpés, dans les termes de l'ordonnance du 28 août 1944, soient expressément relevés par l'arrêt de renvoi et constatés par les juridictions de jugement dans des questions distinctes (150) ;

— a imposé aux magistrats instructeurs de faire connaître aux accusés qu'ils entendaient leur faire application de la loi du 15 septembre 1948 et leur accorder « le temps et les moyens » d'apporter la double preuve susceptible de renverser la présomption de leur culpabilité, toujours irréfragable, et laissant entier le principe de l'intime conviction du juge (151) ;

— a veillé à ce que les questions posées aux tribunaux militaires précisent les éléments légaux de l'incrimination, plus particulièrement en ce qui concerne le caractère criminel des associa-

(148) Crim., 26 octobre 1950, B. 241 ; 4 janvier 1951, B. 11 ; 16 février 1951, B. 54 ; 7 avril 1951, B. 96, D. 1951, Somm. 27.

(149) Crim., 24 janvier 1951, B. 29 ; 7 avril 1951, B. 92 ; 7 mai 1951, B. 129.

(150) Crim., 3 août 1950, B. 227 précité ; 26 octobre 1950, B. 241 ; 7 août 1950, B. 234 ; 4 janvier 1951, B. 8 ; 4 janvier 1951, B. 11 ; 16 février 1951, B. 54 ; 7 avril 1951, B. 96, précité ; 7 mai 1951, B. 185. Cet arrêt a déclaré que les deux ordres d'accusation n'étaient pas indivisibles et qu'en cas de cassation sur les responsabilités individuelles, la déclaration de non-culpabilité du chef de la loi du 15 septembre 1948 restait acquise aux accusés.

(151) Crim., 3 août 1950, B. 227, précité ; 3 août 1950, B. 231 ; 7 août 1951, B. 234 ; 4 janvier 1951, B. 8 ; 4 janvier 1951, B. 11 ; 16 février 1951, B. 54 ; 7 avril 1951, B. 96, précité.

tions (152) et l'absence des justifications inhérentes à l'incorporation forcée et au défaut de participation aux faits incriminés (153) ;

— a restreint le domaine d'application de la responsabilité collective en précisant que l'accumulation de crimes individuels par les membres d'une même organisation ne constituait pas une action collective au sens des articles 1 et 2 de la loi du 15 septembre 1948 (154).

C'est ainsi que, selon la formule du président PATIN, la chambre criminelle, après avoir constaté que la loi du 15 septembre 1948 s'imposait aux juridictions françaises, a eu la préoccupation de l'appliquer « selon les règles d'une justice humaine et sereine » (155).

d) Cependant, la loi du 15 septembre 1948 n'a pas résisté aux remous suscités par l'affaire d'Oradour. La chambre criminelle en a été saisie, une seconde fois, le 7 février 1952 et, constatant qu'il avait été procédé au complément d'information impliqué par son arrêt de cassation du 3 août 1950, elle a rejeté le nouveau pourvoi, en réitérant l'affirmation que la loi du 15 septembre 1948 était conforme au droit de Nuremberg et procédait de la souveraineté française (156).

Les accusés ont donc été renvoyés devant le tribunal militaire de Bordeaux. Mais certains d'entre eux étaient de jeunes Alsaciens qui, mobilisés contre leur gré dans les forces armées allemandes, n'avaient pas disposé d'éléments suffisants pour apporter la preuve qu'il leur aurait été ensuite imposé de s'incorporer aux S.S. Leur situation a porté le débat judiciaire sur un plan politique. Les articles 1 et 2 de la loi du 15 septembre 1948 ont été abrogés au cours du procès, par une loi du 30 janvier 1953 (157), et la chambre criminelle n'est plus intervenue, en la matière, qu'à l'effet de résoudre l'imbroglio procédural né de la loi d'abrogation (158).

Le problème de la responsabilité collective ne s'est plus posé. Il a, pendant trois ans, mis à l'épreuve la science et la conscience

(152) Crim., 3 août 1950, B. 231 ; 4 janvier 1951, B. 11 ; 16 février 1951, B. 54 (insuffisance de la motivation constatant que les condamnés ont appartenu à un service *local* de la Gestapo).

(153) Crim., 7 août 1950, B. 234 ; 26 octobre 1950, B. 241 ; 7 mai 1951, B. 130 ; 22 novembre 1951, B. 318.

(154) Crim., 3 août 1950, B. 231.

(155) *La France et le jugement des criminels de guerre,* op. cit., p. 405.

(156) Crim., 7 février 1952, B. 42.

(157) S. 1953.L.988.

(158) Crim., 18 avril 1953, B. 121 ; 23 juillet 1953, B. 256. Une loi d'amnistie est intervenue le 20 février 1953 (S. 1953.L.1084) en faveur « des Français incorporés de force dans l'armée allemande pour tout fait qualifié crime ou délit commis au cours d'une action criminelle accomplie par l'unité à laquelle ils avaient appartenu ».

des magistrats de la chambre criminelle. Les solutions qui lui ont été données ont procédé d'une minutieuse confrontation des règles du droit international dégagées à Nuremberg avec les normes juridiques imposées par le droit interne. Il faut reconnaître que ces solutions ont quelque peu masqué les contradictions existant entre les unes et les autres. Mais, sans doute la raison de cette discrétion peut-elle se trouver dans la volonté persistante de la haute juridiction de préserver la primauté de l'ordre général interne face aux manifestations coutumières du droit international !

CONCLUSIONS

Plusieurs conclusions paraissent se dégager de l'étude à laquelle nous avons tenté de procéder.

Dans tous les cas où un conflit s'est élevé entre la loi pénale interne et une disposition du droit international, incluse dans une convention à laquelle la France avait adhéré, la chambre criminelle n'a pas hésité à fonder ses arrêts sur le traité diplomatique dont il lui était demandé de faire application. Elle n'a fait en cela que s'inspirer d'une jurisprudence (159) et d'une doctrine (160) constantes, aux termes desquelles, si les conventions internationales sont des actes de haute administration dont l'interprétation est, en ce qui concerne les questions de droit public, réservée aux puissances entre lesquelles elles sont intervenues, il appartient aux tribunaux de les appliquer, lorsque leur sens et leur portée ne présentent aucune ambiguïté. C'est ainsi que les arrêts des chambres réunies de 1950 ont constaté que l'article 63 de la Convention internationale de Genève du 27 juillet 1929, promulguée par décret du 10 décembre 1935, était applicable « sans équivoque possible » et voulait que les tribunaux militaires appelés à juger des prisonniers de guerre fussent composés selon les prévisions de l'article 10 du Code de justice militaire (161).

(159) Crim., 17 avril 1947, B. 105, D. 1947, 333, J.C.P. 1947.II.3643, note BROUCHOT, S. 1948.I.1, note NIBOYET ; 29 décembre 1948, B. 300, G.P. 1949, p. 132, Rev. science crim., 1949, p. 59, obs. P. HUGUENEY ; Civ., 23 octobre 1957, Clunet 1958, p. 760, note BREDIN. V. l'arrêt chambres réunies du 27 avril 1950, S. 1950.I.165, note NIBOYET, J.C.P. 1950.II.5650, selon lequel les pouvoirs d'interprétation des tribunaux diffèrent selon que les conventions internationales concernent des conflits d'intérêts privés ou des questions de droit international public. V. Jurisclasseur de droit international privé, *Les sources du droit international,* par DEHAUSSY, fasc. 12 c, note 8.

(160) DONNEDIEU DE VABRES, *Principes modernes du droit pénal international,* Paris, 1928, p. 292 ; ROUSSEAU, *Principes généraux du droit international public,* Paris, 1944, n° 412 ; Jacques DONNEDIEU DE VABRES, *La Constitution de 1946 et le droit international,* op. cit. ; BROUCHOT, sous chambres réunies, 26 juillet 1950, B. 218, J.C.P. 1950.II.5808.

(161) Cass. chambres réunies, 26 juillet 1950, B. 218, J.C.P. 1950.II.5808, note BROUCHOT, Rev. science crim., 1951, p. 110, obs. P. HUGUENEY ; *ibidem* 1951, p. 305 ; *ibidem* 1953, p. 334, obs. P. HUGUENEY ; 13 décembre 1950, B. 284.

La chambre criminelle s'est, à l'inverse, montrée beaucoup plus réticente lorsque le conflit qui s'est élevé devant elle opposait la loi pénale interne à des coutumes internationales dépourvues de force exécutoire. Il lui est apparu qu'il ne lui appartenait pas de sacrifier la souveraineté traditionnelle de l'Etat à la suprématie équivoque de la communauté internationale. La jurisprudence de la Cour de cassation sur l'éphémère loi du 15 septembre 1948 n'a, en profondeur, pas eu d'autre fondement que le devoir des tribunaux de respecter la volonté souveraine du législateur interne, la chambre criminelle ayant pour mission d'assurer l'application des lois sans qu'il entre dans sa compétence d'en apprécier l'opportunité. Le président PATIN s'est, à cet égard, expliqué sans ambiguïté, tant dans le rapport qu'il a présenté à la chambre criminelle lors de l'examen du pourvoi formé contre l'arrêt de la chambre d'accusation intervenu dans l'affaire d'Oradour (162) que dans l'article qu'il a consacré à l'analyse de la jurisprudence relative à la loi du 15 septembre 1948 (163).

Si, enfin, on élève le débat en le généralisant, on est conduit à émettre les observations suivantes.

La suprématie du droit international relativement aux droits internes est une manifestation de la hiérarchie des ordres juridiques sur laquelle tend à s'édifier la société contemporaine (164). Mais, en matière pénale, elle a fait à l'inéluctable imprécision de la coutume une place dont la nécessaire certitude de la répression peut difficilement s'accommoder ! Toute la difficulté du problème réside dans le particularisme du droit pénal. Les tribunaux de l'ordre interne ont pu se croire autorisés à faire une application directe du droit international coutumier aux relations de droit privé, lorsque ses dispositions n'accusaient pas de contradiction flagrante avec celles des lois ou règlements nationaux. Mais, en droit pénal, le principe de la légalité des délits et des peines a rencontré la doctrine du dualisme dogmatique exigeant que, préalablement à toute application, la règle de droit international soit « transformée » en une règle de droit interne.

Or, les lois et coutumes de la guerre sont, comme l'a souligné DONNEDIEU DE VABRES, des *leges imperfectae* qui peuvent imposer aux Etats des obligations morales, assorties de garanties politiques, mais qui demeurent inefficaces si elles ne sont pas pourvues de sanctions pénales applicables aux individus (165). Peut-on alors trouver, dans le droit pénal commun des Etats civilisés, le fondement juridique de la répression des violations des lois et coutumes de la guerre ? C'est évidemment l'idée qui a inspiré les rédacteurs du Statut du Tribunal militaire international de Nuremberg et qui est impliquée par les termes mêmes du jugement rendu le 1er octobre 1946 (166). Mais l'abstraction dont elle découle a précisément été à l'origine des conflits qui ont trouvé leur solution dans la jurisprudence de la chambre criminelle. Il n'y a donc pas d'autre issue que celle de donner un contenu pénal au droit international en assortissant ses incriminations des sanctions du droit interne et, pour parvenir à cette fin, deux méthodes s'avèrent réalistes.

La première consiste à instituer, par voie d'accords internationaux, des infractions et des peines uniformes susceptibles d'atteindre les crimes de guerre, quels que soient la nationalité de leurs auteurs et le lieu de leur commission. C'est le procédé qui a généralement été préconisé par la doctrine (167). Mais, en dépit des acquits de l'idée d'une répression universelle, il a paru prématuré de se placer ainsi sur le plan de l'infraction internationale. Une autre direction a donc été empruntée à l'effet de sanctionner les violations des lois et coutumes de la guerre et des droits imprescriptibles de l'individu.

Les conventions internationales qui ont été adoptées depuis 1945 ont, à l'exemple des accords de 1929 et de 1937, invité les parties contractantes à introduire dans leurs droits internes des dispositions attribuant une qualification pénale aux atteintes portées aux prohibitions qu'elles ont édictées.

La Convention internationale sur le génocide du 9 décembre 1947 (168) comporte un article aux termes duquel les parties contractantes ont pris l'engagement de prévoir les incriminations nécessaires à l'effet de punir les auteurs ou complices de ce crime, quelle que soit leur position politique ou sociale. De même les conventions internationales humanitaires signées à Genève le 12 août 1949

(162) Sous Crim., 3 août 1950, S. 1951.I.65.

(163) Rev. science crim., 1951, p. 393.

(164) KELSEN, *Les rapports de système entre le droit interne et le droit international public*. Rec. Cours Acad. La Haye, vol. XIV, 1926-IV, p. 227.

(165) DONNEDIEU DE VABRES, *La codification du droit pénal international*, Rev. intern. droit pénal, 1948, p. 33 ; *Les leçons de l'histoire et les progrès du droit pénal international*, op. cit., p. 373.

(166) *Procès des grands criminels de guerre*, op. cit., t. I, p. 232 et 267 ; V. DONNEDIEU DE VABRES, *La codification du droit pénal international*, op. cit.

(167) DONNEDIEU DE VABRES, *Les leçons de l'histoire et le progrès du droit pénal international*, op. cit., p. 373 ; DANIEL, *Le problème du châtiment des crimes de guerre*, op. cit. ; PAOLI, *Contribution à l'étude des crimes de guerre et des crimes contre l'humanité en droit pénal international*, op. cit., p. 129 ; MERLE, *Le procès de Nuremberg et le châtiment des criminels de guerre*, op. cit., p. 151 et suiv. ; HERZOG, *Vingt ans après*, op. cit., p. 47.

(168) Décret du 24 novembre 1950, *J.O.* 1950, p. 12006 ; GROSS, *Les Nations Unies et le développement du droit criminel international*, Rev. intern. droit pénal, 1950, p. 1 ; BERLE, *Mise hors la loi du génocide*, ibidem, p. 147 ; FINCH, *La Convention sur le génocide*, ibidem, p. 153 ; DONNEDIEU DE VABRES, *La répression du génocide*, D. 1948, chr. 145 ; *De la piraterie au génocide*, op. cit., t. I, p. 226.

(169) ont défini les faits qu'elles considèrent comme des « infractions graves » (170) et ont consacré l'obligation réciproque des Etats signataires de prendre les mesures législatives destinées à réprimer les personnes ayant commis ou ayant donné l'ordre de commettre l'une ou l'autre de ces infractions (171). Plusieurs pays ont déjà, sous des formes diverses, tenu compte de ces obligations internationales (172) : la Suisse, qui a édicté une loi fédérale du 21 novembre 1950 modifiant le Code pénal militaire helvétique, la Roumanie, la Tchécoslovaquie, la Hongrie, la Yougoslavie, l'Ethiopie, qui ont incorporé les dispositions des conventions internationales dans leur Code pénal ; l'Allemagne fédérale qui l'a complété d'un article 220 A par une loi du 9 août 1954 ; les Pays-Bas, qui ont modifié leur législation interne par une loi du 10 juillet 1952, dite « loi pénale de la guerre » ; le Brésil, le Danemark, la Suède (173).

Le projet de Code pénal international élaboré par l'Organisation des Nations Unies, au mois d'août 1953 (174), s'est inspiré d'une méthode analogue, lorsqu'il a conféré à la juridiction internationale une compétence subsidiaire, subordonnée à la décision préalable des Etats souverains de lui déléguer leur pouvoir juridictionnel (175). Le

(169) Décret du 18 août 1952, *J.O.* 1952, p. 2617, D. 1962.L.90. Le problème de la protection pénale de ces conventions a été étudié au VI[e] Congrès international de droit pénal ; V. notamment les rapports de GRAVEN, Rev. intern. droit pénal, 1951, p. 451 ; JESCHECK, *ibidem,* 1953, p. 13 ; Antonio QUINTANO RIPOLLES, *ibidem,* 1953, p. 43 ; PILLOUD (rapport général), *ibidem,* 1953, p. 661 ; V. également *Actes du Congrès,* 1947, Milan, p. 45, DAUTRICOURT, *La protection pénale des conventions internationales humanitaires (une conception de la loi type),* Rev. droit pénal et crim., 1953-1954, p. 191, et DONNEDIEU DE VABRES, *De la piraterie au génocide,* op. cit.

(170) DAUTRICOURT, *La protection pénale des conventions humanitaires, La définition des infractions graves,* Rev. droit pénal et crim., 1954-1955, p. 739.

(171) Première Convention, art. 49 ; II[e] Convention, art. 50 ; III[e] Convention, art. 129 ; IV[e] Convention, art. 146.

(172) Pour la Belgique, voir GREVY et CORNIL, *Avant-projet de loi organisant la répression des infractions aux conventions de Genève du 12 août 1949,* Rev. droit pénal et crim., 1955-1956, p. 591.

(173) GLASER, *Introduction à l'étude du droit international pénal,* op. cit., p. 29 ; Antonio QUINTANO RIPOLLES, *op. cit.,* t. I, p. 590 et suiv., notamment p. 603 ; V. également PILLOUD, *op. cit.,* p. 691. Sur le Code pénal yougoslave de 1951, voir Rev. science crim., 1951, p. 580. Sur le Code pénal roumain, *ibidem,* 1960, p. 710, et sur le Code pénal suédois, *ibidem,* 1956, p. 274, et 1963, p. 416.

(174) *Documents officiels de l'Assemblée générale des Nations Unies* (9[e] session, 27 juillet-20 août 1953, Suppl. n° 12 A 2645, New York, 1954).

(175) La Rev. intern. droit pénal a consacré un numéro spécial à l'étude de ce projet, 1964, p. 1 et suiv. V. notamment HERZOG, *Vingt ans après,* p. 47 ; JESCHECK, *Etat actuel et perspectives d'avenir des projets dans le domaine du droit international pénal,* p. 83 ; Antonio QUINTANO RIPOLLES, *Etude critique des projets du Comité de l'O.N.U.,* p. 107 ; DAUTRICOURT, *La justice criminelle universelle aux Nations Unies,* p. 245 ; GLASER, *Remarques sur les projets élaborés au sein des Nations Unies en matière de droit international pénal,* p. 299.

mouvement est, en ce sens, assez déterminant pour que certains auteurs bornent actuellement leur effort doctrinal à suggérer une unification des Codes de justice militaire internes (176).

Il n'est donc pas douteux que la décision 95 (I) de l'Assemblée générale des Nations Unies, en date du 11 décembre 1946, n'a guère été mise en application (177). Ce qu'on a appelé le « message » de Nuremberg a été écouté mais a été mal entendu (178) ! Les conventions adoptées et les projets élaborés par les instances internationales n'ont pas entièrement « formulé les principes reconnus dans le Statut du Tribunal de Nuremberg et dans le jugement de ce Tribunal » (179) !

Est-ce à dire qu'il faille systématiquement le regretter et partager le pessimisme déclaré de notre collègue belge, M. DAUTRICOURT, qui, dans un article récent, n'a pas hésité à écrire qu' « à vingt ans du procès de Nuremberg, il ne restait plus aux juristes qu'à prendre acte de l'échec de l'abandon des tentatives poursuivies, de 1946 à 1955, pour créer, sous les auspices des Nations Unies, un corps de droit criminel universel » (180) ? Ne peut-on pas, au contraire, estimer que l'œuvre ébauchée est raisonnable, parce qu'étant également éloignée de l'immobilisme désabusé et de l'agitation stérile, elle s'est efforcée de concilier l'inévitable idéalisme du droit international pénal avec l'indispensable réalisme de la loi pénale interne (181) ? On est en droit de le penser, et il n'est pas sans intérêt de noter que le développement du droit européen s'oriente, lui aussi, vers une unification des législations internes plus que vers l'utopique élaboration d'un droit supra-national. S'il en est ainsi, les conceptions du droit international pénal ont rejoint les idées qui, profondément ancrées dans l'esprit du président PATIN, ont été à l'origine de la jurisprudence dont il a été l'un des inspirateurs.

(176) DONNEDIEU DE VABRES, *Les leçons de l'histoire et le progrès du droit pénal international,* op. cit., p. 384 ; Antonio QUINTANO RIPOLLES, *op. cit.,* t. I, p. 532 et suiv. V. LUBRANO-LAVADERA, *Les lois de la guerre et de l'occupation militaire,* Paris, Lavauzelle, 1956.

(177) *Historique du problème de la juridiction criminelle internationale,* op. cit., p. 27 ; *Le statut et le jugement du Tribunal de Nuremberg,* op. cit., p. 13 et suiv. V. *Les travaux de la Commission de droit international des Nations Unies,* Rev. droit pénal et crim., 1950-1951, p. 818.

(178) HERZOG, *Le message de Nuremberg,* op. cit., p. 299. V. à ce propos l'ouvrage du criminaliste polonais Jerzy SAWICKI publié en français sous un titre volontairement polémique, *De Nuremberg à la nouvelle Wehrmacht,* Varsovie, Ed. Polonia, 1958.

(179) VERHAEGEN, *Les impasses du droit international pénal,* Rev. droit pénal et crim., 1957-1958, p. 3.

(180) *La justice criminelle universelle aux Nations Unies,* op. cit., p. 246.

(181) Telle paraît être l'opinion de M. JIMENEZ DE ASUA, *Politique criminelle internationale,* op. cit., p. 59.

Persuadé que les crimes de guerre trouvaient le fondement essentiel de leur répression dans la communion de la conscience universelle avec la volonté nationale et conduit par la finesse de son intelligence et par la générosité de son cœur à assurer cette répression en affirmant la primauté de l'Etat sans compromettre les droits de l'individu, Maurice PATIN, dont la personnalité était aussi forte que son caractère était amène, a marqué de son empreinte une jurisprudence que la Cour suprême a fondée sur une fusion du droit et de l'équité. Cette jurisprudence a apporté la contribution de la chambre criminelle à l'édification d'un droit pénal de la guerre, susceptible de satisfaire à la fois les *nécessités* et les *possibilités* de l'humanisme scientifique qui caractérise les ambiguïtés de notre temps.

15 décembre 1964.

Droit pénal international

1967

par

R. LEGROS
Conseiller à la Cour de cassation
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(I met Prof. Legros in Brussels at lunch
at Fondation Universitaire, 26 June 1969)

EXTRAIT DE LA
REVUE DE DROIT PENAL ET DE CRIMINOLOGIE
NOVEMBRE 1967

Droit pénal international

1967

1. — *Importance du droit pénal international.* La pénétration des facteurs internationaux dans le droit pénal, traditionnellement territorial, est l'un des phénomènes importants de l'évolution du droit contemporain (1).

Il s'agit là d'une situation remarquable, presqu'inattendue si l'on considère l'attachement quasi unanime au principe territorial (2), mais, dans le fond, bien naturelle si l'on songe à l'intensité de la vie internationale et à l'intégration de plus en plus poussée de certains pays.

Brusquement, et souvent d'une manière spectaculaire (3), se sont révélés, tant en raison des tendances nouvelles du droit pénal que du développement des relations internationales — avec ses aspects parfois tragiques et inhumains — d'une part, le caractère artificiel et désuet d'un droit pénal purement territorial, et

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(1) Merle et Vitu, Traité de droit criminel, 1967, nos 190 et s. — J.L. Ropers Le droit pénal international à travers la jurisprudence de la chambre criminelle, Mélanges Patin, Paris, Cujas, 1966. —M. Lopez Rey, Les exigences pénales d'aujourd'hui, et la politique criminelle contemporaine, *Rev. internat. de criminol. et de police technique*, 1962, no 4.

(2) Le droit pénal international, Recueil d'études en hommage à J.M. Van Bemmelen, Leiden 1965, notamment, G.E. Langemeijer, Le principe de territorialité.
Le principe de territorialité est fondé sur la notion d'Etat souverain et sur l'idée de courtoisie internationale ; non comme dans l'antiquité, sur le mépris de l'étranger (Voy. César, Mœurs des germains, VI, 23, 6).

(3) Haya de la Torre, Eichmann, Argoud, Perez Gimenez, Bergamin, Curutchet, Ben Barka, Tshombé, Régis Debray, Ignacio Palma... et la guerre. Sur d'autres cas, voy. : J.V. Louis, Procès des diplomates français au Caire, *Annuaire français de droit international*, 1963. pp. 231 - 258. — P. Mertens, Liberté de presse et offenses à la personne des chefs d'Etats étrangers, *Rev. belge de dr. intern.*, 1965, pp. 175 - 196.

d'autre part, la nécessité impérieuse d'une défense internationale contre le crime, d'une protection internationale des droits de l'homme garantie par un système efficace de sanctions appropriées, d'une collaboration des Etats dans les domaines de la prévention, de la police, du droit judiciaire, de la répression et de l'exécution des jugements, singulièrement au sein des groupes homogènes comme Benelux, l'Europe (4), les pays scandinaves (5), ou d'autres encore (6).

Evolution extrêmement intéressante qui a mis soudainement en opposition, presque sans transition, deux aspects curieusement contradictoires du droit pénal tel que nous le concevions il y a quelques années à peine : un droit plus nationaliste que les autres, fondé cependant sur des notions et concepts moins particuliers, moins restreints, que ceux-ci.

Aujourd'hui, l'idée s'affirme de plus en plus que le droit pénal, trop négligé jusqu'ici par les internationalistes, est appelé à jouer un rôle important dans le développement de la coopération internationale, notamment par la répression internationale des violences et des fraudes qui portent atteinte à l'ordre international, et par une contribution efficace à la protection des droits de l'homme. Il faut dire que, plus nettement encore que les autres disciplines juridiques, le droit pénal se caractérise par la défense des droits fondamentaux, des valeurs communes. Sur le plan international, surtout au sein de groupes homogènes, il souligne les idéaux communs, favorisant ainsi les rapprochements. Le droit pénal intéresse plus directement et plus généralement les hommes, les citoyens. Il formule des règles de vie aux fondements moraux, protège les intérêts essentiels, fait appel aux obligations et devoirs naturels. Il développe nécessairement le respect de la personnalité humaine, l'esprit de solidarité, un civisme (7) dont les frontières ne sauraient être le plus souvent qu'arbitraires. La lutte en commun, au nom de valeurs communes, pour une défense sociale humaine et efficace, contribuera au rapprochement des Etats, à l'entente des peuples, et, pour tout dire, à la paix (8).

2. — *Actualité du droit pénal international.* Il ne se passe pour ainsi dire pas de jour, qu'une question relevant du droit pénal international ne vienne troubler les esprits et même les consciences. La fidélité sans nuances, pendant de longues années, à la doctrine territoriale du droit pénal (9) nous a placés devant des problèmes qui dépassent nos conceptions traditionnelles, créant ainsi le phénomène bien connu de l'inadaptation du droit au fait, voire le danger d'un *vacuum juris* (10).

Je ne songe pas seulement aux problèmes que posent encore aujourd'hui les crimes nazis (11) et les guerres de plus en plus meurtrières dont nous sommes les témoins bouleversés (12), mais

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(4) J. Lemontey, Du rôle de l'autorité judiciaire dans la procédure d'extradition passive, Paris 1966, notamment pp. 69 et s., 85 et s., 94 et s. — J. Velu, Aperçu sur l'action accomplie par le conseil de l'Europe dans le domaine du droit, *Rev. de dr. internat. et de dr. comparé*, 1963, pp. 34 et s., notamment p. 54. Action accomplie en 1965 et en 1966 par le Conseil de l'Europe dans le domaine du droit. *ibid.* 1967, p. 6 - 148. — L. Hulsman, Le Conseil de l'Europe se prononce sur la détention préventive, *Cahiers de droit européen*, 1966, p. 271 - 277. — Schultz, Compétence des juridictions pénales pour les infractions commises à l'étranger, *Rev. sc. crim. et de dr. pén. comparé*, 1967, pp. 305 - 338.

Notons que l'intégration des forces armées pose des problèmes d'ordre pénal notamment en ce qui concerne la compétence, l'exécution, les désertions...

(5) Le traité scandinave de 1948 sur l'exécution réciproque des décisions répressives a été remplacé et étendu par un système de législations parallèles. Sur cette question : L. Hulsman, Transmission des poursuites pénales à l'état de séjour et exécution des décisions pénales étrangères, *in* Mélanges Van Bemmelen, *op.cit.*, pp. 108 et s.

(6) Lemontey, *loc. cit.* — Signalons que la Ligue arabe vient de se constituer un organisme important qui a reçu le titre significatif d'Organisation panarabe de défense sociale contre le crime et qui manifeste efficacement son activité ; sur cette question, voy. M. Ancel, La défense sociale nouvelle, 2me éd., Paris, 1966, p. 178.

(7) N'est-ce pas essentiel sur le plan *européen* ? Je citerai comme seul exemple, la nécessité du respect des règles de la circulation routière dans les pays étrangers.

(8) Le rôle joué par la Croix-Rouge internationale est important — même aux points de vue législatif et doctrinal — dans la matière du droit pénal international ; sur cette question : H. Coursier, cette *Revue*, 1962-63, pp. 783 - 795.

Il faut souligner ici l'apport européen en matière de droit pénal aux pays africains en voie de développement ; sur cette question, J. Graven, cette *Revue*, 1964-1965, p. 909.

(9) A. Chavanne, Chronique législative, *Rev. sc. crim. et de dr. pén. comparé*, 1967, 476. — A. Légal, Chronique de jurisprudence, *ibid.*, 438.

Il ne faut pas confondre principe territorial avec compétence *loci dilicti commissi* ; compar. Schultz, *op. cit.*, p. 332.

(10) A cet égard, la renaissance de la justice privée (Commission Russell) est un signe.

(11) Recherches des criminels, jugement, prescription. Sur ces questions : G. Levasseur, Les crimes contre l'humanité et le problème de leur prescription, *Journal de droit international*, 1966, p. 259. — P. Mertens, La prescription des crimes de guerre en Allemagne fédérale à la lumière des événements récents, L'année politique et économique, 1967, pp. 197 et 198.

(12) On reparle des crimes de guerre..., de génocide... Voy. notamment, La guerre au Vietnam, *J.T.*, 1967, p. 227.

à une série impressionnante de faits que nous révèle de plus en plus l'actualité internationale : violations des droits de l'homme (13), pratique de la torture, pratique de l'esclavage (14), sacs d'ambassades, interventions armées, enlèvements hors frontières par la force ou par la ruse (15), extraditions déguisées (16), expulsions illégales, procès fictifs, mépris du droit d'asile (17), fraudes et escroqueries douanières, notamment au préjudice des Communautés européennes (18), faux monnayage, trafic de drogues, vols d'œuvres d'art, émissions pirates, pollutions maritimes (19) ... sans compter la renaissance du racisme, de l'esprit de croisade, du terrorisme ... (19 *bis*).

De plus en plus, par la contrainte des faits, s'affirme l'idée que certains problèmes importants d'ordre pénal ne trouveront de solutions satisfaisantes que sur le plan international : entraide judiciaire dans la lutte contre le crime, danger atomique (20), immunité diplomatique (21), drame des accidents de la route (22), abus

(13) Notamment dans certaines procédures, ou à l'égard d'écrivains et journalistes.

(14) M. Polland - Duliau, Aujourd'hui l'esclavage, Paris 1967.
La presse a révélé récemment un trafic clandestin d'immigrants pakistanais entre Ostende et les côtes anglaises : Le Soir du 25 avril 1967. Le Monde du même jour.

(15) Récemment encore, cinq étudiants sud-coréens ont été enlevés à Paris. Le Monde du 12 juillet 1967.

(16) Note Aymond dans *Revue crit. de droit international privé*, 1967, 163.

(17) P. Mertens, Le droit d'asile en Belgique à l'heure de la révision constitutionnelle, *Rev. belge de droit international*, 1966, pp. 218 - 247.

(18) Le Monde du 7 septembre 1967.
Voy. loi du 23 juin 1967 portant approbation de la Convention douanière relative à certaines facilités d'importation (art. 15).

(19) Convention du 12 mai 1954, amendements du 11 avril 1962. Des poursuites sont actuellement envisagées : Le Monde du 25 avril 1967.

(19*bis*) Voy. notamment, J. Velu, Action accomplie en 1965 et en 1966 par le Conseil de l'Europe dans le domaine du droit. *Rev. dr. intern. et dr. comp.*, 1967, p. 6 - 148, spécialement p. 116 et s.

(20) J. Constant, La législation pénale belge concernant l'énergie nucléaire, *Annales de la Faculté de Droit de Liège*, 1961, pp. 5 - 34.

(21) Voy. la Convention de Vienne de 1961. Se pose notamment la question du statut pénal des fonctionnaires européens.
En ce qui concerne l'immunité, voy. : Schermes, L'immunité devant le droit pénal, *in* Mélanges Van Bemmelen, *op. cit.*, p. 174.

(22) F. Rigaux. Les conflits de la loi nationale avec les traités internationaux, Rapports belges an VII[e] Congrès international de droit comparé, Bruxelles, C.I.D.C., 1966, pp. 269 - 283. — J. Velu, *op. cit.*, p. 120 et s.
A propos de récentes catastrophes routières, la Commission des transports du Parlement européen a critiqué le retard apporté par le Conseil des Ministres quant à l'harmonisation des législations : Le Soir du 19 septembre 1967.

de la puissance économique (23), statut des réfugiés, des déserteurs, fraude à la loi pénale (24), fraude fiscale, doping (25), traite des femmes (26), et même certaines injustices ou difficultés résultant, dans la répression pénale internationale, d'une application stricte et nécessairement artificielle du droit international privé (27).

3. — *Influence des facteurs internationaux.* Il est certain que nous sommes, à cet égard, à un tournant important de l'histoire du droit pénal. Les influences de plus en plus précises et contraignantes de la vie et des facteurs internationaux pourraient bien dans un proche avenir nous obliger à revoir certaines de nos conceptions classiques.

Quelques exemples frappants :

a) On commence à admettre l'imprescriptibilité de certains crimes internationaux en raison de leur caractère odieux.

b) Une disposition du droit positif belge, l'article 3 de la loi du 4 août 1955 concernant la sûreté de l'Etat dans le domaine de l'énergie nucléaire prévoit une peine criminelle pour un délit d'imprudence ; c'eût été impensable quelques années auparavant ...

c) Le règlement sur l'application des articles 85 et 86 du Traité C.E.E. prévoit des amendes et astreintes, véritables sanctions internationales, infligées par décision de la Commission. On a pu discuter au sujet de la nature juridique précise de telles sanctions. Il apparaît cependant qu'étant proportionnées à la faute, elles sont essentiellement répressives. Il est vrai que le règlement décide expressément que ces sanctions n'ont pas un caractère pénal. C'est évidemment une fiction : procédé intéressant à constater ici, car cette fiction est précisément destinée à voiler la réalité de sanctions pénales internationales que l'on désire officiellement ignorer. Mais la fiction disparaîtra un jour. Aujourd'hui, elle est, pour nous, un signe qui ne saurait tromper.

(23) Waelbroeck et Van Reepinghen, La législation belge concernant les pratiques restreignant la concurrence, *Rev. de dr. internat. et de dr. comparé*, 1961, pp. 98 - 112.

(24) Notamment en matière d'avortements : déplacements à l'étranger.

(25) J. Constant, La répression de la pratique du doping, à l'occasion des compétitions sportives, cette *Revue*, 1966 - 67, pp. 207 - 242 et spécialement p. 241. Voy. également art. 30 de l'A.R. du 5 juillet 1962 sur les combats de boxe.

(26) Convention du 21 mars 1950 pour la répression de la traite des êtres humains et de l'exploitation de la prostitution, approuvée le 6 mai 1965 (*Moniteur* du 13 avril 1965).

(27) A. Légal, Chronique de jurisprudence, *Rev. sc. crim. et de droit comparé*, 1967, 440. — Bouzat, *ibid.*, 1966, 351, 1962, n° 3. — Paris 30 octobre 1964, *Rev. crit. de dr. internat. privé*, 1966, 223.

Le Traité C.E.C.A. prévoit également des sanctions pénales, amendes et astreintes, avec, pour l'exécution dans le pays, un minimum d'*exequatur* (28).

4. — *Influence de l'évolution des idées.* D'ailleurs, le droit pénal a subi, comme les autres disciplines normatives, l'influence marquante non seulement des faits sociaux mais aussi de la pensée contemporaine, caractérisée avant tout par l'abandon des absolus, des formules ayant valeur *en soi*, abstractions, au profit de vues plus relatives, sociales, humaines.

La règle n'a de valeur que dégagée d'une manière convaincante, de fondements existants (29). La vie change ; et, dans notre matière, à une vitesse parfois déconcertante. La *règle* n'est pas tout. En s'habituant à la considérer « en soi », comme ayant sa valeur et ses fins propres, on oublie parfois que le droit, finalement, compte moins que son application.

Un exemple, précisément en droit pénal international. On connaît trois grandes règles en matière d'extradition ; elles sont devenues presque des adages.

Tout d'abord : on n'extrade pas dans le cas de délit politique. Règle fondée sur la faveur qu'inspirait au XIXe siècle la lutte des proscrits contre les tyrans ou ceux qui abusaient du pouvoir, et qui ne saurait se justifier dans les cas de crimes odieux, que l'époque contemporaine connaît de plus en plus, ni lorsque le crime est commis par le pouvoir ou avec sa complicité, ou lorsqu'il est commis sous l'instigation du pouvoir usurpateur.

Va-t-on pour autant livrer les auteurs de ces crimes à une justice partiale, vengeresse ? Poser le problème, c'est montrer la nécessité d'une solution nouvelle, plus juste : la création d'une juridiction internationale (30).

En revanche, allons-nous, sous prétexte du respect absolu de la règle, accepter de livrer un délinquant de droit commun à

(28) Voy. loi du 6 août 1967 relative à l'exécution des arrêts et des décisions des Communautés européennes.

(29) P. Foriers. L'ouverture à cassation en cas de violation d'une maxime de droit, note sous Cass., 9 novembre 1965, *Rev. crit. de jurisprud. belge*, 1967, 137.

(30) Cour criminelle internationale dont la compétence pourrait s'exercer en divers domaines : conflits de compétence, extraditions, asile, refuge dans les ambassades, droits de l'homme... Sur cette question : Klein and Wilkes. An international criminal court, *in* Mueller and Wise, International criminal law, p. 526.

un régime qui lui tiendra rigueur de sa race, de sa religion, de ses opinions politiques (31) ?

Deuxième règle : le juge est incompétent pour apprécier la légalité de l'extradition (32). Principe juridiquement logique. Mais ici encore, le temps des réformes n'est-il pas venu, en raison de certains cas spectaculaires de livraisons contraires au droit international (33) ? L'antinomie entre le droit pénal territorial et le droit des gens n'est plus aujourd'hui tolérable.

Enfin, la règle qu'on n'extrade pas les nationaux (34) ne devrait-elle pas aussi subir certains aménagements à une époque où les Etats ont tendance à s'intégrer, et où les institutions et juridictions internationales interviennent de plus en plus dans leurs affaires intérieures ? Nous acceptons que le fonctionnement de nos institutions publiques et l'activité de nos entreprises privées soient soumis au contrôle de juridictions internationales, et nous refuserions de faire juger un délinquant national (tout en acceptant de livrer un étranger ou un heimattos) par le juge d'un pays collaborant avec nous dans ces juridictions ...

Ainsi, chose curieuse, et intéressante, les « moteurs » (comme aurait dit le Code pénal de 1867) des grandes réformes pénales et pénitentiaires sur le plan interne en vue d'une défense sociale — au sens moderne de l'expression — sont ceux qui ont aussi donné au droit pénal son extension internationale : d'une part, l'évolu-

(31) *Compar. :* traité d'extradition Benelux, art. 3 et 5, et convention européenne d'extradition, art. 3 et 6. — Le traité Benelux a été approuvé par la loi du 1er juin 1964, publié au *Moniteur* du 24 octobre 1967. —
Récemment, l'Etat belge a été condamné civilement pour avoir fourni des renseignements politiques à un pays voisin au sujet de particuliers, Le Soir du 13 décembre 1966.

(32) Jurisprudence constante ; en dernier lieu, Cass. 16 janvier 1967, en causse D'H...

(33) Les termes de l'arrêt du 4 juin 1964 de la chambre criminelle de la Cour de Cassation de France dans l'affaire Argoud, sont, à cet égard, révélateurs : « ...les conditions dans lesquelles un inculpé... a été appréhendé et livré à la justice... ne sont pas de nature, *si déplorables qu'elles puissent apparaître*, à entraîner par elles-mêmes la nullité de la poursuite, dès lors que la recherche et l'établissement de la vérité ne s'en sont pas trouvés viciés fondamentalement, ni la défense mise dans l'impossibilité d'exercer ses droits devant les juridictions... ». Sur l'affaire Argoud, voy. Cocatre-Zilgien, Paris 1965, et M. Rousselet, Les cas de conscience du magistrat, Paris 1967, p. 93.

(34) La convention européenne d'extradition apporte certaines améliorations à cet égard. Voy. notamment : Melai, Les Conventions européennes et le traité Benélux d'entraide judiciaire en matière pénale et d'extradition, *in* Mélanges Van Bemmelen, *op. cit.*, p. 92.

tion sociale et politique, d'autre part, la pensée philosophique moderne.

5. — *Autorité du droit pénal.* Pénétration, avons-nous dit, des facteurs internationaux dans le droit pénal. Mais, aussi, dans l'autre sens, une sorte d'appel instinctif au droit pénal, non seulement de la conscience populaire, mais de la part des sociologues politiques et des juristes, soucieux d'assurer par un droit sanctionnateur le règne du droit dans les relations internationales.

Ce fut l'origine de Nuremberg et de Tokio.

Aujourd'hui, on reparle avec insistance d'une Cour pénale internationale, et la protection européenne des droits de l'homme apparait directement liée à la fonction répressive (35).

A propos des prolongements du coup d'Etat en Grèce (36), Maurice Duverger accusait récemment les pays d'Europe occidentale de *complicité* dans un cas, écrit-il, qui « relève de la *non assistance aux personnes en péril,* du *refus de porter secours* aux victimes d'une agression » et pour lequel des *sanctions* non seulement seraient possibles mais sont *juridiquement* prévues (37). Marcel Polland-Duliau dénonce lui aussi la *complicité* des peuples civilisés devant la survivance de *l'esclavage* (38). M. Mazeand se demande comment réaliser cette « nécessité de rendre plus *contraignantes* les décisions des organismes internationaux tels que le Tribunal de La Haye » (39). Et, dans une remarquable étude sur le contrôle international des juridictions nationales (40), le Professeur Henri Rolin dégageait récemment de la jurisprudence internationale, les principes qui régissent la réparation des dommages résultant des dénis de la justice étrangère en matière pénale, des retards injustifiés dans l'administration pénale étrangère, du traitement illégitime des prévenus ou condamnés à l'étranger, et même de certaines condamnations étrangéres partiales (41).

(35) J. Velu. Les régimes de l'arrestation et de la détention préventive, à la lumière de l'évolution du droit international, cette *Revue,* 1955-56, pp. 683-774. — P. Mertens, note sous Comm. europ. des droits de l'homme, 29 octobre 1963, Cahiers de droit européen, 1966, p. 59.2. Voy. également étude de L. Hulsman dans les Cahiers de droit européen 1966, p. 271-277 ; J. Talandier, Pour une cour universelle des droits de l'homme, Le Monde, 1er juillet 1967.

(36) Des sanctions internationales, notamment sur le plan européen, sont actuellement envisagées et déjà en voie d'exécution.

(37) Les complices de Yaros. Le Monde 27 juillet 1967.

(38) *Op. cit.*

(39) La paix, la justice et la force nucléaire. Le Monde 17 avril 1967.

(40) *Revue belge de droit international, 1967,* pp. 1 et s.

On peut vraiment affirmer aujourd'hui que le droit pénal a perdu son caractère nationaliste, purement territorial, qu'il a acquis une autorité certaine sur le plan international et qu'il suscite l'intérêt international.

6. — *Développement du droit pénal international.* Le droit pénal international a pris, ces derniers temps, une extension considérable, conventionnelle, législative, doctrinale, jurisprudentielle.

Les *conventions internationales,* multilatérales et bilatérales, se sont multipliées, spécialement sur le plan européen (42).

Les *législations internes* ont été modifiées en exécution de certaines conventions (43) ou sous la pression des nécessités internationales (44).

(41) *Adde :* F. Rigaux, Le droit international et le droit étranger à la Cour de cassation, *Rev. belge de droit international,* 1967, pp. 52 et s., spécialement nº 18.

(42) Conventions d'extradition, d'entraide judiciaire, sur la répression des émissions pirates, sur la suppression des visas pour les réfugiés. Projets pour la répression des infractions routières (approuvé par le Conseil des Ministres), pour la surveillance des personnes condamnées ou libérées sous condition (approuvé également par le Conseil). Conventions douanières. Convention sur les immunités. Conventions relatives à l'OTAN et aux forces armées... Il existe un comité européen pour les problèmes criminels (C.E.P.C.) créé en 1957 dans le cadre du Conseil de l'Europe. Sur ce comité, voy. : Bishop, L'activité du C.E.P.C., *Rev. sc. crim. et de dr. pénal comparé,* 1966, p. 421. La Commission Benelux pour l'étude de l'unification du droit a préparé une convention concernant l'exécution des décisions pénales dans les trois pays.
La Belgique a ratifié le traité Benelux d'extradition et d'entraide mais pas encore les traités européens. La France vient de ratifier la Convention européenne d'entraide (J.C.P. 1967, 33295). La Belgique vient de ratifier la Convention européenne du 22 janvier 1965 sur les stations pirates (loi du 18 juillet 1967, *Moniteur belge* du 10 octobre 1967).
Le gouvernement vient de déposer un projet de loi sur le plateau continental de la Belgique (Chambre des Représentants, session 1966 - 1967, 471).

(43) Notamment en matière de circulation routière. Voy. Cass., 13 avril 1964, *Pas.,* 1964, I, 849.
Plusieurs pays ont introduit dans leur code pénal les incriminations des Conventions pénales internationales (génocide, terrorisme, crimes contre l'humanité. Conventions de Genève de 1949) notamment la Suisse, la Suède, la Yougoslavie... Pour la circulation aérienne : la Convention sur l'Eurocontrol est entrée en vigueur le 1er mars 1963.

(44) Notamment en matière d'abus de la puissance économique et de représentation exclusive.

Le *droit international privé* a, lui aussi, directement influencé le droit pénal en certaines matières : par exemple, les conventions relatives à l'exécution des condamnations alimentaires ont facilité les poursuites du chef d'abandon de famille (45).

Quant au *droit des gens* et au *droit européen,* leurs liens avec le droit pénal sont de plus en plus étroits, notamment pour tout ce qui concerne le droit de la guerre (46) la protection des droits de l'homme, le droit économique, social, le droit des douanes, les réfugiés, les droits d'établissement (47) et de séjour, les immunités diplomatiques, le droit militaire (48).

Les *travaux* de droit pénal international deviennent importants, les *revues* lui consacrent beaucoup d'intérêt, et les *congrès* de droit pénal étudient de plus en plus les questions qui s'y rapportent.

Il faut ajouter que peu de disciplines juridiques ont retiré autant de profit du *droit comparé* que le droit pénal : son caractère légaliste rend les recherches plus aisées et plus sûres, et les fondements communs en augmentent l'intérêt pratique (49).

Quant à la *jurisprudence,* elle est, en notre domaine de plus en plus abondante, et des tendances et principes généraux commencent à être dégagés des arrêts.

Tout ce mouvement aboutira nécessairement à des réformes

(45) R. Legros, Effets internationaux des jugements répressifs et Communautés européennes, cett *Revue,*1960-61, pp. 795 et s.
Adde : loi du 6 mai 1966 portant approbation de la Convention du 20 juin 1956 de New-York concernant le recouvrement des aliments à l'étranger. Convention de La Haye sur la compétence des autorités et la loi applicable en matière de protection des mineurs.

(46) Touffait et Herzog, Les conflits entre le droit international pénal et la loi pénale interne dans la répression des crimes de guerre, Mélanges Patin. Paris, Cujas 1956, p. 679 - 722.

(47) Loi du 24 mars 1961 portant approbation de la Convention européenne d'établissement *(Moniteur belge* du 24 août 1965).

(48) J. Lemontey, *op. cit.*, pp. 86 et s. — M. Danse, Le statut pénal de l'OTAN, *Rev. de dr. pénal militaire et de droit de la guerre,* 1963, II, 1 et 2, 1964, IV, 1.
Sur la Convention relative au statut des forces, voy. notamment note Jambu - Martin, *Rev. crit. de dr. intern. privé,* 1965, n° 2. — S. Lazareff, Le statut des forces de l'OTAN et son application en France, Paris, Pedone 1964. — John B. Whitton, L'exercice de la compétence pénale à l'égard des forces américaines à l'étranger, *Rev. gén. de droit internat. public,* 1959, p. 5. — R. Meurisse. Les accidents de roulage causés par les membres des forces américaines, J.C.P. 1965, I, 1899.

(49) Le traité C.E.D. avait prévu un système pénal unifié pour les forces intégrées.

importantes, peut-être fondamentales.

Aurons-nous bientôt une Cour pénale internationale, un droit pénal européen, une action répressive dans le domaine des droits de l'homme, des sanctions internationales (50), une police internationale, un casier judiciaire international, européen, et, surtout, une solution au problème des effets des décisions et de la loi étrangères (51) ?

En tout cas, l'importance de toutes ces questions montre combien était artificielle la conception restrictive qu'avaient certains auteurs concernant le domaine du droit pénal international, et arbitraire, la distinction entre le droit pénal international et un prétendu droit international pénal (52).

Le domaine du droit pénal international n'est pas limité aux crimes de guerre et contre l'humanité. C'est, en général, celui de l'action répressive dès qu'elle se pose à l'échelon international.

En 1954, j'avais proposé, du droit pénal international, la définition suivante, dégagée des faits internationaux, et que je crois pouvoir maintenir (53) : *le droit pénal international est la science qui s'occupe de résoudre les problèmes d'ordre pénal contenant un ou plusieurs éléments d'extranéité, relatifs aux juges saisis, au lieu ou à la nature du délit, à la personne de la victime ou de l'argent.*

7. — *Extension de compétence.* En ce qui concerne la *compétence,* divers textes importants ont été votés ces dernières années. Ils confirment, en général, la tendance à *l'extension* (54). Ce sont :

a) La loi du 16 mars 1964 (55) qui abroge l'article 8 et modifie

(50) Certains tribunaux internationaux se sont vus attribuer une compétence répressive. Par exemple : le tribunal de contrôle de sécurité nucléaires de l'O.E.C.E., et le tribunal de l'Agence de l'U.E.O. pour le contrôle des armements. Sur ces questions, voy. R. Pinto, Les organisations européennes, Paris 1963, notamment pp. 207, 208 et 254.

(51) L'application de la loi pénale étrangère par le juge national, *Rev. Internat. de dr. pénal,* 1960, n^{os} 3 et 4. Cass., 2 janvier 1961, *Pas.,* 1961, I, 465.

(52) R. Legros, L'avenir du droit pénal international, Mélanges Henri Rolin, Paris, Pedone, 1964.

(53) R. Legros, Domaine et méthode du droit pénal international, cette *Revue,* juillet 1954.

(54) Sur cette question : P.-E. Trousse, la compétence extraterritoriale des juridictions répressives belges, Rapports belges au VIIe Congrès international de droit comparé, Bruxelles, C.I.D.C., 1966, pp. 511 - 538.
Notons toutefois que la Convention du 10 mai 1952 (loi du 24 mars 1961) sur l'abordage est en régression par rapport à la doctrine de l'arrêt du « Lotus ».

(55) Votée par souci d'uniformisation au sein de Benelux.

l'article 7 de la loi du 17 avril 1878 contenant le titre préliminaire du Code de procédure pénale.

Avant 1964, pouvait être poursuivi en Belgique, notamment le Belge qui hors du territoire du royaume s'était rendu coupable d'un crime ou d'un délit contre un Belge (art. 7 : compétence personnelle passive) ; si le crime ou le délit avait été commis contre un étranger (art. 8), la poursuite n'avait lieu que dans certains cas, et sur plainte ou avis officiel.

La loi nouvelle énonce que tout Belge qui hors du territoire du royaume se sera rendu coupable d'un fait qualifié crime ou délit par la loi belge pourra être poursuivi en Belgique si le fait est puni par la législation du pays où il a été commis (double incrimination) (56). Toutefois si l'infraction a été commise contre un étranger, la poursuite ne pourra avoir lieu que sur réquisition du ministère public et devra en outre être précédée d'une plainte ou d'un avis officiel.

b) L'article 57 bis ajouté au Code pénal militaire par la loi du 27 février 1958, modifié par la loi du 5 avril 1963.

Je pense qu'en raison de son importance exceptionnelle sur le plan des principes, il n'est pas inutile, malgré sa longueur, d'en reproduire ici, spécialement à l'intention des lecteurs étrangers de la Revue, les passages essentiels (57) :

« Le militaire qui, sur le territoire d'un Etat étranger où il est en service, contrevient à la législation de cet Etat en matière forestière, rurale, de chasse, de pêche, de circulation routière, de douanes, de change ou de réglementation des importations ou exportations, sera puni d'un emprisonnement de huit jours à un an et d'une amende de 26 à 1000 francs, ou d'une de ces peines seulement. Il en sera de même de la personne attachée à une fraction de l'armée se trouvant sur le territoire d'un Etat étranger ou autorisée à suivre un corps de troupe qui fait partie de cette fraction

(56) Sur la base de l'ancien texte, la jurisprudence avait déjà pris le système de la double incrimination en considération : Cass., 15 juillet 1907, *Pas.*, 1907, I, 334. Ce système donne un certain effet à la loi pénale étrangère.
Sur l'importance de la jurisprudence en droit pénal international, voy. mon étude Fribourg - Lisbonne, cette *Revue*, 1960, juillet.
Sur la non-rétroactivité de la loi de 1964 : Cass., 12 octobre 1964, *Pas.*, 1965, I, 154.

(57) Sur cette question : R. Hayoit de Termicourt, La Cour de Cassation et la loi étrangère, *J.T.*, 1962, pp. 469 et s.
Cass., 21 mai 1962, *Pas.*, 1962, I, 1066 ; 29 mai 1961, *Pas.*, 1961, I, 1037 ; 2 janvier 1961, *Pas.*, 1961, I, 465.

(58) Une législation dans ce sens existe également aux Pays-Bas.

de l'armée lorsque le fait est commis sur ce territoire. Lorsque la législation étrangère enfreinte est relative à la circulation routière, la déchéance du droit de conduire sera encourue, dans les conditions prévues par la loi belge, comme s'il y avait une violation de la réglementation en vigueur sur le territoire du royaume ». En matière de douanes et de change, « la confiscation ne sera prononcée que dans les conditions prévues par la législation de l'Etat étranger ; les choses confisquées seront mises à la disposition de cet Etat ».

La procédure de transaction est prévue. Les actes de l'autorité étrangère constatant les faits ont devant la juridiction belge la force probante qui leur attache en la matière la législation du territoire où ces faits ont été commis. La prescription de l'action publique est d'un an (58).

On voit immédiatement l'importance de ce texte tant au point de vue de la compétence du juge belge concernant les infractions commises hors du territoire du royaume, qu'en ce qui concerne la prise en considération de la loi pénale étrangère (59) la force probante des actes de l'autorité étrangère en matière pénale, la preuve de la loi étrangère, le contrôle de la légalité par la Cour de Cassation, l'internationalisation des déchéances, l'entraide judiciaire, et enfin, l'abandon de la fiction de la loi du drapeau.

c) La loi du 18 décembre 1962 modifiant la loi du 14 mai 1930 sur la radio-télégraphie, la radio-téléphonie et autres radio-communications. Elle étend la compétence des tribunaux belges en matière d'émissions pirates. Dans le royaume ou hors du royaume ou à bord d'un navire bateau ou aéronef de nationalité belge, aucun Belge ne peut procéder ou collaborer directement ou indirectement à une activité destinée aux émissions déterminées par la loi. L'étranger peut être poursuivi, s'il est trouvé en Belgique. Si son activité a eu lieu hors du royaume, il ne pourra être poursuivi qu'en même temps que le Belge inculpé ou après la condamnation de celui-ci. Des dispositions exceptionnelles sont prévues pour les cas des navires, bateaux ou aéronefs en détresse, d'assistance ou de sauvetage (60).

d) Dans le même sens, il faut également citer la loi du 4 juillet 1962 sur la pollution des eaux de la mer par les hydrocarbures, prise en exécution de la Convention internationale du 12 mai 1954.

(59) Compar., pour le droit international privé : Cass., 15 décembre 1966, *J.T.*, 1967, 150 et l'étude de R. Vander Elst, La Cour de Cassation, la loi étrangère et les règles de droit non écrites, *J.T.*,1967, p. 145.

(60) Sur la théorie de la mer territoriale : Cour suprême de Suède, 21 octobre 1965, *Journal de dr. international privé*, 1966, 410.

Tout Belge ou tout étranger à bord d'un navire belge, qui commet, en dehors des limites du territoire belge, une infraction aux dispositions de cette loi et des arrêtés pris pour son exécution, est passible de poursuites en Belgique (art. 15).

e) L'article 13 de la loi du 27 juin 1937 sur la réglementation de la navigation aérienne rendue applicable par l'arrêté royal du 15 mars 1954 et modifié par la loi du 4 avril 1967, énonce que le coupable d'un crime ou d'un délit commis à bord d'un aéronef étranger en vol pourra être poursuivi en Belgique si lui-même ou la victime est de nationalité belge ou si l'appareil atterrit en Belgique après l'infraction. En cette matière une convention a été signée à Tokyo le 14 septembre 1963.

f) Des *conventions bilatérales* ont été signées par la Belgique et ses voisins (61) concernant les contrôles aux frontières et aux gares communes et d'échange. Ces conventions sont particulièrement importantes quant à l'évolution du droit pénal international, notamment en ce qui concerne la collaboration des Etats en matière répressive, et l'application relative du principe territorial. Ces conventions rendent compétentes les juridictions répressives de l'Etat limitrophe en cas d'infractions aux prescriptions légales et réglementaires commises dans la « zône » (62) et relatives aux contrôles. Des agents étrangers sont autorisés à exécuter dans la zône toutes les opérations relatives aux contrôles, constater les infractions, effectuer des saisies, consentir des transactions sur les infractions constatées, retenir les bagages, marchandises, véhicules et autres biens ; ils peuvent également arrêter les personnes à quelque nationalité qu'elles appartiennent, qui commettent des infractions aux prescriptions relatives au franchissement de la frontière ou qui sont recherchées, procéder à des refoulements et transferts, vendre les biens retenus ou saisis. Les agents des deux Etats doivent se prêter assistance en particulier pour prévenir et rechercher les infractions ; à cet effet, ils se communiquent les renseignements utiles. Les agents de l'Etat limitrophe bénéficient de la même protection que les agents correspondants de leur propre Etat,

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(61) Avec les Pays-Bas, le 13 avril 1948, (loi du 5 mai 1948), avec l'Allemagne, le 15 mai 1956 (approuvée par la loi du 5 mai 1960), avec le Grand Duché de Luxembourg, le 23 novembre 1961 (approuvée par la loi du 2 avril 1963), avec la France, le 30 mars 1962 (approuvée par la loi du 18 janvier 1964).
Sur cette question : P. Smets, La pratique belge en matière de contrôles frontaliers et de gares communes et d'échange, ***Revue belge*** *de dr. internat.*, 1967, pp. 270 - 294.

(62) Partie déterminée du territoire de l'un des Etats, telle qu'elle est précisée à l'article 3, et où les agents de l'autre Etat sont autorisés à exercer les contrôles.

notamment en ce qui concerne les infractions commises contre eux dans la zône.

8. — Les mêmes tendances se retrouvent dans les grandes *conventions pénales internationales. Elles* consacrent une extension caractérisée de la compétence personnelle, et même parfois le principe de la compétence universelle (63). De même, large extension, et collaboration judiciaire dans les *traités européens* C.E.E., C.E.C.A. et Euratom, notamment en ce qui concerne les fausses dépositions de témoins ou d'experts et les violations de secrets (64).

Enfin, il faut citer ici, toujours dans le même sens, la *jurisprudence* qui, de manière de plus en plus générale, et même en dehors des catégories strictes, affirme la compétence des tribunaux nationaux lorsqu'un *élément de l'infraction* a été réalisé sur le territoire national, ou en raison d'un *rattachement de pur fait.*

La Cour de Cassation de France a statué récemment (65) à propos d'un cas-limite, un délit d'omission où, semble-t-il, il était difficile d'affirmer la compétence des tribunaux français. Elle a rejeté le pourvoi de la partie civile contre une décision d'incompétence en matière de non représentation d'enfant, délit commis par la mère, de nationalité britannique, et qui résidait en Angleterre au moment du divorce. Le délit pouvait-il être localisé en France, conformément à la tendance à l'extension de compétence en droit pénal international (66) ?

9. — *Effets des décisions répressives étrangères.* Cette question classique et importante du droit pénal international a, elle aussi, progressé ces dernières années. Elle a fait l'objet d'études récentes approfondies, notamment à l'occasion de colloques et congrès internationaux (67). C'est un domaine où la nécessité de réformes se fait de plus en plus sentir, singulièrement au sein des pays intégrés ou de traditions communes.

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(63) P.-E. Trousse, étude précitée, pp. 533 et 534.

(64) R. Legros, Effets internationaux des jugements répressifs et communautés européennes, étude précitée, nº 24.

(65) A. Légal, Chronique de jurisprudence, *Rev. sc. crim. et de dr. pén. comparé*, 1967, p. 438. Voy. également : Cass., 9 mars 1964, *Pas.*, 1964, I, 733 (faux et usage de faux) ; Corr. Auxerre, 9 avril 1963, Gaz. Pal., 1963, II, 98, J.C.P. 1963, II, 13367 ,note Legeais (vol commis en Belgique).

(66) R. Legros, Domaine et méthode du droit pénal international, étude précitée.

(67) Notamment au VIIIe Congrès de l'Association internationale de droit pénal à Lisbonne, au sein du Comité européen pour les problèmes

(suite de la note page suivante)

Ce problème est évidemment lié à celui de l'organisation d'un *casier judiciaire* communautaire ou international, et, en général, à une politique réaliste et efficace de *défense sociale*, tout spécialement dans le domaine des infractions routières (68). Depuis l'étude que j'ai publiée sur cette question dans cette Revue en 1961 (69), plusieurs lois ont accordé certains effets, une certaine autorité positive, aux jugements répressifs étrangers : la loi du 19 février 1963 portant statut d'établissements hôteliers (art. 5, 2°), la loi du 30 décembre 1963 relative à la reconnaissance et à la protection du titre de journaliste professionnel (art. 1er, 2°), la loi du 21 avril 1965 portant statut des agences de voyages (at. 6) et la loi du 26 juin 1967 relative au statut des auxiliaires de transport de marchandises (art. 5), qui n'accordent leurs avantages qu'à ceux qui, notamment, n'ont pas encouru, à l'étranger, les condamnations qu'elles déterminent.

10. — *Extradition et entraide judiciaire.* C'est vraisemblablement dans le domaine de l'extradition et de l'entraide judiciaire que les signes d'une évolution rapide sont les plus manifestes (70).

Il faut dire que l'opinion internationale a été, à cet égard, fortement sensibilisée depuis quelques années par des cas retentissants, d'une gravité exceptionnelle, et inquiétante sur le plan des principes. Les plus hautes instances nationales et internationales s'en sont d'ailleurs préoccupées (71).

Les hésitations doctrinales, certaines pressions politiques, l'inquiétude de la conscience sociale indiquent l'urgente nécessité de réformes dont la plus adéquate serait assurément, ici encore, l'institution d'une Cour pénale internationale.

(suite de la note 67) :

criminels, et à l'Association internationale des magistrats. Voy. notamment : J.L. Ropers, Le Marché commun et les effets internationaux des jugements répressifs, J.C.P., 1963, 1797. — A. Légal, Chronique de jurisprudence, *Rev. sc. crim. et de dr. pénal comparé*, 1965. — A. Kenneth Pye, Recognition of foreing criminal judgments, *in* Mueller and Wise, *op. cit.*, p. 479. — J. Velu, Action accomplie en 1965 et en 1966 par le Conseil de l'Europe dans le domaine du droit, *Rev. dr. internat. et dr. comp.*, 1967, p. 6 - 148, notam. p. 107.

(68) Travaux de la 4ème conférence européenne des directeurs d'instituts de recherches criminologiques, compte-rendu dans la *Revue de dr. internat. et de dr. comparé*, 1967, p. 71.

(69) R. Legros, Effets internationaux des jugements répressifs et communautés européennes, étude précitée.

(70) Van Panhuys. Les traités d'extradition en tant que source de droits pour les individus, *in* Mélanges Van Bemmelen, *op. cit.*, p. 57.

(71) L'ONU dans l'affaire Eichmann.

Faut-il rappeler les cas Eichmann (72) et Argoud, le drame des Algériens « terroristes » réfugiés en Belgique notamment (73), l'affaire Enahoro et celle des « trois prisonniers de Sainte-Hélène » qui donnèrent lieu à des séances dramatiques à la Chambre des Communes (74), l'aventure du « Santa Maria » (75), les affaires Sebastian Sanchez (76), Abarka (77), Tshombé, Ignacio Palma (78) et certains aspects de l'affaire Ben Barka ... ?

On ne pourrait cependant contester que des progrès notables ont été réalisés ces derniers temps en ce domaine, ou sont en voie de réalisation (78bis).

On peut citer à cet égard les récentes *conventions bilatérales d'extradition* signées par la Belgique (79), le *Traité Bénélux* d'extradition et d'entraide judiciaire en matière pénale (80), les *Conventions européennes* sur le même objet, et les réformes envisagées en ce qui concerne *l'action internationale de la police* (81). Rappelons que, récemment, à la suite d'un accord entre les autorités judiciaires françaises et belges, une procédure utile a pu être mise en application : dans l'affaire de l'assassinat d'un agent de police bruxellois, Jacques Zanotto, détenu en France pour un crime commis en Belgique, a été « prêté » aux enquêteurs belges pour qu'il puisse désigner l'endroit où avait été enterré le corps du malheureux agent de police.

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(72) Helen Silving, In re Eichmann, a dilemma of law and morality, *in* Mueller and Wise, *op. cit.*, p. 290. — R.K. Woetzel, The Eichmann case in international law, *ibid.*, p. 354.

(73) Cass., 22 juillet 1960, *Pas.*, 1960, I, 1263 ; 29 mai 1961, *Pas.*, 1961, I, 1037.
On s'accorde à reconnaître le caractère libéral de la pratique belge en matière d'extradition.

(74) Le Monde du 23 décembre 1961. Le Soir du 28 mars 1963.

(75) T. Franck, The lesson of the Santa Maria, *in* Mueller and Wise, *op. cit.*, p. 218.

(76) Bruxelles, Ch. mises en accus., 31 août 1962.

(77) Cass., 23 mars 1964, *Pas.*, 1964, I, 797.

(78) Actuellement réclamé par le Portugal à la France.

(78*bis*) International judicial cooperation, *in* Mueller and Wise, *op. cit.*, p. 375.

(79) Notamment avec l'Allemagne le 17 janvier 1958 et avec le Maroc le 27 février 1959.

(80) J. Constant, le Traité Benelux d'extradition et d'entraide judiciaire en matière pénale, cette *Revue*, 1962-63, pp. 75 - 117. — B. De Schutter, L'entraide judiciaire en matière pénale dans le cadre du Benelux, *Rev. belge de dr. internat.*, 1967, pp. 102 - 126.

(81) « L'Europe des polices », compte-rendu de la conférence internationale tenue sur cette question à Amersfoort, Le Soir du 17 novembre 1966.
On mentionnera également l'intensification de la lutte contre la délinquance internationale menée par Interpol.

On constate avec satisfaction que le formalisme excessif est en voie de disparition. En 1962, des difficultés avaient surgi à deux reprises entre autorités belges et françaises dans l'enquête relative à l'assassinat d'un diamantaire anversois (82).

11. — *Conclusions.* Ces brèves considérations, bien incomplètes, n'avaient d'autres prétentions que de souligner par quelques exemples, l'importance actuelle du droit pénal international, son évolution rapide depuis quelques années, et la nécessité d'envisager les réformes qui accorderont enfin le droit pénal moderne avec le droit international et la vie internationale ; d'attirer l'attention sur les récents développements législatifs, jurisprudentiels et doctrinaux de ce droit auquel les pénalistes de 1867 ne s'étaient pas intéressés ... ou si peu ; de découvrir dans cette extension du droit pénal, une nouvelle mission de défense sociale au sens le plus élevé de l'expression, allant jusqu'à l'idéal de la paix (83).

D'une puissante vitalité et en pleine évolution dans la plupart des pays, le droit pénal semble bien devoir jouer un rôle important sur le plan international, et surtout au sein des groupes homogènes, de même civilisation, aux mêmes aspirations, comme l'Europe, par exemple (84).

Si les tendances et les progrès récents du droit pénal interne et du droit pénal international se confirment et s'amplifient dans les années qui viennent, c'est peut-être un droit pénal nouveau que la génération suivante connaîtra. Et l'on pourra, je crois, considérer que 1967, l'année du centenaire de notre Code pénal, aura été vraiment celle d'une prise de conscience, celle qui permettait cette prédiction, cet espoir ...

Robert LEGROS,

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(82) La Libre Belgique, 27 mars 1962.

(83) L. Cornil, Les possibilités du droit international pénal, *Académie royale de Belgique, Bulletin de la classe des lettres et des sciences morales et politiques*, 1955, pp. 244 - 265. — W.J. Ganshof van der Meersch, Justice et droit international pénal, cette *Revue*, 1961-62, pp. 3 - 42. — J. Dautricourt, Les conditions du droit criminel universel, cette *Revue*, 1966-67, pp. 867 - 909.

(84) En ce qui concerne notamment la délinquance juvénile, voy. : J. Velu, Action accompli en 1965 et en 1966 par le Conseil de l'Europe dans le domaine du droit, *Rev. dr. internat. et dr. comp.*, 1967, p. 6 - 148, notamment p. 113 et s.

THE "ACTIO POPULARIS" AND INTERNATIONAL LAW

With the best regards of
Egon Schwelb

EGON SCHWELB

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THE *ACTIO POPULARIS* AND INTERNATIONAL LAW

By Egon Schwelb *

THE SOUTH WEST AFRICA CASES AND THE CONCEPT OF *ACTIO POPULARIS*

The term *actio popularis* was injected into recent proceedings and discussions of questions of international law in the course of the South West Africa cases.[1]

In Article 7 of the Mandate for South West Africa, confirmed by the Council of the League of Nations on December 17, 1920, the Mandatory, the Union of South Africa, had agreed that, if any dispute whatever should arise between it and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute, if it could not be settled by negotiation, should be submitted to the Permanent Court of International Justice.

The "third preliminary objection" by South Africa to the application submitted by Ethiopia and Liberia as former Members of the League was to the effect that the conflict or disagreement alleged by the Governments of those two countries to exist between them and the Respondent was, by reason of its nature and content, not a "dispute" as envisaged in Article 7 of the Mandate, more particularly inasmuch as no material interests of the Governments of Ethiopia and/or Liberia, or of their nationals, were involved therein or affected thereby.[2] The Court held, in its 1962 judgment (preliminary objections), by eight votes to seven, that the Respondent's contention ran counter to the natural and ordinary meaning of the provisions of Article 7, which mentioned "any dispute whatever . . . relating to the interpretation or the application of the provisions of the Mandate." The language used, the Court said, was broad, clear and precise; it gave rise to no ambiguity and it permitted of no exception. The manifest scope and purport of the provisions of the Article indicated that the Members of the League of Nations were understood to have a legal right or interest in the observance by the Mandatory of its obligations both towards the inhabitants of the Mandated territory, and towards the League and its Members.[3] Protection of the material

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1 South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa): Preliminary Objections, [1962] *ICJ Reports* 319; South West Africa Cases: Second Phase, [1966] *ICJ Reports* 6.

2 1962 Judgment, *ibid.* 327.

3 *Ibid.* 343.

interests of the Members or of their nationals was, of course, included within the compass of the Article, but the well-being and development of the inhabitants of the Mandated territory were not less important.[4]

In his dissenting opinion,[5] President Winiarski said, *inter alia,* that the institution under the old Roman penal law known as *actio popularis* [6] seemed alien to the modern legal systems of 1919–1920 and to international law. He did not think it possible that such could have been the common intent of the framers of the Mandate instruments.

In the second phase of the South West Africa cases, the Court, in its 1966 judgment, decided by the President's casting vote, held that the substantive provisions of the Mandates might be regarded as falling into two main categories: on the one hand, and, to be sure, as the principal element of each instrument, there were the Articles defining the Mandatory's powers, and its obligations in respect of the inhabitants of the territory and towards the League and its organs. To these provisions, relating to the carrying out of the Mandates as such, the Court referred as "conduct of the Mandate," or simply "conduct," provisions. The second category, referred to by the Court as "special interests" provisions, directly conferred certain rights in respect of the Mandated territory upon the Members of the League as individual States, or in favour of their nationals.[7] The Mandate for South West Africa contained only one such "special interests" provision, which gave missionaries "nationals of any State Member of the League of Nations" the right to "enter into, travel and reside in the territory for the purpose of prosecuting their calling." In its 1966 judgment, the Court held that Members of the League had *locus standi* only in regard to the "special interests" provisions, which meant, in the

[4] *Ibid.* 344.

[5] Dissenting Opinion of President Winiarski, *ibid.* 452.

[6] In Roman law, an *actio popularis* was an action which could be brought by any one member of the public (*quivis ex populo*). The two most important and best known *actiones populares* described below had a certain penal and policing element, but were not so much "institutions of the old Roman penal law," as part of the law of obligations. They came under the heading of actions which arise *quasi ex delicto,* often, not quite precisely, called "quasi-delicts." The so-called quasi-delicts were institutions not of the old Roman penal law, but of post-classical law and, mainly, of the code of Justinian. A quasi-delict was a fact which, without being a tort (delict), created obligations similar to those arising from a delict. *i.e.,* the liability to pay damages and, in appropriate cases, criminal responsibility. The *actio de deiectis vel effusis* lay against the householder from whose dwelling things had been thrown or liquids poured so as to harm people on the street. The householder was also liable if his slave, guest or child had been responsible for the throwing or pouring. The Roman *praetor* granted the *actio de posito et suspenso* to every member of the public when things were located or suspended on the outside of a house or in a window in such a way as to endanger passers-by.

[7] 1966 Judgment, *supra* note 1, ¶ 11, at 20.

case of South West Africa, that Member States had *locus standi* only in regard to the rights of missionaries who were their nationals. In support of this view, the Court, in 1966, took over Judge Winiarski's 1962 argument concerning the absence of *actiones populares* in international law. The Court said:

> ... the argument [of the Applicants claiming 'standing'] amounts to a plea that the Court should allow the equivalent of an *actio popularis*, or right resident in any member of a community to take legal action in vindication of a public interest. But although a right of this kind may be known to certain municipal systems of law, it is not known to international law as it stands at present: nor is the Court able to regard it as imported by the "general principles of law" referred to in Article 38, paragraph 1(c), of its Statute.[8]

An anticipatory reply to the question whether an equivalent of an *actio popularis* is or is not "known to international law as it stands at present" was given by Judge Jessup in his separate opinion of 1962[9] and elaborated upon in his dissenting opinion of 1966.[10] These two opinions contain the most authoritative and convincing treatment of the question.

> "International law has long recognized that States may have legal interests in matters which do not affect their financial, economic, or other 'material,' or, say, 'physical' or 'tangible' interests."[11]
>
> "States conclude multilateral treaties not only in order to secure for themselves concrete mutual advantages in the form of a tangible give-and-take, but also in order to protect general interests of an economic, political or humanitarian nature, by means of obligations the uniformity and general observance of which are of the essence of the agreement. The interdependence of international relations frequently results in States having a vital interest in the maintenance of certain rules and principles, although a modification or breach of these principles in any particular case is not likely to affect adversely some of them at all or at least not in the same degree."[12]

It is the purpose of the present paper to examine, in the light both of the information which was before the Court in 1966 and of subsequent developments, the correctness or otherwise of the Court's statement that an equivalent to an *actio popularis* has not been, and is not, "known" to international law.

THE CONSTITUTION OF THE INTERNATIONAL LABOUR ORGANIZATION

Part XIII of the Peace Treaty of Versailles, 1919, which is the Constitution of the International Labour Organization and antedates the Mandate for

[8] *Ibid.* ¶ 88, at 47.

[9] 1962 Judgment, *supra* note 1, at 387, 425 *et seq.*

[10] 1966 Judgment, *supra* note 1, at 325, 373 *et seq.*

[11] Separate Opinion Jessup, 1962 Judgment, *supra* note 1, at 425.

[12] *Ibid.* 430, quoted from a Note by H. Lauterpacht, 16 *Brit. Y.B. Int'l L.* 165 (1935).

South West Africa, provides that any of the Members shall have the right to file a complaint if it is not satisfied that any other Member is securing the effective observance of any Convention which both have ratified (Article 411 of the Peace Treaty of Versailles, Article 26 of the ILO Constitution). Any question or dispute relating to the interpretation of the Constitution of the ILO, or any subsequent Convention concluded by the Members in pursuance of the Constitution, shall be referred for decision to the Permanent Court of International Justice (Article 423 of the Peace Treaty, Article 37 of the Constitution). Thus, a party to an International Labour Convention can set the complaints procedure provided in the Constitution in motion against any other party without having to allege or prove that its own material interests or those of its nationals have been interfered with. The legal interest in maintaining the standards set in the Convention concerned is sufficient to give the complainant party *locus standi*. Only in two cases have Members of the ILO availed themselves of this procedure: one related to the Abolition of Forced Labour Convention, 1957 (Ghana v. Portugal), the other to the Forced Labour Convention, 1930 (Portugal v. Liberia).[13]

THE PROTECTION OF MINORITIES IN THE INTER-WAR PERIOD

In the Peace Treaties with Austria, Bulgaria, Hungary and Turkey, which ended the First World War, in special Minorities Treaties concluded by the Principal Allied and Associated Powers of the First World War with Poland, Czechoslovakia, Greece, Romania and the Serb-Croat-Slovene State (subsequently renamed Yugoslavia), and in declarations made before the Council of the League of Nations by Albania, Esthonia, Latvia, Lithuania and Iraq, all these States agreed that every Member of the League had the right to bring to the attention of the Council every violation, or danger of violation, of the provisions for the protection of minorities. They also agreed that differences of opinion as to questions of law or fact arising out of the minorities protection provisions between one of them and any one of the Principal Allied and Associated Powers, or any other Power that was a Member of the Council, should be held to be disputes of an international character. They further consented that any such dispute should, if the other party thereto demanded,

[13] Report of the Commission appointed under Art. 26 of the ILO Constitution to examine the complaint filed by the Government of Ghana concerning the observance by the Government of Portugal of the Abolition of Forced Labour Convention, 1957 (No. 105), 45 (2) *ILO Official Bulletin*, Supp. 11 (1962); and Report of the Commission appointed under Art. 26 of the ILO to examine the complaint filed by the Government of Portugal concerning the observance by the Government of Liberia of the Abolition of Forced Labour Convention, 1930 (No. 29), 46 (2) *ILO Official Bulletin*, Supp. 11 (1963).

be referred to the Permanent Court of International Justice.[14] These provisions are, like those relating to Mandates and those contained in the ILO Constitution, examples of arrangements under which States whose tangible rights are not necessarily involved have been given the right to take up cases of alleged violations and to bring them, in the last resort, before the World Court. As far as access to the Court is concerned, the instruments do not provide for an *actio popularis,* but limit the right of action to the Principal Allied and Associated Powers and to Members of the Council of the League of Nations. Each Member of the League, however, had the right to bring violations to the attention of the Council.

THE GENOCIDE CONVENTION

The Convention on the Prevention and Punishment of the Crime of Genocide [15] provides in Article VIII that any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter as they consider appropriate for the prevention and suppression of acts of genocide or any of the acts enumerated in Article III (conspiracy, incitement and attempt to commit genocide; complicity in genocide). While this provision does not add to the rights which States Members of the United Nations, and even non-Member States (Article 35(2) of the Charter), have under the Charter or to the authority vested in the General Assembly and the Security Council by the Charter, it nevertheless emphasizes the fact that each Contracting Party has the specific right to set United Nations procedures in motion in the general interest. Under Article IX of the Convention, disputes relating to its interpretation, application or fulfilment, including those relating to the responsibility of a State for genocide or any of the acts enumerated in Article III, are to be submitted to the International Court of Justice at the request of any of the parties to the dispute. Here again the *locus standi* of every party to the Convention cannot be in doubt, and it is not dependent on nationals of the complaining State having been victims of genocide. In the often-quoted Advisory Opinion on Reservations to the Genocide Convention the International Court of Justice said:

> The Convention was manifestly adopted for a purely humanitarian and civilizing purpose... In such a convention the contracting States do not have any interest of their own; they merely have, one and all, a common interest, namely the accomplishment of those high purposes which are the raison d'être of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.[16]

[14] Art. 12 of the Treaty between the Allied and Associated Powers (USA, British Empire, France, Italy and Japan) and Poland Concerning the Recognition of the Independence of Poland and the Protection of Minorities, Versailles, 28 June, 1919. The Polish Minorities Treaty was the model for the other instruments listed in the text.

[15] Approved and proposed for signature and ratification or accession by G.A. Res. 260A (III) (1948), 78 UN T.S. 227, [1948] UN Y.B. on Human Rights 484.

MEASURES OF IMPLEMENTATION OF VARIOUS HUMAN RIGHTS CONVENTIONS

When the United Nations Commission on Human Rights prepared what eventually became the International Covenant on Civil and Political Rights, and when it drafted the provisions on the international measures of implementation to be applicable to it, it already provided in its first draft, prepared in 1950, and maintained in its final draft, submitted in 1954, that under the Covenant a State Party which considers that another State Party is not giving effect to a provision of the Covenant would have the right to refer the matter to the international organ contemplated in the Covenant, the "Human Rights Committee."[17] As will be shown presently, when the relevant provisions of the Covenant as adopted in 1966 are considered, the proposal of the Commission on Human Rights was changed by the General Assembly in a very important respect. The Commission's original proposal did, however, become the basis of provisions which were included in three international instruments emanating respectively (in chronological order) from the Council of Europe, UNESCO and the United Nations itself.

THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Under the European Convention on Human Rights, [18] any Contracting Party may refer to the European Commission on Human Rights any alleged breach of the provisions of the Convention by another Contracting Party (Article 24). In one of the few inter-state complaints of which it was seised, the European Commission stated "that the obligations undertaken by the High Contracting Parties in the Convention are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings

[16] Reservations to the Convention on Genocide, Advisory Opinion, [1951] *ICJ Reports* 23.

[17] Report of the Commission on Human Rights, sixth sess. Annex I, draft Art. 38, UN Doc. E/1681 (1950); Report of the Commission on Human Rights, tenth sess. Annex IB, draft Art. 40, 18 UN ESCOR, Supp. 7, UN Doc. E/2573 (1954). *See also* Annotations to the Text of the Draft International Covenants on Human Rights, 10 UN GAOR, Annexes Agenda item No. 28, Pt. II, Ch. VII (1955).

[18] European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, [1955] UN T.S. (No. 2889) 221, 45 *Am. J. Int'l L.,* Supp. 24 (1951).

from infringements by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves," ... and that "the High Contracting Parties have empowered any one of their number to bring before the Commission any alleged breach of the Convention, regardless of whether the victims of the alleged breach are nationals of the applicant State or whether the alleged breach otherwise particularly affects the interests of the applicant State and that it follows that a High Contracting State, when it refers an alleged breach of the Convention to the Commission under Article 24 of the Convention, is not to be regarded as exercising a right of action for the purpose of enforcing its own rights but rather [as] bringing before the Commission an alleged violation of the public order *(ordre public)* of Europe."[19] The European Convention vests the final decision in the European Court of Human Rights, to which States Parties and the European Commission have access. If the Court does not have jurisdiction, the final decision rests with the Committee of Ministers of the Council of Europe.

THE PROTOCOL OF 1962 TO THE CONVENTION AGAINST DISCRIMINATION IN EDUCATION

In 1962, the General Conference of UNESCO adopted a Protocol instituting a Conciliation and Good Offices Commission, to be responsible for seeking a settlement of any disputes which may arise between States Parties to the Convention Against Discrimination in Education.[20] If a State Party to the Protocol considers that another State Party is not giving effect to a provision of the Convention, it may initiate proceedings, in the course of which it has the right to refer the matter to the Commission (Article 12). The Protocol does not provide for reference of the dispute to the International Court of Justice, but the Commission may recommend to the Executive Board of UNESCO, or to the General Conference of that Organization, that the Court be requested to give an advisory opinion on any legal question connected with a matter laid before the Commission (Article 18). It should be added that the fact that the Convention of 1960 does not itself have a compulsory adjudication clause was one of the reasons which led to the preparation and adoption of the Protocol of 1962. Article 8 of the Convention of 1960 is to the effect that any dispute which may arise between any two or more States Parties concerning the interpretation and application of the Convention, which is not settled by negotiations, shall at the request *of the parties to the dispute,*

19 Austria v. Italy, [1961] *Eur. Con. on Human Rights Y.B.* 140.

20 *Human Rights, Compilation of International Instruments of the United Nations,* UN Doc. A/CONF. 32/4, UN Pub. Sales No.: E.68. XIV.6, item 11. For the Convention Against Discrimination in Education of 1960 *see ibid.* item 10.

i.e., all the parties to the dispute, be referred to the International Court of Justice for decision.

THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

If a State Party to the International Convention on the Elimination of All Forms of Racial Discrimination [21] considers that another State Party is not giving effect to its provisions, it may bring the matter to the attention of the international organ which has been established by the Convention, namely, the Committee on the Elimination of Racial Discrimination (Articles 8 and 11). Any dispute between States Parties with respect to the interpretation or application of the Convention shall, at request *of any of the parties to the dispute,* be referred to the International Court of Justice for decision (Article 22).

THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The right of States Parties to the International Covenant on Civil and Political Rights [22] to seize an international organ (the "Human Rights Committee") of an allegation that another State Party is not fulfilling its obligations under the Covenant is limited, in comparison with the arrangements which have been discussed so far. Under the Covenant, the inter-State complaints procedure—the complaints are euphemistically called "communications"—is applicable only in regard to a State which has declared "that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant." Only a State which has itself made a declaration recognizing this competence of the Committee in regard to itself can set the procedure in motion (Article 41). Provided that both the State which initiates the proceedings and the "receiving State" have made a declaration under Article 41(1), the complaining State is not required to assert a violation of its own rights or to claim that they have been infringed by the other State's failure to fulfil its obligations.

> Among the community of States Parties to the Covenant which have made declarations under Article 41(1), the right to seize the Human Rights Committee of an allegation that the other State is not giving effect to the Covenant is, to use the reference to Roman law which Judge

21 Adopted and opened for signature and ratification by G.A. Res. 2106 A (XX) (1965), *ibid.* item 8, and 15 *Int'l & Comp. L.Q.* 1059 (1966).

22 Adopted and opened for signature, ratification and accession by G.A. Res. 2200 A (XXI) (1966), 61 *Am. J. Int'l L.* 870 (1967). At the time of writing, June 1972, the Covenant was not yet in force.

> Winiarski made in his dissenting opinion in the preliminary objections phase of the South West Africa cases, an *actio popularis*. This means [that] it is a remedy which every member of that community of States has.[23]

The international Covenant on Civil and Political Rights does not contain a provision vesting in the International Court of Justice jurisdiction to decide disputes, between States Parties, which relate to the interpretation or application of the Covenant.

THE AMERICAN CONVENTION ON HUMAN RIGHTS

The American Convention on Human Rights, 1969,[24] provides that any State Party may declare that it recognizes the competence of the Inter-American Commission on Human Rights to receive and examine communications in which a State Party alleges that another State Party has committed a violation of human rights set forth in the Convention (Article 45). In regard to inter-State complaints, the arrangement is thus similar to that which will apply under the International Covenant on Civil and Political Rights. The subjection by States Parties to the inter-State complaints procedure is optional under both instruments. Every one of the States Parties which have made the declaration accepting it, has the right to set the procedure in motion. As distinct from the International Covenant on Civil and Political Rights, the American Convention provides for the establishment of an Inter-American Court of Human Rights. In this regard it resembles the European instrument.

TREATIES RELATING TO OUTER SPACE, THE SEA BED AND THE LIMITATION OF ARMAMENTS

In recent years, a number of instruments in fields other than the international protection of human rights have been worked out under United Nations auspices and "commended" by the General Assembly, which, while not providing for judicial remedies or quasi-judicial procedures, nevertheless grant to all States Parties certain procedural rights concerning the consideration of their complaints.

The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies,[25] provides that a State Party to it, which has reason to believe that an activity

[23] Schwelb, "Civil and Political Rights: The International Measures of Implementation," 62 *Am. J. Int'l L.* 827, 847–48 (1968).

[24] Pact of San José, Costa Rica, signed at the Inter-American Specialized Conference on Human Rights, November, 1969, 65 *Am. J. Int'l L.* 679 (1971). At the time of writing, June 1972, the Convention was not yet in force.

[25] Commended by G.A. Res. 2222 (XXI), Art. IX (1966).

or experiment planned by another State Party in outer space would cause potentially harmful interference with activities in the peaceful exploration and use of outer space, may request consultation concerning the activity or experiment (Article IX).

The Treaty on the Prohibition of the Emplacement of Nuclear Weapons of Mass Destruction on the Sea Bed and the Ocean Floor and in the Subsoil Thereof[26] gives to all States Parties the right to verify, through observation, the activities of other States Parties on the sea bed and the ocean floor and in the subsoil. If, after such observation, reasonable doubts remain concerning the fulfilment of the obligations assumed under the Treaty, the State Party having such doubts and the State Party responsible for the activities giving rise to them shall consult with a view to their removal. The Treaty provides for further procedures in case the doubts persist, and for the cooperation and consultation of other States. If the additional consultation and co-operation have not removed the doubts and there remains a serious question concerning fulfilment of the Treaty obligations, a State Party may, in accordance with the Charter of the United Nations, refer the matter to the Security Council, which may take action in accordance with the Charter. As in the case of the Genocide Convention,[27] the Treaty does not confer on States rights which they do not already have under the Charter, but it emphasizes their individual right to take the action described.

The situation is similar under the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on Their Destruction.[28] Under that Convention, any State Party which finds that any other State Party is acting in breach of obligations deriving from its provisions may lodge a complaint with the Security Council. Such a complaint should include all possible evidence confirming its validity. The Council has to inform the States Parties of the results of the investigation which it may initiate on the basis of the complaint (Article VI).

CONCLUDING OBSERVATIONS

It is submitted that the provisions summarized in the preceding pages give a fairly conclusive answer to the question raised in the 1962 and 1966 proceedings of the International Court of Justice, viz., that an equivalent to an *actio popularis* was, indeed, "known" to international law in 1919/1920, in 1962 and in 1966, and is "known" today. It was, however, that Court itself which, in 1970, gave a comprehensive and most authoritative reply to the question. It said in its 1970 judgment in the Barcelona Traction case:

[26] Commended by G.A. Res. 2660 (XXV), Art. III (1970).

[27] *See supra* note 16.

[28] Commended by G.A. Res. 2826 (XXVI), Art. VI (1971).

An essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. *By their very nature the former are the concern of all States.* In view of the importance of the rights involved, *all States can be held to have a legal interest in their protection;* they are obligations *erga omnes.*

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law[29] . . . ; others are conferred by international instruments of a universal or quasi-universal character.[30] (Emphasis added.)

29 The Court refers here to its Advisory Opinion on Reservations to the Genocide Convention, *see supra* note 16.

30 [1970] *ICJ Reports* 3, 32, paras. 33, 34.

QUINCY WRIGHT

To John Fried,
from Quincy Wright
with best
regards

THE FOUNDATIONS
FOR A UNIVERSAL INTERNATIONAL SYSTEM

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LES ENQUÊTES DE «COMPRENDRE»

THE FOUNDATIONS
FOR A UNIVERSAL INTERNATIONAL SYSTEM

BY QUINCY WRIGHT

The Unesco Constitution declares in its preamble « since wars begin in the minds of men, it is in the minds of men that the defences of peace must be constructed ». Consequently, peace must be founded upon the intellectual and moral solidarity of mankind. On the other hand, Marxism holds that « the causes of all social changes and political revolutions are to be sought, not in man's brains, not in man's better insight into eternal truth and justice, but in changes in the modes of production and exchange ». Must a universal international system be founded upon a consensus of opinion of the human race upon the character of such a system — the values which it must maintain and the institutions by which they may be maintained — or must it be founded upon conditions of production and exchange which make such a system inevitable ?

Most sociologists recognize that neither human ideas nor material conditions are alone sufficient foundations for social systems, but the social entities arise from their interaction. Social change results from changes in material conditions only in so far as the latter influence human minds, but human minds are not likely to be interested in effecting social change unless changes in material conditions compel them to give attention to the need of modifying or revolutionizing their institutions. The belief by a group on the need for social change and the conviction that desirable social change can be effected may create conditions which make such change possible, and reciprocally the development of conditions which make existing institutions inadequate and unsatisfactory may contribute to such a belief and conviction. Beliefs and conditions, therefore interact, sometimes with revolutionary violence, to create a consensus upon the character of a better social system which, because of that consensus, becomes attainable.

Human invention, conviction, and propaganda on the one hand and human awareness, analysis and understanding of present and of probable and possible future conditions, on the other hand, may, therefore, interact to bring about desirable social changes. If constructive ideas are lacking, new conditions may bring disaster because old institutions are not adapted to them. If a sense of reality is lacking, reformist or revolutionary demands are likely to prove abortive. Faith and reason must go together if a human society, whether local, national or world wide, is to progress and to avoid frustration and disaster in a changing environment.

It must be recognized, however, that material conditions seldom make any particular form of social system inevitable. There are usually alternative solutions when new conditions make social change necessary. This is manifested by the great variety of institutions and beliefs existing among primitive peoples living under substantially the same conditions of environment and technology, and in even greater degree among modern nations, although in both cases similarity in basic technology tends to a convergence of institutions and beliefs. Man may be creative, his institutions are not determined, but there are limits set to his creativity by the material conditions of his environment and technology if he wishes to survive. To be creative, he must, in choosing institutions, values, and procedures to assure his survival or to improve his life, study the material conditions of the actual and potential environment in which they are to function. He must also consider whether these conditions make realization of his model, ideal, or developmental construct probable or possible in the allotted time. The impossible may be achievable given sufficient time, but for practical purposes decision makers must distinguish those conditions which can be controlled by human opinion and action and those that cannot in any forseeable future.

Because conditions change, any system which is to last, must have within it means of self-correction and adaptation, but it must also be sufficiently stable to permit its members to plan their lives in confidence that they can predict the social environment for a considerable future. A social system must be at the same time stable and flexible. « The law must stand but it cannot stand still ». It must combine a legal system to maintain stability with a political system to effect change.

The foregoing analysis suggests that the foundation for a universal international system requires: 1) an understanding by peoples and governments of the actual and developing conditions of the world; 2) a consensus upon the character of the social system that will best adapt mankind to these conditions; 3) legal rules, principles, standards and procedures which will manifest and maintain the character of that system, and 4) political procedures and institutions adequate to modify the law and solve the problems of conflict and maladjustment certain to arise in a world rapidly changing under the influence of advancing science, technology, and propaganda, generating and disseminating new values and movements. Let us consider these four foundations for a universal international system.

I. Conditions of the World

Among the material conditions of the world which have developed in the 20th century, differentiating it from the 19th century, are the invention of radio and television providing means of instantaneous communication over long distances and of rapid dissemination of information and ideas among great populations. No less important is the development of means of rapid transportation of men and materials. Air planes will soon move at supersonic speed and, in a not distant future satellites will move passengers and goods at a far greater speed around the earth and to extraterrestrial bodies. Perhaps most important of all for international relations is the development of means of destruction by nuclear bombs and of means for delivering them from any part of the world to any other part in a matter of minutes

by intercontinental ballistic missiles. Finally, the development of knowledge of the human psyche has made it possible to influence the attitudes, opinions, and behaviour of men as individuals by « brain-washing » techniques, and in the mass by the propagandistic manipulation of symbols in the mass media of press, radio, and especially television.

These changes have shrunk the world. Information on events and ideas occuring anywhere in the world is immediately known, at least to the leaders of opinion and the major decision makers everywhere. Furthermore, the movements of people — tourists, propagandists, soldiers, politicians, economists and administrators — is more abundant and rapid throughout the world than ever before. Their example, precept, indoctrination, or compulsion imparts new ideas, and techniques, sometimes useful, often destructive of traditional ways of life.

The influence of commerce and war have become more widespread. More people than ever before are dependent for their livelihood on the import and export of goods from distant areas and all are dependent on restraint by the nuclear powers for their lives. A very small proportion of the earth's inhabitants are any longer able to escape the impact of news, ideas, propaganda, trade, and military threats from the most distant parts of the world, and contentedly to observe the customs, traditions, and laws which have been adequate in the isolated societies in which they have lived for hundreds, or even thousands, of years.

These changes in the material conditions of the world have contributed to no less important changes in the political world. Most empires have disappeared and over fifty territorial states have been recognized in the 20th century as sovereign in Europe, Asia, Africa, and the Caribbean. Assaulted by a variety of propagandas in the press, telecommunication and diplomatic representations; visited by agents, infiltrators, spies, educators, and propagandists; impressed by returning fellow citizens with foreign education and experience; attempting to assimilate values and to utilize technologies strange to their culture, it is not surprising that many people and leaders in hitherto isolated areas have become confused between the values of the traditional culture and the values of « modernization ». Rivalries have developed among diverse tribal, religious, and linguistic groups formerly quieted by imperial rule. Each has sought influence or autonomy after independence under the banner of « Self-determination ». Under such conditions, coupled with low rates of literacy and low levels of living, democratic, political institutions, though generally aspired to, will not function. Civil strife often occurs and military or party dictatorships are established. To maintain unity they imitate the older states in cultivating the sentiment of nationalism to destroy tribal loyalties and they demand full independence against all forms of neo-imperialism. In the older states nationalism and territorial sovereignty also continue as the major political forces.

Second in political importance have been demands for ideological expansion which in the 20th century arose from the communist revolution of 1917. This demand has resulted in the division of the world into communist, anti-communist, and unaligned sections of about equal population, but these groups have tended to disintegrate as the urge of revolution and of opposition to it receded into history, as differences of doctrinal interpretation developed, and

as divergencies arose among the nationalities within each group (1).

A third political force has been the demand for economic progress. A major force in the West since the Middle Ages, this demand has developed within the poorer states of Asia, Africa, and Latin America as the masses of the peoples become aware of their poverty through communist propaganda, economic assistance programs, and government efforts at modernization. Lacking in capital, advanced technology, literacy, and skills; and usually with agricultural and industrial production lagging behind population growth, these peoples, as reported by the World Bank in 1966, have endured a level of living of less than $ 200 *per capita* on the average compared with $ 500 to $ 3000 *per capita* among the peoples of western Europe and North America. In spite of some progress by economic aid from rich countries, the gap between the poor and the rich has tended to widen.

Any universal system must, therefore, cope with a shrinking and vulnerable world, divided among 130 states recognized as sovereign, each demanding full independence and economic progress with strong sentiments of nationalism, varied ideological persuasions, and little awareness of, or concern for, mankind as a whole. Many of them have unstable governments. They differ greatly in power and the demands and sentiments of each induce formulations of political, ideological and economic interests often in conflict. The struggle of these nations to survive and to forward their national interests, each by its own diplomacy, armaments, and alliances constitutes the system of power politics which began in Europe at the Renaissance and has spread throughout the world.

Regulated by diplomatic practice which seeks to maintain a balance of power, by general international law and by a network of treaties, the system of power politics provided a modicum of security for states in the 17th, 18th, and 19th centuries, prevented imperial domination in Europe, facilitated such domination overseas, and permitted great economic progress, especially in the North Atlantic area in the 19th century, but with frequent wars and the loss of sovereignty by many small states. In spite of efforts at general international organization in the 20th century, numerous conflicts have occured, two of them escalating into world war. Since World War II, thirty-one conflicts have resulted in hostilities each killing a thousand to a million persons. Half a dozen of these hostilities are active or latent today, and the danger of nuclear war has increased as the arms-race proceeds and more states prepare to join the nuclear club. Efforts at *détente* in the East-West ideological conflict were halted by the escalation of the Vietnam war. The gap between the rich and the poor nations has continued to widen. Respect for international law and international institutions has appeared to be declining among the great powers. A system change seems to be called for in order to adapt international institutions (2).

(1) Other large ideological groups have similarly disintegrated under the influence of heresies and local nationalisms unless sustained by outside opposition as were Christianity and Islam during the Crusading period.

(2) « I believe the present international system to be one which has a significant probability built into it of irretrievable disaster for the human race (...) The problem of system change, therefore is urgent and desperate, and we are all in terrible danger. » (KENNETH BOULDING, « The Prevention of World War III », *Virginia Quarterly Review*, 1962, vol. 38, p. 3).

II. Proposals for System Change

What kind of international system might be adequate to ameliorate these conditions and at the same time be so acceptable to governments and peoples that it might be established within a reasonable time? A reasonable time may be a generation which is often considered the limit during which World War III may be avoided under the present system of power politics (1).

It seems improbable that a new system can be established by a sudden constitutional act of the world community without the stimulus of a general war and in the nuclear age such a war would be one too many (2). General efforts to enact a new international system as by the Treaty of Westphalia (1648), the Treaty of Vienna (1815), the Treaty of Versailles including the League of Nations Covenant (1919), and the United Nations Charter (1945) occurred after the world wars so devastating that both governments and people were convinced that a system change was necessary. The first of these established a system change which had been developing more than a century. The sovereign territorial state was recognized as superior to religion (*cuius regio eius religio*) and to the medieval hierarchical order, thus initiating in principle as well as practice the European system of power politics although at the same time it gave hints of the concept of international organization; the others sought to qualify this system by general international organization but succeeded in doing so more in theory than in practice. Power politics soon began to operate in spite of the Concert of Europe, the League of Nations, and the United Nations. But significant progress is discernible in these three successive efforts to define more precisely, and to accord more powers to, a new system of international organization, able to control aggressive action by sovereign states.

It is true that efforts to effect sudden changes of the European system by conquest were made by ambitious rulers such as Charles V, Louis XIV, Napoleon, and Hitler, but these efforts to establish a universal empire on the model of ancient Rome were frustrated by operation of balance of power policies, inherent in the system of power politics under which most states

(1) Herman Kahn, who takes a more optimistic view of the situation than Boulding, says a system change is necessary and « the time available probably is to be measured in one or two decades rather than one or two centuries ». (« The Arms Race and World Order » in Morton Kaplan ed., *The Revolution in World Politics*, N. Y., 1962, p. 350). See also Kahn *On Thermo Nuclear War*, Princeton, 1960, in which he indicates the factors which may cause such war and predicts that it is unlikely to be prevented for more than a generation. The transition from a system of power politics to one of law presents the dilemma that if some states rely on law before it is sanctioned by central power they may cease to exist, so gradual change is impractical, but central power cannot be established suddenly among nationalistic states except by universal conquest (Q. Wright, *Problems of Stability and Progress in international Relations*, University of California Press, Berkeley, 1954, p. 68 ff.). The prospect of thermo-nuclear war, may however make gradual change possible during a period of mutual deterrence, disarmament, and education (Q. Wright, *Study of War*, p. 1533 ff.).

(2) Herman Kahn doubts whether an adequate system change can be effected without the stimulus of nuclear war and even then, if the change were not made within a few days after the holocaust « that is before the dead were buried, one side or the other would quite likely try to exploit the common danger for national advantage. In that case the negotiation would probably degenerate into the usual unproductive cold war jockeying » (« The Arms Race and World Order », *cit.*).

recognized a national interest in common action to frustrate the ambition of any one nation with so much power as to threaten its neighbours. More restricted empires were established both in and out of Europe but they in time were disintegrated by self-determination movements in minority nationalities and colonies.

It would appear that an enduring change of the international system can be effected peacefully only by a gradual process of education which establishes a general awareness of existing and emerging conditions, and of the inadequacy of the existing international system to deal with the problems which can be foreseen. This process of education must also develop a consensus on the general character of an international system which would be both effective and realizable.

Historical studies indicate that at times relatively enduring political structures have been built to unify previously independent tribes, cities, or states. This has sometimes been achieved by the authority and power of a government established by conquest, as in ancient Rome, in England by the Norman conquest, in the Middle East by the Ottoman conquests, and in the overseas empires established by European states from the 16th to the 20th centuries. Such political structures have also been established by agreement among neighbouring states in order to combine their power against apprehended conquest by an outside state. This was a major factor in the formation of the Swiss, American, Canadian, and other federations (1). Anticipated benefits from common institutions to prevent civil strife, and to facilitate production and trade by assuring a larger area of economic activity have also been a factor in the voluntary formation of federations, tariff unions and common markets (sometimes developing into political unions as in the case of the German Empire of 1871), and in the maintenance of empires originally formed by conquest. Most important, however, in the formation and even more in the perpetuation, of political unions has been the existence or development of a common culture, a feeling of common interests and aspirations, a common loyalty to the union and its symbols (2). These sentiments may be the natural product of proximity, long association, a common language and a common law but they may be the contrived product of education and propaganda. All of the factors referred to and especially the experience of civil war, contributed to the evolution of the confederated American States into a nation, and they are all operating to make the Indian sub-continent a nation. Such a national sentiment or « consciousness of kind » accounts for the solidarity of most modern nations whether originally formed from conquest, fear of conquest, or anticipation of political and economic benefits from union. When it does not exist, as in the Habsburg and Ottoman empires and in the overseas colonial empires of Portugal, Spain, Britain, France, Netherlands, Belgium, the United States and Japan, the

(1) Alexander Hamilton is reported to have said: « The Constitution was wrung from the grinding necessities of a unwilling people ». The danger of reconquest by Britain and Shays's rebellion were important influences.

(2) On methods of integrating small and large communities in the past, see Q. Wright, *Study of War*, p. 1013 ff., distinguishing the political method emphasizing opposition, the judicial method emphasizing cooperation, the administrative method emphasizing authority, and the propaganda method emphasizing opinion, as well as, the role of violence in these processes.

empire, even though enduring for some time has eventually disintegrated before demands for self-determination. Modern means of communication have convinced most people of the idea, asserted by the British, French, and American revolutions of the 17th and 18th centuries, that the legitimacy of government rests, not on military power, divine right, or hereditary succession, but on consent of the governed manifested by democratic procedures or popular sentiment. Modern governments, whatever their ideology, generally claim to be legitimate in this sense and unless they convince their people, especially if numerous and diverse, that the claim is actually, or potentially sound, their rule is not likely to be either effective or enduring (1).

A universal system cannot today be built by conquest short of nuclear war, nor can it be built by fear of outside conquest, at least until the advent of extra-terrestrial travel. It must rely on rational appreciation by all peoples and governments of the benefits of universal cooperation and a sense of the unity of mankind. Such a transformation of present nationalistic opinions is not likely to result except from the shock of general war, disastrous to all, or from a gradual process of communication, trade, education and propaganda.

What kind of universal system might develop from this process? What values are so generally accepted that they may serve to appraise the desirability and feasibility of the models which have been proposed? The conditions of the world, which have been surveyed in section I above seem to demand international peace and security, and independence of the nations as a first priority. Justice to individuals and groups within nations, and social and economic progress must also be considered important. Realization of these four values — international peace, national independence, human rights and social progress — is the purpose of the United Nations (Art. 1). It must be recognized, however, that conflict may arise between the demand of peoples for peace and the demand of nations for independence in foreign policy; and also in the demand of nations for independence in conducting their internal affairs and the demand of persons and groups within nations for international protection against oppressive action by the nation or its governement. To realize, or even to conceive of, a system which will reconcile these conflicts, and achieve consensus on the meaning of progress in a world of various ideologies presents obvious difficulties.

Six types of international system have been suggested as improvements on the present system of power politics: 1) arms control to stabilize the balance of power; 2) acceptance of the power and responsibility of the super powers; 3) world federation; 4) regional arrangements or federations; 5) conversion of all people to a universal religion or ideology; 6) improvement of international organization by strengthening the United Nations (2).

(1) The report of a committee set up by Unesco in 1950, though emphasizing the ambiguities in the term « democracy » concluded: « The accusation of antidemocratic action or attitude is frequently directed against others, but practical politicians and political theorists agree in stressing the democratic element in the institutions they defend and the theories they advocate. »

(2) Four types of system — corresponding respectively to numbers 2, 5, 1 and 6 — have given some unity to civilizations in the past: empire centralizing military power; church supporting a universal religion; balance of power, whether between nations or alliances; and international organization some times approaching federation. These types have been paralleled by concepts of the world as a plan, as a community, as an equilibrium, and as an organization. The writer has suggested a fifth concept, less precise than any but containing potentialities of all, « the world as field » (see Q. WRIGHT, *Study of War*, p. 965 ff. and *Study of international Relations*, N.Y., p. 509 ff.)

1. *Arms Control* - Governments and strategic writers have hoped to stabilize the balance of power without modifying the existing system under which each state relies on its own arms and alliances for security. They hope to do it by agreements, tacit or express, to control armaments, especially nuclear weapons with the object of preventing arms races and maintaining mutual deterrence. By permitting defensive conventional armaments but limiting offensive armaments, by assuring that nuclear powers have a sufficient quantity of missiles with nuclear war heads on invulnerable bases to assure a devastating second strike against a nuclear attack, by preventing the proliferation of nuclear capability beyond the present nuclear club, they believe that aggression may be deterred (1). Few, however, believe that such a system could do more than postpone general nuclear war. This proposal is in fact an effort to stabilize the balance of power, which has been the policy of conservative or *status quo* states for centuries, but which has always broken down in general war, whether the balance has been bi-polar or multi-polar. Changing conditions of technology and power distribution have in time always induced an ambitious or dissatisfied state to believe that it could overcome the restraints of the system. Occasional war has been necessary in the past to make the system credible, but few people believe that a nuclear war would be tolerable. Civil and border wars have occurred frequently since World War II. Many, such as the Korean, Indo-Chinese, Algerian, and Vietnam wars, have escalated to serious proportions, and threats of preemptive nuclear war have been made, as in the Cuban crisis of 1962. The fact that such threats have been made and have been widely believed indicates that the system of mutual deterrence has not made a first nuclear strike incredible. Many people believe with General MacArthur that there is no substitute for victory and that however little gain is anticipated from a small war, it must be escalated to victory. Furthermore, accident, misinformation, or miscalculation may precipitate hostilities which may escalate into nuclear war in a heavily armed and suspicious world. If the human race puts its hopes for survival on nuclear deterrence or a balance of military power it is taking a serious risk.

2. *Great Power responsibility* - A second proposal is that all states recognize that the « great powers », and especially the « super powers » (the United States and the Soviet Union), with their overwhelming military power should assume responsibility for policing the world and maintaining order. Albania and China have perceived from the behaviour of the two super powers a conspiracy to divide the world into two spheres within which each would exercise imperial authority. John Foster Dulles, later to become American Secretary of State, proposed in 1941 a « voluntary system » of world order which would « rely upon the nations which are dominant in the world to exercise their power with a sense of moral responsibility and with intelligence... It is practical wisdom », he continued, « to

(1) Winston Churchill called this system « a balance of terror ».

recognize that attempts at arbitrary restraint and the monopolization of natural advantages in the long run defeat themselves and are self-destructive. The ' voluntary ' system relies upon nations following a course upon which both morality and expediency coincide. » This concept figured in President Franklin D. Roosevelt's proposal for « five policemen » in early discussions of the United Nations, and is given some recognition in the permanent seats and veto power of the great powers in the Security Council following the precedents of the 19th century « Concert of Europe » and the League of Nations Council. More recently Presidential adviser McGeorge Bundy referring to unilateral interventions by the United States said that the United States must assume « Great Power Responsibilities ».

This proposal seems to stand between a balance of power and imperial conceptions of a world system. In relation to one another the great or super powers would be restrained only by moral sentiment or mutual deterrence and, as pointed out above, those restraints have not prevented wars in the past, in fact history suggests that balance of power systems tend to bi-polarity between the greatest powers and that, as in the case of Rome and Carthage, France and Habsburgs in the 17th and 18th centuries, and the two alliances before World War I, such bi-polarity rapidly leads to general war. It generates antagonism which convinces each that war is inevitable and the one which believes that time is running against it will initiate the war now, because later its chances will be less. Reflection upon the suicidal character of nuclear war has prevented this normal development of the cold war between the United States and the Soviet Union since World War II. But, as pointed out in discussing arms control many circumstances make it unlikely that this consideration will indefinitely postpone nuclear war in a system of power politics whether bi-polar or multi-polar. Arnold Toynbee has pointed out in his *Study of History* that the natural tendency of power politics in the « time of troubles » is to move toward bi-polarity and a series of wars of increasing magnitude until one great power conquers the other, initiating the « universal » state and subjecting the entire civilization to imperial rule. Such a result might occur after the devastation of nuclear war, but short of that it is likely to be frustrated by the sentiment of nationalism and self-determination which has broken up empires since 1776, and especially since World War II.

In any case the acceptance of great power dominance would tend to division of the world into spheres within each of which one great power would exercise hegemony subjecting the lesser states in its area to satellite positions. Although such relations of dominance and subordination have often existed in the past (1), all states, affected by the sentiment of national sovereignty have insisted on the equality of states, and the United Nations is based on the principle of « the sovereign equality of all its members ». It seems unlikely that a system in which five, two or one of the dominant powers rules the world through empire, hegemony, spheres of interest, or a sense of responsibility can meet the needs of the nuclear age.

(1) Such relations have been especially prominent in the histories of China, India, the United States (Monroe Doctrine), and the Soviet Union. European States have tended to build empires rather than satellite systems though protectorates and other satellite relations have often appeared in the development of empires either continental or overseas.

3. *World Federation* - A third proposal is that of world federation. Its advocates have contemplated the development of the United Nations so as to achieve general and complete disarmament, a modest peacekeeping force controlled by the United Nations, more equitable representation of peoples in United Nations political organs, greater but limited executive and legislative powers in these organs, compulsory jurisdiction of the World Court in legal disputes, and development of procedures for settling international political disputes and for protection of human rights. Such a proposal has been elaborated in detail by Grenville Clark and Louis B. Sohn and is supported by large organizations in many countries. It is appealing as a long run goal. While some advocate a world constitutional convention, most suggest steps by which world federation might be achieved gradually. There are, however, serious obstacles to its achievement in a generation. The analogy drawn to the movement from the Articles of Confederation to the Constitution in American history is hardly applicable because the national and ideological differences among the peoples of the world are so very much greater than were the differences among the peoples of the United States in the 1780's. Furthermore the need for central power against outside attack, which was a major factor, as Hamilton pointed out, in the acceptance of the Constitution cannot exist in the world as a whole. Contemporary nation-states are not likely to submit voluntarily to a supreme legislative and executive power until there is considerable convergence in their social, economic and political principles and ideologies and considerable amelioration of their conflicts of interest. Nor is it likely that they will tolerate penetration by supranational authority to protect their own nationals against their own authority so long as the present difference continue between communist and free enterprise states about the proper relations of man to the state. In the United States, central protection of human rights, while it did not prevent a federation, eventually induced its temporary break up in civil war. Protection of human rights has, it is true, been achieved in considerable measure among the states of western Europe. But no such diversities exist among the states in this area. For the world as a whole, federation, centralizing power and reaching down to the individual, seems hardly feasible in a generation.

4. *Regionalism* - To meet the difficulties of world federation it has been proposed by Clarence Streit that the Atlantic states, with considerable similarity of background and civilization, should federate both for defence against the communist block and for maintaining order and liberty among themselves. Count Coudenhove-Kalergi, although primarily interested in the Pan European movement, had earlier suggested a universal system under which the great regions of the world whose people resembled each other in culture and institutions should form five great federations or confederations, Pan-Europe, Pan-America, East Asia, the Soviet Union, and the British Empire. The United Nations Charter recognizes the expediency of « regional arrangements » (Art. 52) and the United Nations has established regional economic commissions for Europe, for Asia and the Far East, for Latin America, and for Africa. Political regional arrangements have been established by the participating states in Western Europe (Council of Europe, Common Market, and Free Trade Community), the Atlantic and Mediterranean area (Nato), Eastern Europe and Russia (Warsaw agreement),

the American continents (OAS), Africa (OAU), the Middle East (Arab League), Southeast Asia (Seato), and Central Asia (Cento). Such arrangements may be useful to promot economic cooperation and political adjustment among the members but in relation to outside states they do not differ from traditional alliances functioning in the system of power politics. The Charter provisions permitting them to engage in military action only in « collective self-defence » against armed attack (Art. 51) or with authorization of the United Nations Security Council (Art. 53) have been bypassed in practice. If their members do not feel strong cultural, social, economic or historic bonds, such regional groupings have survived only as long as their members have feared outside attack. Since the waning of the cold war after the death of Stalin, the Nato, Warsaw, Cento, and Seato alliances have tended to disintegrate in spite of the efforts of the United States with a strong anti-communist sentiment, to maintain Nato and, as an aid in the Vietnam war, to revive Seato. The Arab League existed mainly because of common opposition to the existence of Israel, an attitude less vigorous among the more distant Arab states and modified by all of them by the results of the brief war in June 1967. The Arab League, however, as well as the OAS, the Western European organizations and the OAU have cultural, economic, and historic grounds for cohesion in addition to needs for defence. These alliances, while perhaps at times useful in maintaining a balance of power, have, in some cases, contributed to maintaining arms races and weakening the United Nations because of their tendency to ignore the provisions of the Charter subordinating their military functioning to decisions and recommendation of United Nations organs. Regional arrangements may assist in adjusting relations among their members, but in external relations they cannot transcend the weaknesses of the system of power politics, and cannot contribute to the solution of the inter-regional problems which most endanger the shrinking world of the atomic age.

5. *Cosmopolitanism* - There seems to be little prospect within the next generation of establishing human solidarity and peace by converting all mankind to a religion or ideology teaching brotherhood. For thousands of years, at least since the time of the Buddha in the 6th century B. C. missionary religions or secular ideologies have taught by example, emotional appeal, or rational doctrine that universal peace and human cooperation might be established if all mankind accepted the particular teaching, thus doing away with the necessity of secular power. The missionary religions — Buddhism, Christianity, Islam and others — and the secular ideologies — cosmopolitanism, democracy, free trade, anarchism, socialism, and communism — have entertained this hope though they have usually recognized that temporal power would have to function until the millenium when all mankind was converted. During the Middle Ages, Christendom, administered by the Pope and the clergy, maintained considerable order in western Europe in the 13th century during which local war was greatly limited by observance of the Peace of God forbidding hostilities in holy places and the Truce of God forbidding hostilities on Sunday and two days before and after in each week. The Crusades by diverting belligerent urges to hostilities in the Middle East also assisted in maintaining peace in Europe. Christendom, however, could not wholly dispense with secular power and recognized the hierarchy of secular power from the Holy Roman

Emperor down. Islam also achieved some harmony in the Dar al-Islam in the days of the Great Khalifs but it taught that universal peace could only come after conquest or conversion of the Dar al-Harb, and to this end the Khalifs must exercise temporal and military as well as spiritual power. The cosmopolitanism of Marcus Aurelius, the 18th century savants of the age of enlightenment, the believers in natural law, government by consent of the governed, free trade, and Marxism, all recognized that civil government and the conduct of international relations would long require political and military power. While anarchists thought political power should be dispensed with immediately they hoped to hasten its demise by assassination. Marxists believed that the socialist millenium will come by historical determinism, but in the meantime it must be helped on the way by democratic procedures in each state or, according to the communists, by authoritarian « dictatorship of the proletariat » exerting power over the political, social and economic life in all states until the universal commune has been achieve and states have « withered away ».

It is notable that even among those ostensibly converted to a particular religion or ideology, heresy or « revisionism » has usually arisen justifying, in the opinion of many, an « inquisition » or forcible suppression. There seems little prospect that all men will be converted to any religion or ideology assuring universal peace and order in any foreseeable future or that if they were, heresies leading to conflict could be avoided. It seems likely that differences in environment, history, and culture will maintain differences in interests, opinions and beliefs which can lead to conflict among different sections of the human race. The problem of a universal system is to identify some values which all can share and some procedures which will prevent conflict from escalating to global war while preserving much self determination in nations and other human groups.

6. *International Organization* - We have considered national sovereignty restrained only by arms control to balance military power, centralization of power and responsibility in a few great states or a single state, world federation reaching down to the individual and with central power superior to that of any state, regional federations or unions, and universal conversion to a religion or ideology teaching human brotherhood. These models, respectively emphasizing the sentiments of nationalism, interventionism, federalism, regionalism, and cosmopolitanism, seem inadequate or unattainable within a generation. They are not likely to so change the system of power politics in time to eliminate its danger. We must look to international organization, manifesting the sentiment of internationalism which was considered by statesmen the best solution after the world wars of the 20th century (1).

This image of a universal system expressed in the League of Nations Covenant and the United Nations Charter includes aspects of all. Its members recognize that national states will continue to exist and that their power must be balanced, but not by a simple military balance between

(1) Many theoretical writers since Pierre Dubois in the 14th, King George of Podiebrad in the 15th, and Émeric Crucé in the 17th centuries have proposed systems of international organization generally for Europe and generally for protection against the Turks. Such a plan went into effect for a few years after the Napoleonic period.

two or more states (1). The Charter contemplates a much more complicated system of checks and balances involving the power of the United Nations itself — economic, political, legal, and military. It appreciates that states with superior political power will, and should, exercise more influence in world politics than others but this influence, recognized in the structure of the Security Council, should be moderated by the influence of other states in that body and by the influence of all in the General Assembly. It looks toward world federation by developing the relative power of the United Nations, by establishing its peace-keeping forces while the nations gradually disarm. Relationship with individuals is also to be established by achieving Covenants among states defining human rights and effective procedures for protecting them. The United Nations encourages regional arrangements to adjust economic and political relations among their members but insists that in external relations they must be controlled by the United Nations. It recognizes cosmopolitanism by insisting that certain universal values, expressed in the purposes and principles of the Charter must be accepted by all peoples and governments and provides procedures for their maintenance.

The law of the Charter rests on the international law which has developed during the past centuries but with important modifications especially in the use of force, as noted in the next section.

This international system, though formally accepted by nearly all states since World War I has not been adequately understood or observed. It did not prevent World War II or numerous smaller wars, though it has had some successes in both the inter-war period and the period since World War II. It stopped a number of incipient wars, and has implemented the principles of self-determination by eliminating empires. It has also forwarded social and economic progress through the Specialized Agencies and has made limited progress in protecting human rights. Public opinion has tended in practice to adhere to nationalism in all states and to interventionism in the great states but in theory, to cosmopolitanism or federalism. It has not in either theory or practice given consistent support to the middle ground of internationalism, a complicated concept, which, as noted, includes elements of all the others. Understanding and commitment to this system seems to be a necessary foundation for a satisfactory universal system. Understanding of the conditions of the world, and of the universal international system most likely to improve them is not, however, enough to meet the world's problems in the next generation. No system can endure and operate unless maintained by a system of law and continually adapted to new conditions by a system of politics.

(1) Q. WRIGHT, *Problems of Stability and Progress*, p. 74 ff., reprinting article in *Yale Law Journal*, August 1946, vol. 55. I suggested in this article: « Conditions will no longer permit a stable balance of power. Opinion will not yet permit a stable world federation. The drift may be, as it has been in similar situations in past civilizations, toward a new world war which might eventuate either in world empire or in such complete destruction that technology and science would decline in a new dark age. (...) The United Nations represents the limit to which present world opinion will go in the direction of world federation. It must not be sacrificed because it is not perfect. Rather it must be the foundation on which to build as evolving opinion permits » (pp. 77-78). This seems still true 23 years later. Arms control to deter nuclear war and education on the need for effective international law have progressed, but the danger that war will escalate has increased.

International law and international organization are essential elements in the foundations of a universal international system.

III. International Law

International law has developed for centuries by treaty, customs, and deduction from generally accepted principles of law by judges and jurists. It has assumed that sovereign states are its subjects, that it is designed to protect their interests, and that the major interest of each is recognition of its equality before the law and maintenance of its territorial integrity and political independence. The latter implies freedom in the exercise of its domestic jurisdiction and in the formulation and realization of its foreign policy through means which the law permits. This assumption implies general acceptance of the division of the world into states the boundaries of which are artificial products of history often corresponding to no geographic, cultural, linguistic, economic, strategic, or other rational criterion.

Because of this artificiality of the state, it has been suggested that man as an individual, or mankind as a whole, should be the subjects of universal law, and that the dignity of man, government by the consent of the governed, and human welfare should be the fundamental interests which it is designed to protect. The state, it is said, is for man, not man for the state. Each state, however, is dominated by a strong sentiment of nationalism demanding first of all respect for its territorial integrity and political independence, and the material power in the world is controlled by governments prepared to use it in response to this national demand. Peace and order in the world, therefore, requires that the interests of states be given consideration ahead of the interests of individuals or lesser groups, that universal law be international rather than cosmopolitan, and that protection of human rights and the self-determination of peoples proceed only gradually. Under present conditions « peace will serve justice better than justice will serve peace » (1). As peoples converge in culture and as nations become less self-centered, states may voluntarily accept territorial changes demanded by justice. They may also accept institutions which regionally or generally assure the dignity of man and government by consent of the governed. With the present assumptions of international law, however, aggression against territorial integrity or political independence of a state, or intervention in its domestic jurisdiction, even with such laudable aims as protection of human rights or suppression of civil strife, must be considered illegal unless justified by special circumstances recognized by international law (2).

Because the basic assumptions of international law are artificial and their conformity to fundamental conceptions of justice often controversial, if the law is to be observed, much of it must be expressed in rules of order as clear as are the rules of the road, so that states will be aware if proposed action is a violation and the law can, therefore, have a preventive as well as a remedial influence. The identity of sovereign states, the limits of a state's territory on land and sea, many procedural rules, and the concepts of aggression, intervention, and domestic jurisdiction should

(1) CHARLES DE VISSCHER, *Theory and Reality in Public International Law*, Princeton Univ. Press, 1957, p. 328.

(2) This follows from the terms of article 2 of the Charter.

be defined as clearly as possible. In other fields, such as the responsibility of states for violations of law, the denial of justice to aliens, the interpretation of treaties, and the duty of states to cooperate for economic and social progress, international law can only provide broad principles of justice, like due process of law, specific application of which depends on the facts of a particular situation. These fields of law can usually be examined with due deliberation by diplomacy or by international tribunals without the danger to peace involved in violation of the basic rules of order (1).

International law developed gradually mainly in the relations of European states, adapting itself to new conditions by the making of treaties, the growth of custom, and the interpretation and application of principles of justice by diplomats and arbitral tribunals. The great changes in technology and politics in the 20th century have required and induced more rapid changes in the law by the conclusion of many general treaties, sometimes called « international legislation » notably the League of Nations Covenant, the Kellogg-Briand Pact and the United Nations Charter. These treaties have radically changed the position of war and force under international law and have established organizations and procedures for the maintenance and development of the law.

The Charter declares that international disputes be settled by peaceful means (Art. 2, par. 3) and forbids the use or threat of force in international relations (Art. 2, par. 4) except in individual or collective self-defence against armed attack (Art. 51) or under authority of the United Nations (Art. 39). It also by implication forbids intervention in the domestic jurisdiction of any state (Art. 2, par. 7) except by the United Nations itself when necessary to maintain or restore international peace and security (Art. 39). It recognizes in principle the self-determination of colonial peoples (Art. 56, 73), respect for the protection of human rights and fundamental freedoms (Art. 56) and the duty to promote economic and social progress for all, especially the developing peoples (Art. 56). These principles, however, are treated as political rather than as legal, and are to be realized in law by the gradual processes of treaty making, and custom resulting from acquiescence in practice or in resolutions of the United Nations or the Specialized Agencies. The Charter also confers on the Security Council authority to make decisions binding on the members (Art. 25) to maintain or restore international peace and security (Art. 39) by provisional (Art. 40) or enforcement measures (Art. 41-42). In addition it confers wide powers to make recommendations, on the Security Council and on the General Assembly, for the pacific settlement of disputes and situations and on all other matters, political and legal, within the scope of the Charter (Art. 11, 14, 33-38).

International law has been criticised in some of the new states on the ground that some of its rules are based on custom which developed among European states when the new states were colonies. These customary rules, it is said, should not be binding on the latter because they had no opportunity to either accept or acquiesce in them. It has also been suggested that international law grew from principles of Greek philosophy, Roman law, or Christianity applied by the classical European jurists and that these sources might not conform to the philosophies and religions accepted in Asia and Africa. These criticisms, however, seem applicable to few of the rules, principles and standards of contemporary international law. Most of that law is deduced from the concept of the sovereign territorial state which the new states accept and the terms of the Charter and other general treaties to which the new states are generally parties. The actual concern of the new states rests on the suspicion that certain customary rules may give undue protection to property and concessionary rights of former imperial rulers or their nationals or to other European investors and concessionaries (1). In this field broad principles accepted by all states concerning denial of justice and compensation for nationalizations can be utilized to settle specific conflicts. There is usually a reciprocity of interest in these situations. The desire of the new states to control their resources and to encourage investment is balanced against the desire of the investing states to provide their nationals an opportunity to invest and to be assured of fair protection. Application of these general principles may often prove adequate as indicated by the debate over the initial clause of the Covenant of Human Rights concerning the right of a state to its natural resources. It is unfortunate that certain decisions of the International Court of Justice, especially the South West African decision, denying standing to Ethiopia and Liberia to pursue their claim that South Africa had violated its mandate, have given some support to the fear that European imperial concepts have had undue influence in the court. This, however, was contrary to the general trend of the Courts' judgments and advisory opinions, as illustrated in the Anglo-Iranian Oil Co. case and the advisory opinions on South West Africa. It is to be hoped that, as the personnel of the Court becomes more representative of all parts of the world, Asian and African states will not be deterred from accepting the compulsory juridiction.

(1) On distinction between « rules of order » and « principles of justice », see Q. WRIGHT, *The Rôle of International Law in the Elimination of War*, Manchester Univ. Press, 1961, chap. I.

(1) R. P. ANAND, « Rôle of the New Asian-African Countries in the Present International Legal Order » *Am. Journ. Int. Law*, 1962, vol. 56, p. 383 ff.

IV. International Organization

Political institutions for change of law and rights are no less essential for a universal international system than legal institutions to maintain the law. The system of diplomacy, the United Nations and the Specialized Agencies were designed to supply this need formerly met in some measure by war and other uses of force. With the latter in large measure outlawed, it was hoped that the opportunities given by these institutions for discussion, negotiation, resolution, acquiescence and acceptance would be adequate to effect necessary changes, even though subject to the principle of international law that a state is not bound by a new rule of law or a sacrifice of its rights without its consent. This rule has been thought to bar general legislative authority in the United Nations capable of changing the law by majority vote. The Security Council can make binding decisions for the maintenance or restoration of international peace and security (Art. 39), subject, however, to the great power veto (Art. 27). Quasi-legislative authority may develop gradually from acceptance of General Assembly resolutions. They may establish

rules of customary international law if generally acquiesced in. This process is useful to supplement the process of formal treaty-making which establishes formal law, binding, however, only on the states which ratify the treaty. Application of the principle of effectiveness in the interpretation of the Charter and other treaties may also contribute to the development of international law. This principle gives weight to the purpose of the treaty in applying it, in contrast to the principle of restrictive interpretation holding that a sovereign state is presumed to have consented to a minimum limitation of its sovereignty in ratifying a treaty. The principle of effectiveness has been useful in the United Nations in developing the power of the General Assembly to recommend on disputes or situations when the Security Council was stalled by a veto and of the Security Council to make decisions on the theory that abstention is not veto. The same problem was faced in the United States and the Supreme Court's application of the principle of effectiveness in interpreting the Constitution doubtless accounts for the capacity of that instrument to function, in spite of the changes of conditions which have occurred since it went into effect in 1789.

Unfortunately states demanding change, especially territorial change have not always been content to utilize the peaceful procedures of the United Nations and have occupied territory and used force to compel acceptance of treaties contrary to their obligations under the Charter, the Kellogg-Briand Pact, and other treaties. It is to be hoped that growing awareness of the needs of the world for peace and for adequate international law and organization will develop confidence in the United Nations procedures for peaceful adjustment and increased willingness of states to accept its resolutions for the settlement of political disputes and the development of international law.

Conclusion

I conclude that the foundations for a universal international system are to be found in education to develop more general understanding of the conditions of the present and emerging world, in commitment of peoples and governments to the international system established by the Charter, and to the maintenance and development of the existing universal legal and political institutions by appropriate policies and actions. People must be prepared to recognize that their major national interests, especially their interests in security, can only be maintained in the atomic age in a secure world, and that a secure world under present conditions and probable conditions for a considerable future, requires general commitment to the image of an international world. Such a world implies some qualification of sovereignty by effective law.

The law and organization to realize this image is in need of continuous improvement. All actual states should be members of the United Nations, thus making it possible for the United Nations to function in Central Europe and the Far East where it is now hampered by the absence of Germany, Mainland China, Korea, and Vietnam. All states should observe their obligations under the Charter to settle their international disputes peacefully, to refrain from threat or use of force in international relations, and to refrain from intervention, military or subversive, in the domestic affairs of other states especially those beset by civil strife. If governments,

especially those of the great powers, should, with the support of the opinion of their people, of the values of the nation and of the law of the state, perceive that they would serve their long run national interests best by observing the obligations to which their state is committed by international law and the Charter, the United Nations would be able to function as anticipated at San Francisco.

The preference of the powers for unilateral intervention, as by Britain and France at Suez (1956), by the Soviet Union in Czechoslovakia (1948, 1968) and Hungary (1956), by the United States in Cuba (1962), San Domingo (1963), and Vietnam (1964), and by China in India (1962) have seriously impaired confidence in the United Nations, have been of doubtful assistance to the intervening states, and have induced smaller states to ignore their obligations as India in Goa (1962), Indonesia in Malaysia (1962) and Middle Eastern states in sporadic hostilities from 1949 to 1967.

The procedures of the United Nations should be strengthened for the pacific settlement of politic disputes, for establishing a cease-fire if hostilities occur, for preventing foreign intervention in civil strife, for facilitating United Nations intervention if civil strife threatens to escalate into international hostilities, and for maintaining an adequate peace force for this purpose and for policing cease-fire lines. Most important is the need to solve the financial problem of the United Nations. The General Assembly's authority in this field supported by the Court should be accepted by all members.

The United Nations has been more successful in stopping hostilities than in preventing them by settling the underlying problem. This is witnessed by the cease-fire lines, supposed to be temporary, especially in the case of Vietnam, but which remain as inadequate barriers to hostilities in Germany, the Oder-Neisse line, Kashmir, the Straits of Formosa, Korea, Vietnam, the Middle East, and Cyprus.

Some such changes can be developed by interpretation and practice, and others by Charter amendment like those adopted for increasing representation of new states in the Security Council. The foundations exist, however, in the formal acceptance by states of the purposes, principles, organs, and procedures of the United Nations. The problem is to build on these foundations, so that the international system which they contemplate will supersede in practice, as well as in theory and law, the inadequate system of power politics which has led to two major and many lesser wars in the 20th century. Salvation of the world from the holocaust of nuclear war may provide the necessary inducement.

POSTSCRIPT

Since writing this article I have had the opportunity to read the contributions to the Comprendre study of « the United Nations, the State and Public Opinion » in Vol. 31-32. These studies appear to converge in recognizing that the United Nations has not fulfilled the purposes of the Charter to « save succeeding generations from the scourge of war », that achievement of this purpose is necessary for the survival

of man in the shrinking, interdependent world in which all parts are vulnerable to sudden destruction by missile borne nuclear weapons, and that the history of human warfare, the persistence of the past causes of war such as demands for national sovereignty, conflicts of ideologies about the proper structure of human society, and the feebleness of the sentiment of loyalty to mankind, justify pessimism about man's future.

The essayists, however, usually end with hope that man's rationality may triumph over these obstacles and suggest action which might be taken to maintain peace. Most of them perceive that education must create a world public opinion, alive to the dangers which the human race faces and the need for change in the system of international relations if these dangers are to be avoided.

There are, however, differences among the essayists on the character of the necessary changes in the present system of international politics, and the procedures by which they should be achieved. Is an effective world organization impossible until all states have become republics, as maintained by Montesquieu and Kant, or until all have become socialistic as Marx asserted; or is peaceful coexistence of states with different social, economic and political systems the proper goal as asserted by Khruschev? Must an effective world organization include all states as John Foster Dulles once asserted or should it be composed only of states which the majority regard as « peace loving » or as sufficiently technologically advanced and democratic to cooperate? Must an effective structure for peace assume that only states are the actors and beneficiaries or must it assume, as have the great religions and the ideologies of democracy and socialism, that man is prior to the state, that the purpose of the structure must be to protect the dignity of man, and to subordinate national loyalties and state sovereignty to the interests of mankind? Should federations of states with a degree of cultural similarity in the great regions of the world be the actors in world politics and would a structure of the world built about them make for peace as suggested in the opening essay by Carl Friedrich? Is world peace dependent on a centralization of military power capable of enforcing law upon the member states, and upon individuals within them, as believed by empire-builders in the past and by some advocates of world governement today, or can the power of world opinion and world law maintain peace even though military forces remain divided among the nations? Can the governments, under the stimulus of public opinion, develop the United Nations sufficiently to perform its functions or must a world conference of peoples be summoned to realize « the revolutionary idea of peace » as proposed by Umberto Campagnolo?

The contributors to the symposium differ on these questions, but most of them believe that the only feasible world structure for peace is an *international* organization which assumes the continued existence of nation states but subordinates their sovereignty to an international law which requires states to settle their disputes peacefully, to refrain from the use of force in international relations, and to respect one anothers territorial integrity and independence in the exercise of domestic jurisdiction. The United Nations, they recognize, is such a structure, and its failure to prevent the wars which have occurred since World War II and to eliminate the danger of nuclear war, they attribute partly to flaws

in its constitution such as the veto, partly to the failure of the member states to recognize their interest in observing their Charter obligations, but most of all to the lack of a world public opinion convinced that nation-states, valuable as they are for many purposes, can not give security through the threat or use of military force and that governments must observe Charter principles and obligations and be guided in their foreign policies by Charter purposes.

I was not surprised to discover that the contributors from the Soviet Union doubted whether a transformation of the United Nations to a federal organization of the world, as proposed in the well known Clark Sohn plan, is feasible, and while convinced that universal acceptance of communism would assure peace in the world, recognized that for a long time the peaceful coexistence of states with different social and economic systems is the goal to be striven for. Bart Landheer from the Netherlands also suggested that analogies to national states had played too great a part in thinking about the proper structure for the world, and while a change of the present system is needed, it should be based at first on a stable balance of power, rather than a hierarchical organization.

The writers are together in believing that the peoples of the world must understand their solidarity, their common danger, the improbability of any technological advance assuring security by direct defense or mutual deterrence, and that world public opinion must play a major rôle if governments and international agencies are to manifest the determination and the ingenuity to surmount the difficulties presented by sentiments of nationalism, claims of sovereignty, cultural diversities, ideological conflicts, rival military forces, and the exclusion of some states from world organizations, and to develop the United Nations into an instrumentality of peace in which all can have confidence.

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THE UNITED STATES AND SELF-DETERMINATION: PERSPECTIVES ON THE WILSONIAN CONCEPTION

By Michla Pomerance *

I.

Introduction

Ever since the principle of self-determination entered the lexicon of international politics during World War I, American foreign policymakers have had to contend with problems revolving around that concept. The need to favor one or another claimant, each waving the banner of self-determination and invoking the "right to determine its own fate," continues to present dilemmas, often extremely troubling ones, for U.S. decision-makers. Examples from recent history come readily to mind. The entire post-World War II decolonization process entailed an endless series of such dilemmas, and even after formal decolonization was all but completed, such nagging issues as Katanga, Biafra, and Eritrea remained, not to mention the problems of South Africa, Northern Ireland, the Middle East, and Indochina. Indeed, even within America's own imperial domain, the United States was faced with the conflicting demands of the Puerto Rican nationalists and the majority of the Puerto Rican electorate, the claims of the Marianas as against those of Micronesia as a whole,[1] and demands for cultural autonomy on the part of diverse ethnic groups.

Not surprisingly, perhaps, the latter-day difficulties with the principle were largely adumbrated in the Wilsonian period, and it is in an analysis of the Wilsonian conception and of the efforts to implement it that one may find the roots of the persistent conundrum surrounding self-determination. Hailed by Wilson as a guiding principle (if not the linchpin) of the peace, self-determination in practice entailed complexities which Wilson, by his own admission, had never dreamed of.[2]

The term "self-determination" has been rightly associated in the popular mind with Woodrow Wilson, although, in fact, he cannot claim true paternity but only foster-fatherhood. In origin "a metaphor borrowed

* The Hebrew University of Jerusalem. This study was completed at the Woodrow Wilson International Center for Scholars in Washington, D. C., where the author was a Fellow during 1974–1975.

[1] *See* the report on the recent plebiscite, conducted in the Marianas and resulting in a more than three to one vote in favor of a commonwealth-style association with the United States on the Puerto Rican model. Washington Post, June 18, 1975; and *cf.* the critical editorial, *id.* June 21, 1975.

[2] *See, e.g.,* Wilson's addresses of September 6, 1919 at Des Moines and September 18, 1919 at San Francisco, in 2 Ray Stannard Baker and William E. Dodd (eds.), War and Peace: Presidential Messages, Addresses, and Public Papers (1917–1924) 17–18, 259–60 (1927). Hereinafter cited as Baker and Dodd, War and Peace.

from the language of metaphysical speculation,"[3] the expression gained political currency in Socialist circles from the turn of the century on, but it did not enter into general vogue until about 1917.[4] Popularization of the term even then owed more to the Bolsheviks than to Wilson,[5] and in no small measure, Wilson's espousal of the principle of self-determination as a central element of the peace was reactive to both Bolshevik initiatives and wartime exigencies.[6]

Nevertheless, the concept of self-determination as a principle of the "consent of the governed" had been embraced by Wilson much earlier (his own favored expression was "self-government"[7]) and he had referred to it in relation to the war as early as November 4, 1915.[8] Moreover, although he does not appear to have used the term "self-determination" publicly until February 11, 1918 (contrary to popular belief, the expression nowhere appears in his Fourteen Points), his addresses of May 27, 1916 and January 22, 1917, as well as his early wartime addresses, are shot through with the ideas which were later to be subsumed by him in the catch-all phrase "self-determination." Thus, "every people," he had said, "has a right to choose the sovereignty under which they shall live."[9] And "no peace can last, or ought to last, which does not recognize and accept the principle that governments derive all their just powers from the consent of the governed, and that no right anywhere exists to hand peoples about from sovereignty to sovereignty as if they were property."[10] Above all, Wilson's reputation as the champion of the principle of self-determination rests on the fact that, of all the peacemakers at Versailles, he alone publicly proclaimed the principle as the lodestar of the peace, and, at least initially, he was believed.

The Wilsonian conception of "self-determination" may, obviously, be viewed in a myriad of ways, depending on the angle of the viewer. However, three general perspectives appear to have dominated the literature—

[3] Arnold J. Toynbee, *Self-Determination*, THE QUARTERLY REV. (London), No. 484, at 318 (1925). The "language" from which it was borrowed was German, and the term used was "*selbstbestimmungsrecht.*"

[4] Wentworth B. Ofuatey-Kodjoe, "Self-Determination in International Law: Towards a Definition of the Principle" (Ph.D. dissertation, Columbia University, 1970), at 41–42.

[5] The Bolshevik slogan was: "Peace without annexations and indemnities on the basis of the self-determination of peoples." The first official statement of war aims to employ the term "self-determination" was made by the Russian Provisional Government on April 9, 1917, apparently as a result of Soviet pressures. ARNO J. MAYER, POLITICAL ORIGINS OF THE NEW DIPLOMACY 1917–1918, at 75 (1959).

[6] *See, generally, id.* 341–44, 352–53.

[7] *See, e.g.*, 1 BAKER AND DODD, WAR AND PEACE, *supra* note 2, at 65, 66, 98. For Wilson's thought on self-government, see generally, HARLEY NOTTER, THE ORIGINS OF THE FOREIGN POLICY OF WOODROW WILSON, *passim*, especially 651–52 (1937).

[8] In that address he emphasized America's belief in "the right of every people to choose their own allegiance and be free of masters altogether." 1 RAY STANNARD BAKER AND WILLIAM E. DODD (eds.), THE NEW DEMOCRACY: PRESIDENTIAL MESSAGES, ADDRESSES, AND OTHER PAPERS, 389 (1926). Hereinafter cited as BAKER AND DODD, NEW DEMOCRACY.

[9] 2 *id.* 187.

[10] *Id.* 411; see also 414.

> pursuant to the principle of self-determination, and also such territorial readjustments as may in the judgment of three fourths of the Delegates be demanded by the welfare and manifest interest of the peoples concerned, may be effected, if agreeable to those peoples; and that territorial changes may in equity involve material compensation. The Contracting Powers accept without reservation the principle that the peace of the world is superior in importance to every question of political jurisdiction or boundary.[113]

The provision underwent several changes, in one of which the projected territorial adjustments were made dependent on the consent also of "the States from which the territory is separated or to which it is added," [114] but ultimately it was dropped altogether, and Article X in its final form referred only to respect for the territorial integrity and existing political independence of the Members of the League. Wilson's attempt to introduce the principle of self-determination in the Covenant had met with objections even on the part of his own advisers. Thus, David Hunter Miller had warned that since the Peace Conference could not possibly satisfy all claims, "such general provisions will make that dissatisfaction permanent, will compel every Power to engage in propaganda and will legalize irredentist agitation in at least all of Eastern Europe." [115] And as for the alleged superiority of world peace to every question of political jurisdiction or boundary, Miller queried: "if a country cannot fight for its territorial integrity, why should it be regarded as the subject of guarantees?" [116]

Despite this deletion of the principle of self-determination from the Covenant, Wilson proceeded to speak as if it had in fact been incorporated, maintaining his confidence in the League as the ultimate arbiter of claims to self-determination. "There is not an oppressed people in the world," he stated, "which cannot henceforth get a hearing at the forum, and you know, my fellow citizens, what a hearing will mean if the cause of those peoples is just." [117] Moreover, he took solace in the fact that Article X of the Covenant spoke only of "external" aggression, explaining that "every man who sat at that board felt that the right of revolution was sacred and must not be interfered with." [118] But the "right of revolution" merely returned the issue of self-determination to where it had always been—in the realm of self-help—while Wilson had initially wished to transform the right into one that would be confirmed or denied by international sanction.

It might be noted that Wilson's efforts to square the circle and reconcile territorial integrity with claims to self-determination have been repeated, with no more success, in the United Nations. Thus, the famous Declaration on Colonialism (General Assembly Resolution 1514) in effect

[113] 2 DAVID HUNTER MILLER, THE DRAFTING OF THE COVENANT 12–13 (1928).

[114] *Id.* 99.

[115] *Id.* 71.

[116] *Id.* 71–72. He also noted that the United States had not acted on that principle in rejecting the suggestions for U.S.-Mexican boundary rectifications contained in the Zimmerman note.

[117] 1 BAKER AND DODD, WAR AND PEACE, *supra* note 2, at 617; see also 2 *id.* 9, 244.

[118] 1 *Id.* 632.

simply restates the dilemma by incorporating both the principles of self-determination and territorial integrity.[119] The question of *whose* claim to self-determination will receive priority over *whose* claim to territorial integrity remains unresolved. And while the "territorial integrity" claims of salt-water empires have been viewed as lacking in legitimacy, future problems of "self-determination *vs.* territorial integrity" will present less clear-cut and more difficult aspects.[120]

If, as Wilson himself realized, absolute self-determination was impossible of achievement, how were those "selves" deprived in the present or future of their "determination" to be satisfied? The solution he suggested was the international protection of minorities which, in practice, raised as many difficulties as it solved.[121] First of all, the minorities regime was not universally applied: all the Great Powers who harbored minorities were exempt, including Italy, Germany, and France, and this aggravated the sense of grievance of those states upon which minority obligations had been imposed. They viewed the minorities' guarantees as undue restrictions of *their* "self-determination" and sovereignty.[122] Secondly, there was the problem of steering the minorities regime between the Scylla of too little autonomy to satisfy the minorities' desires for maintaining their separateness and the Charybdis of so large a measure of autonomy and "positive" rights as to create a "state within a state."[123] And finally, of course, there loomed the problem of implementation and enforcement.

In respect of the minorities regime, Wilson's position was interesting. He had a genuine concern for minorities in Europe, and this was reflected in the initiatives he took to get clauses on minorities and religious liberties included in the Covenant,[124] as well as in his role as prime mover of the minority regimes that were adopted.[125] He deemed protection of minorities to be an essential prop of the future peace. Yet, as far as the United States itself was concerned, he frequently exhibited impatience and hos-

[119] The more recent Declaration on Principles of International Law Concerning Friendly Relations (G.A. Resolution 2625(XXV) of October 24, 1970) continues this pattern.

[120] *See* Michla Pomerance, *Methods of Self-Determination and the Argument of "Primitiveness,"* 12 CANADIAN YEARBOOK OF INTERNATIONAL LAW 38–66 (1974).

[121] *See, generally,* JULIUS STONE, INTERNATIONAL GUARANTEES OF MINORITY RIGHTS (1932) and INIS L. CLAUDE, JR., NATIONAL MINORITIES: AN INTERNATIONAL PROBLEM (1955).

[122] *See, e.g.,* Manley O. Hudson's comments in HOUSE AND SEYMOUR, *supra* note 40, at 213; and see Wilson's remarks in 1 BAKER AND DODD, WAR AND PEACE, *supra* note 2, at 306.

[123] *See* the discussion of "negative" and "positive" minority protection in CLAUDE, NATIONAL MINORITIES, Part I, *supra* note 121. *See also* HOUSE AND SEYMOUR, *supra* note 40, at 217, 474.

[124] *See* 1 MILLER, *supra* note 113, at 267–69; 2 *id.* 91, 105, 141, 145, 154, 237, 273–74, 282, 283, 286–87, 307, 315, and 323–25; and 3 BAKER, *supra* note 29, at 110, 128–29, and 150. Japan's introduction of a racial equality amendment led to the ultimate defeat of the article. 1 MILLER, *supra* at 269; FIFIELD, *supra* note 58, at 158–69.

[125] CLAUDE, NATIONAL MINORITIES, *supra* note 121, at 14; TILLMAN, *supra* note 13, at 217–19.

WHO GUARDS THE GUARDIANS: THIRD PARTIES AND THE LAW OF ARMED CONFLICT

By David P. Forsythe *

The Geneva Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law in Armed Conflicts continues its attempts to supplement the 1949 Geneva Conventions, and in so doing to make the bulk of *jus in bello* consonant with factual reality. The first session of the Conference in 1974 provisionally adopted one highly important article out of 137 presented to the Conference by the International Committee of the Red Cross (ICRC).[1] The second session in 1975 provisionally adopted 77 articles pertaining to such important subjects as the definition of a noninternational armed conflict, the protection of civilians and civilian goods, medical transport, environmental protection, and protection of journalists.

Also among the subjects provisionally treated by the 1975 session was that of the Protecting Power system—the rights and duties of neutral states or their substitutes to supervise the implementation of the law of international armed conflict. This is a crucial part of the law. The debate at the 1975 session on the Protecting Power system is one indication of the strength of the movement to guarantee that the law on the books does indeed become the applied law in war. That debate also reflects the strength of the movement to give nonstate third parties, such as the ICRC or the United Nations, the right to supervise application of the law. These are two sides of the same coin. Moreover, in addition to formal supervision through the Protecting Power system, other supervisory mechanisms are affected by the articles adopted at the 1975 session. All of these de-

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The author was an observer at the 1975 session of the Geneva Conference on Humanitarian Law, representing the Joint Committee for the Re-appraisal of the Red Cross. This article is the sole responsibility of the author, who benefited from comments on an earlier draft by Red Cross and governmental participants in that Conference. The author is especially indebted to Col. G. I. A. D. Draper and Professor Georges Abi-Saab for their comments.

[1] The ICRC drew up, in consultation with individuals and governments, two draft protocols to the 1949 Conventions, the first pertaining to international armed conflict, the second to noninternational armed conflict. The one highly important article provisionally adopted in committee, but not formally adopted in conference plenary, pertains to the material field of application of Protocol I, that is, the definition of an international armed conflict. For a review of the first session, see D. Forsythe, *The 1974 Diplomatic Conference on Humanitarian Law: Some Observations*, 69 AJIL 77 (1975); *cf.* R. Baxter, *Humanitarian Law or Humanitarian Politics: The 1974 Diplomatic Conference on Humanitarian Law*, 16 HARVARD INT. L. J. 1 (1975); and Suckow, *The Development of International Humanitarian Law: A Case Study*, 12 R. INT. COMMN. JURISTS (1974).

velopments relating to the supervision of the law of armed conflict will be the subject of this article.

States, especially those engaged in armed conflict, are under the primary legal obligation to apply the law.[2] States remain, in effect, the guardians of the law. But once again in 1975 a strong sentiment existed concerning the need to guard the guardians.

I.

The Background to 1975

The practice of supervising the law of armed conflict has been little known, little understood, and little studied. It is thus useful to review briefly certain points concerning the background to the 1975 debates.

Legal Evolution

The institution of Protecting Powers in general international law goes back centuries to the practice of powerful states' asserting the right to protect certain citizens of weaker states in a third state of their residence.[3] By World War I, it seems to have been the case that the role of the Protecting Powers was accepted in customary international law, that a state of origin had the right to protect its nationals in the state of residence through a Protecting Power, and that "the State of Residence must accept such protection." [4]

As far as the law of armed conflict is concerned, Protecting Powers had no special rights until perhaps 1870, and for some 60 years thereafter these rights were not clear. In World War I, Protecting Powers did operate to some extent, but in view of the interstate frictions that could be produced by energetic Protecting Power action, "it is not surprising that Protecting Powers generally avoided anything spectacular in their work of safeguarding enemy persons and interests." [5]

What is important for later legal developments is that, in addition to the work done by Protecting Powers during World War I, the ICRC and National Red Cross Societies provided unofficial supervision of some of the law, usually through entering places of detention in order to provide material and medical assistance to individuals.[6] In this process, Red Cross

[2] 1949 Geneva Conventions, Art. 1. 6 UST 3316; TIAS No. 3364; 75 UNTS 135; 47 AJIL Supp. 119 (1953).

[3] J. Pictet, Geneva Conventions of 12 August 1949: 3 Commentary 92–103 (1960).

[4] F. Siordet, The Geneva Conventions of 1949: The Question of Scrutiny 5 (1953).

[5] *Id.* at 8. *See further* Franklin, Protection of Foreign Interests (1946); H. S. Levie, *Prisoners of War and the Protecting Power*, 55 AJIL 374 (1961); G. Draper, *Implementation of International Law in Armed Conflict*, 48 Int. Rel 40 (1972).

[6] The ICRC was the original agency in the international Red Cross movement. Composed only of Swiss nationals, the ICRC has been the primary Red Cross actor in situations of armed conflicts and for the protection of detainees in general. National Red Cross Societies, once recognized by the ICRC, have tended to act independently.

officials made observations to the detaining authorities regarding the standards of detention. This supervision of the law "was unofficial but not ineffective." [7] "If the lot of prisoners had been slightly improved, and the Hague Regulations had not been entirely ignored, it was in many cases because there had been some sort of scrutiny, in fact if not in law." [8]

On the basis of experience in World War I, the ICRC proposed a mandatory system of third party supervision to the 1929 Diplomatic Conference on Prisoners of War, with itself in a central position:

> The Contracting Governments, in case of war, shall mandate to the ICRC the mission of appointing roving Commissions, composed of citizens of neutral States, whose duty it shall be to ensure that the belligerents make regular application of the provisions of the present Convention.[9]

This proposal the 1929 Conference rejected, but it adopted a nonmandatory system. This was the first treaty provision pertaining to Protecting Powers in the law of armed conflict. Article 86 provided that ". . . a guarantee of the regular application of the present Convention will be found in the possibility of collaboration between Protecting Powers . . ." [10] This wording was indeed "slightly comic," [11] the words being a product of states' efforts to avoid a precise legal obligation while recognizing the need for supervision. The 1929 Conference also affirmed in Article 88 the right of the ICRC to practice humanitarian protection and assistance with the consent of the parties.

During World War II, Protecting Powers again operated to some extent, with Switzerland or Sweden becoming the Protecting Power for almost all belligerents. Again, the ICRC supplemented the activity of Protecting Powers by its traditional humanitarian work of protection and assistance to individuals.[12]

After that war, the 1949 Geneva Conference again took up the subject of scrutiny. Three changes were made: (1) Protecting Powers were provided for not only in the Prisoner of War Convention but in all four Conventions produced by that Conference; (2) the activity of Protecting Powers was made mandatory; and (3) official substitutes were mentioned for the first time.

With regard to the function of Protecting Powers, Common Article 8/8/8/9 states, in part, "The present Convention shall be applied with the co-operation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict . . . The said

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While the ICRC has frequently operated on both sides of an international armed conflict, National Red Cross Societies have basically operated directly with regard to conationals. A brief review of Red Cross activity pertaining to armed conflicts and other forms of conflict is found in D. FORSYTHE, PRESENT ROLE OF THE RED CROSS IN PROTECTION (1975).

[7] SIORDET, *supra* note 4, at 9.

[8] *Id.* at 11.

[9] Quoted in *id.* at 12.

[10] Quoted in PICTET, *supra* note 3, at 94.

[11] SIORDET, *supra* note 4, at 15.

[12] *See* ICRC, REPORT OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS ON ITS ACTIVITIES DURING THE SECOND WORLD WAR, (1948) three volumes.

delegates [of Protecting Powers] shall be subject to the approval of the Power with which they are to carry out their duties."

With regard to official substitutes, Article 10 of the Prisoners of War Convention provides:

> The High Contracting Parties may at any time agree to entrust to an organization which offers all guarantees of impartiality and efficacy the duties incumbent on the Protecting Powers by virtue of the present Convention.
>
> When prisoners of war do not benefit or cease to benefit, no matter for what reason, by the activities of a Protecting Power or of an organization provided for in the first paragraph above, the Detaining Power shall request a neutral State, or such an organization, to undertake the functions performed under the present Convention by a Protecting Power designated by the Parties to a conflict.
>
> If protection cannot be arranged accordingly, the Detaining Power shall request or shall accept, subject to the provisions of this Article, the offer of the services of a humanitarian organization, such as the International Committee of the Red Cross, to assume the humanitarian functions performed by Protecting Powers under the present Convention.[13]
>
> . . . .

Substitutes for Protecting Powers were written into the law, not because neutral states were viewed as ineffective, but because there might not be any neutral states in World War III and because in World War II Protecting Powers had ceased to function when a belligerent state went out of "legal or actual existence." [14]

Once again, aside from the tasks assigned to Protecting Powers and their official substitutes, the ICRC was authorized to carry out its traditional tasks with the consent of the parties. Article 9 of the Prisoners of War Convention reads: [15]

> The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, subject to the consent of the parties to the conflict concerned, undertake for the protection of prisoners of war and their relief.

Moreover, the ICRC was authorized by the 1949 Conventions not only to become an official substitute under certain conditions (Article 10/10/10/11) and an unofficial substitute (Article 9/9/9/10) but also to engage in such specific tasks as operating the Central Information Agency under Article 140 of the Civilians Convention. Among its functions was the *right* to visit places of detention, whether or not a Protecting Power or official substitute

[13] Article 8 in the first three Conventions of 1949 becomes Article 9 in the Fourth. Article 10 in the first three becomes Article 11 in the Fourth.

[14] PICTET, *supra* note 3, at 111.

[15] The wording of Common Article 9/9/9/10 is slightly different in each Convention. PICTET, *supra* note 3, at 106, observes the connection between this general article and other articles mentioning specific functions of the ICRC. This same connection can be established for the Civilians Convention as well.

was designated by belligerents (Article 126 of the Prisoners of War Convention; Article 143 of the Civilians Convention). These ICRC visits were to occur *automatically*, subject only to the detaining state's consent to the particular ICRC delegate, but not to the visits in principle.[16]

All of these provisions in the 1949 Conventions covered only international armed conflicts, not noninternational armed conflicts.[17] Therefore, with regard to international armed conflict, the 1949 treaties provided the basis for a complex process of supervision, both de jure and de facto. There were three possible forms of official supervision: (1) belligerent-appointed Protecting Powers, (2) belligerent-designated official substitutes, and (3) automatic introduction of an official substitute like the ICRC. There were two forms of unofficial supervision, one limited, one general: (1) the automatic introduction of the ICRC to perform specific humanitarian visits to detainees and tracing; and (2) the possible introduction of Red Cross agencies to perform traditional humanitarian tasks of an unspecified nature. Unofficial supervision was a byproduct of Red Cross protection and assistance to individuals.

Almost all the states in the world have accepted the 1949 Conventions, with their provision for official supervision in Common Articles 8/8/8/9 and 10/10/10/11 and for unofficial supervision in Common Article 9/9/9/10 and otherwise.[18]

Recent Application

Despite widespread acceptance of the idea of official supervision of the law of international armed conflict as found in the 1949 Geneva Conventions, states have not generally given effect to or accepted that official

[16] The automatic nature of ICRC detention visits has not attracted much attention. In part, this is because the commentary on these provisions is not completely clear. For example, in the official commentary on the Third Convention, at 106, there seems to be an implication that Article 126, paragraph 4, on visits to detainees is to be read in conjunction with Article 9 requiring the consent of the Detaining Power. By contrast, at 606, it is said that visits are performed "to some degree automatically." While it is not clear in the text, "to some degree automatically" refers to state consent for individual ICRC delegates only, not to consent for the visit. This is the ICRC view, as established through interviews. *See further* PICTET, *supra* note 3, at 106, 602–06. The commentary is particularly unclear at 605, para. 1. The commentary on the Fourth Convention is similar.

Another reason that the automatic nature of these visits has received so little attention is that the ICRC does not emphasize clear legal distinctions in much of its work. It is more interested in protecting and assisting victims than in differentiating traditional activities from specific tasks, and both from other possible bases of ICRC action. This approach is, of course, quite acceptable to states which are not eager to admit automatic rights to third parties.

[17] The Protecting Power system, formally and narrowly defined, pertains only to international armed conflict as regulated by the four 1949 Conventions. If a noninternational armed conflict exists, then only Common Article 3 of the 1949 Conventions applies. This article states, in part, "[a]n impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict." There is no reference to a Protecting Power or a substitute.

[18] Socialist reservations are analyzed at p. 52 *infra*.

supervision in specific situations during the period of 1949–1974. Supervision in international armed conflicts remains for the most part unofficial through the ICRC.

Since 1949, Protecting Powers have been appointed in three situations of conflict. In two situations the ICRC has attempted to use Article 10 to obtain the introduction of an official substitute for a Protecting Power. In no situation has an official substitute actually functioned as such, either by belligerent appointment or by automatic introduction.[19] In numerous situations the ICRC has exercised humanitarian protection and assistance—and unofficial supervision.

The legal basis of the ICRC involvement, as well as exactly what activity was being supervised, was not always agreed upon. The ICRC could claim either "specific tasks" or "traditional activities." Or in situations in which the legal nature of the conflict was in controversy, it could claim that its actions fell under Common Article 3 of the 1949 Conventions pertaining to noninternational armed conflicts, or even under its own statutes and its right of initiative to offer humanitarian help in any situation.[20]

It is useful to take a closer look at the three cases of Protecting Powers and the two cases of attempted introduction of an official substitute.[21]

Suez Affair: When France, Israel, and the United Kingdom attacked Egypt in 1956, Switzerland was appointed the Protecting Power for Egypt and France—and also between Egypt and the United Kingdom, the latter of which had not ratified the 1949 Conventions but agreed to apply them. Israel attempted to appoint the Netherlands as its Protecting Power, but Egypt never gave its consent. The ICRC was active under Common Article 9/9/9/10 and other provisions relating to specific tasks.

Two further points are relevant to this present inquiry. First, the United Kingdom, despite having a Protecting Power, turned to the ICRC in an effort to protect and assist the British community in Egypt. (This involved improving communications, insuring that personal daily needs were met, planning for a possible civilian evacuation, and checking on detainees.) Secondly, the ICRC, in trying to improve the application of the Geneva

[19] It is important to recall that Common Article 10/10/10/11 of the 1949 Conventions states that the parties "shall request or shall accept. . . ." Thus according to that law, an offer of services by the ICRC legally entails an automatic acceptance by a state, if no other supervision is provided under Common Articles 8/8/8/9 and 10/10/10/11.

[20] For example, in the situation of violence in Northern Ireland in the 1970's, the ICRC was permitted by the British Government to visit certain detainees as long as there was no reference to Common Article 3 or the Geneva Conventions as a whole. This ICRC presence in a violent situation, without reference to the law of armed conflict, is a common phenomenon; *See* FORSYTHE, *supra* note 6, *passim*.

[21] The three cases of Protecting Powers are mentioned in J. PICTET, LE DROIT HUMANITAIRE ET LA PROTECTION DES VICTIMES DE LA GUERRE (1973). A concise review of the reasons for not using the Protecting Power system since 1949 is found in Abi-Saab, *Le Renforcement Du Système D'Application Des Régles Du Droit Humanitaire,* 12 REV. DE DROIT PÉNAL MILITAIRE ET DE DROIT DE LA GUERRE 223–40, *especially* at 227–29 (1973). The statements in the text reflect the results of interviews carried out by the author in Geneva during 1972–1975.

Conventions, offered itself to Egypt and Israel as an official substitute for a Protecting Power and made specific reference *inter alia* to the third paragraph of Common Article 10/10/10/11 of the 1949 Conventions. Thus the ICRC sought to have itself automatically accepted as an official substitute. Israel responded with a conditional affirmation, subject to reciprocity by Egypt. Egypt never replied to the original or subsequent ICRC communications.

Goa Affair: When India attacked the Portuguese enclave of Goa in 1961, it had already appointed Egypt as its general Protecting Power. Portugal had appointed Brazil in this context of broken diplomatic relations. The appointments were agreed to. The ICRC became involved under Common Article 9/9/9/10 and provisions relating to specific functions. Portugal, despite having Brazil as a Protecting Power, turned to the ICRC in order to guarantee protection and assistance to detained and wounded Portuguese.

Bangladesh Affair: When violence erupted in what was then East Pakistan in 1971, the Government of Pakistan first refused entry to the ICRC, then permitted a Red Cross tracing service for missing persons under the ICRC's right of initiative. When violence continued and the Indian army intervened, the ICRC expanded its activities of protection and assistance under Common Article 9/9/9/10 and provisions relating to specific activities. Switzerland was named a Protecting Power by both India and Pakistan. Emergent Bangladesh, generally unrecognized in the legal sense except by India, was without a Protecting Power.

Problems developed with regard to the role of the Protecting Power. Switzerland and Pakistan interpreted that role to include both the representation of state interests under the 1969 Vienna Convention and the supervision of the 1949 Geneva Conventions. India, however, saw Switzerland's role as limited to the former Convention and denied Switzerland access to detained Pakistanis (except for certain Pakistanis taken prisoners on the western front of the war). The ICRC gained access to prisoners of war held by Bangladesh, India, and Pakistan and to civilian detainees held by India in camps (but not to civilian Pakistanis held in Indian prisons) and to civilians held by Pakistan. Furthermore, the ICRC provided protection and assistance to the Bihari minority in Bangladesh. All of this occurred under Common Article 9/9/9/10 and other provisions of the Conventions.

In this situation, Switzerland and the ICRC agreed on a division of labor. Switzerland dealt with the so-called political and economic interests of the belligerents, such as the repatriation of consular staffs. The ICRC dealt with the needs of detainees and other humanitarian matters. Switzerland agreed to lend diplomatic support to the ICRC's efforts, if needed.

Middle East Conflict: In addition to the three situations above in which Protecting Powers were appointed, one of which also entailed an ICRC offer of services under Common Article 9/9/9/10, the continuation of the Middle East conflict into the 1970's led the ICRC again to offer its services as an official substitute for a Protecting Power. From December 1971 until September 1972, the ICRC directed special attention to the question

of supervision of the Geneva Conventions in its dealings with Egypt, Jordan, Lebanon, Syria, and Israel. In particular, the ICRC indicated that it was prepared to become an official substitute. In September 1972 the ICRC formally presented itself as an official substitute. There was no clearly affirmative response to the ICRC from any party.[22]

All of this practice indicates:

(1) a long-standing effort to introduce Protecting Powers or their official substitutes into situations of international armed conflict to guarantee application of the law;

(2) a parallel development of unofficial supervision of the law through Red Cross activities of humanitarian protection and assistance, practiced primarily by the ICRC;

(3) infrequent recourse to Protecting Powers since 1949 and no recourse to official substitutes;

(4) frequent reliance on the ICRC, even in situations where Protecting Powers were appointed; indeed, Protecting Powers in the form of neutral states do not seem to have constituted the answer to the need for supervision of the law of armed conflict, especially in the period since 1949.

The 1975 Protecting Power System

It is against this background that the debate on the Protecting Power system occurred at the 1975 session of the Geneva Diplomatic Conference.[23] Committee I of the Conference, in adopting Article 5 of Protocol I, approved a supplemental Protecting Power system that is mandatory in international armed conflicts, reinforces the process of appointing Protecting Powers, and provides for substitutes. The crucial question in 1975 was whether a substitute could assume that role automatically, if Protecting Powers or other substitutes were not designated by the belligerents. The answer to this question lies in a careful examination of Committee I's debates and in the wording adopted.

First of all, new paragraph 1 of Article 5 of Protocol I makes even clearer than the 1949 wording the mandatory nature of the appointment of Protecting Powers in international armed conflicts:

> It is the duty of the Parties to a conflict from the beginning of that conflict to secure the supervision and implementation of the Conven-

[22] ICRC, Annual Report, at 69–70 (1972). With regard to the other situations referred to above, ICRC publications are generally silent regarding the legal differences between the roles of Protecting Powers, official substitutes, and the Red Cross. This is not only because the precise legal basis of ICRC action is frequently unclear (the parties may disagree as to whether an armed conflict exists, and if so whether it is international or noninternational), but also, because it does not matter to the ICRC whether it is or is not discharging a function authorized by a treaty, for what it does in the field is the same in either case.

It appears that the ICRC tried to become an official substitute in the Middle East in the 1970's primarily because of long-standing difficulties in implementing parts of the Fourth Convention of 1949 in Israeli occupied territory, a situation that the ICRC was to "deplore." ICRC, Annual Report 6 (1973).

[23] This is not to say that the participants were familiar with the background. Indeed, the reverse seemed to be true.

> tions and the present Protocol by the application of the system of Protecting Powers, including inter alia their designation and acceptance, in accordance with the following paragraphs. Such Powers shall have the duty of safeguarding the interests of the Parties to the conflict.

There was little opposition to the mandatory principle in 1975, and in general little difficulty in adopting this first paragraph of Article 5. The idea that Protecting Powers should represent not the interests of belligerents but the interests of the international community had some support. The United Kingdom made this argument, and Israel and India spoke to the question without taking a clear stand. The ICRC said that it represented the international community.[24] But the 1949 formulation was repeated on this point in the 1975 version. This paragraph was adopted in committee 72-1-2.

The second paragraph of new Article 5 seeks to promote rapid action in the appointment and acceptance of Protecting Powers. The paragraph was noncontroversial and adopted by consensus:

> From the beginning of a situation referred to in article 1 of the present Protocol, each Party to the conflict shall without delay designate a Protecting Power for the purpose of applying the Conventions and the present Protocol and shall without delay and for the same purpose permit the activities of a Protecting Power designated by the adverse Party and accepted as such by it.

The next paragraph of new Article 5 covers a subject not found in the 1949 Conventions—that of the specific process of appointment:

> If a Protecting Power has not been designated or accepted from the beginning of a situation referred to in article 1 of the present Protocol, the International Committee of the Red Cross, without prejudice to the right of any other impartial humanitarian organization to do likewise, shall offer its good offices to the Parties to the conflict, with a view to the designation without delay of Protecting Powers to which the Parties to the conflict consent. For that purpose, it may, inter alia, ask each Party to provide it with a list of at least five States which the Party considers acceptable to act as Protecting Power on its behalf in relation to another Party to the conflict and ask the other Party to provide a list of at least five States which it would accept to fulfill this function; it shall compare them and seek the agreement of any proposed State named on both lists.

Once again, there was little controversy over this third paragraph. Some concern was expressed that the drafting of the paragraph permitted all sorts of organizations to intervene in the process at any time, thus perhaps making for confusion. A number of delegations said that the wording implied priority to the ICRC, but a Spanish proposal to this effect was defeated in committee plenary.[25] The paragraph was approved 65-0-3.

[24] The UK statement is found in CDDH/I/SR.28, March 18, 1975, at 15; Israel's in CDDH/I/SR.18, Feb. 10, 1975, at 4; India's in CDDH/I/SR.19, Feb. 12, 1975, at 7; the ICRC's in CDDH/I/SR.17, Feb. 7, 1975, at 10.

[25] *See* CDDH/I/SR.27, at 24–25. The Swiss delegation also presented a proposal to this effect but withdrew it, contenting itself with a statement of explanation of vote. On the role of other "humanitarian" organizations and the repatriation of prisoners of

The real debate in 1975 on the Protecting Power system concerned paragraph 4 of new Article 5, pertaining to substitutes. Thirteen formal amendments to the ICRC draft Protocol touched upon this issue, plus informal proposals in the Working Group created to handle Article 5. The ICRC itself had presented not one but two formulations in regard to substitutes:

Proposal I

If, despite the foregoing, no Protecting Power is appointed, the International Committee of the Red Cross may assume the functions of a substitute within the meaning of Article 2(e), provided the Parties to the conflict agree and insofar as those functions are compatible with its own activities.

Proposal II

If, despite the foregoing, no Protecting Power is appointed, the Parties to the conflict shall accept the offer made by the International Committee of the Red Cross, if it deems necessary, to act as a substitute within the meaning of Article 2(e).[26]

These formulations by the ICRC and its statements on the subject of the Protecting Power system were extremely important. The ICRC took a highly active role in the negotiations, departing from its more usual role of being a technical drafting secretariat. This change was explained by the head of the ICRC delegation:

> While the ICRC was pleased to place the technical skill of its experts at the Diplomatic Conference's disposal, it did not consider that it should take a stand on provisions which mainly concerned governments. It was for them alone to decide on the commitments they wished to undertake. That was the reason for the ICRC's frequent reticence during the Conference. In the article at present under discussion, however, special functions of great importance were envisaged for the ICRC, and it would therefore be useful for delegations to know its views on the subject.[27]

What the ICRC wanted, which was implicit in its texts and made clear by the statements of its representatives, was the *nonautomatic* introduction of itself as a substitute for Protecting Powers in certain situations. It did not wish to be thrust upon a belligerent against its or the belligerent's wishes. The then President of the ICRC had stated this in the course of the preparatory meetings leading up to the Diplomatic Conference:

> . . . I think it is necessary . . . to confirm that the ICRC proposes to make use of the power conferred on it to assume the role of substitute for the Protecting Power whenever it considers it necessary and possible to do so. This role should not, however, be automatically imposed on the ICRC. Only when all other possibilities were exhausted

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war, see Falk, *International Law Aspects of Repatriation of Prisoners of War during Hostilities,* 67 AJIL 465 (1973); *cf.* Levie, *International Law Aspects of Repatriation of Prisoners of War during Hostilities: A Reply, id.* at 693.

[26] ICRC, DRAFT ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTIONS OF AUGUST 12, 1949, at 4 (1973). In the ICRC draft, this was paragraph 3 of Article 5. The "2(e)" refers to the legal definition of an official substitute, that is, ". . . an organization acting in place of a Protecting Power in accordance with article 5." CDDH/I/235, at 2.

[27] Statement of J. Pictet, in CDDH/I/SR.27, at 21.

> would the ICRC offer its services. Any such offer would then require the agreement of the Parties concerned.[28]

The ICRC delegate in Committee I reaffirmed this stand on several occasions during the 1975 debates, and he actively pursued this line in the Working Group.[29]

These statements had the important effect of making clear that there was no difference in the legal obligation contained in the two ICRC proposals regarding offers of an official substitute. The first proposal explicitly mentioned specific state consent as being necessary for the acceptance of the substitute. The second proposal appeared to state the reverse in the words "shall accept the offer made by the International Committee of the Red Cross, if it deems necessary. . . ." But ICRC statements indicated the ICRC would never consider it necessary to make a formal offer to serve as substitute unless the parties in advance of that offer indicated their consent to the ICRC.

This caused the Egyptian spokesman to remark:

> The first of the proposed alternatives (I) contributed little that was new. The second (II) went further, since it obliged the parties to the conflict to accept the ICRC's offer—an offer it would only make if it could be accepted by the parties. The situation therefore constituted a vicious circle.[30]

The difference between the two ICRC proposals was a matter of psychological pressure. The debate was about the use of law to generate pressure on a state. The negotiating process was concerned with "word politics," or the use of legal wording to create expectations about what states should do, whatever the precise legal obligation.[31] This was perceived by a number of participants at the 1975 session. It was articulated clearly by the Australian spokesman:

> What was needed . . . was a text which would place the maximum pressure upon belligerent States to accept a machinery of Protecting Powers which would not in any way infringe their national sovereignty. That . . . was precisely what the ICRC had had in mind. . .
>
> The two alternative texts provided by the ICRC . . . were not far apart, since neither was intended to provide for the automatic or compulsory appointment of the ICRC as a substitute for a Protecting Power. His delegation preferred Proposal II, not because it made it more obligatory for the party concerned to accept the offer of the ICRC but because it appeared to do so. . . .[32]

Now, a number of states had been in favor, at some point, or reaffirming the automatic introduction of a substitute found in the third paragraph of Common Article 10/10/10/11 of the 1949 Conventions. Many of these arrived at a position of support for the ICRC's Proposal II on the basis of

[28] ICRC, DRAFT ADDITIONAL PROTOCOLS, *supra* note 26, at 13. *Cf.* the ICRC proposal in 1929 calling for the automatic appointment of substitutes by the ICRC.

[29] Statements of Antoine Martin, CDDH/I/SR.17, at 6, 11.

[30] Statement of Georges Abi-Saab, CDDH/I/SR.17, at 14.

[31] *See* in general T. FRANCK AND E. WEISBAND, WORD POLITICS, (1972).

[32] Statement by T. W. Cutts, CDDH/I/SR.19, at 4–5.

reasoning similar to the Australian. Desiring a strong system of supervision, they regarded the ICRC as the only acceptable automatic substitute. When the ICRC refused to become an automatic substitute, these states very early in the long negotiating process supported Proposal II as the best system obtainable. Others among the states favoring maintenance of the clear legal principle of an automatic substitute carried their fight on into the 1975 session. In this group were Belgium, the Netherlands, the United Kingdom, Pakistan, Bangladesh, and Greece, *inter alia*. Spain would have had the ICRC appoint an automatic substitute.[33] Most of these finally and reluctantly also gave their support to Proposal II.

This was principally because the Socialist group was unyielding in its opposition to the principle of automaticity. A number of Third World states, as well as France, were also strongly opposed to automaticity. When the United States showed a willingness to compromise with the Socialist group on this issue, the states in favor of automaticity found it difficult to rally support. The Socialist states were intensely opposed to the operation of an official substitute without the specifically expressed consent of the state involved.[34] They stressed the rights of national sovereignty and recalled their reservations against the automatic acceptance of a substitute found in Common Article 10/10/10/11 of the 1949 treaties.[35] They were unmoved by the Danish argument that national sovereignty and state consent found their exercise in adherence to the legal instrument, making specific state consent regarding substitutes redundant.[36] They sought to generate support for the ICRC's Proposal I, in part by asking the ICRC representative if he did not favor it, and in part by urging acceptance of similar Eastern European amendments.[37]

The United States, despite its past difficulties in Indochina in obtaining supervision of detention conditions for its nationals and despite speeches in Committee I stressing the need for "openness and accountability" in the law,[38] was not in favor of automaticity. Confronted by both the Socialist

[33] *See* the formal amendments contained in CDDH/56, Sept. 16, 1974, *passim:* CDDH/I/24 (Pakistan); CDDH/I/67 (U.K. *et al.*); CDDH/I/77 (Spain); CDDH/I/31 (Greece); and *see* the statement by the delegate of Bangladesh in CDDH/I/SR.18, at 12–13. It is interesting that some of the states pressing the ICRC to assume the role of automatic substitute were non-Western and had had some differences of opinion with the ICRC in the past.

[34] China and Albania did not attend the 1975 session; nor did South Africa. Documentation of the Socialist position is so extensive as to be superfluous.

[35] *See* CLAUDE PILLOUD, RESERVATIONS TO THE 1949 GENEVA CONVENTIONS, 7–10 (1958); and PICTET, *supra* note 3, at 114. The ICRC prefers to refer to these submissions as interpretations rather than reservations.

[36] CDDH/I/SR.18, at 2–3.

[37] *See* the query by the Soviet delegate in CDDH/I/SR.17, at 11, leading to an ICRC reply which seemed to say there was no legal difference between the two ICRC proposals. *See also* the amendment put forward by the Soviet Union, Byelorussia, and the Ukraine, CDDH/I/70, in CDDH/56, at 36.

[38] Statement by Maj. Gen. George Prugh, in CDDH/I/SR.17, at 4–5, referring to R. R. Baxter, *Some Existing Problems of Humanitarian Law,* in THE CONCEPT OF INTERNATIONAL ARMED CONFLICT: FURTHER OUTLOOK, at 6, PROC. OF THE INT. SYMPOSIUM ON HUMANITARIAN LAW, BRUSSELS, 12–14 Dec. (1974).

and ICRC stands on the question, the United States supported Proposal II. While American spokesmen said the delegation was not under instructions to fit this Diplomatic Conference into the pattern of detente between itself and the Soviet Union, that delegation nevertheless felt it wise to seek a compromise with the Soviet Union and Eastern European states and to work for a Protecting Power system that could be adopted by consensus. Many Western states, such as Canada and Switzerland, found this to be the determining factor; they found it difficult to disagree with what the Americans, Russians, and ICRC agreed to.[39]

In addition to this central debate about what type of obligation should exist regarding the offer of services of a substitute was the related question of what type of organization could make that offer. Both the ICRC proposals mentioned itself only, which was not so much an act of vanity as a reflection of the fact that, aside from Protecting Powers, only the ICRC had systematically, if unofficially, supervised the law of armed conflict. This proposed ICRC monopoly was widely supported not only by Western delegations but also by certain Third World delegations like Indonesia.[40] The Socialist group, however, was strongly opposed to an ICRC monopoly and was supported by a number of Third World delegations such as Brazil. Most of the Eastern European delegations did not question the impartiality or efficacy of the ICRC in their formal interventions. Rather, they spoke of expanding the number of possible substitutes with a view to enhancing the effectiveness of the law, a position parallel to that taken in certain Third World statements. Several Eastern European delegates indicated in private discussions their belief that the ICRC was indeed trying to be neutral in its work. To the extent that some of these delegates had reservations about the work of the ICRC in Vietnam, these were offset by favorable views of the ICRC's work in Chile after the overthrow of President Allende.[41]

Despite the fact that no one could name any organization other than the ICRC that might serve as a formal substitute, there was compromise on this point as well, which is reflected in the report of the Working Group on Article 5. As reported out by that Group, paragraph 4 of Article 5 reads:

> If, despite the foregoing, there is no Protecting Power, the Parties to the conflict shall accept without delay an offer which may be made by the International Committee of the Red Cross or by any other organization which offers all guarantees of impartiality and efficacy, after due consultations with the said Parties and taking into account

[39] This paragraph is based on findings from interviews during and after the 1975 session.

[40] It is again interesting (*supra* note 32) that a number of delegations praising the ICRC were non-Western and had had differences of opinion with the ICRC. This had been the case with Indonesia in dealing with the ICRC over the question of political prisoners since 1965. Yet see the Indonesian statement in CDDH/I/SR.28, March 18, 1975, at 8.

[41] This paragraph is based on findings from interviews during the 1975 session. In Chile the ICRC has worked extensively to protect and assist "leftist" detainees and their families under the military junta.

the result of these consultations, to act as a substitute. The functioning of such a substitute is subject to the consent of the Parties to the conflict; all efforts shall be made by the Parties to facilitate the operation of a substitute in fulfilling its tasks under the Conventions and this Protocol.

In the plenary of Committee I this formulation, reflecting an East–West compromise based on the ICRC's Proposal II, proved unacceptable to fifteen states still struggling for automaticity. These states looked to the United Nations to provide an automatic substitute as a last resort. In the plenary of the Committee Norway, with the support of primarily the Arab group, moved the adoption of paragraph 4 bis:

> If the discharge of all or part of the functions of the Protecting Power, including the investigation and reporting of the violations, has not been assumed according to the preceding paragraphs, the United Nations may designate a body to undertake these functions.[42]

The supporting argument was that there was a need to guarantee the operation of a substitute and to improve the *locus standi* of the United Nations in this respect. The Norwegian spokesman indicated that the exact wording was open to negotiation and that the United Nations could designate not only one of its own agencies, such as the High Commissioner for Refugees, but also a non-UN agency, such as the ICRC or World Council of Churches.[43]

Both Eastern and Western delegations opposed this move in no uncertain terms. Both argued in favor of the compromise already reached and the need for consensus approval of Article 5 in toto. Eastern delegations reaffirmed their commitment to state sovereignty and specific state consent, and many Western delegations were not convinced of either the efficacy or the impartiality of the United Nations. The Syrian spokesman said that to oppose paragraph 4-bis "was to show a lack of confidence in the United Nations."[44] He was right; that was precisely what the West was doing.

Moreover, a representative of the United Nations had said in the Working Group:

> The United Nations Charter is the *one and sole* source of the United Nations power and its organs. It is difficult to find the legal link between the activities of the United Nations based on the United Nations Charter and the possible activities of an *unspecified United Nations body* as provided for in paragraph 4 bis of the text now being discussed. The Conventions and the Additional Protocols are the instruments of sovereign states. The sovereign states will ratify and implement them. Therefore, the sovereign states are obliged to try to find a solution such as that contained in article 5. The United Nations have [sic.] special responsibilities in the field of peace and security. Under the present formulation of draft paragraph 4 bis it does not

[42] CDDH/I/235, at 3. This was a merger of earlier proposals by Syria, the Arab group, and Norway.

[43] CDDH/I/SR.27, at 2–3. This idea had been articulated for a number of years. *See* ICRC, *supra* note 27, at 13.

[44] CDDH/I/SR.27, at 5.

> appear clearly which responsibility, if any, the United Nations organs would be called upon to undertake.[45]

Whatever the intrinsic merits of the above reasoning, the UN representative indicated a strong reserve to the UN's being involved in the application of the law of armed conflict, and this did not help the prospects of 4-bis. It also did not help the prospect of having the question of investigation and reporting mentioned in the paragraph, for this interjected yet another controversial element into the amendment.

Paragraph 4-bis was rejected by a vote of 32–27–16, the affirmative votes falling far short of the necessary two-thirds needed for adoption. After further parliamentary maneuvering, paragraph 4 as reported out of the Working Group was adopted 53–10–8. The rest of Article 5 was eventually adopted also:

> 5. The designation and acceptance of Protecting Powers for the sole purpose of applying the Conventions and the present Protocol shall not affect the legal status of the Parties to the conflict or of any territory, including occupied territory.
>
> 6. The maintenance of diplomatic relations between Parties to the conflict or the entrusting of the protection of a Party's interests and those of its nationals to a third State according to the Vienna Convention on Diplomatic Relations does not constitute an obstacle to the appointment of Protecting Powers for the sole purpose of applying the Conventions and the present Protocol.
>
> 7. Whenever hereafter in the present Protocol mention is made of a Protecting Power, such mention also includes any substitute.[46]

Article 5 in its entirety was finally adopted by Committee I by consensus. The plenary of the Conference took note of that adoption. Formal Conference approval is still pending.

Meaning of the 1975 Debate

The 1975 session of the Geneva Diplomatic Conference, in its consideration of the Protecting Power system, manifested a central tension between the widespread desire for more effective supervision of the law of armed conflict and, on the other hand, the equally widespread desire for adoption by consensus and universal acceptance of the norms. The tension was pronounced because of the earlier decision to make Article 5 of Protocol I a

[45] CDDH/I/GT/48, March 10, 1975, at 2, emphasis in the original.

[46] The fifth paragraph was apparently a response to the 1956 situation between Egypt and Israel, where Egypt may have hesitated to accept the Netherlands as Israel's Protecting Power for fear of thereby recognizing Israel.

The sixth paragraph was a response to the 1962 Indo-Chinese border war in which China argued that it did not have need of a Protecting Power and that India should not have allowed the ICRC to visit detained Chinese nationals, because diplomatic relations were not broken. *See* Jerome Alan Cohen and Shao-chun Leng, *The Sino-Indian Dispute over the Internment and Detention of Chinese in India*, in J. Cohen (ed.), China's Practice of International Law: Some Case Studies, 268–320 (1972). The second part of paragraph six was a response to the confusion in 1971 over the role of Switzerland in the war for Bangladesh. See *supra* p. 47.

nonreservable item.[47] Thus opposition by a state to Article 5 could lead to its rejection of the entire Protocol.

In dealing with the Protecting Power system, two approaches were thus available to states. They could seek a compromise, or they could attempt to create a very strong system. The latter approach would have probably entailed taking Article 5 out from the nonreservable category, struggling to secure Conference adoption, accepting a number of reservations against the strong system, and hoping for a withdrawal of the reservations over time.

The approach chosen was compromise, especially on the question of substitutes as found in Article 5, paragraph 4. The result gave rise to some confusion. The *appearance* of automaticity is created by the wording, ". . . the Parties to the conflict shall accept without delay an offer . . . , after due consultations with the said Parties and taking into account the result of these consultations, to act as a substitute." Yet the functioning of the substitute is subsequently explicitly made dependent on specific state consent, and the system established is thus a regression from the automaticity of paragraph 3 of Common Article 10/10/10/11 in the 1949 Conventions and a general concession to state consent. This article of the 1949 Conventions, however, remains legally valid for states that might choose to activate it, as the new Article 5 of Protocol I supplements but does not erase the 1949 Conventions.

This new formulation was, at least to the Spanish delegate, "illogical, imperfect and incomplete." [48] This criticism was not met by the Italian argument that the formulation permitted the "ICRC to offer its services as a substitute, after consultations with the Parties but without their consent being necessary. Only the exercise of the functions of the substitute is subordinated to the acceptance of the Parties." [49] This was legal hair-splitting par excellence; no matter how accurate, it was without immediate significance to the victims of armed conflict.

What has been written about the 1949 Protecting Power system, as found in Common Article 8/8/8/9, is also true of the 1975 formulation found in new Article 5:

> [The Article] as it emerged from the debates of the Diplomatic Conference may appear to be faulty. It is. The Diplomatic Conference was not a meeting of jurists only. It was not concerned with purely scientific law to be treated on purely academic grounds . . . But the enunciation of . . . principles came from plenipotentiaries who, as the representatives of sovereign States, were equally conscious of their duty to protect their countries' sovereignty.[50]

As to the meaning of what was done at the 1975 session on this issue, again there are two views. One sees new Article 5 as not a reaffirmation

[47] Draft Protocol I, Article 85. Article 85 has not yet been adopted.

[48] CDDH/I/SR.28, at 9.

[49] *Id.* at 11, author's translation of the French.

[50] SIORDET, *supra* note 4, at 34. *Cf.* the "scientific" proposals for better law contained in Levie, *Some Major Inadequacies in the Existing Law Relating to the Protection of Individuals During Armed Conflict*, 19 HAMMARSKJÖLD FORUM *passim* (1970).

and development of the law but a step backward, or, as the Egyptian spokesman phrased it, a "retrogression." [51] This, it is argued, is primarily because state consent has been explicitly introduced into the functioning of the substitute, whereas this was not found in Common Article 10/10/10/11 of the 1949 Conventions. While the ICRC did not have to offer its services under the 1949 treaties, a Detaining Power had to request third party supervision, perhaps by the ICRC, in the event that no Protecting Power functioned. This request could have forced ICRC involvement. Hence a critical view of the 1975 draft is held especially by a number of Third World and Western delegations.

On the other hand, some see new Article 5 as a simple confirmation of reality—that the provisions adopted in 1949 were too far ahead of their time and therefore generally unused and unworkable. Moreover, in so far as the ICRC as an official substitute is concerned, the argument can be made that under the 1949 provisions a belligerent did have the opportunity to express its ad hoc consent for the functioning of the ICRC, since under Article 126 of the Prisoners of War Convention, each ICRC delegate must have the consent of the belligerent.[52] Moreover, old Common Article 10/10/10/11 remains on the books.

Which of these two competing views is correct will probably be determined by state practice in the future—assuming the final adoption of, and adherence to, Protocol I and the existence of international armed conflicts in the legal sense. It is difficult to know now whether the future pattern will be: (1) the appointment of Protecting Powers, perhaps stimulated through the good offices of the ICRC or other third party; (2) appointment of official substitutes under Common Article 10/10/10/11 of the 1949 treaties; (3) the offer of services by a potential substitute, whether the ICRC or some other body, after consultations either under the old Conventions or the new Protocol; or (4) no third party supervision, for whatever reason.

It is, after all, only with a long-range perspective that one can fully evaluate the action of the 1975 session on the Protecting Power system. As the delegate of Tunisia said, ". . . international law is a law in the process of elaboration and that which could mark a notable progress, but seems today premature to certain individuals, can be realized in the more or less near future." [53] If international humanitarian law is made to appear more attractive to the greatest number of states, including especially the Socialist and Third World states most strongly committed to the specific exercise of state consent, and if some appearance is maintained of automaticity for substitutes of Protecting Powers, and if the ICRC's diplomacy and field operations find expanded acceptance, then future legal developments may very well achieve what seems premature to some today. The 1975 session took

[51] CDDH/I/SR.28, at 3.

[52] *See* PICTET, *supra* note 3, 603-f. However, the generally accepted view is that state consent for delegates cannot legally be used to block visits; some delegate(s) must be accepted.

[53] CDDH/I/28, at 16; author's translation of the French.

no revolutionary steps with regard to the rights of substitutes for Protecting Powers. But it may have laid the basis for that step in the future. Thus it may have taken one step backward for the sake of two steps forward at a later time. Then again, it may have simply taken a step backward.

Supervision: A Broader View

It is essential to emphasize the importance of unofficial supervision for the law of armed conflict and to take account of the way in which that function is performed, primarily by the ICRC.

Common Article 9/9/9/10 of the Geneva Conventions, pertaining to the traditional humanitarian tasks, remains unchanged. Moreover, both the general and the specific functions of the ICRC, already found in the 1949 treaties, appear to be strengthened by new Article 70-bis:

> The Parties to the conflict shall grant to the International Committee of the Red Cross all facilities within their power so as to enable it to carry out the humanitarian role assigned to it by the Conventions and the present Protocol in order to ensure protection and assistance to the victims of conflicts; the International Committee of the Red Cross may also carry out any other humanitarian activities in favor of these victims, subject to the consent of the Parties to the conflict concerned.[54]

Therefore, the specific tasks of the ICRC and their automatic nature are reaffirmed in Protocol I—as well as the general humanitarian functions of that organization. The parties "shall grant" to the ICRC what is needed for the exercise of the specific functions of humanitarian protection and assistance.

Article 70-bis conveys the expectation that the ICRC will be functioning. While Red Cross protection and assistance is undefined in law and perhaps undefinable in practice,[55] surely that protection and assistance includes most of the Protecting Power's tasks. The ICRC has stated that it performs "many of the functions of substitutes for Protecting Powers as part of its traditional activities."[56] And the ICRC has largely given up its previous effort to distinguish between humanitarian and other tasks of the Protecting Power.[57]

Thus a minimally adequate supervision would seem to be assured in the future through ICRC action, regardless of the disposition of new Article 5. Whether or not the introduction of the ICRC is automatic may become an academic question, if there is a general expectation that the ICRC will become systematically involved in armed conflicts in order to assure that humanitarian needs are met.[58]

[54] CDDH/I/285, April 9, 1975, at 2. It was adopted by consensus. Comments on this article are found primarily in CDDH/I/SR.37, April 4, 1975. *Cf. especially* Article 125 of Convention III of 1949.

[55] *See* Forsythe, *supra* note 6, *passim*

[56] Statement of ICRC representative Antoine Martin in CDDH/I/SR.17, at 11.

[57] For a largely unpersuasive effort to draw that distinction, see Siordet, *supra* note 4, at 71 and *passim*. *See also* Pictet, *supra* note 3, at 112–13.

[58] With regard to automaticity in the performance of humanitarian tasks, new Article 70-bis strengthens the legal basis for specific tasks and reaffirms old Common Article 9/9/9/10.

A "minimally adequate supervision" involves two things. One is the ability to identify humanitarian need and to respond to it logistically and technically and in terms of material goods. The long record of the ICRC in this regard and its recent efforts in the Middle East and Sub-Continent, not to mention Cyprus, suggest clearly that the ICRC is able to provide effective protection and assistance, which is precisely the meaning of implementing the law. A second dimension to adequate supervision is the ability to get states to change their policies when such policies are outside the rules. The ICRC has taken the approach of a "friendly legal adviser" rather than a "policeman." The results are inconclusive historically. All that can be said is that the ICRC has had some success in this matter and that "public finger shaking" and reprisals have not proven any more effective. In historical perspective, and in the light of events in 1956 and 1971 in particular, the ICRC may have more capacity for effective supervising of the law than have governments that have assumed the role of Protecting Power. In any event, it is important to distinguish an ideological or sentimental preference for states as Protecting Powers from the capacity of the ICRC to supervise the law in its most important sense—protection and assistance for individuals.

The ICRC could of course encounter some difficulty in providing minimally adequate supervision of the law. Supervising the actions of a national liberation movement could be one area of difficulty. Supervising the application of the law in the area of combat, as compared with rear areas, is another. And being asked to testify at a war crimes trial is a third. In general, neutral states would experience the same problems. Testimony in war crimes proceedings would seem to present special problems to the ICRC, as it usually avoids public statements as to what its delegates have seen. On the other hand, a trial would provide the ICRC with the opportunity to make a public contribution to protecting human rights, based on the penal provisions to be inserted in Protocol I. Also, presumably states and individuals would prefer to have in court representatives of the ICRC with its reputation for integrity and responsible action, rather than officials of a state serving as Protecting Power which might be motivated by *realpolitik*.

The above analysis, stressing the probable effectiveness of unofficial supervision, is not to belittle the importance of certain proposals aimed at creating a commission of inquiry in the case of alleged violations of the laws of armed conflict.[59] Nor is it to minimize the importance of the effort to write penal provisions into the Draft Protocols[60] or of certain articles

[59] *See especially* the proposal of Denmark, New Zealand, and Sweden, for a permanent International Enquiry Commission, to be appointed by the ICRC, contained in CDDH/I/241, March 19, 1975, with supporting arguments in an unofficial "Explanatory Memorandum" dated March 21, 1975, distributed by the Swedish delegation. *Cf.* a Pakistani proposal in CDDH/I/267, March 25, 1975.

[60] There is an effort to write part of the Nuremberg principles on individual responsibility into the Draft Protocols. *See especially* Draft Protocol I, Section II, "Repression of Breaches of the Conventions and of the Present Protocol," and such subjects as breaches, grave breaches, superior orders, extradition, etc.

provisionally adopted in 1975 concerning other state action, such as a meeting of signatories to discuss "general" problems in the application of the law,[61] the training of qualified experts in the law of armed conflict within the national domain,[62] and reporting by the parties on their dissemination of the law to the ICRC and to Switzerland as the depositary government of the Conventions and Protocols.[63] All of these provisions pertain to supervision too, and if one or more of these provisions are adopted and taken seriously they could result in improved application of the law. But at least in the near future it is submitted that the presence of the ICRC in a situation of violence is the best guarantee that supervision will occur. The *locus standi* of the ICRC is a secondary question—not unimportant, as the question of civilian protection under Israeli control demonstrates, but still secondary.

The actual work of the ICRC is not restricted to a situation of international armed conflict, as is the case for Protecting Powers and official substitutes. In a noninternational armed conflict too, there appears to be a presumption that the ICRC will operate. Article 8, paragraph 4, of Draft Protocol II states, "The parties to the conflict shall endeavour to facilitate visits to the persons referred to in the opening paragraph of paragraph 1 and in paragraph 3 by representatives of an impartial humanitarian organization." [64] This is stronger than old Common Article 3 of the 1949 Conventions which simply authorized the ICRC to offer its services.[65] Additionally, the ICRC supervises the implementation of humanitarian norms, quite aside from any reference to its functions in the law of armed conflict, international or noninternational.[66] Thus the presence of the ICRC in a situation of violence, even if the ICRC is not an official substitute, is likely

[61] *See* Art. 7 of Protocol I. This was provisionally adopted in Committee I after a separate vote *inter alia* on the word "general." One can conceive, however, of a majority of states deciding that, say, Israeli practices in occupied territory constitute not a specific but a general problem in humanitarian law. On the other hand, the slowness of action by such a large group and the *realpolitik* of the process are not likely to permit this mechanism to be an effective medium of supervision.

[62] *See* Arts. 6 and 71 of Protocol I.

[63] *See* Art. 72 in Protocol I. This was provisionally adopted in Committee I over some opposition by the Socialist group to the paragraph on reporting. On the other hand, Norway wanted the ICRC to use the reporting procedure to set standards as to proper reporting on efforts at dissemination. CDDH/I/SR.38, April 11, 1975, at 8.

[64] Paragraphs 1 and 3 of this Article 8 in Draft Protocol II refer to persons interned or detained "for reasons in relation to the armed conflict." The ICRC is the only third party that has systematically supervised the embryonic law of noninternational armed conflict. "Among private organizations, the International Committee of the Red Cross has labored longest and hardest to extend the law of war to internal conflicts." JAMES E. BOND, THE RULES OF RIOT 39 and *passim* (1974).

[65] *See further* Draft Protocol II, Article 39 (a reaffirmation of old Article 3). There have been few formal declarations by governments formally accepting the applicability of Common Article 3. Clear examples of such declarations are those by the French Government in Algeria (1956–1962); and by the Government of Chile (1973–1975). The latter fact is not generally known.

[66] In addition to FORSYTHE, *supra* note 6, see J. MOREILLON, LE COMITÉ INTERNATIONAL DE LA CROIX-ROUGE ET LA PROTECTION DES DÉTENUS POLITIQUES, (1973).

to be more efficacious than the activity of Protecting Powers. Also the ICRC is likely to be less handicapped by any legal dispute as to the overall nature of the conflict.

CONCLUSIONS

While the 1975 debate on the Protecting Power system showed no revolutionary developments in legal thinking and while it required a major struggle—not entirely successfully concluded—to reaffirm concepts in the 1949 Conventions, much sentiment existed in favor of improved application of the law. This took the form not only of minority sentiment for automatic introduction of official substitutes, but also of majority sentiment for maintaining the appearance of as strong a Protecting Power system as was consistent with consensus adoption of the Protocol. Within that latter constraint there was a widespread and successful effort to generate as much pressure as possible on a belligerent to obtain third party supervision. As the Italian delegate remarked, new Article 5 was not the best solution but "le moins mauvais qui pouvait être envisagé dans les circonstances actuelles." [67]

Moreover, if it be agreed that the Conference gave something away with its right hand, it tended to take it back with its left. That is to say, to the extent that the Conference gave something away in writing specific state consent into the operation of an official substitute under new paragraph 4 of Article 5, which was not in Common Article 10/10/10/11 of the 1949 Conventions, it tended to strengthen other forms of third party supervision. This is especially true of new Article 70-bis, and also of a whole series of articles on ancillary or secondary modes of supervision in Protocol I, as noted above. This trend extends as well to Draft Protocol II and noninternational armed conflicts, where the position of the ICRC is clearly strengthened in relation to detained individuals.

What is likely to be important in the near future, as in the past, is unofficial supervision by the ICRC. In the intermediate future the activities of the national experts and national reports to the ICRC may well supplement direct ICRC supervision. And in the distant future the next Geneva Diplomatic Conference on Humanitarian Law may well engage in revolutionary development of the law, if an international armed conflict does not destroy all of us first.

[67] CDDH/I/SR.28, at 11.

THE 1975 VIENNA CONVENTION ON THE REPRESENTATION OF STATES IN THEIR RELATIONS WITH INTERNATIONAL ORGANIZATIONS OF A UNIVERSAL CHARACTER

By J. G. Fennessy *

The United Nations Conference on the Representation of States in their Relations with International Organizations, held in Vienna from February 4 to March 14, 1975, adopted by a vote of 57 in favor to one against, with fifteen abstentions, a new international convention [1] governing the status and functions of missions and delegations of states to international organizations and conferences.

The Convention deals with the status, privileges, and immunities of permanent missions to international organizations, and of delegations, including observer delegations, to organs [2] and conferences convened by international organizations of a universal character. Rules are laid down covering such matters as the establishment and size of missions, inviolability of premises, personal immunity of representatives, and the rights and obligations of host states and sending states.

The 1975 Vienna Convention is the latest in a series of treaties which have resulted from the work of the International Law Commission in its attempts to codify and develop the principles of diplomatic relations. The earlier conventions in the series were the 1961 and 1963 Conventions on Diplomatic and Consular Relations respectively, and the 1969 Convention on Special Missions. What distinguishes the 1975 Convention from its predecessors is that this latest Convention seems unlikely to attract the support of a significant number of states most affected by its provisions—the major host states for international organizations. This is evidenced by the fact that in the vote adopting the Convention as a whole, Belgium voted against, and the states abstaining included the United States (host state for the United Nations), Switzerland (host state for various UN organs, ILO, WHO, UPU, etc.), Austria (host state for IAEA and UNIDO), Canada (host state for ICAO), France (host state for UNESCO), and the United Kingdom (host state for IMCO).[3]

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[1] UN Doc. A/CONF.67/16; March 14, 1975; 69 AJIL 730 (1975).

[2] An "organ" is defined in Article 1 of the Convention as

> (a) any principal or subsidiary organ of an international organization, or
> (b) any commission, committee or sub-group of any such organ, in which States are members.

[3] UN Doc. A/CONF.67/SR.13, at 4–9.

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Classical Legal Positivism at Nuremberg

I

Of the three principal criminal defenses raised at the Nuremberg Trials—the defenses of act of state, superior orders, and ex post facto law—two were expressly rejected in the Nuremberg Charter, and all three were rejected in the prosecution's arguments and later in the Tribunal's Judgment. To those skeptical of the legitimacy of the trials, the rejection of the defenses can be explained in terms of parochial political considerations ("Allied policy") but cannot be justified on either legal or philosophical grounds.

Is the skeptic's position on the rejection of the defenses warranted? I argue that it is not. The skeptic fails to take account of an underlying dispute between defense counsel on the one hand and the prosecution and Tribunal on the other—a dispute over the applicability of doctrines of classical legal positivism to the Nuremberg Trials that reflects radically different philosophical persuasions about the nature of law.[1] Specifically, drawing on material from the proceedings of the

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1. Academic lawyers, however, have been aware of the underlying philosophical dispute. See A.L. Goodhart, "The Legality of the Nuremberg Trials," *Juridical Review* 58 (1946): 1–19; A.L. Goodhart, "Questions and Answers Concerning the Nuremberg Trials," *International Law Quarterly* 1 (1947): 525–531; Lord Wright, "Natural Law and International Law," *Interpretations of Modern Legal Philosophies*, ed. Paul Sayre (New York, 1947), pp. 794–807; Lord Wright, "War Crimes under International Law," *Law Quarterly Review* 62 (1946): 40–52; Quincy Wright, "Legal Positivism and the Nuremberg Judgment," *American Journal of International Law* 42 (1948): 405–414. In these papers there are attempts to defend the legitimacy of the Nuremberg Trials in terms of "Justice and its handmaid, Natural Law," as Lord Wright puts it. For discussion on related issues, see H.L.A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review* 71 (1958): 593, 615–621; and Lon L. Fuller, "Positivism and Fidelity to Law—A Reply to Professor Hart," *Harvard Law Review* 71 (1958): 630, 648–661.

I have profited from Quincy Wright's paper (above), and from Hans Kelsen's paper on "Collective and Individual Responsibility" (see fn. 24, below). Both papers are suggestive on the relationship of legal positivism to the act of state defense, one of my particular concerns.

International Military Tribunal at Nuremberg,[2] I show that, as understood and presented by defense counsel, the defenses of act of state and superior orders presuppose the doctrine of absolute sovereignty, one of two fundamental doctrines of classical legal positivism. And I offer an interpretation of the defense of ex post facto law in terms of the other fundamental doctrine of classical legal positivism, the doctrine that laws are commands. Given my contention that there are noncontingent links between the doctrines of classical legal positivism and the Nuremberg criminal defenses, the Tribunal's grounds for rejecting the doctrines apply as well to its rejection of the defenses. Although my concern here is to show that the noncontingent links exist, I believe it could also be shown that the Tribunal was justified in rejecting classical legal positivism, a theory of law that precludes the very possibility of international law. To demonstrate the latter, however, would require a developed philosophy of international law, something well beyond the scope of this paper.

I begin by sketching the two fundamental doctrines of classical legal positivism as they are set out by the most historically influential

2. With incidental exceptions, all of the trial material I consider is from the November 1945–October 1946 proceedings of the International Military Tribunal at Nuremberg, reported in the first 22 volumes of *Trial of the Major War Criminals before the International Military Tribunal* (Nuremberg, 1947–1949), hereafter cited as *IMT*, with volume number preceding and page number(s) following. Additional material, which also supports the position I argue here, may be found in the October 1946–April 1949 proceedings of the United States Military Tribunal at Nuremberg, reported in the 15 volumes of *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10* (Washington, 1949–1953), hereafter cited as *NMT*, with volume number preceding and page number(s) following.

proponent of that theory, John Austin. Then, after introducing the law of the Nuremberg Charter, I examine the defenses of act of state, superior orders, and most problematic, ex post facto law, as material from the proceedings of the International Military Tribunal bears on each.

II

Jean Bodin's *Six Books of the Commonwealth* (1576) is a convenient mark of the transition from a medieval world, which regarded law as prior to and more fundamental than the institutions of politics, to a modern world, which regards law as an instrument of the state. The "absolute and perpetual power" of Bodin's prince, "not bound by the laws of his predecessors, still less . . . by his own laws," is "the distinguishing mark of the sovereign," and in this respect the prince is a modern figure. But in another respect the prince remains medieval, for his power is "subject to the laws of God and of nature, and even to certain human laws common to all nations."[3]

John Austin's sovereign, on the other hand, is a thoroughly modern figure. In *The Province of Jurisprudence Determined* (1832), Austin distinguishes between "*natural* law" and "the aggregate of the rules, established by political superiors, [that] is frequently styled *positive* law, or law existing *by position*," and he confines "the term *law*, as used simply and strictly," to positive law.[4] The ensuing theory, classical legal positivism, rests on two fundamental doctrines, the command doctrine and the doctrine of absolute sovereignty. The command doctrine is itself to be understood in terms of the components of the legal norm.

Austin speaks of three such components: the commander's intention that a party act (or forbear from acting) in a particular way, the commander's expression of his intention to the party, and–central to

3. Jean Bodin, *Six Books of the Commonwealth*, trans. M.J. Tooley (Oxford, 1955), pp. 25, 28.

4. John Austin, *The Province of Jurisprudence Determined*, ed. H.L.A. Hart (London, 1954), p. 11. First published in 1832, the *Province* consists of the first six lectures of what was published posthumously as the *Lectures on Jurisprudence* (see fn. 8, below). (Here, as in all of the material I quote, the emphasis is in the original.)

the command doctrine–the commander's power to impose a sanction if the commanded party fails to comply with the directive.[5] The power to impose a sanction is not, however, to be understood as a property of the commander. A would-be commander may have power, without thereby having power over the party to whom he issues his directive–as in the case of a sovereign's "command" to a second sovereign. Rather, power is to be understood as a relation between commander and commanded, or more generally, between superior and inferior, a relation I speak of as the *power relation*.[6] Austin suggests the relation when he says: "the term *superiority* signifies *might*: the power of affecting others with evil or pain, and of forcing them, through fear of that evil, to fashion their conduct to one's wishes."[7]

The power relation requires inter alia that the commanding party be able to impose a sanction when there is a lack of compliance and that the commanded party be able to comply.[8] The inability either of the commanding party to impose a sanction or of the commanded party to comply is, for a particular directive, enough to defeat the claim that there exists a power relation of superior to inferior and, with it, the claim that the directive is a legal norm. I return to this requirement of the power relation in examining the ex post facto defense, below.

The other fundamental doctrine of classical legal positivism is that of absolute sovereignty. Austin understands sovereignty, in the language of the command doctrine, as an instance of the power relation of superior to inferior, with the critical qualification that the superior member of the power relation in this instance is not the inferior member in some other instance. What is perhaps the most distinctive feature of sovereignty in Austin is that it issues from a factual state of affairs. To underline this feature we may ask: Who has the right in a society to issue directives, to delegate authority, to be in a word the sovereign power? The answer of James Bryce is represen-

5. Austin, *Province*, p. 17, and see pp. 13–14.

6. In a forthcoming paper entitled "Two Models of Legal Commands," I consider in some detail the command doctrine and the role played therein by the power relation.

7. Austin, *Province*, p. 24.

8. Ibid., p. 14; John Austin, *Lectures on Jurisprudence*, 5th ed. (London, 1885), vol. 1, p. 453.

tative: "The person or body to whom in the last resort the law attributes this right is the logically supreme power, or Sovereign, in the State."[9] For Austin, however, the identity of the sovereign is not a question of legal right, but a question of who satisfies certain factual conditions. As he puts it in a well-known passage:

> The superiority which is styled sovereignty . . . is distinguished from other superiority . . . by the following marks or characters:—1. The *bulk* of the given society are in a *habit* of obedience or submission to a *determinate* and *common* superior. . . . 2. That certain individual, or that certain body of individuals, is *not* in a habit of obedience to a determinate human superior.[10]

The sharp contrast between Austin's view and that represented here by Bryce is in the end a difference between a sovereign power above the law and one subject to the law. Austin's sovereign, having unlimited legal power to enforce his commands, is himself "incapable of *legal* limitation."[11]

Several corollaries of the doctrine of absolute sovereignty are of special interest in connection with the defenses at Nuremberg. One corollary, pertaining to the act of state defense, is the notion of a positive legal right as a triadic relation, or a relation among duty-bearer, right-holder, and sovereign. As we will see, Austin uses this notion to demonstrate, by way of reductio ad absurdum arguments, that the sovereign cannot be either a duty-bearer or a right-holder. Another corollary, this one with an impact on the defense of superior orders, is the requirement of unconditional obedience. Given the sovereign's legally unlimited power, subjects cannot legally condition their obedience to the sovereign on, for example, moral grounds. As the legal positivist cliché has it, there is no necessary connection between positive law and morality.

Given the doctrines of command and absolute sovereignty, it is not surprising that classical legal positivism has no place for international law. In the course of distinguishing three classes of norms, Austin

9. James Bryce, *Studies in History and Jurisprudence* (New York, 1901), vol. 2, p. 505.

10. Austin, *Province*, pp. 193–194.

11. Ibid., p. 254.

points up differences between international law and what he speaks of as positive law.[12] The first class of norms, positive law or law "strictly so called," stems from a determinate source that, in promulgating the law, manifests the power relation. An example is an ordinary legislative enactment. A second class, standing between positive law and international law, is law "properly so called." Like positive law, law "properly so called" stems from a determinate source, but it differs from positive law in that its promulgation does not reflect the power relation. An example here is a state's law directed not to its subjects but to a coequal state. Finally, there is international law, a species of law "improperly so called." Austin refers to international law as the body of "laws which regard the conduct of sovereigns or supreme governments in their various relations to one another." As other species of law "improperly so called," he mentions "*the rules of honour*" and "*the law set by fashion*." Stemming from no determinate source, these norms are "*laws set* or *imposed by general opinion*."[13]

In speaking of classical legal positivism, I have in mind the philosophical theory developed from Austin's two doctrines. The theory has been widely—and correctly—criticized for failing to take account of sources of law that are independent of the state, in particular, indigenous sources; for failing to distinguish between de jure and de facto sovereignty; for failing to take account of functions of legal rules other than the "command" function; for failing to take account of legal obligations of the state; and for a variety of other defects.[14] Still, the theory persists as a conceptual picture of law, "accepted," as Ronald Dworkin puts it, "in one form or another by most working and academic lawyers who hold views on jurisprudence."[15] And the theory

12. See generally ibid., pp. 118–157.

13. Ibid., p. 140.

14. See, respectively, Sir Henry Maine, *Lectures on the Early History of Institutions* (London, 1875), chaps. 12–13; Bryce, *Studies*, vol. 2, chap. 10; H.L.A. Hart, *The Concept of Law* (Oxford, 1961), chaps. 2–3; Roger Fisher, "Bringing Law to Bear on Governments," *Harvard Law Review* 74 (1961): 1130–1140; and generally, Hart, *The Concept of Law*, chaps. 2–4.

15. Ronald M. Dworkin, "The Model of Rules," *University of Chicago Law Review* 35 (1967): 14, 17, reprinted under the title "Is Law a System of Rules?" in *Essays in Legal Philosophy*, ed. Robert S. Summers (Oxford, 1968), pp. 25, 28.

provided the rationale for the defenses raised at Nuremberg. Before turning to the defenses, let us look briefly at the law of the Nuremberg Charter.

III

Meeting in London in August of 1945, the Allied Powers concluded an Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, in which they declared their intention to establish an International Military Tribunal for the trial of those war criminals "whose offenses have no particular geographical location."[16] The Charter of the Tribunal, annexed to the Agreement, granted jurisdiction over crimes against peace, war crimes, and crimes against humanity, and over conspiracy to commit these crimes, as they were defined in the Charter.[17] Article 6(a) of the Charter defined crimes against peace:

> CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a Common Plan or Conspiracy for the accomplishment of any of the foregoing;

Article 6(b) defined war crimes:

> WAR CRIMES: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity;

Article 6(c), defining crimes against humanity, extended the application of the law of the Charter to certain acts committed against German nationals:

16. London Agreement, 8 Aug. 1945, 1 *IMT* 8–9. The plan followed the Moscow Declaration of 30 Oct. 1943, *Department of State Bulletin* 9 (1943): 307, 310–311.

17. The following quotations are from 1 *IMT* 11.

> CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated.

A statement dealing with conspiracy appeared in a paragraph following article 6(c) of the Charter:

> Leaders, organizers, instigators, and accomplices participating in the formulation or execution of a Common Plan or Conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.[18]

Twenty-four high-ranking Nazi officials and a number of Nazi organizations were indicted on two or more of four counts, corresponding to the four types of offenses over which the Charter had granted jurisdiction.[19] The trial was in open session for nearly a year (14 November 1945 to 1 October 1946). After reviewing the enormous mass of evidence, the Tribunal in its Judgment concluded inter alia that "resort to a war of aggression is not merely illegal, but is criminal"; that the defendants' role in the "planning and preparation" of aggressive war was abundantly clear; that war crimes were committed "on a vast scale, never before seen in the history of war"; and that "inhumane acts charged in the Indictment, and committed after the beginning of the war, [that] did not constitute War Crimes . . . were all committed in execution of, or in connection with, the aggressive war, and therefore constituted Crimes against Humanity."[20] Of the twenty-two individual defendants actually tried, only three were ac-

18. This language, corresponding to the language of Count One in the Indictment (1 *IMT* 29), appears to apply to all three of the aforementioned classes of offenses. In its Judgment, however, the Tribunal held that the Charter's language on conspiracy did not itself establish "a new and separate crime" and that the corresponding count in the Indictment therefore applied only to crimes against peace, for which article 6(a) of the Charter established law dealing with a "Common Plan or Conspiracy." 1 *IMT* 226.

19. See Indictment, 1 *IMT* 27–92.

20. Judgment, 1 *IMT* 222, 224, 226, 254–255.

quitted on all counts; sentences imposed on the others ranged from ten years imprisonment to death.[21] Of the seven Nazi organizations tried, four were declared criminal.[22]

IV

The defense of act of state, providing for imputation to the state of an individual's act as an "act of state" and thereby precluding adjudication before a foreign or international forum, was expressly rejected in article 7 of the Nuremberg Charter:

> The official position of defendants, whether as Heads of State or responsible officials in Government departments, shall not be considered as freeing them from responsibility or mitigating punishment.[23]

Notwithstanding the Charter provision, counsel for the defense at a number of points raised the act of state defense and, with it, the doctrine of absolute sovereignty. How, exactly, is the defense related to absolute sovereignty?

Acts of state are "acts performed by individuals in their capacity as organs of the State and therefore acts imputed to the State."[24] Imputation of an individual's act to the state might be thought not only to shield the actor from a claim by an injured party but also to deprive the injured party of his claim altogether, for he cannot have, as a matter of positive law, any claim against a sovereign state. Or so it could be argued, as Austin's concept of a positive legal right as a triadic relation illustrates.[25] Assume, as members of Austin's triadic relation, a sovereign (A) who sets the positive law, an individual (B) on whom a right is conferred, and another (C) on whom a duty is imposed. By the method of reductio ad absurdum it can be demonstrated that A, the sovereign, cannot stand in either of the positions occupied by B and C. If, for example, A rather than C owed a duty to B, what would the result be? The supposition that A is a duty-bearer implies in Austin's scheme a "superior sovereign" setting the positive law from which A's duty and B's right emanate, contrary to the hypothesis that A is sovereign.[26] Similarly for the supposition that A is a right-holder.

21. See ibid., pp. 279–341; and Sentences, 1 *IMT* 365–367.
22. See Judgment, 1 *IMT* 255–279. 23. 1 *IMT* 12.
24. Hans Kelsen, "Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals," *California Law Review* 31 (1943): 530, 533. Associate defense counsel Jahrreiss cited Kelsen's paper as authority for the position that "in questions of breach of the peace, the liability of individuals to punishment does not exist according to the general international law at present valid." 17 *IMT* 478. Kelsen, however, was not in sympathy with Jahrreiss' defense. Anticipating the prosecution of Axis war criminals, Kelsen had argued that in their case the enactment of rules to establish individual criminal liability retroactively would be justified on moral grounds. See Kelsen, *Peace Through Law* (Chapel Hill, 1944), pp. 87–88, and "The Rule against *Ex Post Facto* Laws and the Prosecution of the Axis War Criminals," *Judge Advocate Journal* 2 (1945): 8–12, 46.

One qualification to the act of state defense, as stated above, is essential. An individual performs "acts of state" in his capacity as an "organ of the state," but it is not enough that *he*, an official rather than a private individual, acts. The individual acts in an official capacity only if his acts are "performed at the government's command or with its authorization."[27] The requirement that the individual's acts be authorized by his government establishes a distinction, in the conduct of officials, between lawful (authorized) and unlawful (unauthorized) acts. Whether an official's act is lawful may be determined through citizens' claims against the official. And such claims are allowed by Austin's analysis of a legal right as a triadic relation.[28] If an official acts in excess of the powers of his office, he is personally liable; and the relation here between duty-bearer (the official) and right-holder (the citizen) emanates from, and is enforced by, the third party to the relation, the sovereign. This way around the act of state defense, preserving the dogma of absolute sovereignty while at the same time avoiding a grant of license to officials, is well established in English domestic law.[29]

25. See Austin, *Province*, p. 284.
26. Ibid., p. 290.
27. Kelsen, "Collective and Individual Responsibility," p. 539.
28. See Austin, *Province*, pp. 265–266.
29. See, e.g. Lord Cave, in Johnstone v. Pedlar, *Appeal Cases* 2 (1921): 262, 275: "When a wrong has been done by the King's officer to a British subject, the person wronged has no legal remedy against the Sovereign, for 'the King can do no wrong'; but he may sue the King's officer for the tortious act, and the latter cannot plead the authority of the Sovereign, for 'from the maxim that the King cannot do wrong it follows, as a necessary consequence, that the King cannot authorize wrong.' "

The situation is different in the international context, where to invoke the Austinian doctrine of absolute sovereignty and its corollary regarding positive legal rights is tantamount to raising the act of state defense. Suppose that sovereign state *A* brings a claim, either in its courts or before an international forum, against sovereign state *B* or against an individual for an act imputed to state *B* as an act of state. The claim implies a "superior sovereign," the third member of the legal relation, who sets the positive law from which *A*'s right and *B*'s duty emanate. But this is contrary to the hypothesis that *A* and *B* are themselves sovereign powers. The doctrine of sovereignty means inter alia that positive law always emanates from a superior power. Between *A* and *B*, which are equal powers, there can be no positive law.[30] It was this doctrine that counsel for the defense at Nuremberg invoked in the course of raising the act of state defense, and this doctrine that the prosecution and Tribunal rejected in denying that defense.

The arguments of Professor Hermann Jahrreiss, associate defense counsel,[31] are prominent here. In his statement concerning juridical aspects of the trial, Jahrreiss raised the act of state defense and, with it, the doctrine of absolute sovereignty.[32] He began by asking the Tribunal to suppose, contrary to fact, that there had existed in the 1930s not the ineffectual Kellogg-Briand Pact of 1928[33] but "a general and unambiguous [peace] pact . . . accepted and applied by the contracting parties in fundamental and factual agreement." Given this supposition, "Would the liability of individuals to punishment for the breach of such a treaty be founded in international law?" Jahrreiss

30. See Austin, *Province*, p. 139.

31. Professor of law at Cologne and associate defense counsel for defendant Jodl, Hermann Jahrreiss delivered a long statement on juridical aspects of the trial; it represents the most sustained effort by defense counsel to provide a philosophical basis for the defense position. See 17 *IMT* 458–494. For later reflections by Jahrreiss, see his testimony before the United States Military Tribunal at Nuremberg as an expert defense witness on German constitutional law, in 3 *NMT* 252–284. See also his "Die Fortentwicklung des Völkerrechts," *Jahrbuch für Internationales und Ausländisches Öffentliches Recht* 2 (1949): 654–666, reprinted in Jahrreiss, *Mensch und Staat* (Cologne, 1957), pp. 233–253.

32. See generally 17 *IMT* 476–481.

33. General Treaty for Renunciation of War as an Instrument of National Policy, 27 Aug. 1928, *League of Nations Treaty Series* 94 (1929): 57–64.

answered that "not even the liability of the state to punishment, let alone that of individuals," would be so founded. For although a state could be said to have committed an offense against "international law," a violation, that is, of an obligation incurred by consent, the offending state would not be subject to punishment under international criminal law. And what is more, individuals could not be said to have committed any offense whatever under international law. Jahrreiss appealed directly to the doctrine of absolute sovereignty to support the immunity of individuals from prosecution by an international forum. The prosecution of individuals, he asserted, "cannot take place as long as the sovereignty of states is the organizational basic principle of interstate order."[34]

What does Jahrreiss' appeal to the doctrine of absolute sovereignty amount to? He assumed that the acts of the defendants were within the scope of the powers delegated to them and could be imputed to the state as acts of state, thereby granting the individual defendants legal immunity. He then used this assumption in the international context, arguing that it would be contrary to the doctrine of absolute sovereignty to grant a foreign or international forum the power to hold an individual legally liable for acts imputed to the individual's state as acts of state. If liability under positive law could be imposed by a foreign or international forum, that would set limits on what is by definition unlimited, the legal power of the sovereign state. The upshot of the argument is clear. If an individual has no legal liability for a breach of the ideal peace pact of Jahrreiss' supposition, the same conclusion holds a fortiori for a breach of the existing Kellogg-Briand Pact.

Moreover, the doctrine of absolute sovereignty gave Jahrreiss a means of denying the applicability of nonpositivist criteria for the identification of law—consent, perhaps, or consonance with morality. For Jahrreiss to have allowed such criteria would have left open the possibility that a legal order other than the positive legal order, for example, international law, had the better claim to legitimacy and might therefore prevail over positive law in cases where norms from each order conflicted. The prosecution and Tribunal clearly rejected Jahrreiss' presupposition of absolute sovereignty but were less clear

34. 17 *IMT* 476, 477, 478.

on the matter of the applicability of nonpositivist criteria for the identification of law.

Sir Hartley Shawcross, chief prosecutor for the United Kingdom,[35] directly attacked the classical legal positivist doctrine of absolute sovereignty in his reply to Jahrreiss, arguing that the doctrine is incompatible with commonplace obligations of governments.[36] According to the classical legal positivist, only individuals have legal obligations, and only because the state has power to secure compliance by imposing sanctions. Shawcross argued that states also have legal obligations, but a state's obligations cannot be said to be conditioned on the state's power. Classical legal positivism, restricting as it does the scope of legal obligation to the extent of state power, must be rejected in any system of law that recognizes the legal validity of a state's obligations. As Shawcross put it, referring expressly to the classical legal positivists, "Legal purists may contend that nothing is law which is not imposed from above by a sovereign body having the power to compel obedience. That idea of the analytical jurists has never been applicable to International Law. If it had, the undoubted obligation of States in matters of contract and tort could not exist."[37]

In its Judgment, the Tribunal reaffirmed article 7 of the Charter and rejected the classical legal positivist doctrine of absolute sovereignty. Speaking directly to article 7, the Tribunal contended that "the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state." Having rejected the doctrine of absolute sover-

35. English barrister, attorney general, Labor member of Parliament, and chief prosecutor for the United Kingdom, Sir Hartley Shawcross was perhaps philosophically the most sophisticated counsel arguing before the International Military Tribunal. See his opening statement, 3 *IMT* 91–145, and closing statement, 19 *IMT* 433–529. For later reflections see his "International Law: A Statement of the British View of Its Role," *American Bar Association Journal* 33 (1947): 31–35, and "Robert H. Jackson's Contributions during the Nuremberg Trial," *Mr. Justice Jackson: Four Lectures in His Honor* (New York, 1969), pp. 87–136.

36. See generally 19 *IMT* 458–465.

37. Ibid., p. 463. (Here I draw the quotation from the British printing of the trial proceedings, *The Trial of German Major War Criminals* 19 [1949]: 426, since there is an error at this point in the *IMT* text of the proceedings.) See also 3 *IMT* 94.

eignty as it applied to acts of the defendants, the Tribunal likewise rejected the act of state defense as it applied to these same acts. As the Tribunal put it, "He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under international law."[38]

The viability of the defense of act of state as understood and presented by defense counsel at Nuremberg presupposes the applicability of the doctrine of absolute sovereignty. A parallel presupposition is at work in connection with the defense of superior orders.

V

The defense of superior orders, according to which the accused is not criminally liable for committing an act ordered by his superior, was rejected in article 8 of the Nuremberg Charter although allowed as a factor in mitigation of punishment. In the words of the Charter:

> The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.[39]

The Charter's rejection of an unqualified defense of superior orders reflected the German Military Code[40] and also the newly revised law of war manuals of Great Britain and the United States.[41] Nevertheless,

38. Judgment, 1 *IMT* 223. 39. 1 *IMT* 12.

40. § 47, *Militärstrafgesetzbuch*. Law of 10 Oct. 1940, *Reichsgesetzblatt*, Teil I (1940): 1347, 1351. Section 47 denied the unqualified defense to one who "went beyond the order as given" or acted knowing "that the superior's order referred to an act aimed at a civil or military felony or misdemeanor." Although defendant Jodl was reported to have said that he did not remember a single prosecution under section 47 "in his 30 years of service" (19 *IMT* 43, Exner, defense counsel), section 47 had been used in the past and had yielded a conviction in the well-known *Llandovery Castle* case–a 1921 German prosecution stemming from the First World War, in which two German submarine officers were charged with shooting at British lifeboats in violation of the laws of war. See "German War Trials: Judgment in the Case of Lieutenants Dithmar and Boldt," *American Journal of International Law* 16 (1922): 708–724.

41. Until 1944, the British *Manual of the Laws and Usages of War on Land* and the U.S. *Rules of Land Warfare* both allowed the defense, the latter specifi-

counsel for the defense at a number of points raised the defense of superior orders and, with it, the classical legal positivist doctrine of absolute sovereignty and its corollary, the requirement of unconditional obedience. In considering the relation of the defense to the doctrine of absolute sovereignty, it will be useful to begin with a fairly typical case, that of a foot soldier who is issued iniquitous orders.

Imagine that a soldier in the field has just been ordered by his commanding officer to kill prisoners of war and that the order reflects the will of the military command structure and the policies of the state. The soldier sees himself faced with a genuine moral dilemma posed by the consequences of obedience to the order on the one hand and disobedience on the other. If he obeys, the consequences for the prisoners are clear; and if he disobeys, he is virtually assured of prosecution before a court-martial for a serious violation of military law. The soldier, desiring both to preserve the prisoners' lives and to avoid prosecution, hopes to challenge successfully his commanding officer's order.

One challenge available to him speaks to the morality of the order. Can the soldier legally justify disobedience on grounds that the act in question is immoral? According to the doctrine of absolute sovereignty, he cannot; to contend otherwise is to allow a legal obligation to be overturned on extra-legal grounds–here, on moral grounds. As an expression of the sovereign, the commanding officer's order, coupled with legally unlimited power to enforce obedience, is sufficient to establish a legal obligation, and the obligation is unconditional. If the obligation can be overturned at all, it can be done only by successfully challenging it *qua* legal obligation. One challenge directed to the legal validity of the order is based on the incompatibility of the order with international law, specifically, with the law of war. Can the soldier legally justify disobedience on grounds that the order is contrary to the law of war? Again, according to the doctrine of absolute sovereignty, he cannot; to hold otherwise is to introduce just another "extra-legal" ground. Since the sovereign is incapable of legal limitation, there cannot be, as defense counsel Hans Laternser put it, "any question of a crime if the order requires action which is not directed against the authority of the State, but on the contrary is demanded by that authority."[42]

When associate defense counsel Jahrreiss raised the defense of superior orders, it was not, however, in the familiar context of a foot soldier's orders from his superior, but in the extraordinary context of the Nazi defendants, policy-makers in Hitler's Germany. That Jahrreiss presupposed the doctrine of absolute sovereignty is evident throughout his argument, and nowhere more so than in his reification of the absolute sovereign in the person of Hitler. Jahrreiss first addressed the moral and international legal challenges to orders given by a superior, challenges we have looked at in connection with the foot soldier. Observing that orders "can always be measured . . . against the rules of international law, morality, and religion," Jahrreiss argued that to allow officials to use such rules to determine for themselves whether orders are lawful and to "decide accordingly whether to obey or refuse" would be to undermine the sovereignty of the state. Unilateral decisions made by officials on the legal validity of orders would in the end imperil the state's "supreme orders, which must be binding on the hierarchy if the authority of the state is to subsist at all." Having dismissed the moral and international legal standards, Jahrreiss asked whether an order could be measured "against the existing written and unwritten law of the state concerned." He addressed himself here specifically to challenges to orders defective in legal form. For example, could an official challenge the legal validity of an order if "the person giving the order has exceeded his competency or made a mistake in form"? Again resting his case on the doctrine of absolute

cally providing that "Individuals of the armed forces will not be punished for these offenses [i.e. for violations of the laws of war] in case they are committed under the orders or sanction of their government or commanders." FM 27–10, 1 Oct. 1940 ed., para. 347. In 1944, both the British *Manual* and the U.S. *Rules* rejected the defense, the latter providing that "Individuals and organizations who violate the accepted laws and customs of war may be punished therefor. However, the fact that the acts complained of were done pursuant to order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defense or in mitigation of punishment. The person giving such orders may also be punished." Para. 345.1 (change of 15 Nov. 1944). The British Ministry of Defence *Manual of Military Law*, 12th ed. (1972), Part I, para. 23, and Part III, para. 627, and the United States Department of the Army *Law of Land Warfare*, FM 27–10 (1956), para. 509(a), have both maintained this later position.

42. 22 *IMT* 83.

sovereignty, Jahrreiss denied officials this right of challenge, maintaining that "there must under every government exist orders that are binding on the members of the hierarchy under all circumstances, and therefore represent law to the officials concerned, even though outsiders may find that they are defective as regards content or form. . . ."[43]

Jahrreiss' primary interest, however, was in the legal status of the orders of Hitler himself.[44] These directives, decisions, instructions, and the like were defective if judged by traditional standards, the standards, for example, of the Weimar Constitution. But the so-called Enabling Act of 24 March 1933 swept away the old standards. The Act in effect authorized Hitler to change statutory and even constitutional law by decree, thereby giving legal credence to the abolition of the separation of powers in Germany.[45] The result, Jahrreiss argued, was a doctrine of absolute sovereignty personified in Hitler. "Now in a state in which the entire power to make final decisions is concentrated in the hands of a single individual, the orders of this one man are absolutely binding on the members of the hierarchy. This individual is their sovereign, their *legibus solutus*."[46] In offering this characterization of Hitler, Jahrreiss suggests that the Nazi defendants' duty of unconditional obedience to Hitler was not unlike that of the foot soldier's to his commanding officer.

Sir Hartley Shawcross, replying to Jahrreiss' effort to raise the defense of superior orders, expressly rejected the classical legal positivist requirement of unconditional obedience, arguing that "no rule of international law . . . provides immunity for those who obey orders which—whether legal or not in the country where they are issued—are

43. 17 *IMT* 484–485.

44. See generally ibid., pp. 481–494.

45. *Gesetz zur Behebung der Not von Volk und Reich* [*Law for Eliminating the Distress of People and Reich*]. Law of 24 Mar. 1933, *Reichsgesetzblatt*, Teil I (1933): 141. See art. 1 (in part): "Apart from the procedure provided in the Reich Constitution, laws of the Reich can also be decreed by the Reich Government"; and art. 2 (in part): "Laws decreed by the Reich Government may depart from the Reich Constitution as long as they do not have as their object the institutions of the Reich Parliament [*Reichstag*] and the Reich Council [*Reichsrat*] as such." See also Jahrreiss' discussion of the so-called Enabling Act in his testimony as an expert defense witness, 3 *NMT* 252–284.

46. 17 *IMT* 486.

manifestly contrary to the very law of nature from which international law has grown" and are illegal by "every test of international law, of common conscience, [and] of elementary humanity." International law "must consider the legality of what is done by international and not by municipal tests."[47]

Robert H. Jackson, chief of counsel for the United States,[48] argued that the joint use of the defense of superior orders and the defense of act of state generates an absurdity.[49] If individual *A* is not legally responsible for an act because his superior, *B*, ordered him to perform that act, then according to the converse of the defense of superior orders, the doctrine of respondeat superior, *B* is responsible. Now suppose that *B* is head of state. He cannot invoke the defense of superior orders to free himself of responsibility, but he can impute his act to the state as an "act of state." "Those in lower ranks were protected against liability by the orders of their superiors. The superiors were protected because their orders were called acts of state."[50] As Jackson observed, "the combination of these two doctrines means that nobody is responsible."[51]

In its Judgment, the Tribunal reaffirmed article 8 of the Charter, holding its provisions to be "in conformity with the law of all nations." And the Tribunal dismissed the arguments of defense counsel.

> That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to

47. 19 *IMT* 465–466.

48. Mr. Justice Jackson interrupted his tenure on the Supreme Court to represent the United States at the London Conference (see fn. 16, above) and to argue before the International Military Tribunal as chief of counsel of the United States prosecution. The "Report from Robert H. Jackson to the President," *Department of State Bulletin* 12 (1945): 1071–1078, is a projection of the prosecution's arguments. For Jackson's arguments at trial, see his well-known opening statement, 2 *IMT* 98–155, reprinted as Robert H. Jackson, *The Case against the Nazi War Criminals* (New York, 1946); and his closing statement, 19 *IMT* 397–432. For later reflections see Jackson, "Nürnberg in Retrospect," *Canadian Bar Review* 27 (1949): 761–781, reprinted in *American Bar Association Journal* 35 (1949): 813–816, 881–887.

49. 2 *IMT* 149–150. See also 19 *IMT* 423–424; and "Report to the President," pp. 1073–1074.

50. 2 *IMT* 150.

51. "Report to the President," p. 1073.

> such acts of brutality . . . The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.[52]

The Tribunal's "test" conditions the availability of a defense on the possibility of a moral choice, but what was meant by "moral choice" is not obvious. The "choice" may be understood in genuinely moral terms, inviting serious reflection on the propriety of harming or killing innocent persons to avoid one's own punishment or death. On this interpretation, the soldier has a "moral choice" even when faced with death.[53] But "choice" may also be understood simply as ruling out a situation in which, as Brigadier General Telford Taylor expressed it, "opportunity for reflection, choice, and the exercise of responsibility is non-existent or limited."[54] Given either interpretation, what is significant is that the Tribunal based its test on this "choice." For the possibility of a choice to obey runs directly counter to the classical legal positivist requirement of unconditional obedience to state law and involves a rejection of the doctrine underlying that requirement, namely the doctrine of absolute sovereignty.

That the defense of superior orders presupposes sovereignty is not surprising, for the defense plays its primary role in military law, a body of law in which such concepts as authority and orders predominate. As one theorist puts it, a paradigm of "unconditional obedience to an external, norm-establishing authority" is "a military formation, where a host of people are subjected in their movements to a military order to which they all conform."[55] Unlike the superior orders defense, however, the defense of ex post facto law has no obvious connection to the doctrines of classical legal positivism.

52. 1 *IMT* 224.

53. See Morris Greenspan, *The Modern Law of Land Warfare* (Berkeley, 1959), p. 494.

54. *The High Command Case* (United States v. Wilhelm von Leeb, et al.), 11 *NMT* 373. (Telford Taylor, an associate trial counsel for the United States prosecution at the International Military Trial, was chief of counsel for the prosecution at the later United States Military Trials.)

55. E.B. Pashukanis, "The General Theory of Law and Marxism," *Soviet Legal Philosophy*, trans. H.W. Babb (Cambridge, Mass., 1951), p. 154, cited in Lon L. Fuller, *The Morality of Law*, 2nd ed. (New Haven, 1969), p. 113.

VI

Defense counsel at Nuremberg frequently objected that the law of the Charter, in particular one or more of the classes of offenses cited in article 6, was void as ex post facto law. For example, Otto Stahmer, counsel for defendant Goering, protested the creation of "new material law by threatening punishment for crimes which, at the time of their perpetration, at least as far as individuals are concerned, did not carry any punishment."[56]

Speaking generally, to prohibit ex post facto law is to constrain legal officials and agencies from changing the law retroactively in a way that works to the disadvantage of defendants in criminal proceedings. What is known as the ex post facto defense, or the claim made on behalf of a criminal defendant that the prohibition of ex post facto law has been violated, takes a variety of specific forms, at least two of which were evident at Nuremberg. Stahmer's charge of ex post facto law, quoted above, is an example of the form of the defense sometimes referred to as the rule *nulla poena sine lege*, according to which no person shall be punished for proscribed acts except pursuant to a preexisting statute that fixes a penalty for these acts. To apply the *nulla poena* rule at Nuremberg, it would be sufficient to show that the Charter's provisions made punishable a violation of an obligation that was not punishable at the time of the violation. The *nulla poena* rule raises questions not about the existence of a legal obligation, but only about the enactment of provisions for punishing violations of that obligation. Enactment of such provisions after the fact of violation, that is, post factum, is what the rule prohibits.

According to another form of the ex post facto defense, sometimes termed the rule *nullum crimen sine lege*, no person shall be held criminally liable for acts not expressly proscribed in a preexisting statute. To apply the *nullum crimen* rule at Nuremberg, it would be necessary to show that the Charter's provisions established new obligations that imposed liability retroactively. When defense counsel Stahmer argued that the offense described as conspiracy to wage aggressive war constituted a new obligation, because "conspiracy as used by the Prose-

56. 17 *IMT* 501.

cution is entirely unknown to German law," he was invoking the *nullum crimen* rule.[57]

The prohibition of ex post facto law, expressed here in the *nulla poena* and *nullum crimen* rules, is not derivable from the doctrines of classical legal positivism. Indeed, the ex post facto prohibition is generally understood by jurists as an application of the principle of "legality," "*Rechtsstaat*," or "the rule of law," a pervasive principle that embodies the moral ideals of law.[58] Thus understood, the prohibition is not consistent with, much less derivable from, the doctrines of classical legal positivism. While the prohibition marks a point at which law and state power may diverge, classical legal positivism regards law as an expression of state power. And while the prohibition imposes constraints on state power, classical legal positivism holds state power to be unlimited.

How then might defense counsel have invoked the ex post facto prohibition on classical legal positivist grounds? One possibility would have been to invoke it not as a moral constraint on the Tribunal's power to apply Nuremberg Charter law but rather as a logical limitation on that power. In fact, associate defense counsel Jahrreiss did provide part of an argument invoking the ex post facto prohibition on logical, rather than moral, grounds. By drawing on Jahrreiss and by supposing, contrary to fact, that the command doctrine is applicable to the trial (as defense counsel at some points argued), an argument invoking the ex post facto prohibition on logical grounds can be constructed.

Sketched here in terms of the Nuremberg Charter law on crimes against peace, the argument has three distinct parts. *First*, as Jahrreiss argued, at the time the defendants committed the acts for which they were later prosecuted, there were no applicable legal norms proscribing those acts. *Second*, although the Nuremberg Charter represents for the prosecution and Tribunal merely the addition of sanctions to previously existing legal norms, the Charter represents for the classical legal positivist the enactment of new law. *Third*, it is not possible –not possible logically–to apply Charter law to acts antedating the enactment of that law; that is to say, a present command can have no application to a past act. Let us consider each of the three parts of the argument more closely.

57. Ibid., pp. 508–509.

58. For applications of the principle of legality to the prohibition of ex post facto law, see Fuller, *The Morality of Law*, pp. 41–44, 51–62; Jerome Hall, *General Principles of Criminal Law*, 2nd ed. (Indianapolis, 1960), chap. 2; John Rawls, *A Theory of Justice* (Cambridge, Mass., 1971), p. 238.

In the course of his statement on juridical aspects of the trial, associate defense counsel Jahrreiss argued that at the time the defendants conspired to wage and did wage aggressive war, there were no legal norms proscribing such acts, and that therefore the Charter's article 6(a) dealing with aggressive war–crimes against peace–ran afoul of the prohibition of ex post facto law. There was to be no doubt that the argument would proceed along positivist lines. As Jahrreiss noted, "I am dealing only with the problems of law as it is at present valid, not with the problem of such law as could or should be demanded in the name of ethics or of human progress."[59]

Jahrreiss contended that even if the international norms created by the conventions of the 1920s had enjoyed legal status initially, a point he was by no means willing to concede, by the mid-1930s they had lost all claim to such status.[60] The League of Nations Covenant, providing for the principle of collective responsibility of the members of the League,[61] and the Kellogg-Briand Pact (or Pact of Paris), outlawing war as an instrument of national policy, were dead letters by the mid-1930s. To support his contention, Jahrreiss surveyed the collapse of the system of collective security planned around the League Covenant and the Kellogg-Briand Pact, pointing to a lack of compliance with these conventions and to a lack of any power to respond to "violations" with sanctions, in effect demonstrating that the power relation of the classical legal positivist's command doctrine was not operative. By the late 1930s, the collapse of collective security arrangements was evident to all, and England, Russia, and the United States said as much. Prime Minister Chamberlain, quoted by Jahrreiss, proclaimed in February of 1938 in the House of Commons that

59. 17 *IMT* 459.

60. See ibid., pp. 467–469.

61. See League of Nations Covenant, art. 16, para. 1.

> . . . the League as constituted today is unable to provide collective security for anybody . . . we must not delude ourselves, and, still more, we must not try to delude small weak nations into thinking that they will be protected by the League against aggression . . . when we know that nothing of the kind can be expected.[62]

Similarly, Russia's attitude toward German designs on Poland—affected not least of all by her desire to share in the spoils—was dictated entirely by "the old rules of power politics." In the German-Russian Frontier and Friendship Pact of 1939, which gave details of the Polish partition, "no mention is made of the Pact of Paris or the League of Nations Covenant." The collapse of the system of collective security, Jahrreiss continued, was also evident to the United States. Taking note in September of 1939 of the state of war in Europe, President Roosevelt insisted that the United States "conform with neutrality regulations in the strictest manner." But far from dealing the system of collective security arrangements a death blow, Jahrreiss argued that the United States declaration of neutrality merely acknowledged that "the system had already been dead for years."[63]

What did all of this mean for the ex post facto law question? In Jahrreiss' view, at the time the defendants conspired to wage aggressive war, there were, for want of compliance and of the power to impose sanctions, no legal norms proscribing such activity. Nor, for the same reasons, were there legal norms proscribing the actual waging of aggressive war. The annexation of Austria, the dismemberment of Czechoslovakia, the destruction of Poland—these German conquests were not, therefore, in violation of international law. Or so Jahrreiss argued.

Given the first part of the argument, provided by Jahrreiss, it can be said that there was no law applicable to the defendants' acts at the time the acts were committed. From this it follows that the Charter, in proscribing aggressive war, enacted new law. To put it another way, the norms established by the conventions of the 1920s had, for want of sanctions, no legal status; the Charter, in attaching sanctions to these preexisting norms, thus marked the emergence of new law.

62. 17 *IMT* 465.

63. Ibid., pp. 466, 467.

It is instructive here to compare with Jahrreiss' position that of the prosecution, for whom the Charter merely added to preexisting legal obligations the power to impose sanctions. As United Kingdom chief prosecutor Shawcross put it, "The only innovation which this Charter has introduced is to provide machinery, long overdue, to carry out the existing law, and there is no substance in the complaint that the Charter is a piece of *post factum* legislation. . . ."[64] Shawcross contended that in the international field, "the existence of law has never been dependent on the existence of a correlated sanction external to the law itself."[65] Rejecting the classical legal positivist's characterization of law in terms of the power to impose sanctions and interpreting the preexisting norms as legal obligations, the prosecution granted only that the Charter might be in violation of the *nulla poena* rule. And, as it happened, this was an innocuous concession, for the prosecution (and the Tribunal) refused on both moral and international legal grounds to recognize the *nulla poena* rule.[66]

More generally, the contrast between the position of the prosecution and that of Jahrreiss is this: What for the prosecution was merely the addition of sanctions to preexisting law was for the positivist-minded defense counsel the enactment of new law. And what would have been for the prosecution merely a violation of the *nulla poena* rule (had the prosecution been disposed to recognize this rule), was for the positivist-minded defense counsel a violation of the *nullum crimen* rule.

64. 19 *IMT* 464.

65. Ibid., p. 463.

66. Shawcross' statement here is representative: "There is all the difference between saying to a man, 'You will now be punished for what was not a crime at all at the time you committed it,' and in saying to him, 'You will now pay the penalty for conduct which was contrary to law and a crime when you executed it, although, owing to the imperfection of the international machinery, there was at that time no court competent to pronounce judgment against you.' It is that latter course which we adopt, and if that be retroactivity, we proclaim it to be most fully consistent with that higher justice which, in the practice of civilized states, has set a definite limit to the retroactive operation of laws." 3 *IMT* 106. See also 2 *IMT* 144 (Jackson); Judgment, 1 *IMT* 219–221; Judgment, *The Hostage Case* (United States v. Wilhelm List, et al.), 11 *NMT* 1239.

Given the second part of the classical legal positivist argument invoking the ex post facto defense, the Charter's article 6(a) proscribing aggressive war can be said to represent new law, and in the Nuremberg proceedings this law was applied to a period of time prior to the law's enactment. It is this application of Charter law that violates the *nullum crimen* rule and prompts the classical legal positivist to raise an objection based not on morality but on logic. What purports to be an application of law to a time antedating the law's enactment is, the positivist argues, not even a possible application. As Austin puts it, "Obligation regards the future. An obligation to a past act, or an obligation to a past forbearance, is a contradiction in terms."[67]

The "contradiction" that Austin speaks of here may be demonstrated by appealing to the power relation, one component of the classical legal positivist's command doctrine, and specifically, to the requirement of the power relation that there be at least a possibility of compliance with the directive. (i) In the case of a directive to perform a past act, one lacks the ability to comply, thereby ruling out any possibility of compliance with the directive. (ii) But if there is no possibility of compliance, there exists no power relation between the directing and directed parties. (iii) Finally, if there exists no power relation, the directive in question is not a command, not a legal norm. The "contradiction" is thus generated by the supposition that the modality of command, understood by Austin as entailing the ability of the commanded party to perform, may have among its instances commands that ex hypothesi cannot be performed.

Although a legal agency cannot apply law to a period of time prior to enactment of the law, it may, notwithstanding this logical disability, have extra-legal power to impose penalties for acts committed prior to enactment of the law. Why is such power extra-legal? Because the legal power to impose penalties or sanctions is, for the classical legal positivist, noncontingently linked to the issuing of commands.[68] Where there is no command, as in the case of a directive to perform a past act, the subsequent imposition of a penalty cannot be for failing to comply with a command. But where the penalty is not a response to a

67. Austin, *Lectures*, vol. 1, p. 444, and see pp. 485–486. See also Austin, *Province*, p. 20.

68. See Austin, *Province*, pp. 14, 17–18.

"commanded" act or forbearance, it is not a response to any legally recognized act or forbearance. It is, in the classical legal positivist's view, extra-legal.

The Tribunal presented a view of the ex post facto question diametrically opposed to that sketched above. Briefly reviewing "the state of international law in 1939," the Tribunal argued, concerning crimes against peace, that the Kellogg-Briand Pact was binding on the sixty-three nations, "including Germany, Italy, and Japan," that had signed the pact. The pact was binding even though it "does not expressly enact that [aggressive] wars are crimes, or set up courts to try those who make such wars."[69] As authority for its position the Tribunal appealed to the parallel case of war crimes. The signatories of the Hague Convention of 1907,[70] which "prohibited resort to certain methods of waging war," were, the Tribunal observed, bound by the obligations expressed therein, even though the Convention nowhere designates as criminal certain methods of waging war or prescribes any sentence or makes "any mention . . . of a court [with jurisdiction] to try and punish offenders."[71]

Contending that international norms may be identified as legal norms apart from the power relation of the classical legal positivist's command doctrine, the Tribunal, like chief prosecuting counsel Shawcross, was not sympathetic to the view that the Charter's addition of sanctions to international norms marked the enactment of new law; and it was, therefore, unmoved by the contention of defense counsel that, in its application, the Charter was ex post facto law.

VII

It has been my concern to show that noncontingent links exist between doctrines of classical legal positivism on the one hand and the Nuremberg criminal defenses on the other. The defenses of act of state and superior orders both presuppose the doctrine of absolute

69. Judgment, 1 *IMT* 219, 220.

70. Hague Convention No. IV Respecting the Laws and Customs of War on Land, 18 Oct. 1907, *U.S. Statutes at Large* 36 (1911): 2277–2309.

71. Judgment, 1 *IMT* 220–221.

sovereignty, presuppositions illustrated, respectively, by Austin's analysis of positive legal rights as triadic relations and by the requirement of unconditional obedience. One feature of the command doctrine, the requirement of the power relation that the commanded party be able to comply, provides a basis for invoking the *nullum crimen* rule, one form of the defense of ex post facto law.

These noncontingent links are noteworthy, for they provide a means of replying to the skeptic, who explains the rejection of criminal defenses at Nuremberg in altogether parochial terms and denies that the rejection can be justified. Although the Tribunal's rejection of the defenses may appear arbitrary or capricious when the defenses are considered independently of their underlying classical legal positivist doctrines, the skeptic is challenged once it is shown, as the noncontingent links show, that the rejection of the defenses follows from the rejection of underlying classical legal positivist doctrines. Moreover, good reasons can be given, I believe, for the rejection of the underlying doctrines.

A complete reply to the skeptic would require a statement of these reasons. I have tried here to set the stage for such a statement; the elaboration of the reasons themselves would ultimately call for a philosophy of international law.

Quote Gunnar Myrdal:
need for US "catharsis"
p. 28, 61

THE MILITARY ESTABLISHMENT

COMMENT:

by Herbert C. Kelman

Large segments of the American population are by now convinced that United States involvement in Indochina has been profoundly immoral or have at least developed serious doubts about the moral justification for that involvement. There are those who have challenged the morality of the war from the beginning out of opposition to war in general, out of the feeling that this was an aggressive war rooted in an imperialist posture, out of rejection of policies that committed our country to retarding social change in the developing world or out of the conviction that the war represented a perversion of national priorities and a setback in the struggle against racism and poverty. But, after years of United States involvement in the war, even Americans who had no ideological objections to the war and had accepted the justifications for it began to question its morality because of its disproportionate nature. Whatever the original justifications for the war, it aroused widespread moral revulsion because it used means that were not commensurate with the ends being sought, and because it arrayed the massive military forces of a technologically advanced nation against relatively small, weak and undeveloped societies.

This moral revulsion finally led to American disengagement from Indochina although it has not led to an end of the war or of active American involvement in it. The moral revulsion against the war has also contributed to the crisis of legitimacy that our political system has been experiencing—a crisis that has resulted in what may be described as the unprecedented fall of two successive governments. President Johnson's decision in 1968 not to seek reelection was clearly related to the rejection of his war policies by wide segments of the leadership and the population. The abuses of power and obstructions of justice that forced President Nixon's resignation had their origins in his administration's efforts to suppress and discredit the antiwar movement. In both cases, the administrations' commitment to a war that many Americans found morally repellent or questionable contributed to their loss of the moral authority to govern.

War Criminality

Although many Americans were morally disturbed by the lack of proportion between means and ends and between provocation and response, they have largely been unwilling to draw the implications of this fact: namely, that the disproportionate nature of the war and of the way it was fought amounted to the commission of war crimes and crimes against humanity as defined by the Nuremberg principles. Most Americans have refused to seriously consider allegations of war criminality that have been brought forth. Many would agree that war crimes have occurred within the context of the war, such as the massacre at My Lai. Indeed, a United States military court shared in this assessment when it convicted Lieutenant Calley for the My Lai killings. The My Lai massacre, however, was not an isolated, aberrant event. Similar actions were not uncommon in Vietnam; in fact, they were an inevitable by-product of the very nature of the

War Criminals and War Resisters

war—a counterinsurgency war waged by a high-technology society against low-technology societies, in which revolutionary guerrillas are inseparable from the rest of the population.

It is not just My Lai and similar atrocities that constitute war crimes, but the very policies that helped to legitimize such atrocities—policies such as search-and-destroy missions, the establishment of free-shooting zones, the use of antipersonnel weapons, the bombing of entire villages if they were suspected of harboring guerrillas, the forced migration of masses of the rural population and the defoliation of vast forest areas. Some legal scholars have concluded that these policies and actions added up to genocide, although there is reasonable doubt about whether they reflected a specific genocidal intent, as stipulated in the United Nation's Genocide Convention. But even if the case for the crime of genocide cannot be sustained, there is ample evidence to support the claim that United States actions in Indochina have constituted war crimes and crimes against humanity, as defined by the Nuremberg principles. The possibility—and the high probability—that our country has been guilty of war crimes in Indochina has not been widely recognized. It is one of the realities that society must confront in trying to come to terms with the meaning and implications of the war.

Individual Responsibility

Any national effort to come to terms with the implications of the Indochina war must address the disturbing revelation of widespread failures to exercise individual responsibility at all levels of American society. Data from a national survey conducted by this author in 1971, a few weeks after the conviction of Lieutenant Calley for the My Lai killings, revealed that a considerable proportion of the American population, despite misgivings about the war, was apparently prepared to go along with whatever policies and actions the authorities deemed necessary, even if these were of a criminal nature. Many citizens felt that it was neither possible nor necessary to exercise individual responsibility in this situation. This feeling seemed to be strongest among respondents who had a general sense of powerlessness vis-à-vis political authorities, rooted in part in the realities of their positions in society.

The most serious failures in the exercise of individual responsibility, however, did not occur among the powerless segments of the society. To the contrary, they occurred among those closest to the centers of power and highest in status, education, wealth and security—among the large numbers of decision makers, bureaucrats, legislators, diplomats and military officers who shaped, carried out or at least acquiesced in the war policies without taking personal responsibility for the human consequences of their actions.

On the positive side of the ledger, we find that many Americans were prepared to take personal responsibility for the moral consequences of their actions. An unprecedented number of young men refused complicity in the war by resisting conscription, deserting or disobeying military or-

ders. In refusing to become involved in a war that they regarded criminal, to place themselves in a position where they might be given criminal orders or to cooperate in criminal actions, they acted in accordance with their obligations under the Nuremberg principles, which hold each individual responsible for war crimes and crimes against humanity even if he was following orders from his government or from a superior.

To be sure, some of the war resisters—particularly among the servicemen who deserted or received less-than-honorable discharges for rule infractions—were not only unaware of the Nuremberg Charter, but did not even have a consciously articulated position of conscientious objection. Yet, many of these men clearly acted out of moral opposition to the war as they had come to know it, protesting in the only way they knew how. Their lack of a well-articulated position can be understood if we consider that these men came disproportionately from poor, uneducated and minority backgrounds. Unlike the well-educated, middle-class men of their generation, they lacked the conceptual frameworks, the verbal skills, the role models and the counseling opportunities that would have enabled them to develop a conscientious objector position.

The survey on the Calley trial suggested that the very concept of placing one's own moral principles in opposition to the demands of authority is not readily available to individuals from lower socioeconomic and educational backgrounds, not to mention the social and material support for such a stand. A recent article by L. Monke ("Amnesty: Who Needs It?" *Fellowship*, 1974) on war resisters cites a University of Wisconsin study on the comprehension level of Form 150 (the application for conscientious objector classification) which indicated that one would have to be a high-school graduate "just to understand the questions—to say nothing of answering them." Monke stated that resisters from lower class backgrounds "learned from hard experience what their higher class peers learned from books and careful reflection. They felt the moral outrage in their guts but were frustrated by their inability to verbalize it." In short, those who protested the war by desertion or infraction of rules chose a different time and means of protest than the draft resisters—a time and means dictated by the realities of their life situations—but they deserve no less credit for the exercise of their individual responsibility.

The manifestations of war resistance indicate that the principle of individual responsibility did receive some support during the Indochina war. Unfortunately, society's response to its war resisters, at least so far, demonstrates once again the failure to live up to this principle and to uphold it. While those who formulated and carried out the policies that involved us in an immoral and illegal war are enjoying high and respected positions in government, industry, the military, the universities and the foundations, the resisters—whose assessment of the morality and legality of the war is now widely shared within the country—continue to be penalized for their decision. Some are still in prison and others are awaiting judgment. Many have served their terms and now, as convicted felons, are deprived of some of their citizenship rights. Many more are in exile, unable to return without risking arrest and conviction. Others have returned or have remained home and suffer the disadvantages of an underground existence while constantly facing the risk of imprisonment. Finally, the men whose resistance earned them less-than-honorable discharges are deprived of some of the benefits to which they might otherwise be entitled and carry a stigma that severely limits their employment possibilities. President Ford's clemency program will change the statistics somewhat by enabling some of the men to gain an earlier release from incarceration and persuading some (probably a small proportion) to come out of exile or hiding. The terms and assumptions of the program, however, leave the basic picture unchanged: Our society continues to reward those who violated the Nuremberg principles and to punish those who upheld them.

What can be done to help the society come to grips with the failure of the principle of individual responsibility and to assert the validity of that principle for the future? In the long run, we need to promote both institutional and attitudinal changes that would foster a sense of personal efficacy among all segments of the population and establish a sense of personal accountability at all levels of organizational functioning—in other words, changes that would extend both the capacity and the necessity to exercise individual responsibility. The clearest message about where society stands on the principle of individual responsibility will be conveyed by the way in which we deal with the two kinds of war-related crimes: crimes against the Indochinese peoples (as well as against the American Constitution) committed by the war makers and crimes of conscience committed by young war resisters.

Crimes against Humanity

As to war crimes, it is essential for the American people to confront the possibility that our involvement in Indochina represented and led to serious war crimes and crimes against humanity. In introducing the report of the International Commission of Enquiry into United States Crimes in Indochina, which met in Oslo in June, 1971, Gunnar Myrdal wrote that Americans "must go through an intellectual and moral catharsis and clearly see, understand, and even confess the war crimes committed under the order of their government . . . . Without such a catharsis, the nation will not be able to avoid this war from becoming a break in its history, a break against cherished national aspirations and

ideals." From the present perspective, recognition of war crimes is important not only because it represents a necessary cathartic process, but because it helps to recommit us to the principle of individual responsibility for collective actions. It is not enough to conclude that the war was a mistake and that it was the outcome of complex institutional and social processes. All of this may be perfectly true, but ignoring the fact that it was also the outcome of a series of decisions on the part of many individuals (particularly individuals in leadership positions) to formulate, carry out, go along with and condone specific policies and actions reinforces the notion that no one is responsible. The focus on war crimes has a particular advantage here because the legal framework, by its very nature, poses the issue in terms of individual responsibility.

How can we bring our society to confront American war crimes committed in Indochina? An official war-crimes trial—under American or international auspices—is so far outside of the realm of realistic possibility that it makes little sense to advocate it. Sanford Levinson, writing on the applicability of the Nuremberg precedent to the Vietnam War in *War and Moral Responsibility*, proposes two general alternatives: "One is the establishment by inevitably self-appointed groups or individuals of a citizens' tribunal which would consider the guilt of named officials and publish its assessments. A second alternative would be the preparation by individual scholars of articles, to be published perhaps in law reviews, as to the guilt or innocence of named individuals under the applicable precedents." Such alternatives actually have an advantage over official trials because they are oriented toward establishing guilt rather than administering punishment. The added social value of punishing those found guilty of commitment of or complicity in war crimes (even if this were feasible) would be outweighed by the enormous cost in creating bitter resentments and irreconcilable divisions within the society. What is important—in terms of the message that must be communicated—is to establish responsibility for the criminal actions and to delegitimize these actions, not to punish those found responsible for them.

Concern about the danger of lasting resentments and divisions also causes some hesitation about Levinson's emphasis on establishing, in quasi-legal fashion, the guilt of specific individuals. Furthermore, such an approach would have to concentrate on the key decision makers and would, to that extent, dilute the message that—although some individuals are obviously more guilty than others—the responsibility is widely shared. Levinson's contention that the inquiry must be personalized is well-taken. If we are to reinforce the principle of individual responsibility, we cannot take the view that things just happened through the impersonal workings of institutional or organizational processes. It must be made clear that things happened because of the decisions that individuals made or failed to make, and the actions that individuals took or failed to take at particular times and places. However, the real point of the inquiry is not to allocate blame, but to identify the actions that are deserving of blame: not to determine who is guilty of crimes, but to illustrate how individuals become participants in such crimes. By these means, a war-crimes inquiry would help to delegitimize actions that short-circuit the exercise of individual responsibility—because the actor fails to consider the human consequences of the policies he formulates or carries out, because he obeys superior orders without question or because he divorces his task from its larger human context through routinization and specialization.

Crimes of Conscience

In examining alternative ways of dealing with American war crimes, this writer has accepted the idea that while it is essential to establish responsibility for criminal actions, it is neither possible nor desirable to punish those found guilty of such actions. The question of punishment leads to the second set of war-related crimes on which society must take a stand: the crimes of conscience committed by the young war resisters. Unlike the war makers, these men have been punished, continue to be punished or are threatened with punishment for their actions. Some observers have connected the two issues and have argued that if war criminals are to be exempt from punishment, then war resisters must also be exempt. This position was well-stated in an editorial in *World* by Norman Cousins. After speaking of the errors and horrors committed by the war makers, he went on to say:

> A case might be made for the fact that such errors and horrors are now behind us, and that our attention must be turned to the challenge of rehabilitating Vietnam and to the larger challenge of remaking America at home. It can be argued, too, that this nation could tear itself to pieces if it ever attempted to fix the blame for everything involved in the Vietnam tragedy. Such arguments are not without merit. But if there is to be amnesty for government, there must also be amnesty for those who refused to acquiesce in the government's efforts to violate its own laws and traditions. Amnesty for all or amnesty for none.

This position may be effective in overcoming some of the opposition to amnesty for war resisters because it bases its appeal on the requirements of equal justice. If we are going to forget one set of war-related actions that many Americans consider criminal, then we must also forget the other set of actions that a second group of Americans consider criminal. Moreover, it is a position consistent with one of the important reasons for offering amnesty to war resisters: namely, that it would help to heal the wounds left by the war and to promote a national reconciliation. From that perspective, it is important to point out that reconciliation is a two-way street.

From the present perspective, however, which focuses on reasserting the principle of individual responsibility, it must be stressed that nonpunishment of war criminals and amnesty for war resisters are not at all commensurate. In the first case, we are dealing with men who have violated the Nuremberg

principles; if they are to be exempted from punishment, it is despite their actions and only after responsibility for these actions has been established. In the second case, we are dealing with men who have tried to uphold the Nuremberg principles and who should be granted amnesty because of their actions.

Our society has no better opportunity to express its commitment to the principle of individual responsibility than by granting universal and unconditional amnesty to all those who, as a result of their protest against the war in Indochina, find themselves in legal jeopardy or suffer continuing legal and economic disadvantages. This would include draft resisters and deserters who are currently in prison, on probation or subject to prosecution or who have completed prison terms; those who have exiled themselves to other countries; and those who have gone underground. It would also include veterans from the Vietnam era with less-than-honorable discharges, as well as those men and women who have been prosecuted or face prosecution for civilian acts of protest and resistence.

Universal Amnesty

The amnesty must be universal, in the sense of including all of these categories and all individuals within each category. A selective amnesty would tend to focus on the extent to which an individual—in his original form of protest and in his current attitude—gives obeisance to proper middle-class norms, rather than on the fact that each individual has, in his own way, protested a war he considered immoral or illegal. An attempt to differentiate between individual resisters would also be almost impossible to administer effectively and fairly. The danger that universal amnesty might include some individuals whose actions were not taken out of conscientious opposition to the war is far outweighed by the danger that a selective amnesty would unfairly exclude certain individuals or classes of individuals. It would be particularly unfair if the amnesty excluded those who protested from within the armed forces, such as the deserters and the veterans with less-than-honorable discharges. This point is put across very well by Robert N. Barger in *Amnesty: What Does It Really Mean?*:

> To exclude deserters from amnesty would be to make of amnesty another instrument of discrimination in our society on the grounds of economic class and race. The burdens of the draft and of combat have fallen disproportionately on the poor and the non-white men of our society because of their lack of college deferments, their lack of counseling about conscientious objector eligibility... and their ignorance of other "legal" means of draft evasion which middle and upper class white men could, and did, use as an excuse to avoid the war. To extend this inequity by amnestying draft evaders, but not deserters, would be a tragedy.

The amnesty must be unconditional, in the sense that the individual must not be asked to earn his amnesty by expressing remorse or by performing some form of public service. To demand performance of public service imposes a penalty based on the notion that the individual must pay a price to society in order to be reinstated. This ignores the fact that the war resisters who have been in exile or in hiding (not to speak of those who have been in prison) have already suffered heavy penalties for their acts of conscience. But beyond that, to ask these men to accept a penalty now would be to ask them to admit guilt for refusing to participate in a war that they saw as immoral and illegal—an assessment eventually shared by large segments of the society. Even if conditional amnesty does not represent a form of penalty, it clearly defines amnesty as an act of mercy of which the individual must prove deserving, rather than as an act of justice. As Abraham Heschel said, "Something precious will have been lost by the American people if they should regard amnesty as a matter of mercy. Much of the hope of the future depends upon a clear recognition that resistance to an unjust war is a sacred right of man."

Unconditional amnesty offers the best opportunity to reinforce the principle that the individual has not only the right, but the obligation to consult his conscience when the government asks him to participate in war. The war resisters were absolutely right in their judgment that American involvement in Indochina was immoral and illegal, that participation in the war would have constituted complicity in war crimes and crimes against humanity and that by resisting they were acting in accordance with the Nuremberg principles. One does not have to agree with this judgment, however, in order to favor amnesty. Even those who feel that, on balance, the war was legally and morally justified must recognize that the war did raise serious moral questions and that large segments of the population considered it morally and legally wrong. They must recognize that the war imposed tremendous moral and psychological burdens on the young men who were called upon to participate personally in actions over which the country was so divided and anguished. Under these circumstances, any young man who was convinced that the war was wrong had a moral obligation to dissociate himself from it. The war resisters did precisely what any morally responsible person must do in the face of what he conceives to be immoral and criminal orders. Amnesty for those who acted in this way would be a concrete way of demonstrating and reasserting the validity of the principle of individual responsibility.□

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NOTES AND COMMENTS

THE PROPOSED TRIAL OF PAKISTANI WAR CRIMINALS

The atrocities and genocide that were committed by the Pakistani army against the people of Bangla Desh and the proposed trial of the major criminals responsible for them raise the following important legal issues. The first one concerns the commission of war crimes by Pakistan—specifically the nature and scope of the obligations of the Pakistani occupying army towards civilians and non-combatants in Bangla Desh. The scond issue relates to the scope of crimes against humanity. The third is, whether the mass killing of the Bangali people by the West Pakistani military constitutes genocide and, if so, what procedures and mechanisms are to be instituted for punishing the culprits. Fourth, whether the 1949 Geneva Conventions preclude the trial by the Government of Bangla Desh of persons who have committed the offences mentioned above, even if they are prisoners-of-war, held in Indian custody. Fifth, are the accused entitled to the plea of 'superior orders', and if so, what is the real effect of such a plea? Finally, what kinds of safeguards may be instituted by the authorities concerned for ensuring observance of impartiality and independence in the proposed trials?

One may set out the factual background of the events so as to clarify the relevant legal issues before considering them.

1. Facts

According to a recent estimate by Sheikh Mujibur Rehman, about three million people were massacred by the West Pakistani soldiers and 25,000 to 30,000 houses looted and burnt in Bangla Desh. The commission of rape by the Pakistani soldiery was also testified to, among others, by Mujibur Rehman.[1]

In addition about one crore of people were driven away as refugees to India,[2] and 30 million people were rendered homeless.[3]

1. *Hindustan Times*, January 18, 1972. It is also reported in *Hindustan Times*, January 29, 1972, that Mother Teressa, the 61 year old Roman Catholic nun from Albania, who has moved to Bangla Desh to set up a home for the girls who became pregnant from Pakistani soldiers, estimated that "there might be upto 4,000 rape victims expecting babies in the Dacca area alone".
2. *Ibid.*, January 11, 1972.
3. *Ibid.*, February 13, 1972.

The Fourteen Days, War ended with the surrender of 93,000 Pakistani regular and para-military troops to the Indian and Mukti Bahini forces. Over 33,000 surrendered in Dacca itself. As on January 19, 1972, all but 650 Pakistani prisoners-of-war have been shifted from Bangla Desh to India. Those who are still in Dacca include 500 wounded soldiers and another 150 manning some hospitals.[4]

There are at present 11,000 Pakistani civilians in Dacca.[5] The estimated number of East Bengalis living in West Pakistan range from 150,000 to above 4000,000. Several thousands are members of the Pakistan armed forces. About 1,000 are civil servants.[6]

II. Legal Issues

As the above narrative of facts demonstrates that the crimes committed by the Pakistanis in Bangla Desh centre on war crimes, crimes against humanity, genocide, and violation of the Geneva Convention, it will be necessary to examine them against the background of international law and practice.

A. War Crimes

The concept of 'rules of warfare' is based on two fundamental principles : first, that the civilian population (non-combatants) who do not take part in fighting should not be made the object of direct attack, and no hostilities should be committed against them; and second, that all such kinds and degrees of violence which are not necessary for the overpowering of enemy are prohibited.[7]

Violations of the recognized rules of warfare amount to war crimes in the strict sense. General international law not only obligates the national State to punish its nationals for violating rules on the conduct of war but also authorises any belligerent State to punish the prisoners of war for having committed war crimes prior to capture.[8] The trial of war criminals is limited neither to offences having a particular geographical location nor to offences

4. *Ibid.*, January 19, 1972.
5. *Ibid.*
6. *Indian Express*, (New Delhi) January 31, 1972.
7. Dr. Radha Binod Pal, however, denied the efficiency of the rules of warfare. He maintained that "experience, however, shows that whenever any of the laws of war has been found to be a definite and permanent obstacle to the objectives of war, the sanction has disappeared and the rule has not been observed. Unless the party violating gets worsted in the war such violations would go unheaded". Pal, *Crimes in International Relations* (Calcutta, 1955), p. 383.
8. H. Kelsen, *Principles of International Law*, (New York; N.Y., 2nd edn , 1966), pp. 151, 206; G. Schwarzenberger, *International Law*, vol. 2, *The Law of Armed Conflicit* (London, 1968), pp. 483-84; see also his, *The Frontiers of International Law*, (London, 1962), p. 186; Oppenheim, *International Law*, vol. II, (London, 7th edn., 1953), p. 566, f, n. 1.

committed against the national of the Power claiming jurisdiction.[9] Like pirates, war criminals are considered as *hostis humani generis*, the enemy of humanity, and any one may capture, try and punish them.[10]

The following acts constitute war crimes in the strict sense : (1) murder and massacres; systematic terrorism; (ii) torture of civilians; (iii) rape; (iv) abduction of girls and women for the purpose of enforced prostitution; (v) pillage ; (vi) confiscation of property ; (vii) wanton devastation and destruction of property ; (viii) deliberate bombardment of undefended places; (ix) and wanton destruction of religious, charitable, educational and historic buildings and monuments.[11]

There is a substantial body of opinion and of practice in support of the view that there exists individual criminal responsibility for the perpetrators of war crimes.[12] The *Exparte Quirin*, *Yamistha*, *Nuremberg*, *Tokyo* and *Eichmann's* war crimes trials amply support this view. The Nuremberg Tribunal defined individual criminal responsibility thus :

> It was submitted that international law is concerned with the actions of sovereign states, and provides no punishment for individuals. . . In the opinion of the Tribunal, both these submissions must be rejected. That international law imposes duties and liabilities upon individuals as well as upon States has long been recognized. . . Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.[13]

The Pakistanis who have been responsibile for committing indiscriminate killing of civilians, rape, arson and loot, are to be considered as war criminals whom any State can apprehend, try and punish.

B. Crimes against Humanity

Crimes against humanity are defined for the first time in Article 6 (*c*) of the Charter of the International Military Tribunal at Nuremberg which is as follows :

9. Thus the Nuremberg Tribunal was established for the trial of German war criminals "whose offences had no particular geographical location".
10. G. Schwarzenberger, *The Frontiers of International Law*, (London 1962), p. 187; Ian Brownlie, *Principles of Public International Law*, (Oxford, 1966), p. 266.
11. See the list of war crimes prepared by the United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Law of War*, (London, 1948).
12. H. Kelsen. note 8, p. 206; Woetzel, *The Nuremberg Trials in International Law*, (London, 1960), p. 121.
13. *International Military Tribunal (Nuremberg) Judgment and Sentences*, October, 1, 1946, *A.J.I.L.*, vol. 41 (1947), pp. 220-221.

> (*c*) Crimes against Humanity: namely, murder extermination, enslavement, deportation, and other inhumane acts committed against civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal whether or not in violation of the domestic law of the country where prepetrated.

Schwelb says that three important principles are embodied in Article 6(*c*). The first, indicated by the words 'before or during the war' apparently implies that international law contains penal sanctions against individuals, applicable not only in time of war, but also in time of peace; and that in certain circumstances, inhuman acts constitute international crimes. The second principle, which appears to be deducible from the words 'against any civilian population', is to the effect that 'any civilian population' is under the protection of this system of international law. This implies that civilian populations are protected against violations of international criminal law also in cases where the alleged crimes have been committed by sovereign States against their own subjects.[14]

That indiscriminate mass killing of civilian population and other heinous crimes committed against them constitute crimes against humanity was confirmed by the *Nuremberg* and *Tokyo* War Crimes Tribunals, and by the 1946 resolution of the U.N. General Assembly.[15] Needless to say, that the leaders, organisers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.

The record of the Pakistani atrocities in Bangla Desh is unparalleled in the history of war crimes. The civilian population was massaered in a systematic, planned manner. It has been reported that about one lakh persons were killed at the "slaughter houses" in Khulna town alone by the Pakistani army during the nine months of their occupation.[16] These acts have been confirmed by various impartial, national and international, governmental and non-governmental organizations and individuals. Thus, the fifth conference of the Afro-Asian People's Solidarity Organization (ASSPO), held in Cairo in January 1972, "strongly condemned" the genocide and atrocities committed by the Pakistani military regime in Bangla Desh.[17] The U.S. Senator Adlai Stevenson, after a visit to Bangla Desh observed that the "intensity of the terrible atrocities is without any parallel in the world history" and that the atrocities evidenced "a calculated policy to extinguish Bengali culture".[18] Mr. John Stone-house, the British

14. Egon Schwelb, *Crimes Against Humanity*, *BYIL.*, vol. 23 (1946), p. 178, at p. 179.
15. Resolution 95 (I).
16. *Hindustan Times*, February 2, 1972.
17. *Statesman*, January 16, 1972.
18. *Hindustan Times*, January 31, 1972.

Labour MP, said in Dacca on January 9 that General Yahya Khan was "certainly a guilty man" responsible for what happened in Bangla Desh. He pleaded for the trial of those responsible for genocide.[19] The Pakistanis who are guilty of war crimes and crimes against humanity deserve appropriate punishment for the same.

C. Genocide Convention

Whereas the Nuremberg judgment did not cover genocide committed in time of peace, the Genocide Convention in Article 1 "confirmed"[20] that genocide, whether committed in time of peace or in time of war, "is a crime under international law" which States undertook to prevent and punish.

Defining the term 'genocide', Article 2 of the Convention provides that 'genocide' means any of the following acts "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such":

(*a*) killing members of the group;

(*b*) causing serious bodily or mental harm to members of the group;

(*c*) deliberately inflicting on the group the conditions of life calculated to bring about its physical destruction in whole or in part;

(*d*) imposing measures intended to prevent births within the group; and

(*e*) forcibly transferring children of the group to another group.

This volitional element of criminal "intent" in the crime of genocide is very important, because it distinguishes 'genocide' from ordinary murder.

Under Article 3 not only genocide, but also 'conspiracy', 'direct and public incitement', 'attempt' and 'complicity' in committing genocide are punishable. Refuting the possible plea of 'act of State', Article 4 of the Convention provides that persons commiting genocide or any of the other acts enumerated in Article 3 shall be punished, whether they are constitutionally responsible rulers, public officials, or private individuals. Under Article 5 contracting parties are obliged to enact the necessary legislation to give effect to the provisions of the Convention and in particular to provide effective penalties for persons guilty of 'genocide' or any other acts enumerated in Article 3.

As to jurisdiction, Article 6 of the Convention stipulates that the persons charged with genocide or any of the other acts enumerated in Article 3 shall be

19. *Statesman*, January 10, 1972.
20. The word "confirm" here is significant, because already the General Assembly in resolution 96 (I) of 1946 had "affirmed" that genocide is a crime under international law.

tried by a competent tribunal of the State in the territory of which the acts were committed; this provision is very important for our purposes, because the crimes in the instant case were committed on the territory of Bangla Desh —or by such international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction.

Approved by the General Assembly in December 1948, the Genocide Convention has since been ratified or acceded to by 75 States, as of 31 December 1970. The Convention came into force in 1961. Both India and Pakistan are parties to it.

The crimes of the Pakistani army in Bangla Cesh are such as to clearly fall within the purview of the Genocide Convention.[21] The "intent to destroy" in whole or in part an ethnical, racial, or religious group is also discernible in this particular case. Where massacre was carried out at such a vast scale, a *prima facie* case can be made out in favour of such "criminal intent". The reported statement of General Tikka Khan, suggesting an "intent to reduce majority" of the Bangalis confirms this argument. The independent testimony of various foreign observers, like the U. S. Senator Adlai Stevenson, and the findings of various international bodies like the Interntional Commission of Jurists goes to corroborate the existence of an "intent" to destroy Bangali people. In such circumstances, the trial of Pakistani war criminals for the crime of "genocide" is a logical sequence.

The next relevant question is whether the Government of Bangla Desh, a non-party to the Genocide Convention, is competent to try the accused for the crime of 'genocide'. The answer to this question will depend on whether 'genocide' is a crime merely by virtue of the Convention, or whether it is a crime under general international law. The Genocide Convention has been ratified by an overwhelming majority of States. This indicates the general and near-universal acceptance of the crime of genocide as international crime, thereby transforming a coventional rule into international custom. Many authorities hold the view that the humanitarian principles incorporated in the Convention are binding on non-parties as customary rules of international law.[22] The International Court of Justice in its advisory opinion on *Reservations to the Genocide Convention case*,[23] regarded that the underlying principles of the Convention were recognised by civilized nations as binding. Even before the adoption of the Convention, the General Assembly resolution declared that 'genocide is a crime under international law'[24]. Since genocide

21. See M. K. Nawaz, "Bangla Desh and International Law"; *I.J.I.L.*, vol 11 (1971), p. 261.
22. Sorensen, *Manual of Public International Law* (New York, N. Y., 1968), p. 517 Brownlie, *Principles of Public International Law* (Oxford, 1966), p. 456; Kunz, 'The United Nations Convention on Genocide ; *A.J.I.L.*, vol. 43 (1949), p. 738.
23. I.C.J. *Reports 1951*, p. 15 at p. 23.
24. Resolution 96 (I) of 1946 and Resolution 260 (III) of 1948.

is regarded as a crime under general international law, Bangla Desh Government is competent to try the accused, even if it is not a party to the Genocide Convention.

Granted, Bangla Desh Government is competent to try the Pakistani soldiers for 'genocide', two options are open for such trial. The first is that the Government of Bangla Desh, the State on whose territory genocide has been committed, may set up a tribunal and try the alleged criminals. In that case the Government of Bangla Desh will have to enact its own law,[25] incorporating the relevant rules of international law, and providing penalties for the trial. The other possibility is, that States whose interests are materially affected, for example Bangla Desh and India, may set up an international tribunal for the purposes of trial.

D. Violation of Geneva Conventions

Two provisions of the 1949 Geneva Conventions relative to the protection of the victims and prisoners-of-war deserve consideration for the present purposes— the first guaranteeing minimum humanitarian safeguards in case of civil war, and the other dealing with the repression of abuses and infractions of the Conventions.

Even assuming that the hostilities between Mukti Bahini and the Pakistani army in the initial stages of the conflict did not amount to an international war, still the Pakistani army had the obligation to honour certain minimum humanitarian norms which it failed to do, with regard to the civilian population and the non-combatants. The four Geneva Conventions of 1949 provide uniformly that in the event of an armed conflict not of an international character each party to the conflict shall be bound to observe a minimum standard of behaviour. Persons taking no active part in the hostilities shall be treated in a humane manner, without any adverse distinction founded on race, colour, religion, sex, or any other similar criteria. Violence to life or person, and the outrages upon personal dignity, are forbidden.[26] These provisions of the Convention are made obligatory for the parties to civil conflicts.

The Pakistani soldiers in so far as they violated the fundamental human rights of the civilians provided for under the Geneva Conventions, are guilty of committing "grave breaches" of the Convention and should be dealt with accordingly.

The other provision relevant for our purposes is that which deals with the repression of abuses and infractions of the Convention. Each of the four Conventions uniformly obliges the parties to enact legislation necessary to provide effective penal sanctions for persons committing, or ordering to be

25. The Bangla Desh Government has infact promulgated the "Bangla Desh Collaborators Special Tribunal Order, 1971" providing for the trial of certain criminals.
26. Article 3; the Article forms part of Chapter I which contains the General Provisions and which is common to each of the four Conventions. 75, *UNTS*, p. 32.

committed, any of the "grave breaches" of the Convention. "Grave breaches" of the Convention have been enumerated as follow : wilful killing, torture or inhuman treatment, including biological experiments; wilfully causing great suffering or serious injury to body or health; and extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly. The parties to the Geneva Conventions are under an obligation to try persons committing "grave breaches" which presumably are war crimes.[27] The Geneva Conventions relative to the protection of victims of war and prisoners-of-war for that matter do not protect persons guilty of committing "grave breaches" of the Conventions or war crimes.[28] They are liable to be tried and punished for their offences. Thus the Pakistani soldiers charged with 'war crimes' and 'crimes against humanity' and 'genocide' etc. are not protected by the Geneva Conventions relative to the protection of prisoners-of-war. Since there is no possibility of the Pakistani Government fulfilling its obligation of "searching" and "punishing" persons guilty of committing "grave breaches" of the Convention, any other State may apprehend, try, and punish such persons in order that the humanitarian rules of warfare are ensured.

E. The Plea of Superior Orders

The President of Pakistan, Mr. Bhutto, adressing students of Peshawar University, admitted that the Pakistani army had indulged in "brutality" in Bangla Desh. He further stated that he was prepared to take action against particular army officers whom the Bangla Desh Prime Minister, Sheikh Mujibur Rehman, might name. However, he added : "it must be understood that soldiers merely carried out whatever orders were handed down to them".[29] Mr. Bhutto was obvioushy raising the plea of "superior orders" in defence of the war criminals.

The plea of 'superior orders' is to the effect that an individual cannot be made responsible for an act which he performs under the orders of his superior, since responsibility for such violations rests on the latter.

The doctrine of 'superior orders' is relevant in considering the defence of any person standing trial for war crimes, but under no circumstances is it to be regarded as an absolute justification for the criminal's acts. An unqualified acceptance of the doctrine of superior orders might result in the immunity of crimes.

The plea of superior orders has been rejected as a ground of justification of war crimes[30]. The military law of many States contains express provisions

27. Kelsen, note 8, p. 129, f.n. 128 ; Oppenheim, note 8, p.395.
28. Schwarzenberger, *The Frontiers of International Law*, note 8, p. 186 ; Schwarzenberger, *International Law*, vol. 2, note 8, pp. 215, 219, 241, 438, 458, 541-42, 718.
29. *Hindustan Times*, January 16, 1972.
30. Schwarzenberger, *Manual of International Law*, 5th edn., p. 211 ; Schwarzenberger, *International Law*, vol 2, note 8, pp. 532, 543. Oppenheim, note 8, p. 598.

to the effect that a subordinate must obey only lawful orders.[31] The plea of 'superior orders' may constitute, however, a mitigating circumstance in particular cases, but only after it has been determined that the accused did all that was possible to resist it, or he clearly demonstrated his intention not to commit the crime for which he is being tried. The test is not whether a man has received an order, but whether he in fact has had the opportunity, without endangering his own life, to choose between criminal compliance and lawful disobedience.[32] The plea of 'superior orders', in any case can be put forth when the alleged perpetrator has had no choice to avoid the crime in question.

The Charter of the International Military Tribunal set up in 1945 for the trial of major war criminals expressly rejected the plea of 'superior orders' as an absolute defence. It provided in Article 8 : "The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires."[33] The Nuremberg and Tokyo Tribunals held that plea of 'superior orders' could not be considered an absolute defence, but merely a mitigating circumstance.

Conclusions

In the foregoing discussion it has been demonstrated that Bangla Desh has a right to try Pakistani war criminals for 'war crimes', 'crimes against humanity', and 'genocide'. The Geneva Conventions relative to treatment of prisoners-of-war cannot be a bar to the proposed trial by Bangla Desh. It may be considered by the authorities concerned whether the Government of India should hand over to the Government of Bangla Desh the persons responsible for the crimes, as the latter may have the necessary evidence for trial and punishment. As the Pakistanis had surrendered to the joint command of Indian and Mukti Bahini forces it may be argued that the Bangla Desh Government is equally entitled to initiate the necessary action for trials. The Bangla Desh Government may, however, consider establishing a tribunal in consultation with the Government of India. But it will be in the fitness of things if some foreign judges are included in the proposed tribunal, which is not impossible. That may eliminate the criticism levelled against the Nuremberg Tribunal, ensure the impartiality of judges, minimise the chances of vindictive action against the accused and enhance the prestige of the tribunal as a precedent for future war crimes trials.

31. See for example, Amendment 34 to the British Manual of Military Law ; amended para 345 of the United States 'Rules of Land Warfare.'
32. Calvocoressi; *Nuremberg : The Facts, The Law and the Consequences* (London, 1947), p. 13.
33. Cited from Woetzel, note 12, p. 347.

The proposed trial of Pakistani war criminals will help to enhance the effectiveness of the rules of warfare, will deter repetition of such crimes in future, and promote the role and significance of international law.

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* Assistant Editor.

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PERSONAL RESPONSIBILITY AND THE LAW OF NATIONS

by

ELIZABETH THORNEYCROFT

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THE HAGUE

PERSONAL RESPONSIBILITY AND THE LAW OF NATIONS

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This book is dedicated to the memory of my father

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ELIZABETH THORNEYCROFT

1

The changing character of sovereignty

Until this century public international law has been regarded as the law governing the relations between sovereign states. Only states, it was constantly said in the text books, could have rights under international law, and as a corollary, only states could be directly bound by its obligations. This was natural since the European system was designed by the early writers to regulate the relations of sovereign kings. Its authority was moral authority, and it owed its origin to an appeal to the consciences and to the personal honour of Monarchs.

The sovereign person of modern international law is not however an individual, but a collective entity – the nation state. Its sovereign authority is not exercised by a monarch but by many men, Presidents, Prime Ministers, Foreign Ministers, Members of the Cabinet, Senators and Parliamentarians – only rarely Kings – participate in international decisions.

The idea of making men personally responsible for the actions of the governments in which or under which they serve is a recent one, and it is in conformity with the historical growth of law out of primitive custom, which shows a uniform movement away from collective and towards individual responsibility for lawless conduct. It seems probable that sooner or later international law, if it is to become effective, must take this path. The stumbling block is the central position of the sovereign state in international thought. There is

a logical collision between the doctrine of sovereignty and the concept of the rule of law, however these be formulated, which is manifest in all attempts to fix the blame for unlawful behaviour upon men rather than upon nations. It has hitherto been taken for granted that, as a general rule, before any action can be taken against an individual for a breach of international Law the acquiescence of the state of which he is a citizen must be obtained, either by formal agreement or voluntary acceptance of the jurisdiction of a tribunal, or by forced submission to a victorious power [1]. The German and Japanese War Crimes Trials were not a departure from, but an illustration of this basic assumption.

It is not proposed here to examine the pros and cons of the War Crimes Trials, but only to distinguish those proceedings from the suggestion presently to be advanced for the judgment and restraint of individuals who in all the manifold relationships of international life today may from time to time offend against the rules or principles of international law binding upon the countries in whose name they issue orders.

In the existing system of international law it is axiomatic that no new legal rule can be imposed upon a sovereign state without its consent. It is likewise axiomatic that a state cannot be judged by an international tribunal unless it consents to the jurisdiction either by a preliminary general acceptance of an international convention instituting the court, or by *ad hoc* submission in a particular case. It has hitherto been thought that from these two axioms it must follow that individual servants of a particular state cannot be brought to judgement for an allegedly illegal action of that state unless it be a party to such a convention, or unless it acquiesces. In national law which regulates the relations between private citizens consent induced by duress invalidates an agreement. This principle has never made any great headway in international law. Agreements of various descriptions, and in particular peace treaties, are no wit less valid in international law

by reason of the fact that they are sometimes extracted by economic pressure, military threats or actual conquest unless it can be proved that the treaty was imposed by an aggressor [2]. Negotiation there may be, but it is sometimes of an order which, in private litigation, would disentitle a plaintiff to redress for breach of contract. A state on the brink of defeat in war will sue for peace, and the resulting agreement gives rise to consequences which are deemed to be, and in the existing system certainly are, legally unchallengeable. It is not, for instance, possible to conceive of Germany, Italy, or Japan putting forward any legal claim to territory detached from their rule by the various treaties and arrangements establishing their frontiers after the first and second world wars. In international life the plea of *force majeure* makes no legal impact at all, and practically no political impact, unless and until that plea is backed by the threat or use of force.

The law creating role of force in international life being thus admitted, and the policy of unconditional surrender having been pursued to the bitter end in 1945, it was easy for the victors to claim the right, for which there were numerous precedents,[3] to judge and punish enemy offenders against the laws of war. The idea of making individuals responsible for the illegal conduct of the states they serve was an undoubted advance, but the attempts since made under the direction of the General Assembly of the United Nations,[4] to establish this idea permanently in international life have proved abortive because the notion of consent includes, in international law as it is today, the notion of forced submission. A nation might very well consent to a convention giving an international tribunal jurisdiction over its statesmen and servants, but it will not consent, *in limine*, to the use of external force to secure the persons of the accused. Even if it were to agree to use its own internal police force to arrest and deliver an accused Minister into the custody of an international tribunal, it will not consent to be forced to do so. It would not permit its own police to be policed.

The adoption and enforcement of an international criminal code applicable to politicians is thus not practicable. The contradiction between the doctrine of sovereignty and the rule of law previously referred to is a radical fault in the existing system of international law. This has been widely recognized by those who advocate a World Security Authority, an international Police Force, Federal Union, World Government and many draft proposals for Charter revision. All these suggestions imply and sometimes express the view that the concurring nations should yield some part of their sovereignty to a central authority. Sovereignty can only be yielded by consent or snatched by force from a defeated government, and the consent or forced submission must be a continuing consent or submission. However unreservedly a state might frame its accession to a legal instrument establishing a central authority either executive or judicial, the leading statesmen responsible for its international conduct could not be compelled to submit without the threat or use of force, for they would never themselves voluntarily consent to the execution of a command issued by international authority if they deemed it to be contrary to the rights and interests of the state they governed, and for whose welfare they were responsible. A central authority would therefore always have to be armed with overwhelming force if it were to discharge, among other functions, that of disciplining the responsible political leaders of a recalcitrant state.

It is the purpose of this book to suggest and describe a mode of discipline which could be applied without the backing of a central military force, without cession of sovereignty, and without either the consent or forced submission of the state whose leading politicians and officials are judged guilty of internationally illegal conduct. Furthermore, if this method of discipline were to be applied it will be shown that the stumbling block of national sovereignty which admittedly obstructs the development of international law, and prevents it from assuming a compulsory character, can be circum-

vented. So far from calling upon the nations to renounce their sovereign rights, which they would probably never do voluntarily, it points out a way, perhaps the only immediately feasible way, whereby they can safely retain these rights, and by making intelligent use of them, subject those who direct international policies to the control of law. Before describing the proposal it is, however, desirable to consider how the character of the international sovereign person of present day international law, that is to say the modern nation state, differs from the sovereign persons of the seventeenth century whom the early European writers had in mind when they first formulated the principles of behaviour known to us as International Law.

These early writers on International Law addressed European kings, not the Emperor of China, nor the Mogul rulers of India nor African tribesmen, nor the Americas. Recognising the fact of sovereignty, they appealed to the consciences of individual men, the rulers of the newly risen European States, who shared a common culture, a common language for the inter-change of thought and a common inheritance of legal principles and ethical standards. The focal point, the person bound, by the international obligations of Grotius' day was a human being exercising sovereign power, but personally responsive to the same principles as his brother sovereigns. The international situation today offers a parallel and a contrast. National sentiment is rising all through Africa, the Near East and Southern Asia, but on the other hand sovereignty has changed.

Absolute sovereignty has always been a political myth, for no state, not even imperial Rome, has ever been free to do exactly as it liked. Every king or emperor, however despotic at home, and however powerful abroad, has always had to consider the probable reactions of friendly or unfriendly neighbours to his foreign policy, and this necessity has increased with the growth of communications. The political, economic and military interdependence of states now seems

to have reached a point where the sovereignty of most states is becoming unreal. It remains as an idol in men's minds. Lawyers distinguish between sovereignty *de jure* and sovereignty *de facto*, the former being the right to exercise power, and the latter its actual exercise. In another dimension of thought the conception of sovereignty may be divided into its internal and external aspects. With certain exceptions the nation states today have internal sovereignty, that is to say they enjoy the right and power of self government, without interference from other powers. The exceptions are the communist satellite states which possess internal *de jure* sovereignty, but they cannot freely exercise their right to determine their own form of government. It may be that the majority of their populations believe in communism in some form or other, but their *de facto* sovereignty is subject to that of Russia to the point that they cannot develop communist theory, let alone any other kind of political or economic theory, as they please.

The internal sovereignty of the vast majority of states remains intact. It is the external *de facto* sovereignty of almost all states which has diminished since the second world war. Not even Great Britain and France, which are still classed as great powers and possess the right of veto in the Security Council of the United Nations have the power to take independent action and carry it through to a predetermined conclusion, as was illustrated by the Suez crisis of November 1956. Interdependence is less a chosen policy than a description of facts.

In varying degrees the *de facto* external sovereignty of nations is dissolving into an inchoate tangle of agreements, economic pressures, military necessities and moral ideas. Only Russia, Red China and the United States are strong enough to steer self-chosen courses, and they alone retain separate *de facto* sovereignty in world affairs. National sovereignty appears to be crumbling.

The existing system of international law was built round the concept of sovereignty. Its purpose was to control the

relationships of supreme rulers, and it was not and is not designed to deal with the confused and uncontrollable relationships of governments which are subject to so many conflicting pressures that no one of them can maintain a consistent separate policy.

What is needed is a new concept of international law not entirely dependent for its growth upon the agreement of sovereigns, for a mere agreement cannot have contractual force unless it is contained within and enjoys the *imprimatur* of a superior and compulsory legal order. Every system of national law provides elaborate criteria for determining which agreements shall and which shall not be enforced by its courts. In most systems a defined degree of mutuality is required, that is to say both parties must freely perform or promise to perform some act for the benefit of the other. Otherwise the agreement is binding only in honour or unenforceable by reason of improper pressure.

2

Analysis of international sanction

Because the persons of early international law were sovereign monarchs there was no place in the writings of early international lawyers for Law enforcement by the decisions of international Courts, or for police action, and this perhaps accounts in part for the failure of attempts made to introduce sanctions into the League Covenant and the United Nations Charter. There is an inconsistency in the concept of sanctions as expressed in the doctrine of collective security, much in vogue between the world wars.

In all the debates since the first world war international lawyers seem to have lost sight of the whole meaning of legal sanction, which is the fear, before action is taken, that some unpleasant consequence will certainly follow an action in breach of the law. In truth the word sanction has two aspects. The primary one is antecedent fear of a penalty, the second is forcible prevention of an unlawful action and civil correction or penal action after the event. The sanctions provided for in the Covenant of the League of Nations, and in the Charter of the United Nations belong in the second class. They have never operated in the primary sense because their imposition has always been a matter of political calculation, not the certain consequence of a Court Order. The doctrine of collective security has never been put into operation successfully, except in the case of the Korean war, but in this case the American and Associated troops were only able

lawfully to fight under the United Nations flag, because Russia, foolishly from her own point of view, withdrew her representative from the Security Council, which was thus able to make a decision without the impediment of the Russian veto.

Many consider the North Atlantic Treaty Organisation to be a successful experiment with the doctrine of collective security, but it is not so in the sense of either the Covenant or the Charter. Collective security was originally meant to be the common military action of the Member States against any one of their number which used or threatened violence against another, contrary to the agreements, to further its own political ends. The North Atlantic Treaty Organisation is not designed for this purpose. It is a defensive alliance of a number of States of variable power against the possible aggression or military threats of one group of the members of the United Nations, Russia and her satellites. It is easy to say that this Organisation could be used against any aggressor within the group of the NATO Powers, but those closely associated with the Organisation know well that this is legally and militarily impossible. It is legally impossible because the NATO Council can only make decisions if all members are agreed. The resulting legal difficulty became evident during a dispute between Turkey and Greece over the Cyprus issue. Both countries are members of NATO. Had the quarrel between them reached the point of violence, NATO could not lawfully have intervened to keep the peace without the consent of both. Even if a majority of the NATO Council had decided that one or the other was exclusively at fault, no legal intervention would have been possible within the NATO framework. NATO is not therefore a manifestation of the real doctrine of collective security, as it is not empowered to keep order among its own members, but only to act as an organ of collective defence against an outsider.

NATO is the consequence of the weakness of the Security Council system. It is true that if any one or more of the

members of the United Nations were to use violence, the Security Council could take military action, but only if the powers possessing the right of veto were in agreement. As Russia and the Western Powers are respectively addicted to taking opposite sides in any international conflict, military sanctions are problematical, and if there is any doubt in the mind of a would-be Law breaker as to whether or not action will be taken against him, the sanction loses its primary character which is to prevent unlawful behaviour by fear of the consequences rather than to restrain or correct it by force during or after the event.

The ineptitude of the collective security doctrine is even more apparent in the hypothetical case, which may well not remain hypothetical, of an outbreak of lawless violence between the veto powers. In such a case the United Nations would be legally disentitled and physically unable to keep order among its own members, just as is NATO.[5]

The military objections to the doctrine of collective security are even greater than the legal ones and more practically convincing. War today is a complex and widespread social operation. It involves whole populations and their industries, and therefore it must be planned beforehand, as it is being planned today by the United States and her Western allies and as it is also certainly being planned by Russia and her allies. Planning does not always imply the intention to execute the plan. It is possible and, one hopes, probable that Russia has no more intention of attacking Western Europe or North America than *vice versa*. But a defensive military plan must take into account primarily the principal source of danger, that is to say it must be aimed. This is not true of the military planning of any single government which prepares for operations in all conceivable conflicts, neither is it true in the case of a small scale international operation involving contingents from one or more national armies, but it is true in the case of total war, involving the whole of the United Nations, and military force on this unlimited scale

would be required to control a major state. It would thus be impossible for a United Nations General Staff, or the General Staff of a World Federal Government, to plan the application of military sanctions against an unspecified member.

Recognition of this difficulty led to the establishment of NATO which is the political planning Staff of some of the principal Western members of the United Nations designed to restrain that member which is thought to be the most likely to commit a breach of the peace, but NATO is necessarily outside the framework of the United Nations Organisation, and not subject to the control or supervision of the Security Council or the General Assembly.

At the time of the establishment of NATO, no armed attack had occurred, but there was manifest danger, as there still is, of a Communist intrusion into Western Europe, whether by direct military advance or, as was and still is more likely, by planned political coups, followed by military support from Russia. The planners of NATO were merely being realistic in recognising that a political and military invasion of non-Communist areas by the Communists could not be withstood unless a combined plan of defence were made at once. They realised that defensive war needs to be planned just as much as offensive war, but that the United Nations cannot by reason of its almost universal character plan defensive war against any one of its own members and in particular not against one of the veto powers. NATO is however, an organisation outside the United Nations security scheme, and has no relations with the Security Council. From the point of view of those who desire to establish orderly relations between states under the rule of Law, it would be better to recognise the fact and in recognizing it to acknowledge that International Law as we know it, founded upon the principle of good faith between rulers cannot find a place for the universal enforcement of its obligations by physical force short of war. That is not to say that there is no use for force in international affairs. It has been said that the function of force is to give moral ideas time

to take root. Possibly this is the service that NATO may render to the world. Even nuclear armaments may serve this end, but it should be understood that no combination of forces, no specific armaments, and no defence planning, can secure the rule of law for the world.

Peace is not the proper goal of international politics.[6] Peace is a by-product of orderly civic life, just as happiness is a by-product of an orderly private life. If peace or happiness are pursued, the means of pursuit will destroy the goal.

> "He who bends to himself a joy
> Doth the wingèd life destroy." [7]

This exposes the fallacy of the old argument *si vis pacem para bellum*. Desire for peace leads men to prepare for war, and always in the end we have had war and not peace, destroying what we sought to hold. It is a common opinion that World War II broke out because Britain and France were insufficiently prepared for war, and that had they been able to attack or convincingly threaten Germany on the occasion of one of Hitler's earlier *coups*, war could have been avoided. No one however allows for the fact that a nation which has peace as its primary goal cannot seriously threaten war until it feels compelled by imminent danger, thus giving an aggressive state the initial advantage and so ensuring war. Peace will result from law and order, but law and order will never grow out of the armed truces which are all the twentieth century knows of peace.

The moral ideas which must emerge while NATO and the nuclear missiles maintain the truce have been formulated in the principles of the United Nations Charter, and in the Universal Declaration of Human Rights. No sanction is, however, applicable to breaches of these principles because even those who hold that war is the ultimate sanction of international law, would not maintain that war or the threat of war either could or ought to be used in every case to uphold

the principles of the Charter or the Declaration of Human Rights when these are infringed.

The problem before the world now is how to make international law into effective law. It is debatable whether law is the cause or the effect of ordered human life, but both the *Pax Romana* and the *Pax Britannica*, throughout the centuries when they prevailed, were based on law, and it seems evident that a *Pax Mundi* must also be based on law. Whether it is at present possible to create a world law is very doubtful. The common mind of peoples is perhaps so undisciplined that it cannot evolve a legal system on an international scale. This is however not certainly the case, and to believe it leads to despair. It is better, "to hope till hope creates from its own wreck the thing it contemplates." [8] Would not the best way to set about translating hope into achievement be, instead of attempting to transform the world by blueprints, to educate and gradually control the men who play a part in international affairs? The weakness of traditional international law, which purported to know only states, and ignored individuals is that its rules, often antiquated and uncertain, find little echo in the consciences of individuals, so that the whole feeling of responsibility of statesmen, officials and diplomats is turned exclusively towards their own government and people, and takes very little account of the disapproval of the rest of the world.

The proposal now to be made for strengthening international law is to make individuals responsible for its application, but only in so far as it is practicable to impose some penalty upon a law breaker without seizing his person or property. Arrest and seizure would not be feasible except by using physical force against the state in whose name an unlawful act had been committed, and within whose territory the culprit can take refuge with his goods and chattels intact. Civilisation is a long way from international warrants of arrest or writs of attachment, but if mankind could abandon its tendency to anarchy, a machinery of law en-

forcement with the minimum use of actual force might be devised. If it is not, the only enduring peace which seems likely is the peace of death.

International law is at present concerned primarily with states and their relationships, seldom directly with human beings, nor even with the big international companies. It is not, even now, entirely true to say that the only "persons" in international law are states, and that these alone have rights and duties according to international law. The European convention on Human Rights and the Red Cross Conventions of 1949 bestow certain rights and duties under international law directly upon individuals. Moreover although individuals may not be parties before the Court of International Justice at the Hague,[9] there are precedents for private litigants before other international courts, such as the *Tribunaux Arbitraux Mixtes* after the first World war.

In practice however, it is usually states or interstate agencies which are entitled to rights and subject to duties under the rules of international law. Scores of proposals have been made before and since Nuremberg for some form of international criminal jurisdiction dealing with terrorism, war crimes, breaches of the Hague Conventions of 1907 on the laws of war, crimes against the peace, crimes against humanity and genocide. The idea of a permanent Court operating in peacetime, as well as at the end of a war, has failed time and again, and the reason seems to be that the proposals for such an institution have not fitted existing conditions. Crime is an offence which concerns the whole of society to which a man owes his duty, not merely the particular person who has been robbed or attacked. It is a rejection of the duty of obedience a man owes to his country. There is no international focus of duty at present, and everyone owes political, legal and personal allegiance to the state of which he is a citizen. The notion of international crime therefore hardly makes sense, for crime involves an anti-social action endangering the whole community whose interests all citizens are in duty bound to

respect. The actions which have been suggested as proper subjects for international criminal judgment are, in this context, unsuitable, for they have been performed for the benefit of the state to which the accused men owe their allegiance. The acts and intentions are political and should be judged with reference to the appropriate focus of loyalty. They are admittedly odious and cruel by humanitarian standards, but it is nevertheless unfair to ignore their political context, which is relevant in assessing moral responsibility, an essential feature of crime. There can be no acceptable criminal law not based upon a common code of duty. Breaches of international law of whatsoever degree should not therefore be treated as common crimes. Individuals must be made subject to international law and held answerable for breaches of it, but not regarded as criminals in the same sense as the prison population of a nation state. All criminal law acknowledges degrees of crime, and Anglo-Saxon readers will be familiar at least with the words "felony" and "misdemeanour" and will know that there are many minor offences which carry little blame. The Common Law of England however does not provide a pattern which would be readily adaptable to international law. Continental law offers more promising analogies for meeting the present international situation.

3

International delinquency

No widely accepted classification of punishable wrong-doing, capable of adaptation to international affairs, has ever been evolved, either by English or by Latin legal talent. Modern Continental codes however illuminate the moral element of law better than the common law tradition. The codes divide crimes into three classes, and German codes and commentaries provide the best illustration. According to the code of 1871, crimes are either major crimes (*Verbrechen*), minor crimes (*Vergehen*), or petty offences (*Übertretung*). The corresponding French terms are *crime*, *délit* and *contravention*. According to one German commentator, Kohlrausch,[10] the tripartite division of offences was derived from philosophical doctrines of the early nineteenth century. A wrong was conceived as criminal in different degrees according to the nature of the right violated. Wrongs against natural inherent rights (*angeborene Rechte*) were considered as major crimes, (German *Verbrechen*; French *crime*). Wrongs against rights acquired by virtue of membership in an organized body politic were minor crimes (German *Vergehen*; French *délit*). An act of disobedience to an order was a petty offence (German *Übertretung*; French *contravention*).

The philosophical basis of this threefold classification has never been followed in practice and is not universally accepted. The verbal classification is used, but the words are related to the type of punishment inflicted and not to the

nature of the right violated or the status of the rule infringed. Thus murder is classed as a crime in all continental codes, not because it is a wrong against the natural inherent right to live, but because it has been made statutorily punishable by death, or long imprisonment in a penitentiary. The severity of the punishment has been legislatively fixed to match the gravity of the crime, and is thus indirectly related to the right violated, so that the three philosophical classes have had due effect in framing the penal laws, but the verbal definitions found in the codes ignore the ethical grounds on which, according to some commentators, the classification is based. Thus, in the introductory provisions of the German code of 1871, "a major crime is any act punishable by death or by confinement in a penitentiary, or by confinement in excess of five years in a fortress." If the ethical basis had been used the definition should have been that a major crime is an unlawful act infringing the natural or inherent rights of man; but perhaps a definition of natural or inherent rights of man would tax too far the ingenuity of legal draftsmen.

For present international purposes the continental classification of wrong-doing is useful because the historical basis of it is a consciously thought-out classification of rights and duties. International law now deals mostly with the rights and duties of states, which are not natural entities in the same sense as man. There are numerous definitions of the word "state" varying between the simple declaration *l'état, c'est moi* of an absolute monarchy, to the communist claim that when true communism is universally established states will cease to exist. The different definitions do not, however, always describe the same thing, but frequently describe different social conditions at different times in history, whereas any definition of "a man" always relates to the same object. From the point of view of the law therefore, the natural and inherent rights of man (whatever they may be) are distinguishable in character from the rights of states. In devising future penal international law therefore it is logically possible to

ignore the whole group of "natural and inherent rights," breaches of which constitute major crimes, and to concentrate on the second type of rights referred to by Kohlrausch as rights acquired from society. At present the world is a badly organized society, but the purpose of all sane policy must be to organize it better. International law-breaking should therefore be treated as the type of wrong-doing dealt with in continental codes under the heading of *Vergehen* or *délits*, which can be translated into English as delicts or delinquencies. Both because of the absence of any international focus of duty, and because the rights of states are in a different category from the natural and inherent rights of man, the world is not ripe for an international criminal code. It is true that international wrong-doing, if it involves physical violence, causes death and bodily injury to men, thus violating their natural rights, but from the standpoint of classical international law responsibility lies in the state not in its servants.

Although therefore there is at present no place for an international penal code providing for direct criminal responsibility across the boundaries of nation states, breaches of international law ought to be punished, where they are judged to be wrong, account being taken in assessing blame, of the patriotic duty a man owes to his own country.

A system of penal law not containing a moral element could not thrive. The arbitrary use of power is not lawful authority, so that even if some centralised organ of the international community were to become the sole repository of power, there would still not necessarily be any rule of law in the world, though there might be tyranny; and international tyranny is not an imaginary spectre to be dismissed by contemporary political realists. It has happened before now that a whole nation, sick of disorder and civil war, has submitted to a tyrant simply for the sake of quietude. This could very well happen over the whole earth and will, if further world wars break out. The only safeguard is law, not bombs. Slowly

the peoples of the world must learn to withdraw their confidence from rulers who are wanton international law breakers. Wantonness is suggested as the key factor in international delinquency. The word here is intended to imply a reckless and unwarrantable defiance of international obligations. It implies guilt, but not the guilt of the common thief or assassin. Illustrations sufficient to guide a court in determining wantonness are to be found in all national legal systems. In English Law, for instance, blackmail is defined in part as a demand for money with menaces *without reasonable or probable cause*.[11] Again, part of the definition of fraud is to make an untrue statement *recklessly, not caring whether it be true or false*.[12] In determining *mens rea* – the guilty mind – when judging these crimes the court makes a subjective judgment much more individual and profound than in cases of theft, murder and other felonies where, for the most part, the act alone demonstrates the guilty intent unless the accused can adduce special explanatory factors. The guilt of Hitler and his colleagues would be included but the conduct of men who, acting under political and economic pressure and being charged with responsibility for the safety and well-being of the people whom they rule, dishonour an international treaty obligation would sometimes be excluded. Thus true national loyalty would not be condemned, and conscientious men could hold high positions in the state without fear.

This is not to say that a plea of patriotic duty should always excuse a man for breaking the law, but it should be taken into account before he is declared to be an international delinquent, and in recommending a penalty. For instance, in 1956 the standing threat to Israel by all her Arab neighbours, the constant border raids, and the military alliance between Egypt and the other Arab countries threatened the very existence of Israel, so that the attack on the Sinai peninsula could be supported as a defensive act, and for that reason might be defended in law under article 51 of the Charter. The question for examination now is therefore what can be done

to men who give orders contrary to International Law. Apart from the straightforward issue of legality, any judgment of guilt must take patriotism into account. No court machinery has ever been devised which can fully explore motive, and the moral judgments of men differ according to the political context of the action. A spy is a villain in an enemy country, but a hero in his own. For the sake of their countries men will perform acts which in every other context they would themselves condemn, and which are condemned by the citizens of all politically detached or unfriendly states. They will lie, cheat, imprison, kill and destroy, honestly believing themselves to be justified. Heads of states and their responsible ministers initiate policies which necessarily lead to all or some of these actions, but they are obeyed and kept in power because the people believe that these men are best able to serve the public well-being in their own countries.

4

The new sanction described

Classic International Law provides that certain actions may be taken by states against states if the rules are broken and damage suffered. Apart from certain special cases such as the German and Japanese War Crimes trials, and the United Nations Resolution of the 12th December 1946 in the General Assembly affirming the principles of the Nuremberg Charter there has never been any general provision for dealing with men who give internationally illegal orders, especially in time of peace.

One of the things that a state can do if it is offended by another state is to sever diplomatic relations. This is not a very forceful action, though it sometimes leads to a settlement by agreement. It is at present a political action taken only by states parties to a dispute, regardless of the legality or otherwise of the actions of the offending state, and it is taken only against a state. A subsidiary practice, which is related to this right to sever diplomatic relations, is the diplomatic practice, according to which a government may, and often does, take action against an individual diplomat from a foreign country by declaring him to be *persona non grata*. This action is taken if the government considers the behaviour of the diplomat to be offensive. Sometimes the conduct of which the offender is accused is spying, or other improper political activity, and sometimes it is mere lack of social decorum; but whatever the cause the diplomat has to be recalled. This is but a minor

punishment, but it is directed against a person for his personal behaviour, and imposed by political authority. It is never the result of judicial decision.

The repudiation of one man on political grounds, by one government, for instance the refusal of the Netherlands to accept Mr. Molotov as Ambassador, could be adapted and developed for use internationally by giving to Courts of International Delinquency power to recommend that a politician, diplomat or other representative of one country who has officially given orders in breach of international obligations, should be treated as *persona non grata* by all states. Thus a man who was judged personally guilty of international delinquency could be repudiated by the whole community of nations. He would be denied recognition in the office which he held. Such a man could not travel outside his own country even on holiday. He could not conduct international negotiations, nor represent his government. His signature would be dishonoured on every international document subsequently issued under his authority, including the passports of his fellow countrymen and the credentials of delegates whom he thereafter purported to appoint. He would, in law and in fact, become incapable of acting in the international world. He would not be physically injured or imprisoned, even outside his own country; he would merely be sent home.

Outlawry is a universal sanction of primitive law. What gave it its power in the ancient world was an attendant superstitious horror. The outlaw was in a sense unclean and was deprived of social protection by his tribe. So far as we can now surmise it was the fear of being outcast, just as much as the fear of death, or hunger, or cold, which operated as a social sanction then, but whatever it may have been, it was psychological rather than physical force which constrained primitive man to conformity.

It is not possible to resurrect from the ancient world the fear of being cut off from the tribe, the fear of gods and demons, of death and the loss of social protection which

constituted the sanction of primitive law, but it might be possible to restrain sophisticated politicians by striking at their weakest point, which is a combination of vanity and ambition. The collective rejection of a man by the international community might oust him for ever from the world stage where, if only in phantasy, such a man desires to play an heroic role. Exclusion from the international community would hurt his self-esteem and might eventually injure his career, which is what he cares about most, and it would cost nothing in either blood or money, except fees of Court and Counsel. Fear of pain and loss is the real sanction of Law, and this fear can be induced by other means than physical force.

Those who, reading this proposal for the first time, consider that the suggested sanction is too weak to have any compelling power, should reflect that banishment from the company of one's fellows is the fundamental social sanction in all communities. Exclusion from clubs or from professional organisations operates effectively to secure certain standards of conduct by those who belong, and pride themselves in belonging to the choicest social groups or professions. Moreover, though we are accustomed today to think that the proper fate of a law breaker is imprisonment this penalty is in essence exclusion from society. The primitive world had no prisons – only outlawry or banishment were practicable. Even the death penalty itself, though other elements enter in, is the final sentence of exclusion imposed by men upon a dangerous member of the human race.

It is admitted that even if the sanction were to be applied to a Foreign minister judged delinquent, and had the effect of making him incapable of carrying out his functions so that he had to be replaced by another, there would be nothing to prevent a determined government from appointing another foreign minister who would carry on the same policy. In this case the sanction would have failed in its primary purpose which is to restrain law-breaking before it occurs, just as national criminal law fails every time an offence is

committed. It is the initial function of sanction which is lacking in international law today, and which the suggestion made in this book is designed to supply. The prospect that one's policy will be carried on by another would be no consolation to an ambitious politician so that the strength of the primary sanction would not be weakened by its inefficacity as a secondary or corrective sanction.

Lawbreaking politicians could not be arrested personally without making war on the state in whose name they had acted. From the point of view of legal procedure the objection to using force to bring an accused man before a Court is that the war would first have to be fought and won, and in the course of such a conflict the original issues might be lost to sight. The practical and political objections to the use of war as a legal instrument are obvious. It is not possible to go to war at a moment's notice, since a warlike mood must develop in people's minds. Today war does not involve merely armed forces. Whole peoples with their industrial and agricultural resources are engaged. Collective wrath, fear and hate are prerequisites. Even if an accused politician belonged to a relatively small and weak state the use of force against him would be impracticable, for no state today exists in a political vacuum. When international tension occurs, the focal point of trouble may be in the early stages only a quarrel between two states, but surrounding nations, and other nations all over the earth, with world-wide interests or political sympathies one side or the other, become involved. A catscradle of conflicting interests, political pressure and misrepresentation ensues, and results in dangerous and unmanageable confusion. Moreover there is a disproportion between the discipline suited to an individual delinquent and the havoc of war.

Since only war is a sufficient force to secure compliance with the summons of an International Court, and since it is an impracticable and inefficient instrument, it is necessary to devise legal procedure not requiring the physical presence

of the defendant, yet not allowing judgment to go by default in his absence. It is essential that the case of an accused politician, which would of course be the same as that of the state in whose name he had acted, should be fully argued before judges. In law there would be no difficulty about this, as the court could appoint an independent lawyer to represent the defendant and meet the argument of the accuser. The difficulty would be to get at the facts if the defendant and his government boycotted the proceedings. Most countries would probably cooperate to some extent, and would not allow a public argument to go on in an international court, based on the accuser's version of the facts. By some means or other they would state their own case, if only for domestic consumption. At the same time they would no doubt repudiate a jurisdiction exercised without their consent. It is nevertheless vital that the jurisdiction should be so exercised, for if the jurisdiction is established by treaty, or any other technical variation of international agreement, it would always be possible for signatory states to make reservations or withdraw from the agreement, as witness the reservations made by the United Kingdom and nearly all other countries to the "compulsory jurisdiction" clause of the statute of the International Court of Justice.

As has been truly said the jurisdiction of that court is not compulsory.[13] Article 36 of the Statute provides that the court shall have jurisdiction over all cases referred to it and all matters specially provided for in the Charter or in treaties or conventions in force. All this jurisdiction is thus purely voluntary for it depends upon the agreement of states. The same article goes on to say in paragraph 2 that states may recognize the compulsory jurisdiction of the court over certain classes of cases, but in paragraph 3 it is said that this recognition may be made on condition of reciprocity on the part of several or of particular states, or that it may be only for a time. Among other states the United Kingdom has accepted the compulsory jurisdiction of the court, but this acceptance is now subject

to nine reservations among which are "disputes arising out of, or having reference to, any hostilities, war, state of war, or belligerent occupation in which the Government of the United Kingdom are or have been involved." The acceptance is moreover only made until such time as notice is given to terminate it. This is not an acceptance of compulsory jurisdiction at all; it is jurisdiction by consent. While the states were sovereign in fact and in law, no other kind of jurisdiction would have been possible. Now, however, that only two of all the members of the United Nations retain anything approaching full *de facto* sovereignty, the time has come to act as a community in the primitive sense and set up courts to judge breaches of the law. There is no need for the peoples of the world to take any further action to form themselves into a community, they are a community in fact. Law is rooted in facts. Out of the facts of family life, the actual relationships of husband, wife, parents and children, the laws governing the family evolved; commercial law arose out of the dealings of merchants. It is not possible to make world order by making an arbitrary plan and drafting a set of rules. Apart from the fact that no government today would consider a proposal for a World Constitution, it would not, if adopted, be a forward movement. Those who advocate "World Government" as a formula do disservice to the cause they have at heart, which is world order. A written constitution for the world making provision for courts, for parliament and for offices of state comparable to cabinet offices in national government, would itself be based on consent, and would be binding only upon those states which consented, not upon the others, and only upon consenting states for so long as political circumstances in which they gave their consent remained substantially unchanged. International law as we know it today leaves too many ways open for the repudiation of treaty obligations for a constitutional document based upon consent to become effective law.

The community of nations can, even today, judge its

members by passing resolutions, but an assembly of hundreds is not a suitable machine for ascertaining the law, nor for assessing the guilt or innocence of individual politicians. The General Assembly of the United Nations is not a judicial assembly, but it is historically analogous to the tribal assemblies, the early councils, the meetings of the heads of families and of chieftains, which in primitive communities carried out the functions of government including judging and banishing from the society of their fellows those who would not obey.

The next question to be considered is whether or not the United Nations has authority to set up a court of international delinquency by resolution. The preamble, the statement of purposes and principles, and indeed the whole Charter is a legal haze. Professor Kelsen has done a superhuman task in his work on the Law of the United Nations. This great commentary has come near to giving to the Charter one of the qualities of law, namely the capacity for explicit interpretation. Nevertheless, the relevant phrases in the preamble and in the first article are so general that one could conclude that nearly anything could be done by the United Nations which would "establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained." It is in the articles of the Charter which set out the functions of the different organs that a rather more precise idea of what the organisation is lawfully entitled to do should be sought. The conclusions to be drawn are however negative. It is possible to say with some certainty what each organ may not do, but difficult to be precise about what it can do.

Articles 10 to 17 inclusive, which set out the functions of the General Assembly, contain the following main verbs: "the General Assembly may discuss – may consider – may call the attention of the Security Council – shall initiate studies – may recommend measures – shall receive and consider reports – shall consider and approve the budget . . ." The impression

given is that the Assembly can sit and think and talk but can never act.

Article 22 however provides that it can 'establish such subsidiary organs as it deems necessary for the performance of its functions.' Again however one has to be able to define a function of the Assembly before being sure that a subsidiary organ can be created to perform it. This power has been used to a considerable extent, in order to establish quasi-military organizations to keep the peace on the borders of Israel and to control disorder and fill the administrative gap in the Congo. The United Nations has established relief organisations in Korea and in the Middle East which do a great deal of practical work. It has set up one administrative tribunal on the lines of the International Labour Office tribunal, to deal with the claims of staff members aggrieved by their treatment at the hands of the Secretary General. This tribunal, though not composed necessarily of professional judges, is a true Court in that its judgments are binding upon the whole United Nations organisation, and establish the rights and obligations of the parties within its jurisdiction. There is no reason why the Assembly, which can pass resolutions concerning the conduct of states and by reason of Article 14 'recommending measures for the peaceful adjustment of any situation,' should not set up a judicial organ to try the legality or otherwise of international conduct and to judge the degree of blame to be attached to the actions of responsible ministers and other public servants.

The scope of such a judicial authority could be determined in the resolution, and funds provided by an appropriation. Such a move would provoke some opposition, and, having regard to the fact that it would be a new departure in the history of the United Nations, it should be passed by a two thirds majority vote under Article 18. If the Security Council were to sponsor such a plan there would be no ground to challenge its legality, for the Security Council has power to act as well as to talk. For instance, Article 41 provides that the

Security Council may decide what measures, not involving the use of armed forces, are to be employed to give effect to its decisions, and may call upon the members of the United Nations to apply such measures. These 'may include ... the severance of diplomatic relations ...' There is nothing here to exclude a declaration that a delinquent politician is to be disqualified from international functions, and treated as *persona non grata.*

If it must be assumed that some members of the Security Council would veto any such proposal, the General Assembly could nevertheless establish a judicial organ to advise it or its members on matters of internationally delinquent behaviour. It is here submitted that it has legal authority to do this by the combined effect of Article 1, paragraphs 1 and 4, and Articles 10, 14 and 22. Put together, the relevant phrases of these articles give the General Assembly power to establish subsidiary organs for performing its functions, and one of these functions is to discuss any question within the scope of the Charter and make recommendations to the members of the United Nations so as to bring about by peaceful means and in conformity with the principles of justice and International Law, adjustment of disputes or situations which might lead to a breach of the peace. Any breach of International Law and especially any wanton breach or any unlawful intervention could obviously lead to a breach of the peace, and as the Assembly itself is not, by reason of its numbers, and its political complexion, a fit body to decide whether an action is lawful or not, it could reasonably set up an organ to adjudicate on the law, and assess the guilt of those responsible.

It is necessary to emphasize here that though a two thirds vote of the Assembly is not binding on the members in any legislative sense, since a resolution is not a treaty engagement and could not commit the dissenting members, yet the effect of such a vote when executed by the establishment of the court of delinquency would be to extend the sanction even to dissenting members, as the sanction could be applied

to their ministers and officers of state however strenuously such states might oppose the policy. Thus the Foreign Minister of a dissenting state, if he were judged guilty of breaking any substantive rule of international law binding on his country, such as a breach of treaty to which his country was party, or breach of a general rule of customary law, could be treated as *persona non grata* by all the states favouring the use of the sanction in pursuance of a judicial recommendation. Every country enjoys, as a part of its sovereign status, the right and the power to refuse admission to any foreigner, and to refuse recognition to any representative of a foreign state, and to refuse recognition to foreign governments, and thus to their members, especially to foreign ministers whose every communication can be refused as of right. It follows that the rule of international law that no state can be bound by the decisions of others without its consent, can by the method suggested be circumvented in so far as enforcement procedure is concerned. No attempt should be made to impose new substantive rules of law, but the ministers and officers of all states, whether such states consent to or dissent from the machinery outlined in this book, can, without infraction of any existing rule or doctrine, be subject to international judgement and be made to suffer the penalty consequent upon an adverse finding of the judicial organ established by majority vote of the United Nations.

This debate would be the first test of international solidarity. Community sense may still be too weak, and political sympathy with the group of nations to which one belongs may still be too strong, to allow the adoption of the policy of the universal application of a recommendation of international outlawry. If the judicial machinery were established, however, either within or outside the framework of the United Nations, even partial disqualification of a wrong-doer would not be wholly insignificant.

5

The court of international delinquency

There are difficulties in the way of setting up Courts of International Delinquency. One of them is to find competent and impartial Judges. Intellect is needed, but this is not hard to find. Experience of the legal thought of other countries than one's own is essential, for otherwise the reasoning behind a judgment or its manner of expression might seem utterly unconvincing to both lawyers and people in a country vitally affected. Nine times out of ten a set of facts judged in one country will produce the same judgment as in another country under a different legal code, but this is not always so and especially not where the interests which conflict are international.

The people of continental Europe would not be satisfied by a judgment rendered by an Anglo-Saxon judge, and *vice-versa*. The Arabs would not be satisfied by the judgment of a Pakestani Moslem Judge, because they think that their concepts of law have been contaminated by the British influence in India. The people on either side of the iron curtain could not accept the judgment of one another's Judges. This is no doubt an underlying reason why all through the short history of the Court of International Justice there has been a demand for national representation. People of one culture do not trust the opinions of people of other cultures. Article 31 of the Statute of the Court therefore provides that if the Court includes on the Bench no Judge of the nationality of any

party, that party may choose a Judge to sit with the others.

The integrity of foreign Judges is not suspect, but people do not believe that foreigners will be able to see their point of view, or understand their conception of justice. People who have never travelled extensively abroad do not realise that there can be more than one standard of behaviour. Hence, unhappily, comes that terrible contempt felt by the people of one nation for others which, excited by politicians and newspapers, is the worst of all the obstacles in the way of those who desire to see the world ruled by law. When therefore a Minister of State is to be judged, it is important that the Court should be so constituted as to carry conviction to the minds of the people of that state. This was probably the dominating factor in the minds of those who at the end of the first world war decided that those Germans who were politically and militarily responsible for the inception and conduct of that war should be judged by Germans under those provisions of International Law which had been, throughout the period of hostilities, part of the laws of Germany. As everyone knows the attempt was abortive. German courts would not condemn men whom they regarded as German patriots. This failure brought about the equal but opposite legal weakness of the Nuremburg trials after the second world war. Here the Germans were judged, not by themselves, but by their victorious enemies. In the first case justice was not done and in the second case it was not 'seen to be done' by reason of the absence of neutral judges. A large section of public opinion on the side of the conquerors of the Second World War defend the justice of Nuremberg, but even liberal-minded Germans, Italians and Japanese are unconvinced by the composition of the Court. International courts of law must be universally convincing if the law is to prevail.

In private civil litigation, or national criminal courts, the loser is inclined to sulk, but he does not reject or even challenge the authority of the court which rejects his argument. A convicted criminal accepts his fate more philosophi-

cally than the loser in civil litigation, confining his complaints to the social, political or domestic situation which he says compelled him to commit the crime. It is essential that some such acceptance of international jurisdiction should be brought about if the conviction of Ministers of State is to have the desired effect. This can only be done if the Court is so constructed as to command respect for its impartiality, and confidence in its understanding of the problem, from the points of view of the nations concerned. Such a Court would take a long time to mature. In order to command some confidence at the outset, it should be composed of professional Judges who are among the highest in the judicature in their own countries. Although legal knowledge is important and although the leading Judges of the member nations of the United Nations have a less extensive knowledge of international law than the academic lawyers who have made of that subject a life-long study, a judicial habit of mind is the most important factor. There is no substitute for the day-to-day practice of weighing evidence, disentangling allegations of fact from points of law and determining between counter arguments. Moreover it is busy men who do the best practical work. If an international case were just one case occupying a few days' work behind the scenes and a few days' work in court, it would be only a passing incident, albeit an important one, in the minds of the Judges who decided it, and not an 'occasion' as is every case brought before the Hague Court of International Justice or the Administrative Tribunals of New York and Geneva. Men seldom do their best work when they feel themselves to be on show. The consciousness that one is occupying a position of somewhat glamorous importance in the world stultifies the intellect, and all work is done best if it is just part of the day's work.

A panel of International Judges should therefore be appointed from among men who hold high judicial office in their own countries. The panel might well be large, possibly including principal Judges of all nations, but there should be

a maximum and minimum number allowed to sit together to hear any one case.

What is the optimum number is a matter for debate. The fewer the better, since the law of diminishing returns applies to bodies of men called together to reach a decision. An odd number is essential as a majority decision must prevail. The decision of one Judge alone would not satisfy the people of contending states, and this therefore rules out the numbers one and three for a court of three judges often leaves one to make the decisions. There are objections to the number five as there must be both a president and a vice-president who would between them share the administrative business of organising the hearings, and they might come to form a 'corner' in International Law, so that if there were five Judges the two constant Judges would only have to convince one other in order to secure a majority. Seven is thus the minimum. The maximum should be as small as can be endured by politicians. A clean break should be made with the doctrine of representation of interested parties on the Court. Every other argument apart, there will never be any true International Law while this element is present. The essence of the judicial function is impartiality. In all civilized countries, if a Judge knows the parties, or if he has any personal interest in the case, he disqualifies himself voluntarily from adjudicating. Representation of a system of law is however possible even if national representation is excluded.

In order to maintain uniformity of case law, machinery for judicial review of questions of law by the existing Court of International Justice should be provided. This could be done without international agreement, and without modifying the statute of the Court. The General Assembly of the United Nations has power under Article 96 of the Charter to request the International Court of Justice to give an advisory opinion on any legal question. Paragraph 2 of that article provides that 'other organs of the United Nations ... authorised by the General Assembly may request advisory opinions on legal

questions arising within the scope of their activities'. It would be undesirable for the Assembly by a political vote to request an advisory opinion in every case. If the Assembly were unwilling to give the Court of Delinquency power to demand an advisory opinion from the Hague it could appoint a subsidiary organ under Article 22 for the purpose of carrying cases to The Hague. Here it would be best to follow the continental legal structure, adapting the organ known as the 'Parquet' to international purposes.[14]

After a French law student has passed his qualifying examinations, he has to decide immediately whether he will follow the career of a Judge or of an Advocate. There is no promotion from advocacy to the Bench, as in England and the United States. If he decides to be a Judge, three different types of occupation may come his way at different times in his career. He may be a civil servant in the Ministry of Justice, or he may be a Judge in civil and criminal cases, or he may fill a role the nearest equivalent to which is that of prosecuting Counsel in Anglo-Saxon countries. In this last role, he is a member of the 'Parquet,' but because he is a servant of the Ministry of Justice and has the same professional status as a Judge, his function is much wider than that of an English or American Attorney General, or a simple prosecutor briefed from time to time by the authorities. His basic duty on behalf of the State is to see that justice is done in the particular case, but when he attains a high standing he has to watch over the whole field of law. One special function is exercised at the very top of the hierarchy of the French Parquet. This is the task of referring not a whole case but a particular point to a supreme court called the Court of Cassation, in the interests of the law. It is this particular function of the 'Parquet' which should be adapted to international use. A subsidiary organ of the United Nations should be charged with the task of referring points of law to the Hague Court and the Nations whose Ministers were accused of delinquency should not, and under the present Statute would not, have that right.

An International Parquet could play a valuable role in demanding and conducting prosecutions against individual men for international delinquency, but the organ would have to be realistically constituted. It would be no use delegating these tasks to theoretical jurists, however eminent. The more responsible the men appointed, the more their decisions would be respected. Individual nations considering themselves aggrieved should, of course, have the right to complain and accuse any man they deem responsible, and it would not again be politically possible to insist that the international Parquet should have power to negative an accusation. It ought, however, to supervise the case whether or not the accused minister or his National government intervened, so as to ensure properly conducted contentious proceedings. The constitution of the Parquet must be left for the consideration of lawyers trained in the latin tradition. This book, being in English, is addressed largely to those who have been reared in the Anglo-Saxon tradition, and to whom the conception of a Parquet is *terra incognita*.

6

The right to accuse

Every state must have the right to bring an accusation against a man for wanton illegality. There are however, other persons aggrieved by a breach of International Law who should be permitted access to a Court of Delinquency. For instance, the Anglo-Iranian Oil Company had cause to complain of the action of the Government of Iran in taking over the oil fields contrary to an Agreement, yet when the case came before the Hague Court, this held itself to have no jurisdiction. The Company could not appear and plead breach of the Agreement which had been set aside by Iran, and the United Kingdom, though interested, could not collect enough treaty law to give the Court jurisdiction to deal with the substance of the injury suffered.

International companies such as this and the Suez Canal Company, for example, ought to have access to an international Court. The Hague could not be given jurisdiction in such matters without a modification of the statute of the Court, and this would require the agreement of states.

An International Parquet should however have the deciding voice as to whether or not a case in which a company were to be the plaintiff or accuser, should be heard before an International Court. The Parquet should decide, not upon the merits of the dispute, but upon whether it would be in the interests of international justice for it to be judicially resolved. There ought to be some control over this litigation, because

the directors of large financial concerns do not suffer from the squeamishness which besets diplomats. They are hard-boiled business men and have no timidity before the law, no false pride in their positions, and do not have to consider their promotion or political advancement. For them litigation is a natural recourse, whereas a major political decision taken after endless discussion throughout the echelons of government and involving all sorts of legally irrelevant factors is required before the foreign offices of the world resort to international tribunals.

In addition to the international companies there are other groups of people who should have the right of complaint in these courts. These are the people of the non-self-governing and trust territories who at present have no separate standing in International Law because they are not independent 'sovereign' states. They have no separate political voice in the General Assembly of the United Nations, and cannot be parties before The Hague Court. In spite of the very genuine efforts which were made by the draftsmen of the Charter to provide for their interests, these people are still dependent upon the goodwill of sympathetic states and individuals for either a political or a judicial hearing. This ought not to be so. From time to time these non-self-governing territories become centres of dangerous emotional tension, as for instance Algeria and Cyprus, whose political importance in world affairs far outstrips their economic or strategic value. The territory of South West Africa is practically a text book case on the colour issue. The populations of these territories have no constitutional machinery for producing a unified political voice and therefore they need the help of an international Parquet to present their case before the world. This would be a familiar task to those brought up in the latin legal tradition. It is simply part of the task of securing justice for all and making the law equal and coherent everywhere. Nevertheless, non-self-governing territories should not be allowed to embark upon frivolous litigation, and therefore their claims

ought always to pass through an international Parquet; otherwise they would constantly sue the colonial ministers in order to attract the press, thus using a judicial process as propaganda.

Finally, there are the individuals who may be damaged by breaches of international law committed by national or international officials or political ministers. Because the wrong is small on the world stage, and provokes no danger of war, that is no reason why they should not have their rights judicially secured, nor should the 'important' men concerned be exempt from blame. If men do wrong, to whomsoever it may be done, they ought to be punished, and they could be punished, not by the crude forms of imprisonment, fines or death, but in the subtler way of disgracing them before the world by disqualifying them from action in the international community. This litigation should however be under control. Only after exhausting every other remedy should the individual be permitted by the Parquet to accuse a responsible minister or official of delinquency.

It is true that many, perhaps most of the cases which might be brought before a court of delinquency by these various accusers, might not arise out of sets of facts which could possibly cause war. It is however part of the thesis of this book that the mere avoidance of armed conflict is a negative and self-defeating political goal. It should not be so much abandoned as set on one side and replaced by the prior and positive goal of promoting international justice for all men and nations whether in groups or as individuals. The aim of the new sanction is primarily educative. Men who make decisions on international issues, however transient, and even politically petty, should be brought to a serious consideration of the law governing those issues. The risk of public disgrace will have this effect upon their minds, for everyone who has advised a political chief knows the extreme sensitiveness such men display in private to any possibility of loss of prestige. To show that a given course of action may result in any kind of

censure is, in practice, a more compelling argument than mere legal reasoning which is at present often shrugged off as a technical triviality. Moreover the new sanction could not control events once a warlike mood had developed, and it was felt that circumstances presented a *casus belli*. Its aim is to prevent such a situation from ever arising by regulating the behaviour of politicians before their emotions and the public anger at a series of illegal actions have reached the point of danger.

The elements of international delinquency should be personal, deliberate and wanton breach of international law, causing damage to the plaintiff. Only an experienced lawyer can know just how many intricate problems are raised by every word of the preceding sentence. Therefore, in its initial stages an international legal claim or accusation should be subject to the scrutiny of experienced lawyers, not in order to decide the issues, but to make sure that they are lucidly formulated, to discriminate between legal and political arguments, and to ensure that both sides are arguing on the same issue.

7

The choice of a defendant

A more delicate task than the selection and approval of cases to be brought before an International Court of Delinquency is the choice of a defendant. This should not be the random choice of a plaintiff colony, company or individual, though a state should be free to choose a defendant, and the Foreign Secretary of every state would be the normal defendant by virtue of his office. The English doctrine of Cabinet responsibility is no bar to legal proceedings against a Minister of the Crown in the Courts of the United Kingdom, so that there is no objection of constitutional principle to a Foreign Minister being made party to international proceedings.

The constitutional operation of governments is so various, and the relations between a prime minister and a foreign minister and between all the members of a cabinet so dependent upon local custom, and upon the personalities who participate in the making of international decisions, that it is impossible to lay down any general rule as to the choice of a defendant in any particular class of cases; moreover the effect of the judgement and the sanction in each case would vary in each country. For these reasons the Parquet should exercise a large measure of control on the selection of the defendants. In the appendix a number of actual international incidents occuring during the post-war period are described and indications given as to the persons who would have been the proper defendants. The basic principle must be that

whoever was really at fault must bear the blame whatever his position in the governmental hierarchy.

The responsibility of civil service advisers must however also be considered. Personal liability for violation of international law and the risk of international disqualification would in the first place cause a Foreign Minister to make serious investigations through his advisers as to the legality or otherwise of any proposed policy, and secondly compel his advisers, were they civil servants or political lawyers, to examine the law dispassionately and consider the situation with as little prejudice as if they were advising an important client about private business. It is just this which, at the present time, they will not or cannot do. If they are political lawyers, they are themselves involved in a policy in which a particular legal issue is but one, and perhaps in their eyes, only an unimportant factor, and if they are civil servants they are personally interested in pleasing the Minister whom they advise.

If a Foreign Minister were in danger of punishment, the wish to please would be supplanted by the desire to protect. Only lawyers who have played both roles, the part of the independent adviser to a private client and the part of a legal adviser in a government office, can know the difference.

In the one case the client comes as a suppliant asking aid, and to him the lawyer's word is law, but in the other the lawyer is summoned as a servant, and if his service is unpleasing he is not invited to further discussions. To the political chief his lawyer's opinion is a tool for use as policy dictates. Men of the initial intellectual calibre of senior governmental legal advisers could, at the bar of England, hope to earn £ 20,000 a year subject to the risk of failure, not for lack of brains, but for lack of luck or personality. In their present offices they can earn £ 4,000 a year and a knighthood and they have security and a pension. The discrepancy in income reflects the discrepancy in their value as lawyers. The legal advisors do not lack brains, but they lack the experience of responsibility for the life or death, the freedom or imprison-

ment, or the personal ruin of their clients. If they had this responsibility they would become the equals of their colleagues in the national courts.

The object of this book is to produce the rule of law itself, not the rule of lawyers. Law has not been produced by lawyers, but by the collective legal genius of certain nations; but if international life remains as it is, and international lawyers remain subservient to politicians, either because they are powerless theorists, or powerless civil servants, there can be no international legal order.

At present international law is thought to be of little account, as witness the statement in a leading article of the London Times on August 1st 1956, less than a week after Colonel Nasser had nationalised the Suez Canal, where it was said, 'Quibbling over whether or not he was 'legally entitled' to make the grab will delight the finicky and comfort the fainthearted, but entirely misses the real issues.' Those who are familiar with national law, whether as parties, counsel or judges, know that every detailed point of law is by reference to the human interest concerned, a legal quibble; yet it is by such 'quibbles' that the law is applied and made, and we live at peace with one another because we respect it as a whole, even if it is intricate, and at times falls short of justice.

The status and quality of present day international legal advisers are not of merely academic interest. They raise the question as to whether the advisers of Foreign Ministers should themselves be liable for delinquency on the ground that they may have conspired to defeat or evade the law. This problem concerns not only legal advisers, but all high-ranking civil servants. In most countries the power of the civil servant is considerable and this is no modern development. The fathers of Charlemagne were hereditary Mayors of the Palace of Frankish Kings and so the authors of an Empire which lasted a thousand years. English readers, acquainted only with the practice, in Great Britain almost a fetish, that the Minister alone is responsible for the action of his department, may be

shocked at the idea of imposing personal responsibility upon the civil service adviser. Such is the force of this rule in Great Britain that a Minister will resign his office for a fault committed by men in his department, though he had no personal knowledge of it. This practice is the corollary of the constitutional victory of the House of Commons over all other organs of government. Humble in origin, the Commons waged a centuries long battle to secure dominance, and one part of their strategy was to exclude the King from their deliberations. It followed logically that the King's servants must be excluded from debates, and that therefore they are neither permitted, nor can be compelled, to answer politically for their actions to the people whose lives and liberties are gravely affected by their decisions. It does not however follow that these men should not be answerable to other nations. Where real power is, the men who hold it should be compelled to submit to judgment for what they do, and what they advise their political chiefs to do. It is true that there is no method of compelling the principal Foreign Office advisers to attend in person an International Court, any more than it is possible to compel a Foreign Minister to attend; but if held to blame they would be debarred from a wide field of foreign service, and in particular from holding the office of Ambassador which, for all its declining responsibility, is still the goal of the diplomat. Admittedly all nations may not immediately impose the penalty of international disqualification. The natural impulse of the remaining sovereign states, that is to say U.S.A., Russia and Red China, would be to repudiate the whole proposal for a sanction which would in the end subject them also to the rule of law, and thus strike at the roots of their sovereignty. Once the proposal were adopted by a two thirds majority of the United Nations, however, many states would apply the sanction. If a diplomat were known to be *persona non grata* either by reason of his own misbehaviour or that of the Minister who appointed him, he could scarcely hold the principal diplomatic posts in Washington, Moscow,

London or Paris. Such a man could not carry out his mission if he were disowned by two thirds of the Diplomatic Corps. This would be done on the instructions of governments acting in pursuance of a judicial recommendation against the man or the minister who appointed him – not against the state of which he was the pretended representative. Even the giant states, which might be tempted to defy an international judgment, could by this means be affected in the choice of their representatives.

To be affected by the law against one's consent is the first step leading towards the authority of law, for though government by consent is often taken as a definition of democracy, this consent is not the consent of individual lawbreakers, but the general consent of the community. Government by individual consent in each instance would be anarchy, and this is the state of the world. The middle way between tyranny and anarchy is the acknowledged supremacy of the law and to achieve this the people of very many countries may be willing to sacrifice the personal prestige of their statesmen, politicians, ambassadors and civil servants.

It would be very much more difficult in some countries than in others to apply this sanction to permanent officials, such as British civil servants who are constitutionally shielded by the Ministers of the Crown, and who if involved in some internationally illegal undertaking of the government of the day, could not oppose their political chiefs without risking their careers. In tyrannical states the subordinate would risk his life if he resisted his own government. This is not so in all countries however. For instance, the head of the American State Department and his staff can be made answerable to Congress, and there is nothing in the Constitution of the United States to prevent them from being answerable to an International Court. Their responsibility is personal, and so far as the senior appointments are concerned, the occupants are by no means always career civil servants. There is alternative work open to them should they choose to resign rather

than participate in an illegal policy. In every country each case must be judged on its merits, and in judging the conduct of a senior government servant his personal situation and prospects could not, without injustice, be ignored.

This factor was taken into consideration in the trials of men accused of crimes against the peace, war crimes and crimes against humanity in Germany and the Far East, and also in analogous proceedings conducted by Allied Tribunals, after the Second World War. The Nuremberg Charter, in Article 8, provided that 'the fact that the defendant acted pursuant to the order of his government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determine that justice so requires.' The activities judged at Nuremberg and in the Allied Tribunals in Europe and the Far East were cruel attacks on human life rather than minor political illegalities; but the principle of mitigation remains valid. In the War Crimes Trials if a man had acted in pursuance of superior orders but subject to 'irresistible fear of immediate and extreme consequences' he was dealt with mercifully or even exonerated.

Wherever an internationally illegal action causes death or pain to innocent people it ought to be possible to inflict physical punishment, but the time has not yet come, and the international community has not yet power to impose a sufficient penalty upon the most violent international offenders. The only method of controlling such men is war, which as a sanction is legally unmanageable and would now be indiscriminately disastrous.

Initial international wrongdoing could however be controlled at an early stage before there is danger of bloodshed on a large scale, and so produce respect for International Law. Respect for law is not just a general idea of all men of goodwill that law ought to be obeyed, but a fear in the minds of those whose decisions are affected by it that if they disobey they will suffer. Minor breaches of law committed with impunity, or a succession of legally disputed incidents, can easily lead to a

major breakdown of international order. Hence the value of imposing by court machinery the comparatively mild sanction of international disqualification upon men who will not otherwise be brought to take international law into serious consideration before making their decisions, for though they often, probably almost always, enquire what the relevant rules of international law are, they take only public opinion at home and abroad into account. A British civil servant representing his country once advised an international conference on a critical issue of legal principle in the following terms: 'I remember a professor many years ago in the University of Oxford telling us never to ask in a crisis "What are all the facts? What is the legal position? Never ask the question: What is the principle involved? Always ask: What is wise?" '[15] A more candid repudiation of law has probably never been made. Only immediate personal risk should exonerate a civil servant for participation in an illegal policy, just as under the Nuremberg Charter it was only the 'irresistible fear of immediate and extreme consequences' which was allowed as a plea in mitigation.

8

Heads of states

If Prime Ministers, Foreign Ministers and subordinate officials are to be internationally answerable for their decisions, there remains the inescapable problem of the liability of those heads of states who are the real holders of power. In some countries, such as the United States it is the head of the state who is ultimately responsible for all executive decisions. He is the chief executive and control of Congress over him is merely negative. Congress can refuse him funds, and it can decline his proposals where these require legislation, and the Senate can reject a treaty, but Congress has no power of positive command, so that the President is responsible for his decisions and should therefore logically be answerable internationally for all he does.

In many other states the situation is otherwise. The King or President is the titular head of the state, the real decisions being taken by the Prime Minister and his Cabinet. This is the case in Great Britain. Depending upon the personality of the monarch, great or less influence can be exercised by him or her upon public affairs; but the influence is remote, and no situation is now likely to arise in which the Queen of England, for example, could be judged personally guilty of a breach of international law, even though she may, on the advice of her Prime Minister, sign an illegal order. In such a case neither she, nor anyone in her position, could have a free choice, and therefore the Constitutions of each country must be examined to see where real power lies.

The states of the world have constitutional arrangements capable of classification into three main groups with reference to the seat of executive power. The first is the Eurasian which consists of a head of the state, either hereditary or elected, a Prime Minister, a council of Ministers and a parliament. Sometimes one or more of these organs is missing, and the distribution of real power among them varies from country to country. This pattern has evolved historically, and never been consciously planned, although nearly all the written constitutions of Europe and Asia (excluding the Communist group) and also of Africa, have been drafted to conform with this evolutionary pattern in its most mature form. Real power is usually in the hands of the Prime Minister, if there is one, and if not it lies with the head of the state, either a King or a National leader, but much depends upon the personality of the men holding these offices, and they are always subject to control in varying degrees by the Council of Ministers, by the Parliament or by the Army.

The second group is American. It consists of a President, individual advisers and a legislature. Power is always vested in the President. Constitutions of this type are mostly to be found in North and South America, though where the United States has had predominent influence, as in Liberia and South Korea, this pattern has been followed. The restraining organ is the Congress, but in most American countries Congress has no power to overthrow a President in office, as the Parliaments of the Eurasian states have power to overthrow a constitutional Prime Minister and his Cabinet.

The third group consists of the Communist states. Even these today are becoming heterogeneous, though the basic pattern is the government of Soviet Russia. The written constitutions of these states provide for numerous presidencies, councils, chairmen, assemblies and other bodies, and it is difficult to identify the real seat of power, though the focal point is within the Communist party.

There is an objection to arraigning the head of a state before

an international tribunal for a breach of International Law. Such proceedings would be offensive to the people collectively. In varying degrees people identify themselves with the personality of monarchs, or the heads of states, who, though not royal personages, have assumed, whether by election or revolution, whether indefinitely or for a term of years, the aura, though not the crown of kings.

The constitutions of forty-six of the present so-called independent sovereign states are of the Eurasian type, as against twenty-two of the American pattern and eleven Communist.[16] This reckoning ignores the miniature states and a dozen or so which are unclassifiable, though not of course unimportant.

This threefold classification is not intended to connote praise or criticism, nor does it correspond to the distinctions between monarchy and republicanism, or between democracy and dictatorship. There are dictatorships in all three groups, and the largest group, the Eurasian, contains both monarchies and republics. The purpose of making the classification is to examine whether any of these forms of government are constitutionally incompatible with the use of the proposed sanction of personal disqualification against the head of a state who may be responsible for a breach of international law. The problem lies in the nature of the functions of the head of the state. Wherever there is either a constitutional monarchy or a titular presidency there would be no difficulty because such a man could not be held responsible. The Prime Minister might in exceptional cases, for instance those involving local violence, be answerable internationally for his actions, and he could be declared *persona non grata* without attacking the constitutional functioning of an erring nation. Where the head of the state has real executive power however difficulties might arise. If a President were to order the use of physical violence against the people of another state in breach of international law, and were to be judged, whether or not he chose to defend himself, and found

delinquent so that he would be liable to be disqualified from performing his international functions, then every international act performed by him, including the appointment of Ambassadors, would have to be treated as a legal nullity. Even if one could assume the willingness of most other states to apply the sanction, the result would be tantamount to boycotting the whole nation. Moreover, the propriety of a sanction directed against the head of a state might be widely doubted. It would offend against patriotic emotions which are still focussed upon Monarch or President. And this is especially true in the United States. The Americans who are by no means unduly respectful of men in high places, have a very strong and special regard for their President. These emotions would not be affected by a judgment against a Foreign Minister. For instance, if the American Secretary of State were to be condemned for delinquency in some hypothetical case, the judgment would carry some degree of conviction even to the people of the United States of America. These latter might very well support the policy of their own Secretary of State, but the judgment would not shock them. If, on the other hand the President were to be condemned and internationally repudiated, not only would the people of the United States be affronted, but the people of other countries not involved in the quarrel might sense a threat to their own Kings or Presidents, just as at the time of the French and Russian Revolutions the overthrow of monarchs was felt by the outside world to be an indirect threat to their own régimes. If an indirect threat were to be felt sufficiently strongly by peoples not involved in a quarrel, they could influence their own governments against applying the sanction to the President of the United States, and thus render ineffective the judgment of an International Court.

The focus of loyalty in all states today, whatever their constitutional form, and whatever political or economic doctrines they follow, is nationalistic. Any tendency towards internationalism, or any enforced interdependence, seems to

be followed by an enthusiastic reaction in the direction of nationalism. The British felt an immense emotional relief after Dunkirk produced, apparently, by the knowledge that at last they were on their own, and no longer dependent upon allies, although they well knew that without American help they were doomed. The history of France ever since her rejection of the plan for a European Defence Community points the same way, in spite of many statesmen of international vision.

This emotional focus is personified by the head of the state. The question as to whether or not the head of a state should be subject to international judgment and liable to be penalised for an unlawful action thus poses the most difficult problem in the way of making international law effective by the method set out in this book, and the problem is not made any the easier by reason of the fact that the issue could not arise in matters affecting the majority of the Eurasian States, nor affecting Soviet Russia, for any state of any type may change its constitution, as France has done, and place at its head a strong ruler invested with executive authority.

If the rule of law over the nations is to be established however it cannot but be upon the principle enunciated traditionally by a Chief Justice of the Common Law of England, that the King ought not to be subject to any man, but to God and the Law. No constitutional ruler, certainly not the President of the United States, will quarrel with this dictum. No man, not even the head of a state, should be above the law.

There is therefore a conflict between logic and morals on the one hand and practicability on the other. The only way out of this dilemma is compromise. It is suggested that only in extremely grave cases should the conduct of a head of state be subject to judicial examination, and only then if there is no responsible minister, such as a Secretary of State for Foreign Affairs, who initiates and directs his country's international policy. Moreover where the head of a state is accused the Judges should limit themselves to giving a ruling on the

law. They should not assess moral blame, and they should not recommend a penalty. These functions should be discharged politically by the Assembly of Nations, be it the General Assembly of the United Nations or the representatives of a group of nations acting together outside the framework of the Charter. A political Assembly could take into consideration all the consequences of boycotting the head of state, both psychological and economic, which judges could not do. Probably also the fear of an adverse legal judgment, even without penalty, would do much to control an executive president.

This solution, logically imperfect though it be, has the advantage of excluding from the operation of the sanction all democratically elected executive Presidents, and hereditary Kings who govern constitutionally, but it would not exclude the Heads of Police States, whose actions could be judicially examined from the point of view of international law, and who would risk bringing upon themselves and upon their people the inconvenient consequences of a collective boycott politically imposed. It is true that such a boycott might make a dictator an heroic figure among his own supporters at home, and even gather to him racial or ideological sympathisers outside the borders of his own land, but on the other hand a military dictator is not the focus of stable patriotic feelings, as is an elected president or hereditary monarch, and he must always contend with an underground opposition. The international action here proposed, partly legal and partly political would run no risk of making a man an international hero outside the field in which he were already an admired leader, and while not being in itself an inducement to the violent overthrow of a tyrant, it would rally the undecided or half-hearted to the support of the oppressed section of opinion.

9

The law to be applied

In proposing a definition of international delinquency, it has been stated that a breach of the rules of international law is an essential element of the offence. No attempt has been made to state what these rules are. For that, reference must be made to standard text books, and to writers of all nations on special subjects. There does not however exist any single authoritative work, nor any agreed body of doctrine to which a court of delinquency could be referred.

In November 1947 the General Assembly of the United Nations decided to establish an International Law Commission, whose task would be the promotion of the progressive development of international law [17] at least on certain subjects, with a view to the agreed codification of the law in accordance with Article 13, 1.a. of the Charter. This Commission has sat regularly for more than ten years, and has done a great deal of careful and detailed work which may ultimately be of real value, but which is only slowly achieving results because a restatement or codification of law is, if it is to be authoritative, an act tantamount to legislation, and no international legislature exists. If a restatement is to become authoritative, previous conflicting interpretations of doctrines or treaties would be made obsolete. It is manifest that international law is in need of this treatment, but no restatement or codification is at present possible, because the rights and duties of sovereign states cannot be altered, even by being redefined, without the

individual consent of each state given at a diplomatic conference. This principle, which is of the essence of the existing system, is one of the few doctrines which are still universally held.

If however it is recognised that the declining sovereignty of nation states has undermined the existing system, to the extent that the state should no longer be regarded as the exclusively competent personality in international life, but that on the contrary it is a varied and changing succession of statesmen and officials who ought to be held answerable for breaches of international law, then new prospects appear.

There are several possibilities of advance, but all depend upon the existence of a court of international delinquency having authority to judge men for their official actions, and it would be premature to examine them until this proposal was well enough understood to have gained a large measure of acceptance. Broadly speaking the possibilities of legal development which present themselves, once this central idea is accepted, fall into two groups. If two-thirds of the members of the United Nations Assembly accept the proposal, and assert their competence to set up a judicial organ, then they would have to define what law the new court should apply in judging accused persons. In such case it would hardly depart from the description of international law set out by agreement for the Hague Court in Article 38 of its statute, which is annexed to the Charter.

The Article reads in part as follows:

'The Court ... shall apply:

a. International Conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
b. International custom, as evidence of a general practice accepted as law;
c. The general principles of law recognised by civilised nations.
d. ... judicial decisions and the teachings of the most highly

qualified publicists of the various nations, as subsidiary means for the determination of rules of law.'

Though this clause has been criticised, it is the logical point of departure for any new court dealing with problems of international law. If the Assembly were to set up the new court, and to bear in mind the possibility of using the Hague Court as a final court of reference on points of law, it is obvious that the two courts should apply the same law. Only one adjustment would need to be made in adapting the words of paragraph a. of Article 38 in order to eliminate direct reference to the 'contesting states' in the statute of the new court and substitute for it a reference to the state on whose behalf an accused man had been officially acting.

If the court is to be open to litigants who are either companies incorporated under national law, or private persons, the law to be applied would have to include agreements between the collective or individual person on the one hand, and states or intergovernmental organizations on the other. This would extend the jurisdiction in some cases to the field of private international law, but as the line between public and private international law is by no means clearly drawn, there is no reason why this should not be done.

Legislative action is of two kinds. It can declare what the law is, or it can alter the law, either by amendment or by making new laws. The initial action of the Assembly should be merely declaratory. It would direct the new court to apply existing rules of law to individuals, and thus in certain circumstances stamp an action in breach of law as an offence, coming within the purview of the Court of Delinquency. Although the German and Japanese War Crimes trials may be perhaps considered as a useful political and psychological precedent for the proposal now made for the judgment and punishment of offenders by an international court, it is now essential to make an important legal distinction. The criticism that the London Agreement of the 8th August 1945, and the Charter annexed to it, created *ex post facto* criminal law insofar as it

dealt with Crimes against the Peace and against Humanity, need not here be examined, as that part of the Nuremberg precedent obviously need not be followed. A much more technical objection was that according to international law no state may exercise jurisdiction over the official agents of another state without the consent of that state.[18]

This principle is known as the doctrine of act of state, and its usual operation is in time of peace to protect the official agent of one state from the jurisdiction of another state. It is an argument used to prevent domestic national courts from adjudicating on the officials actions of another sovereign state, done by its agents. Its application to the laws of war in a court established by many nations would give rise to objections which need not be discussed here, but as the doctrine could be used as an objection to the competence of the proposed court of delinquency, which is intended to operate in peace time, it is necessary to distinguish any international criminal jurisdiction, which either has been or may in the future be established, from the jurisdiction of the proposed court, in order that it may not be judged faulty on the ground of the act of state doctrine.[19]

No group of states, such as the signatories of the London Agreement could, it has been argued, exercise jurisdiction over German Statesmen, Generals and officials without the consent of a German government, which was, of course, not a signatory.

The reason a state may not exercise jurisdiction over the official agent of another state is that the act of the agent is the act of the state, and that the 'offending state,' being sovereign, is not subject to the domestic jurisdiction of the 'offended state.' One sovereign person cannot be subject to another sovereign person. From this proposition it might be argued that a group of 'offended states' ought not by agreement among themselves to bestow upon any court which they think it desirable to establish, the right to try and to punish the agents of an 'offending state,' even if they have power to

enforce the judgment of the court. If the 'offended states,' by the instrumentality of their joint court, its judges and officials, prison officers and executioners, restrain the liberty and impose fines, imprisonment or death upon the agents of the 'offending state' they infringe the sovereignty of the latter, and thus act in breach of international law.

Although the sanction proposed in this book has been spoken of as a penalty in order to underline its sanctioning character, it is not in itself an action in breach of international law whereas the normal penalties of domestic criminal law mentioned above would be breaches of sovereignty if imposed upon the official agent of a foreign state. The new sanction is the exercise of a combined right and power which every state possesses by reason of its legal and its *de facto* sovereignty. The sanction will be imposed by the political decision of the law enforcing states, and not by the direct order of the Court of International Delinquency, whose jurisdiction, which need not even be initially termed a jurisdiction, will be merely to determine the legal issues, assess the blame, and recommend action to the law-enforcing states. It is not a breach of international law for a state or group of states to establish an organ composed of judges to advise it on law and recommend what action may be taken within the law to promote gradually a just and orderly regulation of world affairs.

As soon as the proposed Court or judicial organ were established, however, some reformulation of the law to be applied would be seen to be necessary in order to apply it to individuals.

As everyone who has handled international law knows, it is in a very unsatisfactory condition. Wherever the texts of international documents seemed to be insufficiently precise to be applied with certainty to individuals, other possibilities of legal development present themselves by reason of the fact that neither universal consent and in particular the consent of an 'offending state', nor the fiat of the veto powers, nor the cumbersome machinery of treaty making, would be required

to establish the proposed system of personal responsibility for the giving of unprincipled international orders.

It is not proposed to alter the existing obligations of states, even by redefinition, in drafting the terms of reference of a Court of Delinquency. Clearer definitions of the duties of politicians would however sometimes be required. Known uncertainties in the law could thus be resolved beforehand, not *vis à vis* the states parties to an international agreement, but *vis à vis* the men who operate it, so that they would know how a court would interpret a given clause, and would know that, if accused of law breaking, they would not be able to rely upon an ambiguity construed in their favour to excuse them if the court were to consider their conduct blameworthy.

For instance, to take an extremely difficult issue by way of illustration, the Charter of the United Nations provides in Article 2 paragraph 4 that 'All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state ...' Article 51 provides that 'Nothing in the present Charter shall impair the inherent right of ... self-defence if an armed attack occurs against a member of the United Nations ...' These clauses are difficult, if not impossible, to apply to any particular outbreak of violence, in the absence of an authoritative definition of aggression. Attempts to formulate a definition have been made ever since the days of the League, but without success, partly because those who have worked on it have had to seek a form of words which would be almost universally acceptable, and in any case acceptable to the major military and economic powers.[20]

In the Assembly it has become almost a habit to vote in political blocs, because in deciding which way to vote on any given issue, each state considers future political alignments, rather than, or in any case as well as, the merits of the matter in hand. In seeking a definition of aggression the members of the United Nations have to consider how such a definition

would affect them in some unspecified future conflict. Each state has in mind, not merely conflicts in which it may become directly engaged, but its relationships with economic or political allies which may be accused of aggression according to a definition. No government can afford to bind itself to take what might turn out to be the 'wrong' side, having regard to its current political necessities; that is to say, no state today will commit itself to take action against allied states. It would not be nearly so difficult to find a definition of aggression applicable to individuals, which would be applied, not by the Assembly but by a court in a concrete case, and which could not in any event engage a country to take military or economic measures against other states whose constant friendship and support are necessary to it.

A debate, the purpose of which is to produce universal agreement, takes a different course from a debate in which it is known beforehand that the vote of the majority will prevail, and a text resulting from the latter is much more lucid, because, where universal agreement is sought, concessions can be extracted by each member of a conference, every delegate knowing that if he makes a firm stand he can, single-handed, make the work of the conference abortive. The outcome of a debate on international delinquency would be to define the circumstances in which a principal executive, Prime Minister or other public servant, could be held personally to blame for the threat or use of violence, though the legal responsibility of his country would not be affected. As however the legal responsibility of a state for an act of violence is seldom the subject of a court judgment, and then only, as in the case of the Corfu Channel, in terms of money damages which cannot be enforced, the legal position of the state concerned is relatively unimportant.

The definition of aggression is an ambitious example, and no doubt it would be necessary to proceed conservatively, especially if the plan were to be put into operation by the Assembly of the United Nations. Use could be made of the

work of the International Law Commission, whose work has so far made little impression on account of the over-riding necessity of universal agreement, and of the practice of bloc voting in the Assembly.

The advantage of acting through the United Nations if this can be achieved is that it would secure the continuity of legal authority, and thus the confidence of the population of the world in the truly legal character of the new court and its judgments. Such confidence is the real root of law. If however, the requisite two-thirds majority were not forthcoming, or if there were an adverse advisory opinion from the Hague as to the powers of the Assembly, there would still be no impediment to independent action by a group of states. No one doubts that as far as law enforcement goes, we are still, internationally, in the age of self-help. In a limited way the North Atlantic Treaty Organisation is an example of this. Failing any hope of agreement in the Security Council, and recognising that that body was incapable of maintaining world security, which is its primary task, the original members of NATO made what is in form a treaty, but in substance a joint declaration, that they proposed to make common plans to deal with certain dangers to the peace.

Similarly, if a substantial body of nations were to come to the conclusion that any breach of international law is, if not subject to penalties, a potential danger to them because lawless behaviour is dangerous to any community, there would be nothing in the Charter of the United Nations, nor in general or particular international law, to prevent them from making a joint declaration that, their own safety being endangered by the increasing lawlessness of all nations, they proposed to declare delinquent, in accordance with the judgment of a court, any individual found to be to blame for a breach of international law wherever committed, with the consequence that the law-breaker would henceforward be treated as *persona non grata* within all their territories. Such action is within their existing rights. All that would be needed

would be joint action taken as the result of a recommendation of independent and impartial professional judges. The judicial machinery would be set up by them, but neither the judges nor the administrative staff would need to be chosen exclusively from among their own nationals.

Such a body of law-enforcing states would not necessarily be tied to the description of international law set out in Article 38 of the Statute of the Hague Court, since it would not be entitled to use that Court as a final Court of Reference on points of law. This great loss might however be balanced by the fact that there would be greater liberty to select, redefine and even codify those parts of the existing body of international law, which are relevant to the immediate needs of the world. A great deal of law found today in text books is obsolete, owing to the rapid technical advance of our generation. Maritime law, for instance, including the law governing the maritime belt, has developed since the days of sailing ships, and has an archaic texture, and the law of the air, though it dates only from the Warsaw Convention of 1925, is not capable of governing excursions into space.

A very long digression would be needed to examine the laws of war, and it must suffice here to say that with the coming of nuclear weapons, those conventional rules which governed the conduct of warfare, and were dependent upon making a distinction between military forces and civilians, have become unreal. It must also be admitted that not only would the sanction not be strong enough to control the behaviour of men, either military or civilian, in wartime, but it could not prevent a government from resorting to war if its members believed there was grave danger of attack from other states. Neither law, nor any human power, can control a state which possesses modern weapons and becomes involved in war, and the law-enforcing states would do well to admit this at the outset. This is not by any means to say the nuclear experiments, and the construction of nuclear weapons, could not ultimately be controlled by the system of judgment and

sanctions here proposed, but the system would have to be well established upon a basis of world-wide public opinion before any attempt could be successfully made to outlaw them. World opinion is, no doubt, opposed to the testing, manufacture and use of nuclear weapons, as it is in a general way opposed to all out-breaks of violence, but there is as yet no channel for the effective co-ordination and expression of such feelings. The policy here proposed would supply such a channel, but what is perhaps of more immediate importance, it would supply a channel for the expression of public indignation against foreign politicians. In national law it is necessary to have strong criminal law which matches in severity the general anger at certain types of crime, because if offenders are insufficiently punished, public feeling will show itself in uncontrolled outbursts of mob violence and lynchings. There is at present no international channel of this kind, so that resentment accumulates to flashpoint and issues in war.

The sanction will not be complete until a man is repudiated by his own people. This can scarcely happen in our generation. National sentiment is very strong in all countries. Support within a nation for an adverse international judgment, apart from political party manoeuvres, is far in the future, and even if it were fairly strong it could not overthrow a dictatorship. Such regimes are however even now sensitive to world opinion, and seek either to conceal their worst excesses or else to justify them at the bar of world opinion. International pressure could therefore be brought upon them to conform, even in their internal affairs, with minimum standards of justice. Once the practice of judging and punishing delinquent individuals were widely accepted, the law-enforcing states could from time to time make declarations to the effect that certain defined actions, such for instance as actions conflicting with the Universal Declaration of Human Rights, would henceforward be treated as delinquent.

That purely declaratory document is not now part of international law, because the draft covenants intended to be

binding have not yet been agreed by the negotiating states, though they have been under discussion for many years. Moreover, the document itself is expressed as a statement of principles, rather than a definition of obligations, and it could therefore only be treated as a basis for selective directions to the court of delinquency. It is however in common use in the Secretariats of the United Nations and other international agencies, whenever these are called upon to advise the Trusteeship Council, or other executive councils, as to what, if any, action may be taken as the result of individual petitions from persons or groups aggrieved by the treatment they have received at the hands of their own governments. To this very limited extent it has a certain status in international law even today. Moreover it has formed the basis of a Convention for the protection of human rights [21] recently agreed by a number of European states which have established a Commission and a Court to deal with claims, though this convention and the organs thereby established operate only within the territory of the concurring states. The Commission may, according to Article 25 'receive petitions addressed to the Secretary General of the Council of Europe from any person, non-governmental organisation, or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in (the) Convention,' subject to certain conditions. The new European Convention thus bestows rights arising under international law directly upon individuals. The recommendation made in this book that individuals should be made personally responsible under international law for breaches of its obligations, is not therefore without logical precedent. The only attempts so far made to hold individuals responsible for disregarding, such obligations have been the war crimes trials during the 20th century, and the abortive drafts of the International Law Commission for an international criminal code. Neither war crimes trials, nor an agreed criminal code, can however guarantee security, or lay the foundations of the rule of law.

They depend upon military victory by whichever side is presupposed to be in the right, as judged by its own political leaders, for military action cannot await a Court Judgment. Such measures cannot therefore fulfil the primary purpose of a sanction, which is the certainty of incurring a penalty in case of illegal action.

The organised exclusion of men in official positions from international society when their conduct has been impartially judged to have been illegal could operate as a sanction inside the existing system of international law. It could be applied only to the servants and representatives of those states which, by an international convention, have given preliminary consent to the plan. There is however no legal necessity so to limit its application. There is no legal impediment in the way of a state, and in particular a group of states, which may decide to refuse recognition to any foreign statesman of any nation, and to deny him access to their territory. Sovereign states have this right and this power if the conduct of the man in question is politically distasteful to them. They are not obliged by existing law to recognise and receive any foreign citizen whatever position he may hold in his home country. They can reject him even if no judges have ruled that his policy has been executed by unlawful means. It follows that this penalty could be applied politically outside the field of existing international rules of behaviour. Its efficacy in controlling the actions of international statesmen depends however upon the number of participating states, and upon the extent to which they can command the support of world opinion.

Even in this century, when respect for international law by governments has reached its nadir, the concept of legality and the hope, or dream, that by some device, some change of heart, some cession of sovereignty to a central authority, world affairs may come to be regulated in an orderly and rational manner are very much alive in men's minds. Respect for the existing rules of international law is the only safe point

of departure even though they be incomplete and unsatisfactory. If the sanction proposed were to be used for purely political ends by a group of states bound together by an ideology, and exercising great economic and military influence in the world, the plan would fail, for it would become a battlecry of political partizans. All systems of law, even the very best, are capable of misuse, sometimes with the best intentions, and in the end the only safeguard is the character of the men who administer them. It is easy to see how a large group of powerful states, for instance the Western allies, organized as they are in a defensive alliance, might with the best will in the world, collectively impose this new sanction in cases of misbehaviour by communist rulers, when force was inappropriate or dangerous. This would serve no good purpose. It would indeed bring the law into contempt. The only safeguard against such misuse is the impartiality of the men called to judge international issues. They must be impartial in national origin and in personal character. If such men can be found the system can work and develop and their existence will guard against its misuse, for if a panel of impartial judges were to be established no attempt to use the sanction irregularly for ideological purposes would command respect. If, however the existing rules of international law were taken as a basis, and if the notion of *mens rea* were introduced into the instructions initially given to the Judges, then their judgment or recommendation, and the collective action taken in consequence thereof by the law-enforcing states, could command the assent of world opinion.

Because the sanction can operate freely in accordance with the existing rules of international law, and yet its operation is not technically restricted to the consensual framework within which those rules have been formulated, the proposed plan would work slowly as a solvent agent for combining the discordant elements of law and sovereignty. The nation states, new and old, would retain their sovereignty for so long as they desired to do so. They would remain the law makers by

exercising their present treaty-making power within the existing framework of international thought, but so soon as it was perceived that by shifting the focus of international obligation from the collective national 'person,' which the sovereign has now become, to the individual who is in fact responsible, the nation states would discover that they already have the power not only to secure obedience to the imperfect law of today, but to develop it and resolve its contradictions. International law is weak because it is not enforced. It is not enforced because it is defective, and because the sanctions so far proposed for its enforcement are too costly and too dangerous. Economic and military sanctions may possibly be used in case of unbearable necessity, in the secondary sense of the word sanction, that is to say to correct a breach of law after it has been committed. They do not, and never can come into play in the primary sense every time a policy of dubious legality is under discussion. The new sanction of personal disgrace and exclusion from the honour and prestige of international work would operate constantly in the primary sense thus bringing the men who are occupied with world affairs by a slow educational process to an acceptance of their international responsibilities.

Appendix

In order not to interrupt the presentation of the idea contained in this book no attempt has been made to intersperse the text with illustrations of its possible effect in practice were it to be adopted as a policy and carried out by a majority of states. In this appendix it is intended to take certain international incidents which have happened since the end of World War II and consider briefly what the effect a Court of International Delinquency could have had upon events had it been in existence at the time of these various incidents and to indicate who would have been the proper defendants. Such a proceeding is necessarily speculative for it is impossible to turn back the pages of history and say with certainty what would have happened had a factor been present which was lacking at the time. It is emphatically not suggested that a new Court should be given *ex post facto* jurisdiction, even though some of the episodes to be examined present continuing problems. The future conduct of responsible rulers and officials should alone come within the new jurisdiction.

The Berlin Blockade There was no formal agreement between the Russian Authorities on the one hand and the American, British and French on the other, covering the right of surface transport between the Western Zones of Germany and the Western Sectors of Berlin. Consequently every journey by road or rail across the Russian Zone was by permission and

passengers were subject to documentary examinations, which varied in their thoroughness, at Russian check points on entering and leaving the Russian Zone. Increasing friction between the Western and Russian authorities at the Control Council and its subordinate committees, and failure to agree on a number of topics proposed for joint policy action was accompanied by increasing Russian suspicions. The Russians alleged that the Western Commanders were using their transit trains to evacuate Germans from Russian jurisdiction in their Sector and Zone. These suspicions led to prolonged delays on the railways and to corresponding irritation and mutual distrust.

One of the main subjects of disagreement in the Control Council had been currency reform. The Reichsmark was a valueless currency and dealings great and small were either in real goods or speculative values. New money was vital to Germany as a whole. Failing agreement at the Control Council the Western Military Governors produced at great speed the Western Deutsche-Mark for their three Zones and overnight the empty shops were filled with consumer goods. The new money commanded confidence and a further decision was taken to introduce it into the Western Sectors of Berlin. The Russians declared that this would create a black market in currency in Berlin and sealed off their Sector and their Zone. They continued to respect the only explicit transit agreement binding upon them covering the air corridors. The airlift was a tremendous technical success. The facts leading up to the blockade were not publicised in America or Britain and the consequent emotional tension produced the iron curtain as we know it today. Pride in the airlift and in the economic sunrise in western Germany and resentment at Russian intransigeance filled the minds of the western peoples. Anger at what they believed to be western trickery in misusing military trains for political purposes and in endangering their precarious economic control of eastern Germany by introducing the new currency into Berlin filled the minds of

the Russians. This dangerous tension was only resolved because in 1949 neither side had recovered from the effects of the World War. They were in no state to embark upon another.

Had a Court of Deliquency been in existence the Russians would have been able to air their grievances through a defined legal channel instead of by clumsy and damaging political expedients. They could have alleged that the Western Commanders were abusing their privilege of military transport and that in introducing the new currency they were breaking the agreement of June 5th, 1945. There might very well not have been enough evidence for a Court to adjudicate upon the first ground of complaint, and on the second there was a substantial degree of economic justification. It would be altogether too speculative to attempt a judgement now, but if there had been a court which could have judged the issues, an impartial statement of the facts, in so far as they were ascertainable, would have done much to clarify the minds of people who saw the whole episode through the restrictive and emotionally distorted spectacles imposed by their own political allegiances. Finally, however, it may be said with certainty that if those responsible for making the arrangements which divided Germany and Berlin had known at the time that they or their colleagues might one day be called personally to account for their actions they would have been a great deal more careful to define their rights and obligations beforehand, for a *causa sine qua non* of the blockade was the lack of precise agreement on the surface transit arrangements between the Western Zones and the Western Sectors. The problems arising out of this failure still present danger to the world.

The proper defendants would have been the British and American Zone Commanders if the Russians had brought an accusation, the Russian Zone Commander, if the Western Allies had brought a counter suit. It would have been unnecessary and undesirable to bring in the Western foreign ministers.

'Mc Carthyism' in the United Nations and its Agencies The interrogatory procedures associated with the name of Senator McCarthy were not confined to officials of the United States Government and employees of American institutions. They were also directed to a number of American citizens who were International Civil Servants in the employment of the United Nations and its Specialised Agencies. The United States Government demanded the dismissal of those International Officials who failed to satisfy the Interrogating Boards that they were free of Communist associations. The demand was, in the case of one organization, followed by a threat that if the Executive Head of this International Organization did not comply with the request of the United States Government the latter would withdraw its support from the Organisation concerned.[22] This demand was contrary to Article 100 paragraph 2 of the Charter and to the Constitutions of the Agencies whereby member nations undertook not to seek to influence the Executive Heads in the discharge of their responsibilities. The Executive Heads, however, for the most part complied with the American demands under pressure. The International Officials resorted to such Administrative Tribunals as were open to them demanding reinstatement by the Organisation which had employed them, or else compensation. A large proportion were awarded compensation but were not reinstated. Some failed by reason of the temporary character of their contracts. Had they been able to avail themselves of a Court of International Delinquency the results might have been very different. The Executive Heads who yielded to American governmental pressure did so only after prolonged struggles. To comply with the American request was contrary to Article 100 paragraph 1 of the Charter which forbade them to receive instructions from any government, and which applied to them all. Had they been subject to judgement by a Court of Delinquency they could have replied to American pressure that the course of action required of them would have been a violation of the Charter and might

result in their own loss of office. A Secretary General or Director General of an International Organisation judged delinquent by a panel of impartial judges could scarcely maintain his position before the world, and were a large majority of the members of the United Nations to establish such a court it can be assumed that they would apply the penalty of international ostracism suggested in this book. The existence of the Court proposed would therefore be a weapon in the hands of the Secretary General and of the other heads of agencies in case of national pressure brought to bear upon them.

Officials of the American State Department who exercised the pressure in these cases would themselves have been answerable to a Court of Delinquency and this factor might very well have restrained them, in so far as their international policy was concerned. For them also the existence of the Court would have been a means of defence against the attack of the Senator. In so far as Senator McCarthy was responsible for this unhappy chapter in the history of the United Nations and its Agencies, he could himself have been judged delinquent and this might well have terminated his influence long before the Senate itself took action against him.

The proper defendants would have been the Secretary General of the United Nations, the Directors General of the Specialized Agencies concerned, officials of the State Department, the United States permanent delegates, and Senator McCarthy himself.

The Nationalisation of the Suez Canal. July 1956 Nationalisation was carried out abruptly and caused great indignation in many interested countries, notably the United Kingdom and France. Colonel Nasser was widely accused of breach of treaty. All through the summer and early autumn of that year political discussion continued in London and Paris. Various devices were adumbrated for compelling or inducing Colonel Nasser to respect the rights of nations which used the canal. It was

genuinely feared that the Egyptians would not be capable of managing the canal. The British and French Governments took the line that international obligations must be respected. The matter could have been referred to the Hague Court had the contending governments been willing to take this course. No move however was made in this direction, either because there was no compulsory jurisdiction, or because of the delays involved, or because the aggrieved governments feared that they had no certainty of winning. Isolated voices were raised in England declaring that Colonel Nasser was no more guilty of illegal action than were those who nationalised or confiscated privately owned industries in many other countries either side of the iron curtain. These comparisons were not always apt, but the legal issue was clouded in the minds of those peoples who had a national interest in the free navigation of the canal. Colonel Nasser was presented in the press as the butt of the cartoonists and the violator of international engagements. Had a court of International Delinquency existed the proper complainant would have been the Suez Canal Company itself rather than the governments claiming under breach of treaty. It was the Company and its shareholders who were immediately wronged by the act of nationalisation, supposing it to have been illegal, and they ought to have had the primary right to decide as to whether or not to litigate subject to the control of an international parquet as described in this book. Had this been possible the political tension would necessarily have been held in check pending litigation, and the legal issues would thus have been clarified. As things are the question as to whether or not the act of nationalisation was illegal remains a matter of opinion very much subordinated to political emotion. Had the legal issue been decided one way of the other the consequences would certainly have been different. Had it been established that Colonel Nasser had the right to do what he did the user countries would have been confined to free and equal negotiation unmixed with threats and abuse, and had the case gone

the other way the offended states would have had the support of world opinion in any political or even military action they might have thought proper to take.

The proper defendant, having regard to local political conditions, was Colonel Nasser, not his foreign minister.

The Israeli invasion of Sinai and the Franco-British intervention in Egypt October and November 1956 The Israeli invasion was not provoked by the nationalisation of the canal but by Arab encirclement, frontier raids on both sides, and the continuing refusal of the Egyptians to permit Israel to use the Canal. It is not possible to say whether or not Israel received any promises of active or passive support from France or Great Britain. Therefore the possibility of collusion or connivance will not be dealt with here except to say that had a Court of Delinquency been in existence these questions would have been germane to its deliberations after the events of that autumn. Israel's complaints against Egypt by reason of the latter's refusal of free passage for Israeli ships and cargoes could have been made the subject of a delinquency suit long before 1956. The abortive resolutions of the United Nations could not have the psychological effect of an independent judgement and the application of the proposed sanction to Colonel Nasser. It must be emphasized that rulers in positions of dictatorial power are very often helplessly subject to the passions of the people whom they rule. Colonel Nasser could not have maintained his position in Egypt if he had voluntarily yielded to rights claimed by Israel. Had he been faced squarely with a choice between international outlawry and obedience to the law he might well have found it politically expedient to yield. This is speculation. The power of the proposed sanction can only be discovered by trial, but it may well operate as an aid to rulers such as Colonel Nasser who, in weighing the pros and cons, dare not at present choose the path of legality for fear of their extremist supporters.

Because the legality or otherwise of the nationalization of

the canal was never tested, the policy of Great Britain and France during the succeeding months was based upon the assumption that Colonel Nasser had broken the law. Negotiations led nowhere, and the United Nations was powerless. In the circumstances the French and British leaders believed themselves to be entitled to protect the interests of their own countries by all available means. Throughout the negotiations with Colonel Nasser the threat of force had lurked in the background, thus making it more difficult for him to come to terms with them.[20] The legality of the ultimatum of October 1956 and of its consequences was evidently not considered seriously by Sir Anthony Eden, for when he was asked in the House of Commons whether Great Britain was at war with Egypt and whether the Prisoners of War Convention would apply to captured British troops it was manifest that he had not taken detailed advice as to the legal position of his country. The sitting was suspended for half an hour owing to the unmanageable conduct of the opposition, and this permitted time for hasty legal consultation among other more urgent discussions. When the sitting was resumed Sir Anthony had been primed with a legal answer. He said that there was a state of armed conflict between Great Britain and Egypt and that the Convention would be applied even though it had not been ratified. The existence of a Court of Delinquency prior to the nationalization of the canal would, as has been said, have affected the whole course of the negotiations between July and October of that year, but it would also have had the effect of causing the British Prime Minister to take legal advice quietly before he made a decision, rather than in the heat of a parliamentary debate. In any society governed by law responsible people take legal advice before they decide what to do. The absence in 1956 of any Court capable of judging the conduct of statesmen produced a situation in which the British Government declared itself to be acting in defence of international legal obligations, the content of which it itself judged, and yet it failed to take any sufficient

legal advice as to its own legal rights and duties before embarking upon military action.

Colonel Nasser would have been the proper defendant to an Israeli suit regarding the closing of the Canal to Israeli ships and cargoes. Mr. Ben Gurion was responsible for the Sinai invasion. The Prime Ministers and Foreign Secretaries of Britain and France should have been made defendants in respect of the intervention in Egypt. It is admitted that the sanction could not have controlled Mr. Ben Gurion, but submitted that the threat of it might well have controlled the British Ministers and through them the French.

The Russian intervention in Hungary in October and November 1956
What discussions took place within the Kremlin before it was decided to intervene in Hungary and overthrow the emergent and antisoviet regime are not publicly recorded. The care taken by the Russians to ensure that their government was invited to intervene shows however that formal legal requirements were not ignored. The whole Soviet record since the second world war displays a policy of compliance with the strict forms of legal engagement as witness the respect for the agreement covering the air corridors during the Berlin Blockade. The legality or otherwise of the intervention in Hungary depends entirely upon whether or not the Kadar Government was the lawful government at the time it issued its request for help to the Russians. If it was, then the Russian intervention was no more illegal than the landing of American troops in the Lebanon some two years later in response to a request from the Lebanese government. Whether a given régime is a lawful one or not, depends upon a number of factors both internal and external to the country. The Kadar government was not however in command of the country and could not have gained control without Soviet intervention. The legality of the Russian move was therefore dubious, to say the least, even though before a court of law they would have had a colourable argument. No doubt the

Russian decision was taken on political grounds, but though nothing is known for certain it is the common opinion in the West that it was preceded by long debates. Since some legal aspects of the action were certainly considered, the existence of a Court of Delinquency which might have been charged with the duty of examining their conduct would have focussed the minds of those who favoured intervention upon the legal factor, and might perhaps have tipped the scale. More than this cannot be said.

The real Ruler for the time being – Mr. Kruschev – would have been the proper defendant.

The territory of South West Africa and the colour issue In the administration of justice within a state it is very often necessary to take proceedings against a misdemeanant in respect of some only of his actions which are known or suspected to be illegal, either because evidence is lacking to prove criminal guilt, or because the law does not cover the whole field of socially objectionable conduct.

The treatment of dark-skinned people by the Union of South Africa since the end of the second World war has profoundly disturbed the world. It has become a matter of international interest and importance inasmuch as continuing racial tension seems likely to provoke violence which would not necessarily be confined to the Union of South Africa. It could spread to the whole continent and beyond. Nevertheless the only internationally delinquent action with which the men responsible for the policy of apartheid can at present be charged is in relation to the territory of South West Africa. This territory, originally a German Colony, was made a mandate under the League of Nations between the wars. After the liquidation of the League the mandated territories were for the most part transformed into Trust Territories under Chapter XII of the Charter of the United Nations. The Union of South Africa, which was the administering power in the days of the League, not only did not take

this step but also refused in the face of a succession of United Nations resolutions to take the actions required under Article 73 of the Charter in respect of non-self-governing territories. An advisory opinion of the Hague Court requested by the United Nations in 1950 recommended that the territory of South West Africa should be registered as a Trust Territory but the majority of the Court was unable to rule that there was a legal obligation on the Union to do so. The United Nations Assembly set up a sub-committee to deal with the problem but has made no effective progress in safeguarding the rights of the population of the territory. The subcommittee somewhat naturally aims at securing the highest possible degree of supervision over this territory by inducing the Union of South Africa to deal with it as a Trust. Politically this is a reasonable course, but it would be better to handle it as a legal issue and, if the responsible ministers in the Union Government could be accused of internationally delinquent conduct in respect of the minimum legal obligations incumbant upon the government, there can be no doubt that in the present state of world opinion a judicial recommendation that they should be excluded from international society would be widely implemented.

A boycott on South African exports was organised in the United Kingdom in 1960 as a protest against the apartheid policy, and there have been many privately directed campaigns whose object was to bring outside opinion to bear upon the Government of the Union. These campaigns have probably had some temporary effect at least upon the business community of South Africa, and thus indirectly upon the Government, but there has been no change of policy. The general condemnation of that policy is unlikely to have any effect unless it can be focussed upon the responsible men through a legal channel, and this cannot be done until machinery exists for judging them upon issues which are justiciable. Merely to pass resolutions and make declarations to the effect that their conduct is inhumane and dangerous will

lead nowhere. Succeeding administrations in South Africa have shown themselves to be sensitive to legal forms even while their policies appear to be in conflict with principles which are enshrined within the Anglo-Saxon concept of the rule of law. It took them five years of constitutional manoevering to amend the franchise laws affecting the coloured people in the Cape Province, and they were careful for many years to maintain a limited observance of the law laid down in the Hague Advisory Opinion relating to the territory of South West Africa. If they have now trespassed beyond the terms of the Charter of the United Nations in their administration of that territory it is partly due to the absence of any legal channel whereby the undoubted force of world opinion could be brought to bear upon them personally. It is of course impossible to be certain that the method of judgement and sanction proposed in this book would be strong enough to compel the South African statesmen to obey the rules of international law. The fear of the white men surrounded by black men who outnumber them may prove uncontrollable, and if this is so the colour problem is a survival problem and cannot be resolved by legal procedure. A clear definition of the rights and wrongs of the matter would however do much to prevent the conflict from spreading.

All ministers from time to time whose departmental responsibilities have included the Territory of South West Africa would have been and would be proper defendants.

Tibet The Peking government of China has been accused of internationally unlawful conduct chiefly in connection with the occupation of Tibet and its treatment of the inhabitants. American influence has so far excluded the Peking government from the United Nations. This exclusion does not absolve it from compliance with the rules of international law. Nevertheless to exclude a government from the principal forum of world affairs and at the same time to expect it to conform itself to the standards which are being developed in

that forum is illogical. The mainland of China is treated as an outlaw state. How then demand from it obedience to the law? The rational course is to bring it in and then bring pressure to bear upon it to behave lawfully by means of the procedure proposed in this book. This procedure can be applied whether or not a government has agreed to it. Once the Peking government is bound by the terms of the Charter on points of substance, the machinery of law enforcement which has been described would be applicable to the effective rulers of China whether or not they had participated in its establishment.

Here the defendant would be the effective ruler of China.

The U.2. episode and the Summit Conference 1960 An American aeroplane – the U 2 – was brought down on Russian territory in circumstances which left little doubt that the pilot was engaged in espionage by photographing Russian installations. This was later acknowledged by the President of the United States. The consequence was the abandonment of the proposed Summit Conference of May 1960 by the refusal of the Russians to take part except under politically impossible conditions. The proposals made in this book provide a remedy for just such a situation.

The Russians demanded an apology for breach of Sovereignty, and punishment of the men responsible. In the setting of the twentieth century war of ideas the head of the greatest western state felt unable to accede to this demand. Had the Russians been able to avail themselves of the legal procedure suggested in this book, the emotions which led them to torpedo the Summit Conference would have been siphoned into a legally defined channel. Their indignation would have been directed to the man responsible – the head of the American Intelligence Services, who would have been made defendant in a suit of international delinquency and, if judged guilty of wilfully committing a breach of international law, would have been penalised by the condemnation of a court

of independent judges and by future exclusion from international society.

It may be that this would not have hurt him very much, as he may not care to travel widely nor aspire to any office from which such a sentence would exclude him. Nevertheless, even the possibility of such a proceeding would have had certain consequences both for the Americans and the Russians. With the possibility of a legal remedy available to them and, as must be admitted, every hope of winning before the Court, the Russians could have made no propaganda move at a political or diplomatic level, save perhaps a demand to postpone the Summit, pending the determination of the legal issue. Had they anticipated the Court's decision by diplomatic intransigeance they would have put themselves in the wrong before the world. It may be true that Mr. Kruschev was acting in Paris against his own best judgment and under pressure from sections of his own people – the Party and the Army – but the leverage exercised by these upon him would have been deprived of force if legal proceedings had been available. The condemnation of a responsible official by an international court could be regarded by the Russians as a more telling humiliation for the United States than any presidential apology, and the demand for the punishment of the offenders would have been met.

The allegation that it was Mr. Kruschev's intention to wreck the summit in any event is not borne out by his immediate reactions to the U 2 episode, and even if rigorist party members and Red Army generals had this intention all along, they could not have used the U 2 disaster to enforce their wishes had proper legal redress been available.

On the American side it was recognised that the conventions of nineteenth century diplomacy are no longer realistic, and therefore they acknowledged their spy. Wise or foolish, this action would have been irrelevant had the system of international delinquency proposed in this book been in operation, for the Russians would have been as free as any

other complainant to choose their defendant or defendants. Mr. Kruschev was probably right in thinking that this particular flight was not specifically authorised at a higher political level, and this early admission would very likely have been sufficient to cause a court to exonerate all senior holders of public office in the United States from deliberate complicity in that particular breach of Russian sovereignty. Moreover, in the course of a judicial hearing the allegations of spying by the Russians in the American Embassy in Moscow, and in the territory of the United States could have been presented and sifted in justification of the American spying operations over Russian territory. Once these arguments and counter arguments had been impartially judged the way would have been open for summit negotiations.

As it appeared from newspaper reports that the decision to make the flight was not taken at a high political level, the proper defendant would have been the head of the intelligence service. The legal judgment would have redressed the situation even though the penalty might not have harmed him greatly.

Possibly, however, the new President might have found it politic to appoint another head of intelligence and would thus have received different and perhaps better informed advice touching the affair of Cuba in 1961.

Notes and References

1. There are exceptions to this general rule. For instance 'a pirate and his vessel lose *ipso facto* by an act of piracy the protection of their flag state, and their national character. Every maritime state has, by customary rule of the law of nations, the right to punish pirates. And the vessels of all nations, whether men-of-war, other public vessels, or merchantmen, can on the open sea chase, attack and seize the pirate, and bring him home for trial and punishment by the courts of their own country.' Oppenheim's *International law:* Lauterpacht, Vol. 1. 8th ed. p. 616. Moreover those accused of offences against the laws of war who fall into the hands of the enemy can in certain conditions be tried before the termination of hostilities (*op. cit.*, Vol. II, pp. 390–391). Thus jurisdiction over the individual citizen of a foreign state can in exceptional cases be exercised in war time without the consent of that state and without awaiting its submission induced by military defeat.

2. See Oppenheim, *op. cit.*, Vol. II, p. 219: '... a peace treaty imposed by a victorious aggressor has no legal validity, notwithstanding the rule that international law disregards the vitiating effect of duress.' The difficulty of defining aggression is however so well known that at present the legal validity of a peace treaty would seem to depend upon a political rather than a legal judgment.

3. Cf. the establishment of a Military Commission and the

Council of War by order of General Scott at Tampico on the 19th February 1847. See N. Winthrop, *Military Law and Precedents*. 2nd ed., p. 839. Washington, Government Printing Office 1920. See also Oppenheim, *op. cit.*, Vol. II, p. 612, from which it appears that the right to try persons accused of war crimes exists unless waived by the Peace Treaty which is considered to waive all claims whether or not it contains an amnesty clause. See also A. Mérignac, 'De la sanction des infractions du droit des gens,' *Revue Générale de droit international public*, Tome XXIV, Paris 1917, p. 5 ff.

4. See Resolution 489 (V), 12th December 1950 of the General Assembly of the United Nations. See also General Assembly, Official Records, 7th Session. Supplement No 11 (A/2136) and 9th Session. Supplement No 12 (A/2645).

5. This weakness was not recognized by the draftsmen of the Covenant of the League of Nations. Article 10 of the Covenant provides that 'The Members of the League undertake to respect and preserve *as against external aggression* the territorial integrity and political independence of all Members of the League,' but Article 16 provides that 'should any Member of the League Resort to war in disregard of its covenants ... it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League'. Provisions for international "sanctions" then follow. See also H. C. Nicholas, *The United Nations as a political institution*, O.U.P. (1959), p. 64: 'The core of the Security Council plan lay in the assumption of Great Power Unity. The wars it was to stop were conflicts among other Powers ...'

6. It is true that Article 1 of the United Nations Charter states that the purposes are: '1. to maintain international peace ...' but it is submitted that a just ordering of world affairs ought to be the paramount aim and that peace is merely the desirable consequence of that achievement.

7. Blake, *Gnomic verses*. XVII, 1.

8. Shelley, *Prometheus Unbound*, ll. 573–4.

9. Article 34, paragraph 1 of the Statute of the International Court of Justice.

10. Kolrausch-Lange, *Strafgesetzbuch*, 39 and 40, Auflage III.

11. Archbold, *Criminal Pleading*, 29th ed., p. 692.

12. Derry v. Peek 14 A.C. 337 at p. 374.

13. Hans Kelsen, *The Law of the United Nations*, Stevens, 2nd impression 1951, p. 489.

14. The suggestion that an international Parquet should be established was made by several contributors in the reports on the punishment of war crimes at the London International Assembly during World War II.

15. Records of the General Conference of Unesco, Second Extraordinary Session, Paris 1953 III 4 (88).

16. This classification is based on information published in standard works of reference and is necessarily out of date. Existing states have changed their real constitutional nature and new states have come into being.

17. Article 1 of the Statute of the Commission.

18. Hans Kelsen, 'Will the Nuremberg Trial Constitute a Precedent?,' *The International Law Quarterly*, Vol. I, No 2, 1947.

19. The definition of this doctrine given by Oppenheim, *op. cit.*, Vol. I, p. 267, is as follows: 'A consequence of equality – or independence – of states is that the courts of one state do not as a rule, question the validity or legality of the official acts of another sovereign state or the official or officially avowed acts of its agents, at any rate insofar as those acts purport to take effect within the sphere of the latter state's jurisdiction.

20. There are may other reasons. See Julius Stone, *Aggression and World Order*, Stevens 1958.

21. Convention for the protection of Human Rights and Fundamental Freedoms, signed at Rome on the 4th November 1950.

22. Records of the General Conference of Unesco. Second Extraordinary Session. Paris 1953, 2 XC/7, p. 2.

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Roundup

A brief review to catch and record the important recent developments in the world affairs field and what Americans are thinking, writing, and doing about them. Many items are appropriate for teacher and classroom use.

World Affairs—General

ORGANIZATION ACTIVITY

■ The ***Foreign Policy Association*** (345 East 46 St., New York, N.Y. 10017) has announced the 17th annual "Great Decisions" foreign policy study/discussion program for the eight weeks February 7–March 28. This program is designed to increase understanding of foreign policy issues through participation in small discussion groups which any individual, group, or organization can easily arrange. Topics for the 1971 program are as follows: Vietnam, Laos and Cambodia: Which Way to Peace and When? The Middle East Conflict: Is a Peaceful Settlement Possible? Latin America and the U.S.: How Can We Improve Hemispheric Relations? Man and His Environment: What Price Survival? Communist China and the U.S.: Can We Live in Peace? Dissent, Public Opinion and Foreign Policy: How Responsive Is Our System? West Germany: What Role in Europe? National Priorities and World Peace: What Directions for the U.S. in the 70s? A 100-page "Great Decisions" booklet ($3) contains a concise section on each of the topics, to provide the members of the group with a common background of information prior to the discussion, discussion questions, and a short bibliography of recommended readings covering a wide range of opinion. It also contains tips on how to run a successful discussion group, and opinion ballots on each topic, so that groups can send their views directly to their representatives in Washington.

■ The ***Friendly World*** (G.P.O. Box 1004, Brooklyn, N.Y. 11202) has prepared a 1971 World Holiday Calendar ($3 prepaid only; bulk rates). Decorated with 19th century British and U.S. children's illustrations, the calendar features the national holidays of the UN member and observer nations; important anniversaries of the UN and its specialized agencies; religious holidays of the major world religions; UNESCO-assembled holidays of great personalities and events that have left deep imprints on human society and world culture; noteworthy anniversaries that have played a significant role in the evolution of human rights and world cultures; and astronomical highlights.

■ ***Society for Social Responsibility in Science*** (221 Rock Hill Road, Bala Cynwyd, Pa. 19004) has changed its publications policy. The monthly newsletter, reduced in size and content will go only to members to keep them in contact with each other. SSRS will also publish a quarterly, The *SSRS Review,* in winter, spring, summer and autumn editions that will contain essays, book reviews, and similar material. Other materials will be prepared and published as occasional papers or pamphlets.

RESOURCES

New Periodicals:

Foreign Policy. *Edited by Samuel P. Huntington and Warren Demian Manshel. 114 East 28 St., New York, N.Y. 10016. 1 year, $9; charter subscription, 2 years, $15.* A quarterly journal to stimulate new thinking on the U.S. role in world affairs, which its editors deem necessary to avoid catastrophe. It intends to challenge "the conventional wisdom of hawks and doves, of globalists and isolationists." The Editorial Board includes: W. Michael Blumenthal, Zbigniew Brzezinski, Richard N. Cooper, Richard A. Falk, David Halberstam, Morton H. Halperin, Stanley Hoffman, Joseph S. Nye, Jr., James C. Thomson, Jr., and Richard H. Ullman. First issue, Fall 1970.

Pamphlets, Reprints, Articles:

How to Work on Legislation, *Frances E. Neely and R. Elizabeth Johns.* CHURCH WOMEN, *January 1970. Reprints available from Church Women United, 475 Riverside Drive, New York, N.Y. 10027. 4 pp. 5¢.* A brief guide, written for church women but useful for anyone, on how to work effectively on legislation. Has recommendations on self-education, electoral politics, work with legislators and opinion-making in one's own community. Includes a list of selected resources.

Soviet Motives and Stateside Suspicions, *Ramsdell Gurney, Jr.* COMMONWEAL, *October 16, 1970.* A historian at the University of Santa Clara looks at the origins of the cold war and claims that the new school of revisionist historians (Alperovitz, Fleming, Gardner, Horowitz, Kolko, Paterson, and Williams) present impressive documentation for their claim that Washington's suspicions, not Soviet expansionism, are the reasons.

Books and Reference Works:

Truth and Power: Essays of a Decade, 1960-1970, *Hans J. Morgenthau, Praeger, 1970. 449 pp. $12.50.* A selective group of 39 essays by the noted political scientist covering a wide range of domestic and foreign policy issues. These interesting pieces are the more cogent since the author's development can be traced during these 10 years to his present belief that the world's problems will remain intransigent under the existing system of power relations.

International Educational Exchange, *Richard E. Spencer and Ruth Awe. Publications Division, Institute of International Education, 809 UN Plaza, New York, N.Y. 10017. 1970. $6.* A comprehensive bibliography on international education, with over 4,000 entries covering exchanges, curriculum, general works, cross-cultural and psychological studies, and bibliographies.

Arms Control and Disarmament

ORGANIZATION ACTIVITY

■ The *Institute on Man and Science* (Rensselaerville, N.Y. 12147) has issued a report of its international seminar on "Politics of Disarmament—Proposals for the 1970s," convened May 22–24, 1970. This report makes a significant contribution to the understanding of the complex issues involved in arms control and disarmament and points the way for steps that can be taken in international negotiations and national decision-making. The analytical discussion outline for the conference, the report of the discussions with agreements and differences, and the list of suggested readings make a useful tool for groups who are interested in exploring the problem and moving to effective action.

RESOURCES

Pamphlets, Reprints, Articles:

UNESCO Courier, *November 1970.* From the cover picture of "The Rare Bird," the dove of peace, through most of the issue, this issue confronts the reader with the urgency of ending the "madness" of the arms race. Included are articles by Nobel Peace Prize winner Philip Noel-Baker on the escalation of the arms race in the developing as well as the developed nations, and by Bert V. A. Roling, secretary-general of the International Peace Research Association, on "Peace Research—the Science of Survival. Other articles cover the supply of superarms to developing countries, a summary of the major conclusions of the 1969 UN Secretary-General's report on chemical and bacteriological weapons, and a startling list of 100 wars and other conflicts since World War II.

Chemical and Biological Weapons: The Hazard for Mankind, *Matthew Meselson.* WORLD HEALTH, *October 1970.* A discussion of chemical and biological weapons, stressing their threat to mankind, their uncertainty and unpredictability if used, and the possibility of a lasting impact on the environment. Notes the similarity between the conclusions of a UN study group which reported in 1969 and a WHO report in 1970.

Where Defense Cuts Hurt Most. U.S. NEWS AND WORLD REPORT, *October 5, 1970.* A quick overall look at defense cutbacks and consequent unemployment. It is estimated that just about 2,000,000 defense jobs will have been eliminated by 1971, as compared to 1968. Only seven states will enjoy defense spending increases this year over 1968, and each of these has relatively little military industry. The states which enjoy the major portions of military procurement have all been cut sharply—in Connecticut, for example, by over 47%. Despite these adverse effects, a Gallup Poll in September reveals that a majority of voters everywhere except in the South will support additional defense expenditure reductions.

Indian Attitudes on International Atomic Energy Controls, *Michael J. Sullivan III.* PACIFIC AFFAIRS, *Fall 1970.* A political scientist at Drexel University analyzes Indian opposition to the nuclear nonproliferation treaty. He posits that the refusal to sign is the result of careful deliberation, with full recognition that it runs counter to the longstanding Indian position favoring arms limitations and

controls, and with willingness to accept the consequences. This position arises out of India's increased fears of China with respect to her national security, and her opposition to the discriminatory nature of the international controls imbedded in the treaty.

Soviet Approaches to SALT, *Thomas W. Wolfe.* PROBLEMS OF COMMUNISM, *September/October 1970.* A senior staff member of the Rand Corporation, a specialist in Soviet military history, argues that economic considerations are not prime determinants of Soviet military policy. He feels that strategic and technological considerations, complicated by the Soviet Union's emergence as a great world power, balancing the U.S., will determine the outcome of the SALT talks.

Is U.S. Forfeiting the Arms Race to Russia? U.S. NEWS AND WORLD REPORT, *October 19, 1970.* A conventional analysis of the arms race, limited purely to a military view, concluding that the Soviet Union is capable of rendering more damage to the U.S. than the reverse. It is claimed that the long war in Vietnam has sapped the American will to be dominant militarily. No attention at all is given to political policy or the prospect of change.

Books and Reference Works:

Arms for the Third World: Soviet Military Aid Diplomacy, *Wynfred Joshua and Stephen P. Gibert. Johns Hopkins Press, 1969. 169 pp. $6.95.* A view of the pragmatic use by the Soviet Union of military aid to achieve diplomatic objectives. While the authors see such military aid as a threat to peace, this does not prevent them from an objective presentation. Some very interesting tables showing roll call votes in the UN, related to sources of aid from the U.S. and USSR.

Exploring Nonviolent Alternatives, *Gene Sharp. Porter Sargent, 1970. 164 pp. $2.25. Introduction by David Riesman.* A survey of, and argument for, nonmilitary defense of national boundaries, as well as for the planned use of nonviolence as a strategy for change and for defending values. Gene Sharp is the leading exponent of what he calls "civilian defense," and presents here a readable summary of a large number of historical precedents and the current theory and practice, showing the "state of the art" and indicating where more work is needed. An extensive bibliography is included.

International Organization

ORGANIZATION ACTIVITY

■ The *International Peace Academy Committee (IPAC)* (2 West 45 St., New York, N.Y. 10036) sponsored a Transnational Training Project in Vienna in the summer of 1970 to assist staff and participants in working out "appropriate methods for transmitting the practical skills in peacemaking and peacekeeping which are IPAC's objectives." Participants from voluntary organizations, religious groups, universities, and diplomatic ministries from over 50 countries gathered in seminars led by social scientists and authorities from many different nations. Workshops considered questions such as the Middle East conflict, nonviolent revolution, and peace theory.

■ The *Stanley Foundation* (Stanley Building, Muscatine, Iowa 52761) has issued a report of its "Fifth Conference on the United Nations of the Next Decade," held in Frendensborg, Denmark, June 25–July 4, 1970. An international group of statesmen and scholars examined the questions of how the UN could be made more effective in its primary task of maintaining international peace and security, and how the Second Decade of Development could be made more successful than the first. In addition to the "Statement of Members," with their recommendations in these two areas, the report includes the "Statement of the First Conference," concerned with Charter revision, and the "Statement of the Fourth Conference," which recommends actions for strengthening the UN that do not require Charter revision. Intended to stimulate study, research, and education, the report is available free of charge.

■ The *World Peace Through Law Center* (75, rue de Lyon, CH1211, Geneva 13, Switzerland) has created 25 new standing committees to study the work of special commissions and committees of the UN and affiliated agencies in the fields of international relations and the development of world trade and aid. Recognizing that international agencies and organizations are a source of expertise on virtually every topic of interest in today's complex world, and that they have been responsible for major developments in international law, the Center wishes to insure maximum cooperation between its programs and the work of these agencies. Results of the research of the study committees will be distributed to the Belgrade World Conference, July 1971.

RESOURCES

Pamphlets, Reprints, Articles:

Introduction to the Annual Report of the Secretary-General on the Work of the Organization. UN MONTHLY CHRONICLE, *October 1970.* For the first time in several years, the Secretary-General expressed cautious optimism about the international situation as he surveyed progress in various fields of concern to the UN. The Introduction provides a background for understanding the work of the current Assembly and a guide to measure its achievements, and should suggest to individuals and organizations, as well as governments, areas requiring action that will promote the authority and effectiveness of the United Nations "as an instrument of achieving international peace, justice and progress."

Can the UN Negotiate Peace? *Dorothy Hutchinson.* FELLOWSHIP, *November 1970. Fellowship of Reconciliation, Box 271, Nyack, N.Y. 10960.* The author argues that establishment of peaceful settlement machinery is possible without revision of the UN Charter. Only as such machinery is perfected and used can the war system be abolished and the foundations laid for world disarmament and satisfactory UN peacekeeping.

Regional Problems:
How They Relate to World Stability

ASIA

ORGANIZATION ACTIVITY

■ The *National Committee on US-China Relations* (777 UN Plaza, Room 9B, New York, N.Y. 10017) has announced a new publication, *Notes from the National Committee,* to be published three times a year, fall, winter, and spring, as a service to Committee members, educators, civic organizations, and those with a professional interest in China. It features news of the National Committee, information about recent events concerning China's international relations and internal affairs, summaries of noteworthy articles about China, and lists of resources and Committee services.

■ The *Overseas Education Fund of the League of Women Voters* (1730 M St., N.W., Washington, D.C. 20036) has announced the appointment of its first Asia program consultant. Under the direction of the new consultant the Fund will launch a program of advisory services for leaders of selected voluntary groups engaged in leadership training activities in Indonesia and Malaysia. The long-range goal of the program is "to train able young women from all cultural and religious backgrounds for civic leadership."

■ The formation of a *Committee for New China Policy* (777 UN Plaza, Room 9H, New York, N.Y. 10017) was announced by Professor Hans Morgenthau at a press conference in July 1970. The aim of the Committee is a new U.S. policy toward China that recognizes "that the People's Republic of China is the sole legitimate Government of China." Its work is guided by a national board of some 30 members from the academic, religious, voluntary organization, and business communities. The interim chairman is Mr. Daniel Tretiak of Boston, Mass. Activities are designed to help secure representation of the People's Republic of China in the United Nations and to facilitate the development of cultural, diplomatic, and economic relations between the United States and the People's Republic of China based on the principles of equality, mutual respect, and nonintervention in each other's affairs.

RESOURCES

Pamphlets, Reprints, Articles:

A New Peace Initiative for All Indochina, *President Richard M. Nixon. Department of State* BULLETIN, *October 26, 1970.* The text of the President's

October 7, 1970, Address to the Nation, setting forth his proposals for settlement of the Vietnam war, based on a standstill cease-fire and an Indochina peace conference.

Vietnamization Is Immoral, *W. Averell Harriman.* LOOK, *November 17, 1970.* President Johnson's Chief Negotiator at the Paris Peace Talks with Hanoi and the National Liberation Front, opposes Vietnamization because it means continued U.S. military support to the minority Thieu-Ky Government. He calls for an announced withdrawal schedule and the ending of Thieu's veto power over the U.S.

The U.S. Maps Its Progress. NEWSWEEK, *October 26, 1970.* Maps of Vietnam published by the U.S. show a dramatic reduction of Communist strongholds between 1967 and 1970, providing justification for continued military action. Viet-cong maps published in 1970 show almost exactly the reverse, with the Communists claiming virtually the entire country, except the cities where the U.S. military exist in force. There is a definitional question involved here—what is pacification, what is control?

Participation, Policy Preferences, and the War in Vietnam, *Sidney Verba and Richard A. Brody.* PUBLIC OPINION QUARTERLY, *Fall 1970.* A sophisticated and complicated analysis of the polls on Vietnam, going beneath the superficial and attempting to find political guidelines in the degree of activism of both hawks and doves as related to Vietnam policy.

Southeast Asia, 1970. CURRENT HISTORY, *December 1970.* Seven articles, President Nixon's Indochina peace proposals, and reviews of current books on the area make up this issue. Subjects covered are U.S. policy, Laos, Cambodia, Burma, Malaysia, the two Vietnams, and Thailand. Maps included.

Sihanouk Talks to Americans. LOOK, *October 20, 1970.* An interview by mail between William Attwood, LOOK's Editor-in-Chief, and Prince Norodom Sihanouk, writing from Peking. The Prince looks forward to a return to Cambodia, claiming the support of a majority of the people. He feels that U.S. interests would best be served by a neutral policy toward his struggle against Lon Nol, since that would permit friendly relations after his successful revolution.

Resolving the Problem of Kashmir, *David E. Lockwood.* WORLD AFFAIRS, *December 1970.* A specialist in the area, on the staff of the Institute for Defense Analyses, provides a dispassionate review of the Kashmir dispute and discusses the efforts of Mohammed Abdullah, the "Lion of Kashmir," to achieve self-determination. He points out that granting of greater autonomy by India might heal divisions with Kashmir and thus reduce support for the pro-Pakistani guerilla movement.

United States Policies Toward Regional Organizations in Southeast Asia, *Donald G. McCloud.* WORLD AFFAIRS, *September 1970.* An examination of the U.S. role, which is generally supportive of regional organizations. In the Southeast Asia Treaty Organization (SEATO) the U.S. has played a direct and dominant role, but the author finds that this is not consistent with the long-term goals of the area and hence has led to a decline in U.S. influence in the organization. The Mekong Project was organized so that the U.S. could play a direct role but not dominate. At the other end of the spectrum is the Association of South East Asian Nations (ASEAN), which has specifically excluded the U.S. from membership or participation, so that there can be only an indirect impact by the U.S. The author recommends the median role for the U.S., feeling that limited but direct participation can yield the best long-term results for all.

The United States and China: The Evolution of Policy, *Harry G. Gelber.* INTERNATIONAL AFFAIRS, *Vol. 46, No. 4, October 1970.* An Australian political scientist traces the development of changing attitudes in both countries since the Great Proletarian Cultural Revolution. He concludes that a new U.S. policy is in the making, although its outlines are not yet clear.

International Economic Relations of the People's Republic of China, *Bernhard Grossman.* ASIAN SURVEY, *September 1970.* The author examines the political and economic objectives of the foreign trade of the People's Republic of China (PRC) and states that for 20 years the PRC tried to use foreign trade as a political weapon to influence other countries, but that after 1960 the PRC took a more pragmatic approach to foreign trade and has since displayed a willingness to trade with every country ready to sell to her. He concludes that foreign trade and aid have not been an effective instrument through which the People's Republic of China has been able to exert political leverage, and that any small degree of influence with industrialized countries will decrease as the Chinese market grows.

AFRICA

ORGANIZATION ACTIVITY

■ The *Institute for International Education, Division of Study Abroad* (809 UN Plaza, New York, N.Y. 10017) has announced a 1971 African Seminar for Teachers. The academic program includes two required courses: Traditional and Modern Africa (30 sessions), a survey of the history and environmental context of African societies, social structures and values, cultures, social change, and nation-building; and Africans and the Western World (10 sessions), exploration of African relations with the rest of the world and cross-cultural contacts between Africans and other peoples. The academic program will be supplemented by special lectures and events, including seminars offering teaching methods to utilize most effectively African subject material, and seminars on the interpretation of these materials in the classroom. Write for brochures and application forms.

RESOURCES:

Pamphlets, Reprints, Articles:

Apartheid and Imperialism: A Study of U.S. Corporate Involvement in South Africa. AFRICA TODAY, *September–October 1970.* A fiercely partisan review of the involvement of U.S. corporations, claiming that the net effect is to buttress the racial policies of the Union of South Africa. The issue concludes with a demand that American business withdraw from that country.

South Africa and the Atlantic Defense System, *George W. Shepherd, Jr.* CHRISTIANITY AND CRISIS, *October 19, 1970.* An analysis of the reasoning through which the Union of South Africa is considered part of the NATO defense system, and the change of policy resulting from the Conservative Party's accession to power in England. The writer argues that the concepts are outdated and no longer of military significance, and that the human and political costs involved in sending arms to the Union of South Africa are excessive.

The United Nations, the United States, and Africa, *David D. Newson.* The Department of State BULLETIN, *October 12, 1970.* The Assistant Secretary for African Affairs addressed the Chicago Council on Foreign Relations and reviewed current problems and policies with respect to a number of African Nations. Of particular interest were his comments on Southern Rhodesia and the Union of South Africa, where such sanctions as the U.S. has supported have not resulted in any changes. The U.S. has opposed economic sanctions against the Union of South Africa and as a consequence has had some problems with other African nations.

Chinese Working on the Railroad, *Thomas Land,* NATION, *October 19, 1970.* A political journalist points out that Communist China's financial and technical support of the Zambian-Tanzanian railroad, a project made necessary by the Rhodesian reaction to trade sanctions, will also make necessary an enlargement of the port at Dar es Salaam, the railroad's terminal. He argues that Western financial support for this project will offset the political gains made by China.

Books and Reference Works:

Population, Migration and Urbanization in Africa, *William A. Hance. Columbia University Press, 1970. 450 pp. $15.* A geographer specializing in Africa surveys the problems created by population pressures in some of the newer states of tropical Africa. Discusses the impact on economic, political, and social developments, including flow into the cities, agricultural problems, markets, and other matters. Well illustrated, with tables and occasional maps.

Spear and Scepter: Army, Police and Politics in Tropical Africa, *Ernest W. Lefever, Bookings Institution, 1970. 251 pp. $6.50.* A study of the role of the military and police in Ghana, Ethiopia, and the Congo (Kinshasa) since 1960, including the effects of military and police assistance from the U.S. Includes appendixes, bibliography, and index.

MIDDLE EAST

RESOURCES

Pamphlets, Reprints, Articles:

The Palestinian Refugees, *Georgie Anne Geyer.* NEW REPUBLIC, *November 21, 1970.* A journalist argues that the exile from Palestine exploded a primitive, feudal people into the modern era. As a group they exhibit great upward mobility and have one of the highest percentages of college graduates in the world, as well as a familiarity with modern ideologies. Their drive to return to Palestine is not economic, but for an ideal, and hence will not be resolved by economic measures alone.

The Impotence of Victory, *J. L. Talmon.* DISSENT, *November–December 1970.* A historian from Jerusalem examines Israeli attitudes following the 1967 Six-Day War in a section excerpted from a book to be published in 1971. An interesting and penetrating analysis of the psychological barriers to peace on both sides. Also in the same issue is an article by Michael Walzer describing a recent visit to Israel and the attitudes he encountered.

Divide Palestine or Continue War, *Paul Jacobs.* WAR/PEACE REPORT, *November 1970.* A reprint of an interview that originally appeared in FREE PALESTINE, a publication closely associated with Fatah, the largest Palestinian guerilla group. Jacobs argues for recognition of the State of Israel and the creation of a Palestinian state as the only way to end the war. FREE PALESTINE's reason for printing the interview is to open a dialogue with American liberals; and its editor, Abdeem Jabara, specifically stated that this does not represent any change in the Palestinian position. He makes this position clear in a response appended to the Jacobs interview.

The Coming Decade in the Middle East, INTERPLAY, *November 1970.* This issue features eight articles on the Arab-Israeli conflict. The range of opinions and forecasts is a reflection of the general lack of agreement on how to resolve this crisis. Nothing very new, but a good summary of various points of view.

Vietnam, Israel and the Left, *Irving Howe.* DISSENT, *September–October 1970* A well-known democratic socialist takes up the dilemma posed by U.S. intervention in both Vietnam and Israel. He asks those who condemn all U.S. actions as imperialistic to consider whether they are prepared to take the responsibility for an Arab victory and the end of the liberal democracy that is now Israel. On the other hand, he finds the question of how far he would himself be prepared to go—to the brink of war or to war itself—agonizing. Thoughtful and provocative.

Books and Reference Works:

Soviet Russia and the Middle East, *Aaron S. Kleiman.* Johns Hopkins Press, 1970. 107 pp. $2.45. This work, #14 in the series STUDIES IN INTERNATIONAL AFFAIRS from the Washington Center of Foreign Policy Research of the School of Advanced Studies at Johns Hopkins University, asserts that the Soviet Union has made a clear affirmation of the importance with which it views its foothold in the Arab world, and that it will not be dislodged easily. The author argues that a strong demonstration of resolve by the United States, at relatively low cost, would inhibit additional Soviet expansion in the area and give America time to develop a careful policy of either cooperation or opposition.

EUROPE

RESOURCES

Pamphlets, Reprints, Articles:

Current Tensions in NATO, *Philip Windsor.* THE WORLD TODAY, *July 1970.* A specialist at the London School of Economics describes NATO as a treaty in search of a purpose. The detente with the Soviet Union is now being sought individually by each of the member states, while the SALT talks have further complicated NATO's military future. NATO, appearing to be more permanent than ever before, has not taken a fixed form.

European Security: Prospects and Possibilities for East Europe, *John C. Campbell.* EAST EUROPE, *November 1970.* A Senior Research Fellow of the Council on Foreign Relations concludes that there are gains for both sides in the recent relaxations of tension and the slowly growing detente. He urges the develop-

ment of a multiplicity of contacts and interlocking interests to move toward that security which rests on voluntary cooperation and perceptions of common benefits.

Unity and Diversity in Western Europe, *William C. Cromwell.* WORLD AFFAIRS, *December 1970.* A discussion of the Common Market and unification in post-de Gaulle Europe. It is pointed out that the original and traditional concept of European integration has been eroded by conflicting interests, which still persist and did not die with de Gaulle.

Western Europe and the Soviet Union, *Giovanni Agnelli.* VITAL SPEECHES OF THE DAY, *November 15, 1970.* In an address to the Economic Club, Detroit, Michigan, October 12, 1970, the Chairman of FIAT, citing his company's experience in building a plant in the USSR, discusses problems and possibilities for the automotive industry related to east-west trade and the imbalance between the developed and developing world. As a businessman he is interested in the markets of East Europe, and he argues that the "consolidation of forms of cooperation between the industrialized economies of the West and East Europe widens the economic and political bases without which the problem of the third world . . . cannot be solved."

Books and Reference Works:

Detente Diplomacy: United States and European Security in the 1970s, *Timothy W. Stanley and Darnell M. Whitt. University Press of Cambridge, Mass., Dunellen, N.Y., 1970. 170 pp. Published for the Atlantic Council of the United States, with an introduction by Livingston T. Merchant.* Since both authors have held important posts in the Department of Defense, their views have a special interest in that perhaps some policy changes are presaged. The essays essentially call for a token unilateral initiative by the U.S. reducing its European forces, to be followed by balanced and mutual reductions by both the Soviet Union and the U.S. Among other steps, they call for greater concentration on the SALT talks and also for increased liberalization in trade, travel, scientific, and cultural affairs. Some military opposition to the initial unilateral withdrawal is acknowledged.

The Soviet Union and Eastern Europe, a Handbook, *edited by George Schopflin. Praeger, 1970. 614 pp. $25.* A reference work for specialists, with essays from 47 contributors, covering the Soviet Union and its satellites. In addition to general history, politics, religion, social, aesthetic, and literary matters, there are special essays dealing with nationalism and nationalities, trade unions, agriculture, energy, trade, etc. Maps and tables.

LATIN AMERICA

RESOURCES

Pamphlets, Reprints, Articles:

Inter-American Cooperation: A Prime Concern to the United States, *John N. Irwin II. Department of State* BULLETIN, *November 9, 1970.* An Undersecretary of State makes an official statement reviewing U.S. policies towards Latin America, in an address before the Inter-American Committee on the Alliance for Progress. Not new, but a concise summary of present approaches and attitudes.

Ethics and the Art of the Possible in Inter-American Relations, *John B. Housley.* CHRISTIAN CENTURY, *October 28, 1970.* Believing that there has been no improvement in U.S. policy toward Latin America under the Nixon Administration, the writer argues against both "benign neglect" and "unilateral disengagement." He proposes a set of tentative guidelines that would allow Latin America to work out its own destiny in ways that are radical enough to cut through the present problems, yet palatable to the U.S.

Brazil: A Country Where Christians Are Outlaws, *Marcio Moreira Alves.* CATHOLIC WORLD, *November 1970.* A leftist Brazilian journalist, now in exile, describes the awakening of clerics to social injustice in Brazil, leading first to a reformist position by many Catholics and finally for lack of response, to a revolutionary posture. His thesis is simple: Brazil is un-Christian, and every Christian has the duty of organizing the masses to destroy the present iniquitous social and political structure. Since this is illegal, to be a Christian in Brazil is to be an outlaw. An obviously biased article, interesting and provocative.

The Militarization of Fidelismo, *Rene Dumont.* DISSENT, *September–October, 1970. A translation of lengthy sections from the book* Cuba: Est-il Socialiste? *Editions du Seuil, 1970.* Dumont, a distinguished agronomist with a long history of leftist sympathy, is critical of agricultural developments in Cuba. Militarization and mismanagement seem pervasive.

Books and Reference Works:

The Soviet Union and Latin America, *Edited by J. Gregory Oswald and Anthony J. Stover. Praeger, 1970. 190 pp. $7.50.* The 16 papers presented were among those submitted during the spring of 1968 at the Institute for the Study of the USSR, held in Munich and attended by 53 scholars, diplomats, and journalists. Soviet Latin-Americanists had been invited but did not attend. The papers cover a multitude of subjects of concern to those interested in Latin America. Present Soviet strategy seems to be low-profile, discouraging revolution and supporting popular fronts and democratic development, pending sufficient economic growth to warrant the promotion of "socialism."

Aid, Trade, and Development

ORGANIZATION ACTIVITY

■ The *Ford Foundation* (320 East 43 St., New York, N.Y. 10017) has announced grants for new research, training, and education programs aimed at increasing the quantity and quality of food production in Latin America and Asia. In Brazil's northeast region 30 million people live in the greatest concentration of poverty in the Western Hemisphere. Food must be imported from other parts of Brazil although 65% of the workers are employed in agriculture. A grant to the Federal University of Ceare will support a two-year research and training program in production of sorghum, a cereal suitable for humans and livestock. A grant to the Argentine Graduate School in Agricultural Economics will support the first graduate program in agricultural eco-

nomics in Argentina. A grant to the International Rice Research Institute will support a national rice research project to improve and increase rice production in Indonesia, where rice is the staple food of 120 million people.

■ The ***Agricultural Development Council, Inc.*** (630 Fifth Ave., New York, N.Y. 10020) has issued as an A/D/C Paper *The Bangkok Conference* (14 pp., free), a summary report of a conference held under its auspices in Bangkok June 3–6, 1970, for 35 Asian scholars from 11 countries. The purpose of the conference was to exchange views on experiences as graduate students in the U.S. and to evaluate the usefulness of those experiences for work at home. In preparation each participant submitted a critical evaluation of his own experience, with suggestions for improvement. The scholars discussed the strengths and weaknesses of their training but devoted most of their attention to the question of how that training could be better used, how their own Asian universities could be improved, and how they could cooperate with each other to these ends. The summaries of the preliminary statements of the participants, the reports of the discussion groups, and their recommendations should be invaluable to those helping to arrange graduate study for foreign students in American universities. A limited number of copies of the full report will be available.

■ The ***Population Council*** (245 Park Ave., New York, N.Y. 10017) and the ***International Institute for the Study of Human Reproduction*** (Columbia University) published as the July 1970 Report on Population/Family Planning *Population and Family Planning Programs: A Factbook* (75 pp., free). An updated version of the preliminary edition issued in December 1969, its purpose is to present information on national family planning policies and programs throughout the world. The report consists of a general overview of information on population, economic development, government positions on family planning, demographic, social, and economic characteristics for individual countries, and national family planning policies, and program data. The core of the report is the 57 pages of tables containing data on which the overview is based.

■ The *Maryknoll Fathers* have established a new publishing division, Orbis Books (Maryknoll, N.Y. 10545), "to alert the mind and awaken the conscience of the American community to the aspirations of the human family in the Third World." Books in preparation include *A Richer Harvest,* by Sudhir Sen, an Indian agronomist, who reports on agricultural development integrated with industrial development as a solution to the hunger problem; *Clash of Titans: African and United States Foreign Policy,* by Edward W. Chester, who discusses U.S. foreign policy with regard to each African nation from 1812 to the

present; *The Church and Revolution,* by Abbe Francois Houtart, a priest-sociologist, who traces the resistance of the church to the waves of radical social change and revolution over the last two centuries; and *The Myth of Aid,* by Denis Goulet and Michael Hudson, a critique of American foreign policy as it applies to the development of the emerging nations.

RESOURCES

Pamphlets, Reprints, Articles:

Lines of Action for the 1970s. *The* OECD OBSERVER, *June 1970.* The Organization for Economic Co-operation and Development's first Ministerial-level Council meeting in 1970 recognized that top priority must be given to controlling inflation on the one hand and to dealing with the qualitative aspects of social and development policies on the other. Increasing attention is called for by environmental deterioration and the relations between aid, trade, scientific policy, education, agriculture, and industry. It was agreed that tied aid was not desirable, and that the markets of the developed countries must be made more open to the products of the developing nations.

Address to the Board of Governors, *Robert S. McNamara, President, World Bank Group. Copenhagen, Denmark, September 21, 1970. Available from the International Bank for Reconstruction and Development, 1818 H. St., N.W., Washington, D.C. 20433. 24 pp. Free.* A brief review of the Bank Group's operation and progress toward meeting the goals of their Five-Year Program and discussion of the responses to key recommendations of the Pearson Commission. Of special interest is the discussion on the flow of aid to the developing world, the recommendations concerning population planning, and the comments on the objectives of development in the seventies. Mr. McNamara outlines the problems succinctly and proposes an agenda for action including the diversion of part of the world's arms budgets to provide the resources for carrying out the program.

Managing the Green Revolution, PROGRAM QUARTERLY, *September 1970, entire issue. The Asia Foundation, 550 Kearny St., San Francisco, Calif. 94108.* The development of new strains of high-yield cereal grains in the past few years was hailed by many as the "green revolution" which would go a long way toward solving the problems of hunger. Real progress, it is argued in this issue, will be achieved only if there are major institution adjustments. Some preliminary views of the "dimensions of the agricultural transformation impending in Asia" are presented in two articles on two phases of managing the green revolution. "Reorienting Agricultural Institutions" and "Food Grain Storage" point to the necessity for integrated programs, training, and technological development planning within the framework of the social and economic conditions peculiar to each country. The articles reveal the complexities of increasing food supplies, but point out specific ways some of the problems can be and are being solved.

World Bank Atlas: Population, Per Capita Product and Growth. *International Bank for Reconstruction and Development, Washington, D.C. 20433. 1970. 12 pp. Free.* Fifth edition of the *World Bank Atlas* with maps of each continent and accompanying lists of all countries, arranged from most to least populous, giving population, per capita product (GNP), and growth rates of each. Also includes two lists of all countries in the world with a population of over

one million: one for population and one for GNP, each arranged in descending order of magnitude. The figures highlight the great inequalities that exist between nations.

Trends in Developing Countries. *International Bank for Reconstruction and Development, Washington, D.C. 20433. 1970. 60 pp. Free.* Third annual edition of the chartbook to provide background information on economic trends affecting the developing countries. The tables and charts focus on highlights in population, economic growth, international capital flow and external debt, and international trade. Of particular interest to those with general concern for the issues but little background in economics are the graphs and maps showing population distributions and comparisons of gross national product and flow of development aid from various developed countries.

The Challenge of a Decade, *Robert Theobald. United Nations Centre for Economic and Social Information. Introduction by Secretary General U Thant. 32 pp. 75¢.* Theobald presents two sets of news stories we might expect to see in the fall of 1980. The first set, recounting unending disasters and a complete breakdown of the world as we know it, is posed as a probability if we do not now take adequate developmental steps. The second, depicting gains as man conquers his problems, can become true if we move ahead now.

International Economic Development in the 1970s, JOURNAL OF INTERNATIONAL AFFAIRS, *Vol. 24, No. 2. 1970.* This special issue has an introduction by Lester B. Pearson, followed by six essays on various aspects of the subject, each by a different author, and includes also a series of review-essays on books in the aid area. The treatment is technical and not for the average reader.

Rich Country, Poor Country, *Charles Elliott.* AMERICA, *November 28, 1970.* An Anglican priest and economist questions whether the lesser developed countries should use the model of the industrialized nations for development. He distinguishes four different goals, roughly called technical, Marxist, humanist, and Christian, each of which requires different means. The interpretation of statistical information is another stumbling block, and by most standards the so-called developed countries also are in need of development in terms of distribution, liberation, and the quality of life.

Urbanization Problems and Prospects, *Richard M. Westebbe.* FINANCE AND DEVELOPMENT QUARTERLY, *No. 4, 1970.* A World Bank official writing in the journal of the International Monetary Fund and the World Bank Group, sees the rapid urbanization of the lesser developed countries as a historical and unavoidable phenomenon. He believes that careful study will provide action possibilities making this urbanization an opportunity rather than a crisis.

Land, Labor and the New Seeds in Southeast Asia, *Harry E. Walters.* FOREIGN AGRICULTURE, *November 23, 1970.* A discussion of the "green revolution" in relation to questions of land use and labor and the possible undesirable consequences in unemployment, etc., if agricultural policies are designed only in relation to increasing output. The author concludes that the question is not whether to adopt or reject the "green revolution" but how to use it to the greatest possible advantage.

Yugoslavia's Nonaligned Role in Africa, *Alvin Z. Rubinstein.* AFRICA REPORT, *December 1970.* A specialist on Yugoslavia analyzes Tito's interest in the area, concluding that the Yugoslavian leader looks upon Black Africa as

critical to the future of nonalignment. While Yugoslav exports to Africa have remained virtually stable for the past eight years, its imports from that region have almost tripled, and it has undertaken a number of critical engineering and aid projects in eight African countries.

The Aid Programmes of the Communist Countries. OECD OBSERVER, *June 1970.* An analysis of the aid and development programs of the Communist nations, with tables showing the assistance from the USSR, China, and Eastern Europe to various Asian, African, and Latin American countries. The intent is to strengthen the state-owned sectors of the economy, so that the recipient nation will have stronger political and economic resistance to colonialism or its vestiges.

Books and Reference Works:

Amount and Sharing of Aid, *Jagdish N. Bhagwati. Overseas Development Council, Washington, D.C., 1970. 197 pp. $1.50.* A highly technical study covering the problems of measuring aid flows, their distribution among donors and among recipients, and determining overall aid magnitudes. Principal conclusions are that the real cost of aid has been grossly overstated as has the real worth of aid, that the recent declines in aid granted worsen this situation, and that therefore the performance of the LDCs has not been as poor as pictured. Makes recommendations for improving aid flow and use. Extensive tables and charts.

The Sea Against Hunger: Harvesting the Oceans to Feed A Hungry World, *C. P. Idyll. Thomas Y. Crowell Company, 1970. 221 pp. $7.95.* An oceanographer and marine biologist casts some pessimism on the claims that the world's food problems can be solved by farming the sea. What is lacking is not only the political organization of the world but the necessary technology. Until these are achieved, sophisticated fishing techniques can provide significant food increments, but the sea will not be the complete answer to man's food needs.

Ethics and War

ORGANIZATION ACTIVITY

■ The *Division of World Justice and Peace, United States Catholic Conference* sponsored the publication of a book of essays *The Family of Nations,* edited by James S. Rausch (Our Sunday Visitor, Inc., Huntington, Indiana 46750. 1970. 144 pp.) to focus attention on the burning issues of war and peace. Invitations were extended to a list of outstanding scholars and political figures representing a broad range of opinion to write commentaries on "The Family of Nations," Chapter 2 of the Pastoral Letter issued by the American Catholic Bishops in November 1968. Its theme is the vision of "peace in which life is shared by men and nations in a community of love." The essays by Robert McAfee Brown, James Finn, Arthur J. Goldberg, Hubert H. Humphrey, James J. Jennings, Walter F. Mondale, and Gordon Zahn, with an appended discussion guide and bibliography on war and peace,

arms control and disarmament, international community, Vietnam, and the role of conscience, make a useful study book.

■ The *National Council to Repeal the Draft* (101 D St., S.E., Washington, D.C. 20003) has issued *A Guide to Organizing for Draft Repeal,* (13 pp. mimeographed, 25¢). Based on the experience of several groups, the guide, prepared by Arthur Boyd of the New England Regional Office of the American Friends Service Committee, offers detailed suggestions for organizing a campaign and specific activities and projects that can be implemented by already existing groups or a few concerned individuals before the June 1971 expiration date of the present Selective Service Act.

■ The *War Resisters League* (339 Lafayette St., New York, N.Y. 10012) has provided a "Rainbow Bus" for a team of six young people to travel to some of the more isolated campuses and communities as a mobile workshop presenting the case for nonviolent change. Included in the team are three young men whose experience includes work in the Resistance and the National Council to Repeal the Draft, and traveling among chapters of the War Resisters League. One member has recently been appointed to the Draft and National Service Task Force of the White House Conference on Youth.

RESOURCES

Pamphlets, Reprints, Articles:

Nuremberg and Vietnam: Who Is Responsible for War Crimes? *Telford Taylor,* WAR/PEACE REPORT, *November 1970.* The chief counsel for the prosecution at Nuremberg raises some of the complex issues involved in the MyLai prosecutions, including the responsibility of senior staff officers for the misconduct of troops under their command. He points out that General Yamashita was hanged for crimes committed by his troops, his guilt being the failure to establish and maintain adequate discipline.

Peace, War and the Christian Conscience, *Joseph J. Fahey. The Christophers, 12 East 48 St., New York, N.Y., 10017. 20 pp. Single copy, free; 100 for $2.* A historical review of Catholic and Protestant approaches to questions of war and peace, from first century Christianity to the present day, offered as an aid to help individuals make their own moral decisions on how to achieve a just peace. The pamphlet urges each person to act to promote peace and offers suggestions for individual action.

Onward Christian Soldiers: Dehumanization and the Military Chaplain, *Robert E. Klitgaard.* CHRISTIAN CENTURY, *November 18, 1970.* A former soldier charges that so long as the military chaplain is *in* the Army, he cannot fulfill his Christian mission, indeed he often contributes to soldiers' problems. He proposes either civilian chaplains, as at West Point, or else independent status for military chaplains, and recognizes that neither alternative is completely adequate.

Organization News and Notes

■ *The Asia Society,* 112 East 64 St., New York, N. Y. 10021. New Washington Center: 1785 Massachusetts Ave., N.W., Washington, D.C. 20036.

■ *Carnegie Endowment for International Peace,* 345 East 46 St., New York, N.Y. 10017. Joseph E. Johnson is retiring as President. New President: Thomas Lowe Hughes.

■ *Coalition on National Priorities and Military Policy,* 100 Maryland Ave., N.E., Washington, D.C. 20002. New Executive Director: Reuben McCornack.

■ *East Europe: An International Magazine* has resumed publication with Volume 19, No. 2, November 1970. Publishers are Robert Speller & Sons, 10 East 23 St., New York, N.Y. 10010, and there is no connection of any kind with the former publishers, Free Europe, Inc.

■ *National Association of the Partners of the Alliance* has assumed the functions of the Partners Office of the U.S. Agency for International Development, which closed July 1970. New address: 2001 S St., N.W., Washington, D.C. 20005.

■ *National Committee on U.S.-China Relations,* Room 9-B, 777 UN Plaza, New York, N.Y. 10017. New Chairman: Alexander Eckstein. New Program Director: Douglas P. Murray. First Field Staff Coordinator: Arne deKeijzer.

■ *Overseas Education Fund of the League of Women Voters,* 1730 M St., N.W., Washington, D.C. 20036. Asia Consultant appointed: Karen H. Smith.

■ *Population Reference Bureau, Inc.,* 1755 Massachusetts Ave., N.W., Washington, D.C. 20036. New President: Rufus E. Miles, Jr., who took office July 1, 1970, succeeding the late William E. Moran, Jr.

■ *Public Law Education Institute,* Dupont Circle Building, Suite 610, 1346 Connecticut Ave., N.W., Washington, D.C. 20036. *Selective Service Law Reporter*—New Editor-in-Chief: John Schulz. New Associate Editor: Daniel Hoffman.

■ *World Federalists, U.S.A.,* 2029 K St., N.W., Washington, D.C., 20006. New National Field Director: Bill Wickersham.

Preface

This issue of INTERCOM is experimental in that it is not centered around a major feature essay by a single author. Rather it is a collection of pieces reflecting various approaches to a single problem. The editors will welcome comments and criticisms on the contents of this issue. Reports of classroom or adult discussion use would be especially useful, as would suggestions for future issues.

The extensive publicity surrounding the events at Mylai and the subsequent trials have made the question of the rights and responsibilities of individuals in warfare a matter of immediate and pressing concern. High school teachers find their students who are facing the draft very much engaged and wanting discussion and clarification. Adult groups have also expressed a need for in-depth exploration of this subject. The following articles are an attempt to begin to meet that need.

The World Law Fund is now working on curriculum units for junior high and high school use dealing with these and other matters. **Betty Reardon,** Director of the WLF School Program, has acted as guest editor of the feature section of this issue. The views expressed in each article are the author's and not necessarily those of the WLF or the Center for War/Peace Studies. The teaching suggestions are designed for the eleventh and twelfth grades, and most of the bibliographic annotations and citations for further study have been prepared by Miss Reardon. A brief biographical note on each contributor follows.

Margaret Carter teaches in the Department of Education at the University of Hartford and was formerly assistant director of a summer institute at Wayne State University on teaching about war and peace. She is currently working with Jack Fraenkel on a series of booklets on world order, for use in junior high schools.

Richard A. Falk is Milbank Professor of International Law and Practice at Princeton University and Research Director of the North American team of scholars at work on the Models of World Order project sponsored by the World Law Fund.

Jack R. Fraenkel is Associate Professor of Interdisciplinary Studies in Education at San Francisco State College and editor of the Prentice-Hall Series, INQUIRY INTO CRUCIAL AMERICAN PROBLEMS. He is co-author, with Margaret Carter, of a series of booklets on world order.

Robert Low teaches social studies at Mark Keppel High School, Alhambra, Calif., and is editor of a book on the individual and the international system, one of a secondary school series in preparation by the WLF.

Gerald L. Thorpe is Associate Professor of Political Science at Indiana University of Pennsylvania, a designer of world order curriculum materials and an experienced teacher of high school social studies.

Jonathan Weil is head of the Social Studies Department, Harwood High School, Waitsfield, Vt., and a consultant to the WLF. He is a former regional director of the Foreign Policy Association.

Feature:

The Human Person and the War System

Introduction

by BETTY REARDON

"War is cruelty and there is no refining it!" This often misquoted statement by General Sherman goes to the heart of one of the major dilemmas facing policy-makers, educators, and citizens. At the end of a decade that has seen the killing of hundreds of thousands of alleged Communists in Indonesia, the mass starvation of children in Nigeria, civilians of many nations held hostage or hijacked from their intended air destinations, the murder of political kidnap victims, a war in Vietnam resulting in civilian deaths estimated at over 300,000, with total civilian casualties of perhaps 1,000,000, and a series of criminal proceedings against American military personnel, we are still attempting to do that which seems impossible. Humanizing the conduct of war, when most wars by their very nature involve large numbers of civilians and the use of highly sophisticated weaponry, much of it deliberately designed as antipersonnel, has become about as difficult as abolishing war, while the need to abolish war becomes even more urgent.

It has become clear to many that to survive as a species on this planet, man must overcome the major threats to his existence. First and foremost of these is war. Beyond survival, war must be abolished so that man may preserve his humanity. War, more than any other dehumanizing force of contemporary life, prevents mankind from establishing a human community in which all may live in dignity. This issue of INTERCOM will explore some of the more dehumanizing aspects of the war system, so that we may learn how to help build a global community for mankind.

This issue of INTERCOM also represents, on the part of the authors and the guest editor, support of the recommendations made by the Foreign Policy Association in its study for the United States Office of

Education on *Needs and Priorities in International Education.*[1] Two of the major conceptual bases there recommended for international education are stressed herein. The first is the species concept of mankind. For some years now, those educators who sought to be more effec ive in their attempts to teach for international understanding have searched for an appropriate mode of teaching about the common characteristics of all men in all nations. Clearly the most simple and probably the most functional approach is through their membership in a single animal species. As the FPA study points out, now that the planet earth can be viewed as a single ecosystem with most behavior of individuals, groups, and nations ultimately affecting all men, a working understanding of the single species concept may be essential to man's survival. Certainly without such a conceptual base there can be only a dim hope of forming a single human community on this planet. Every member of our species is a human person, and all attempts to improve the lot of man and extend human rights must apply to all men equally. The exhortations of *Pacem in Terris* and the rights enumerated in the Universal Declaration of Human Rights refer to every human person, whether members of our own groups, or of all groups opposed to our own, and even to the "enemy." Indeed, the Papal encyclical is quite clear on this point. It warns that:

> . . . one must never confuse error and the person who errs, not even when there is question of error, or inadequate knowledge of truth. . . . The person who errs is always and above all a human being, and in every case he retains his dignity as a human person. He must always be regarded and treated in accordance with that lofty dignity.[2]

The second recommendation of the FPA study which we are concerned with here is that the present international system be studied as one of the operating levels of human social organization. It is in fact this particular conceptual base of international education which is the subject of the research and curriculum development program of the World Law Fund; the Fund's special concern being the war system, that aspect of the international system reflected in the unrestricted use of violence for resolving conflict and pursuing the particular goals and interests of individual nation states. The international system is the only unit of human social organization which does not enforce prohibitions against the use of violence. All other units have done so or attempted to do so, recognizing that the absence of such prohibitions erodes the viability and cohesiveness of the unit and is likely to lead to its destruction.

World order is a field of study devoted to seeking nonviolent modes of international conflict resolution. It seeks to achieve on a global scale certain goals sought internally by the nation state, namely peace and

order, economic welfare, and social justice for every member of the human species. World order methodology thus combines both concepts recommended by the OE study as basic to the needs of international education.

The major focus of the world order inquiry is on violence as a political device, exploring its use by nation states, groups within nation states and individuals. It is also concerned with the ways in which these categories of actors within the international system attempt to devise alternatives to, or prevent, violence. The study of world order, therefore, provides a responsible base from which to examine the specific problem of war crimes and the general issues related to the rights and responsibilities of the individual in the international system. As Professor Falk points out in the article which begins our inquiry, the problem of war crimes cannot in fact be separated from the larger issues of world order and the unrestricted behavior of nation states.

Another responsible base from which to approach these issues is the historical perspective. The history of man is a chronicle of warfare, and the history of warfare is a chronicle of crime. In spite of the chivalric traditions from previous centuries and the rules of warfare established in 1863, war crimes before the present century were not considered antinormative, much less antilegal. It is significant to note that the Dutch Government would not surrender the Kaiser to the Allies after World War I to be tried for violation of "moral" not legal principles. The Allies afterwards recognized all war to be a crime against humanity, and that principle was supposedly written into law by the Kellogg-Briand Pact in 1928. It took another war to get most nations to recognize the principle, now stated in the United Nations Charter, and to engender a statement defining the minimal rights of all human beings. The Universal Declaration of Human Rights of 1948 was promulgated about the time of the United Nations' endorsement of the Nuremberg Principles. If either of these documents were retroactive, there is good reason to believe that not a single nation state could avoid charges of having violated these principles.

An interesting question for teachers of history to pose to their students would be: How might the history of man have differed had law as it evolved included the concept of war crimes? Would those gifted lawmakers, the Romans, then have sacked Jerusalem and destroyed Carthage? Would the Norman Christians have desisted from rape, pillage, and murder against their fellow Christians of slightly different persuasions as they marched to the Holy Land? Would the Christian colonizers of the Americas have enslaved and tortured the native inhabitants of these continents in the name of Christian conversion? Would hundreds of thousands of Armenians have died in the process of being expelled from their homelands? Could Belgian soldiers have brought to the colonial officers in the Congo baskets

filled with human hands as proof of the severity of punishment imposed upon those who did not work for their imperial masters? If the Nuremberg Principles had come after the First World War, would the second have produced a history of wanton death and destruction, including such horrors as the Nazi death camps, the Katyn Forest massacres, Lidice, and the saturation bombing of Dresden in the European theater? Or would the Asian theater have seen the Bataan Death March, the annihilation of a Philippine village for which a Japanese general was later executed as a war criminal, or the unleashing against civilian populations of the greatest weapon of mass destruction that has been devised by man?

How might the history of this nation have been changed? Would there have been the deaths of far more than the majority of the Continental Army prisoners taken by the British in our Revolutionary War? Would the infamies of Andersonville in the Civil War, or the shame of Samar in the Philippines which brought about the court-martial of American officers at the turn of this century, or in fact the shock of Mylai, be on our nation's conscience?

Although it is obvious that we have not yet fully established the Nuremberg Principles as inviolable legal norms for the conduct of international relations, it is also true that they do represent a significant landmark in Western history, one which should be given far greater attention not only in classes dealing with the history of World War II but also in those courses concerned with the development of Western traditions and moral values. Gerald Thorpe in his article offers some useful insights and teaching strategies for examining the moral questions arising out of the trials. By applying the scheme of Lawrence Kohlberg for the assessment of stages of moral development, he provides teachers with a responsible and valid framework for the analysis of war crimes.

There is no doubt that many thoughtful young people today look cynically upon the Western moral tradition, and their feeling was reinforced if not magnified by the Mylai disclosures. The historic perspective may offer a reasonable framework through which the teacher can present the issues, and the world order perspective may provide lines of inquiry about how to prevent such events in the future. However, for high school students, particularly those of draft age, there is urgent emotional and intellectual need to confront the problem directly. Robert Low outlines for us the manner in which he dealt with this problem in his class, almost immediately after reports of Mylai were made public. He also shares with us some excerpts from his students' papers, which indicate not only a genuine concern with the problem, but also an admirable level of maturity and responsibility. Such students certainly deserve the opportunity to study the events, the precedents, and the possibilities for prevention of and restitution for war crimes. Even more important, they must understand what their

own individual rights would be should they ever find themselves faced with the moral dilemma of being called upon to commit inhuman acts in warfare.

Jack Fraenkel in his article makes a case for these topics as the focus of concentration in social studies courses, and offers some theory and techniques for introducing them into the classroom. Although presented in terms of teaching methodology, his suggestions are useful guidelines for any group attempting to analyze these problems and evaluate proposed solutions.

No matter how high a level of analysis we achieve in exploring these issues in discussion groups and classrooms, there is still the basic emotional-moral question which always emerges when we confront inhuman practices. How can human beings do such things to their fellow humans? How does an average citizen become an inhumane killer of men? The average citizen does not become a killer of men, per se, but a soldier, an honorable defender of his own nation or group against the threat of an enemy. The enemy is then dehumanized, and the soldier believes that his opponents are those against whom "it is allowed to exercise all means necessary. . . . The first consideration is to crush the . . . enemy."[3] The true trauma of Mylai is that it has revealed the defenders of humanity in the inhumane role formerly reserved exclusively for the enemy. Those who condemn such acts generally tend to view the victims as fellow human beings; those who condone them view the dead as the "enemy." It is precisely the question of the dehumanization and stereotyping of the enemy that Margaret Carter raises in her article on *The Battle of Algiers.*

In situations such as that depicted in *The Battle of Algiers,* one sees clearly how limited are the rights and humanity of the individual in a violent political struggle. The present system of international relations seems to have no answers for individuals consistent with the spirit of the Universal Declaration of Human Rights or *Pacem in Terris,* or for that matter, with the Geneva Conventions. This problem is sharply illustrated by the Shimoda Case, which Johnathan Weil describes in his treatment of the atomic bombings of Japan. In addition, the use of certain weapons and practices, as in Vietnam, indicates the close relationship between types of weapons employed and the unavoidable violation of the rights of human persons in war. And it also fixes on the major problem of war crimes; is it in fact possible to conduct warfare without committing gross violations of the human rights of large numbers of persons, civilian as well as military?

There are those who assert that it is war itself which constitutes the crime. Some contend that there are no circumstances and no causes which can possibly make war an acceptable strategy for the achievement of political or human goals, and will argue this position on pragmatic as well as moral grounds. Martin Luther King was such a man, and for his espousal and use of nonviolence he was awarded the Nobel

Peace Prize. Another clergyman, who has yet to win any awards for his struggles for the rights of the human person but who in the opinion of the guest editor is truly deserving of one, is the Reverend Michael Scott. Long before social and political scientists had defined the phenomenon of institutional violence, Michael Scott had not only recognized it but begun to struggle against it. While institutional violence exists both inside and outside the war system, wherever it continues without relief it almost inevitably leads to open warfare. This problem, therefore, is also central to any inquiry into the dilemma of the human person in the war system. When modes and methods by which men rule other men negate humanity, then those political, social, and economic processes constitute violence. Michael Scott is one individual who has acted within the international system, using the institutions available to try to gain dignity and justice for victims of political violence. His work, described in the last article in this issue, indicates that although limited there are still nonviolent recourses open to those who will not or cannot use the war system.

The contributors to this issue are classroom teachers and university scholars with a professional concern in developing the skills of analysis and evaluation necessary to probe the legal and institutional problems involved in crimes of war, as well as the wider question of the war system itself. The issues are varied and complex, and the articles herein do not attempt to deal with them in great depth, or in fact to touch substantively on all of them. Rather they suggest some lines of inquiry and some of the more readily analyzable questions in order to lead readers into further study and wider reflection upon all the relevant topics. I am indebted to Dr. Mark Sacharoff, of the English Department of Temple University, for his assistance with annotations of recent books on war crimes.

Many of the problems affecting the human person in the war system have not been discussed, and some of those omitted may be as important as those included. The fate of prisoners of war is a source of anxiety to their families and fellow countrymen. The needs of the poor are given low priority. Parents may face the return of sons in coffins, or be forced to visit them in military stockades, or sit as spectators as they are tried for war crimes. Homes are razed, crops destroyed, and death, injury, and anguish reach far beyond the field of combat. The acute problems of limitations on civil rights and the risks involved in dissent from foreign policy in wartime affect in one way or another every citizen, and the press and other media must grapple with delicate questions of censorship.

These are all problems to be raised in any disciplined examination of the human condition and principles guiding human institutions. We hope that reflection upon these issues will contribute to a better understanding of the war system and consequently to its abolition.

Footnotes

1. A summary of the Office of Education study is available from the Foreign Policy Association, 345 East 46 St., New York, N.Y. 10017.
2. *Pacem in Terris,* Part V.
3. "The Shimoda Case," *The Strategy of World Order,* Vol. 1, Richard A. Falk, Saul H. Mendlovitz, eds., World Law Fund, 327 pp.

Editor's Suggestions for Further Study and Discussion

THE HISTORICAL PERSPECTIVE

It has been suggested that the lessons of slavery and its abolition might be applied to the war system. Review the history of the development and abolition of slavery up to the United Nations Anti-Slavery Convention. What circumstances contributed to the establishment of the institution of slavery? What were the moral and legal arguments in its favor? What were the arguments against it? What attitudes toward the human person are reflected in the institution? How was the abolition brought about? What were the theories and strategies of the abolition movement?

THE WORLD ORDER PERSPECTIVE

Films

Who Speaks for Man? Write to the World Law Fund for a study guide based on this film which inquires into the relationship of human rights to the present international system.

Readings

The Universal Declaration of Human Rights may be obtained from the United Nations at 10¢ per copy.

War Crimes and Individual Responsibility: A Legal Memorandum, Richard A. Falk, available from Fellowship Publications, Box 271, Nyack, N.Y. 10906, 20¢ per copy. Contains in its appendix an excellent summary and citation of the relevant portions of the Hague and Geneva Conventions.

Nuremberg and Vietnam: An American Tragedy, Telford Taylor. New York Times Book (paperback), $1.95. The U.S. Chief Counsel at Nuremberg reflects upon the significance of Nuremberg and its application to events in Vietnam, and provides a retrospective look at the historical development of the concept of war crimes.

The Limits of War, PUBLIC ISSUES SERIES, American Education Publications, Education Center, Columbus, Ohio 43216, 1970. Provides an

overview of national policy and world conscience, touching on most major issues relevant to rights of the human person in the war system.

Pacem in Terris. Pope John XXIII's encyclical is available in many editions and is the best single statement on problems of war and peace from a mankind perspective.

Suggestions for Film Viewing and Discussion

Since films form a major portion of the resources suggested in this issue, directions for their use may be helpful. Films should be shown under the best possible conditions. Where it is not possible to show the complete film at one sitting, the point at which the break is made should be decided upon in advance. Use two projectors in tandem, screening the film through without pause for reel changes. The speaker should always be placed at the front of the room; if the projector has a built-in speaker, a suitable speaker should be connected to the extension speaker socket. These simple measures can help viewing to be a vivid and stimulating experience.

Before screening, give the students a brief factual introduction to the time and place, the personnel involved, and the production method. *This opportunity should not be used to prime the students to look for certain things in the film, as this will destroy most of the vitality of the following discussion.* The discussion itself is best attempted at least 24 hours after the film has been seen, allowing time for the students to digest the experience.

The discussion will of course depend for its final form on the individual teacher, but there are some guidelines that may profitably be followed. The early stages of the discussion should be as nondirected as possible so that the students may feel their way toward their ideas and opinions about the film, and their reactions to it. The particular interests of the students may then be linked to those ideas and concepts the teacher wishes to consider. In this way, the discussion will remain firmly rooted in the experience of seeing the film and will not become a series of unprofitable vague generalizations. Those generalizations which can be drawn will be based on the perceptions of a shared experience.

A word of warning: It is best to order the films as far in advance as possible. Try to place your order at least two months in advance. For further film information, contact Educational Film Library Association, 17 West 60 St., New York, N.Y. 10023.

—Adapted from *3 Films and World Peace*
published by the World Law Fund

The Nuremberg Tradition

by RICHARD A. FALK

The recent upsurge of interest in the Nuremberg trials and in war crimes generally is an outgrowth of America's involvement in Vietnam. Many people in this country and elsewhere believe that the standards used to judge German and Japanese civilian and military leaders at the end of World War II should be applied to present American policy-makers and that there is a contradiction between current activities in Indochina and our attempts at Nuremberg to establish principles of criminal responsibility. To understand the questions raised by this situation it is important to have some sense of what indeed the lesson of Nuremberg was.

The Nuremberg Principles, endorsed unanimously by the General Assembly of the United Nations at the initiative of the United States, conveniently and concisely summarize the issues involved. The United States was not just a participant in the Nuremberg experience, it was the most activist government and was successful in overriding more conservative approaches to the punishment of leaders of the defeated Axis countries. The allies of the United States in World War II, particularly the Soviet Union, were nervous about establishing general principles of criminal responsibility and argued for very specific judgments against particularly barbaric individuals, with punishment for war crimes limited to the defeated nations in that war. The unanimous position of the American political leadership at that time was that this was not enough, that it was important to make the sacrifices and the experience of World War II a meaningful basis for organizing the future, and thus the United States argued that the Nuremberg Principles should be applicable to all governments for all time. Often quoted in this context are the words of Justice Robert H. Jackson, chief American prosecutor, to the effect that if Americans had done what Germans had done in the war, then those Americans should be prosecuted just as those Germans have been prosecuted. Nuremberg created a legal precedent and was not merely an enactment of a historical morality play.

The Nuremberg Principles state that when a government commits war crimes those responsible for planning and executing the criminal policies are individually responsible as criminals and are liable to punishment. It is no defense to be a head of state or in a position of authority. There is no immunity there, and such an individual is not relieved of responsibility. Furthermore, it is no defense that the accused individual was acting on the basis of superior orders and was simply carrying out instructions.

War crimes were broken down into three principal categories at Nuremberg. The first, and at the center of both the Nuremberg and

Tokyo trials, is the planning and waging of a war of aggression, that is, an illegal war, fought neither in self-defense nor under, in the present setting, the United Nations. By definition, any war not sanctioned by the Charter of the United Nations, which is a treaty of international law, is illegal and a war of aggression. The second category of war crimes prosecuted at Nuremberg includes violations of the law of war, that is to say the use of prohibited weapons, tactics, or battlefield practices. It is this aspect that is at the center of awareness of war crimes in the Vietnam context, providing the basis for the current prosecutions arising from the Son My massacre. The third category, crimes against humanity, arose from the genocidal aspects of Nazi policy and was considered at the time of Nuremberg to be the primary justification for prosecuting German leaders. The rules in this category were not made technically a basis of responsibility at Nuremberg because they were deemed not to be in existence at the time the acts were committed, but they have since been recognized in the Genocide Convention. It is now clear that positive international law does make it a crime for a government systematically to try to destroy any ethnically, religiously, or racially distinct human group in whole or in part. The claim has been made that, regardless of intent, the war in Vietnam is genocidal in effect, because counterinsurgency warfare carried on above a certain level is inevitably directed against the population as a whole, and there is in fact no way of conducting a large-scale counterinsurgency war with high technology weapons except against the population as a whole.

The basic tradition of Nuremberg is, in a sense, only a crystallization of the ideals that have been evolving for a long time in Western civilization, and it reflects fundamental notions of morality. Yet we see many governments, and not only our government, act without much reference to these notions of restraint. The contradiction between the ideals proclaimed and the policies of governments has provoked an unprecedented crisis of legitimacy, which leads in turn to a wider questioning of the concept of loyalty to the nation state.

An educational challenge is raised as to whether to resolve the contradiction in favor of the Nuremberg tradition or in favor of what might be called the Westphalia tradition. The Peace of Westphalia, in 1648, established the system of the sovereign state in international affairs. One could argue that the logic of the Westphalian system is that since states are indeed sovereign their basic policies with respect to war and peace are not subject to any inherent limitation. If so, it is naive and even misleading to try to pretend that the Nuremberg tradition can operate effectively within this kind of international setting. The war system, as it operates in international relations, can only be overcome by changing the structure of world order.

There are many problems with Nuremberg: the standards evolved were applied only to defeated powers and defeated individuals; the judges were drawn only from the victorious powers; and some of the

worst excesses of the war were committed by the victorious countries, the bombing of Dresden and Hiroshima being among the prominent examples. Also, perhaps the whole experience of Nuremberg itself exposed the contradiction that is inevitable when one tries to bring law and morality to bear on the initiation and conduct of war in the present international system. The difficulty with rejecting Nuremberg because of this is that such action is dramatically inconsistent with the needs of survival in the nuclear age. If the pre-nuclear tradition of unrestrained sovereign prerogative were reinforced, it would be claimed not only by America but by an increasing number of governments. And many of these governments are faced with insuperable domestic problems that are likely to induce increasingly desperate strategies, including expansive foreign policies. Thus, unless some framework of restraint can be evolved very rapidly, the future of international relations is likely to be even more destructive than it has been for the last decade or so.

There seems, therefore, to be a critical and urgent need to find ways to restrain the international behavior of large governments particularly, and the Nuremberg tradition does provide a very powerful set of limitations that should indeed be imposed. Preventing one's own government from exceeding certain limits is a recognition that the objective situation in international relations no longer permits governments to be unrestrained in the conduct and execution of foreign policy, even in the national interest. It is essential that we recognize that a government of law and not of men is as important in international affairs as it is in domestic affairs, perhaps even more so because of the potential for catastrophe that is implicit in the unrestrained conduct of international relations.

A very strong case can be made for resolving the contradiction between Westphalia and Nuremberg in favor of the latter, at the same time recognizing that this is only buying time. Choosing Nuremberg is not really resolving the problem of war and peace. Just as the "green revolution" at best gains thirty years within which to solve the imbalance between birth and death rates with respect to population growth, so the active endorsement of a framework of restraint imposed upon governments, of which Nuremberg is but one aspect, might gain enough time to change sufficiently the world consciousness existing in the principal societies to allow for the possibility of creating a central guidance system that could effectively maintain control of international relations in a world in which the war system can no longer be the mode by which conflicts among states are resolved.

This is the challenge which seems to be the basis of any kind of meaningful educational use of the whole Nuremberg tradition—it must be related to an overall interpretation of world order. If it is viewed only intrinsically, it induces hypocrisy and cynicism, since it is obviously not going to be applied within the world as it is now constituted,

because there is no way to bring the defiantly powerful to judgment. Therefore, the most it can hope to do is socialize communities and world public opinion in the direction of accepting a system of restraints capable of implementing Nuremberg not just against defeated countries but as a framework for international politics.

Two points must be made in conclusion. It is essential to acknowledge the contradiction between the proclaimed ideals embodied in the Nuremberg Principles, which the United States has been associated with, and actual practice by the United States and other countries in Vietnam and elsewhere. Second, it seems, on balance, to be desirable to resolve that contradiction in favor of the Nuremberg tradition, provided it is understood that it is only a stopgap measure, one of a number, to gain the time needed to achieve a system of world order that can sustain peace with justice.

Editor's Suggestions for Further Study and Discussion

An excellent complement to this article is Professor Falk's article on Mylai which appeared in *Transaction,* March 1970 (reprints available from the World Law Fund), in which he points out that the United States also established an important precedent by the trial and execution of General Yamashita, the Japanese commander in the Philippines during the closing months of World War II. Yamashita was held accountable for the commission of war crimes by combat personnel under his command, even though he had neither ordered nor approved these actions, nor had he any means to prevent their occurrence. Such responsibility of higher officers is peculiarly relevant in light of the prosecution by the U.S. Army of several soldiers involved in the Mylai massacre. The two pieces together will provide an adequate base for examining in greater depth the relationship of the Nuremberg Principles to the affixing of guilt in instances of war crimes.

Those who wish to explore further into the international system aspects of war crimes will find a very useful resource in "Issues Before the General Assembly," *International Conciliation,* September 1970, No. 579, available from the Carnegie Endowment for International Peace, 345 East 46 St., New York, N.Y., 10017, $1.25.

Additional articles and a very complete bibliography on the Nuremberg Principles will be found in the National Lawyers Guild *Practitioner,* Vol. XXV, No. 3, Summer 1966, currently available with an addendum, Vol. XXVII, 1968.

The Nuremberg Trials:
Considerations and Suggestions

by GERALD L. THORPE

> *I am a German, I encircle this land with all my love, but I know also that the thing up there that rumbles and thunders is the denial of right and justice . . . a man must hate this Germany if he really loves it.*
>
> —Fritz Reck (a German who was ashamed at the right time)

As the most spectacular of all war crime trials, the proceedings at Nuremberg initiated at the conclusion of the Second World War often serve as the focal point of teaching directed toward an examination of one of the most troublesome dilemmas facing the individual in society—how to reconcile conflicts between a man's conscience and the dictates of societal duty, as defined by the State.

Although this dilemma has received prominent attention throughout history, Nuremberg exemplifies how much more crucial it has become in our lives as a result of the amplified force at the disposal of modern technologically developed nations. Germany, highly industrialized, considered by many as the flower of Western civilization, whose soil has nurtured some of the most lyrical poets and majestic of humanistic philosophers, also spawned the most chillingly organized and most rationalized genocidal atrocities known to man. Nuremberg provided revelations that caused an earthquake in the Western psyche, shaking our confidence in Western culture to its very foundations. The trials publicized events that are often cited by some of our most intelligent and sensitive youth in their broad indictment of the Western cultural heritage.

The trials at Nuremberg, coupled with recent domestic and international events, have brought home to reflective individuals the realization that the problem of individual conscience versus duty to the State is no longer one with which only a few unlucky or careless people must grapple. The pervasiveness of the State, made possible by an increasingly sophisticated technology, has made it highly probable that many of our individual lives will not run their course without our personally having to face this great dilemma. Perhaps even more ominous is the probability that many more of us will live out our lives free of this conflict because unaware of even the possibility that there might be a morality higher than absolute obedience to the will of the State.

This thought has led me to some preoccupation with the implications of the Nuremberg trials. Over the years I have made extensive

use of these trials in my teaching and have observed their use by others. My experiences have convinced me that a study of certain problems raised by the trials and their implications can be a rewarding learning experience for students and teachers alike. The purpose of this article is first to identify what this writer considers the problem of first importance, then to provide some guidelines for teaching about the trials, and finally to outline some broad but suggestive procedures for effecting these guidelines.

The Trial and the Problem

Nuremberg resulted in the establishment of a legal axiom that individual conscience takes precedence over the dictates of the State when such dictates are of an inhumane nature. This runs directly counter to the intellectual and emotional currents of modern nationalism. Anglo-American jurists laid down at Nuremberg the rule that violations of the rights of humanity are punishable, even if committed under the authority of the State. Yet it is quite obvious that nationalism remains one of the most viable forces in the hearts and minds of men. As a result, the proceedings at Nuremberg—based as they are on ideas of world community and individual responsibility—are rejected in practice, and often in theory, as inapplicable legal precedents in national courts. There is no question, however, that the trials and the precedents established there are not without effect, often embarrassing, on governments today. They are also not without effect on private individuals, many of whom find the necessity to make moral choices a more complicated and, indeed, a more obligatory affair than might have been the case had Nuremberg not been an event upon which public reflection is constantly being forced.

The Nuremberg precedents have recently been cited, mostly without success, by draft resisters, by those seeking a selective deferment for the Vietnamese war in draft board hearings, by a soldier charging General Westmoreland for responsibility for the massacres at Mylai, by the International War Crimes Tribunal established by the late Lord Russell in Sweden for the purpose of trying American "war crimes" in Vietnam, by captured, but contrite, American prisoners in North Vietnam as justification for what have been traditionally considered treasonous statements, by military deserters, and by other assorted groups with equally assorted motives.

There is evidence that many American military officers were quite prescient about the way in which Nuremberg could boomerang on the victorious Western Allies of 1945, making the righteous accusers of that year the accused of later wars. Murray C. Bernays, a colonel on the Army General Staff who was given principal responsibility for outlining procedures for the trials, recalled some time later that he tried

to use "ordinary legal methods" in designing the trial procedures.[1] This of course meant the application of domestic legal guidelines for criminal actions conducted in the name of sovereign nations. The Nuremberg precedents, as can be seen by the way they have been used in connection with those hostile to the American intervention in Vietnam, have had a profound impact on many people. Trying to hold individuals responsible for actions legalized by a given government leads to a somewhat broadened definition of neighbor, one which is definitely at odds with some of the prevailing notions of national sovereignty, national duty, and patriotic virtue. What the policeman is not permitted to do in the Bronx, neither would many of us permit him to do in Vietnam—orders notwithstanding.

At the time of the trials the chief American prosecutor, Associate Justice Robert H. Jackson, was accused by some among our military of trying to establish a principle of international law "under which professional soldiers, sailors, and armies shall be convicted as criminals on the mere grounds of membership in high commands or general staffs."[2] In defense of the trial guidelines, Mr. Bernays replied that the Nazi war criminals were not being prosecuted simply because they had been members of commands or staffs, but because they had seen fit to play the dual role of soldiers and politicians and . . . "were deeply implicated in . . . planning and making wars which were aggressive in their intention, treacherous in their inception, and ruthless in their execution."[3] These words have now come back to haunt military and civilian leaders. Whether intended or not, the conduct of the Nuremberg trials under the guidelines set down by Bernays and Jackson did create the precedent feared. What major military leader today is innocent of "deep implication" in the politics of war? Bernays' words, "Surely . . . if political government directs a murderous policy of exterminating civilians and prisoners of war, soldiers who carry out that policy are properly liable to punishment,"[4] are considered relevant today by many of our more well-informed and sensitive citizens.

The basic contemporary significance of the Nuremberg trials arises from the persistent application of the doctrine of individual accountability for crimes against humanity not only to those who are in authority but also to those who are subject to that authority and are expected to accept and carry out—or perhaps only acquiesce in—national policies made by others. The message is clear: the individual cannot hide behind the authority of the State; he must accept full responsibility for his actions. There are times when the necessity of disobedience is manifest. Unfortunately, the court has laid down no clear guidelines concerning time, place, or circumstance. Many cynics suggest that they will not be available until the next round of international war crime trials, furnished, ex post facto of course, through the courtesy of the victors.

Guidelines

It is suggested that the focus of study of the trials at Nuremberg should be the problem of individual moral decisions in juxtaposition to the will of that individual's government. To use the trials, then, in such a way as to emphasize the atrocities and to leave students with the impression that those found guilty had no emotional or intellectual similarities to ourselves is to miss the major purpose for spending time on this topic. It is precisely because most of those accused of crimes were men possessed with the same range of emotion and thought that we all recognize in ourselves that makes what they did—or perhaps didn't do—so frightening and so relevant to our own existence. To pass off the Germans as "different" and the Nazi experience as an historical aberration, the result of an unfortunate convergence between an irrational Fascist ideology and a quirk in the moral character of the German masses, is but another form of ethnocentric chauvinism and does nothing to further our understanding. Rather than being morally instructive, we end with an exercise in moral smugness.

A case can be made that the logic of rationalism, the so-called myth of empirically-based "Objective Consciousness" could well be used to lead us down the path trod by the Nazi leadership. Theodore Roszak warns us that:

> It was not foreseen even by gifted social critics that the impersonal, large scale social processes to which technological progress gives rise generate their own characteristic problems. When the public finds itself enmeshed in a gargantuan industrial apparatus which it admires to the point of idolization and yet cannot comprehend, it must of necessity defer to those who are experts or to those who own the experts—only they appear to know how the great cornucopia can be kept brimming over with the good things of life.[5]

Goering, Hess, Donitz, Rosenberg, and others were the analogous experts of the Third Reich. The German people deferred to these experts, perhaps engaging in what Jerome Frank calls "psychological denial" that they were in any way connected with the unpleasant aspects of Nazi rule. In the face of such unpleasantness, they tended to resort to the very human device which Harry Stack Sullivan has termed "selective inattention."

We also have our experts, and we also defer. The Nazi leadership was infested with the disease of romantic and racist irrationality. Our leadership is guided by the myth of objective consciousness—scientism. The Nazis used modern technology to carry out bizarre experiments on Jewish women. Our Government gives financial support to biologists intent upon growing babies in glass bottles and to bacteriologists busy whipping up batches of plague that no one will be able to inoculate against. There may be a qualitative difference, and yet some of the

more bitter critics among us persist in describing the work of some of our most respected scientists as prime examples of the "irrationality of rationality."

In short, the cultivation of empirical and logical objectivity will not prevent a repetition of the Nazi experience unless we take care that the mind is guided by the heart. Moral judgment is the necessary ingredient here, not the rational-empirical ethic of science. It is not enough to dramatize the enormity of the crimes revealed at Nuremberg and to expose the evil of those who led the German people to the edge of the abyss; we must examine the events from the perspective of the problem of moral judgment and extend the lesson beyond the German people. The moral problem raised at Nuremberg is not a German problem; it is a universal problem. This is so much a part of the conventional wisdom that we often forget its truth.

Lawrence Kohlberg of Harvard University has, with little fanfare, engaged in a series of studies that promise to have more significance educationally than those of all other prominent curriculum reforms of the past few years. It is from his work that a basic framework for getting at the moral dimension of the Nuremberg trials can be derived. There is no time here to do justice to Kohlberg's theories, and any attempt to do so would only be a poor imitation of the original. A careful study of Kohlberg's work in the area of moral orientation is urged upon the reader.[6]

Kohlberg's main concern is with stages of moral judgment, an area that has been sorely neglected as a result of the one-sided and often sterile emphasis on learning "structures of disciplines" and cognitive skills that has swept the field of curriculum reform recently. By moral education, we are not referring to the teaching of morals, but to teaching about moral judgment—the exposure of students to stages of moral thought and confrontation with the moral implications of personal decision. Kohlberg's theories are useful both as an explanation of why people make certain choices and under what conditions we might behave in similar fashion, and as a pedagogical tool for evaluating the stage of moral development of our students and changes in this development over time.

Kohlberg speaks of three levels of moral development, each of which contains two stages, or a total of six stages. It takes a great deal of practice to be able to assign verbal statements to the appropriate stage of moral orientation. Fortunately, for the immediate purposes to which we wish to apply Kohlberg's descriptive schema, it is enough to describe the three basic levels of moral orientation, which are:

I. PRECONVENTIONAL LEVEL

> At this level the child is responsive to cultural rules and labels of good and bad, right and wrong, but interprets these labels in terms of either the physical or hedonistic consequences of action,

punishment, reward, exchange of favors, or in terms of the physical power of those who enunciate the rules and labels. This level is divided into two stages:

Stage 1: The punishment and obedience orientation. The physical consequences of action determine its goodness or badness regardless of the human meaning or value of these consequences.

Stage 2: The instrumental-relativist orientation. Right action consists of that which instrumentally satisfies one's own needs and occasionally the needs of others. Reciprocity is a matter of you scratch my back and I'll scratch yours.

II. CONVENTIONAL LEVEL

At this level, maintaining the expectations of the individual's family, group, or nation is perceived as valuable in its own right, regardless of immediate and obvious consequences. The attitude is not only one of conformity to personal expectations and social order, but one of loyalty to it, of actively maintaining, supporting, and justifying the order and of identifying with the persons or group involved in it. At this level there are the following two stages:

Stage 3: The "good boy-nice girl" orientation. Good behavior is that which pleases or helps others and is approved by them. There is much conformity to images of what is majority behavior.

Stage 4: The law and order orientation. An orientation toward authority, fixed rules, and the maintenance of the social order. Right behavior consists of doing one's duty, showing respect for authority, and maintaining the social order for its own sake.

III. THE POST-CONVENTIONAL, AUTONOMOUS, OR PRINCIPLED LEVEL

At this level there is a clear effort to define moral values and principles which have application apart from the authority of the groups and persons holding these principles and apart from the individual's own identification with these groups. This level has two stages:

Stage 5: The social-contract legalistic orientation. Right action tends to be defined in terms of general individual rights and in terms of standards which are critically examined and agreed upon by the whole society. An emphasis upon procedural rules for reaching consensus. This is the official morality of the American Government and the Constitution.

Stage 6: The universal ethical principle orientation. Right is defined by the decision of conscience in accord with self-chosen ethical principles appealing to logical comprehension, universality, and consistency. These principles are abstract and ethical, like the Golden Rule, and not moral imperatives like the Ten Commandments. At heart these are universal principles of justice, of the reciprocity and equality of human rights, and respect for the dignity of human beings as individual persons.[7]

The explanatory power of this three-level schema and the opportunities it presents to the teacher for generalizing the lessons of Nuremberg to individual moral orientation are quite obvious. Any group of people contains individuals operating at different stages of moral development. The social environment has a shaping influence on the operant stages of moral orientation at any given time, and the great mass of people in any given culture never operate on the Post-Conventional, or Level III plane.

If this is true, and Kohlberg has impressive empirical warrant to support his conclusions, it complicates our original formulation of the problem arising out of Nuremberg. It is not only that individuals feel the dilemma of conscience versus social duty and that they sometimes acquiesce despite this feeling of tension. Many individuals, conceivably most at a given time and place, never *feel* that tension. They find it difficult to define moral values and principles which have validity and application apart from the authority of the groups or persons holding these principles and apart from the individual's own identification with these groups. The problem, then, is not only that many individuals are faced with the dilemma of choice, but that some never have this problem because it is above their level of awareness. It is this latter group that provides both passive and active support for totalitarian and barbaric social orders.

Procedures

While it is essential as a first order of business that students gain a knowledge of the official purposes for and reasoning behind the trials and the specific atrocities with which the defendants were charged, the main focus for our study should be the moral problem of why individuals could commit themselves to the policies and acts which the Nuremberg Court and most of the world agreed were crimes. It is also important for students to examine under what conditions they themselves might make similar choices and how a repetition of the events decribed at Nuremberg might be prevented in the future.

To begin such a study, you might present a hypothetical or slightly disguised actual case to your students which places them in a dilemma where they have to choose between obedience to the will of the State

or a social group and their own moral sense of what is right and wrong. Since it is possible that there will be no sense that a conflict exists, the main purpose of such an exercise is to get some indication of the operational level of moral development of each student. This exercise should be completed before any discussion takes place. When analyzed in relation to Kohlberg's schema and later compared with similar exercises at the end of the study of the trials, we should have an excellent indication of the impact of the teaching experience on the student. After the written exercise has been completed and handed in and during the discussion that ensues, the teacher should outline the three levels of Kohlberg's moral orientation schema and ask students mentally to relate their own orientation to it.

Once this exercise has been completed you may announce your intention of studying the Nuremberg trials. A good place to begin is with a showing of the film *Judgment at Nuremberg*.[8] If this is not feasible, the play upon which the film is based can be used.[9] The play appears in a very inexpensive paperback format. Both film and play are ideally suited to our purposes. There is a conscious attempt to portray the moral positions and the agony of decision-making on the part of the major protagonists. Students should be asked to decide what the purpose of the trials is and to note specific charges against the defendants, but to pay special attention to the arguments made for the defense by the defense attorney, played by Maximilian Schell, and the position taken by the judge, played by Spencer Tracy. They should also be encouraged to pay special attention to the attitudes held by lesser people in the drama, such as the German caretaker couple and the widow of the German General who serves as the love interest in the film. While these people were actually not on trial, the impression that they are somewhat implicated in the crimes, if by nothing more than a sort of ex post facto feeling of guilt, is clear. A major portion of your discussion after the showing or reading should be directed toward whether these people were in any way guilty and, if so, in precisely what ways. An attempt should also be made to understand their moral orientation and to relate it to Kohlberg's three levels. In order to facilitate this, it is suggested that self-justifying quotes be lifted out of the movie or play and mimeographed for purposes of careful analysis and class discussion. If time permits, students should be assigned to become better acquainted with the lives of some of the major defendants in order to try to gain a clearer understanding of the ways in which they justified their actions. (A brief bibliography for use in this regard appears at the end of this article.)

An often successful technique used in conjunction with the movie is to stop the projector just after the final defense summation and ask the students to reach a verdict and to justify their decisions. Once the morality orientations of the protagonists have been thoroughly discussed and categorized as either Stage III or below and the verdicts

have been discussed by the students, the discussion should shift to a more personal level. For this purpose, we have found the case of Hermann Graebe to be an excellent one. The problem of judging Herr Graebe is not easy since he is not in a position of political authority, not a direct participant in the atrocities he witnesses, and not able to control the circumstances of the dilemma in which he finds himself. It is also not clear what actions he takes in response to the events which he describes, which leaves the account somewhat open-ended. It should be noted, however, that he remained in his managerial position until the end of the war. Since Graebe's testimony focuses attention on the problem of implication by acquiescence, students will find the case both disturbing and one with which they will be able to identify more easily than that of Hess, Goering, or other major Nazi leaders. Quite plausible parallels between Herr Graebe's predicament and similar predicaments one could face in this country are easily drawn if teachers or students want to go this far. A portion of Graebe's testimony is reproduced below:

> I Hermann Friedrich Graebe declare under oath:
>
> From September 1941 to January 1944 I was manager and engineer in chief of a branch office in Sdolbunow, Ukraine, of the Solingen building firm of Joseph Jung. In this capacity it was my job to visit the building sites of the firm.
>
> On 5 October, 1942, when I visited the building office at Dubno, my foreman . . . told me that in the vicinity of the site, Jews from Dubno had been shot in three large pits. . . . About 1500 persons had been killed daily. All of the 5000 Jews who had still been living in Dubno were to be liquidated.
>
> Moennikes (the Foreman) and I went directly to the pits. Nobody bothered us. Now I heard rifle shots in quick succession, from behind one of the earth mounds. The people who had got off the trucks—men, women, and children of all ages—had to undress upon the order of an SS man, who carried a riding or dog whip. They had to put down their clothes in fixed places, sorted according to shoes, top clothing and underclothing. I saw a heap of shoes of about 800 or 1000 pairs, great piles of underlinen and clothing. Without screaming or weeping these people undressed, stood around in family groups, kissed each other, said farewells, and waited for another sign from an SS man, who stood near the pit.
>
> I watched a family of about eight persons, a man and woman, both about 50, with their children of about 1, 8, and 10, and two grown-up daughters of about 20 to 24. An old woman with snow-white hair was holding the one-year-old child in her arms and singing to it and tickling it. The child was cooing with delight. The couple were looking on with tears in their eyes.

The father was holding the hand of a boy about ten years old and speaking to him softly; the boy was fighting his tears.

At that moment the SS man at the pit shouted something to his comrade. The latter counted off about 20 persons and instructed them to go behind the earth mound. Among them was the family. I well remember a girl, slim and with black hair, who, as she passed close to me, pointed to herself and said "23." I walked around the mound, and found myself confronted by a tremendous grave. People were closely wedged together and lying on top of each other so that only their heads were visible. . . . Some of the people shot were still moving. The pit was already two-thirds full. I estimated that it already contained about 1000 people.

I looked for the man who did the shooting. He was an SS man, who sat at the edge of the narrow end of the pit, his feet dangling into the pit. He had a tommy gun on his knees and was smoking a cigarette. The people, completely naked, went down some steps which were cut in the clay wall of the pit and clambered over the heads of the people lying there, to the place where the SS man directed them. They lay down in front of the dead or injured people; some caressed those who were still alive and spoke to them in a low voice. Then I heard a series of shots. . . . I was surprised that I was not ordered away, but I saw that there were two or three postmen in uniform nearby. The next batch was approaching already. . . . I left with Moennikes and drove in my car back to Dubno.

On the morning of the next day, when I again visited the site, I saw about 30 naked people lying near the pit. Some of them were still alive; they looked straight in front of them with a fixed stare and seemed to notice neither the chilliness of the morning nor the workers of my firm who stood around.

> I make the above statement at Wiesbaden, Germany, on 10th November, 1945. I swear before God that this is the absolute truth.
>
> HERMANN FRIEDRICH GRAEBE
>
> Subscribed and sworn to me at Wiesbaden, Germany, this 10th day of November 1945.
>
> HOMER B. CRAWFORD, MAJOR, AC
> Investigator Examiner
> War Crimes Branch.[10]

Certain questions should be raised about Herr Graebe. Was he a powerful man? What role did he play in the events described? Is he a war criminal—why or why not? Should he have done something about the events he witnessed and, if so, what? If he is guilty of war crimes, is he more guilty than the SS man with the tommy gun? Is he as

guilty as the major defendants at Nuremberg, like Hess, Goering, and Rosenberg? What would you have done had you been in Herr Graebe's shoes—is it possible to really say? Are there different kinds of guilt? If so, how would you distinguish between them?

It is also possible to have the class stage a trial of Herr Graebe. If this is done, make sure that the justifications by the defense and the prosecution are carefully examined for their moral orientations.

You should end the discussion of Herr Graebe by having students speculate concerning Graebe's moral orientation and by raising the question of whether a man with a post-conventional orientation might have acted differently. It is important at this point that you also mention the possible role played in situations like this by the defense mechanisms of psychological denial and fear. Students should be aware that actions cannot be predicated on moral orientation alone. Other factors, in addition to those mentioned above, also enter in. Finally, you could ask if Graebe's reactions to what he saw were typical human reactions and how they would explain why so many Germans were so passive in the face of direct or indirect knowledge of atrocities like those described by Graebe.

Many teachers, for a variety of good reasons, might want to stop at this point, and others might wish to tread the uncertain ground of current parallels to the lessons of Nuremberg. Whether or not one chooses to expand beyond Herr Graebe is a personal decision. No matter what the decision, however, the teacher must resist the temptation to bring closure to the perplexities raised in class.

All that can be hoped for is that some light has been thrown on the nature of moral choice and that students who are operating at different levels of moral development have had the opportunity to hear and to understand the source of morality upon which others operate. If we can offer no more than vagueness in place of definite conclusions, we do so only because we have not been able in fact to resolve collectively the dilemma arising out of the conflict between social conformity and individual conscience or—perhaps more significantly—to deal effectively with the problem presented by those who see no conflict. If we do nothing more than make students aware that the problem exists for some among us and lead them to understand why it doesn't exist for others, some insight will have been gained, and our time will have been well spent.

Footnotes

1. Obituary, *New York Times,* September 22, 1970, p. 42.
2. Idem.
3. Idem.

4. Idem.

5. Theodore Roszak, *The Making of a Counter-Culture* (New York: Anchor Books, Doubleday & Company, Inc., 1969), p. 205.

6. See especially, Lawrence Kohlberg and Richard Kramer, "Continuities and Discontinuities," *Human Development* (December, 1969), pp. 97–120, and Lawrence Kohlberg, *Stages in the Development of Moral Thought and Action* (Holt, Rinehart and Winston, New York, 1969).

7. Lawrence Kohlberg and Richard Kramer, "Continuities and Discontinuities," *Human Development* (December, 1969), p. 100.

8. *Judgment at Nuremberg,* United Artists, Producer-Director: Stanley Kramer. (See study suggestions.)

9. Abbey Mann, *Judgment at Nuremberg* (New York: Signet Books, Little, Brown Co., 1959).

10. *Nazi Conspiracy and Aggression* (Washington, D.C.: U. S. Government Printing Office, 1946) V, 696–699.

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"Goering Proudly Defends His Nazi Record," *Life* (April 1, 1946).

"Hermann's Version," *Newsweek* (March 25, 1946).

Karl Heiden, "Why they Confess, the Remarkable Life of Hans Fritzche," *Life* (June 20, 1949).

T. Howart, "Eight Eyes on Seven Faces," *Newsweek* (August 18, 1947).

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J. Kirkpatrick, "Inside Story of Rudolf Hess," *Atlantic* (February, 1960).

D. Shabecuff, "Last Prisoner of Spandau," *New York Times Magazine* (August 28, 1966).

J. Dreyfus, "Again Schacht Comes Out on Top," *New York Times Magazine* (November 2, 1952).

Editor's Suggestions for Further Study and Discussion

RELATED FILMS

Judgment at Nuremberg, directed by Stanley Kramer, 186 minutes, black and white, dramatic treatment of the Nuremberg trials covering the arguments of both the defense and the prosecution, available from United Artists, 729 Seventh Ave., New York, N.Y. 10019.

Nuremberg, a 75-minute documentary produced in 1946 by the Department of the Army (check with nearest office for availability).

Secrets of Nazi Criminals, 85 minutes, black and white documentary, produced in Germany, available from Brandon Films, 221 West 57 St., New York, N.Y. 10019.

Night and Fog, directed by Alain Resnais, 31 minutes, a powerful and distressing film made primarily from documentary footage taken by German photographers in the Nazi concentration camps, some of it used as evidence in the Nuremberg trials. The most meaningful piece of film available on the subject, BUT MUST NOT BE SHOWN WITHOUT PREVIEW AND PREPARATION. Available from American Documentary Films. (Following this film, a discussion about the roles and responsibilities of photographers might be fruitful. Examine the case of the *Look* photographs in Mylai.)

General Alexander Doniphan. General Doniphan refused to execute the unpopular Mormon prophet Joseph Smith; part of the "Profiles in Courage" series, available from IQ Films, Inc., 689 Fifth Ave., New York, N.Y. 10022.

Other Study Suggestions

FOR AN HISTORIC PERSPECTIVE:

Have some members of the group research the topic of the removal of the Armenians from the homelands in 1915. This Turkish-imposed policy cost the Armenians, in addition to their lands, approximately 600,000 lives. (See C. L. Sulzberger, "The Forgotten People," *The New York Times,* Nov. 29, 1970, p. 11, section 4.) Ask the group to compare the Armenian experience with that suffered by the Jews, Poles, and other political prisoners under the Nazis. What reasons can they give for the lack of world concern over the plight of the Armenians? What other examples of genocide can they list which have gone without notice or punishment of the perpetrators? What constitutes genocide?

FOR A WORLD ORDER PERSPECTIVE:

Have some of the group report on the status of the United Nations Draft Convention on Genocide. What relationship does this treaty have to the Nuremberg Principles? How might it have affected the fate of the Armenians and of the European Jews had it been drafted earlier? How can such a convention be enforced? Would enforcement require changes in the international system? In the case of this particular draft, what are the chances of its being put into effect in the near future? Who supports it and who opposes it? What are the grounds for support and opposition? Might such a convention be a useful instrument in limiting the number of civilian victims in contemporary wars? Have any of the wars of this century been truly genocidal? Ask those who believe that some have been to provide evidence of both the fact and the intent. Do these arguments stand only in favor of opposing genocidal wars or may they be applied to all wars?

USING THE DRAMA

There are a number of excellent plays, most of them readily available in public libraries, which raise in a most interesting and provocative way questions of individual conscience and the State. Some have also been produced on television; for their availability, you should inquire at the film library of the University of Indiana. The following list of plays will be of use to those interested in this approach to the examination of such crucial issues:

The Andersonville Trial, by Saul Levitt
The Deputy, by Rolf Hochhuth
The Investigation, by Peter Weiss

The Man in the Glass Booth, by Robert Shaw
In the Matter of J. Robert Oppenheimer, by H. Kippardt and R. Steirs

BOOKS

Vietnam & Armageddon: Peace, War & the Christian Conscience, Robert F. Drinan, S.J., Sheed and Ward, New York, 1970, 210 pp., $5.95. A Jesuit criticizes the majority of American Catholics for their position on Vietnam and raises issues related to the logical inconsistency and moral ambiguity of many Christian attitudes on questions of war and peace. Suggests the possibility of post-Vietnam trials in Asia invoking the Nuremberg principles against the U.S. Provides a useful means of applying the Kohlberg scale to views on Vietnam.

Mylai:
Some American High School Students' Views

by ROBERT LOW and Members of His High School Class

The greatest honor history can bestow is the title of peace-maker. This honor now beckons America—the chance to help lead the world at last out of the valley of turmoil and on to that high ground of peace that man has dreamed of since the dawn of civilization.

Richard M. Nixon's Inaugural Address

How can one teach high school students that "The greatest honor history can bestow is the title of peace-maker"? War has played a major role in the history of Western civilization. History books, motion pictures, and television often condition us not only to accept international conflict, but almost to look forward to it as an opportunity to test our manhood.

It seems that almost nightly, in addition to the vivid news reports from Vietnam, there is a movie or program on some television station featuring total warfare with its indiscriminate killing of civilians and destruction of property. Young and old are subconsciously conditioned to believe that violent conflict between nations is the natural order of things.

To those who think about it, it is obvious that man must find an alternative to war as a means of resolving international problems. Nations have not abandoned armed conflict as an instrument of national

policy; instead, for decades they have been trying to develop rules to regulate and control it. But with the rapid developments in sophisticated military hardware and the proliferation of guerrilla insurrections, man's attempts to control war, much less replace it with new modes of conflict resolution, have not kept pace with the times.

As the 1969 school year was about to begin, I decided to do what I could to teach my twelfth grade government students about the efforts that have been made to use law to regulate and control war. From the World Law Fund I obtained two case studies, one on the Nuremberg trials and the other debating the legality of the nuclear bombing of Japan.

The class read and studied the cases, and then held a mock trial in which it was pretended that the survivors of the atomic bombings sued for damages in the World Court. In preparing for the trial, the students studied the World Court, the United Nations Charter, the Universal Declaration of Human Rights, and the relevant treaties and customs governing the use of weapons and the rights of civilians in time of war.

Just as the class was concluding the unit, the December 5, 1969, issue of *Life* magazine shocked the nation with pictures purporting to be of the alleged Mylai massacre. Terrible as the story was, I thought that it might serve as an effective vehicle for getting the students to relate the theory that they had been studying to a real and meaningful event. Further, I was anxious to see what their reactions and feelings were to the events so vividly described in the news magazines.

Each student was asked to write a paper on some aspect of the historical, moral, legal, and/or psychological implications of the Mylai tragedy. Every effort was made to keep the assignment as open ended as possible with one exception. The class was urged to refrain from passing hasty judgment. Unless one had been subjected to prolonged enemy fire, seen friends killed and wounded, and felt the general pressures of combat, how could he feel certain that he would not have done the same things that are alleged to have happened at Mylai? The students were asked to try to view the case not only through the eyes of the victims but also through those of the men accused of the acts.

There are rules governing war, and sometimes they are enforced. Yet typical high school government textbooks do not deal with the subject. They make little or no effort to prepare students for the great responsibility of military service that so many of them assume shortly after graduation. From talking to former students who have returned from combat, one can only conclude that it was their own basic goodness rather than any formal education in the public schools that has prevented numerous other Mylais.

As illustrated by the excerpts taken from the student papers on Mylai that are cited below, the project encouraged the class to take a sophisticated look at war, its cause, conduct, and impact. The assign-

ment did not produce any unanimity of opinion, and the students drew varied conclusions. Some even found it impossible to believe that Mylai ever happened. But the unit did raise a number of fundamental questions, and it encouraged the class to do some really original thinking. And that is what education is all about.

Excerpt from Student 1:

A small group of American soldiers have possibly massacred the occupants of a village in Vietnam. With the indoctrination which preceded their attack on the Son My village, a number of the possible deaths could be justified, but all the facts in this case will never be known. The atrocities of the press are the great crime in this issue. These soldiers are being tried in the press. In all my readings in preparation for this report, I have found few facts which would hold up in a court of law. The press has devoted itself to sensationalism; a crime against the men on trial and our system of law.

If this alleged massacre did take place, then it is grounds for withdrawal from Vietnam. But I do not feel that the people of the world can ever know the truth. With the press (in particular, magazines) having stooped to sensationalism, the defendants in this case have been tried and found guilty on circumstantial evidence. The truth will never be known; this is the true atrocity accompanying the issue.

Excerpt from Student 2:

Mylai will go down in history as a black mark for the United States. It will only prove, however, that Americans are humans and, like every group of humans, are subject to mistakes. These mistakes, though carried out by only a few, represent the whole group.

However, in defense, Americans of the future will say that the massacre was a fortune of war. Blame will eventually fall on the war itself and the incident will be used as a weapon against wars.

Excerpt from Student 3:

What will happen to the men? According to the 1949 Geneva Convention, military forces are forbidden mistreatment of noncombatants in a war zone, and the United States signed that agreement. The men could be tried by this declaration by a special committee appointed by President Nixon. Or how about the same convention, though this time regarding genocide.

Excerpt from Student 4:

This evidence, if indeed true, is extremely significant. If this attitude does prevail among many of the soldiers we must question the society which has nurtured these men. Certainly, they *are* responsible for their

actions. But can we wholly blame it on them? Are they not a reflection of *our* attitudes and desires?

Now, even the Geneva Conventions of August 12, 1949, do not protect Vietnamese citizens. Article 3, for instance, prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples." Yet, who judges what a regularly constituted court is? Because Americans claim they cannot distinguish a civilian from a non-civilian, how can any civilian be secured his rights as a civilian?

Excerpt from Student 5:

Another aspect to be brought up is whether the occurrence is actually more terrible than the war, itself, in Vietnam. Firstly, if a bomb had been dropped and killed the same people, would such an issue have been propagandized around the world? Not necessarily. Morally, if a person is killed by a bomb or by a gun pointed at his chest, makes no difference. The person will surely be dead either way. Does it make a difference which way he is killed? Secondly, the people killed were civilians. The incident was *not* accidental. Whether or not it was planned, the United States is as responsible for its crime as Germany was of its crimes.

Excerpt from Student 6:

In a country where technology is ruling humanity and where mechanical murder of civilians from planes is overlooked, the slaying of civilians by the hands of soldiers was particularly shocking. Many critics of war ask what the difference is—why is there a distinction in killing of whether or not the men can see whom they are killing. (People show little concern over the firebombings of Dresden in which 150,000 Germans were killed.)

Mylai is also a legal dilemma. Civilians cannot be court-martialled for crimes they committed during military service. Legislation must be enacted, such as trying men in federal courts for crimes committed while in the military. Another problem is whether or not these men can receive a fair trial. The men will plead that they acted under superior orders. But our laws concerning war crimes and related acts are defined. They forbid torture, looting, and killing spies or other persons who have commited hostile acts without a trial. A soldier is justified in not following an order if "a man of ordinary sense and understanding would know it to be illegal." But instant obedience is preached by the Army, and in combat a man may be executed on the spot for disobedience.

One main issue is where the orders came from originally. Another is whether the killing was necessary. Says a Boston law professor, "If

the court buys the argument that under the circumstances it was necessary to destroy the village for the preservation of Calley's men, and that this was the field policy of the Army, then I could see a verdict of not guilty. But that's a dreadful moral position for this nation to end up with." Men are morally responsible for their acts in war under the Nuremberg trials. Humanity comes before obedience to orders of crimes.

Excerpt from Student 7:

Psychologically, war impresses many new conditions upon the soldier. Indoctrination, propaganda, and other similar operations are usually used to the fullest in order to adequately condition a soldier against the enemy. But certainly this cannot justify the actions of these soldiers. The massacre of women, children and elderly people cannot possibly come under the justifications of war. It is questionable whether women and babies would serve as an adequate threat to our national security. War is hell, and the sooner men realize that it is not just a game, the sooner we'll be able to extricate ourselves from involvements like Vietnam.

Excerpt from Student 8:

First of all, the Mylai incident brings to mind the lesson of the Nuremberg Trials of 1945–46. It brings, I feel, to focus and into true perspective the historical issue of the killings. Attorney Telford Taylor, American prosecutor at the Nuremberg war trials, said that the lesson learned there (that the atrocities committed by the Nazis were not done by "individual monsters" but by very ordinary people) is being driven home in a very direct way. Taylor comments, when asked about the massacre, that the plea of being under orders was not recognized as a viable defense under American, British, and German military law. But, he continues, that there are many circumstances where the soldier simply cannot be expected to know what the ins or outs and rights or wrongs of the matter are. One must look with the greatest sympathy on the soldiers and officers caught up in the terrible difficulties of guerrilla warfare such as in the war in Vietnam.

This leads one to the moral and psychological issues brought out by the incident. Morally, any killing is wrong and a crime, but because of a thing called war and its rules of war, killing is justified so long as the war involved is sanctioning self-defense and punishing aggression—a Machiavellian concept of war as a legitimate instrument of policy making. It seems now, suddenly, the American people have become aware of their "morals" and have already zealously tried, convicted, and condemned the men accused of the massacre. Instead, if they in truth have morals, they and the press (who, I feel, have gone far beyond the limits in their encouragement of conclusion jumping resulting from

comment and inflammatory photographs that contribute to the masochistic hysteria) should strike to condemn war rather than condemn the men who are the victims of this most confused and brutal war. After all how can anyone send men to war and not risk their moral disintegration.

Furthermore I submit that instead of pondering on the legality of the killings, one should ask if war is legal; for, in fact, the circumstances arising from war are then justifiable. The drawing, taken from the editorial page of the Los Angeles Times, perfectly expresses my feelings. (The student attached a cartoon depicting a battle-weary soldier standing under the bloody inscription "My Lai Massacre." In the caption he asks, "How About All of War on Trial?")

Editor's Suggestions for Further Study and Discussion

FILMS

The Anderson Platoon, directed by Pierre Schoendorter, 65 minutes, black and white, depicts the sufferings and risks of the American field soldier in Vietnam. May be used to give his perspective on the war. Available from Contemporary Films, McGraw-Hill Book Co., 330 West 42 St., New York, N.Y. 10036.

In the Year of the Pig, directed by Emile de Antonio, 105 minutes, black and white, available from American Documentary Films. Takes a strong stand against American involvement in Vietnam and does so by depicting actual events which might be construed as war crimes. Also gives a good historic overview going back to the pre-World War II French colonial period.

PERIODICALS

"Mylai," Seymour Hersh, *Harper's Magazine,* May 1970, pp. 53–84. Although graphic in much of the description, brevity spares the reader much of the detailed horror in other accounts of the atrocities in Vietnam. Provides the single most useful short factual description which can be used as a basis for discussion.

"Our Mylai of 1900," Stuart C. Miller, *Transaction,* September 1970, pp. 19–28. An account of an incident in the Philippines which led to a court martial for war crimes. Offers specific comparisons to Vietnam and interesting photographs. Provides an excellent vehicle for bringing historic perspective to recent events.

BOOKS

At War With Asia, Noam Chomsky, Pantheon, 1970, 313 pp., $7.95. Critical of American policy in Vietnam and the methods by which it is

carried out, this book provides an overview of the effects of counter-insurgency as carried out by a technologically advanced nation against a rural village society.

The Indochina Story, Committee of Concerned Asian Scholars, Bantam, October 1970, 300 pp. (paperback) $1.25. Deals with war crimes within the context of a critique and analysis of United States policy in Vietnam. Well-documented historic approach, contains a chronology, as well as detailed bibliography.

Teaching About Dissent and the Draft

by JACK R. FRAENKEL

Most young American males who are eligible to be drafted, if and when they are called, accept their situation without thinking much about it. Some do think about it but decide to accept their fate anyway. A small but steadily growing number of individuals, however, are refusing induction. They respond in several ways. Some seek deferment —for numerous reasons, legitimate and illegitimate. Some burn their draft cards. Some overtly resist and go to jail. And some flee the United States to seek asylum elsewhere. Their schools have given few youths the opportunity to reflect upon the merits and consequences of these and other alternatives.

Those who refuse induction, not to mention those who desert from the armed forces *after* being inducted, do so for a variety of reasons. Some consider the current war in Vietnam "illegal" or "immoral" or both. Some object to having their lives interrupted. Some hold that all war is immoral, and that to participate as a member of the military is an immoral act. Some believe in the war but want the other side to win. Some are conscience-stricken—they inwardly and outwardly rebel at the thought that they themselves may be called upon to kill other human beings under circumstances that they would consider to be crimes of war. And some fear that they will be killed themselves.

The whole question of military service therefore represents not only one of the most pressing political issues of our time but also a profound personal problem for many young men in our secondary schools, as well as their families and friends. Though personal in nature, the social and political consequences of the problem require that it be considered seriously in courses dealing with public issues. It is my contention, in fact, that the discussion of such issues should comprise the very heart of secondary school social studies and they should be systematically explored by every social studies teacher in the land.

How might teachers help students explore such issues in their classrooms? Let me outline briefly one strategy that offers promise.

If students are to use effectively the information they obtain and apply it to the resolution of either personal problems or social issues, they must be encouraged to establish connections and relationships among otherwise unrelated pieces of specific information. The ability to establish valid relationships, i.e. statements supported by evidence, is essentially one of forming, using, and validating generalizations. Such a process is vital to reaching a reasoned position on any disputed issue.

Getting students to make warranted generalizations involves essentially three steps:

1. They must look at two or more different samples of content with the same questions in mind. For example, what are the various reasons for refusing to serve in the armed forces offered by a number of dissenters?

2. They must then explain the data they have obtained by determining why various individuals differ in their reasons. For instance, why do some give a moral reason, some a legal one, and some personal reasons?

3. They must then offer a generalization by inferring what are the common factors and differences involved in a number of situations. For example, they might identify similar reasons that could be categorized as moral, legal, personal, etc., and explain how and why they are similar.

An interesting device for opening discussion of dissent from the draft and getting students to generalize about the phenomenon is to offer a set of cases or brief descriptions of actual instances in which young men refused induction. Students might offer cases that they themselves know about.

A sequence of questions that a teacher might use to help students formulate generalizations is illustrated below:

—What happened in each of these experiences?
—Why do you suppose it happened as it did?
—In what ways are the descriptions different? Similar?
—How would you explain these similarities and differences?

Note that the same questions are to be asked of each account in a definite order. This order is based on the assumption that students must understand what is occurring in each instance before they will be able to explain why it is occurring. They must decide *how* two or more instances are similar or different before they will be able to explain *why* they are similar or different.

Getting students to generalize is not as easy as it may seem. If they are to suggest relationships that are anything more than trivial truisms, they will have to make inferences which go beyond that which is directly given them in the cases or whatever study material is used. In the above example, they must not only identify and understand but also generalize about the reasons offered by the dissenters, and in turn make further generalizations by comparing and contrasting the generalizations which different members of the class suggest. They might then obtain information about dissent in other phases of military service or warfare, such as cases in which individual soldiers refused to follow orders, troop mutinies, or objections to certain actions (from particular combat instances to the entire war system).

In this strategy, an effective starting point is to begin with student concerns. Indeed, all classroom instruction and investigation should originate there. We might first ask students to think of an incident in which they themselves dissented (e.g. against a parental dictum, or a school rule), to state their reasons for so dissenting, and to describe how they felt about their action. They might then suggest a rather narrow statement (narrow in the sense that it only applies to themselves) as to why people dissent in a particular situation.

The class can now be assisted to broaden the applicability of their generalization. Students can be asked to consider how other people might feel about dissent. Information can be obtained about various people who have dissented, such as the German theologian Dietrich Bonhoeffer, the Anglican priest Michael Scott, the American medical officer, Captain Levy, the Soviet writer Yuri Daniel, the French writer Jean-Paul Sartre, or the young man down the street who refused induction. Different learning activities can be employed, such as reading, interviewing, and inviting speakers to class, the individuals' reasons for dissenting can be reviewed and their feelings about dissent considered. General statements about each of the different dissenting individuals can be expressed, these generalizations compared, and then as inclusive and broadly applicable a generalization as possible can be suggested and evaluated. This last step is probably the most significant. By evaluating generalizations about dissent from certain forms of military activity and various forms of warfare, students will have to come to grips not only with societal values about individual rights and warfare but also their own personal values. They will have to understand the social consequences of individual actions and face up to the fact that personal values sometimes conflict with social values. Such conflicts represent a major problem for our young people, and the schools have an obligation to help them deal with it. Helping students to develop the ability to generalize and subsequently to evaluate is one way of fulfilling that responsibility.

The greatest difficulty which students have in learning how to make inferences and generalizations of a more than trivial nature lies in the

fact that they have had little practice in the past in going beyond what they find on the printed page. Many are conditioned to accept as literal gospel that which is on the pages of their textbooks and other sources, and are discouraged from abstracting important ideas from these same pages. Trained to settle for specific answers as found in the text, they are uneasy about probing the information given there. They have no model for "going beyond the data," and certainly no experience in handling general issues and value conflicts. An 18-year-old or a 20-year-old "regular soldier," faced with the question of what to do when his life is threatened by a six-year-old "irregular" who happens to be a guerrilla with a hand grenade, has usually had little from his schooling that will help him. If his country and his commanders expect him to react with anything more than his guts, then the schools had better help him learn how to use his head. Suitable teaching techniques such as the inducing of generalizations are being devised. They must be more widely used in our classrooms and responsibility applied to issues which concern and affect students, if the schools are to help students develop the capacity to envision and consider the full range of alternatives that exist even in areas of sharp controversy.

Editor's Suggestions for Further Study and Discussion

FILMS

Either of the following will provide a good basis for discussion of the draft and dissent. Both are available from American Documentary Films.

Some Won't Go, directed by Gil Toff, 50 minutes, black and white, depicts the draft through the eyes of resisters.

Sons and Daughters, directed by J. Stoll, 90 minutes, black and white. A strong indictment by youth of the war, the draft, and military training.

PERIODICALS

INTERCOM, November/December 1969, focusing on *Conscience and War,* contains very useful resource suggestions on the subject of the draft, dissent, and the rights of the military.

"Nuremberg and Vietnam," Telford Taylor, WAR/PEACE REPORT, November 1970, is an article taken from his book on the subject. Taylor reviews American attitudes (both military and civilian) toward the atrocities, but more importantly for those interested in teaching about such events in relation to the draft, he discusses the rights of the soldiers on trial and cites significant earlier cases: i.e., Levy and Duffy.

"Song My & Phoenix Operation," Diane Leonetti, *Fellowship,* March 1970. Against the backdrop of an indictment of the Phoenix program,

describes the case of two dissenters, Reitemeyer and Cohn, who won CO status. In the same issue, "Our Sons Are Both Executioners and Victims," by Robert J. Lifton, is a compassionate view of the plight of the American soldier in guerrilla warfare.

BOOKS

The series edited by Dr. Fraenkel, INQUIRY INTO CRUCIAL SOCIAL PROBLEMS contains two useful titles for study of this topic. Marion A. Bressler and Leo A. Bressler, *Country, Conscience and Conscription,* and Frank Kane, *Voices of Dissent.*

The Limits of War, PUBLIC ISSUES SERIES, American Education Publications, Education Center, Columbus, Ohio 43216, 1970. Contains a good short account of the Howard B. Levy case.

The Battle of Algiers:
A War of Liberation

by MARGARET CARTER

In the classroom "war crimes" are often distant events enacted by other people in other lands at other times. Students can intellectualize, holding forth with aloof verbalization, because they are not involved. The complexities of the question of what constitutes criminal action in pursuit of a "just" cause are often not realized in the study of expository material. However, the sounds and imagery of the right film can offer opportunities for the affective involvement of students in the analysis of feelings, values, and attitudes toward the issues of responsibility and justice.

In *The Battle of Algiers,* director Gillo Pontecorvo provides the texture and tone of a revolution. He cautions the viewer that the film does not contain any newsreel footage and that it is a reenactment of specific events in Algeria during the years from 1954 to 1957. But the grainy film, the hand-held cameras, and the naturalness of the actors argue that "this is for real." Indeed, the scenes of torture and mayhem have so much impact that under no circumstances should it be shown without previewing by the teacher or discussion leader.

When the terrorists intensify their campaign to rid Algeria of the French, the colonial government calls in a World War II hero, Colonel Mathieu, and his paratroopers to destroy the rebel organization. The Colonel turns to his task with dispassionate military precision: "There is the objective. This is the way to achieve it." The outline of the staff

and line of the National Liberation Front is neatly chalked on the blackboard, to be filled in with names of rebels. The Colonel hesitates for a moment and points out that the job might be considered dirty or distasteful because it will be necessary to use torture. But, he assures his soldiers, it is their duty and is absolutely necessary.

The story focuses on Ali la Pointe, the last name to be filled in on the chart. He is cornered in a walled-up cubicle in a house in the Casbah. With him in the cramped space are a young, newly married couple and a small boy who have each played an active role in the terrorist activities. The Colonel asks them to surrender, or at least to send out the woman and the child.

As the paratroopers prepare to blow up the building, a series of flashbacks traces the development of the illiterate boy of the streets who finds personal identity and purpose in the NLF. We see Ali encountering Frenchmen and each time being classified as "an Arab," a worthless Algerian. He, in turn, sees a European as an oppressor. Neither Frenchman nor Algerian sees another human being . . . only "the enemy."

Through the flashbacks the viewer is able to follow the escalation of murder and destruction as the two opposing groups become locked into their dedicated death struggle. Neither side exhibits concern with human life. There are no "innocents." Every individual is classified as "Arab" or "European" and, therefore, "friend" or "enemy." For instance, one group blows up whole apartment houses at night, while the other knifes a doctor on an emergency call and uses his ambulance to run down people who just happen to be on the street. In this climate of violence the only thing that matters is the liquidation of "the other side."

Who "wins" in the end? Well, the Colonel feels victorious because his chart is completed, but in a flash forward of several years the people of the Casbah take to the streets in huge numbers to drive the French back across the Mediterranean. A voice asks the crowd, "What do you want?" And the crowd replies, "We want our freedom! Long live Algeria!"

Discussion Ideas

EMOTIONAL RESPONSE

How do the students feel about the film? With whom do they sympathize or identify? Why? What might have been the "feelings" of Ali, the Colonel, the parents of the small boy, or the wife of the doctor?

In 1966 the French Government barred from France the co-producer and former guerrilla, Yacef Saadi, because they feared "incidents that could disturb public order." Can students explain this attitude?

Come back to these ideas again after further discussion.

VALUES

Students should be able to state the positions held by the French and the Algerians, pointing out the values held and considered most important.

LABELS

Give consideration to the meaning of "dehumanization." There are enough examples of Frenchmen and Algerians confronting each other in their everyday activities to enable students to make inferences about the dehumanization of individuals seen through group labels. The daily news can provide them with current examples from all parts of the world.

What happens when we label someone as "the enemy"? Can he still be a person? Does he have "human rights"? Why?

RESPONSIBILITY

Students might be asked to respond to such statements as:
(1) "These people were all good and honorable. They were forced to act in immoral ways because they were caught up in *history,* a sequence of events over which they had no control."
(2) "All means are justified if we believe our cause is right."

ALTERNATIVES

Give consideration to the possibility of any alternatives which were open to (1) individuals such as a soldier under Colonel Mathieu's command, the Arab girl who bleaches her hair and dons European clothes to plant a bomb in a dance hall, or the doctor, (2) the NLF, (3) the French Government, and (4) other governments.

JUSTICE

To whom could Ali have appealed under the colonial system for a fair hearing?

Can the students envision a judicial system that could have prevented the bombings and murders? What kind of changes would have to be made in our world to lessen the chance of such occurrences? How might the cause of rebels be assured a fair hearing?

WARFARE AND CRIME

Would students classify any of the film's acts of violence as crimes? Can they explain their answers? Can acts performed in the pursuit of justice ever be considered criminal? Why?

Were any of these victims of violence "protected" by the Geneva Conventions?

Since the laws of warfare and various conventions about the treatment of prisoners and civilians have often been violated, and no nation which has engaged in war is without blame, what should we do? Consider among others these possibilities: (1) accept this condition as an inevitable "fact of life," (2) make new laws on the conduct of warfare, (3) revise enforcement procedures of the old laws and "crack down" on the offenders.

ACTIVITIES

1. Have three girls do soliloquies of the thoughts of the three Algerian women as they disguised themselves in order to carry out their terrorist assignments.

2. Students could select other revolutions—checking to see if other groups of rebels have resorted to campaigns of terror.

3. An "Ali" might present his case to the Court of Mankind and call upon "witnesses" who were Frenchmen or Algerians depicted in *The Battle of Algiers.*

4. Shift the setting of #3 to another revolution, e.g. the American Colonies in 1770, with "Ali" a Yankee Patriot and the Colonel an English general. Students could consider whether or not the struggle was different and whether those two adversaries regarded each other in a manner similar to that of Colonel Mathieu and Ali.

Editor's Suggestions for Further Study and Discussion

FILMS

The Battle of Algiers, directed by Gillo Pontecorvo, 123 minutes, black and white, available from American Documentary Films (which also distributes various other films on wars of liberation: write for catalog), 336 West 84 St., New York, N.Y. 10024 or 379 Bay St., San Francisco, Calif. 94133.

Algeria—What Price Freedom, produced by NET, 54 minutes, black and white, a more objective documentary, available from Indiana University, Audiovisual Center, Bloomington, Indiana 47405.

PERIODICALS

"Body Count: The Degrading Illusion," *Nation,* November 16, 1970, pp. 486–489. Offers some insights on a professional soldier's perspectives on one of the most dehumanizing practices of the Vietnam war.

BOOKS

A Dying Colonialism, Franz Fanon, Grove Press, 181 pp., $1.95 (paperback). An account of the Algerian struggle for independence which covers the aspects of civilian victims and the dehumanizing aspects of the colonial system, and the response of revolutionary guerrilla warfare.

DRAMA

Les Blancs, Lorraine Hansberry (final text adapted by Robert Nemiroff), not yet published play currently being performed at the Longacre Theatre in New York City. In gripping theatrical form, raises the same issues as *The Battle of Algiers*—colonialism, dehumanization, violence, and racism—in a setting of sub-Sahara Africa. Recommended to those in the New York metropolitan area.

Twenty-five Years from Hiroshima

by JONATHAN WEIL

The film *Hiroshima-Nagasaki, August, 1945* begins with the image of the mushroom cloud and then probes the devastation to describe the consequences of the world's first atomic attack. With this film and other new materials, the classroom teacher, too, can begin to go beyond our image of the mushroom cloud and inquire into some of the consequences and issues related to the use of weapons of mass destruction. The film, produced by the Center for Mass Communications of Columbia University, is based on photographs made by nine Japanese cameramen. Shot during the days and weeks following the 1945 dropping of two atomic bombs, the footage had been classified by the United States military authorities and barred from all public viewing. Requests by the Japanese leaders over the past twenty-five years finally led to the release in 1968.

Hiroshima-Nagasaki, August, 1945 focuses on the human victims of nuclear war. It is in a very real sense "a horror film." No teacher or discussion leader should show it without previewing, and should prepare his audience for its emotional impact. A document of human agony and despair, it tells about people forced apart from the rest of the human community through the unique experience of having been the first victims of a nuclear attack. A teacher should therefore make a careful assessment of the students' ability to deal with the experience of witnessing actual dehumanization—the sufferings of the injured of Hiroshima and Nagasaki. It is also important to develop a classroom

unit that helps eliminate the feelings of helplessness left by the film. One resource for this is *Hiroshima: A Study in Science, Politics and the Ethics of War,* by Jonathan Harris, a unit in the AMHERST PROJECT SERIES, published by Addison-Wesley, which documents the reflections and exchanges among American wartime leaders prior to the decision to use these weapons.

The combined use of the film, the Amherst unit, and the Shimoda Case (described below) provides a unique basis for a discussion of the rights and responsibilities of individuals in the war system. If the film offers a disturbing picture for the viewers, the case provides an excellent opportunity for students to reflect upon the international institutions and processes responsible, while the Amherst unit provides readings for inquiries into the "science, politics and ethics of war."

The Shimoda Case, although mentioned infrequently in discussions of the Hiroshima bombing, has a very special significance to the problems of the human person in the war system. In it, a vanquished nation was asked to pass judgment on the conduct of the war by the victor, and a national court had to rule upon the rights of individuals under international law. In 1955, Ryuichi Shimoda and four other plaintiffs brought suit against the Japanese Government, asking modest compensation for injuries suffered in the atomic attack. Their case was presented in a Tokyo District Court, where they argued that the use of atomic bombs violated international law, citing several treaties and agreements which prohibited the use of such weapons against civilian populations. Neither Hiroshima nor Nagasaki, they noted, had been centers of war production or contained important military bases or targets. These undefended cities had been attacked by surprise. In addition, they claimed violation of domestic law of Japan, where homicide is excused only if justifiable under international law.

In its argument, the Japanese Government was obliged to defend the use of the atomic bombs by the United States. As the defendant, it readily conceded the facts about the bombing of Hiroshima and Nagasaki, including the grievous damage suffered by the Japanese people. The defense claimed, however, that there were no specific legal prohibitions against the use of atomic weapons, which were unknown when the Geneva Conventions were drafted, and that the plaintiffs, being individuals, had no rights to claim damages under international law.

In considering the arguments of the contesting parties, the court ruled that these were in fact the only issues in dispute—the legality of atomic bombings and the rights of individuals to claim damages from violation of international law. The court held that the atomic attacks upon Hiroshima and Nagasaki were in violation of international law and further ruled that a belligerent is liable for damages when it illegally injures another belligerent. But, the court stated, the plaintiffs

had no right to claim damages, since international law applies only to governments, and regulates relations among governments which have given their assent to such regulations. The United States was liable and it should have paid Japan, but the plaintiff could not collect because individuals have no rights in international law other than as represented by their nation states.

Procedures for Inquiry and Discussion

STATING THE ISSUES

The atomic bombings of Japan raise some critical issues of human rights and warfare. Some of the most crucial among them are:

1. Should weapons such as nuclear devices and chemical and bacteriological agents be added to the list of practices of war outlawed by treaties? Why did the United States fail to vote in favor of the resolution against the use of nuclear weapons approved by the General Assembly in 1960? And why did we oppose a resolution to add massive bombing of civilians and the use of chemical weapons to the list outlawed by the Geneva Convention?

2. Do we need new procedures for defining, preventing, and prosecuting crimes of war, and for distinguishing between combatants and noncombatants?

3. What rights do individuals have in international law? Should the victims of war crimes have the right to sue in courts of law? If so, in which courts? Do we need new institutions and procedures for protecting human rights in warfare?

SHOWING THE FILM *Hiroshima-Nagasaki, August, 1945*

Before showing the film it is important to provide background on what the film depicts and the circumstances of its production. *Hiroshima-Nagasaki, August, 1945* is an actual record of events that occurred in these two Japanese cities immediately after the bombs were dropped. After wandering through scenes of utter destruction by blast and fire, the cameramen entered emergency hospitals and recorded the mutilations and radiation burns suffered by the survivors. Because there are highly affecting close-ups, viewers should understand that they may leave during the showing, if they so wish. After the film, allow the audience to express their feelings freely. You might ask them about how they feel about the horrible suffering depicted in the film. Ask them who should see this film. You might explore the question of the long-term consequences of this event to the people of Hiroshima and to the world.

THE SHIMODA CASE

Provide the group with the basic facts of the Shimoda Case. Divide them into smaller groups and pose the questions listed below. Have each group select a chairman and a recorder. After enough time for research and/or exploration, have each chairman report his group's thinking to the class, and open each topic for general discussion.

Questions for the Shimoda Case:

1. Although the United States used the atomic bomb in 1945, what would have been our attitude had the Germans used it in a last, desperate effort to avoid defeat?

2. Would the ruling of a world court have been more significant than the ruling of a Japanese court? Why?

3. What gaps do you think exist in international law between the establishment of individual responsibilities and the protection of individual rights?

4. Why do those injured in international conflicts have no personal legal right to redress for the damages they have suffered? Should they have such right? If you believe they should, how could such procedures be established and carried out?

THE AMHERST PROJECT UNIT

Have the group read the Hiroshima unit by Jonathan Harris, then review the conclusions reached in the discussions of the Shimoda case. Ask if their opinions have been changed by knowing the decision-making factors in the case. If so, how so? Does the unit provide any helpful insights into questions of individual responsibility? Does it assist in drawing general conclusions about the morality and efficacy of the war system?

SUMMING UP—ADDITIONAL QUESTIONS FOR THOUGHT AND DISCUSSION

There are many ways in which you may want to conclude this unit of study. Often useful is the introduction of a new and related item or way of looking at the material studied. The questions listed below suggest other relevant matters for student discussion.

1. To what extent is the international law cited in the Shimoda Case enforceable under the present international system? How could enforcement be extended?

2. What procedures exist for resolving conflict and controlling violence in national societies? in the international community? Are these procedures adequate?

3. What practices exist within nations to defend individuals against crimes and to assure their civil and human rights?

4. Thinking back to what happened at Hiroshima and Nagasaki, do you think there is more or less chance for nations to refrain from the use of such weapons? What restraint does the United Nations' resolution against nuclear weapons place upon a nation's freedom of action? Is the unrestricted sovereignty of nation states a help or a hindrance to protection of individual rights?

5. Give arguments for and against war crimes trials. Does the Declaration of Human Rights provide validity for such procedures? Who should conduct such trials?

Suggested Readings

Richard A. Falk and Saul Mendlovitz (eds.), *The Strategy of World Order,* Volume I, World Law Fund, New York.

"The Shimoda Case: A Legal Appraisal of the Atomic Attacks upon Hiroshima and Nagasaki," *American Journal of International Law.*

Richard A. Falk, "The Claimants of Hiroshima," *Peace Is Possible,* edited by Elizabeth Jay Hollins, Grossman Publishers, New York, 1966.

The Limits of War, PUBLIC ISSUES SERIES, American Education Publications, Education Center, Columbus, Ohio 43216, 1970.

Diplomacy and International Law: Alternatives to War, American Education Publications, Middletown, Conn., 1970.

Jonathan Harris, *Hiroshima: A Study in Science, Politics and The Ethics of War,* Addison-Wesley, Palo Alto, Calif., 1970.

John Hersey, *Hiroshima,* 1946, Bantam, 75¢.

John Feis, *The Atomic Bomb and the End of World War II,* Princeton University Press, Princeton, N.J., 1966.

Editor's Suggestions for Further Study and Discussion

FILMS

Hiroshima-Nagasaki, August, 1945, produced by Eric Barnouw, 16 minutes, black & white, available from the Center for Mass Communications, Columbia University, New York, N.Y. 10027.

Hiroshima, Mon Amour, directed by Alain Resnais, 88 minutes, black & white, French with subtitles, a story of personal consequences long after the fact. Available from Audio Film Center, 34 MacQuesten Parkway S., Mt. Vernon, N.Y. 10550.

The Children of Hiroshima, a Japanese-made film with subtitles, 93 minutes, black & white, available from Brandon Films, 221 W. 57 St., New York, N.Y. 10019.

BOOKS

Peace Is Possible, Elizabeth Hollins, Grossman, 350 pp., $1.75. Available from World Law Fund. Contains a detailed account of the Shimoda Case and Robert J. Lifton's article on Hiroshima.

Defoliation, Thomas Whiteside, Ballantine, 143 pp. A very thorough report on the consequences of the use of herbicides in Vietnam. Of special interest to those who study in detail the Shimoda case and the decision regarding the bomb.

The Destruction of Indochina, Stanford Biology Study Group (Box 3724, Stanford, Calif. 94305), 1970. A shorter treatment of the topic covered by Whiteside.

Michael Scott:
An Individual and the International System

by BETTY REARDON

When we reflect upon the issues and problems of individual rights and responsibilities in the international system, the negative aspects often dominate and we find ourselves thinking only of "criminal responsibility" and of the need to restrain, more than the need to facilitate, the actions of individuals. There are, however, some who have dedicated themselves to positive courses of action within the realm of international politics. From them we can learn much about how to influence the system toward the fulfillment and extension of the rights of the human person.

In a series of conversations with one such person, Reverend Michael Scott, I learned something about the outlook and strategies of someone who has attempted to deal with international system problems from the perspective and within the resources of a single human being. Some of his observations, I believe, will be of interest to those concerned about replacing the war system with more humane modes of conflict resolution.

For years Michael Scott has been coming to the UN General Assembly in an effort to remedy a grave injustice imposed by one nation state upon a minority group subject to its political power. As Reverend Scott views the situation, the basic injustice in Southwest Africa is discrimination against the native inhabitants because "they were what they were," a culture different from the ruling classes of the Union of South Africa. Indeed, he recognizes that other colonial powers have

enslaved and annihilated large numbers of people, but the unique situation in this case is the continuation and expansion of this policy of repression into the postcolonial period.

The inhabitants of Southwest Africa have no vote, no representation within the government, no way of having their voices heard or their needs heeded by South African decision-makers. Yet they are subject to the political decisions of the state and required to pay no less taxes than those people who do enjoy civil rights. In virtually every aspect of life these people are separated from those who govern them. They have, in effect, been dehumanized to the point of being simply a basic resource. So dehumanized in fact, that even into the 20th century, humans were hunted, slain, subjected to taxidermy, and publicly displayed in museums. The administration of Southwest Africa is a clear case of institutional violence.

There was no recourse open to these people to ameliorate their condition. Prior to the establishment of the United Nations, there were virtually no channels through which they could seek justice. Until recently, there were no means, and no hope of building the means, of taking their rights by force. Glimmers of hope of justice through international adjudication, however, began to flicker when the United Nations heard their pleas through the voice of Michael Scott and others like him, mainly scholars and clergymen. The roles of such individuals, of the World Council of Churches, the United Nations, and the International Court of Justice, in the Southwest Africa case are an excellent illustration of the multiplicity of actors in the world system. Especially interesting is the role of one individual working in opposition to a nation state for the rights of certain human persons who are unable to employ the war system.

Reverend Scott learned of these dire conditions during his own first ministry when he was assigned to South Africa after having served in the British armed forces in World War II. The conditions in the slums of Johannesburg brought home to him the meaning of economic inequity, and the lack of social justice inherent in the apartheid system. He came to believe that the future and the survival of the white race depended upon the liberation of the nonwhite peoples subject to their rule, a liberation which he felt could and should have taken place quickly and peacefully after World War II. In practical as well as moral terms, this would have been to the advantage of all. Scott publicly disassociated himself from the white policy-making elite in an effort to bring these conditions to the attention of the people of England and the United States. At that time he believed that if the conditions were known they would be changed. Gradually he came to realize that changing the situation required a struggle against powerful vested interests, garnering profits largely at the cost of the extensive suffering and dehumanization of the laboring black people of South Africa.

Scott's involvement in the case began shortly after his release from a jail sentence, imposed upon him for having sat in with mine workers protesting employment conditions. As the only European then known to these Africans to have a concern with their problems, he was approached by the people of the area now known as Namibia, and asked to plead their cause before the United Nations. Their chief came to Scott and told him the long tale of his peoples' oppression. Their lands had first been taken from them by the Germans, and their hope of reclaiming them after the first World War ended when the South African Government received these lands as a mandated territory from the League of Nations. One oppressor had been replaced by another. The Second World War, which had been fought for the "four freedoms," had not advanced their fortunes in the least.

Although feeling less than adequate as a representative of these people, it was clear to Scott that they had no other voice. Accepting this charge, he began the suit on their behalf, on the basis that the UN was the legitimate successor of the League and could return their lands to them once the violation of the conditions of mandate had been documented before the international body.

Scott had no personal funds and lost his institutional association with the Church of England, which he had counted on as his main resource, when his license was revoked by the Bishops of South Africa. Efforts were made to discredit him as a responsible representative of the people whose cause he had taken up. He persisted, however, and it ultimately became apparent to the United Nations and to responsible individuals outside South Africa that there was inherent justice in his cause. He gained assistance from many people, one being the Bishop of Chichester in England, an outstanding ecumenicist who issued him a license to preach wherever he was invited to do so, thereby enabling him to support himself. Some agencies became interested in the cause, including the International Commission of Jurists.

One high moment of hope was dashed when after years of effort the case was at last brought before the International Tribunal at The Hague, which then refused to rule on it on a technical basis. In 1969, there were some hopeful developments. The Security Council acknowledged the termination of the South African mandate—a termination which the General Assembly had already declared in 1966—but even more important, actions began to be taken indicating that the UN's Fourth Committee, set up to govern Namibia on behalf of the United Nations, assumed that it indeed had that power. Individual Namibians now had some status in the international community by virtue of travel documents issued to them as a kind of "United Nations passport." In the spring of 1970, Reverend Scott presented to the Committee a potentially precedent-setting proposal drafted by Professor Gidon Gottlieb of New York University for a UN commission to hear the claims of the Namibians.

The case points up two very significant factors currently at work in the international system; the unrestrained and often perverse power of the nation state and the persistence and courage of certain individuals dedicated to transforming that system into one capable of achieving justice. The Government of South Africa continues to defy the United Nations, even after a General Assembly resolution of 1969 stating that the situation was a threat to the peace and expressing "solidarity with the people of Namibia in their legitimate struggle against foreign occupation."

Reverend Scott continued to oppose some of the most powerful forces in his own nation, and in his testimony of October 1970 raised some very clear questions of specific individual responsibility for the flagrant injustices in Southwest Africa. Ht contended that the Government of the Union of South Africa is aided in its defiance of the international community, as represented by the United Nations, by certain individuals in the United Kingdom, and that these included members of the Cabinet who have profitable investments in the area which they wish to protect, even if it means the use of force. There is unrestrained power opposing the Namibian cause, whose advocates, mostly clergymen and scholars, seek to achieve their goal through procedural and juridical methods. The resolution of this case can have significant impact on the development of the international system.

Reverend Scott perceives the significance of this and therefore continues his struggle. He sees also that flagrant violations of the rights of human persons can lead to open hostilities and armed violence. If some legitimate attempts to redress injustice are continually frustrated, the oppressed may themselves become violators of human rights, and insurgency can be a major threat to the peace. Southwest Africa has the potential for exploding into the kind of warfare conducted in Vietnam; in Nagaland, India; in Biafra; and in so many places of the world where minorities are struggling against the power of major nation states. Scott points out that continued frustration can only lead to more desperate measures. People fighting for their identity and human existence do not give up easily, he observes, noting particularly the case of the Nagas, a people little known outside their land in the hill country where India borders on Burma. For fifteen years the Nagas, also aided by Scott, have continued their struggle with minimum resources, no outside aid, and little interest in their cause. These people, unlike the Southwest Africans, have yet to achieve even a hearing before the United Nations.

Considering this circumstance, and the fact that nearly a quarter of a century of supplication and litigation has not brought justice to Southwest Africa, one may ask why Michael Scott has not lost faith in the United Nations. He responds that he never based all his hopes on the United Nations. Clearly, it is an inadequate institution for the

purposes of protecting individual rights in the present international system, being so often frustrated by the sovereign power of nation states. He believes, however, the means can be found to make the United Nations an adequate channel through which individuals may appeal for ultimate justice. The continued existence of the organization, he holds, asserts the primacy of man's struggle for survival and supports the hope that questions of human rights and individual dignity may ultimately be divorced from ideological and power struggles. Procedures may be established through which individuals and minority groups may seek redress of injustice instead of turning to power groups with which they may have no real ideological community, simply to gain the force to pursue their cause. Such procedures, he believes, are vital to the fulfillment of human rights and to the abolition of the war system.

When asked, "Are juridical procedures really necessary to create humane conditions in the international system? What about the claim that the real need is to make better men, to develop the sense of brotherhood and concern for other human beings, and an identity with all mankind? Don't we need these feelings more than we need procedures?" he responded that indeed many fronts must be covered at the same time. But were we to depend solely upon the conversion of mankind to a more humane attitude, people would go on being oppressed; new heroes might emerge, but the lot of the oppressed would not be changed. Under such circumstances virtues may develop but will not prevail. Procedures and processes to resolve differences and to establish justice must be found. We must use what we have now, expand and improve it, so that ultimately peaceful measures of change may replace the war system.

Reverend Scott expressed concern for two significant needs in the movement for peace and human rights. He believes that the success of the movement depends upon its integrity, with that in turn resting upon the logical and moral consistency of its strategies and the individual integrity of its adherents. Above all, individuals who see these problems clearly and who understand the procedural and institutional needs must take action. Michael Scott has acted.

Some Questions for Discussion of the Role of the Individual in the International System

1. What are the risks and personal costs involved in individual opposition to one's own or another nation state? What are the rewards and satisfactions?

2. Under what conditions, in your opinion, is it legitimate to oppose the will of the nation state? Under what conditions might such opposition not be legitimate? Can you establish moral or legal guidelines for such opposition?

3. Under what circumstances do you think nation states should be forced to submit to the will of the international community? How should this will be enforced?

4. Is individual action an effective means to bring about change in the international system? Try to think of both positive and negative examples.

5. Compare the strategies employed by Michael Scott to those used by Ali in *The Battle of Algiers.* a) Evaluate them in terms of morality, and political efficacy. b) How should contradictions between these two criteria be resolved? c) Evaluate them in terms of human cost. You might want to look into the current state of civil liberties and the rights of minorities in Algeria in order to have more adequate data for this inquiry. d) How would the Kohlberg scale described in Thorpe's article apply to these strategies?

6. Review the various strategies used by the civil rights and peace movements in the United States. a) Compare the tactics of various factions within the movements. b) Evaluate them in terms of moral and logical consistency with their purposes. c) Apply the Kohlberg scale to the strategies discussed.

7. Under what circumstances does violence appear to be an effective political tool? If you were a member of an oppressed group would you abjure violence?

8. What actions can you as an individual take for human rights? What actions should you take?

Editor's Suggestions for Further Study and Discussion

FOR FURTHER INFORMATION ON THE SOUTHWEST AFRICA CASE:

Issues Before the 25th General Assembly (as cited following the Falk article) contains recent information on Namibia in the section entitled "Colonial Peoples."

An account of the case before the International Court of Justice has been published in the HAMMARSKJOLD FORUMS, *Race, Peace, Law and South Africa,* by Oceana Publications, Inc.

United Nations Press Release, G.A. 4187, April 22, 1970, an account of Michael Scott's testimony before the Council, on Namibia.

Other individuals to be researched and studied, inquiring into their purposes, strategies, and attitudes toward violence, and the results of their efforts on international politics and human rights: Albert John Lutuli, Dietrich Bonhoeffer, Grenville Clark, Dr. Tom Dooley, Mahatma Gandhi, Che Guevara, Martin Luther King, Dr. Albert Schweitzer, and others from a list drawn up by the group.

RELATED FILMS

Come Back Africa, directed by Lionel Rogosin, 83 minutes, black and white, a cinema verite treatment of the human meaning of apartheid, distributed by American Documentary Films, 366 West 84 St., New York, N.Y. 10024.

South Africa, a color documentary on the system of apartheid, 28 minutes, also distributed by American Documentary Films.

Mahatma Gandhi—20th Century Prophet, a black and white documentary, 82 minutes, distributed by Audio Film Center, 406 Clement St., San Francisco, Calif. 94118.

The Life of Mahatma Gandhi, a black and white documentary made in India, 78 minutes, distributed by Films of India, 109 South Edinburgh Ave., Los Angeles, Calif. 90048.

Looking Back:

Education on War, Peace, Conflict, and Change

Vol. 12, No. 3 (Fall 1970) $1.50

A broad survey of the present situation in secondary school social studies with respect to teaching about war, peace, conflict, and change, covering problems, prospects, and areas which need developing. Describes some projects and organizations, includes a bibliography.

Careers in World Affairs

Vol. 12, No. 2 (March/April 1970) $1.50

A directory of employment opportunities in international affairs and overseas work, covering government, international organization, business, teaching, and voluntary organization career possibilities. Includes information on where to apply, as well as training, education, and previous experience required.

From Aid to Development

Vol. 12, No. 1 (January/February 1970) $1.50

Analyzes domestic problems arising from overseas development, summarizes situation to date and Pearson, Peterson, Tinbergen, and Jackson reports.

Conscience and War: The Moral Dilemma

Vol. 11, No. 3 (November/December 1969) $1.50

Summarizes attitudes toward war and moral choices facing individuals facing conscription. Lists resources and organizations concerned.

The UN at Twenty-Five: A Handbook for the Anniversary Year 1970

Vol. 11, No. 2 (September/October 1969) $1.50

U.S. Voluntary Organizations and World Affairs

Volume 11, No. 1 (May/June 1969) $1.50

Orders for these issues of INTERCOM should be placed with:

*The World Affairs Book Center, 345 East 46 St., New York, N.Y. 10017 or
World Without War Council Bookstore, 1730 Grove St., Berkeley, Calif. 94709.

Orders under $3.00 should be prepaid. *Order Vols. 1–10 from WABC.

Looking ahead to the next issue:

Teaching About War, Peace, Conflict, and Change

Our Fall 1970 issue presented an overall survey of the present situation with respect to education on war, peace, conflict, and change. Our next issue will be devoted to problems of the classroom, and will deal more specifically with teaching techniques, subject matter, and resources available.

The feature essay will evaluate some curriculum units actually being used, will discuss the concept approach and analyze some of the most important concepts, and will include descriptions of some simulation games, scenarios, and case studies.

The Center for War/Peace Studies of the New York Friends Group, Inc., is a national nonprofit research and consulting organization on a broad spectrum of educational activities. It works through publications, special projects, and programs with educational institutions and voluntary organizations. The NYFG is an operating foundation under the Tax Reform Act of 1969. Contributions to it are deductible for Federal income tax purposes.

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2: Nonsense about Nap "superior order" doctrine + Ng generally: p. 27

Conscience and War

Morlens = "accursed race" Pope in 1045 p. 40

The Moral Dilemma

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A resource and program guide in the international affairs field for community leaders and teachers, and for the program leadership of voluntary organizations in the business, labor, religious, education, public affairs and communication fields. INTERCOM presents those new developments, resources and program ideas which promote constructive alternatives for fulfilling international responsibilities, furthering democratic values and resolving conflict without war.

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Note: Since the lottery system for the draft was instituted in late 1969, and affected this issue of INTERCOM substantially, publication was withheld in order to include clarification and comment on the impact of this change. Thus, although this issue is dated in sequence as November-December 1969, the actual publication date is March 1970

Feature

Conscience and War: The Moral Dilemma

Introduction

The young people who today face the draft constitute the first generation which has grown up in the nuclear age, conditioned to instant annihilation. There is no question but that, while they partake in very many ways of the traditional values and mores of our society, many are also qualitatively different. The generation gap that is so often named as the cause of the present lack of communication derives not only from the normal problems of parents versus children but also from the fact that this generation has imbibed from birth the possibility, even the probability, of nuclear holocaust.

While this is perhaps the most important qualitative difference, it is buttressed very strongly by the fact that this is also the first American generation which can be called affluent. Not that there is absolute economic security for all, but spectres of great depressions such as those who lived through the 1930's still cannot shake, are utterly foreign to this new generation. Even those from "blue collar" families are psychologically certain that there is a job for them whenever they want to work. There are still far too many in poverty, but the number declines steadily and the quality even of poverty is less degrading each year.

In addition, this generation grew up under a seemingly permanent Selective Service System, with complex legalistic structures and generally admitted serious inequities. Each young man coming to maturity (see Table I) has to face the draft and has to decide whether or not he is willing to serve in the armed forces.

Add to this a difficult war, impossible to explain in terms that will gather the support of the young; a war fought not for the traditional victory but merely to gain time; a war fought with restraint and with only a fraction of the military muscle available;

Table I

ESTIMATED NUMBER OF AMERICAN MALES TO TURN 18 BY YEAR					
1964:	1,402,000	1967:	1,794,000	1970:	1,883,000
1965:	1,898,000	1968:	1,786,000	1975:	2,114,000
1966:	1,794,000	1969:	1,830,000	1980:	2,169,000

Figures from U.S. Census Bureau.

yet a war of excessive duration (now the longest in U.S. history) with mounting casualties. In sum, an unpopular war and one which, at this stage, probably cannot be made popular.

This is the background against which a sharply increased number of men are claiming that their consciences force them to oppose the war. Statistics released by Selective Service (see Table II) show that in 1960 less than 0.4% received conscientious objector status (I-O). In 1969 the figure exceeded 1%. Untraditional, sometimes shocking, methods of dissent are used. Support is claimed for expressions of courage, not wisdom. A bloodied head is an honor—a practical procedure to win acceptable changes is a "sellout," a capitulation to the establishment. We have hippies, flower children, druggies, crazies, communards and many other more or less dramatic rejections of society, war and the draft.

How are these people to be understood? How is society to react? What is it that these young people demand? Families, churches, civic organizations and every level of government find these questions intruding—unwanted but inescapable. The result is polarization.

This issue of INTERCOM is devoted to the subject of *Conscience and War* in the hope that it will help individuals and organizations meet the difficulties posed. The background data alone requires dipping into religion, theology, theories of liberty, sociology, political

Table II

MEN UNDER SELECTIVE SERVICE JURISDICTION						
Year	Classified		Ratio	Serving		Ratio
	I-A & I-A-O	I-O	I-A & I-A-O to I-O	I-C	I-W	I-C to I-W
June 1960	2,315,992	8,791	261:1	1,373,193	1,800	763:1
1963	2,034,655	9,095	223:1	1,674,437	2,162	774:1
1966	1,112,013	9,031	124:1	2,301,688	4,378	526:1
1969	1,373,869	14,585	94:1	2,984,385	7,279	410:1

Adapted from *Selective Service Newsletter.*

science, philosophy and psychology. It is not possible to do more here than provide an overview and some guidelines, and to recommend additional material. An extensive bibliography is attached.

What Is Conscience?

Conscience is usually defined as the capacity to make moral judgments about *one's own* actions. It is purely subjective in nature, and operationally can be described as that inner force which compels a person to do or to refuse to do something. Since the origins are so interior, there is no necessary relation between conscience and truth, or love, or honesty. Opposing values can be conscientious expressions of the holders. In itself, conscience is not necessarily socially beneficial.

This definition has, through the years, been modified by the addition of certain limiting attributes. Thus, the primary motive is never personal gain. Also, when men act conscientiously and are utterly convinced of the morality or "correctness" of their positions, many frequently have no hesitation in forcing it on others. Conscience is no respector of majority rule or the goals of other people. Further, it is not rational in the sense that it is necessarily a conscious development deriving directly from logic, reason, wisdom and experience. Rather, conscience is value oriented and stems from the totality of the person. The ultimate test of a conscientious belief is sincerity, and the ultimate test of sincerity is the extent of suffering the conscientious person is willing to endure.

A list of people whom history has highlighted as conscientious would include the Hebrew Prophets, the Buddha, the human Jesus, Sir Thomas More, Martin Luther, Giordano Bruno and Gandhi. But even some of the less attractive actions of Hitler and Stalin could be called conscientious. A classic example of the opposition of conscientious beliefs is represented by the Greek myth of Antigone and her uncle, Creon.

A society cannot possibly know, in any immediate way, whether a conscientious position is "right" for it. What "right" is, is itself a definitional problem. Do we know even today whether Martin Luther was "right"? We know only that he did what he felt he had to do, that his actions found resonances in others, and that as a result a whole religious and cultural system was overturned. The only "right" thing we are certain of is that his positions had extensive popular support, presumably from people who also acted out of conscience.

How then is a society to deal with individuals who refuse to follow accustomed norms, claiming conscience as the reason? In a democracy, the obvious simple answer is to be permissive and to tolerate such acts so long as they do not impinge on the rights of others to do what they conscientiously feel they should do, and so long as such

acts do not threaten the existence of the society. In the main, this is the American position.

What happens, however, when an increasing number of people claim conscience for refusing certain obligations imposed by the state, and when that number grows so great as to threaten established customs? The three obvious options are to muddle through somehow, to change society so that the asserted conscientious positions become the norm, or to enforce existing standards.

This article deals mostly with the dramatic and direct expression of conscience in the United States with respect to the war in Vietnam. With the number of young people expressing conscientious objection far larger than ever before, and growing, there is a strong possibility that the time will come when those charged with preserving the traditional forms will look upon such acts as a direct and revolutionary threat to the entire society. How should they respond? One simplistic way would be repression, and such repression would affect everyone in the United States, whether young or old, whether a conscientious objector or a conscientious warrior. This possibility concerns us all. We all need to know a great deal more about every aspect of this problem in order to make the right decision as individuals and as a society.

Historical Notes on Conscience and Conscription in America

From its very beginnings, America was troubled by conflicts of conscience. While many of the early settlers came here seeking freedom to practice their own religious beliefs, they were reluctant to grant this same liberty to others. The prerevolutionary period witnessed much religious prosecution in New England, with both the oppressed and their oppressors claiming conscience as motivation. When opposing consciences collide, the results can be bloody, since reason and compromise are ruled out by the very nature of the contending forces. It is generally recognized today that, on the whole, our Revolution was unpopular as wars go. There are no accurate statistics available, but revisionist historians estimate that probably at least one-third and possibly two-thirds or more of the population were either Tories or neutral. Yet, because the Revolution was fought by volunteers, there were no problems of conscientious objection within the armed forces. There are, however, many stories of atrocities against those who refused (out of conscience) to collaborate with whoever held any particular territory at any particular time.

When the United States was established, there were two early efforts to introduce conscription, in 1790 and 1814. Both were defeated as being contrary to the spirit of liberty. The unpopular Mexican War was fought without benefit of conscription, and hence

without conscientious objectors. Conscription was legislated in the North in 1862 to meet the manpower needs of the army for the Civil War (a conflict of consciences). The Act was amended in 1863 to permit draftees to pay $300 in lieu of service—a measure which benefited the wealthy and did little to endear conscription to the majority. Violent dissent ensued, with some 1,200 dead in one draft riot in New York City alone.

Conscription was allowed to lapse after the Civil War, was not legislated for the Spanish-American War, but was put into effect again in 1917 for World War I. It was here that the term "conscientious objector" came into more or less general usage to describe men who refused military service (those seeking noncombatant service were handled administratively). The numbers of such men were not high, but since there was no provision for them under the Act, they were sent to Federal penitentiaries, mostly Fort Leavenworth. A number of death sentences were passed, but none were carried out. Although these men counted only in the hundreds, there were thousands upon thousands of "slackers," men who evaded the draft illegally by one device or another (16,000 were rounded up in a drive in New York City alone in August 1918).

Again, conscription was permitted to lapse after the war ended and was not instituted again until the fall of 1940, when war in Europe appeared imminent. It was an unpopular measure and narrowly escaped defeat (passing by one vote) when it came up for extension the following August. With the attack on Pearl Harbor in December of 1941 and the entry of the United States into World War II, the Act was extended and broadened. With the exception of a one-year interval, we have had conscription ever since, each renewal being for four years. The present Act expires on June 30, 1971.

The Individual and Society

The ethos of democracy stresses the worth and dignity of each individual, but the growing complexity of society each year seems to demand increasing central regulation. The resultant tension between the rights of the individual and the obligation of the state to protect all its citizens has never been resolved. There is an extensive literature on the subject dating from ancient times, but there is no clear-cut definition on which all can agree as to where individual rights end and societal duties begin.

It is important to understand that this tension between the individual and his society has no necessary political coloration. Many assume that the pressure for more individual freedom comes from liberals and radicals, but this is not always the case. In fact, in many instances, the liberals and radicals have called for greater centralization and regulation, while the conservatives support "laissez-faire" policies

and the rights of individuals. The struggle for "states rights," for example, is an effort to curb centralization.

In a complex democracy of 200,000,000 people, there is bound to be great diversity of modes of thought, customs, desires and personal needs. On the whole, our society seems to have been tolerant of (even encouraging and accommodating) this diversity. Conflicts arise when an individual, or a group of individuals, jeopardizes the rights of others, endangers others or endangers the state. But standards for such judgments are ill-defined and subject to varying interpretations, so that no sure, firm guidelines exist. On some matters, for example, the Board of the American Civil Liberties Union has been unable to agree.

It is relatively easy to define circumstances where individual freedom must be limited—such as traffic regulations. But Prohibition was an area in which there was so much disagreement that something as difficult to achieve as a Constitutional amendment had to be repealed. We are now also seeing great differences of opinion about nonaddictive drugs like marijuana. There is also a growing body of opinion demanding coercive legislation on pollutants and environmental controls. Individual and corporate freedom is constantly being redefined through changing public opinion.

On the one hand, therefore, the basic commitment to individual freedom requires constant expansion of individual rights. On the other, demands which others regard as excessive and as threatening the public good or their own freedom invite repression. Recent elections have been won and lost on the issue of law and order, and in many cases the references are not to well-defined criminal behavior but to attempts to change institutions and effect social change through what must be considered by any stable society unacceptable methods.

There is another tension here. Quite obviously, an urgent priority of any society is stability and self-perpetuation. Yet, we know that societies must change and that the way must be open for desirable changes to occur as they become recognized as needed. For this to happen, there must be continuous pressure for such change, and it follows automatically that the initial pressures for any specific change are premature. Further, most people believe that too much change too fast will result in chaos, and this becomes another limiting factor.

Those who seek change make a choice of means based on their perception of the society. If they see it as relatively open and providing effective channels for processing change, the means selected tend to be nonviolent and therefore more socially acceptable. If they see the society as rigid and impermeable, then violence and revolution seem the only valid choice. In sum, the more democratic the society, the more those who seek to change it can and should work through existing institutions.

Despite these tensions there is a general and growing recognition that wherever possible each individual must be permitted to follow

his own conscience. Nowhere is the conflict in democracy clearer than in the area of conscientious objection to war. Here the demands of the state, the rule of the majority, and sometimes even the very existence of the society can depend on a unity of purpose and action which the conscientious objector would reject. For example, how would any nation react should the number of objectors rise so alarmingly that it would prove impossible to maintain and supply an armed force for its defense? If the society was not ready to adopt alternative foreign policies and defenses, and if the objectors constituted a very substantial minority, it is possible that social order could break down and perhaps destroy the very democracy which both the majority and the minority seek to preserve.

An exacerbating feature here is the Nuremberg trials held after World War II, in which not only was guilt for the war pinned on the Germans, but individuals obeying "illegal" orders from their superiors were deemed to have committed war crimes. In a very real way, this puts the conscript in an intolerable position. He cannot refuse to obey an order from a superior (and most men cannot be expected to be able to distinguish a lawful from an unlawful order in a complex technological society where pushing a button is all that may be demanded of them) and yet he may later be subject to trial and conviction. This is a simplified view of what actually was decided at Nuremberg, but it is the popular one. It has affected large numbers of young people, and it is today being used as an argument for refusing to serve in the armed forces.

There is also the problem of those persons not subject to the draft who feel the compulsions of conscience with respect to how their society is acting in one field or another. Scientists have refused to work on weaponry, some people have refused to pay taxes for war (echoing Henry David Thoreau), others have felt compelled to take extreme positions on racial issues, and a few are now planning direct action on matters of environmental control. While these acts of conscience are not central to the immediate problems of draft-age men, they are relevant and an integral part of any study of conscience and the demands of society.

RESPONSE OUTSIDE EXISTING INSTITUTIONS

It is clear that the moral problem of the limits of individual obedience to establish authority has not been eliminated by majority rule. There exist "no compromise" issues of a moral or political nature involving conscience—racial segregation, slavery, inhumane violations of a minority's rights, and so forth—which do not become acceptable because of majority sanction. Abolition of religious liberty by the majority, for example, will not bind the religious. As far as the individual is concerned, when it is demanded that he submit to what he believes to be a violation of his basic beliefs, it makes little

difference to him whether the evil is one approved by a single ruler or by all the rest of his fellow citizens. One of the sobering aspects of politics is the number of occasions in history when a government's laws and policies have, in the perspective of later years, been condemned as having been wrong. The simple extension of the franchise is no guarantee against gross injustice.

Political violence is one alternative for those who believe a society incapable of peaceful change. It is also, alas, the first resort of those temperamentally suited to violence and/or lacking the will or ability to propose rational solutions to social problems. Those violent revolutionaries whose efforts have "helped" the human race, were very few in number. Their revolutions were last, not first, resorts and had little to do with personal incapacity to function within a social group.

Withdrawal, or passivity, in its rejection of social commitment, is another choice, but one which expresses profound pessimism. One argument for withdrawal is that history provides examples of scientists, philosophers and artists who consciously remained uninvolved in periods of political chaos, and saved for posterity records and achievements not otherwise possible. Those who withdraw or choose violence are, however, most often those about whom history hears nothing.

There is another alternative for *extreme* objectors—deliberate, peaceful and public violation of particular laws, decrees, regulations, ordinances and military or police orders—in effect, civil disobedience. The laws selected to be violated should be those regarded as inherently immoral, unjust or tyrannical. This method is practiced as a nonviolent way of responding to conflicts and of expressing extreme dissent while recognizing the democratic rights of the majority. Integral to it is respect for the concept of law and open and willing acceptance of the penalties. Its roots are deep in democratic theory.

A given policy can be changed by nonviolent means only by converting the majority to accept the desirability of that change. Such majority support can be gained, in part, through "witnessing." The example of individuals willing to undergo penalties and hardships for their conscientious dissent may lead increasing numbers of the public to think about the issues for the first time. Also, the government is compelled to provide the necessary enforcement personnel, administrative machinery and punishment facilities to cope with the dissenters. Hence, nonviolent resisters accept the penalties imposed on them and regard those penalties as a means of coercing others into facing the issues and deciding how far they want to go in enforcement.

The Selective Service System at Present

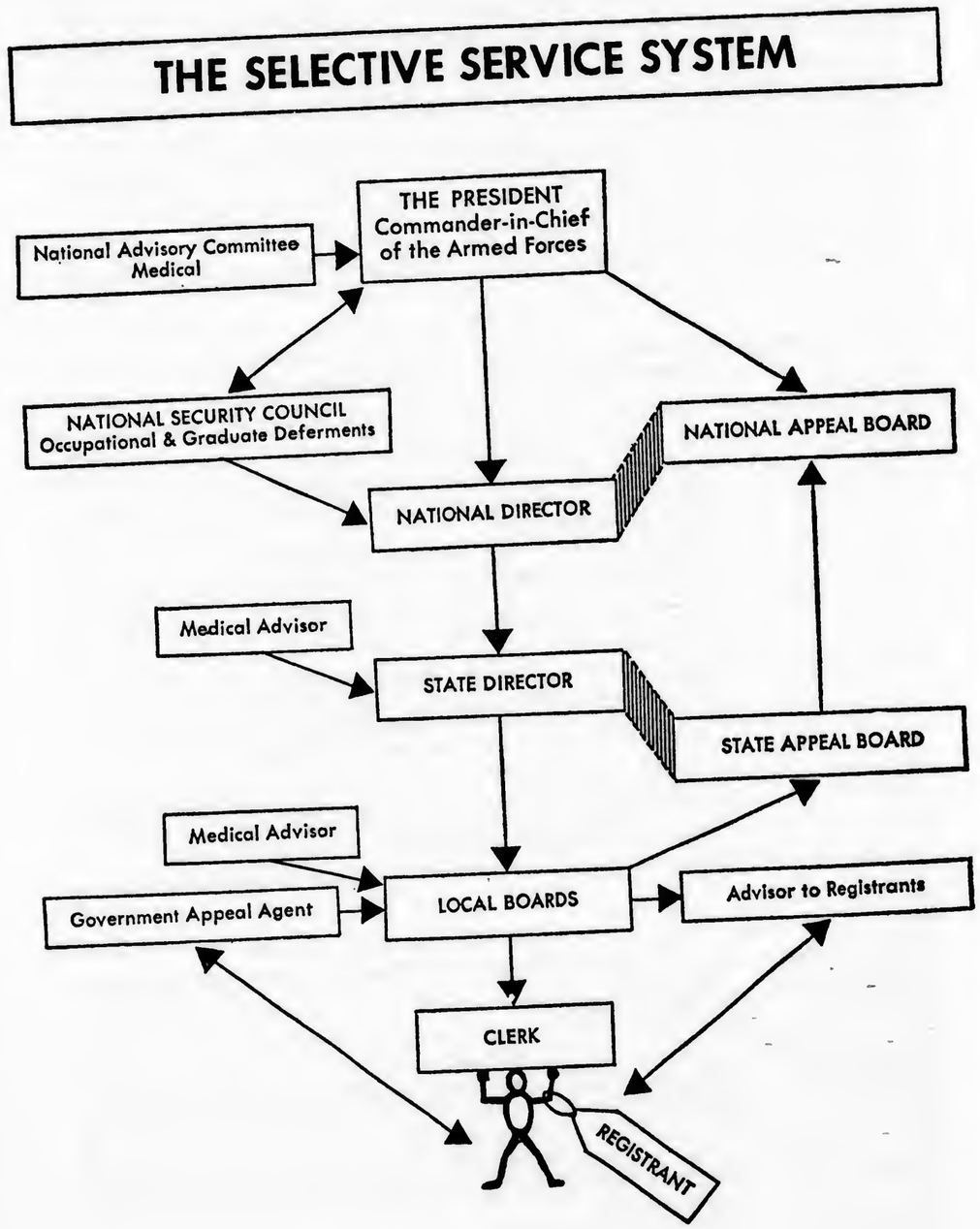
The Selective Service System (Figure I) is administered by the Director and his staff in Washington, D.C., and by more than 4,000 local draft boards, under the supervision of state directors. Draft calls originate with a manpower request from the Defense Department, based on projected enlistments and needs. The System operates under regulations drawn at the national level, though local boards retain considerable latitude in implementation. Such procedural matters as classification (Table III) and ordering registrants for induction, granting of deferments, and judging the sincerity of individuals applying for conscientious objector status differ in practice from board to board.

Table III

SELECTIVE SERVICE CLASSIFICATIONS

	CLASS I
Class I-A:	Registrant available for military service.
Class I-A-O:	Conscientious objector registrant available for noncombatant military service only.
Class I-C:	Member of the Armed Forces of the United States, the Coast and Geodetic Survey, or the Public Health Service.
Class I-D:	Qualified member of reserve component, or student taking military training, including ROTC and accepted aviation cadet applicant.
Class I-O:	Conscientious objector available for civilian work contributing to the maintenance of the national health, safety, or interest.
Class I-S:	Student deferred by law until graduation from high school or attainment of age of 20, or until end of his academic year at a college or university.
Class I-W:	Conscientious objector performing civilian work contributing to the maintenance of the national health, safety, or interest, or who has completed such work.
Class I-Y:	Registrant qualified for military service only in time of war or national emergency.
	CLASS II
Class II-A:	Occupational deferment (other than agricultural and student).
Class II-C:	Agricultural deferment.
Class II-S:	Student deferment.
	CLASS III
Class III-A:	Extreme hardship deferment, or registrant with a child or children.
	CLASS IV
Class IV-A:	Registrant with sufficient prior active service or who is a sole surviving son.
Class IV-B:	Official deferred by law.
Class IV-C:	Alien not currently liable for military service.
Class IV-D:	Minister of religion or divinity student.
Class IV-F:	Registrant not qualified for any military service.
	CLASS V
Class V-A:	Registrant over the age of liability for military service.

Figure I



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A local board is required to have at least three members; in practice it is usually composed of three to five civilians who serve without pay and, unfortunately, usually without significant formal training. They are generally business and professional community leaders who, as David and Dolbeare point out (*Little Groups of Neighbors: The Selective Service System*, p. 68), represent "extensions of established local structures." While technically local board members are nominated by the Governor and appointed by the President, actual appointment procedures differ from state to state, with court judges, veterans groups, political machines and Selective Service officials often exerting varying degrees of influence in the selection of members. Minority groups, particularly Negroes, have been underrepresented. Approximately two-thirds of draft board members are veterans, and the System at national and state levels is primarily administered by ranking military officers.

Board members are expected to pass judgment on the status of large numbers of men. Since they normally meet only once a month, time limitations often permit only superficial consideration of each case. Most of the recommendations are actually made by the Selective Service clerks and approved by the Board at their monthly meetings.

At the age of 18 every male citizen and most alien residents are required to register with Selective Service. According to the procedure that was instituted in the fall of 1969, the sequence of induction is determined annually by a chance drawing of the days of the year and the letters in the alphabet. This lottery system also limits to one year the period during which a person is most vulnerable to the draft. (Under the previous system men were in the pool of maximum vulnerability to the draft until they were 26. Men are now drafted in the order in which their birth date was randomly selected in the lottery and, within that birth date, by the alphabetical order (also randomly selected) of their last names. Under the lottery system, deferments have not been affected (though there have been indications that the President may move gradually to eliminate the granting of student and ocupational deferments to men who do not already hold them).

The December 1969 lottery applied to all men born between January 1, 1944 and December 31, 1950. Each of these men has been assigned a permanent order number and will be vulnerable during 1970 or during the calendar year in which any deferment they now have will expire. Future annual lotteries will concern those men whose 19th birthday occurs in the calendar year in which the lottery is drawn. These men will be liable for the draft in the following year, or the year in which their exemptions, if any, expire. There is thus presumed to be only one year of maximum vulnerability. If a man is not called during that year or if his deferments extend to age 26, it is presumed he is no longer vulnerable except in case of national emergency.

The lottery was the first step in draft reform to correct universally admitted inequities in the system. Two of the major charges were: young men remained subject to unnecessary uncertainty about their futures until age 26 and were therefore unable to plan careers, marriage, etc.; and deferments to college students resulted in the burden being placed on the poor and disadvantaged, mostly from minority groups. Few were willing to defend the system, and it came under increasing attack in the Congress and from the general public, especially those of draft age.

Public interest in draft reform lessened somewhat after the decision to institute a national lottery, but may increase sharply during the next few months as several factors coalesce to bring the issue back to the center of the political arena. Of primary importance is the desire of the President to reform the methods by which the military obtains its manpower. During his candidacy, Mr. Nixon repeatedly advocated an all-volunteer army, but indicated that the timing of such a change would depend on the needs of the Vietnam war. Depending on a number of other factors, including his willingness to ask Congress for the additional funds required to finance an all-volunteer army, the President may this year support further reform of the current Selective Service structure or even propose an eventual substitution for the draft.

Extensive hearings on the draft law are scheduled to take place in Congress, with Senator John Stennis, chairman of the Armed Services Committee, agreeing to hold comprehensive hearings, now scheduled for April 1970. Congress has already demonstrated substantial interest in this matter (nearly 60 separate draft reform bills had been introduced into the 91st Congress as of September 1, 1969) and will probably consider a full range of proposals, including a volunteer army, before the current Selective Service law expires in June 1971.

Draft reform will be further stimulated by the recent report of a Presidential commission, headed by former Defense Secretary Thomas S. Gates, Jr., which concluded that an all-volunteer armed service should be established. The Gates Commission, composed of five members of the academic community, two former Supreme Allied Commanders in Europe, two former members of Congress and several representatives from the business community (and including two Negroes), in effect gave strong and broad-based endorsement to the President's proposal for a volunteer military.

According to a Harris Poll released in late January 1970, 52% of the American public would like to replace conscription with a volunteer army, with 38% opposed and 10% undecided. Of those under 30, 54% approved of a volunteer army, with 59% of those with college educations, regardless of present age, approving. The greatest opposition was found in those aged 31 to 49 and those with high school educations, and amounted to only 41% of those categories.

Continued efforts to keep draft reform or repeal in the public

spotlight can be expected from coalitions like the National Council to Repeal the Draft and from a variety of other groups, particularly those in or associated with the "peace movement." It would also now appear that men with lottery numbers in the bottom third of the sequence, who it was previously thought stood little chance of being drafted, may in fact be called. If men who initially were led to believe they held "safe" lottery numbers are drafted, frustration with the whole lottery idea could build into a politically significant force. The Secretary of Defense's most recent estimate of total draft calls for 1970 is 225,000, down 65,000 from the number called in 1969. Opinions differ on how far through the lottery numbers local boards will have to go to meet this call.

The primary advantage of the lottery system is that it limits vulnerability to the draft to one calendar year—that in which a man's 20th birthday occurs—a point in life when most men are not established in their careers.

Critics of the lottery have argued that it does not go far enough to correct the inequities of the Selective Service System. Indeed, the lottery has not changed the broad discretionary powers of local boards to grant or refuse deferments and to assign classifications. One reform proposal is to do away with this discretionary power by abolishing local boards or requiring that they operate within tighter guidelines. Such modifications may be offered in this session of Congress as a way to make the current system more equitable without abandoning the process of random selection.

Also certain to be discussed is the principle of a volunteer army. Some proponents of this alternative to eliminate the draft argue that conscription is as unconstitutional as it is undesirable. Others suggest putting the draft on a stand-by basis, allowing for manpower to be procured by conscription in the event of an emergency. Most of the current bills in Congress are similar to President Nixon's plan in that they would retain the draft at least on a stand-by basis.

Some opponents of an all-volunteer armed force have contended that it would be too costly, that it would be an all-black and an all-poor army and that it would dangerously increase the influence of the military. Past increased cost estimates have ranged from 7 billion to 17 billion dollars. The Gates Commission, however, has estimated the increased cost as between 2 to 4 billion dollars annually. The additional cost would be spent primarily on salaries in the lower ranks where, according to advocates of the volunteer army, conscriptees now pay an "implicit tax" because their wages are in general much inferior to what they would receive as civilians.

The Commission did not agree that a volunteer army would be all black. According to its estimates, while it was possible that the number of Negroes in the services might reach a maximum of 25 per cent in the Army and the Marines, it was far more likely to remain unchanged at the present 11 or 12 per cent. In response to the con-

tention that a volunteer army would dangerously increase the influence of the military, supporters point out that for most of our nation's history we have had a professional all-volunteer army. In one form or another the voluntary army concept has received wide support from people with quite different political philosophies. For example, one Senate proposal introduced by Mark Hatfield was sponsored by: Barry Goldwater (R., Ariz.), Robert Dole (R., Kan.), Marlow Cook (R., Ky.), Richard Schweiker (R., Pa.), Winston Prouty (R., Vt.), Robert Packwood (R., Ore.), Gaylord Nelson (D., Wis.) and George McGovern (D., S.D.).

Proponents of continued conscription claim the draft is a far more democratic way of spreading the burden. They point out that it involves the entire population and hence makes every family sensitive to ill-advised foreign military ventures. Unpopular wars like Vietnam will in the future be carefully avoided if only not to repeat the pressure against President Johnson expressed in early 1968. A conscript army, they claim, is not as disposable as a volunteer army. Further, military justice would come under constant public scrutiny. Also, since the U.S. has historically depended on small volunteer forces, this tradition, cannot serve as a basis for projecting the social impact of a volunteer military of between 2 and 3 million professionals. (See insert for a summary of the arguments for and against conscription).

There was widespread public discussion about another proposed alternative to the current Selective Service System—Compulsory National Service. There are a variety of specific proposals based on this concept, most of which derive from two principles: (1) that all men (and perhaps women) should engage in some type of national service and (2) that military manpower needs should be filled through a system of selective service which is both fair and flexible. According to one plan, proposed by Morris Janowitz in *The Logic of National Service,* all 18-year-old men would have a choice of three basic alternatives: (1) to volunteer for military service; (2) to subject themselves to Selective Service, indicating a type of alternative national service which they would perform if they were not selected by lottery to serve in the military; and (3) to apply for exemption for reason of conscience or serious familial or financial hardship. Some type of service would be required of conscientious objectors, as it is now, but they would not be compelled to serve in the military. Exemptions might also be provided for persons involved in special Federal programs such as the National Teachers Corps, the Peace Corps, Vista, National Job Training, and possibly for those involved in similar projects under nongovernmental sponsorship.

Margaret Mead has listed some of the arguments in favor of Universal National Service (UNS). By requiring some form of service from *every* able person, it "would provide a setting within which the sense of unfairness [about the present system] could be enormously reduced." UNS would also "make it possible to assay

SOME ARGUMENTS FOR CONSCRIPTION

1. It is right for the entire population to share sacrifices to meet public needs.
2. A conscript army would mean that every family in the nation would be involved in any military adventure and this, certainly after Vietnam, would act as a restraining influence on world policing measures.
3. The end of the draft, and a smaller standing army, would mean greater reliance on nuclear weaponry, and a greater chance of their being used.
4. A smaller army would also mean greater reliance on the troops of the developing nations to help carry out our foreign policy. In effect, this would lead to increased interference with these nations.
5. The draft is itself a minor issue compared to the need for major foreign policy changes and big-power agreements for disarmaments. Until these come, the processes by which the army is raised are relatively of minor importance.
6. A professional army will constitute an "elite" with its own vested interests and will exercise a coordinated influence on the American society, and will be a greater threat to civil liberties than the present draft.
7. Up to now, at least, free men have been willing to bear the burden of fighting for their own freedom.
8. A volunteer army of highly trained specialized soldiers with high morale will be itching for opportunities to display their prowess.
9. In order to attract recruits, it will be necessary to glorify the military life.
10. The present inequities of the draft law can all be corrected through changes in the law.

SOME ARGUMENTS AGAINST CONSCRIPTION

1. The "draft is unfair to young men" (President Nixon in 1968) and makes the orderly planning and development of their lives impossible.
2. The draft enables the Administration to engage in foreign military adventures, since increased quotas of draftees can be established to meet the needs so created.
3. The draft is undemocratic, extending state control over individuals.
4. The draft is un-American in that we have traditionally depended on a volunteer army.
5. The draft is militarizing America, influencing the "mind-set" of people to depend on military power as an appropriate method of settling disputes. The end of the draft will reduce the influence of the military.
6. The draft is "a bad way to build our armed forces" (President Nixon in 1968). A better way would be an all-volunteer force with higher pay and attractive career possibilities.
7. The increasing violence in America is partially a consequence of training millions of young men in violence and the justifications therefore.
8. The draft is deliberately used to "channel" young men into occupations through the selective use of deferments. This is, in effect, a distortion of their normal life patterns and the mark of a dehumanized society.
9. The draft, even with provisions for conscientious objection, involves violations of religious liberty and freedom of conscience and, especially in the light of the Vietnam war, is seen by increasing numbers of people as immoral.
10. The Navy, Marines and Air Force are already completely voluntary. Only the Army depends on draftees. The end of the draft is therefore not such a drastic step.

the defects and the potentialities of every young American on the threshold of adulthood." It would provide opportunity for young adults to experience an identity and a sense of self-respect and responsibility as individuals and it "would provide for an interval within our very prolonged educational system in which actual, responsible work experience would precede further educational and vocational choices."

The major argument against Compulsory National Service is essentially identical to one of the arguments against conscription—that forced service of any kind is fundamentally incompatible with the broadest possible definition of freedom, that it is an invasion of individual rights contrary to the American traditions of voluntarism.

It should be noted that while Congressional and much public activity for draft reform or abolition has been directed against Selective Service as a system for procuring men for military service, significant antidraft sentiment is also expressed by those who wish to see the end of U.S. participation in the Vietnam war, as well as by those who wish to avoid military service. An all-volunteer army would sharply reduce the number of those presently protesting the war in Vietnam and completely eliminate conscientious objection, except for those already in the military.

But the problems of war and peace will not be solved by changes in manpower procurement procedures, no matter how fundamental. The primary goal of changing foreign policy to move toward the abolition of war is often lost sight of in the current draft reform rhetoric.

Religious and Philosophical Approaches to War

Most civilizations have produced strong moral and legal injunctions against the taking of life. This has meant that the resort to war has required special justification. With the slow growth of personal freedom and the concept of personal responsibility, especially in the West, individuals have found it necessary to consider two basic questions: Under what circumstances is it immoral to wage war? Under what circumstances is it immoral not to wage war? There are a variety of philosophical and religious positions which enable individuals to answer these questions for themselves. Again, without trying to be exhaustive, some of the dominant themes are presented below.

PACIFISM

Pacifism, like conscience, yields to no rigid definition. During the 19th century it described "a principle or policy of establishing and maintaining universal peace or such relations among nations that all differences may be adjusted without recourse to war." This definition did not exclude participation in war if the avenues of peaceful resolu-

tion failed. In the 20th century, however, the term "pacifism" acquired a narrower content and is now used almost exclusively to describe those persons who will not, under any conditions, support or participate in any war.

Still, the pacifist conscience cannot be limited to a single theory of nonresistance to violence or aggression. There are many interpretations, viewpoints, approaches and expressions ranging from absolute personal pacifism to acceptance of a police force but rejection of organized violence by the state. Pacifism is an imprecise term that embraces varying types and shades of opposition to war and violence.

It is impossible in the space available to characterize all shades of pacifist thought in detail, especially since many nonpacifists frequently share some or most of the pacifist's convictions. With this in mind, the following commentary is presented as a thumbnail sketch—more for the purpose of delineating basic concepts than to serve as a primer on pacifist theory.

Traditional Religious Pacifism

For the first 200 years after Jesus, no Christian was permitted to be a soldier. But by 400 A.D. no non-Christian could be a Roman soldier. The original pacifist content of Christianity has since been latent, but has found much fresh vigor since the Protestant Reformation. The Quakers, Mennonites and Brethren are pacifist in their doctrinal positions and are now known as the historic peace churches. The Amish, Doukhobors and others, including the recently formed Bruderhof, are also pacifist. While some of these denominations are quite fundamentalist in approach, others, like the Quakers, are on the whole liberal. But all believe firmly that Jesus was a complete pacifist and that the imitation of Christ is the highest human endeavor. There are Jews, Buddhists and even nonreligious pacifists whose views on war are essentially the same as those of Christian pacifists.

Gandhian Pacifism

There is a tendency to view all pacifists as similar and to argue that they are unrealistic or irrelevant because they have no program for social change and the elimination of injustice. While this is true of some inner-directed pacifists, it is particularly not applicable to Gandhians. Gandhi never developed his ideas into a single coherent statement, but some of his concepts provide practical tools for thinking about social justice and ending war. A brief outline follows:

> ***Conflict:*** In contrast to those pacifists who believe that any form of conflict is evil, Gandhi argued that conflict was an essential element of living, was useful and often good. The problem was to find means for resolving conflict which were creative and humanizing rather than destructive and brutalizing.

Truth: Whereas love is the core idea in Christian pacifism, truth was the core idea to Gandhi. By truth he meant that reality which human beings can *agree* on as their common condition and common need. Truth requires agreement, while violence and war destroy humans and prevent agreement. Striving for truth requires nonviolence.

Constructive Program: Nonviolence means not only not hurting others but also positive good will. An essential element of nonviolence is a constructive social and material program, necessary not only for itself but also as a means of demonstrating good intentions to opponents.

Self-Suffering: Gandhi believed in accepting punishment as a means of forcing those inflicting that punishment to review their own beliefs and to decide whether they really wanted to carry out such punishment. In order for this to work, one's own good intentions, honesty and truthfulness had to be apparent to all. The voluntary acceptance of suffering can operate as a coercive force, but creatively rather than violently.

Social Change: Gandhi agreed with most social observers that there is an interrelationship between the consciousness and morality of people and their social institutions; that both people and institutions need to be changed, but that real change can occur only as an interaction between these elements. Those who seek to perfect themselves apart from society are doomed to futility, as are those who would deal only with social institutions.

Means and Ends: Gandhi did not make any distinction between ends and means, and believed that not only are these inseparable, but that the means used actually determine the ends achieved. If the goal is a peaceful society, it can be built only through nonviolence.

The Individual: The world contains many different societies because people have made them different. But all institutions require the consent and cooperation of the individuals involved. By withholding consent, people can force institutions to change.

Power: Gandhi believed that violence is one expression of power, but there are many other types of power more humane and effective. The power of ideas, of love, of work, of competence, of knowledge, of cooperation are all available to the man who foregoes violence.

Philosophical Pacifists

Many consider anarchists as bomb throwers and lovers of chaos. There is also a very different, less well known, tradition of anarchism which believes that order can be created only by the building of voluntary nonviolent cooperative relations among people. Pacifist anarchists are opposed to most aspects of the state, which they see as the institutionalization of violence and force. They therefore refuse

cooperation with the draft. However, they do not believe in the use of violence to destroy the state. Rather, like the Gandhians, and to some extent the conservatives, they argue that the "revolution" occurs when people change themselves, act differently and voluntarily take care of themselves and their neighbors.

There are also those who become pacifists out of a philosophical approach and who see nonviolence as the only means of achieving the good life not only for themselves but for all men. They accept, like the Christians, many religious moral values. They accept, like the Gandhians, many of the Mahatma's teachings, including the inseparability of ends and means. They have many of the same suspicions of the state as the pacifist anarchists. Essentially, they are eclectic, and each builds his own philosophy out of many historic supporting strands.

THE JUST WAR THEORY

Various criteria for distinguishing between just and unjust war have been formulated by Augustine, the Medieval Scholastics, St. Thomas Aquinas, John Calvin, Charles Montesquieu, John Stuart Mill and more recently by men like Karl Barth, Reinhold Niebuhr and Paul Ramsey. In most cases, consideration is given both to the goals to be achieved by a particular war and the means employed. The following, formulated by Edward L. Long, in his book *War and Conscience in America,* are some conditions theologians have generally felt should obtain for a war to be considered just:

— "Resort to arms can be regarded as legitimate only when all other means to the morally just solution of the conflict are exhausted."

— "War can be just only if employed to defend a stable order or morally preferable cause against threats of destruction or the rise of injustice."

— "A war must be carried out with the right attitudes." A war's ultimate purpose must be to establish the conditions for peace and justice.

— "A just war may be conducted only by military means that promise a reasonable chance of attainment of the moral and political objectives being sought."

— A just war requires a "proportionality between evil to be done and good to be achieved." The just war theorist must therefore pose not only the question of when it is immoral to wage war but also the question of when it is immoral not to wage war. According to Paul Ramsey, ". . . of all the tests for judging whether to resort to or participate in war, this one of balancing an evil or good effect against another is open to the greatest uncertainty. This, therefore, establishes rather than removes the possibility of conscientious disagreement among prudent men."

— ". . . just or limited warfare must be *forces-counter-forces* war-

fare, and *people-counter-people* warfare is wholly unjust." This prohibition is particularly difficult to observe today, with the distinction between combatant and citizen increasingly hard to determine.

Just war theory remains only theory, since no international system of law and juridical order exists capable of rendering and enforcing judgments on particular wars. The League of Nations, the Nuremberg Tribunals and the United Nations have been steps in this direction, but no international authority has yet been able to declare a war just or unjust and then enforce its decision. Each individual is left to decide for himself or accept an authority's judgment. If a war is just, it follows that it is immoral not to support it—therefore, one must be a conscientious warrior. If unjust, a conscientious objector.

Just war theory, Roman Catholic in origin, is now popular among many non-Catholics and even among those not at all religious, since it does raise the issues involved in judging whether a war is moral or immoral. Some claim that no war can be just in today's world. Others are willing to concede the possibility of a just war, but find the Vietnam war unjust. Although formulated in religious terms, the just war theory is, in effect, a basis for selective objection or participation in a particular war.

THE CRUSADING WAR

Another attitude toward war comes to us from the religious crusade. While crusades occurred in antiquity and are also part of the history of religions other than Christianity (notably Islam), it is within the context of Christianity that the crusading ethic of war developed its significance to the Western world.

The Augustinian doctrine of the just war was subjected to radically new demands as the political order of the Roman Empire disintegrated. Instead of stressing the permissibility of war only as a defensive measure in the protection of a Christian state, Medieval Scholastics justified offensive war as a vindication of an injury to life or honor. As church and state merged, war was no longer considered inherently incompatible with the spirit of Christ.

In 1095, at the Council of Clermont, Pope Urban II introduced a new premise upon which war could be waged. Calling on the members of the assembly to end their fratricidal conflicts, the Pope called for the wresting of Palestine from an "accursed race" and "unclean nation"—the infidels. Thus were launched the Christian Crusades.

The motivation behind any crusading war is ideological: crusades are fought in the name of religion; in the name of Freedom "to make the world safe for democracy"; in the name of Marx "to carry the Socialist revolution through to the end"; and so forth.

Crusading war calls for unyielding and extremist attitudes. The

slogan "better dead than red" became a popular cold war shorthand expression for the preference many Americans share, to die fighting for democracy rather than be forced to live under an alien ideology. In Spain, in 1936, it was said, "It is better to die on your feet than live on your knees."

The crusading war ethic justifies war either as ennobling to the nation and the human spirit or as the only possible way to achieve glorious and desirable goals. In such a war ideals are the real antagonists, and the "higher level of truth" *ultimately* must always win. Nietzsche wrote, "What does it matter if life be sacrificed so long as truth be realized?" Hitler believed that the death of a soldier fighting for the fatherland was the ultimate experience open to man.

The crusading war imposes few constraints and sometimes exults in the unrestrained use of force. Hitler's solution to the "Jewish problem" and Stalin's mass "liquidations" become rational once the ideal end is accepted as necessary by whatever means. The enemy is not simply wrong but considered nonhuman, and methods used to liquidate such enemies do not, therefore, fall under moral strictures still binding among real human beings. Among these enemies are those opposed to the crusade and those who support the other side.

Those who believe in the idealistic goals of a crusade are perforce also conscientious warriors. For them not to participate in such a war would be immoral.

POLITICAL WARS

The crusading war, originally religious in origin, now finds its counterpart in the political field. Wars are supported or opposed as they conform to the political goals and values of the societies involved. World War II was "popular" because it was seen from both the religious and political viewpoint as absolutely essential to the preservation of the values of freedom, individual worth and democracy. These are political as well as religious values.

But political motivations can also lead to selective opposition or support of one side of a particular war. Thus, some who oppose the U.S. intervention in Vietnam actually support the objectives of the Vietcong, the military arm of the Vietnamese National Liberation Front. Some who oppose the violence of Israel support the Arab states, and vice versa. Political objection to one side in a war is not objection to all war. It is actually selective objection, which sees some wars (or some sides of some wars) as wrong, others as desirable. Again, depending on one's political convictions, one can become a conscientious objector or a conscientious warrior.

PREEMPTIVE WAR

Carry the analysis to the extreme, it is conceivable that the only way a nation can preserve itself and its values is to attack an opponent

nation in order to prevent that opponent from marshalling and using its own armed forces for aggressive purposes. The Six Day War in 1967 is a clear example of this conviction. Containing elements of both just war theory and the crusading war, a logical and rational case can be made for this kind of war. Those who subscribe to this case will again find themselves conscientious warriors.

Types of Response to War and the Draft

The term "draft resister" has been commonly and often mistakenly used in recent times to lump together all men who for a variety of reasons have been opposed to participation in the Vietnam war. This generalization of individual motives is counterproductive and is politically useful for that small minority in the United States interested in organizing a broad revolt against society. The draft resistance "movement" is not cohesive, however, and any assumption that it is will lead to a failure to understand the nature and significance of much of this county's youth-led dissent.

Any individual's response to the draft and to the demand of his society that he participate in a war must be among the most significant decisions of his life. It may mean death or injury on a battlefield, it may mean military heroism, it may mean jail. The consequences of this decision testify to the sober consideration it must be given, and the background information which must be made available for such consideration to take place.

That individual is rare whose motives can easily be summarized into a simple, neatly defined category. Though a single decision is required, the elements of that decision are complex. Far from negating categories, this complexity reinforces the need for them. There is a human compulsion to judge some responses wiser than others, some morally preferable, some of dubious merit and some dangerous and wrong. Such valuations must be tentative, much as one might want to think them absolute. While value judgments are inevitable, they should be attempted only on the basis of a full understanding of the nuances involved in various positions and the need to avoid overly simple group categorizations of individual responses. To this end INTERCOM sets forth a few ideas designed only to characterize some of the basic types of responses to war and the draft, with the hope of encouraging further public study and understanding.

ACCEPTANCE OF THE MILITARY

While most men accept the draft unthinkingly, some seriously deliberate the problem of war and violence, search out their beliefs and responsibilities and then decide they must participate in the army. These men would not declare that all war is right and good, but rather that the consequences of not going to war are more evil than war itself. Or they might feel that while they want to rid the

world of war in the long run, war is the only available or practical solution to the immediate crisis. In the case of World War II, many felt that participation was the only moral act open to men of conscience. For such men, acceptance of the draft is a response to conscience and, whether reluctant or voluntary, cooperation with the war system is a principled and moral act, consistent with their responsibilities to themselves and the society.

LEGALLY RECOGNIZED CONSCIENTIOUS OBJECTORS

During early discussion of the U.S. Constitution, a proposal was made to include a provision guaranteeing the right of members of religious groups such as the Quakers and the Mennonites to abstain from participation in the armed services. James Madison argued that such a provision was not necessary since it was beyond imagination that this right would ever be denied. He was wrong, of course. During World War I, only members of historic peace churches were exempt from combat duty as conscientious objectors, but they had to perform noncombatant duty in the armed forces. There were no provisions for men opposed to noncombatant service, and these went to jail.

The current draft law does provide for two types of conscientious objectors. Both must be opposed to *all* war, and their opposition must be based on religious training and belief. The Supreme Court, in the Seeger decision of 1965, ruled that the belief on which objection was based need not represent an orthodox religion as long as it "is sincere and meaningful [and] occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for exemption." A 1967 rewording of the draft law eliminated reference to a Supreme Being, but continued to exclude objections based on "essentially political, sociological, philosophical views or a merely personal moral code."

The two classifications Selective Service designates for sincere conscientious objectors are I-O ("Conscientious objectors available for civilian work contributing to the maintenance of the national health, safety, or interest") and I-A-O ("Conscientious objectors available for noncombatant military service only"). The I-O is opposed to participation in any way in the armed forces. Two years of alternative service is required of the drafted I-O, with an approved nonprofit or government agency, with hospital work being the most common form of this service. The I-A-O is unwilling to kill but is willing to serve in the armed forces in a noncombatant capacity; he is usually assigned to the medical corps and does not carry weapons while in the Army.

UNRECOGNIZED CONSCIENTIOUS OBJECTORS

The distinction between the convictions of a legally recognized conscientious objector and one not legally recognized is frequently arbitrary. A man may not be granted conscientious objector status

because his particular draft board used a narrow or erroneous set of criteria or because the man was unconvincing in presenting his evidence to the board. A conscientious objector whose claims are not recognized by Selective Service may refuse induction and be prosecuted, or violate his conscience by submitting to the draft. He can seek legal recognition through the courts, but can only do so by first violating the law. If the litigant loses, he is subject to penalties of up to five years imprisonment and $10,000 fine.

Some men hold beliefs which clearly do not meet the requirements of the current Selective Service regulations because the basis of that belief is not recognized as religious or because they are opposed to participation in a particular war they consider unjust ("selective objection"). The Supreme Court has recently agreed to rule on two cases, one (Sisson v. U.S.) dealing with selective and nonreligious objection, and another (Welsh v. U.S.) dealing with nonreligious objection. A third case, dealing with selective religious objection based on the Catholic just war doctrine was recently heard in California. In that case a Federal judge held that the "opposed to all war" section of the Selective Service law is unconstitutional, and that conscientious objection to a particular war on religious grounds is acceptable. The Government is expected to appeal this case as well.

In general, it should be stressed that legal decisions such as these, even when they seem to overrule certain parts of the draft law, do not immediately become uniform practice at the local board level and sometimes still cause differences of interpretation and confusion. This has been true of the Seeger case, and it is likely to be true in other cases pertaining to conscientious objection, since the local boards retain great discretion in deciding CO claims. On the whole, however, the courts have steadily been broadening the bases for classification as a conscientious objector.

NONCOOPERATION (INCLUDING RESISTANCE)

Noncooperators (and resistors) object not only to participation in war but to participation in the draft process as well. They refuse to register for the draft and refuse to apply for conscientious objector status, or if they become noncooperators after registration, may return their draft cards and refuse further cooperation with Selective Service. They may refuse induction or, if classified I-O, alternative service. Noncooperators do not take advantage of even those aspects of the draft which might exempt them, e.g. deferment as seminarians. Many noncooperators write to their draft boards to explain why they cannot cooperate. Some have publicized handing in or destroying their draft cards. Noncooperators usually become delinquent and are brought to trial. Because they have not cooperated in any way, they have few legal defenses and are often sentenced to prison terms.

Noncooperators generally believe that the draft is so root an

evil that to cooperate would violate their integrity. Many who assume this position are sincere in their belief that the nation would benefit from the abolition of conscription, that every increase in individual freedom serves society. They are willing to accept prison to testify to their convictions.

Opposition to the draft can in fact be a broader issue than opposition to war; many conservatives and liberals alike oppose the draft mainly as a violation of personal freedom. Some of these people support U.S. policies in Vietnam, but are willing to work together with opponents of the war to abolish conscription. These people try to work through existing institutions and usually do not take the noncooperative route.

Sentences for violations of Selective Service tend to become heavier during wartime, with no separate statistics available for those violating the draft as an expression of conscientious opposition to war as opposed to evaders, delinquents, etc. It is interesting to note (Table IV) that longer sentences were imposed in 1945 (W.W. II), 1952 (Korean War) and 1967–1968 (Vietnam) than in non-war years. Indeed, the 1968 sentences are even heavier than those inflicted in 1945. Also, the numbers of violators brought to trial are clearly a function of whether there is peace or war.

Table IV

SELECTIVE SERVICE VIOLATION CASES BEFORE UNITED STATES DISTRICT COURTS BY YEAR

Year	Total Defendants	Not Convicted		Convicted				
		Dismissed	Acquitted	Total Sentenced	Probation	Fine or other	Prison	Average Imprisonment (months)
1945	4,287	1,399	50	2,838	453	17	2,368	31.9
1950	449	272	2	175	65	1	109	13.4
1952	561	222	26	313	39	2	272	30.5
1955	719	367	63	289	70	2	217	24.8
1960	239	65	8	166	37	3	126	21.5
1965	341	88	11	242	52	1	189	21.0
1967	996	224	24	748	78	4	666	32.1
1968	1,192	353	55	784	202	2	580	37.3

Adapted from *Federal Offenders in the United States District Courts, 1967,* Administrative Office of the U.S. Courts, Washington, D.C., and other sources.

SEEKING DEFERMENTS

The desire for a deferment can often distort normal life patterns by influencing young men to make important choices on the basis of what is a deferable occupation, and not necessarily on the basis of their skills or interests. Selective Service itself sees value in this; its officials have explained that it enables them to "channel" young men into those educational and occupational activities which are considered to be in the national interest. Since the Selective Service process requires that all possibilities for deferment be examined before the registrant is classified for induction, those men whose claims for conscientious objector status are skimpy under present law are subject to great temptation to try to find bases for deferment. The deferment features of the conscription law lead many to distort their life styles and futures in order to meet the immediate problem. As in all countries where there is conscription, some young men seek "undeserved" deferments. They try to prove mental or physical disability, homosexuality (if they are not), or lie about their occupational or parental status. They try whatever they think will permit them to escape military service. Since the process of achieving I-O status is usually lengthy, some may even claim conscientious objection in the hope that the determination will drag on until they are past draft age or can prove other bases for deferment.

The process of deferment is, of course, precarious and inequitable and tends to favor those with more resources and education. Those who deliberately delay their induction through deferments clearly do not wish to join the Army, for one reason or another. Noncooperators are critical of this approach and argue that, for those who sincerely oppose war, political effectiveness is reduced by acceptance of a deferment as opposed to confronting the system more directly. A sincere conscientious objector may seek other deferred classifications, but if he fails to obtain them—or CO status—he will go to jail. The person who merely seeks to avoid the draft will, if all else fails, go into the Army.

EMIGRATION

Increasing numbers of draft-eligible men are settling in Canada, Sweden, France and other countries. (Many of these countries use military conscription also. See Table V.) Counseling services in Canada suggest that as many as 60,000 have fled to that country, although no accurate statistics exist. However, men who emigrate still have a legal obligation to perform military service. If they do not keep their draft boards informed of their whereabouts and if they do not respond to induction calls, they have committed a crime and are subject to arrest and prosecution if they ever return, no matter how long they have been out of the country. Those who support fleeing as a means of evading the draft point out that, historically,

TABLE V

COUNTRIES WITH REQUIRED MILITARY SERVICE
*** (asterisk indicates provisions for conscientious objectors)**

Afghanistan	El Salvador	Lebanon	Singapore
Albania	Finland	Luxembourg*	Somalia
Argentina	France*	Malaysia	Spain
Australia*	Germany* (East & West)	Mali	Syria
Austria*	Gibraltar*	Mexico	Sweden*
Belgium*	Greece	Morocco	Switzerland
Bolivia*	Guatemala	Netherlands*	Taiwan
Brazil	Guinea	New Zealand*	Thailand
Bulgaria	Honduras	Norway	Tunisia
Cambodia	Hungary	Paraguay	Turkey
Cent. African Republic	India	Peru	U.S.S.R.
Chile	Indonesia	Philippine Republic	Union of South Africa
China	Iran	Poland	U.A.R.
Colombia	Iraq	Portugal & Colonies	U.S.A.*
Curacao	Israel (*women)	Puerto Rico*	Uruguay
Cyprus	Italy	Rhodesia*	Venezuela
Czechoslovakia	Ivory Coast	Rumania	Vietnam, North
Denmark*	Korea, North	San Marino	Vietnam, South
Ecuador	Korea, South	Senegal	Yemen
			Yugoslavia

England and Canada do not have required military service.

emigration to escape tyranny and military service in particular has been a respected act. Many Russian immigrants came to the U.S. to escape the Tsarist draft. Others fled Europe after the failures of the revolutions of 1848. On the other hand, most people who seek foreign policy changes view emigration as of questionable political value. It is looked upon as an evasion of responsibility to fight for changes in foreign policy and/or the draft law in this country. The judgment basically comes down to an evaluation of the viability of the democratic process and of the price one has to pay if one wishes to be an effective instrument of social change. In this view, emigration is a cop-out, as is going "underground." For those who say "love our country or leave it" emigration is a clear choice and makes the emigrant a traitor.

PROBLEMS OF CONSCIENCE WITHIN THE MILITARY

While some men enter military service out of patriotism, most do so without thinking at all about their principles or the nature of war. They accept the draft because they believe they have no choice, or because everybody does and is expected to, or because they want to

get away from home or the misery of ghetto life, or for many varied reasons. Many problems arise for a man who realizes his conscientious objection after he has joined the armed forces. Receiving recognition as a CO is particularly difficult within the system of military law; career officers feel that a man should have dealt with his conscience before submitting to induction, that once he has accepted military service he is committed to obey orders.

Nevertheless, an increasing number of men in the military have claimed and been recognized as conscientious objectors, long and arduous and dangerous as the process may be. During 1968, 27.8% of those in the military claiming conscientious objection to all war were recognized as sincere and released from military service. Those seeking noncombatant military service were successful in 76.6% of the cases adjudged.

With the recent change in the draft law, the average age of inductees will be reduced. Many nineteen-year-old's have not yet formulated coherent philosophies, and no doubt some of these would become conscientious objectors were they permitted to defer their choice for another year or two. This may mean that while the number seeking I-O will decline, there will be an increase in those claiming conscientious objection during their military service. The pressure will be strong for modification of military law and the military process of recognizing conscientious objection.

There is also an increasing rate of desertion, for a variety of reasons. The total for 1968 was 53,352, up 13,000 over 1967. The anticipated total for 1969 is 73,839, a sharp increase despite a reduction of the armed forces by 89,000 men. Although desertion is not here considered a conscientious act, it is a comment on the popularity of the war and military service. It is fairly clear that the numbers of men seeking either CO status or deserting from the military are a function of whether there is peace or war, and if war, how "popular" that war is.

Some Special Problem Areas in Dealing with Conscience and War

FACING THE ISSUE

The preceding section describes various categories of response to the problem of war and the draft and demonstrates that there are significantly different alternatives available. Some men fit neatly into one of these categories. For example, there are many who are traditional CO's, while others know that all they want to do is get out of the draft any way that does not involve a high price, such as going to jail.

There are also many men whose ideas are still unjelled and who may need to test their own positions. They may start out one place

and end in another. These men are not necessarily insincere, but rather may be exploring their own values. Even men who sincerely want to do right are subject to fads, beguilement by the style of their peer groups or by social pressures. One may burn his draft card to impress a girl friend, and later regret it. But another may do the same and later decide that while his original reason was silly he has since found other justifications which make him willing to do it again.

In recognizing the humanity of young people grappling with difficult problems, it is important not to practice that paternalistic condescension or that unthinking support so characteristic of many people overimpressed with the morality of contemporary youth. There has been a sharp increase in the number of men becoming conscientious objectors. But there has also been an increase in the number of young people who believe violence is justified, who reject democratic institutions and values and who do not believe individual lives are sacred or valuable. There are an increasing number of men going to jail as testimony to the depth of their beliefs. But there are also many who will yell and scream as part of protest mobs, but remain unwilling to take responsible positions requiring individual risks. Which direction young people go will depend in part on whether they are challenged and helped to think seriously about the meaning and implications of different responses to war, violence and social conflict. The responsibility for this is not theirs alone but also that of our society and its institutions.

SPECIAL PROBLEMS OF NEGRO MEN

For many Negro men the army has been an attractive way out of the ghetto and a significant means of upward social mobility. The army has offered Negro men the opportunity to live in other countries, where they may encounter little or no racial prejudice. It has been argued that one cause of the upsurge in civil rights activities was the feelings of Negro veterans who had seen that there were alternatives to a segregated society.

For the Negro man who wants to stay out of the Army there are special problems in addition to his need for information. Until recently, there were very few Negroes appointed to draft boards. In 1966, only 4% of draft board members were nonwhite, though this figure rose to 6.5% by 1969. Negro men have had difficulty entering the Reserves and the National Guard—half-way out programs. For the Negro man trying to base his decision about the draft on principle, there are very difficult dilemmas. He is asked to fight to defend values which he knows are inadequately implemented for his own group. On the other hand, he cannot reject American society completely if he wants to increase the participation of Negroes in the benefits of that society. Jail for a Negro has very different

implications than it does for a white middle class youth whose family and education help compensate for the stigma of having been a felon.

IMPORTANT VALUES FOR THE INDIVIDUAL

Regardless of what specific type of response to war and the draft a man is considering and regardless of the philosophic or religious principles which motivate him, there are certain important value choices which he ought to consider as he makes his decision.

War: A draft-age man has to decide whether or not he believes war is wrong and whether he thinks it is absolutely wrong or perhaps wrong but not so much as other evils. Some protesters against the Vietnam war are not against war per se, rather they are against United States "imperialism" or in favor of the Vietcong, or perhaps think other problems are more important.

Personal Responsibility: A draft-age man has to decide whether he will assume some personal responsibility for his own deeds and for what his society does or whether he will simply obey the demands placed upon him. Hannah Arendt in *Eichman in Jerusalem* argues that modern bureaucratic society tempts many people to deny they have any personal responsibility for what is happening around them. An important element in the acceptance of personal responsibility is the consequent commitment to action.

Religiousness: Because of the fact that the draft law requires CO's to be religious but also because war is a violation of the traditional proscription against murder, young men have to decide whether they have religious beliefs and the nature of such beliefs. Many morally sensitive teenagers have rejected organized religion because of what they see as its hypocrisy. They do not want to be associated with "religion" even though in a profound way they may actually be deeply religious. Most men who are willing to go to jail for their beliefs are religious in the sense that they are willing to sacrifice their own material well-being for the sake of some greater spiritual identity or some more important set of values beyond themselves.

Social Responsibility: There are both traditional Christian pacifists and nonreligious antiwar protesters who are concerned only with their own salvation or being left alone to do their own thing. In contrast, there are religious and political protesters who may be concerned about their personal integrity but who also want to change the world by getting rid of war or eliminating injustice. Personal salvation and social responsibility do not have to be mutually exclusive, but some men do decide to travel one road and not the other.

IMPORTANT VALUES FOR THE SOCIETY

In dealing with conscientious objectors, and with the context from which they spring, it is equally important that the society as a whole face up to certain important value determinations. Among these are: how far we should go in the cherishing of the individual, especially when his convictions run counter to prevailing customs; how we can show tolerance for the widest possible range of dissent consistent with the preservation and extension of democratic values and the democratic process; the recognition that the German people were accused of war guilt for sheepishly or enthusiastically following Hitler, and an understanding of the burden this places on young people unwilling to repeat that mistake; and a pragmatic acceptance that harsh punishment does not stifle conscientiously held convictions—it is easier for the martyr to go to the stake than recant.

There is also the real question: What is, or should be, the role of the conscientious dissenter in the perfecting of a democratic society? Before even a tentative answer can be suggested, there must be widespread consensus on the goals of such a society and on the process by which these goals can be achieved. In many ways, the last has been and is the central educational challenge facing voluntary organizations.

What Should Voluntary Organizations Do?

The foregoing material, even in its abbreviated and truncated form, gives some indication of the major educational work needed in this field. The appended bibliography and the list of organizations actually working in the area of conscience and war will also be useful. The editors of INTERCOM are convinced that this problem will be with us for some time, that if anything the tensions involved will be exacerbated and that most churches, trade unions and civic organizations will find themselves involved without necessarily having made any conscious decision in that respect. Members of these organizations are not only parents, but are also concerned citizens trying to grapple with community and local difficulties as well as national and international problems. INTERCOM suggests that grass-roots organizations seek out from their memberships small groups of people specially concerned with this issue and ask them to prepare a program of study and action. The bibliography attached will be a good beginning for the study. It can serve as a basis for reporting on this subject to membership, thereby raising their level of information.

A number of religious denominations and other voluntary agencies have allocated staff and/or funds to support draft counseling. A substantial proportion of these funds are being used to bolster the work of existing agencies. It seems useful to set up some guidelines

and to ask some questions, so that those charged with the administration and disbursement of such funds can make some valid judgments on which kinds of work should be supported. Some questions are:

1. Draft counseling is not a "neutral" activity. Every counselor grounds his work implicitly or explicitly on some philosophic or religious values and on some social and political goals. Are these clear in the agency under consideration, and are they the values and goals your agency wishes to support?

2. While technical competence is required, does the agency under consideration consider itself merely technical—that is, limited to pointing out the provisions of the law and making no real effort to aid the counselee in his attempts to think about the important value questions raised?

3. Does the agency see itself as part of the "movement," with the responsibility of helping young men stay out of the Army by whatever means possible? Or is it concerned with helping him examine his own conscience to arrive at a position which is truly his and which he can hold under pressure?

4. Is the agency "directive," seeking to convince the counselee that one or another position is better, or does it help him understand himself and choose that position most meaningful to him?

5. Does the agency accept and encourage an "everyone does his own thing" approach, or is it seriously concerned with an examination of the values and attitudes actually held by the counsellee?

The above are a few of the considerations needing clarification before entering this field with staff or funds, or before considering direct programs that can be carried out by local organizations. The feasibility of action programs will vary from community to community. Among those that might be considered are:

1. Surveying and evaluating draft counseling agencies operating in the community, based on criteria derived from the above questions.

2. Surveying the information about the Selective Service System available in the community, to be sure that young men anxious or willing to enter the armed forces get adequate information about the options they have and the choices available to them. For those willing to serve, the military can be a stepping stone to a particular trade or career, and each draftee should be informed about what possible advantages there are for him.

3. Surveying the information about the Selective Service System available in the community to be sure that young men anxious not to enter the armed services will be informed as to what options exist for legal exemption from military service.

4. Seeing that the local library features a complete resource section on the draft.

5. Encouraging the local school system to institute a training program on the draft for all high school guidance counselors. Perhaps also setting up occasional forums or seminars where draft-vulnerable young men can hear varying points of view from knowledgeable people.

6. Organizing public forums, through the PTA if feasible, where parents and sons can hear varying viewpoints from experts.

7. Organizing a meeting or even a week-end "retreat" with members of your local draft board to determine what their views are on these subjects.

8. Asking the State Director of Selective Service to address a group on these problems.

9. Trying to get your local weekly newspaper to run a feature on the draft, in which all points of view will get a hearing.

10. Using the above suggestions to develop any other programs you think might be helpful in educating your community on the subject of conscience and war.

Organizations Working on the Problems of Conscience and War

Prior to the war in Vietnam, there were only a few national organizations engaged in this field, and these were primarily pacifist or related to the historic peace churches. In the past few years, a large number of new organizations have entered this area, some being recently founded, while others have shifted priorities to release funds and staff for this work. The number has grown so large that it is impossible to do more here than list a few organizations and describe them briefly, to show their special interests and their range of activity. Besides the groups listed in the following pages, there are many others engaged to a greater or lesser extent. Many of these have an ongoing concern with international affairs, and were described in our May–June 1969 issue. Some of these organizations will be listed at the end of this section, together with the page number on which a fuller description will be found in that issue of INTERCOM.

Secular Organizations

The following groups are classified here as secular, although many have a religious or denominational basis. The criterion is whether or not they are an official part of any church structure.

American Friends Service Committee (160 North 15th St., Philadelphia, Pa. 19102). The AFSC was founded during World War I to give conscientious objectors to war a constructive alternative to military service. It now conducts educational programs within the U.S., as well as relief and other service work abroad. Its Peace Education Division is responsible for the work on conscience and war that is carried out in some of its 18 field offices. Although the counseling service varies from office to office, depending on budget and staff availability, as a general rule the AFSC counsels all who resist the draft, including those not claiming conscientious objection. Some offices have begun to stress education on the draft for high school students, to give them information at an earlier age on their obligations under Selective Service. Stewart Meacham, Peace Education Secretary.

American Veterans Committee (1333 Connecticut Ave., N.W., Washington, D.C. 20036) has as its motto "Citizens First, Veterans Second." AVC has always had a special concern for the rights of the man in uniform and was the leading participant in a new program begun in 1968 stemming from Human Rights Year, with the goal of a uniform international United Nations declaration of human rights for those serving in any nation's armed forces. A Planning Conference was held in 1968, leading to an International Conference in March 1970, to culminate in another International Conference in 1971 or 1972, which will make specific recommendations to the UN. The March 1970 Conference included sessions on "Conscientious Objection in the Armed Services," "International Aspects of the Human Rights of the Man in Uniform," and "Conscience and Illegal Orders—The Nuremberg Trials." The 1968 Conference report is available on request. June A. Willenz, Executive Director.

CCCO: The Central Committee for Conscientious Objectors (2016 Walnut St., Philadelphia, Pa. 19103) is the largest organization in the country devoted exclusively to providing information and counseling on the draft. Its national office and regional offices in Chicago and San Francisco supply literature to almost all draft counseling groups in the United States, and its staff counselors are constantly called as consultants by counselors and attorneys. CCCO is a voluntary nonsectarian committee organized by church, peace and civil liberties groups to interpret the moral and legal basis of conscientious refusal to participate in war, and to counsel and assist conscientious objectors who oppose conscription, civil defense, loyalty oaths or payment of taxes for military purposes. Service is rendered free of charge, and includes counseling CO's on draft problems, training of draft counselors, advising local counseling agencies and attorneys, arranging for legal counsel for CO's facing criminal prosecution, assisting in arranging bail when needed, prison visitations, assisting in securing pardons, and working for general amnesty for prisoners of conscience. CCCO also

provides information on deferments and assists objectors in the Armed Forces. Its publications program includes *News Notes, National Counselors Newsletter* and a *Handbook for Conscientious Objectors.* Arlo Tatum, Executive Secretary.

Clergy and Layman Concerned About Vietnam (475 Riverside Drive, New York, N.Y. 10027) was organized to oppose the war in Vietnam through ecumenical action programs for religiously concerned persons and local clergy and lay groups. It has broadened its program to support men who will not fight in Vietnam and to sponsor local conferences and institutes on the draft. Twenty field staff work in major metropolitan areas providing draft counseling. It seeks to help U.S. military deserters in Canada and Sweden and has sponsored a special mission to Stockholm for one year to work with them. Rev. Richard R. Fernandez, Director.

The ***Commission on Youth Service Projects*** (475 Riverside Drive, Room 830, New York, N.Y. 10027) is composed of North American based organizations which sponsor voluntary service and involvement programs. The Commission supports and promotes these programs through the publication of *Invest Yourself,* the most inclusive available listing of voluntary service opportunities in all parts of the world (26,000 openings in 400 projects), and through specialized consultations on issues relevant to organizations sponsoring voluntary service projects. A recent consultation, "Alternate Service and Voluntary Service" applicable to alternative service within the Selective Service System, probed special problem areas regarding the locating of jobs which are socially productive as well as meaningful to the men assigned, and the related problem of getting such assignments approved by local selective service boards. Suggestions which emerged included: creation of a national Center to coordinate job placement, pressure on church agencies which are approved for alternative service to expand their programs into areas that would be more attractive to CO's. The new edition of *Invest Yourself* lists cooperating organizations sponsoring alternative service assignments. James Neal Cavener, Executive Director.

National Council to Repeal the Draft (201 Massachusetts Ave., N.E., Washington, D.C. 20002) is coordinating an educational campaign to exert pressures on Congress not to renew the draft, which expires June 30, 1971. Cooperating with the Council are representatives from nearly forty organizations including labor, religion, youth, women and business. These include radicals, liberals, moderates and conservatives who agree on the issue of draft repeal. The National Council serves as a clearing house for information on current draft law and suggested alternatives to the draft as well as on the activities of its local councils and groups. A literature list is available on request. Tom Reeves, National Director.

National Service Board for Religious Objectors. (550 Washington Bldg., 15 St. and New York Ave., N.W., Washington, D.C. 20005). Composed of 45 affiliate members, NSBRO functions as a service agency for individual conscientious objectors and for churches and other religious organizations. Founded during World War II, it maintains contact with the legislative and executive branches of Government (particularly with the Armed Services Committees of Congress, Selective Service and the Department of Defense) on issues related to the draft system. NSBRO corresponds and counsels with individual conscientious objectors seeking recognition of their position and with their counselors, assists recognized CO's in obtaining appropriate alternative service assignments, and assists in problems that may arise during service. Its publications include information and counseling materials such as *Civilian Work Agency List for Conscientious Objectors, Statements of Religious Bodies on the Conscientious Objector* (lists available on request), and its regular monthly *The Reporter for Conscience' Sake.* Warren W. Hoover, Executive Secretary.

Public Law Education Institute (1346 Connecticut Ave., N.W., Suite 620, Washington, D.C. 20036). Founded January 1968 for conducting research on and educational programs in those areas of public law which merit more attention than they have heretofore been given (e.g., selective service, environmental conservation and community relations). The Institute is nonprofit and relies on public contributions, foundation support and private contributions. It publishes *Articles & Comments: Selective Service Law Reporter* (extremely useful for every draft counselor and lawyer handling selective service cases). Thomas P. Alder, President.

War Resisters League (339 Lafayette St., New York, N.Y. 10012). This pacifist organization is concerned with action, education and programs in nonviolence. While it counsels conscientious objectors who seek legal CO status, it also supports all nonviolent forms of resistance to the draft. It is currently conducting an education program to gain public understanding for those men in the armed forces who are conscientiously resisting continued service, either by deserting or by belatedly seeking CO status. WLR distributes literature and sponsors two publications, *WIN* and *WRL News.* Ralph DiGia and David McReynolds, Co-secretaries.

Workers Defense League (112 E. 19 St., New York, N.Y. 10003) is a human rights organization devoted to full equality before the courts, on the job, in the union and in the military establishment. Founded during the depression to oppose racial, economic and political exploitation, it has expanded its work to offer counsel and legal representation to those young men whose CO claims were denied because of lack

of formal church affiliation. Legal aid is also given to those in the service who request release for reasons of conscience. Seventy-five lawyers from various parts of the country carry out its legal work. The *WDL News* prints information concerning the program. Rowland Watts, President.

Religious Groups

Practically every major religion is now working on the problems of conscience and war, some through national commissions or committees, others as yet only locally or regionally. The short listing which follows is not intended to be exhaustive, but is designed primarily to show the type of activity which religious bodies are now carrying out in this area.

Executive Council of the Episcopal Church (815 Second Ave., New York, N.Y. 10017). The staff of the Executive Council and of the various dioceses provide counsel and legal advice to those members of the church who have problems of conscience with regard to the military draft, cooperating with and assisting wherever possible other community agencies engaged in this counseling service. They support draft counseling programs (not necessarily Episcopalian, but ecumenical) through a special fund in 17 regions. A kit of informational materials is available for applicants who register as conscientious objectors with the Episcopal Church. Rev. Everett W. Francis, Coordinator, Public and Social Policy Programs.

Friends Peace Committee (1520 Race St., Philadelphia, Pa. 19102) is under direct Quaker supervision, with its major thrust toward Friends and Meetings. Its outreach, however, includes considerable non-Friend constituency as well as schools and colleges. The Committee strives to develop and apply the philosophy of religious pacifism, and of the pacifist-federalist position, to the "world in which we live." Services include draft counseling, the training of draft counselors, publication of pamphlets for distribution (list available on request), speakers and films on peace and related subjects. The Friends Peace Committee sponsors a radio program, *Avenues to Peace.* George C. Hardin, Executive Secretary.

Peace Section, Mennonite Central Committee (21 South 12 St., Akron, Pa. 17501) sponsors over 300 domestic and foreign alternative service programs for conscientious objectors, most of which are administered by Mennonite church agencies. It has extensive experience in assisting registrants with alternative service assignments. Counseling services are available through the central office or from draft and service counselors located throughout the country. A 200-page manual

of draft information, a variety of peace literature and display materials have been produced by the Peace Section which cooperates with other organizations working with draft-age persons. Its services are available to anyone seeking assistance and information regarding the draft and alternative service. John A. Lapp, Executive Secretary; Walton N. Hackman, Associate Secretary for Selective Service Affairs.

Presbyterian Service Committee for Religious Objectors (830 Witherspoon Bldg., Philadelphia, Pa. 19107) provides information and assistance to United Presbyterian conscientious objectors seeking legal recognition; serves as advocate in the adjudication of particular cases; and aids CO's who have been recognized as such by the Selective Service System to find meaningful alternative service employment under the auspices of the United Presbyterian Church. Howard C. Maxwell, Director.

Unitarian Universalist Association. (25 Beacon St., Boston, Mass. 02108). The Division for Social Responsibility maintains a ministry for draft resisters and includes prison counseling and assistance in providing legal aid to men who in conscience resist the draft. UUA encourages local schools, churches and other community organizations to conduct educational programs so that young men of draft age will understand their rights under Selective Service provisions. A Registry of Conscientious Objectors has been established to provide for the acceptance and recording of voluntary written statements of objection to participation in war by members of Unitarian Universalist churches or fellowships. This is available to young men who desire to strengthen their present position with their draft boards. The Unitarian Universalist Service Committee provides a placement service (domestic and overseas) for CO's seeking alternative service assignment (CO Placement Coordinator, UUSC, 78 Beacon St., Boston, Mass. 02108). Pamphlets and other materials have been prepared for distribution (list available on request). Dr. Homer A. Jack, Director.

United Church of Christ (289 Park Ave. South, New York, N.Y. 10010). The Council for Christian Social Action provides a general information packet dealing with conscientious objection. This is available to local pastors, church members and others requesting assistance, since the Council (although it has direct contact with CO's) operates mainly through local churches. The UCC has called for recognition of selective objection, has asked for amnesty for men of conscience, and has called for reform of selective service inequities including elimination of the draft except in times of national emergency as determined by Congress. Rev. Huber Klemme, Coordinator of Draft Counseling Services.

Additional Organizations

Jewish Peace Fellowship, 420 Riverside Drive, New York, N.Y. 10025. (Affiliated with Fellowship of Reconciliation.)

Described in May/June 1969 INTERCOM:

Catholic Peace Fellowship, 339 Lafayette St., New York, N.Y. 10022. Page 41. (Affiliated with Fellowship of Reconciliation.)

Council on Religion and International Affairs, 170 E. 64 St., New York, N.Y. 10021. Page 44.

Fellowship of Reconciliation, Box 271, Nyack, N.Y. 10960. Page 46.

Friends Committee on National Legislation, 245 Second St., N.E., Washington, D.C. 20002. Page 47.

Local and Regional Agencies

The number of local and regional draft counseling agencies now runs into the hundreds, and cannot be described, or even listed, in the available space. These range from New Left and revolutionary to traditional religious pacifist in approach. The three which are here described are illustrative of the broad range possible.

Draft Information Center (153 N. 16 St., Philadelphia, Pa. 19102). Seven organizations have cooperated in the development of DIC, which was founded in 1968 by the Friends Peace Committee. DIC is seeking still wider sponsorship. It serves as the hub of a coordinated network of counseling services in the Greater Delaware Valley (radius of 50 miles of Philadelphia). Thirty satellite groups exist at various levels of development, and more than 400 draft counselors have been trained. Draft training for School Guidance Counselors is now being instituted in cooperation with the Public Schools of Philadelphia, and it is hoped the program will extend to the suburbs soon. Robert Edenbaum and George Hardin, Co-chairmen.

East Bay Draft Information and Counseling Center (2320 Dana St., Berkeley, Calif. 94704), a joint project of the World Without War Council of Northern California and the Bay View District of the United Methodist Church, in cooperation with 16 other community organizations (primarily churches), the EBDICC offers a full range of counseling services, including the training of counselors. Its formal support by local and regional community organizations is rare in the draft counseling field.

The Center is explicit about the value framework governing its activities. It believes that all counselees should be confronted with the

various ethico-religious, philosophical and political issues involved in making a decision about participation in military service. Its *Guidelines* makes clear that so long as war continues to be used as a means of processing international conflict, no individual can make a completely satisfactory response to the draft and military service, even though each individual still has the responsibility to make a decision in this area. Available from EBDICC are: informational materials on the draft, training materials and resources, information on EBDICC, and program materials and suggestions.

Merton-Buber House (342 E. 6 St., New York, N.Y. 10003) is a joint venture of the Catholic Peace Fellowship and the Jewish Peace Fellowship providing draft counseling information, training for draft counselors, and an outreach visitation program to high schools and colleges in New York City. Staff members are also active in the questions of reparations to black people and the servicemen's protest movement, with draft counseling being only part of a larger program that tries to reach all who protest, regardless of the reasons for such protest. Complete information and materials are available on request.

Resources

BIBLIOGRAPHY

The following, while perhaps appearing extensive, is only a sampling of the voluminous literature on the subject of conscience and war. Each item listed is classified for convenience under its primary focus, but many also deal with other aspects of the subject.

The Individual and Society

Obligation and the Body Politic, *Joseph Tussman. Oxford, 1960. 144 pp. $2.25.* A discussion of individual responsibility in a democratic society. It makes a decisive case for a social obligation to obey the law based on the doctrine of tacit consent, e.g. an individual who accepts the benefits of a society incurs an obligation to uphold its laws, an argument that any individual considering his alternatives to the draft needs to consider.

A Lawyer's Case for Civil Disobedience, *Harris Wofford.* LIBERATION, *January 1961. World Without War Council Reprint, 1730 Grove St., Berkeley, Calif. 94709. 4 pp. 10¢. (Also available in* Instead of Violence, *edited by Arthur and Lila Weinberg. Beacon, 1965. 486 pp. $2.75. pp. 64–69.)* Sees respect for genuine civil disobedience (as distinguished from draft dodging or revolutionary violence) as an essential requisite of a free society. Argues for the kind of civil disobedience that is open, accepts the legal consequences of the disobedient act and thus demonstrates respect for the law even while disobeying.

Misuses of Civil Disobedience, *Paul Kurtz.* DISSENT, *January-February, 1970.* A philosopher attempts to dispel some of the confusion and ambiguity that have grown up around the term in recent years, proposes a working definition and tries to state as simply as possible the conditions in which civil disobedience may be justified.

Concerning Dissent and Civil Disobedience, *Abe Fortas. Fawcett, 1968. 128 pp. 50¢.* and
Disobedience and Democracy: Nine Fallacies on Law and Order, *Howard Zinn. Vintage, 1968. 124 pp. $1.45.* A Supreme Court Justice's argument for the limited use of civil disobedience to challenge "profoundly immoral or unconstitutional laws" and a reply by a political scientist who sees a place for a much more widespread "deliberate, discriminate violation of law for a vital social purpose." Taken together, these two books are a good indication of the current state of the debate.

Religious and Philosophical Viewpoints

War and Conscience in America, *Edward L. Long, Jr. Westminster Press, 1968. 130 pp. $1.65.* A contemporary survey of the various moral positions and dilemmas in our society regarding war, introducing some helpful new categorizations and also briefly presenting historical foundations. Talks cogently of the moral issues raised by the draft and the Vietnam War, and recommends a more even-handed governmental attitude regarding individual conscience, including recognition of the "selective objector." Clearly the best general book on the subject.

Christian Attitudes Toward War and Peace: A Historical Survey and Critical Re-Evaluation, *Roland H. Bainton. Abingdon Press, 1960. 299 pp. $4.75.* Probably the best available survey of Christian positions, beginning with pre-Christian foundations and tracing the development of pacifism, the Crusade ethic, the just war doctrine and the special problems of the nuclear age. Closes with the author's own criticisms and recommendations.

War and Moral Discourse, *Ralph B. Potter. John Knox Press, 1969. 123 pp. $2.45.* A brief but lucid analysis of the various possible attitudes toward war from the perspective of contemporary moral philosophy. Includes a highly readable explanation for the non-philosopher of the nature of ethical judgments and an excellent bibliographic essay.

War, Peace, and Conscience in Jewish Values and Social Crisis, *Albert Vorspan. Union of American Hebrew Congregations, 838 Fifth Ave., New York, N.Y. 10021. 1969. 339 pp. $4.00.* A skillful exploration of the various and sometimes contradictory teachings on conscience and war to be found in different strands of the Jewish tradition. Includes an essay on "Can a Jew Be a Conscientious Objector?" and a uniquely valuable anthology of statements by Jewish authorities from Biblical times to the present.

Religion and International Responsibility, *Robert Gordis. Council on Religion and International Affairs, 170 East 64 St., New York, N.Y. 10021. 1959. 21 pp. 50¢.* Summarizes pertinent aspects of the Biblical world-view and the ethical heritage of the Judeo-Christian tradition, and argues their practical relevance to the conduct of international affairs.

What Violence Is, *Newton Garver.* THE NATION, *June 24, 1968.* A Quaker philosopher attempts a definition and typology of violence in human affairs—overt and covert, physical and psychological.

The Moral Dilemma of Nuclear Weapons, *edited by William Clancy. Council on Religion and International Affairs, 170 East 64 St., New York, N.Y. 10021. 1961. 78 pp. $1.* A clarification of the moral issues which surround the threat and/or the use of nuclear weapons. Includes selections from diverse points of view. A good introduction to this subject.

Justifications of War and Violence

Moral Man and Immoral Society, *Reinhold Niebuhr. Scribner's, 1960. 284 pp. $1.65.* One of Niebuhr's basic works which set the categories in which the issue of the morality of war is still being argued. Niebuhr justifies the use of violent means in the conduct of international affairs by holding that societies are special entities to which the rules of individual morality cannot apply.

Modern War and the Pursuit of Peace, *Theodore R. Weber. Council on Religion and International Affairs, 170 East 64 St., New York, 10021. 1968. 39 pp. 50¢.* A good brief survey which explains the development of the just war concept, contrasting it with Christian pacifism. Indicates how many traditional just war assumptions have been threatened by contemporary ideological and technological developments.

The Just War: Force and Political Responsibility, *Paul Ramsey. Scribner's, 1968. 554 pp. $12.50.* One of the foremost writers in the field of ethics and war argues, in a collection of essays which includes previously unpublished papers, that "political life [cannot] endure without the use of force"; it is necessary to analyze the ethical requirements governing "just conduct" in situations in which force is employed. In separate chapters, Ramsey deals forthrightly with some of the major problems of our time, such as the ethics of intervention, nuclear war, counterinsurgency war, chemical weapons and Vietnam.

War, Conscience and Dissent, *Gordon C. Zahn. Hawthorne Books, New York, 1967. 317 pp. $5.95.* A Catholic pacifist and sociologist presents a series of incisive essays in which he argues that there can never be a "just" war. Dr. Zahn devotes a chapter to Catholic conscientious objection in the United Sttates.

The Wretched of the Earth, *Franz Fanon. Grove Press, 1963. 225 pp. $1.25.* A psychoanalyst's argument that violence in the ex-colonial countries is necessary to the achievement of true dignity and selfhood. Equates dignity with power over others, and denounces the cities of the world as strongholds of neo-colonialism. Fanon sets no limits to his justification of violence, making his argument presumably valid against anyone in power. An extremely influential book with today's New Left.

Declaration at His Court Martial, *Regis Debray.* LIBERATION, *February 1968. Available in a reprint entitled "Revolution: Violent and Nonviolent." 28 pp. 35¢.* A guerrilla fighter argues that only violent struggle can create the class consciousness needed for a successful revolution.

Their Morals and Ours: Marxist versus Liberal Views on Morality. *Four essays by Leon Trotsky, John Dewey, George Novak. Merit Publishers, New York. 1969. 80 pp. 95¢.* The communist argument for the morality of revolutionary violence to gain social objectives. A classic presentation of the belief that "the ends justify the means."

Reflections on Violence, *Georges Sorel. Macmillan, 1967. 286 pp. $1.50.* The primer of revolutionary syndicalism (1906), with its apology for working class violence, visible again in current justifications of street and university violence. A basic source for much of today's rationale for revolutionary violence.

Pacifism and Nonviolence

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The New Testament Basis of Pacifism, *George H. C. MacGregor. Fellowship Publications, 1960. 160 pp. $1.25.* Originally published in 1936, this is the standard work by a theologian on the Biblical origins of pacifism and its historical development in the early Church. The essay "The Relevance of an Impossible Ideal," included here as an appendix, appeared in 1941 as a reply to Reinhold Niebuhr's attack on the pacifist position.

Conquest of Violence: The Gandhian Philosophy of Conflict, *Joan Bondurant. University of California Press, 1965. 261 pp. $1.95.* The best introduction to Gandhian pacifism, using concrete examples from Gandhi's struggles for Indian independence. Criticizes the frequent identification of power with military force. Cites Gandhi's success in transforming his "enemies."

Drawing the Line, *Paul Goodman. Random House, 1962. $1.50.* This essay by a noted contemporary social critic is the most influential recent restatement of the anarchist pacifist position and its view of the individual's relationship to society.

Speak Truth to Power, *American Friends Service Committee, 160 N. 15 St., Philadelphia, Pa. 19102. 1958. 68 pp. 35¢.* A study of international conflict and a source of considerable controversy within the pacifist movement as well as outside it, this groundbreaking work affirms the Gandhian commitment to truth and political justice as a root value for pacifists. While rejecting war, the study requires pacifists to accept responsibility for finding alternative ways of defending values and forcing needed change. Though somewhat dated now in its examples, it is still the most cogent argument for a "hard-headed" pacifism.

Pacifism in the United States: From the Colonial Era to the First World War, *Peter Brock. Princeton University Press, 1968. 1005 pp. $18.50.* A monumental treatment of the denominational and otherwise institutional history of pacifism in the United States up to World War I. Exhaustively documented and spiced throughout with anecdotes about the ordeals and experiences of individual pacifists. Includes a bibliography.

The Quiet Battle, *edited by Mulford Q. Sibley. Beacon, 1968. 377 pp. $2.95.* A good anthology of essays discussing historical instances when nonviolent means have been used successfully to achieve desired social ends.

In Place of War, *American Friends Service Committee, 160 North 15 St., Philadelphia, Pa. 19102. Grossman, 1967. 115 pp. $1.45.* Discusses nonviolent means of national defense, and argues that these means are not only preferable on moral grounds but are more effective, and that the techniques for successfully implementing them can be acquired.

On Revolution and Equilibrium, *Barbara Deming.* LIBERATION, *February, 1968. Available in reprint entitled "Revolution: Violent and Nonviolent." 28 pp.*

35¢. Believing that revolutions are both necessary and fully justified in many parts of the world, Deming argues that they can and must be waged nonviolently. Gives thoughtful, hard-headed pacifist answers to the usual objections to the use of nonviolence by oppressed peoples. A powerful reply to Frantz Fanon's book *Wretched of the Earth*.

Revolution and Violence, Mulford Q. Sibley. PEACE NEWS *Reprint, 1964. 8 pp. 10¢.* Argues that revolutionary violence is inherently destructive of progressive, egalitarian ends, and hence is an obstacle to, not a desirable means of achieving, democratic and humane social change. A radical's rejection of the current New Left case for violence.

The Power of Nonviolence, *Richard B. Gregg. Schocken, 1966. 187 pp. $1.75.* A pioneering work on the theory and practice of nonviolence. The author, a friend of Gandhi's who spent several years in India, describes the less well-known nonviolent struggles of Norway and Denmark during World War II, and analyzes the psychological reasons for the power of nonviolent action. The last half of the book is one of the best available presentations of the case for nonviolence as an effective substitute for war. Gregg compares the similarities between the soldier and the nonviolent resister, between military strategy and techniques of nonviolent resistance, and concludes with his version of the nonviolent equivalent to the Army Field Service Manual which is issued for instruction to all soldiers.

Civilian Resistance as a National Defense: Nonviolent Action Against Aggression, *edited by Adam Roberts. Penguin Books, Baltimore, 1969. 367 pp. $1.65.* A provocative collection of essays proposing an alternative to military defense, arranged in three sections: the first, on the nature of problems to be faced, i.e., military attack, *coup d'etat*, totalitarianism; the second, on the lessons of past experiences with nonviolent action against aggression; and the third, on the political, strategic and organizational aspects of a civilian defense policy. Of particular interest are the introduction, which discusses the Czechoslovak resistance in August 1968, and the concluding essay, by Thomas Schelling, which raises important questions about the meaning and implications of civilian defense.

The Draft

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In Pursuit of Equity: Who Serves When Not All Serve? *Report of the National Advisory Commission on Selective Service (Marshall Commission). Superintendent of Documents, Washington, D.C. 20402. 1967. $1.50.* A thorough and factual study of Selective Service prepared for the President. Finds much to criticize and concludes with both majority and minority recommendations for change.

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The Draft: A Handbook for Facts and Alternatives, *edited by Sol Tax. University of Chicago Press, 1967. 497 pp. $3.95.* Based on a 1966 conference on the draft held at the University of Chicago, this anthology includes selections by General Hershey, Erik Erikson, Sen. Edward Kennedy, Margaret Mead, Kenneth Boulding and others. A comprehensive survey of analyses of the draft and plans to change or replace it.

Who Will Do Our Fighting for US?, *George E. Reedy. Introduction by Senator Edward M. Kennedy. World (Meridian Books), 1969. 126 pp. $1.95.* The author criticizes the volunteer army as less democratic and representative than an army which relies partially on a broadly based lottery draft of nineteen-year-olds. His system would include the almost complete elimination of current deferments and a revamping of the present local board system.

Humanist Conscientious Objection, *Edward L. Ericson.* THE HUMANIST, *May/June 1969.* The President of the American Ethical Union argues that "the First Amendment was carefully drawn to protect equally all beliefs concerning religion—not just the beliefs of the 'religious' and that, therefore, the tying of eligibility for classification as a conscientious objector to 'religious belief' violates freedom of conscience—and equal protection of the law on matters of religion."

Humanist Conscientious Objection: A Guide for Men of Draft Age, *Dale H. Drews. American Ethical Union, 2 West 64 St., New York, N.Y. 10023; and the American Humanist Association, 135 El Camino del Mar, San Francisco, Calif. 94121. 1970. 44 pp. $1.25; bulk and dealer rates on request.* Useful to draft counselors, and complete with bibliography, the book is designed to meet the needs of the large groups of unaffiliated Humanists, non-theists and religious liberals. The steps which must be taken to qualify for CO status are discussed, as is noncooperation.

Different Responses to War and the Draft

Guide to the Draft, *Arlo Tatum and Joseph S. Tuchinsky. Beacon Press, 1969. 281 pp. $1.95.* This is the most outstanding single book written to aid young men in coping with the draft. A clear and generally impartial discussion of all rights, deferments and options, including emigration and noncooperation. Twenty-two official forms are reprinted. Urges individuals to consult a draft counselor for more specific aid.

Handbook for Conscientious Objectors, *edited by Arlo Tatum. Available from CCCO, 2016 Walnut St., Philadelphia, Pa. 19103. 100 pp., continually updated. $1.00.* This is must reading for any draft-age man interested in conscientious objection, both within and outside current law. In addition to a comprehensive outline of relevant Selective Service laws and procedures, the Handbook contains chapters on noncombatant military service, civilian alternative service assignments, the courts and prison life. Raises issues that need to be considered by anyone in thinking through his own conscientious position. Includes a bibliography.

Face to Face With Your Draft Board: A Guide to Personal Appearances,

Allan Blackman. World Without War Council, 1730 Grove St., Berkeley, Calif. 94709. 1969. 90 pp. 95¢. A first-rate primer for conscientious objectors, also useful to others facing a personal appearance before their draft board. A unique source of information on what to expect at an interview with a draft board and how to prepare oneself, including transcripts of actual personal appearances. Designed to help a young man become clear on his own beliefs and demonstrate them in action. Includes an excellent collection of readings grouped under selected questions about fundamental value choices and attitudes. Indispensable for draft counselors.

Statements of Religious Bodies on the Conscientious Objector, *edited by P. Wayne Wisler and J. Harold Sherk. National Interreligious Service Board for Conscientious Objectors, 550 Washington Bldg., 15th and New York Ave., N.W., Washington, D.C. 20005. Sixth edition, 1968. 68 pp. 50¢.* Official statements of all major religious denominations on conscientious objection.

Why We Counsel: Conscience and War. *World Without War Council, 1730 Grove St., Berkeley, Calif. 94708. 1967. 20 pp. 35¢.* A kit of materials with a distinctive approach to problems of draft counseling, emphasizing the relation of the individual's objection to war and the problem of ending war.

Guidelines for East Bay Draft Information and Counseling Center, *Robert Pickus and Steve Bischoff. World Without War Council, 1730 Grove St., Berkeley, Calif. 94709. 1969. 8 pp. 10¢.* A presentation of draft counseling aimed at providing a searching examination of the religious and ethical dimensions of draft decisions.

A Conflict of Loyalties: The Case for Selective Conscientious Objection, *edited by James Finn. Pegasus, 1968. 288 pp. $1.75.* Thoughtful arguments for governmental recognition of selective conscientious objection. A number of distinguished contributors examine the moral, philosophical, political and legal aspects of the issue.

We Won't Go, *edited by Alice Lynd. Beacon, 1968. 331 pp. $1.95.* Composed principally of statements by draft refusers and resistance members in response to the editor's query "Why won't you go?" The selection reflects the author's interest in noncooperation (the CO position is largely disclaimed). Offers useful insights into some of the present draft opposition.

Of Holy Disobedience, *A. J. Muste. Greenleaf Publications, 1952. 20 pp. 25¢.* One of American pacificism's leading theoreticians and activists argues that noncooperation (a refusal to register for the draft) is morally superior to the CO position.

Your Military Obligations and Opportunities, *Jack Raymond. Collier, 1963. 95¢.* A reliable guide from a traditional pro-military service viewpoint.

Let's Think About the Christian and Military Service, *Herman Will, Jr. Board of Christian Social Concerns, United Methodist Church, 100 Maryland Ave., N. E., Washington, D.C. 20002. 14 pp. 15¢.*
and
Your Decision About Military Service, *Council for Christian Social Action, United Church of Christ, 289 Park Ave. South, New York, N.Y. 10010. 24 pp. 25¢.*
and
War, Peace, and Conscience: Resources for the Church's Ministry, *United Presbyterian Church, Office of the General Assembly, 510 Witherspoon Bldg., Philadelphia, Pa. 19107. November, 1969. 47 pp. 75¢.* Three of the finest recent church publications on the dilemmas of war and the individual conscience. Well-rounded and impartial, they touch on most of the arguments, issues and basic value choices that must be faced by the draft-age Christian and a clergyman trying to counsel such a man. They draw no conclusions, except the need for much hard thought and careful soul-searching on the part of all concerned.

AUDIO-VISUAL AIDS

Film making on the problems of conscience and war has been enormously stimulated by Vietnam. However, the quality by and large of these films does not equal the quality of most books and articles on the subject. With that caveat, INTERCOM lists the following resources.

Distributors

American Friends Service Committee (AFSC), 160 N. 15 St., Philadelphia, Pa. 19102. (Also regional offices.)

Fellowship of Reconciliation (FOR), Box 271, Nyack, N.Y. 10960.

American Documentary Films (ADF), 336 W. 84 St., New York, N.Y. 10024 and 379 Bay St., San Francisco, Calif. 94133.

Films

Who Owns Tony Fargas? *AFSC. 16mm., 9½ min., b&w, sound. Rent, $3.00; purchase, $75.00.* A black man fights for CO status with his all-white local board. Good for discussions.

Alternatives. *FOR and AFSC. 16 mm., 24 min., color, sound. Rent, $10.00; purchase $125.00.* Explains CO position and alternative service. Recommended for high school students.

For Ages Ten to Adult. *AFSC. 16 mm., 16 min., b&w, sound. Rent, $3.00.* Presents actual films of the proceedings at a draft board and induction center, interspersing these with scenes of war and its influence on Americans.

Some Won't Go. *ADF. 16 mm., 50 min., b&w, sound. Rent, $65.00; purchase $375.00.* A critique of the draft from the resistance point of view.

Sons and Daughters. *ADF. 16 mm., 50 min., b&w, sound. Rent, $65.00; purchase $550.00.* A general attack on the war, the draft and the military in America from the point of view of the young people being asked to contribute to them.

Let's Live. *AFSC. 16 mm., 16 min., b&w, sound. Rent $3.00.* A panel discussion involving four past and present CO's.

The Magician. *AFSC and Sterling Educational Films, 241 E. 34 St., New York, N.Y. 10016. 16 mm., 13 min., b&w, sound. Rent $10; purchase $125.* A symbolic story of young men invited to a shooting gallery, in which they soon become carried away with their newfound ability to destroy.

The Way of Nonviolence. *FOR. 16 mm., 14 min., b&w, sound. Rent, $2.50.*

A recorded speech by Andre Trocme, drawing on his experiences in World War II, East Germany and Algeria.

Not by Might. *FOR. 16 mm., 17 min., b&w, sound. Rent, $2.50.* A. J. Muste discusses an antiwar program focused on children.

Blessed Are the Peacemakers. *FOR. 16 mm., 17 min., b&w, sound. Rent, $2.50.* Dr. Martin Niemoeller speaks of current world tensions and concludes that "pacifism has become a necessity."

Recordings and Tapes

Draft Dodger! *Todd Records, 62 Lakeview Ave., Toronto 3, Ontario. LP. $4.95, postage prepaid.* A discussion by eight American draft resisters in Canada of what led them to their action and how they have reacted to the change.

The Historical Basis of Pacifism. *FOR. 50 min. tape. 3¾ ips. Rent, $1.50; purchase $3.50.* A speech by Roland H. Bainton.

Nonviolent Resistance in Wartime. *FOR. 13 min. tape. 7½ ips. Rent, $1.50; purchase $3.50.* By Andre Trocme, who sheltered Jewish refugees during the Nazi occupation of France.

Other Resources

For official publications and descriptive material on Selective Service write to: Selective Service System, Office of Public Information, 1724 F St., N.W., Washington, D.C. 20435.

For occasional articles on this subject, the following magazines, among many others, will be useful to scan: AMERICA, SATURDAY REVIEW, NATION, CHRISTIAN CENTURY, LIBERATION, COMMONWEAL, DISSENT, WAR/PEACE REPORT, COMMENTARY, CATHOLIC WORLD, CHRISTIANITY AND CRISIS, HUMANIST, WORLDVIEW and NATIONAL CATHOLIC REPORTER. The New Left, revolutionary and noncooperation points of view can be found in the NEW YORK REVIEW OF BOOKS, RAMPARTS and LEVIATHAN, among others.

Magazine articles are listed in the READER'S GUIDE TO PERIODICAL LITERATURE (check your local library) under such categories as "Conscientious Objection" and "Military Service."

Looking Back:

The UN at Twenty-five: A Handbook for the Anniversary Year 1970

Volume 11, No. 2 (September/October 1969) $1.50

Stressing the educational rather than the ceremonial nature of the observance, this handbook provides factual information and an extensive listing of supplementary resources for an assessment of the past and an appraisal for the UN's future role in achieving world order. Programs and activities are suggested on UN, U.S. Government and major voluntary organization plans for the anniversary year.

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Looking ahead to the next issue:

From Aid to International Development

The Report issued in March 1970 of the Presidential Task Force on International Development (the Peterson Report) will suggest the guidelines for a new U.S. policy on foreign aid. Citizen response to the recommendations offered in the Report will be instrumental in the formulation of our policy on international development, and our participation in the Second Development Decade.

purchase $3.50. A speech by Roland H. Bainton.

Nonviolent Resistance in Wartime. *FOR. 13 min. tape. 7½ ips. Rent, $1.50; purchase $3.50.* By Andre Trocme, who sheltered Jewish refugees during the Nazi occupation of France.

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VIKTOR VON WEIZSÄCKER

„EUTHANASIE“ UND MENSCHENVERSUCHE

VERLAG LAMBERT SCHNEIDER / HEIDELBERG

SONDERDRUCK AUS DER ZEITSCHRIFT

PSYCHE

TIEFENPSYCHOLOGIE UND MENSCHENKUNDE

IN FORSCHUNG UND PRAXIS

1. Folge 1947

VIKTOR VON WEIZSÄCKER

„EUTHANASIE“ UND MENSCHENVERSUCHE

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VERLAG LAMBERT SCHNEIDER / HEIDELBERG

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Ich weiß, daß die folgende Darlegung viele Fragen offen läßt oder nur neu anregt. Selbstverständlich war diese meine mehr verstandesmäßige Analyse angeregt auch durch den Nürnberger Ärzteprozeß. Während der Abfassung erschien die Dokumentensammlung (Das Diktat der Menschenverachtung) von *A. Mitscherlich* und *F. Mielke* im gleichen Verlag. Sie hat die öffentliche Beurteilungsbasis auch jenes Prozesses wenigstens verbreitert. Hier aber kam es mir darauf an, nicht zum Prozeß Stellung zu nehmen, sondern den Geist der Medizin zu prüfen. Es gibt nicht nur einen Geist der Medizin; aber es gibt einen Geist der Medizin, der auch beim Prozeß und vor allem beim Zustandekommen der von jedem braven Menschen verabscheuten Taten selbst sein Alibi vergeblich zu beweisen suchen würde. Dieser unsichtbar auf der Nürnberger Anklagebank sitzende Geist — der Geist, der den Menschen nur als Objekt nimmt — ist nicht nur in Nürnberg im Spiele, er durchsetzt die ganze Welt in fein verteilter Form und ist im Beispiel der „Euthanasie" und der Menschenversuche nur in einer so groben und scheußlichen Form zutage getreten, daß nun eine neue Verdunklung zu befürchten ist; man könnte sagen (und sagt es bereits): die Greuel von Dachau und so weiter zeigen, wohin man nicht gehen darf, also um so deutlicher auch, wie weit man gehen darf und muß. Das sieht dann so aus: „Euthanasie" und Menschenversuche sind „an sich" ärztlich begründbar, nur müssen sittliche Grenzen eingehalten werden. Was aber dies „an sich" bedeutet, bleibt hier immer noch dunkel. Ich gestehe, erst im Verlauf meiner Untersuchung selbst die Klarheit gefunden zu haben, daß ein ganz bestimmtes Prinzip, nämlich das der Solidarität, mir brauchbar erscheint, um zu beweisen, daß es eine An-sich-Berechtigung jener Maßnahmen nicht gibt, und daß das Wesen vernichtender und experimentierender Maßnahmen aus dem Solidaritätsprinzip ableitbar ist. Wenn dies — und es handelt sich um einen Vorschlag — richtig ist, dann wäre der nächste Schritt der, daß man in sittlich strittigen Fällen untersucht, ob das Gebot der Gegenseitigkeit erfüllt ist. Dies aber in jedem Bereiche der Medizin, nicht nur wie hier an ihrem Rande oder jenseits desselben. Das Weitere lag außerhalb der folgenden Darlegungen. Noch wichtiger aber ist dann das Problem: der Mensch in der Medizin als Objekt, als Subjekt, als Naturobjekt, als Wertsubjekt

und so weiter. Es ist bestürzend und fordert die größte Anstrengung heraus, daß derartige Vorkommnisse nötig gewesen zu sein scheinen, damit Gefahr und Sinn der objektiven Wissenschaftsform zu allgemeiner neuer Besinnung in die Schranken gerufen wurden. Für diese Hauptaufgabe liefert das hier Folgende nur einen begrenzten Beitrag.

1. Kann die künstliche Abkürzung des Lebens (sogenannte „Euthanasie") bei unheilbaren Geisteskrankheiten vom medizinischen Standpunkt aus vertreten werden?

a) Was heißt „medizinischer Standpunkt"?

Dieser Begriff scheint vorauszusetzen, daß es eine allgemeine Sittlichkeit gibt, deren Anwendung in der Medizin besondere Fachkenntnisse und eine Erfahrung in besonderen Situationen nötig macht. Es müsse jemand gelernter Mediziner sein, um zu beurteilen, welche Handlungen in der Medizin als sittlich oder unsittlich zu gelten haben. Aber auch die Ansicht eines einzelnen Arztes würde hier nicht zureichen, wenn sie nicht mit einem allgemeingültigen Standpunkt der gesamten Ärzteschaft übereinstimmt; so als ob es etwas wie eine Berufs- oder Standesethik gäbe, nach der der Einzelne sich zu richten hat.

Diese Voraussetzung, also daß es einen medizinischen Standpunkt gibt, der selbst unbestritten wäre und zur Anwendung bereit läge, trifft aber nicht zu. Die Ansichten sind geteilt und darauf eben kann es beruhen, daß eine bestimmte Handlung sowohl als zulässig, erwünscht oder notwendig, wie auch als schlecht, strafbar und vermeidbar beurteilt wird. Wenn also eine selbstverständliche oder allgemeine ärztliche Ethik nicht existiert, so ist nach dem Grunde dieses Mangels zu suchen. Der Grund ist, daß die Idee der Medizin nicht einheitlich ist; geschichtlich zeigt sie Entwicklung und Wandel und persönlich ist sie insofern freigestellt, als sie in Staatsgesetzen nirgends festgesetzt, in der ärztlichen Prüfung und der staatlichen Zulassung zum Beruf nicht enthalten ist. Die Idee der Medizin, und auch die Berufsethik ist also nur individuell und subjektiv vorhanden. Das hat wieder zur Folge, daß kirchliche, weltanschauliche, politische und dann wieder persönliche Bindungen mitbestimmen, welche ethischen Grundsätze jemand hat, oder auch wieder wie er ohne Grundsätze praktisch entscheidet. Die weitere Folge dieses Zustands ist aber, daß ich hier ebenfalls von meinem medizinischen Standpunkt und meinen persönlichen Ansichten aus, also als Individuum zu sprechen genötigt bin. Ich kann nicht immer genau wissen, welche und wieviele meiner Kollegen mir zustimmen werden. Trotzdem werde ich versuchen, nicht „autoritär", sondern in Übereinstimmung mit den sittlichen Gegebenheiten meines Standes und meiner Zeit und mit Rücksicht auf die tatsächlich vorhandenen Verhältnisse zu urteilen. Ich bin ferner der Ansicht, daß der Begriff des medizinischen oder ärztlichen Standpunktes zweierlei zum Inhalt hat: erstens eine Bindung an wenn auch ungeschriebene Gesetze, zweitens aber auch eine persönliche Freiheit zur Entscheidung, ohne welche die Sittlichkeit nicht möglich ist.

Endlich gehe ich davon aus, daß die Handlung des Arztes in der Tat so eigenartig ist, daß es sinnlos und nutzlos wäre, etwa zu behaupten, das Sittliche sei überall dasselbe und die ärztliche Sittlichkeit sei die gleiche wie in jeder anderen Situation. Insofern also akzeptiere ich den Begriff eines „medizinischen Standpunktes" und verweigere die Beantwortung der gestellten Frage nicht.

b) Was heißt „unheilbare Geisteskrankheit"?

Man darf sich hier nicht an das Wort Geisteskrankheit klammern. Eine angeborene Idiotie oder eine arteriosklerotische oder traumatische Verblödung sind eigentlich keine Geisteskrankheiten. Andererseits sind sehr viele geistige Abnormitäten leichterer Art unheilbar, und es kommt dann auf den Grad der Erkrankung an, beziehungsweise darauf, wo ein Arzt die Grenze zwischen Abnormität und Geisteskrankheit nach seinem Ermessen zieht. Man sieht, daß hier bereits eine Wertsetzung, nicht nur ein Tatbestand im Spiele ist. Auch ist die Annahme der Unheilbarkeit in vielen Fällen ungewiß. Es gibt diagnostische Irrtümer, es gibt Ausnahmen von der Regel und es gibt Fortschritte der Therapie, nach denen für unheilbar gehaltene Fälle heilbar werden. Ferner ist der Begriff einer Heilung relativ. Ein Mensch kann unheilbar krank, aber sozial eingeordnet und sogar nützlich sein; umgekehrt gibt es asoziale und zerstörend wirkende Psychopathen, die nicht geisteskrank sind. Wenn also in dem Begriffe „unheilbare Geisteskrankheit" irgendein Kennzeichen oder ein Motiv zur Beseitigung solcher Personen liegen sollte, dann ist der Ausdruck so gewählt, daß er das eigentlich Gemeinte — unwertes Leben — entweder nicht bezeichnen kann oder verdecken soll. Im übrigen ist hier die verhältnismäßige Subjektivität, das Vorkommen fließender Übergänge zwischen krank, abnorm und gesund, und endlich die Fehlerquote, die mit aller menschlichen Unvollkommenheit auch in der Wissenschaft einhergeht — es sind alle diese drei Relativitäten kein Grund, das Urteil der Unheilbarkeit überhaupt für unmöglich zu erklären. Eine große Zahl von Fällen kann und muß vom unterrichteten Arzt als unheilbar bezeichnet werden — selbstverständlich in den Grenzen alles menschlichen Urteilens.

c) Die Willensbildung bei ärztlichen Vernichtungsmaßnahmen

Zunächst muß klargemacht werden, daß zahlreiche ärztliche Handlungen absichtlich oder unvermeidlich mit Vernichtungsmaßnahmen verbunden sind. Man kann also von einer ärztlichen Vernichtungsordnung

sprechen und muß, nach dem was geschehen ist, bedauern, daß eine solche nicht früher und bis heute in keinem Lande aufgestellt oder nur in Bruchstücken vorhanden ist.*)

1. Eine absichtliche Vernichtung betrifft zunächst nur einen Teil des Körpers. Eine Amputation, in gewissem Sinne aber jede chirurgische Operation vernichtet Gewebe, um dem übrigen Organismus zu helfen.

2. Vernichtung eines ganzen lebensfähigen Organismus muß vorgenommen werden bei pathologischen Geburten, wobei man zwischen dem Leben der Mutter und dem des Kindes wählen muß und das der Mutter wählt um eines von beiden und dann das „wertvollere" oder unentbehrlichere zu erhalten. Ähnlich liegt der Fall bei der sogenannten ärztlichen Indikation zum künstlichen Abort, zur Schwangerschaftsunterbrechung. Auch die Sterilisation und Kastration aus ärztlicher Indikation hat diesen Charakter, mit dem Unterschied, daß hier noch ungezeugtes Leben verhindert, also gleichsam als potentielles schon vernichtet wird.

3. Eine andere, nämlich nicht absichtliche aber unvermeidliche Art der Vernichtung kommt beim sogenannten ärztlichen Risiko vor. Beispiele sind die Narkose, die Pockenschutzimpfung, deren Risiken statistisch genau erfaßbar sind. Von solchen Fällen erstreckt sich eine kontinuierliche Reihe bis zu einmaligen Vorkommnissen, die statistisch unbeherrschbar sind.

4. Eine Sonderstellung nimmt der Arzt ein, der eine bisher unerprobte Heilmethode erstmalig einzuführen sucht. Auch hier besteht ein Risiko; aber der Arzt ist nicht gedeckt durch die communis opinio der Ärzte oder des Publikums. Man würde beinahe jeden wichtigen Fortschritt der Medizin unterbinden, wenn man diese Form des freiwilligen und absichtlich übernommenen Risikos ablehnte. Eben darum aber muß hier die Art der Willensbildung besonders sorgfältig später untersucht werden. Berühmte Beispiele, die auch Todesopfer gefordert haben, sind etwa die Ausbildung der Magenresektion durch Billroth, die Erprobung des Tuberkulins durch Robert Koch. Aber ähnliche Beispiele haben den Weg der modernen Medizin überall begleitet.

5. Schädigungen und Todesfälle durch „Kunstfehler" besagen soviel, daß ein Arzt fahrlässig eine Vernichtung herbeigeführt hat in Mißachtung oder in Unkenntnis allgemeiner anerkannter Kunstregeln. Was nun allgemein anerkannt ist, wird vor Gericht gewöhnlich durch das Gutachten einer Autorität festgestellt und hier zeigt sich, daß ein autoritärer Entscheid auch dort nicht entbehrlich ist, wo die juristischen oder politischen Formen nicht autoritär, zum Beispiel demokratisch geordnet sind.

Diese fünf Vorbemerkungen waren nötig, um das Problem der Willensbildung bei ärztlichen Vernichtungsmaßnahmen sachgemäß behandeln zu können.

*) Vgl. v. Weizsäcker, Ärztliche Fragen, Thieme, Leipzig 1934, S. 72 u. 73. — Dazu: A. Mitscherlich, Freiheit und Unfreiheit in der Krankheit, Classen u. Goverts, Hamburg 1946, S. 121.

Dies geschieht im folgenden zunächst unter Beschränkung auf solche, die den Tod herbeiführen. Dabei werde ich also zwei Voraussetzungen gelten lassen: 1. daß es keinen „medizinischen Standpunkt" gibt, der als ein selbstverständlicher zugrunde gelegt werden könnte; 2. daß es keine Medizin geben kann, in der Vernichtungsmaßnahmen nicht bereits notwendig enthalten sind.

Da es, wie schon erwähnt, eine „ärztliche Vernichtungsordnung" als Gesetz oder formulierte Standesvorschrift nicht gibt, wohl aber die Vernichtung als notwendiger Bestandteil die ärztliche Handlung überall begleitet, ist die Frage der Willensbildung dabei am besten zunächst durch einen Vergleich mit Vernichtungen außerhalb des ärztlichen Aufgabenkreises zu beleuchten. Hier gibt es legale, erlaubte und verbotene Vernichtungen menschlichen Lebens.

Legale Vernichtungen sind die Hinrichtungen, gemäß dem Strafgesetz, und der Krieg, gemäß dem Völkerrecht. Nur im ersteren Falle erfolgt die Willensbildung durch ein Gerichtsverfahren, den Strafprozeß bzw. die Richter und den Scharfrichter. Im Falle des Krieges ist der einzelne Soldat gedeckt durch internationales Recht, während die Einleitung des Krieges aus der politischen Willensbildung hervorgeht. In beiden Fällen liegt aber die Willensbildung bei einer Instanz, die ihrerseits aus der Willensbildung des politischen Zusammenlebens der Individuen und Völker hervorging. Die gegenwärtigen Versuche, das Völkerrecht zu verändern, interessieren hier nur insofern, als es auch im Rechtsleben Wandlungen und einen Status nascendi geben muß, und ein solcher Zustand ist nun auch für die ärztliche Vernichtungsgewalt als möglich zu fordern. Es kann sein, daß die ärztliche Vernichtungsgewalt von Zeit zu Zeit reformiert werden muß und daß wir gerade jetzt vor einer solchen Aufgabe stehen.

Der Krieg leitet über zu der erlaubten Vernichtung des Lebens: sie kann, muß aber nicht angewendet werden. Hierher gehört die Notwehr und der Selbstmord. In beiden Fällen erfolgt die Willensbildung individuell, das heißt hier nicht durch eine Gesamtheit, die selbst legal ist. Diese Fälle stehen einer ärztlichen Vernichtung insofern nahe, als der Arzt in vielen Fällen als Einzelner entscheiden muß: so wenn der Patient ein Embryo, ein unmündiges Kind, ein Bewußtloser oder ein geistig Unzurechnungsfähiger ist; ferner wenn sein Handeln keinen Aufschub duldet, so daß die Befragung weiterer Personen nicht zu verantworten ist. Diese Fälle sind Analogien zur Notwehr.

Der Selbstmord ist in Deutschland und den meisten anderen Ländern nicht strafbar, während er in England im Falle des Mißlingens bestraft werden kann. Allerdings soll es auch in Deutschland zu Bestrafungen von versuchtem Selbstmord in Fällen gekommen sein, in denen man ihn bei Soldaten als Spielart der Selbstverstümmelung unterordnen zu dürfen meinte. Wo der Selbstmord erlaubt ist, ist es auch die Beihilfe zu ihm. Hier also

kommt eine Willensbildung zu zweien in Betracht, und dasselbe gilt für den Fall, daß eine Person eine andere auf deren Wunsch tötet: diese Tötung ist nach § 216 StGB. strafbar. Dies wird wohl besonders praktisch, wenn es sich um Doppelselbstmord von Liebenden oder Eheleuten handelt, wenn jemand dabei überlebt.

Diese Übersicht zeigt, daß für die Willensbildung bei Tötung aus ärztlicher Indikation zwei Momente zu beachten sind: die Legalität und die Übereinstimmung aller Beteiligten. Es läßt sich voraussehen, daß die Zulässigkeit der sogenannten Euthanasie von beiden abhängig beurteilt werden muß. Ich erörtere jetzt die sogenannte Euthanasie in der Form, daß ich deren nach meinem Ermessen zu fordernde Willensbildung angebe.

Wenn ein Kranker eine unheilbare Krankheit hat, die unerträgliche Schmerzen und Leiden hervorruft, so ist der Arzt nach dem Gesetze nicht berechtigt, mit oder ohne Beistimmung des Kranken, das Leiden durch Euthanasie zu beenden. Dies ist der Fall, in dem zahlreiche Ärzte trotzdem illegal und auf eigene Gefahr den Tod herbeigeführt oder durch Unterlassung exzitierender Mittel beschleunigt haben. Diesen Ärzten gebe ich recht, und zwar sowohl wenn solches auf Wunsch, als auch wenn es ohne den Wunsch des Kranken geschieht. Ich würde mir aber in jedem Falle vorbehalten, die besondere Lage des Falles und die sittliche Persönlichkeit des Arztes genau zu prüfen. Denn es kann immer vorkommen, daß das beschleunigte Ableben auch durch mehrere und zum Teil unsittliche Motive empfohlen war, zum Beispiel bei Erbschaftsinteressen, Verhinderung der Beeinflussung eines Testamentes und dergleichen. — Dieser Fall ist also ein Beispiel formell illegaler und trotzdem materiell, das heißt ethisch erlaubter Euthanasie.

Die Euthanasie ohne diese Voraussetzung, also die Tötung „unheilbarer Geisteskranker" und weiterer Gruppen von „lebensunwertem Leben" ist erst im nationalsozialistischen Staat als legalisiert bezeichnet worden. Hier ist also die Durchführung dann als legal anzusehen, wenn die betreffenden Verordnungen als Gesetze angesehen werden. Das würde heißen, die Folge der Strafbarkeit sei vollständig auf das Gebiet der juristischen und politischen Diskussion verschoben und überhaupt kein Thema der ärztlichen Beurteilung. Es kann sich hier also ausschließlich darum handeln, ob man diese Verordnungen und Gesetze, wenn sie bestanden, als ärztlich begründet beurteilen soll. Erst wenn ich dies erörtert habe, kann ich auf die Willensbildung zurückkommen. Denn die Art der erforderlichen Willensbildung hängt ab von der Art der wirksamen Motive.

d) Die Motive einer Lebensvernichtung („Euthanasie") vom ärztlichen Standpunkt aus

Es gibt drei Motive solcher Vernichtung: Unwert des Lebens, Mitleid und Opfer.

Die Vernichtung unwerten Lebens kann nur motiviert werden, wenn man den Wert eines bestimmten Lebens oder des Lebens allgemein positiv bestimmt hat. Gibt es eine medizinische oder ärztliche Bestimmung vom Wert und Unwert des Lebens? Selbstverständlich: das gesunde Leben ist wertvoller als das kranke für den Arzt. Es kann also keine ärztliche Anzeige zur Krankmachung geben als die scheinbare: daß eine kleine Art künstlicher Krankheit dem Zwecke dient, eine größere zu beseitigen oder zu verhindern. Beispiele sind die Malariatherapie der Paralyse, die Fieber- und Schocktherapien, die Verschlimmerung einer Neurose während einer Psychotherapie und so weiter.

Wie steht es mit der unheilbaren Krankheit? Die Tötung wegen Unwert ist in keinem Falle zu motivieren aus ärztlichen Gründen, weil es sich nicht um Beseitigung zwecks Heilung, sondern wegen Unwert handeln soll.

Wenn bei einer Tierseuche die kranken Tiere geschlachtet werden, so handelt es sich darum, die weitere Ausbreitung der Seuche zu verhindern. Wenn aber ein krankes Tier geschlachtet wird, weil es keinen wirtschaftlichen Wert mehr hat, dann ist das Tier nicht als Tier, sondern als ökonomisches Objekt behandelt worden. Wir stoßen also hier auf die Frage, ob die Medizin den Menschen in irgendeinem Sinne als wertvolles Objekt betrachtet, und diese Frage verlangt später eine ausführliche Untersuchung.

Im übrigen könnte die ärztliche Tötung von Menschen wegen Lebensunwert nur beantwortet werden, wenn gesagt wird wer welches Leben für kränker beurteilt, als den Tod oder das Nicht-leben. Dies ist dann möglich, wenn die Menschen den Tod überhaupt als eine Gesundung auffassen, und dies ist zum Beispiel religiös möglich. Wenn also ein religiöser Kranker und ein religiöser Arzt übereinkommen, daß der Tod gesünder ist als das Leben, dann kommt eine Vernichtung unwerten Lebens in Frage. Diese Auffassung hat aber nur dann einen Sinn, wenn das zeitliche Leben an sich überhaupt keinen Wert hat, sondern seinen Wert nur erborgt hat von dem ewigen Leben, auf welches das zeitliche vorbereitet. Diese Vorbereitung ist dann auch der eigentliche Sinn und Zweck der Medizin und man erkennt, daß ihre Aufgabe nicht die Beseitigung des zeitlichen, sondern die Vorbereitung des ewigen Lebens durch das zeitliche ist. Hier bekommt also die Euthanasie einen völlig anderen Sinn: die ganze Medizin hat den Zweck der Euthanasie, nämlich der guten und richtigen Vorbereitung auf einen Tod, der den Eintritt in das ewige Leben einleitet.

Man kann jetzt sagen: die Vernichtung unwerten Lebens ist die Aufgabe der gesamten Medizin, aber die Vernichtung unwerten Lebens ist ein Mord wie jeder andere, da nur das zeitliche Leben getötet werden kann und da seine Vernichtung die Vorbereitung des ewigen Lebens abschneidet und verhindert.

Andererseits kann man sagen: eine Medizin, welche das zeitliche Leben um seiner selbst willen zu erhalten strebt, kann die Vorbereitung des ewigen

Lebens nicht fördern, sie kann sogar diese Vorbereitung verhindern. Wenn nun der Arzt einen Wert des diesseitigen, zeitlichen Lebens annimmt, ohne Rücksicht auf einen ewigen Wert*), dann kann in der Tat dieses zeitliche Leben auch an sich so unwert sein, daß es Vernichtung verdient. Die Bewertung etwa des rein biologischen Lebens hat also zur unmittelbaren Folge die mögliche Entwertung im biologischen Sinne und wird so zur geistigen Voraussetzung der Vernichtung dieses biologischen Unwertes. Man erkennt jetzt, daß die nur biologische Auffassung des Lebenswertes die biologische Verurteilung (im Falle unheilbarer Krankheit) nach sich zieht. So schafft die nur biologische Auffassung der Medizin die geistige Voraussetzung der Krankentötung in bestimmten Fällen.

Man kann dies auch so ausdrücken, daß die Definition des Lebens, welche seinen Sinn, Zweck oder Wert nicht als transzendent versteht, keinen inneren Schutz gegen den Begriff eines unwerten Lebens im biologischen Sinne besitzt. Damit ist dann auch eine Brücke zu einer Vernichtungspolitik unwerten Lebens geschaffen. Wenn andererseits das Leben als wesentlich transzendent verstanden wird, dann müssen sich alle Bewertungen nur auf dieses Ziel, nämlich die Verwirklichung der Transzendenz beziehen, auch die Bewertungen der Medizin. Nur wo eine ärztliche Handlung also im Dienste einer Transzendenz des Biologischen erkennbar ist, ist sie als ärztlich ethisch qualifiziert.

Es gibt nun eine zweite Qualifikation der ärztlichen Handlung, die sie ebenfalls als ethische zu charakterisieren scheint: die Sympathie mit dem Leidenden. Das ärztliche Mitleid scheint dieser zuletzt entwickelten Bedingung: der Transzendenz, zu genügen. Denn im Mitleid transzendiert der Arzt das biologische Faktum ganz ebenso und in der gleichen Richtung wie der Kranke selbst. Das Leiden der Seele ist kein biologischer Wert, sondern es überschreitet die Tatsache des physischen Daseins. Man sagt also, aus Mitleiden mit den Qualen des Kranken kürze man sein Leiden ab, indem man ihn töte, transzendiere also sein physisches Dasein ebenfalls.

Manche sagen auch die objektive Unwürde eines Idioten, der Anblick also unwerten Lebens quäle sie, die Zuschauer so, daß sie in sich die Pflicht zur Beseitigung spürten. — Es ist nicht ersichtlich inwiefern dies ärztliche Motive sein sollen. Übrigens sind in vielen Fällen die Schmerzen, der Ekel, Erbrechen und Durchfall nützliche, dem Alarm und der Abwehr dienliche Leiden. Auch nützt das Mitleid des Arztes dem Kranken an sich nichts: er holt sich mehr aus dessen unbeirrter Sachlichkeit. Wenn ich krank bin, ist das Mitleid der andern eine zweiseitige Erscheinung für mich: es kann mich trösten, aber auch beleidigen, beruhigen, aber auch erregen. Man fühlt unter Umständen durch, daß das Mitleid des im Besitze seiner Gesundheit befindlichen für ihn eine Abschlagszahlung, eine Selbstbefriedigung, eine masochistische Schmerzlust oder einen frommen Augenaufschlag bedeuten kann. Das Leiden des Kranken ist nicht die Ursache, sondern die Wirkung der Krankheit, und nur als Symptom betrachtet, steht seine Bekämpfung stets niedriger als die ätiologische Therapie. Überhaupt ist die ursprüngliche Divergenz der Ziele von Kranken und Arzt die, daß der erste behandelt sein, der zweite helfen will. Diese Divergenz ist durch Mitleid nie zu beseitigen; im Gegenteil könnte sie dadurch noch fixiert werden; nicht mitzuleiden, mitzuwirken sind wir da. So kann der Kranke mehr davon haben, daß ein Arzt sich bereichern will, als daß er Mitleid fühlt. Das Mitleid trifft den Kranken im ärztlichen Sinne nur, wenn es ihn dort trifft, wo er sein eigentlichstes inneres Ziel hat, also in seinem Subjekt. Es ist nicht selbstverständlich, daß das Ziel seiner verborgenen Subjektivität immer die Beseitigung der objektiven Erscheinungen (Symptome) ist. Die bloße Symptombehandlung ist, wie gesagt, die stets schlechtere gegenüber der Causalbehandlung. So kommt es sogar, daß die bloß die Symptome erreichenden Mitleidsgefühle die Subjekt- und Ursachenfindung verdrängen und so die Individuation des Kranken verhindern, damit aber auch die Heilung verhindern. Sie bleiben dann bloße Sentimentalität, sind Wegbereiter einer Scheinethik und können nicht die Solidarität der Individuen begründen, welche das wahre Ziel der Sympathie, des sittlichen Mitleidens gewesen wäre. Das Ergebnis ist: ein auf die nur biologische oder nur psychologische Realität bezogenes Mitleid verhindert die wirksame Sympathie, welche die biologische Tatsache und das psychologische Phänomen transzendieren muß.

Damit ist nun das dritte, oben als Opfer bezeichnete Motiv einer möglichen ärztlichen Lebensvernichtung erreicht. In ihm kann man sich die Motive des Unwerts und des Mitleids auch zusammengefaßt denken, aber erst der Opfergedanke enthält diejenige Kraft, die offenbar nötig ist, um eine Tat, welche dem Mord so ähnlich ist, auch wirklich zustande zu bringen. Im Opfergedanken steckt nämlich allein die besondere Dialektik, welche aus dem bloßen Motiv ein Gesetz, ein Soll, eine Pflicht, einen unausweichlichen Zwang, eine sittliche Handlung machen kann. Ich gehe hier nicht auf die religions- und kulturgeschichtliche Vergangenheit des Opfers ein. Seine modern wirksame Form scheint mir das Prinzip der Solidarität zu sein, in dem freilich als Vorformen die Menschenopfer und auch dessen Surrogate, die Tier- und Speisopfer, noch stecken mögen. Die Begründung durch Solidarität lautet zum Beispiel so: wenn das ganze Volk in Lebensgefahr schwebt, und durch Beseitigung einzelner Individuen gerettet werden kann, dann müssen diese Individuen geopfert werden — selbst wenn sie diese Notwendigkeit nicht einsehen. Die Einsichtigen, in der Erkenntnis des Zusammenhangs befindlichen, sind dann berechtigt und verpflichtet, dieses Opfer zu erzwingen, also zu töten. — Wie kann diese Idee einen ärztlichen Inhalt bekommen? So, daß „krank" diesmal nicht nur Individuen, son-

*) Die Fortpflanzung schafft keinen ewigen Wert; eine Sippe kann zum Beispiel aussterben. Es geht daher nicht an, die Erhaltung der Art als Erzeugung eines ewigen Lebens zu unterstellen.

dern eine solidarische Gemeinschaft, ein Kollektiv, ein Volk oder die Menschheit ist. Es gibt jetzt eine soziale Krankheit; ein Volk, die Menschheit ist krank. Dabei braucht es sich nicht nur um die Addition individueller Krankheiten, wie bei einer Seuche, Typhus oder Malaria, zu handeln. Ein Kollektiv kann als solches auf eigene, neue Art krank sein. Hier handelt es sich also um eine Erweiterung des Krankheitbegriffes. So wie die Amputation eines brandigen Fußes den ganzen Organismus rettet, so die Ausmerzung der kranken Volksteile das ganze Volk. Als Opfer betrachtet wären beide Fälle berechtigt und beide als ärztliche Handlung sinnvoll und nötig.

Wer diese Betrachtung oder ihre Konsequenzen nicht liebt, kann sich ihrer nicht dadurch entledigen, daß er pathetisch oder unter Berufung auf offenbarte Religion und ihre Texte, oder auf die Idee der Humanität oder die Menschenrechte die ärztliche Aufgabe auf die Heilung des einzelnen Menschen zu beschränken fordert*) und den Übergang von der individualen zur Kollektivtherapie ablehnt. Wir wissen, daß es einen solchen reinen Individualismus in der Medizin nie gab und nicht geben kann. Außerdem hat die Anmeldung des individualistischen Standpunktes eben die Bedeutung einer Stimmabgabe; sie kann auch den Eindruck eines autoritären Versuchs erwecken. Offenbar ist, wie im politischen Bereiche so auch hier die Schwierigkeit, nicht zwischen Individualismus und Kollektivismus ein für allemal zu entscheiden, sondern die Erfordernisse der Individuation mit denen der Sozietät zu verbinden, also die Solidarität zu verwirklichen.

Es genügt aber nicht zu beweisen, daß die Einschränkung der Medizin auf die individuelle Therapie faktisch undurchführbar und ideologisch zu einseitig wäre. Wer solches versucht, der übersieht, daß die ärztliche Idee eine ungeheure Verstärkung durch den Prospekt auf die allmenschliche Bedeutung erfährt. „Der Menschheit zu dienen" — das ist, wäre es auch eine Illusion, eine anfeuernde Hoffnung, die man auch sehr genau prüfen wird, ehe man sie verwirft. Aber noch viel uneinsichtiger wäre es, die Macht des Opfergedankens zu übersehen, und ich behaupte, daß seine Verwendung im Nationalsozialismus die allergrößte Bedeutung für seine Macht über viele Gemüter hatte. Ich behaupte ferner, daß die Durchtränkung seiner Ausrottungs- und Ausmerzungsmaßnahmen mit der Opferidee vielleicht deren gefährlichste Kraft war. Denn es kommt nicht auf die an, welche gedankenlos und eitel nur Werkzeug waren, und es kommt nicht nur auf bewußte, sondern vor allem auf unbewußte Motive an. Und nun bedenke man, daß der Opfergedanke eine Verschmelzung von Töten und Erlösung ist! Man bedenke ferner, daß diese Verschmelzung in einem wachen, logischen und rationalen Bewußtsein gar nicht vollziehbar ist, vielmehr unbewußt und irrational vollzogen werden muß. Wenn man sich danach die geschichtlichen Formen des Opfers vergegenwärtigt, dann bemerkt man,

*) Vgl. zum Beispiel Thure v. Uexkuell in der „Zeit".

daß zwar ein wiederholter Wechsel im Gegenstande, in der Auswahl stattfand: Abraham opfert den Sohn, Agamemnon die Tochter, die christliche Theologie den Gottessohn, die Kirche im Meßopfer die Hostie und den Wein; aber im Krieg werden die Söhne des Vaterlandes und in den Revolutionen die Träger der sozialen Idee geopfert. Aber die Form des Opfers: Freiheit durch Tod, ist dieselbe geblieben. Es ist klar, daß auch der, welcher sich als ungerecht zum Tode verurteilt sieht, sich als Opfer erkennt. Das Opfer ist dann die einzige Möglichkeit, das Unrecht und das Recht miteinander zu verbinden und auszugleichen. In der modernen Welt ist daher der Krieg die verbreitetste und unerschüttertste Anwendung des Opfergedankens geblieben, und wer den Krieg aus der Welt schaffen will, muß bedenken, daß er entweder den Opfergedanken abschaffen oder eine andere Form des Opfers herbeischaffen muß.

Diese Überlegung ist aber erforderlich, wenn man das Problem ärztlicher Vernichtung ganz verstehen will. Es könnte nämlich sein, daß es sich gar nicht um das Verständnis eines medizinfremden Vorganges handelt, der von außen in die Medizin eingedrungen wäre, sondern um eine Selbstentfremdung, eine Degeneration der Medizin selbst. Jemand kann das für einen Streit um Worte halten. Das ist aber nicht der Fall. Ich höre sagen: da haben Leute der Politik mit Terror oder Verführung einige Ärzte zu unärztlichem Tun bewogen; diese haben daraufhin die Grenzen der Medizin überschritten; das geht die Medizin aber eigentlich gar nichts an. So ist es aber nicht. Was für eine Medizin war es denn, die so terrorisierbar oder verführbar war? Es muß einen Grund in der Medizin selbst geben. Es könnte sein, daß die Medizin selbst in ihrem Wesen am Opfergedanken teil hat, sich dessen aber nicht mehr bewußt war. Und es könnte sein, daß die außenstehenden Politiker der Medizin eine Opfertat aufdrängten, aber gar nicht wußten, was ein echtes Opfer eigentlich ist. So kam es dann, daß diese Begegnung keine äußerliche und zufällige, sondern eine sogar wahrscheinliche war. Nur ist die Sache dann gerade umgekehrt, als man sie darstellt, wenn man sagt, die Mediziner hätten ihre Grenzen überschritten. Die Medizin hatte sich zu sehr verengt auf eine naturwissenschaftliche Technik, die den Menschen nur als Objekt behandelt, anstatt den Menschen, der sich selbst zum Individuum und zur Gemeinschaft hin transzendiert, ins Auge zu fassen. Darum hat sie auch die Idee des Opfers in sich selbst nicht mehr gekannt und nicht realisiert. Darum wurde sie anfällig für die Idee des Opfers, die ihr nun von außen und in entarteter oder verlogener Gestalt aufgedrängt wurde.

Ich bin also ganz und gar nicht der Ansicht, daß es richtig ist, nur zu sagen, diese Ärzte hätten ihre Grenzen überschritten. Man muß sagen, sie haben sie falsch überschritten. Nach meiner Ansicht ist daran ein persönliches Versagen in Verbindung mit einer verfehlten Idee der Medizin schuld. Denn in der Art, wie die Vernichtungspolitik in der Form der Euthanasie

und im Namen eines Opfers gemacht wurde, erfolgte gar nicht die Herstellung einer Solidarität und konnte also auch kein Opfer realisiert werden. Weder der Unwert des Lebens, noch das Mitleid, noch der Opfergedanke in der Art seiner Anwendung sind also imstande, vom ärztlichen Standpunkt aus die sogenannte Euthanasie des NS.-Regimes zu begründen. Aber es stellt sich heraus, daß die Wirksamkeit des Opfergedankens in die Medizin hineingehört und daß die moderne Medizin schuldig ist, ihn zu entwickeln.

e) Individualität und Totalität

Um die notwendige und sittliche Form des Opfergedankens in der Medizin zu entwickeln, ist am wichtigsten die Beantwortung der Frage: wer opfert wen? Wenn nämlich verlangt wurde, daß das Opfer im Geiste einer Solidarität zu geschehen habe, dann lag darin bereits die Forderung: es muß das Opfer als gemeinschaftliche Aufgabe begriffen werden. Da nun der individuelle Tod unteilbar ist, sofern er nämlich physischer Tod sein soll, entsteht sogleich und von selbst das Problem: wer wird geopfert? Es ist ein Tötender und ein Getöteter da und damit sind alle Probleme des Mords, der Todesstrafe, des Rechtes und der Moral, auch der Religion und der Metaphysik auf den Plan gerufen. Es ist nun nicht etwa falsch, diese Fragen im Geiste der Medizin zu lösen, sondern es wäre falsch von der Medizin, sie andern Wissenschaften, Fakultäten oder Daseinsbereichen zu überlassen, diese Fragen von der Medizin aus also als extraterritoriale zu behandeln.
Daß dies so richtig ist, zeigt sich daran, daß bei der Durchführung einer ärztlichen Vernichtungsaktion die Einführung medizinfremder Gesichtspunkte jedesmal zu ärztlich unvertretbaren Handlungen führen kann. Es handelt sich ja offenbar jedesmal darum, zwischen den Ansprüchen eines Individuums und den Ansprüchen einer Gemeinschaft in ihrer Totalität einen Ausgleich zu finden, und die Methode dieses Ausgleichs, die Art der Willensbildung hängt davon ab, was hier ausgeglichen werden soll, welche Werte schließlich die überlebenden sein sollen.
Da die meisten Menschen nicht gerne und nicht freiwillig sterben wollen, so kommt auch bei der irgendwie definierten „Euthanasie" die Anwendung irgendeiner Superiorität, die Anwendung von Gewalt gegen den Willen oder ohne den Willen des Getöteten ins Spiel. Zwar ist nicht selten der Selbstmord ebenfalls als Opfer für andere ausgeführt worden; so wenn ein politisch Untergehender sich tötet, um seiner Familie die Belastung durch Prozeß, Bestrafung und so weiter zu ersparen. Aber die von Ärzten, namentlich von Psychiatern (auch nicht nationalsozialistischen) empfohlene Tötung unheilbarer Geisteskranker stützt sich auf eine Gewaltanwendung durch überlegene Macht. Ich habe bereits ausgeführt, daß Lebensunwert und Mitleid keine ärztliche Tötung begründen können und daß nur die Idee des Opfers, aber in erst zu findender Form, eine ärztliche Motivation enthalten

könnte. Wenn nun überlegene Macht erforderlich ist, so ist verständlich, daß, wie auch die Erfahrung lehrt, es medizinfremde Macht ist, die zunächst den Ausgleich zwischen Individuum und mehr als individueller Gruppe herbeizuführen sucht.
Schon die Internierung des Geisteskranken, seine „Freiheitsberaubung", macht damit den Anfang. Es wäre abwegig, in der Diagnose „geisteskrank" nur einen Majoritätsbeschluß zu sehen. Die Gefährdung anderer Menschen durch ihn und seine Gefährdung durch sich selbst motiviert die Internierung. Aber hinzu kommt die sachkundige Autorität, die entscheidet, ob Geisteskrankheit oder zum Beispiel gemeines Verbrechen vorliegt. Wenn es sich dann um die Tötung eines Geisteskranken handelt, so stellt man diesem nicht nur eine Majorität, wohl aber eine Autorität gegenüber, welche außerdem im Besitze superiorer Macht ist. Um herauszubekommen, welcher Art diese Autorität ist, muß man also wissen, wie sie zu ihrer Autorität und wie sie zu ihrer Macht gekommen ist. Da hier nur die ärztliche Indikation zur Ausrottung untersucht werden soll, so ist scheinbar sofort klar, daß es eine ärztliche Tötung nicht geben kann. Die Sache ist aber nicht so klar. Wenn ein Fall so läge, daß einige Menschen nur gesund werden oder gesund bleiben können, wenn ein bestimmter anderer stirbt, dann ist eine ärztliche Indikation vielleicht gegeben. Sie wäre auch gegeben, wenn ohne seinen Tod mehrere andere sterben müßten. Dieser Fall liegt bei der Internierung eines geistesgestörten Massenmörders, überhaupt bei der Schutzverwahrung eines gemeingefährlichen Geisteskranken vor, aber gerade dieser Fall zeigt, daß die Internierung genügt, die Tötung überflüssig ist.
Bei diesen Beispielen wird nun bereits klar, daß das Problem des Ausgleichs von Individuum und Gesellschaft ein Problem der Gegenseitigkeit ist. Die Gesellschaft kann die Unschädlichmachung, aber nicht die Tötung verlangen, und die Befürworter der Tötung sind genötigt, sich auf andere Motive zu stützen als das der Gefahrverhütung. Sie sind dazu genötigt, weil sie der Gegenseitigkeit gegenüber dem Geisteskranken nicht ins Auge sehen, und sie sehen ihr nicht ins Auge, indem sie ihre eigene autoritäre Superiorität nicht aufgeben wollen. Es steckt im Ausweichen vor der Gegenseitigkeit also eine Selbstbehauptung, und sie maskiert sich mit einer Abwertung des Kranken, die sich dann auf Wissenschaft, Wahrheit oder Gefühl von der Würde des Menschen beruft. Wissenschaft sagt: der Geisteskranke ist abnorm; Wahrheit sagt: er ist im Irrtum (verwirrt, wahnhaft); Würde sagt: er ist kein Mensch, sondern weniger als ein Mensch. Diese Abwertungen sind aber, ob sie nun begründbar sind oder nicht, jedenfalls nicht in Gegenseitigkeit mit dem Kranken gefundene Wertungen. Die Urteilsfindung ist nicht in Begegnung mit diesem bestimmten individuellen Kranken erfolgt, sondern von wo anders her gefunden worden.
Es ist jetzt an der Zeit zu sagen, was hier unter Gegenseitigkeit und Begegnung verstanden wird. Es ist etwas damit gemeint, was eine Superiorität

nicht voraussetzt, sondern erst finden will. Es gibt im Zusammenleben unzählige Verhältnisse, in denen die autoritäre Entscheidung unvermeidlich ist, und auch die demokratische oder die kommunistische Gesellschaftsordnung vermeidet sie nicht. Der Grund, warum bei der Entscheidung über Tod und Leben die autoritäre Entscheidung zum Fragezeichen wird, ist der, daß hier die Gegenseitigkeit aufgehoben ist: einer wird getötet, der andere lebt, und darum ist dieser Entscheid immer so: du oder ich, und zwar *total*. Die Tötung kann also niemals auf Gegenseitigkeit beruhen. Es fragt sich jetzt, ob diese Situation als Ausgangspunkt jeder anderen, milderen genommen wird oder ob sie umgekehrt als seltene, abnormale Grenzsituation des sozialen Lebens genommen wird. Ich bin nun der Ansicht, daß sie die Grundsituation alles Lebens ist, daß jedes Leben sowohl individuelles wie soziales ist und daß nur von hier aus die sittliche Kritik menschlicher Handlungen und Motive zu treffen ist. Die Medizin macht hierin keine Ausnahme und das bedeutet, daß sie aus der Gegenseitigkeit von Arzt und Patient beurteilt werden muß, weil ihre zutreffende Autorität nur unter, nicht über dem Verhältnis der Gegegenseitigkeit zu rechtfertigen ist.

Dies angenommen, werden nun die Aussichten ärztlicher Rechtfertigung der sogenannten „Euthanasie" sehr ungünstige. Es ist klar, daß die, welche sie empfohlen oder befohlen oder durchgeführt haben, die Kranken nicht befragt haben, ob sie sterben und so sterben wollen. Es ist ferner klar, daß sie ihnen auch kein ebenbürtiges Urteil darüber zugestanden und zugetraut haben. Es ist ferner klar, daß sie die Volksmeinung darüber nicht befragt haben. Weder hat man durch Abstimmung eine Majorität festgestellt, noch hat man ein gewähltes Parlament gehört, noch hat man sich bemüht festzustellen, wie die Ärzte oder ihre zur Leitung berufenen Vertreter sich zu der Sache verhielten. Die Absicht der Ausrottung war das erste, die Auswahl der Berater war das zweite, dem ersten angepaßte. — Aber eine ganz andere Frage ist, ob auf solchen nicht beschrittenen Wegen der Ausgleich zwischen Individuum und Gesellschaft überhaupt herzustellen gewesen wäre. Und ich will als Hypothese zugeben, daß dies die Absicht hätte sein können, daß sie jedenfalls anzuerkennen gewesen wäre, wenn sie vorhanden war. Dr. Mitscherlich hat ganz recht, wenn er sagt, daß die Ereignisse gezeigt haben, welch schlechte Gesellschaftsform die Diktatur doch ist. Aber man kann dann immer noch fragen, ob, wenn die Diktatur eine gute wäre, sie das Ausgleichsproblem nicht lösen könnte. Es ist nämlich gesagt worden, daß die Frage „du oder ich" in keinem Falle, in keiner Gesellschafts- und Staatsform vermeidbar ist. Aber an dieser Stelle soll ja die Frage beantwortet werden, wie die ärztliche Entscheidung als solche, da auch sie unausweichlich sei, ausfallen müsse.

Die Antwort ist nun die folgende: Wenn es sich um lebenlassen oder töten handelt, dann war die Frage überhaupt nicht wie die Medizin ist, sondern wie sie werden soll. Den Auftraggebern und Ausführenden der Medizin

war diese Situation zum Teil sehr wohl bewußt. Sie fühlten die große neue Wendung und sie haben gerade dadurch die Kraft bekommen, so, auf die Länge der Zeit gesehen, gefährliche Dinge zu übernehmen. Dies ist der Grund, warum sie sich jetzt (ungeschickt genug) oft als Idealisten bezeichnen. Sie sind nämlich, paradoxerweise, sowohl die Opfer und Mitläufer einer inhumanen Medizin, die sie gelernt haben, wie auch die gegen sie Protestierenden. Sie sind beides.

Anders ausgedrückt: der Ausgleich zwischen Individuum und Totalität der Menschengemeinschaft ist kein Ausgleich, wenn er von einem Individuum im angemaßten Namen der Gemeinschaft mit Gewalt erzwungen wird. Dieses Unterfangen ist aber kein anderes, wenn ein Arzt im Namen des Arzttums, als Autorität im Namen der Wissenschaft oder der Wahrheit oder der Menschenwürde, ohne Gegenseitigkeit über Tod und Leben, aber auch über geringere Daseinswerte entscheidet. Schiller sagt allerdings: das Leben ist der Güter höchstes nicht. Er verabsäumt aber zu sagen, daß auch die Unschuld — ein höheres Gut nach ihm — auf Leben und Tod entschieden wird. Einfacher gesagt: durch Superiorität ist Solidarität im ärztlichen Bereiche nicht zu bewirken. Es war vermessen und ist immer vermessen, die Lösung des Problems aus irgendeiner Instanz der Superiorität bewirken zu wollen. Jeder Richter muß entscheiden, welche Strafe er dieser Vermessenheit zumessen will; aber das, was er entscheidet, wird eine Entscheidung über eine Vermessenheit sein.

Ich glaube, daß danach andere Schwierigkeiten nur noch sekundärer Natur sind. Zum Beispiel die Frage der Freiwilligkeit. Es kann der Fall vorkommen, daß ein Mensch sich freiwillig zum Opfer meldet: er meldet sich im Frontdienst zum Patrouillengang, zur Angriffsgruppe, zur Nachhut beim Rückzug. Im Falle der Geisteskrankheit kann man den Selbstmord als freiwilliges Opfer auslegen. Der Überlebende wird dabei ehrlicherweise nur ein Schuldgefühl haben können, denn hier ist klar, daß das Opfer des Andern diesem einen Rang verleiht, zu dem er, der Überlebende, sich nicht erhoben hat. Hier ist Solidarität mißlungen und das Rühmen des Opfers des Andern ist immer ein Schuldbekenntnis der eigenen Flucht vor dem Selbstopfer. Überlegt man das Ganze mit dem Verstand, dann ist die Euthanasie, vom Standpunkt derer, die sie durchführten, ein vollkommener Mißerfolg, und auch derer, die ihr zusahen. Man wird also sagen: sie ist der Lösungsversuch eines echten Problems, das falsch zu lösen eine Art von Schuld ist, die durch die Haltung, es gar nicht anzufassen, eine Art von Mitschuld wird. Vom Gedanken des Opfers aus betrachtet, ist jeder Mensch des Todes schuldig, der sich nicht opfert und auch der Richter muß entscheiden, ob er und wie er die Mitschuld des Andern größer einschätzt als die eigene. Auf eine ärztliche Rechtfertigung der „Euthanasie" braucht er dabei keine Rücksicht zu nehmen; denn eine solche gibt es, nach meinem Urteil, nicht. Ein Arzt, welcher sich auf ein ärztliches Motiv dabei beriefe, hätte nachzuweisen, daß er sich

„fair", nämlich auf Gegenseitigkeit, und nicht autoritär, das heißt auf Superiorität eingestellt hat. Man kann sagen, daß die Berufung auf das überwiegende Recht der Mehrheit, der Gesunden, Tüchtigen oder rassisch Bevorzugten die Solidarität nicht erzeugt, welche nur auf Gegenseitigkeit beruhen kann. Das bedeutet, daß die „Opferung" eines Anderen niemals ein Opfer ist, das nur im Selbstopfer sich der Welt beweisen kann.

f) Die Unantastbarkeit des Lebens

(„Habeas-Corpus-Akte" der Medizin)

Es ist unmöglich, von einer ärztlichen Indikation zur Euthanasie zu sprechen, ohne zu sagen wer der Mensch ist. Deswegen ist es verwirrend, von einer Unantastbarkeit „des Lebens" zu sprechen, so zum Beispiel als sei das Gebot „du sollst nicht töten" für das Leben des Menschen und nicht für den Menschen selbst gemeint. Ebenso irreleitend ist es, die physische Vernichtung als unerlaubt, die psychische dagegen als freigestellt oder nicht feststellbar zu behandeln. Wenn man nun ganz richtig empfindet, daß gewisse Eingriffe unsittlich oder vom ärztlichen Standpunkt aus unsittlich sind, so liegt dem nicht ein Gesetz zugrunde, welches sich auf die physische Integrität bezöge, sondern das richtige Gefühl, daß der Mensch als Mensch eine Unantastbarkeit hat, die nicht verletzt werden darf. Nun kann dieser Mensch nur als Mensch unter Menschen konstituiert, also sozial, also in Gegenseitigkeit ermittelt werden. Es gibt also keine abstrakte Unantastbarkeit des Lebens, sondern wenn ein Risiko des Lebens übernommen wird oder ein Leben vernichtet wird, dann muß es aus Gegenseitigkeit geschehen. Nun wird behauptet, der Geisteskranke sei zu dieser Gegenseitigkeit unfähig und darum müsse der Arzt als eine Art Treuhänder über ihn verfügen. Angenommen dies wäre richtig, müßte der Treuhänder aus einer besten (nicht aus einer beliebigen) Solidarität heraus den Willen bilden. Daher kommt die Empörung der nächsten Angehörigen bei Ausführung der NS.-Euthanasie. Sie wurden übergangen. Wenn nun ein Arzt in Hitler die höchste, also auch die beste Solidarität verkörpert glaubte, dann war er von seinem Standpunkt aus im Recht. Man kann ihm also nicht mehr ein Gesetz der Unantastbarkeit bzw. dessen Verletzung zum Vorwurf machen; denn es gibt nur eine Unantastbarkeit des Menschen und alle Argumente für eine individuelle oder familiäre oder demokratische Solidarität sind für ihn durch seinen Glauben an den Führer bereits außer Kraft gesetzt.

Hier wird wieder deutlich, daß es keine ärztliche Indikation zur Euthanasie im Nationalsozialismus geben kann, denn der ärztliche Gedanke ist bereits vom Führergedanken aufgesogen und ihm bedingungslos untergeordnet. Es ist nämlich so, daß Hitler nicht nur politische Befehlsgewalt hat, sondern

auch der erste Arzt ist. In diesem Zustande befanden sich einige jener Ärzte oder sie vermeinten es zu sein.

Andererseits ist von einer ärztlichen Indikation nur zu reden, wenn der ärztliche Gedanke überhaupt existiert. Ich bin nun der Ansicht, daß dieser Gedanke klar ist, indem er fordert, den kranken Menschen zu helfen. Die Unantastbarkeit des Menschen muß also trotz der Antastung des Körpers oder der Seele gewahrt werden. Dies geschieht in der Regel durch die Freiwilligkeit der Arztwahl, das Vertrauen und so weiter. Wenn nun beim Geisteskranken diese Gegenseitigkeit nicht mehr möglich wäre, dann wäre die Treuhänderschaft nötig und die Antastung auch seines Lebens zulässig, weil er ja kein Mensch mehr ist.

Das Ergebnis ist: die Unantastbarkeit des Menschen muß vom Arzt unter allen Umständen erhalten werden, aber es bleibt die Frage, ob der unheilbar Geisteskranke kein Mensch ist und auch keiner mehr werden kann.

g) Ist der unheilbar Geisteskranke ein Mensch?

In dieser Frage kann man sich auf die irgendwo vorkommenden Urteile von Gesunden berufen und wird dann die entgegengesetzten Meinungen hören. Wie ist zu entscheiden? Ich bin der Ansicht, daß auch der Geisteskranke (im weiteren Sinne siehe unter 1b) ein Mensch ist, beabsichtige aber nicht dieses Urteil als autoritäres zugrunde zu legen. Ich würde mich allerdings anheischig machen, die Motive eines jeden, der den Geisteskranken als Nicht-Menschen erklärt zu analysieren und darzutun, daß es nicht-ärztliche und unmenschliche Motive sind, welche ihn bestimmen. Der entscheidende Grund ist der, daß der, welcher den Geisteskranken das Menschsein abspricht, sich selbst damit als Nicht-Mensch konstituiert. Damit ist auch gegeben, daß dies kein ärztliches Urteil mehr ist.

Ich setze dabei nicht voraus, daß jeder Arzt sich darüber von selbst im klaren ist. Wenn dann die Schuldfrage aufgeworfen wird und die Behandlung des Kranken als Objekt ohne Subjekt als schuldhaft verurteilt wird, dann wäre der Angeklagte in diesem Falle eine bestimmte Art von Medizin, nicht ein bestimmter Arzt. Und es würde der Grad und Umfang dieser Schuld von hier aus bestimmt werden müssen. Der Nachweis jedoch, daß der unheilbar Geisteskranke ein Mensch ist, kann im übrigen in Annäherung durch viele Einzelerfahrungen geführt werden, die dann wohl für die meisten Ärzte und Laien überzeugend genug sind. Dann bliebe nur noch eine Teilung in menschliche und unmenschliche Geisteskranke übrig. Wer aber sollte diese Einteilung richtig durchführen und würde die Wissenschaft dies leisten? Das ist unmöglich, aber auch unnötig.

Das Ergebnis ist: der Geisteskranke ist auch ein Mensch, und eine ärztliche Euthanasie mit der Begründung, er sei kein Mensch, kommt nicht in Frage.

h) Zusammenfassung: eine ärztliche Indikation der sogenannten Euthanasie ist nicht möglich

Es war nur ein einziger Fall zu finden, in welchem die Abkürzung des Lebens durch ärztliche Handlung oder deren Unterlassung als sittlich anzuerkennen war: der etwa an Carcinom unter Qualen Sterbende. Dieser Fall allein verdient den älteren Sprachgebrauch: Euthanasie. Es ist derselbe, den das Gesetz nicht zuläßt, aber ich könnte mich nicht für eine gesetzliche Legalisierung oder die Aufhebung von § 216 StGB. aussprechen. Indem der Arzt hier gesetzlich Verbotenes tut, also sich selbst in Gefahr begibt, bekundet er etwas von jener Gegenseitigkeit, die hier als Voraussetzung sittlicher Handlungsweise behauptet wurde. Es handelt sich hier um einen Bereich menschlichen Tuns, dessen Formulierung in Strafgesetzen bisher wenigstens nicht möglich war. Dem Gebot: liebe den Andern als dich selbst, käme einer solchen Handlung näher. — Was hier als „sogenannte Euthanasie" verhandelt wurde, verdient diesen Namen nicht und kann auch ärztlich nicht gerechtfertigt werden. Die Einschränkung auf unheilbar Geisteskranke ist sinnlos, da der Befund der Unheilbarkeit, das Motiv des Unwertes, des Mitleids und des Opfers bei vielen anderen Krankheiten ebenso oder noch deutlicher vorkommt. Ihrer aller Tötung wäre dann nur konsequent und sie geschah auch.

Die Gründe dieser Verwerfung der „sogenannten Euthanasie" waren von zweierlei Art. Einmal zeigen sich deren Motive: Unwert, Mitleid und Opfer, als unärztliche und nicht als sittliche. Zweitens ist die Form der Willensbildung, wie sie stattfand, als unsittlich und unärztlich bezeichnet worden. Beides ließ die Frage offen, ob bei anderer Motivierung und besserer Willensbildung eine Euthanasie doch zu rechtfertigen wäre. Aber auch diese Aussicht ist versperrt, da eine Medizin, welche das biologische Leben als solches und um seiner selbst willen als Wert setzt, abgelehnt wurde. Nur eine nicht die Lebenstatsache, sondern den Menschen bewertende Medizin ist ärztliche Medizin; sie muß also das biologische Faktum transzendieren. Nun ist der Tod eine solche Transzendenz. In diesem Sinne also soll die ganze Medizin und jede ärztliche Handlung das nur Biologische transzendieren. Sie sollen aber nicht auf den Tod, sondern auf dieses Transzendieren gerichtet sein. Sonst wäre das ärztliche Ziel in jedem Falle die Tötung; diese Absurdität hebt sich selbst auf.

Andererseits erwies die Idee des Opfers sich als eine, welche nicht außerhalb der Medizin liegt und bei der weiteren Entwicklung für sie konstitutiv bleibt. Es fragt sich dann, welche Konsequenz dies hat, wenn, nach Ablehnung der „sogenannten" Euthanasie, der ganze Bereich, der das biologische Leben erhaltenden, der therapeutischen Medizin also, in Frage kommt. Dies kommt im zweiten Abschnitt zur Sprache.

2. Ist die Vornahme von Menschenversuchen vom ärztlichen Standpunkt aus vertretbar, wenn von den Ergebnissen dieser Versuche eine günstige Rückwirkung auf die Behandlung von gefährdeten Soldaten zu erwarten ist?

Ein Teil der in dieser Frage verlangten Antworten ist bereits im ersten Abschnitt gegeben worden; so der Begriff „ärztlicher Standpunkt", des Opfers, die Willensbildung bei Vernichtungsmaßnahmen. Auch das Verhältnis von Individualität und Totalität wurde dort berührt, aber es erhält hier eine neue Beleuchtung durch die besondere Rücksicht auf das Wohl der Soldaten und damit auf die Verhältnisse des Kriegs. Wehrmacht und Krieg versetzen auch den Arzt in besondere ideelle und materielle Abhängigkeitsverhältnisse, die irgendwie als gegebene damit schon anerkannt sind. Trotzdem darf das allgemeine Problem dem eines Kriegszustandes vorausgestellt werden.

a) Versuche am Menschen im allgemeinen

Über die Zulässigkeit von Versuchen am Menschen im allgemeinen kann nicht der geringste Zweifel bestehen. Man hat die Krankheiten selbst als einen Versuch der Natur am Menschen bezeichnet. Gegen diese Formulierung, die freilich einer eingeschränkten und insofern unzulänglichen Auffassung der Krankheit entstammt, ist nichts einzuwenden. Ein großer Teil zum Beispiel der Gehirn- und Rückenmarksphysiologie verdankt ihre Erkenntnisse bestimmt lokalisierten Erkrankungen dieser Organe. Ebenso aber lernt die Medizin ununterbrochen durch die Erfahrungen in der Therapie. Jede rationale Therapie ist ein Versuch am Menschen, was am sinnfälligsten bei Einführung neuer (operativer, chemischer, strahlentherapeutischer, diätetischer und so weiter) Methoden geschieht. Es bleibt hier überall dem ärztlichen Takt überlassen, neue Versuche nur so weit zuzulassen, als eine Schädigung des Patienten ausgeschlossen oder so unwahrscheinlich ist, daß er den Versuch meint verantworten zu dürfen.

Anders steht es, wenn ein Risiko wahrscheinlich oder gewiß ist. Hier ist einwandfrei eigentlich nur der Selbstversuch des Forschers und der seiner Mitarbeiter, sofern diese genau unterrichtet und freiwillig zum Selbstversuch bereit sind. Dies muß nun auch die Richtschnur abgeben für die Heranziehung von solchen Personen, die sich nicht mit Forschung und experimenteller Therapie beschäftigen, wie Geisteskranken, Strafgefangenen, vom Gericht zum Tod Verurteilten, unheilbar und vor dem Tod stehenden Kranken.

Ich sehe keinen Nutzen darin, jeden dieser Fälle genau zu analysieren und beschränke mich auf die Feststellung, daß darüber, wie weit man gehen darf, auch unter Forschern und Ärzten die Meinung geteilt ist. Wichtig ist hier aber der Grund solcher Meinungsverschiedenheiten. Es besteht nämlich kein Zweifel, daß die, welche am weitesten in der Herbeiführung experi-

menteller Risiken am Menschen gehen, dieselben sind, welche überhaupt vom naturwissenschaftlichen Experiment am meisten erwarten, während die, welche diese Experimente ganz oder teilweise ablehnen, Menschen sind, welche in der Krankheit nicht nur einen Naturvorgang, sondern eine menschliche Situation und Aufgabe erkennen. Jetzt läuft es darauf hinaus, welche Auffassung von der Krankheit jemand hat und welcher man zuneigt. Es ist aber wichtig zu bemerken, daß extreme Typen in beiden Gruppen selten sind. Ärzte, die gar keine Hemmungen bei Versuchen am Menschen haben, waren bisher kaum zu sehen, und solche, die jeden zum Fortschritt der naturwissenschaftlichen Therapie unvermeidlichen Versuch ablehnen, ebenfalls. — Man kann aber nicht sagen, daß hier die Wahrheit in der Mitte liege. Durch Einnehmen eines Kompromiß-Standpunktes wird die Klarheit über den wahren Begriff der Krankheit nicht ermittelt, sondern nur verdunkelt und hinausgeschoben. Man muß daher feststellen, daß wir hier auf einem Gebiet stehen, in welchem die heutige Medizin sich in einem inneren Kampf befindet. In der Zone dieses Kampffeldes gibt es also wieder keinen „ärztlichen Standpunkt", der unbestrittenes Allgemeingut aller Ärzte wäre, und diese Lage spiegelt sich im Verhalten der Laien, also des Publikums und der Patienten wider. Der besagte Kampf findet außerdem im Innern jedes einzelnen Arztes statt, so daß er von Fall zu Fall schwanken kann und sich neu entscheiden muß. Veranlagung zu Wagemut oder Vorsicht, zu leidenschaftlichem Erfolgswillen und nüchterner Zurückhaltung oder Skepsis spielen ihre Rolle dabei. „Wer wagt, gewinnt", „nil nocere", „einmal ist keinmal", „gebrannte Kinder scheuen das Feuer" — solche Sprüche stellen sich ein, wo das Leben doch nie stillsteht.

Über die Unvermeidlichkeit des Versuchs ist also kein Zweifel möglich und jeder Patient, jeder Krankheitsfall ist ein Original, also ein Versuch. Die Frage ist also nur: was ist ein Experiment und was kann man von ihm erwarten.

b) Der Nutzen der Wissenschaft für die Therapie

Wenn hier zunächst von der Naturwissenschaft und Biologie die Rede ist, dann muß deren Begriff so hoch und anspruchsvoll wie möglich gefaßt werden. Hier müssen wichtige und unwichtige Probleme, gute und schlechte Methoden, oberflächliche und scharfsinnige Überlegungen unterschieden werden. Der Rang eines Forschers ist eine unentbehrliche Realität, und es wird ein schwerer Vorwurf sein, wenn Versuche an Menschen nicht den Sachkundigsten und besten Forschern überlassen werden. Dagegen ist es nicht möglich, nur solche Probleme zuzulassen, welche einen unmittelbaren Nutzen beim Kranken versprechen. Die Wissenschaft ist eine große Einheit, und der Nutzwert ist bei segensreichen Entdeckungen oft nicht vorauszusehen. Das weiß jeder Wissenschaftler. Ich halte aber die Beiziehung

inkompetenter Personen zu Versuchen mit menschlichem Risiko für so schuldhaft, daß sie eine eigene Strafbarkeit nötig macht. Unter der Maske der Wissenschaft werden nämlich nicht nur unnötige, sondern unsinnige und obendrein schädliche Untersuchungen ausgeführt. Und ich behaupte, daß dieser Mißbrauch eine große Verbreitung auch dort hat, wo die Öffentlichkeit es gar nicht ahnt oder in dumpfer Ahnung, in primitiver und dann am Kern der Sache sozusagen vorbeischießender Richtung reagiert. Die Kranken sagen dann: „so etwas lasse ich mir nicht machen"; aber sie können keine Einsicht besitzen, ob sie im Einzelfall recht oder unrecht haben. Solche Einwendungen treffen sowohl physikalische Maßnahmen, wie die Lufteinblasung ins Gehirn, als auch psychische, wie die Psychoanalyse.

Die nähere Betrachtung zeigt dann, daß es sich um zwei Dinge handelt. Erstens gibt es hier ein Autoritätsproblem und zweitens eine Frage, was Wissenschaft überhaupt ist. Ich halte eine Lösung des Autoritätsproblems dann für unlösbar, wenn man die wissenschaftliche Autorität, den Vorsprung des Wissenschaftlers vor dem Laien, des Arztes vor dem Kranken in der Weise beseitigt, daß beide in gemeinsamer Einsicht übereinkommen, was wissenschaftlich begründet ist, etwa die Diagnose einer Lungentuberkulose oder die Notwendigkeit eines bestimmten Eingriffes. Ganz dasselbe gilt aber für den Entschluß zu einem Experiment am Menschen. Unterstelle ich nun als gegeben, daß unnötige, unsinnige, schädliche und wissenschaftlich unqualifizierte Versuche gemacht worden sind, so muß die Einsicht kompetenter Forscher und Gelehrter dies feststellen. Auch daß nur kompetente wirkliche Autoritäten und nicht andere herangezogen werden, ist Sache einer autoritären Entscheidung und sie beruht auf einem richtigen Instinkt und Auswahlvermögen etwa des Richters. Eben weil dies so ist, tritt aber nun der zweite Punkt hervor: was Wissenschaft ist und welche Wissenschaft die beste ist, dies muß die Wissenschaft selbst bestimmen. Die Selbstbestimmung der Wissenschaft ist jetzt der Akt, in dem die Verantwortung für Art und Grenze des Versuchs an Menschen beruht. Ein solcher Akt ist nicht nur ein ideologischer: jede Besetzung etwa eines Lehrstuhls ist eine praktische Verwirklichung dieser Selbstbestimmung, und man muß annehmen, daß dabei häufige Fehler vorkommen.

Es ist also unzulässig zu sagen: die Wissenschaft ist immer gut und richtig; man muß sie nur auch richtig, das heißt menschlich und edelmütig anwenden. Die Wissenschaft selbst bestimmt sich gut oder schlecht. Und hier behaupte ich, daß eine Medizin, die sich nur naturwissenschaftlich oder biologisch als Wissenschaft bestimmt, sich schlecht, falsch und schuldhaft entscheidet. Die Epoche nun, in der die in Nürnberg angeklagten Ärzte ausgebildet wurden, ist eine, in der diese falsche, schlechte und schuldhafte Entscheidung in der ganzen Welt die auf Universitäten und Kliniken überwiegende war. Daraus folgt, daß hierin ein entlastendes Argument für diese

Angeklagten vorliegt, denn ihre Denkweise war und wird noch von jenen anerkannten Autoritäten vielfach geteilt. Die Frage, welche sich nun erhebt, ist die, ob über diese entlastende Abhängigkeit hinaus Handlungen begangen wurden, die auch im Rahmen solcher sozusagen kollektiver Schuld besonders schuldhaft, vermeidbar sind und die also keine natürliche Konsequenz eines überpersönlichen Irrtums waren.

Was hier festgestellt wurde, ist, daß die naturwissenschaftlich-biologische Medizin in sich selbst kein ausreichendes Korrektiv einer unmenschlichen Anwendung enthält. Um ein solches Korrektiv zu erlangen, ist sie auf ein außerhalb ihrer Art von Wissenschaft vorhandenes Sittengesetz oder religiöses Gebot oder eine Staatsidee oder eine menschliche Autorität angewiesen. Darin liegt das Besondere für den primär nur wissenschaftlich (solcher Art wissenschaftlich) Handelnden. Da man demnach die naturwissenschaftlich-biologisch bestimmte Medizin gar nicht befragen kann, ob gewisse Versuche zu rechtfertigen sind oder nicht, kommt man auch hier zunächst zu der Frage, unter welchen Voraussetzungen nicht wissenschaftlicher Art sie gemacht werden dürfen.

c) Die erlaubten Voraussetzungen solcher Versuche

Hier nehme ich als gegeben an, daß die Versuche nach Anlage, Methode und sachlichem Zusammenhang wirklich wesentlichen Nutzen für Verwundete und Kranke versprachen. Ich bezweifle, daß dies in jedem Falle so war und daß die Personwahl dieses Niveau gewährleistete. Aber der Nutzen rechtfertigt nicht jede beliebige Durchführung. In England zum Beispiel dürfen auch Versuche an warmblütigen Tieren nur mit Genehmigung des Home Office vorgenommen werden. Die Auswahl von Menschen für quälende oder gefährliche Versuche muß, in Ermangelung einer der Wissenschaft immanenten Ethik, nach dem Prinzip der Freiwilligkeit, der Gegenseitigkeit und im übrigen des bürgerlichen und des Völkerrechtes erfolgen. Die Willensbildung muß solidarisch und nicht einseitig sein. In allen diesen Punkten gelten meines Erachtens die im ersten Abschnitt schon entwickelten Grundsätze. Sie sind hier in der Regel aber leichter durchführbar, da mit Ausnahme von Geisteskranken eine freie Willensbildung des Versuchsmenschen verfügbar ist. Versuche an Geisteskranken halte ich für unerlaubt, weil deren freie Willensbildung bereits vom Arzte verneint worden ist.

Die schwieriger zu beurteilende Voraussetzung liegt eigentlich im Ziel der Versuche. Wenn man nämlich etwa als das Ziel die Gesundheit der Anderen, der Volksgenossen, der Soldaten, der Menschheit ins Auge faßt, dann muß man auch sagen was hier Gesundheit heißt. Wir vereinfachen diesen Begriff zunächst, indem wir nur deren Verfügbarkeit und Tüchtigkeit für beliebige Leistungen fordern. Dann ergibt sich die Situation, daß der „natürliche" Mensch ein „natürliches" Widerstreben hat, krank gemacht zu werden. Hier offenbart sich, daß die medizinischen Experimente an Menschen fast ausnahmslos soviel bedeuten wie künstliches Krankmachen — zunächst unableitbar aus der ärztlichen Idee. Der Erfolg ist, daß die Experimente, wie auch geschehen, gegen den Willen dieser Menschen und unter Gewaltanwendung gemacht werden mußten. Wieder soll es also die überlegene Einsicht und Übersicht des Arztes sein, die den höheren, das heißt allgemeinen und quantitativ überwiegenden Nutzen des Versuchs rechtfertigt. Wenn also durch 10 künstlich malariakrank Gemachte 1000 oder eine Million andere Malariakranke gerettet werden können, dann wäre nach dieser Auffassung jene Gewaltanwendung berechtigt. Wenn aber eine unsittliche Handlung durch ihre Sanktionierung 1000 oder eine Million andere unsittliche Handlungen ebenfalls sanktioniert, dann müssen wir wählen zwischen dem ärztlichen Nutzen und der Rettung der Sittlichkeit. In dieser Alternative liegt das Problem.

Man darf unbedenklich sagen, daß darin das ganze Elend und die ganze Unfähigkeit der menschlichen Kreatur beschlossen liegt. Denn hier ist eine Alternative und eine Entscheidung aufgedrängt, zu deren Bewältigung der Mensch offenbar unzulänglich ist. Nun ist hier gefragt, ob die Vornahme solcher Versuche vom ärztlichen Standpunkt aus zu rechtfertigen sei. Um das richtig zu beantworten, muß ich einen Idealfall voraussetzen, in dem der, der solche Versuche rein aus seinem Willen vielen Menschen, nicht nur einem Menschen, zu helfen getroffen hat. Der Richter muß sagen, ob er den Angeklagten für einen solchen Willensreinen hält oder nicht. Als Gutachter sage ich dazu folgendes: Da der Richter sich in der Beurteilung eines Menschen und seiner Ziele täuschen kann, so ist dieser Teil seiner Entscheidung, als auch nur menschlicher, für den Geist der Medizin relativ unwichtig; wichtig ist, ob er sich für die natürliche (biologische) oder für die sittliche Geschichte der Menschen entscheidet. Und als Arzt werde ich ihm meine Ansicht als die mitteilen, welche ich für den ärztlichen Standpunkt richtig halte: ich halte vom ärztlichen Standpunkt aus die sittliche Geschichte der Menschen für maßgebend, die biologische für untergeordnet. Dies bedeutet nun keineswegs, daß die Versuche am Menschen in der gedachten Gefährlichkeit an sich unerlaubt sind. Aber ich bestehe darauf, daß die Anwendung der Gewalt in jedem Experiment und für diesen Fall der Forschung sittlich gerechtfertigt war. Die erlaubte Voraussetzung ist also nicht ein naturwissenschaftlich-biologischer Erklärungszusammenhang („wenn ich dann weiß, wie ich Malaria heilen kann, darf ich einen Menschen opfern"), sondern die erlaubte Voraussetzung ist, daß die Anwendung von Gewalt hier erlaubt war. Es kommt jetzt alles auf die Frage heraus, in welchem Falle der Arzt Gewalt anwenden darf.

d) Die erlaubte Gewaltanwendung in der Medizin

Man kann hier wieder damit beginnen, daß Gewaltanwendung in der Medizin im technisch-abstrakten Sinne fortwährend nötig ist. Es ist ein leichtes, dies für jede ärztliche Handlung durchzudenken. Die so sich aufdrängenden Beispiele (Knochensäge, Medikament, Diät, Opiumgesetz, Forderung wahrer Angaben unter Androhung eines Schadens) sind aber doch von ganz anderer Art als die Durchführung von Versuchen an unfreiwillig Gefangenen oder Ahnungslosen, an Häftlingen und so weiter. Hier ist gefragt nach dem gewaltsamen und Erkenntnis der Medizin versprechenden Versuch mit Unterdruck, Kälte, Seewasser, Operation, Infektion und chemischer Substanz. Und die aufsehenerregende Sonderstellung solcher Experimente wäre eine scheinbare, wenn überlegte und überlegene Einsicht in die Zusammenhänge und eine Vorzugsstellung einer Gesamtheit gegenüber einem Individuum, einem Führenden gezeigt hat, daß die Gewaltanwendung hier geboten ist durch eine höhere sittliche Stufe als die, welche den Vergewaltigten zukommt. Mit anderen Worten: es gibt hier die Anerkennung einer sittlichen Stufung der Menschen. Nur wenn man das Problem so weit vortreibt, ist ein Urteil möglich, ob die Gewalt hier berechtigt ist. Sie ist als Gewalt ein zugleich physischer und sittlicher Begriff. Es zeigt sich jetzt, daß jener ärztliche Standpunkt selbst eingefangen ist in diese Dialektik und sich die Erklärung desselben nicht von anderswo holen kann. Denn es bleibt dabei, daß der Arzt Menschen zu helfen verpflichtet ist. Und da zeigt sich nun, daß er sich diese Aufklärung aus Naturwissenschaft und Biologie nicht holen kann.

Ich vertrete deshalb hier die Ansicht, daß der der geläufigen medizinischen Wissenschaft verhaftete Arzt sich die Beurteilung der Gewaltanwendung außerhalb dieser Medizin holen mußte und daß ein Urteil über dieses Außerhalb maßgebend sein muß für die Beurteilung seiner Gewaltanwendung. Man muß, wenn man zur Strafe verurteilt, diese außermedizinische Instanz und die Unterwerfung unter sie verurteilen — oder man muß die Art medizinischer Wissenschaft und die Beistimmung zu dieser Medizin verurteilen. Nicht kann man aber verurteilen eine Übertretung „der" medizinischen Ethik, so als ob es diese fraglos gäbe in unserer Zeit. Es gibt sie nicht. Der Eid des Hippokrates geht uns gar nichts an. Mit diesen Sätzen (die man natürlich aus dem Zusammenhang reißen und mißbrauchen kann und vielleicht wird) will ich sagen: es ist unzulässig, alte Wahrheiten auf eine gegenwärtige Situation anzuwenden, ohne sie für diese Gegenwart neu zu interpretieren, so daß man sie überhaupt versteht. Denn, wir sahen: das „töten" ist unser tägliches Geschäft, und Gewalt anwenden auch.

Es bleibt also dabei, daß die Gewaltanwendung im Menschenversuch nicht sittlich zu rechtfertigen und nicht ärztlich zu erlauben ist, wenn das Heilziel kein sittliches, sondern ein rein natürlich-biologisches ist: nämlich zum

Beispiel das Überleben „wertvollerer" Menschen. Denn weder daß sie überlebten, noch daß sie wertvoller waren, war in einem solidarischen sittlichen Bewußtsein anerkannt. Der Widerstand der Vergewaltigten war nicht freiwillig aufgegeben, sondern gebrochen worden, und das Urteil, dieser Widerstand stamme aus ungenügender Einsicht oder ungenügender Moral, ist ein angemaßtes, kein sittlich erworbenes.

Es kommt also nicht in Frage, diese Form der Gewaltübung aus dem medizinischen Standpunkte zu rechtfertigen.

e) Das Ziel der Medizin

Es wurde schon gesagt, daß das Ziel der Medizin innerhalb der Medizin kontrovers ist, und daß ein Beschluß der Ärzte durch Abstimmung in der praktischen Wirklichkeit höchstens ein Mehrheitsbeschluß, aber kein Weisheitsbeschluß sein würde. Befragte man einige Autoritäten, so wäre die Situation dieselbe. In dieser Lage kann sich der Gutachter nicht auf seine eigene Autorität (zugestanden oder selbst kreiert) verlassen, sondern auf die kräftige Wahrheit seines Argumentes.

Da sei nun gesagt: es mag angehen, die Schuldklage vom medizinischen Gebiet aufs politische zu verlegen. Es kann auch notwendig sein, die bürgerlich-strafrechtliche Seite in den Mittelpunkt zu verlegen. Es wird aber nicht möglich sein, an der inneren Spaltung der Medizin selbst vorbeizugehen, so als ob mit dieser das Zustandekommen der Taten gar nichts zu tun hätte. Eine Freilegung dieses letzten Tatbestandes gehört meines Erachtens zu den Pflichten eines Prozesses, der die Stellung in der Welt hat, nicht nur Schuld und Sühne in Ausgleich zu bringen, sondern, als ein Novum, der irrenden und kranken Welt weiterzuhelfen. Darum überschreite ich hier auch den normalen Rahmen der gestellten Fragen. Ich mußte diese Fragen nicht nur beantworten, sondern auch ihrem Sinne kritisch nachgehen. Daraus ergibt sich das Folgende.

Das medizinische Experiment am Menschen wurde nicht abgelehnt, wohl aber eine bestimmte Form desselben und wahrscheinlich auch die Form, welche einige Angeklagte durchgeführt oder ermöglicht haben. Die Verantwortung dafür liegt nach meinem Erachten aber auch bei einer Form der Medizin, für die diese Angeklagten nicht allein verantwortlich, vielmehr eine weltweit anerkannte Autorität zuständig ist, was als Entlastung anzusprechen ist. Die Diskussion, die jetzt noch folgt, bezieht sich also weder auf die Anklage, noch auf die Angeklagten, ist aber wichtig für beide zum Verständnis.

Ich habe gesagt, daß eine Medizin, welche die Krankheit nur als ein naturwissenschaftlich-biologisches Faktum betrachtet, gezwungen ist, sich ihre sittliche Norm zum Beispiel bei Gewaltanwendung, außerhalb der Medizin

suchen muß. Eine Medizin dagegen, für welche die Krankheit eine Weise des Menschseins ist, muß in sich selbst die Entscheidung über sittlich und unsittlich treffen. Im ersten Fall kann die Therapie nicht wissen, wofür sie gesunde Menschen bereitstellt, und sie erstrebt nur Menschen für beliebige Zwecke verfügbar zu machen. Im zweiten Falle übernimmt sie die Aufgabe, den Menschen zu einem richtigen Menschsein hinzuführen; hier ist Gesundheit nicht Verfügbarkeit für Beliebiges, sondern Gesundheit ist selbst eine Art der Menschlichkeit. Da ich mich für diese zweite Idee der Medizin entscheide, muß ich auch hier etwas darüber sagen, ob und in welchem Sinne es schuldhaft sein kann, der ersten oder der zweiten Idee zu folgen. Meines Erachtens ist ohne weiteres zuzugestehen, daß die naturwissenschaftlich-biologisch orientierten Ärzte kein Bewußtsein davon haben, daß in der Behandlung der Krankheit als Naturobjekt ein schuldhaftes Vergehen gegen die Menschlichkeit liegen könnte. Und sie werden durch ihr unwissenschaftliches Gewissen oder durch eine bestimmte religiöse oder moralische Erziehung und Bindung davon abgehalten, Unsittliches zu tun, welches ihnen bewußt sein kann. Wenn sie etwas von einem anderen Bewußtsein aus gesehen Unsittliches tun, dann geschieht es also unbewußt. Das bedeutet aber nicht, daß diese unbewußte Schuld, dann weil sie eben unbewußt wäre, nicht auf das Bewußtsein auch solcher Ärzte einen Druck ausübte. Denn dieses Unbewußte übt aufs Bewußtsein die stärkste Wirkung aus und meldet sich hier, obwohl unerkannt, in verschiedenster Weise als ein Warner. Ein Arzt, der zum Beispiel trotz einwandfreier Technik Mißerfolge sieht, wird gewarnt durch eine seelische Depression oder durch einen Zweifel an seiner Technik. Er braucht darum noch nicht an der Wissenschaft oder an der Idee seiner Medizin zu zweifeln. Die Protokolle und Dokumente des Nürnberger Prozesses zeigen, daß solche Warnungen fortwährend auftauchen und dann versucht wurde, durch Rückfragen bei Vorgesetzten oder beim Führer, durch Rücksichten auf den Kriegszweck oder die Rassenideologie, diese Warnungen und Zweifel zu beseitigen. Ich deute das so, daß unbewußte Schuld durch solche Rückendeckungen und natürlich auch andere Hilfen wie Alkohol, „Idealismus", „Patriotismus", Pflichtgehorsam niedergekämpft wurden. Daraus erklärt sich auch das eigentümliche und rasche Crescendo der Unmenschlichkeiten. Je mehr dies unbewußte Schuldgefühl und sein Einbruch ins Bewußtsein durch neue Verdrängungen verstärkt wurde, um so mehr schuldhaftes Tun mußte ja getan werden. Hier ist der von Freud beschriebene Vorgang des Verbrechens aus unbewußtem Schuld*gefühl* wirksam: eine verbrecherische Tat befreit ja vom Druck des unbewußten Schuldgefühls und ist deshalb von Lustgefühl begleitet. Die Geheimnistuerei, die Vorstellung, man sei der Rückständigkeit der Masse und der Dummheit der Kirchen und der Moralen voraus, zeigt die Verwendung dieses Lustgefühls deutlich an. Aber das unbewußte Schuldgefühl ist meiner Ansicht nach (und dies geht über

Freud hinaus) etwas anderes als die unbewußte Schuld selbst, die ebenfalls vorhanden ist, und diese stammt aus der wissenschaftlichen Objektivität, welche die Ärzte lehrte, die Krankheit als ein Objekt zu behandeln.

Daß nun diese Idee der Medizin eine objektive Schuld enthält, geht daraus hervor, daß es sich begibt, daß man nicht nur die Krankheit, sondern den *Menschen selbst* in der Medizin tatsächlich wie ein Objekt behandelt. Daß sich dies begibt, beweist umgekehrt, daß die Krankheit kein Objekt, sondern ein menschliches Verhalten, eine Weise des Menschseins ist. Denn wenn die Krankheit nur ein Objekt wäre, dann wäre dieses Übergleiten der medizinisch-naturwissenschaftlichen Objektivität auf die Behandlung des Menschen als Objekt (und damit auf eine Unmenschlichkeit) nicht zu verstehen. Darum wird hier diese Art von Medizin als schuldhaft bezeichnet.

Wendet man sich nun zur möglichen Schuldhaftigkeit der zweiten Idee der Medizin, die man kurz als die anthropologische bezeichnen kann, dann zeigt sich hier keine Immunität gegen die Schuld. Aber sie ist von anderer Art. Wenn die Medizin es übernimmt, den Menschen zum Menschsein zu führen, so ist sie von einer permanenten Schuld begleitet, die darin besteht, daß sie sich etwas vornimmt, was sie nicht leisten kann. Im Bewußtsein äußert sich dies so, daß der Arzt fühlt und erkennt, daß er gar nicht klar und präzise weiß, was dieses Menschsein eigentlich ist. Aber auch im Unbewußten ruht die tatsächliche Schuld, daß Kranke zu Menschen zu machen nicht genügt, sogar ein falsches Ziel ist. Dies wurde früher in der Art bemerkbar, daß von der Medizin verlangt wurde, daß sie das biologische Dasein „transzendiere". Dieser Ausdruck enthält nämlich gar nichts anderes als die Feststellung, daß die Heilung, die Gesundheit nur Menschen, lebende und nicht tote Menschen zum Ziele hat und also die Transzendenz verfehlt, ja sogar verhindert. Dies ist also wirklich Schuld, die im Unbewußten bleiben muß, solange ich ärztlich handle. Und auch diese unbewußte Schuld drängt sich fortgesetzt ins Bewußtsein mit der Warnung, daß man nicht nur etwas relativ Unvollkommenes, sondern etwas Falsches und Schlechtes, ja Böses tut. Während dann die „Euthanasie" im Sinne des Nationalsozialismus die Befriedigung eines Strafbedürfnisses und, mehr noch, die Konsequenz einer unbewußten Schuld und so selbst schuldhaft ist, ist die andere, die anthropologische Medizin, wenn sie rein vollzogen wird, so etwas wie ein Selbstmord der Medizin und ein Morden des transzendenten Menschen zugunsten des zeitlich lebenden.

Es bleiben, nach diesem Vergleich zweier Ideen der Medizin, noch zwei Fragen. Die erste soll erklären, warum hier die zweite, die anthropologische, vorgezogen wird; die zweite betrifft die Situation, vor die ein Strafgericht gestellt ist, wenn diese Ausführungen zutreffende oder wenigstens auf dem Wege zu einer Wahrheit sind. In diesen beiden Fragen ist es aber nicht mehr erforderlich, die beiden Probleme der Euthanasie und der Menschenversuche vom ärztlichen Standpunkt aus getrennt zu behandeln. Sie konvergieren zu

einer einfachen Grundfrage und schon bisher waren die Überschneidungen an mehreren Stellen erkennbar.

Die Bevorzugung der anthropologischen vor der naturwissenschaftlich-biologischen Idee der Medizin geschieht hier, nicht zum ersten Male, weil die Gegenseitigkeit und die Solidarität nur in der anthropologischen selbst liegen und nicht, wie in der anderen, von außen an das ärztliche Bewußtsein herangebracht werden müssen, also extraterritorial für den Mediziner bleiben. Wenn sich dann ergibt, daß eine Schuld auch der Realisierung der anthropologischen Idee notwendig einwohnt, so ist diese Schuld hier von anderer Art. Es ist diese Art von Schuld nicht die gemeine und meidbare, sondern etwa das, was in der Kirchensprache als felix culpa bezeichnet wird. Das heißt, es ist die Schuld, welche eine sühnende Befreiung aus sich selbst hervortreibt. Wenn das ärztliche Bemühen nämlich dem Menschen helfen will Mensch zu sein, Menschsein aber nicht nur Mensch, sondern anderes als nur Mensch sein heißt, dann ist dieser innere Widerspruch und diese ewige Schuld eine größere als die gemeine Schuld und daher eine bessere Warnung des Arztes vor seiner Überheblichkeit.

Die zweite Frage kommt im folgenden zur Besprechung.

3. Die Gegenseitigkeit und die Solidarität sollen ärztliches Handeln leiten

a) Entlastungsmöglichkeiten

Vieles von dem bisher Gesagten scheint in einem Zwielicht zu stehen, weil Probleme behandelt werden, die zwei Seiten haben. Diese Zweiseitigkeit wird dann zur Zweideutigkeit, wenn man oberflächlich über sie weglesend nur Sätze herausholt, die für eine vorgefaßte Meinung oder Absicht entweder günstig oder ungünstig klingen. Handelt es sich dann um konkrete Handlungen, die angeklagt sind, dann werden die günstig klingenden Sätze als entlastende benutzbar sein. Dies aber wäre ein voller Mißbrauch unseres Textes, und der Gutachter hat auch nicht auf der Seite der Anklage oder der Verteidigung, auch nicht der des Richters zu stehen, sondern er hat allen dreien zur Klärung des Falles behilflich zu sein und außerdem der ferneren Wirkung des Prozesses zu dienen. Der Prozeß soll eine fortschrittliche Wirkung auf die Medizin, die Kranken und das Rechtsbewußtsein ausüben. Wenn also zum Beispiel gesagt wird, daß Gewaltanwendung in der Medizin unvermeidlich oder daß die Unantastbarkeit des Menschen zu wahren sei, dann kann man solche Sätze nicht als Maximen und Oberbegriffe anwenden, unter die man in abstrakter Weise beliebige Handlungen subsumiert, ohne noch auf deren konkrete Fülle Rücksicht zu nehmen. Darum werden einige besonders zweiseitige Situationen hier nochmals herausgehoben, um dem Mißverständnis und Mißbrauch den Weg zu versperren.

1. Wenn es praktisch unvermeidlich und sittlich nötig ist, zerstörende Maßnahmen anzuwenden, dann genügt es nicht etwa zu sagen, daß solche Maßnahmen auf ein Minimum einzuschränken und dem Hauptzweck zu heilen untergeordnet werden müssen. Das wäre immer eine Selbstverständlichkeit, die ganz offen ließe, welcher Zweck denn der Hauptzweck ist. Was aber der Hauptzweck ist, gerade dies ist nun unbekannt (nicht nur strittig), und deshalb liegt das ganze Gewicht auf der Art, nicht auf dem Zweck ärztlichen Handelns. Darum sind die Willensbildung und die Motivationen dieses Handelns das, was wir kritisieren müssen und was verurteilt und eventuell bestraft werden muß. Wenn nun ein Arzt aussagt, er habe etwas Bestimmtes aus „Idealismus" oder „in gutem Glauben" getan, so ist eben dies nicht a priori entlastend, sondern es muß kritisiert werden, und zwar, wie gezeigt sowohl in dem bewußten wie dem unbewußten Teil. Sache des Richters ist es dann, zu entscheiden, wie weit er der Subjektivität des Täters glaubt folgen zu können, wie weit er die objektive Tat als solche dem Urteil zugrunde legen muß. Auch der Waldhüter, Gärtner, Metzger muß also unvermeidlich ausrotten und töten. Der Frevel dabei beginnt aber nicht nur da, wo das unvermeidliche Minimum überschritten wird, sondern wo die Art des Tötens grausam und die Motive des Ausrottens asoziale Bereicherung und so weiter sind. Auch ergibt sich die sittliche Beurteilung nicht aus einer einzelnen Handlung, sondern aus einem Gesamt von Verhaltungsweisen, wie bei einer ärztlichen Diagnose. Die Einzelsymptome, ihre Aufzählung sind nur Gedächtnishilfen des Lernenden.

2. Wenn hier ferner eine bestimmte Idee einer bestimmten Medizin ungünstig beurteilt wurde, dann kann der Schein entstehen: also seien nicht einzelne Mediziner, sondern der Geist einer Medizin verantwortlich, und dies bedeute eine Entlastung. Es wurde aber gezeigt, daß auch der in dieser hier verworfenen Idee der Medizin Erzogene gewarnt wird von den Regungen seines Gefühls, die ihn von den schlimmen Exzessen abhalten wollen. Wenn er nun diese Warnungen im vollen Bewußtsein niederringt, um ein sittliches Risiko auf sich zu nehmen, so muß er auch bereit sein, auf sich selbst die gleiche Gefahr zu nehmen, wie die ist, die er einem andern, etwa bei Euthanasie oder Menschenversuch, zumutet. Das ist der Fall beim Selbstversuch. Ärztlich gehandelt wäre, die Gefahr, die er selbst auf sich nimmt noch größer zu gestalten, als die, welche er einem andern zumutet. Ich weiß, daß das schwer ist. Aber ein Arzt kann, wenn er aus „Idealismus" oder „im guten Glauben" andere Menschen gefährdet, geschmerzt und getötet hat, kein Unrecht behaupten, wenn ihm selbst im weiteren Verlauf dasselbe geschieht. Ob er sich in irgendeinem Sinn schuldig erkennt, spielt dabei keine Rolle, denn die Gegenseitigkeit, die Solidarität in solchen Fällen ist es, welche Tat und Strafe in Proportion setzt. — Es ist dabei auch nicht angenommen worden, daß es mehrere gleichberechtigte Ideen der Medizin gäbe und daß aus Gründen der Toleranz man zwei oder noch mehr zulasse.

So als ob man jeden Arzt nur an seinem Maßstab seiner Vorstellung von Medizin messen dürfe und von hier aus seine Sittlichkeit zu beurteilen habe. Es handelt sich nämlich hier nicht um das Verhältnis einer reinen Idee zu deren mehr oder minder ehrlichen Verwirklichung, sondern die Beurteilung muß bestimmte Taten und deren sittliche oder unsittliche Motivation zu treffen suchen. Was nun sittlich oder unsittlich ist, das sagt jedem Menschen eine Warnung, die nicht aus einer Idee, sondern aus dem Bösen selbst stammt. Es folgt daraus noch nicht, daß mehrere Ideen gleich gut sind, im Gegenteil. Auch welche Idee die allein gute ist, entscheidet sich schließlich aus dem Gegensatz von Gut und Böse; aber diese Entscheidung kann in einem solchen Prozeß nicht vorausgesetzt werden, sondern der Prozeß ist als Ganzer ein Opfer, das diese Entscheidung näherbringen muß.

3. Endlich kann keine Entlastung daraus abgelesen werden, daß hier nicht Medizin und bestimmte Mediziner, sondern eine Staatsform, ein Volksbegriff oder eine Weltanschauung angeklagt seien. Wenn strafbare oder unsittliche Handlungen nicht im Namen der Medizin, sondern jener außermedizinischen Verpflichtungen begangen worden wären, dann sind zwei Fälle möglich. Entweder jene Staatsform, Volksbegriff oder Weltanschauung waren gute: dann sind sie gar nicht angewendet, sondern verraten worden, wenn die medizinischen Handlungen schlecht waren; oder sie waren schlechte, dann waren die ärztlichen Handlungen, sofern sie nur konsequent abgeleitet wurden, ebenso schlecht, unsittlich und strafbar. Diese Logik bedeutet aber nur, daß ein Rückgriff auf außermedizinische Instanzen an dem eigenen sittlichen Charakter der ärztlichen Handlung gar nichts ändert. Ein solcher Rückgriff dient zweifellos zum Verständnis der Motivbildung, aber er bestimmt nicht die sittliche oder juristische Beurteilung. Es ist derselbe Fall wie oben beim Rückgriff auf eine ärztliche Idee: nicht das Verhältnis von Idee und Realisierung, sondern die Art der Realisierung ist allein Gegenstand eines Urteils, und die Güte einer Idee kann weder als Belastung noch als Entlastung herangezogen werden.

Es könnte jetzt so aussehen, daß die vorhergehenden Erörterungen für die Beurteilung des sittlichen oder Schuldcharakters eigentlich alle überflüssig waren, weil das Urteil sich ja doch aus einem richtigen Instinkt oder Gefühl für Gut und Böse ableite. Bliebe die Beachtung geltenden Gesetzes, der Voraussetzung seiner Anwendung und der Strafprozeßordnung. Hier ginge es dann noch etwa um den Grundsatz nulla poena sine lega, das Rechtsempfinden, den gesunden Menschenverstand, das einfache Gefühl und dergleichen mehr. Wenn dem so wäre, dann wären nicht nur die hier angestellten Untersuchungen überflüssig, sondern auch die Vertretung eines ärztlichen Standpunktes wäre mißglückt. Das Ergebnis wäre ein völlig negatives. Dies ist nun nicht so. Ich werde also den positiven Inhalt, der in der kritischen Darstellungsweise unterschätzt werden könnte, jetzt für sich auszusprechen suchen.

b) Kriegsverhältnisse

Der positive Grundsatz, dem ich hier Gehör verschaffen will, ist der der Gegenseitigkeit und der Solidarität im Verhältnis von Ärzten und Kranken. Wie sich die Anwendung dieses Grundsatzes für die beiden Extremfälle, nach denen hier gefragt war, auswirkt — dies ist oben mehrfach skizziert worden, und es könnte jetzt nur wiederholt, oder aber in einer viel ausführlicheren Weise dargestellt werden. Dagegen bleibt noch zu fragen, ob Gegenseitigkeit und Solidarität, die zusammen eine Einheit bilden, etwas spezifisch Medizinisches überhaupt an sich haben. Die beiden Worte erinnern mehr an Sozialethik oder Politik im allgemeinen. Ich halte nun diese Alternative — spezifisch ärztlich oder generell sozialethisch — für ein Scheinproblem. Man kann nämlich keinen Menschen und auch den Arzt nicht spalten in eine etwa staatsbürgerliche und eine berufsständische, oder in eine autoritäre und eine dienstpflichtige Hälfte. Man kann auch eine Tat nur in der realen Situation annehmen, in der sie sich befanden, und nur von hier aus ist eine Wahrheitsfindung möglich.

Es ist aber doch nicht überflüssig zu sagen, daß der Beruf des Arztes seine eigene Ironie hat. Helfen? ja; aber heilen? nein. Die Wunde heilt von selbst. Es hat seine Gründe, daß der Arzt bei den meisten der großen Dichter nicht besonders gut wegkommt. Das Heilungsversprechen wäre im Munde des Arztes doch eine Anmaßung, aber es stellt sich ungerufen ein. Es gibt einen Grund gegen Euthanasie und Menschenversuche, der hier noch nicht ausgesprochen wurde: sie helfen gar nicht was sie sollen, denn sie bringen keine Heilung. Ich habe in der Dokumentensammlung, welche der Nürnberger Prozeß vorlegte, bisher kein Experiment am Menschen gefunden, welches unvermeidlich war um Heilung zu bringen und gebracht hat. Die Ausrottung der Geisteskrankheiten durch Sterilisation war wissenschaftlich so schlecht begründet und die biologische Verbesserung der Volksgesundheit durch sie und die Steigerung der Kriegsleistung durch die Euthanasie ist gar nicht erreicht worden, weil sie auf diesem Wege nicht erreichbar war. Die Ironie des Heilversprechens will, daß die medizinischen Fortschritte hinter dem Heilversprechen zurückbleiben, und die gewaltsam versuchten Fortschritte werden dann eben blutige Ironie. Auch die Gegenseitigkeit und Solidarität in der ärztlichen Aktion hat daher ihre Ironie. Der Kranke stirbt, aber der Arzt überlebt. Der Kranke vertraut, aber er bezahlt auch aus seiner Tasche. Der Arzt opfert seine Nachtruhe, aber der Nachtbesuch wird höher bezahlt. Die Gegenseitigkeit ist keine Gleichheit und die Solidarität ist keine freiwillige. Die Diagnose steht wissenschaftlich höher als die Therapie, die Pathologie ist wissenschaftlicher als die Klinik. Diese Ironie seiner Lage muß dem Arzt anraten, auf die Propaganda und das Selbstlob, denen die Politik nicht entraten zu können scheint, zu verzichten und keine öffentliche Figur zu machen. Und das Bewußtsein dieser Ironie

schützt den Arzt auch wirksamer gegen die Übertreibung seines Heilversprechens als das ethische Pathos, es schützt ihn auch gegen den Selbstbetrug und die Überheblichkeit des „hochgesteckten Ziels". Man darf daher sagen, es sei spezifisch unärztlich, sich von hochgesteckten Zielen ehrgeizig hinreißen zu lassen. Es ist sekundär ob der Ehrgeiz von materiellem Gewinn oder von Ruhmstreben oder von Verliebtheit in die Tugend befeuert war. Die Ironie des ärztlichen Berufes würde in jedem Falle machen, daß er nicht nur öffentliche, sondern auch komische Figur wird. Das ist der Grund, warum der Landarzt nicht über oder unter, sondern neben dem Klinikchef steht, warum hier die Dienstgrade der Wehrmacht und die Hierarchie der Beamtenschaft keinen Sinn haben.

Damit kommt noch ein Punkt zur Sprache, der das ärztliche Verhalten im militärischen Verbande, das Problem des Sanitätsoffiziers angeht. Es hängt mit der Frage zusammen, ob sich aus dem Kriegszustande und der Sorge für die Soldaten im Kriege etwa eine Verschiebung des ärztlichen Standpunktes ergäbe. Die damit eröffnete Diskussion berührt hier nur insofern, als der Krieg ein erhöhtes Recht auf Gewaltanwendung, sei es zur Tötung direkt oder indirekt kriegsuntüchtiger Menschen, sei es zu Menschenexperimenten, ergäbe. Der Druck der Not, die Landesverteidigung und das Kriegsziel geben dem Wehrmachtangehörigen, aber auch dem, der ihn in der Heimat mit dem Erforderlichen versieht, nämlich eine Vorzugsstellung. Ich sehe aber keinerlei Möglichkeit, hieraus ein Sonderrecht zu Euthanasie und Menschenversuch im Kriege abzuleiten, solange der Krieg und sein Ziel selbst einen sittlichen Charakter haben. Sobald es sich nämlich um das Opfer des Lebens handelt, entsteht hier die Frage: du oder ich? In dieser Frage, die also nach dem Grundsatze der Gegenseitigkeit und Solidarität zu entscheiden ist, kommt es nicht nur darauf an, ob die zu opfernde Person freiwillig zustimmt, sondern auch ob die andere dieses Opfer anzunehmen bereit ist. Ein redlicher Soldat kann aber nicht den Wunsch haben, daß ein anderer für ihn sein Leben opfere damit er lebe. Geschähe das dann ohne seine Befragung, dann liegt hier eine Bevormundung vor, welche mit dem Wesen der Solidarität unvereinbar ist.

Nun sind aber Kriegführung und Gemeinwesen ohne Disziplin, Befehlsgewalt und Polizei nicht durchführbar. Auch ein öffentliches Gesundheitswesen bedarf dieser Mittel, und in jeder Staatsform ist das so. Allgemeine Wehrpflicht und Arbeitsdienstpflicht würden auch zur Erhaltung des Friedens nötig sein. Der dazu erforderliche Betrag von Bevormundung ist also auch im Gesundheitsdienst und hier unter Mitwirkung von Ärzten nirgends in der Welt vermeidbar. Das bedeutet zugleich, daß es für bestimmte Krankheiten (zum Beispiel Seuchen) und für bestimmte Menschen (kriegs- und arbeitstüchtige) eine bevorzugte Behandlung, für die andern aber eine verminderte ärztliche Behandlung geben wird. Der Fall des Kriegs hätte sogar den Vorteil, daß das Ziel der Therapie (die letzte Bestimmung des Menschen)

nicht so wie oben behauptet wurde, unbekannt bleibt, sondern genau bekannt ist: Rettung des Vaterlandes, Sieg. Dieser Situation entspricht also die Befehlsunterstellung des Sanitätsoffiziers. Dieser ist unausweichlich in der Lage, zwischen zwei Arten von Unrecht wählen zu müssen: zwischen dem gegen Gehorsamspflicht und dem gegen ärztliches Gewissen.

Diese Situation ist nun ausweglos, und sie ist daher die wichtigste und schwerste Frage von allen, die hier überhaupt zu behandeln sind. Es ist die Lage des Esels, der zwischen zwei Heuhaufen verhungert, weil er sich zu keinem von beiden entschließen kann. Man muß aber das Bild dahin ergänzen, daß beide mit dem Gift der Schuld vergiftet sind. Ich sehe ab von der hier nicht gestellten Frage, ob in den zur Anklage gekommenen Fällen einer vorliegt, der überhaupt derartig liegt, daß eine gut begründete Aussicht auf Lebensrettung durch die in den Prozeßakten bekannt gewordenen Experimente und Euthanasien bestand. Deshalb hat meine Antwort auf die gestellten Fragen nur noch den Sinn, in abstrakter Weise die Zulässigkeit eventuell besserer, das heißt aussichtsreicher Experimente und Euthanasien vom ärztlichen Standpunkt aus zu prüfen. Nehmen wir also die Unentrinnbarkeit der Situation an, zwischen zwei Unrechten eines als das geringere wählen zu müssen.

Hier sehe ich überhaupt keinen anderen Weg als den (trotzdem voraussichtlich diese Lage des Menschen, zwischen zwei Arten von Schuld wählen zu müssen, bis ans Ende der Welt dauern wird): in der Richtung des Fortschrittes zu wählen: Was also wäre ein Fortschritt zu nennen? Ein Fortschritt wäre meines Erachtens die Entscheidung für die Gegenseitigkeit und Solidarität und gegen die Bevormundung und Gewalt. Diese Entscheidung ist in den bisherigen Ausführungen bereits getroffen worden und ich wiederhole sie nicht. Daraus geht hervor, daß ich mich gegen die ärztliche Sanktionierung einer durch Befehlsgewalt erzwungenen Ausführung von Euthanasie und Menschenexperimenten auch dann entscheide, wenn sie nicht durch gegenseitige Willensbildung und freiwilliges Opfer erfolgt — auch im Kriege.

Da aber in der wirklichen Welt eine schuldlose Entscheidung nicht möglich ist, vor allem weil es über die Kraft wohl der Überzahl der Menschen geht, sich zu einem freiwilligen Opfertod zu entschließen (der Soldat entschließt sich zu einem freiwilligen Risiko, nur ausnahmsweise zum freiwilligen sicheren Tod), so bleibt es bei der notwendigen Schuld. Und da ferner die Richtung des Fortschritts durch keine zuverlässigen Wegtafeln bezeichnet ist, so erlöst diese Auskunft auch den wählen Müssenden nicht aus seinem Dilemma. Das besagt, daß die Wahl selbst ein Risiko ist, und zwar bis zum Risiko des persönlichen Untergangs. Daraus folgt, daß die Wahl zwischen zwei Schuldarten eine Aufgabe von männlicher Art ist. Unmännlich wäre es, zu behaupten, man habe gar nicht auf diese Art gewählt, sei also unschuldig.

Es könnte hier so aussehen, als ob die Wahl in der Fortschrittsrichtung mehr von einer rationalen Einsicht oder einer Höhe des Bildungsstandes abhängig ist, von Faktoren also, die an sich gar nicht sittlicher Natur wären. Die Einsicht und die Bildung sind aber gleichfalls von sittlicher Art. Indes sollte hier noch ein Prinzip geltend gemacht werden, welches als sittliches für jedermann unverkennbar ist. Es handelt sich ja nicht nur darum, ob ich die eine oder die andere Art von Unrecht begehe, sondern auch ob ich dem andern oder mir Unrecht zufüge, und das heißt, ob der andere oder ich Unrecht leidet. Das läuft dann für mich auf die Frage hinaus, ob es besser sei Unrecht zu tun oder zu leiden. Die Antwort, obwohl sie selbstverständlich scheint, läßt sich von Platon holen (Gorgias und Politeia): besser ist Unrecht leiden als Unrecht tun. Man darf sagen, daß die richterliche Beurteilung einer Tat auch erwägen sollte, wie es damit gestanden hat.

c) Der Sinn des Prozesses

Es mag bezweifelt werden, ob der Sachbegutachter irgendwie mit der Strafbarkeit einer Handlung sich befassen darf. Nur ist die Frage, was eine Handlung überhaupt ist, gar nicht trennbar von deren, wie wir es hier genannt haben, sittlichem Charakter. Das Recht soll Ausdruck derselben Sittlichkeit sein, die dem handelnden Täter einwohnt oder zugemutet wird. Darum muß sich der Gutachter in die Lage des Richters versetzen, um ihn zu beraten. Andererseits kann der Gutachter sich nicht auf Begriffe stützen, die vielleicht für den Richter maßgebend sind, für den Angeklagten aber nicht. Solche Begriffe wären die sogenannten Menschenrechte, der Begriff der Humanität oder der der Freiheit der Person. Ich bin nicht sicher, ob es mir gelungen ist, mit den Forderungen der Gegenseitigkeit und Solidarität eine Sittlichkeit zu umschreiben, die von den „Menschenrechten" der neueren Zeit unabhängig ist; indes ist das Streben nach solcher Unabhängigkeit wirksam gewesen, da nach dem ärztlichen, nicht nach dem rechtsphilosophischen Standpunkt gefragt war.

Ich nehme nun an, daß eine der den Richter beschäftigenden Fragen die ist, ob die Handlungen der Angeklagten sich etwa auch aus einem, wenn auch mißleiteten, ärztlichen Streben verstehen lassen. Das ist meines Erachtens selbstverständlich der Fall. Aber wenn diese Genese so teilweise verständlich ist, so ist sie darum noch nicht zu billigen. Meine Ansicht läuft auf den Entscheid hinaus: weil die angeklagten Taten von einer überlebten Art von Medizin aus geschahen, die in sich selbst keine Hemmung gegen unsittliches Handeln enthält, darum fanden sie auch in dieser Art Medizin keinen Schutz und keine Warnung gegen mögliche unsittliche Handlungen. Man muß es dann dem Richter überlassen, ob dieser Sachverhalt, den ich als Tatbestand ansehen muß, zur Entlastung beitragen kann oder nicht.

Ich kann es aber nicht unterlassen, auf folgende Konsequenz aufmerksam zu machen: Wenn der angegebene Zusammenhang eine Entlastung der Angeklagten ist, dann ist dieser Entscheid eine Belastung der nur naturwissenschaftlich-biologischen Medizin. Dieser Medizin, nicht der Art sie anzuwenden. Wenn der Richter aber die Angeklagten dadurch belastet findet, daß sie dieser Art von Medizin anhingen, dann verurteilt er eo ipso auch diese Medizin als strafbar. Wenn er endlich fände, daß diese Art von Medizin weder als Belastung noch als Entlastung ihrer Taten gelten kann, dann würde er einen Tatbestand ignorieren, der für das Zustandekommen der angeklagten Taten wesentlich ist. Damit würde vielleicht die Qualität der Rechtsfindung verringert werden. Wesentlich aber wäre, daß damit der produktive Wert des Prozesses, die Findung besserer Einsicht für die Zukunft versäumt würde. Es ist also unausweichlich, daß in dem Prozeß ein Urteil über eine bestimmte Art von Medizin, nämlich die nur naturwissenschaftlich-biologische Pathologie mitgefällt wird: ein begünstigendes, ein verwerfendes oder ein die ganze Frage vertagendes also unproduktives.

Denn es kann wirklich kein Zweifel darüber bestehen, daß die moralische Anästhesie gegenüber den Leiden der zu Euthanasie und Experimenten Ausgewählten begünstigt war durch die Denkweise einer Medizin, welche den Menschen betrachtet wie ein chemisches Molekül oder einen Frosch oder ein Versuchskaninchen. Das weiß heute die ganze Welt, und man muß fürchten, daß es auch Mediziner und Pathologen sind, welche durch bestimmte Verhältnisse abgehalten sind, dies einzusehen.

Ich hoffe also, daß der Prozeß dazu beiträgt, diese Einsicht zu verbreiten, und meine Ausführungen haben die Absicht, dazu beizutragen. Die Angeklagten aber, ob verurteilt oder freigesprochen, würden dann ein Werkzeug sein, das diesen menschlichen Fortschritt ermöglicht. Ich bin sogar der Überzeugung, daß sie diesen Beitrag in jedem Falle und schon jetzt geliefert haben, aber der Prozeß hat noch die Wahl ob er diesen Beitrag vergrößert oder verkleinert.

Ich liebe Deinen Zorn. So falsch er ist, so echt
ist er zugleich. Du meinst, daß Du im Rechte seist,
und irrst Dich — und hast Recht. Und dieses Glück heißt Geist.

*

Gottlob, das wär' vorbei! Man stickt in diesem Äther
von Ja und Nein und Auch. Wir wollen nun konkreter
vom Geiste und vom Glück — o Glück! — zusammen reden.
Geist ist konkret. „Konkret" heißt: Geist! Das will nicht Jedem
so ohne weitres ein, am wenigsten den Blinden.
Sie finden Geist im Stoff. Das Weitre wird sich finden.
Ist es Dir nie passiert — wo, wann und wie auch immer:
sei's tags im Luxembourg, sei's nachts in Deinem Zimmer,
daß plötzlich ohne Grund ein nichtiges Irgendwas,
ein Ding noch so gering: ein Scherben Glas, ein Gras,
ein schräger Sonnenstrahl, ein Schatten an der Wand
an Herzens Herz Dir griff, und standest wie entbrannt,
und wußtest wie noch nie (und wußtest es auch nicht):
„Ich b i n ! Und in der W e l t ! Und war ich jemals n i c h t ?
Halt ein, geliebte Zeit! JETZT sei die Ewigkeit!
und Überall sei HIER! o Überglück! o Leid! —
O Leid: das Gras ist Gras, die Scherbe Scherbe, und
der Schatte nur noch schwarz, die Mauer ohne Mund.
Siehst Du, in dieser Qual: zu sein und nicht zu sein,
(lies Hamlet, Fortinbras!) trankst Du vom dunklen Wein
und aßt vom bittern Brot, und ist kein süßers nicht
als dieses, das der Geist für seine Kinder bricht — —
Mein Kind, hier halt ich ein. Ich habe nichts gesagt.
Ich weiß es. Sei nicht bös, daß Du umsonst gefragt.
Ein Stückchen Glas, ein Gras, ein Schatten an der Wand:
drei Weiser-weiser, ach, als ich — ins Wunderland,
wo eben das geschieht, was kein Verstand erreicht;
was nur die Liebe weiß: wo Glück und Leid sich gleicht.

JÜRGEN VON KEMPSKI

DEUTSCHLAND ALS VÖLKERRECHTSPROBLEM

In Moskau konferierten die Außenminister der vier großen Siegermächte darüber, wie sich in Zukunft die Rechtslage Deutschlands gestalten soll. Langsam beginnen sich Formen abzuzeichnen, die das Verhältnis Deutschlands nach außen und die das Staatsleben der Deutschen im Innern annehmen kann. Noch aber ist alles Möglichkeit, noch ist sehr wenig, von dem man sagen kann: so wird es sein.

In dieser Situation liegt die Frage nahe: Wo stehen wir jetzt, wie läßt sich die Situation, in der sich Deutschland heute befindet, juristisch beschreiben, staatsrechtlich wie völkerrechtlich?

Die Antwort auf diese Frage ist schwer. Die Antworten, die bisher gegeben worden sind, sind unbefriedigend. Deutschland befindet sich in einem Provisorium. In seiner alten Form und Unform scheint es untergegangen, seine neue ist noch nicht gefunden, soviel ist deutlich. Sein gegenwärtiger Zustand ist durch die Tatsache der Besetzung gegeben. Das erscheint klar, aber schon oberflächliches Nachdenken zeigt, daß sein Status juristisch alles andere als eindeutig ist. Bereits die Frage, ob es überhaupt noch als Völkerrechtssubjekt existiert, ist strittig: ist es als Staat untergegangen oder nicht? Die einen sagen ja, die andern nein. Gründe haben beide für sich, eine Entscheidung zwischen ihnen erscheint dem, der unvoreingenommen die Tatsachen betrachtet, kaum eindeutig möglich.

Dennoch ist die Erwägung des Für und Wider nicht müßig. Es dient der Klärung dessen, was man will, und das ist Rechtfertigung genug.

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Am 8. Mai 1945 vollzog das Oberkommando der Wehrmacht den Akt, der seit Casablanca als Kriegsziel der Alliierten feststand: die bedingungslose Kapitulation. Keitel, Friedeburg und Stumpf erklärten und unterschrieben: „Wir Endesunterzeichneten, die wir im Namen des deutschen Oberkommandos handeln, erklären die bedingungslose Kapitulation aller unserer Streitkräfte zu Lande, zu Wasser und in der Luft sowie aller übrigen Streitkräfte, die zur Zeit unter deutschen Befehl stehen, vor dem Oberkommando der Roten Armee und gleichzeitig vor dem Oberkommando der Alliierten Expeditionsstreitkräfte."

Zu diesem Zeitpunkt gab es keine völkerrechtlich anerkannte deutsche Regierung mehr. Was sich unter Führung des Großadmirals Dönitz so nannte, entbehrte der Legalität im staatsrechtlichen Sinne wie der Anerkennung im völkerrechtlichen. Sie hat auch nicht mehr die Staatsgewalt in Deutschland ausgeübt. Als sie ihr angemaßtes „Amt" antrat, war

bereits der größte Teil Deutschlands von den alliierten Truppen besetzt, der Rest, in Stücken voneinander getrennt, in Auflösung begriffen. Die „Deklaration in Anbetracht der Niederlage Deutschlands" vom 5. Juni 1945 beschreibt den Zustand zutreffend: „Es gibt in Deutschland keine zentrale Regierung oder Behörde, die fähig wäre, die Verantwortung für die Aufrechterhaltung der Ordnung, für die Verwaltung des Landes und für die Ausführung der Forderungen der siegreichen Mächte zu übernehmen."

Daraus ziehen nun die Alliierten die Konsequenz, indem sie deklarieren: „Die Regierungen des Vereinigten Königreichs, der Vereinigten Staaten von Amerika, der Union der Sozialistischen Sowjetrepubliken und die Provisorische Regierung Frankreichs übernehmen hiermit die höchste Autorität hinsichtlich Deutschlands, einschließlich aller Machtvollkommenheiten, die die deutsche Regierung, dem Oberkommando der Wehrmacht und allen staatlichen, städtischen oder örtlichen Regierungen oder Behörden zustehen. Die Übernahme zu den vorstehend genannten Zwecken der besagten Autorität und Machtvollkommenheiten bewirkt nicht die Annektierung Deutschlands."

Die Zwecke, auf die hingewiesen wird, sind: „unbeschadet späterer Beschlüsse, die hinsichtlich Deutschlands getroffen werden mögen, Vorkehrungen für die Einstellung weiterer Feindseligkeiten seitens der deutschen Streitkräfte, für die Aufrechterhaltung der Ordnung in Deutschland und für die Verwaltung des Landes zu treffen und die sofortigen Forderungen zu verkünden, denen Deutschland nachzukommen verpflichtet ist."

Von den späteren Beschlüssen erwähnen wir hier nur den, in unserem Zusammenhang entscheidenden, der im Potsdamer Abkommen vom 2. August 1945 niedergelegt ist: „Es müssen Vorbereitungen getroffen werden für die endgültige Umgestaltung des politischen Lebens Deutschlands auf demokratischer Grundlage und die eventuelle friedliche Mitarbeit Deutschlands im internationalen Leben." (III. A. 3. IV.)

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Nach völkerrechtlicher Lehre geht ein Staat nur durch „Subjugation" unter. Diese überträgt die Souveränität. Die occupatio bellica hat als solche nicht den Untergang eines Staates im völkerrechtlichen Sinne zur Folge, sie ist ein reiner Machtakt, der die rechtliche Substanz des okkupierten Staates nicht berührt. Die occupatio bellica ist durch die Haager Landkriegsordnung geregelt. Artikel 43 derselben macht dem Okkupanten die „Beobachtung der Landesgesetze" zur Pflicht, „soweit kein zwingendes Hindernis entgegensteht". Nach Beendigung der Okkupation leben die früheren Gesetze eo ipso wieder auf.

Bedauerlich oder nicht: daß die Rechtslage Deutschlands nicht zureichend durch den Begriff der occupatio bellica erfaßt werden kann, unterliegt keinem Zweifel. Von einem Wiederaufleben der früheren Gesetze nach Beendigung der Besatzung kann keine Rede sein: denn es ist die erklärte Absicht der Alliierten, das politische Leben Deutschlands *endgültig* umzugestalten. Wer also das Rechtsverhältnis zwischen Deutschland und den Alliierten als hinreichend durch den Begriff der occupatio bellica erfaßt behaupten wollte, käme zu der absurden Folgerung, daß die Alliierten fortgesetzt den Artikel 43 der Haager Landkriegsordnung verletzen würden. Es hilft nichts, wenn man versichert, daß sich politische Intervention und Okkupation überschneiden: Artikel 43 schlösse eben eine derartige Intervention aus. Da die Vertreter dieser Auffassung jene Konsequenz natürlich nicht ziehen können, glauben sie sich folgendermaßen zu behelfen: „Endgültige Maßnahmen jedoch, die im Gegensatz zu Artikel 43 über militärische Notwendigkeiten hinaus unmittelbar in das Verfassungsrecht eingreifen, werden sich nach den allgemein anerkannten Grundsätzen des Völkerrechts nicht aus der „bloßen Tatsache" der Okkupation, sondern allein aus der beim Volke ruhenden Staatsgewalt des okkupierten Staates herleiten lassen. Diese Okkupation läßt, wie total sie sein mag und wie lange sie dauern soll, Deutschland als Staat ebensowenig zugrunde gehen wie andere europäische Staaten durch jahrelange vollständige Besetzung in den napoleonischen Kriegen oder in den beiden Weltkriegen zugrunde gegangen sind, da nach dem völkerrechtlichen Sprichwort „Der Staat stirbt nicht" Deutschland lebt, weil das deutsche Volk lebt, um die Worte des Ministerpräsidenten von Württemberg-Baden, Reinhold Maier, zu wiederholen.

So der hessische Justizminister Zinn in der „Süddeutschen Juristenzeitung" (1947, Heft 1). Nichtsdestoweniger ist diese Auffassung juristisch irrig. Daß die Staatsgewalt beim deutschen Volk ruhe, steht zwar in der Weimarer Verfassung; diese ist jedoch nach wohl einhelliger Ansicht untergegangen. Positiv-rechtlich läßt sich daher diese Ansicht nicht begründen. Aber rebus sic stantibus ist der ganze Gedankengang Zinns juristisch nicht vollziehbar. Daß jemand die Staatsgewalt innehat, bedeutet, daß er bestimmte Kompetenzen hat. Wer diese Kompetenzen hat, ergibt sich aus dem angeführten Wortlaut der Deklaration vom 5. Juni 1945: es sind die vier alliierten Regierungen. Diese haben, um es zu wiederholen, „die höchste Autorität hinsichtlich Deutschlands, einschließlich aller Machtvollkommenheiten, die der deutschen Regierung, dem Oberkommando der Wehrmacht und allen staatlichen, städtischen oder örtlichen Regierungen oder Behörden zustehen", übernommen. Das heißt: sie haben alle Kompetenzen der legislativen, exekutiven und richterlichen Gewalt in Deutschland übernommen. Es ist keine Kompetenz übrigge-

blieben, die dem deutschen Volk noch zukäme; denn muß auch noch daran erinnert werden, daß dem deutschen Volk bereits alle diese Kompetenzen von seinem „Führer" abgenommen worden waren? Wenn je ein Herrscher mit Recht sagen konnte: „l'état c'est moi", so war es der „Führer", dem Deutschland zwölf Jahre folgte. Man wundere sich also nicht, wenn der Untergang des „Führers" der Untergang der deutschen Staaten war und sein mußte.

Doch selbst einmal zugegeben, beim deutschen Volke ruhe noch die „Staatsgewalt" — also im Sinne der Lehre von der Volkssouveränität —: wie äußert sie sich? Gewiß, eine Reihe von Kompetenzen haben die Alliierten nun zwar nicht dem deutschen Volke, sondern den neugeschaffenen Ländern und ihren Organen zurückgegeben: aber das betrifft eben nicht Deutschland als Ganzes und ist in jeder Zone in verschiedenem Maße erfolgt. In bezug auf Deutschland als Ganzes äußert sich die angeblich beim deutschen Volke ruhende Staatsgewalt ausschließlich durch den Kontrollrat. Dieser aber ist nun mitnichten ein Organ des deutschen Volkes, sondern ein Organ der vier alliierten Regierungen. Konsequent verfolgt, besagt also die Zinnsche Argumentation, daß dem deutschen Volk eine Kompetenz zukommt, die alliierten Regierungen zu ermächtigen, gewisse Gesetze in seinem Namen zu erlassen. Die Widersinnigkeit dieser Konstruktion liegt auf der Hand.

Warum aber diese Verrenkungen? Man würde Zinn nicht gerecht, wenn man seinen Gedankengang lediglich als Zweckkonstruktion ansieht, errichtet, um die Weiterexistenz des deutschen Staates zu sichern. Es liegt ein wirkliches juristisches Problem vor. Er formuliert es so:

„Über Begriff und Wirkung einer occupation bellica ist sich die internationale Rechtslehre aller Völker heute einig. Die Okkupation ist ‚un pur fait', ist ‚simplement un état de fait' (Fauchille); ‚sie ne transfère aucun droit de souveraineté à l'occupant, mais seulement l'exercice de quelques uns des droits de la souveraineté' (Jacomet), weil einzig die ‚subjugation', die Einverleibung, die Unterdrückung durch Annexion die Substanz der Souveränität überträgt (Oppenheim), die Besatzungsmächte aber eine Annexion ausdrücklich abgelehnt haben und es in der Proklamation Nr. 1 heißt: ‚We come as conquerors, but not as oppressors'."

Nun reicht es völlig hin, als „conqueror" zu kommen, wenn man ein Gebiet annektiert, man braucht sich nicht in der Rolle eines „oppressors" (like Hitler) zu gefallen. Und man kann als „oppressor" kommen, ohne schon das Gebiet zu annektieren, das hat schließlich selbst Hitler nicht überall getan. Der angezogene Satz beweist also nicht das, was er beweisen soll. Aber der zentrale Irrtum liegt in der Interpretation von „subjugation" als Annexion. Zwar ist die Annexion die häufigste Form

der „subjugation" und daher auch in wechselseitigem Gebrauch bei Völkerrechtlern verständlich, aber sie ist der weitere Begriff. Jede Annexion ist zwar eine „subjugation", aber eine „subjugation" braucht noch nicht eine Annexion zu sein. „Subjugation" bedeutet zunächst „to bring into subjection", also „Unterwerfung" und noch nicht „Einverleibung", „Annexion".

Die ausdrückliche Erklärung der Deklaration vom 5. Juni 1945, daß die Übernahme der Autorität und Machtvollkommenheit keine Annexion bedeute, sollte zu denken geben. Man wird den Text kaum vergewaltigen, wenn man annimmt, daß dieser Zusatz nicht der Beruhigung der Gefühle des deutschen Volkes zuliebe eingefügt ist, sondern um einen naheliegenden Rechtsirrtum auszuschließen. Da die Völkerrechtslehre bisher nicht säuberlich zwischen Subjugation und Annexion schied — weil der Fall bisher praktisch keine Rolle spielte — deshalb war diese einschränkende Erklärung durchaus angebracht. Es läßt sich aber eben deshalb nicht der Schluß daraus ziehen, den Zinn sieht. Dieser Schluß wird auch durch den sehr genau formulierten Text der Deklaration ausgeschlossen: es ist mit aller Klarheit gesagt, was übernommen wird: es ist nichts anderes als die Staatsgewalt.

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Wir haben hier, wie gar nicht so selten im Völkerrecht, den Fall, daß durch die Ereignisse eine völkerrechtliche Rechtsfigur aktuell wird, die bisher mehr oder weniger unbeachtet geblieben ist und daher das Maß an juristischer Durchdringung vermissen läßt, das wir an anderen Rechtsfiguren kennen und oft bewundern. So stellen sich dem Völkerrecht immer neue Aufgaben und es erscheint uns besser, uns diesen zu unterziehen, als um jeden Preis Tatbestände unter Begriffe zu pressen, die vorn und hinten nicht auf sie passen.

Annexion, so sagten wir, ist immer auch Subjugation, aber die Umkehrung gilt nicht. Die Annexion bezieht sich in erster Linie auf das Staatsgebiet, und wenn sie nur einen Teil des Staatsgebietes betrifft, so kann sie sogar das Staatsvolk von der Annexion ausschließen. Man unterscheidet herkömmlicherweise drei Momente an einem Staat: Staatsgebiet, Staatsvolk und Staatsgewalt. Jedes dieser drei Momente kann sich ein anderer Staat bemächtigen. Kommt einer von ihnen in Fortfall, so geht der Staat unter. Diese Folgerung ist unvermeidlich, wenn man mit der herrschenden Lehre alle drei Momente als für einen Staat konstitutiv betrachtet. Es empfiehlt sich, den Term „Subjugation" für den Fall der Übernahme der Staatsgewalt durch einen Dritten zu reservieren, während man die Einverleibung des Staatsgebietes als Annexion bezeichnen und unter diesem Begriff auch verstehen mag, daß das Staatsvolk inkorporiert wird, wenn nicht ausdrücklich anderes bestimmt ist.

Die juristische Kennzeichnung einer Rechtslage interessiert wegen der Rechtsfolgen, die sich aus ihr ergeben. Um diese genau erfassen zu können, ist zunächst zu fragen, ob und in welchen Grenzen die Subjugation sich mit den Prinzipien des gegenwärtigen Völkerrechts verträgt. Es ist evident, daß sich die Subjugation als Dauerzustand nicht verteidigen läßt. Sie ist rechtlich nur als Übergangserscheinung möglich. Durch Annexion kann ein Staat einem anderen Staate inkorporiert werden. Er ist dann als Völkerrechtssubjekt verschwunden, es sei denn, daß das übernommene Staatsvolk als Minderheit als Völkerrechtssubjekt anerkannt wird. Auf jeden Fall aber ist das Verhältnis der Annektierten zu ihrem neuen Staat eine Frage des innerstaatlichen Rechtes; wenn nicht ausdrücklich anders bestimmt, erwerben die Annektierten automatisch die Staatsangehörigkeit des annektierenden Staates. Aber auch hier gelten gewisse Prinzipien naturrechtlicher Art, die die Gleichberechtigung aller Staatsbürger in einer modernen Demokratie fordern, und das Problem der Minderheiten ist ja nicht so sehr das ihrer formalen Gleichberechtigung als das Recht auf ihr kulturelles Eigenleben, insbesondere auf eigene Schulen, auf religiöse Verkündigung in ihrer Muttersprache und dergleichen. An der Staatsgewalt pflegen ja auch sie gleichberechtigt wie alle anderen zu partizipieren. Gerade das fällt bei der vollkommenen Subjugation weg, aber es ist nur gerecht, zu sagen, daß den der Subjugation Unterworfenen das Recht auf Selbstregierung nicht auf die Dauer entzogen werden darf.

Man wird daher sagen müssen, daß es der Zweck einer Subjugation ist, die Eigenstaatlichkeit wieder herzustellen, also einen neuen Staat als Völkerrechtssubjekt aufzubauen. Da für diesen die Anerkennung durch die anderen Staaten Voraussetzung seiner Völkerrechtssubjektivität ist, so muß er gewisse Bedingungen erfüllen und zumal die, seinen völkerrechtlichen Pflichten nachzukommen. Es gibt Kriterien, auf Grund derer sich die Fähigkeit eines Staates, Völkerrechtssubjekt zu sein, beurteilen läßt.

Die Rechtsfolgen einer Subjugation bemessen sich zunächst nach den Bedingungen, unter denen die Staatsgewalt übernommen wurde. Hinsichtlich Deutschlands sind sie also durch die Deklaration vom 5. Juni 1945, das Potsdamer Abkommen vom 2. August 1945 und die verschiedenen Konferenzen der Außenminister gegeben. Man kann auch an das Mandatsrecht des Völkerbundes erinnern — auch dort spielte in der juristischen Diskussion der Umstand der Nichtannexion eine bedeutende Rolle: es fehlte der präzisierte Begriff der Subjugation in dem hier entwickelten Sinne, mit dem sich der rechtliche Tatbestand wohl hätte adäquat erfassen lassen. Das gilt vor allem für die B.- und C.-Mandate, wobei hier freilich die Verhältnisse so sind, daß an eine Entwicklung zu Staaten, die unter den modernen Verhältnissen lebensfähig sind, auf

lange Zeit hinaus nicht gedacht werden kann. Aber auch hier haben wir den Vorgang, daß die Staatsgewalt, die bisher von Deutschland ausgeübt worden war, übernommen wurde, während keine Annexion erfolgte und sogar Art. 22 Abs. 1 der VBS dem begegnen sollte. Man könnte ferner an den Fall Neufundlands denken, das 1933 zeitweilig sein Parlament verlor und von einem britischen Gouverneur regiert wurde: auch hier eine Übernahme der Staatsgewalt ohne Annexion, falls man den Dominien, was strittig ist, die völkerrechtliche Eigenständigkeit auch in bezug auf ihr Staatsgebiet zugibt.

Lassen sich also durchaus in gewisser Hinsicht analoge Fälle aus der Staatspraxis anführen, so wird man doch keine allzu weittragenden Schlüsse daraus ziehen können. Hier wie so oft ist das Völkerrecht von den durch Kodifikationen und Dogmatik ausgebildeten Begriffspalazzi anderer Rechtsmaterien weit entfernt, und weniger als andere Gebiete des Lebens läßt sich die Staatenpraxis durch starre Rechtsbegriffe einengen, wenn sie nicht in Verträgen sich verfestigt hat. Dennoch ist es wichtig, einen Rechtsbegriff herauszuarbeiten, der geeignet ist, einen politischen Vorgang — und zumal einen von der Tragweite des deutschen Zusammenbruchs — zu erfassen. Es handelt sich um die Entscheidung der Frage, ob der politische Vorgang rechtlich möglich ist oder nicht. So lange man das, was in Deutschland vor sich geht, als occupatio bellica hinreichend gekennzeichnet findet, ist die Antwort ganz eindeutig verneinend. Aber dieser Begriff ist unangemessen. Die Subjugation in dem gekennzeichneten Sinne ist völkerrechtlich legitim: es ist ein dogmatisches Vorurteil zu meinen, der Sieger habe nach der bedingungslosen Kapitulation eines Staates nur die Wahl zwischen Annexion und occupatio bellica. Es steht theoretisch nichts im Wege, daß die Siegermächte sich nur der Staatsgewalt des besiegten Staates bemächtigen. Daraus erwachsen ihnen Rechte und Pflichten. Die Rechte sind durch die Innehabung der Staatsgewalt gegeben, die Pflichten erwachsen daraus, daß die Subjugation nur durch den Zweck, das unterworfene Volk wieder instandzusetzen, in die Völkerrechtsgemeinschaft zurückzukehren und seinen Staat neu aufzubauen, gerechtfertigt ist. Hier findet sinngemäß der Rechtsgedanke, der in Artikel 22 der VBS ausgedrückt ist, Anwendung, ein Gedanke, der dort als „une mission sacrée de civilisation" bezeichnet ist.

Die rechtliche Kennzeichnung der deutschen Lage als Subjugation schließt auch keineswegs die Anwendbarkeit der Bestimmungen der Haager Landkriegsordnung bzw. der Genfer Konvention von 1929 aus, die sinngemäß angewandt werden können. Die Beschränkung unserer Handlungsfreiheit macht denen, die sie beschränken, die dadurch für die materielle Existenz des deutschen Volkes notwendig werdende Fürsorge

zur Pflicht, ebenso wie in bezug auf die Kriegsgefangenen die entsprechenden Rechtssätze nach wie vor ihre Geltung haben. Aber die Subjugation erlaubt — im Gegensatz zur occupatio bellica — die Eingriffe der Besatzungsmächte in die innerdeutsche Gesetzgebung, die die Herbeiführung demokratischer Formen des öffentlichen Lebens in Deutschland zum Ziele haben.

Es kommt nicht auf das Wort „Subjugation" an, man mag ein anderes wählen. Es kommt aber darauf an, sich klarzumachen, daß es sich in dem Verhältnis des deutschen Volkes zu den Besatzungsmächten um eine eigentümliche völkerrechtliche Figur handelt, die mit den herkömmlichen Begriffen nicht genau bezeichnet ist. „Entstehung und Untergang des Staates sind grundsätzlich vom Völkerrecht nicht geregelt, sondern regeln ihrerseits das Völkerrecht." Dieser Satz Hermann Hellers findet auch hier seine Bestätigung.

Aber ist der deutsche Staat untergegangen? Ich möchte meinen, daß die Entscheidung darüber praktisch nicht so wichtig ist, wie man gemeinhin annimmt, denn das Maß, in dem die Alliierten die künftige staatliche Form Deutschlands bestimmen werden, setzen diese selber fest. An sich ist schwer einzusehen, daß der 8. Mai 1945 nicht das Ende einer debellatio gewesen sein sollte: wie soll eine solche aussehen, wenn nicht so. Gibt man die Subjugation als die auf den deutschen Fall zutreffende Rechtsfigur zu, so geht ein neuer deutscher Staat aus der Besetzungszeit hervor. Daß das nach einer occupatio bellica, die immerhin irgendwann eine occupatio pacifica werden mag, nicht der Fall ist, das ist es ja gerade, was die einen die These vom Untergang des deutschen Staates verfechten läßt und die anderen, die diesen Untergang nicht zugeben wollen, zu der merkwürdigen Konstruktion der beim deutschen Volk ruhenden und die Alliierten in mysteriöser Weise ermächtigenden Staatsgewalt führt.

Für die Annahme des Unterganges des deutschen Staates scheinen mir vor allem folgende drei Umstände zu sprechen: Die Übernahme der gesamten Staatsgewalt durch die Besatzungsmacht, der nun seit der Kapitulation andauernde Mangel auch nur eines einzigen deutschen Organes, das für alle vier Zonen zuständig ist, und schließlich der Umstand, daß die zukünftige staatliche Organisation Deutschlands noch vollkommen offen ist.

Was den ersten Umstand, die Übernahme der Staatsgewalt durch fremde Regierungen anlangt, so ist es schwer, diese Tatsache mit der Annahme der Fortexistenz eines deutschen Staates wie überhaupt mit der Existenz eines solchen im gegenwärtigen Zeitpunkt zu vereinbaren. Sind Staatsgewalt, Staatsgebiet und Staatsvolk die konstitutiven Mo-

mente eines Staates, dann bedeutet, wie gesagt, der Fortfall eines dieser Momente eben dessen Untergang. Es heißt schließlich in Fiktionen flüchten, wenn man eine faktisch einfach nicht vorhandene Staatsgewalt als irgendwie juristisch vorhanden annimmt. Nun gäbe es immerhin einen Ausweg aus diesem Dilemma, wenn man unterstellt, daß nach dem erklärten Willen der Besatzungsmächte wenigstens die Wirtschaftseinheit Deutschlands gewahrt oder besser wiederhergestellt werden soll und daß hierfür deutsche Organe gebildet werden sollen. Dann könnte man ihr bisheriges Nichtvorhandensein technischen und politischen Schwierigkeiten zugute schreiben und sie als der Intention nach als vorhanden annehmen. Aber, und das führt nun schon auf den dritten Umstand, diese Einheit präjudiziert nichts über die künftige rechtliche Organisation Deutschlands, und da reichen die Pläne vom Einheitsstaat bis zum Staatenbund. Daß aber der Plan, Deutschland als Staatenbund zu organisieren, ernsthaft zur Debatte steht, spricht offenbar gegen die Auffassung, Deutschland sei als „Staat" noch vorhanden. Denn ein Staatenbund ist eine völkerrechtliche Verbindung zwischen Staaten, und schließt man die inzwischen gebildeten Länder zu einem solchen zusammen, dann ist der deutsche Staat zerfallen und untergegangen. Ein Staatenbund setzt offenbar nicht einen Staat, sei er nun Einheitsstaat oder Bundesstaat gewesen, als völkerrechtlich identisches Subjekt fort. Werden die Länder irgendwann zu einem solchen zusammengeschlossen, dann ist das doch offenbar ein Integrationsprozeß, an unserem gegenwärtigen Zustand gemessen, während die Verfechter der Annahme, der deutsche Staat existiere trotz allem fort, ihn für einen Desintegrationsprozeß erklären müßten.

Die Argumente, die bisher für die Annahme der Fortexistenz unseres Staates vorgebracht worden sind, vermögen kaum zu überzeugen. Die Länder haben ein finanzielles Interesse daran, das Defizit ihrer Haushaltspläne auf einen fiktiven Reichshaushalt zu übertragen. Daß ein Finanzausgleich erfolgen muß, ist nicht bestritten und diese Frage ist unabhängig von der, ob Deutschland als Bundesstaat oder Staatenbund organisiert werden wird. Wenn Hamburg seine Senatoren auf die Treue zum „Deutschen Reich" vereidigt hat, so hat beispielsweise Bayern das Entsprechende nicht getan. Wenn es eine deutsche Staatsangehörigkeit noch gibt und diese auch noch erworben werden kann, so ließe sich das schließlich auch juristisch anders konstruieren als auf der Voraussetzung der Fortexistenz des deutschen Staates: zumal unter der Voraussetzung unseres Begriffes der Subjugation, der die Einheit des Staatsvolkes (wie auch des Staatsgebietes — doch muß in bezug auf dieses die Einteilung in Zonen und die Neuschaffung der Länder beachtet werden) nicht antastet. All diese Argumente sind nicht zwingend.

Ernster ist der Umstand zu nehmen, daß nach einer Erklärung des ersten Sekretärs des Königs von Großbritannien vom 2. April 1946 sich Seine Majestät noch als im Kriegszustand mit Deutschland befindlich betrachtet. Wenn Rudolf Laun („Die Zeit" vom 13. März 1947) daraus die Fortexistenz des Reiches folgert, weil sonst England mit seinem eigenen Herrschaftsgebiet im Kriege läge, so setzt er eben die Alternative: Annexion oder occupatio bellica voraus, die, wie wir gesehen haben, eine unvollständige Disjunktion ist; denn es ist eine dritte Möglichkeit in Gestalt der Subjugation gegeben und diese läßt die Möglichkeit der Fortexistenz des Kriegszustandes in bezug auf das Staatsvolk und die Auffassung des Staatsgebietes als feindliches Ausland offenbar zu, zumal die angelsächsische Völkerrechtslehre den Krieg auch rechtlich als ein Verhältnis nicht nur zwischen Staaten, sondern zwischen Völkern mit den bekannten Rechtsfolgen auffaßt.

Schließlich verdient noch das Urteil des Obergerichts des Kantons Zürich vom 1. Dezember 1946 Erwähnung, nach dem das deutsche Reich als Völkerrechtssubjekt fortexistiere und folglich das Haager Zivilprozeßabkommen von 1905 zwischen der Schweiz und dem Deutschen Reich noch in Kraft sei. Nun ist das Zürcher Obergericht kein internationaler Gerichtshof, der die Frage völkerrechtlich verbindlich entscheiden könnte, und die Frage liegt nahe, wie er wohl entschieden hätte, wenn die Schweiz ein politisches Interesse daran hätte, durch jenen Vertrag nicht mehr gebunden zu sein. Auch daß der Vatikan das Reichskonkordat von 1933 bisher als Rechtsgrundlage seines Verhältnisses zu Deutschland weiterhin ansieht, hat ja seinen Grund nicht zuletzt darin, daß es ihn günstig stellt, und seine „Geltung" heute läßt sich, wie Erler („Süddeutsche Juristenzeitung" 1946, Heft 8/9) gezeigt hat, auch anders begründen. Spanien wieder scheint die Forderungen, die das Reich auf Grund der Unterstützung Francos an es hat, für erloschen zu halten.

Es liegt nahe, an den Begriff des Kondominats zu denken, wenn man das Verhältnis zwischen Deutschland und den Besatzungsmächten zusammenfassend charakterisieren will. Kelsen hat denn auch diesen Begriff herangezogen und Laun und Zinn haben ihm widersprochen. Die Analogien, die Kelsen beibringt, sind in der Tat nicht glücklich. Er verweist auf das Kondominat Österreichs und Preußens über Schleswig-Holstein von 1864—1866 und das Kondominat Österreichs und Ungarns über Bosnien 1909—1919. Nun lag im ersten Fall, wie Laun mit Recht betont, eine Abtretung von seiten Dänemarks an die beiden anderen Mächte vor, im zweiten Fall eine Annexion. In jedem Fall aber — und das trifft auch auf die anderen von Kelsen genannten Fälle zu: Neue Hebriden (Kondominat Englands und Frankreichs seit 1914), Sudan (Kondominat Englands und Ägyptens seit 1898) — handelt es sich um

gemeinsames Staatsgebiet, und das ist, wie wir gesehen haben, genau das, was inbezug auf Deutschland *nicht* vorliegt. Es scheint mir daher richtiger zu sein, im Falle Deutschlands von einem *Koimperium auf Grund einer Subjugation* zu sprechen. Diese völkerrechtliche Definition unseres rechtlichen Zustandes schließt — unter Beachtung der Willenserklärungen der Besatzungsmächte, denen sie nicht begrifflich widerstreitet — diejenigen Rechtsfolgen ein, die eine realistische Betrachtung unserer politischen Lage auf Schritt und Tritt bestätigt findet und auf deren Ableitung es Kelsen offenbar ankommt.

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Laun hat seinen Artikel überschrieben: Hat Deutschland Rechte? Mir scheint, man sollte lieber fragen: Hat das deutsche Volk Rechte? Und nach Konstituierung der Länder kann selbstverständlich gefragt werden, welche Rechte gegenüber den Besatzungsmächten diese haben. Laun nennt als die Rechte, die Deutschland zugesprochen werden könnten, folgende: Berufung auf gewisse Menschenrechte; den Grundsatz, daß niemand Richter in eigener Sache sein könne; und schließlich den Anspruch jedes Rechtssubjekts auf rechtliches Gehör.

Daß auch dem Besiegten gewisse Menschenrechte zustehen, ist heute allgemein anerkannt und unabhängig von der Existenz eines deutschen Staates. Der Grundsatz, daß niemand Richter in eigener Sache sein könne, besteht zwar zu Recht, doch fragt sich, was als „eigene Sache" anzusprechen ist. In bezug auf Maßnahmen einer untergeordneten Stelle kann zweifellos von einer übergeordneten Stelle auf Klage der Betroffenen hin entschieden werden. Es käme also auf Maßnahmen der Militärregierungen in den Zonen an und gegen diese gibt es allerdings kein justizförmiges Verfahren. Aber ein solches ist ja für zahlreiche Anordnungen der Regierungen im gewöhnlichen Staatsleben auch nicht gegeben, und es ist nicht recht einzusehen, was dieser Grundsatz uns gegenwärtig viel hilft. Denn — und damit kommen wir zum dritten Punkt — ein Petitionsrecht steht, zumal über die inzwischen eingesetzten deutschen Organe wie Länderregierungen, Landtage, Zonenbeirat usw., den Deutschen zweifellos zu. Allerdings besteht keine Möglichkeit, sich direkt an den Kontrollrat zu wenden, solange zentrale Regierungsstellen fehlen. In diesem Punkte allerdings macht sich der Untergang des deutschen Staates empfindlich bemerkbar.

Freilich scheint Laun der Auffassung zu sein, daß aus der Weiterexistenz des „Reiches" ein Anspruch auf eine zentrale Vertretung folgt, und daß wir deshalb Grund haben, an dieser Fiktion festzuhalten. Aber ein Rechtsanspruch in dieser Richtung steht uns auch zur Seite, wenn wir

die den Tatsachen adäquatere Auffassung vertreten, das „Reich" sei untergegangen. Er erwächst uns nämlich daraus, daß die Subjugation zweckbedingt ist und ihr Zweck eben in der Neuerrichtung einer deutschen Eigenstaatlichkeit besteht. Man mag darüber streiten, welcher Anspruch „stärker" wäre: es ist ein Streit um des Kaisers Bart, weil die Erfüllung dieses Anspruchs Sache der großen Politik ist, deren Objekt wir nun einmal sind.

Wir werden zu dieser Erfüllung am besten beitragen, wenn wir im Innern uns bemühen, feste Fundamente für das neue deutsche Staatsgebäude zu schaffen. Dazu kann die Erkenntnis des Unterganges des alten Staates nur nützlich sein. Mir scheint, daß gewisse sensationelle Fehlurteile deutscher Gerichte nicht möglich gewesen wären, wenn die Richter sich die Rechtstatsache, daß der deutsche Staat nicht mehr existiert, vor Augen geführt hätten. Wir stehen der Frage, was von der Erbschaft des alten Staates übernommen werden soll und was nicht, freier gegenüber, wenn wir sie als eine Frage der Staatensukzession auffassen. Der fiktive Reichshaushalt, auf dem die Länder ihr Defizit eintragen, wird schließlich auch nicht realer, wenn wir die Existenz eines deutschen Staates fingieren. Für das, was technisch notwendig und wünschenswert ist, lassen sich schließlich immer Formen finden.

Schließlich wollen wir den alten Staat, der uns wahrhaftig den Abschied von ihm leicht genug gemacht haben sollte, nicht überschätzen: er hat das biblische Alter von nicht ganz 75 Jahren erreicht. Aber das deutsche Volk ist ein altes Volk. Es ist ein Volk, das immer wieder einmal in seiner Geschichte vor dem Zusammenbruch seiner Staatlichkeit gestanden hat und genötigt war, diese neu zu formen. Möge sie dieses Mal dauerhaft sein, weil sie freiheitlich ist.

PAUL VALÉRY †

DER MENSCH UND DIE MUSCHEL

Gäbe es eine Dichtkunst über die Wunder des Verstandes und seine Erschütterungen (ich habe mein Lebtag darüber nachgesonnen), so könnte kein Vorwurf sie mit reizvolleren Verheißungen locken und entzücken als die Schilderung eines Geistes, welcher bis in seine Tiefen vom Anblick irgendeiner jener absonderlichen Naturformen erregt wurde, die man hie und da zwischen den vielen uns umgebenden Dingen von gleichgültiger Zufallsgestalt beobachten kann (oder die vielmehr erzwingen, daß man sie beobachtet).

Wie von Geräuschen ein reiner Ton oder ein melodisches Gefüge reiner Töne, ganz so sondert sich von den gewöhnlich ohne Regel gefügten Gestalten der wahrnehmbaren Dinge rings um uns ein *Kristall* ab, eine *Blume* oder eine *Muschel*. Verglichen mit all jenen anderen Gegenständen, welche unser Auge nur undeutlich begreift, scheinen sie uns bevorzugt zu sein: verständlicher für das Sehen, wenn auch geheimnisvoller für das Denken. Sie rufen in uns, seltsam verbunden, die Vorstellungen von Ordnung und Willkür wach, von Erfindung und Notwendigkeit, von Geseţ und Ausnahme, und zugleich erspüren wir in ihren Gestalten den Anschein einer *Absicht* und den Anschein eines *Tuns*, die sie geformt haben könnten, ungefähr wie Menschen es vermöchten, nichtsdestoweniger entdecken wir in ihnen aber auch die Gewißheit von Verfahren, die uns versagt sind, und die wir nicht zu enträtseln vermögen. Wir könnten diese absonderlichen Formen nachmachen, unsere Hände können ein Prisma schneiden, eine künstliche Blume kleben, eine Muschel formen oder drehen, wir können sogar durch eine *Formel* die Eigenschaften ihres Gleißmaßes ausdrücken oder sie ziemlich genau durch eine geometrische Konstruktion darstellen. Bis dahin können wir der „Natur" borgen, ihr Absichten, eine Mathematik, einen Geschmack, eine Einbildungskraft unterschieben, die nicht unendlich verschieden von den unseren sind; aber, siehe da, nachdem wir ihr alles *Menschliche* zugestanden haben, dessen es bedarf, um dem Menschen verständlich zu sein, offenbart sie uns ihrerseits, was an Unmenschlichem ausreicht, um den Menschen über die Grenzen seines Verstandes hinauszuschleudern. Wir begreifen den *gewordenen Bau* dieser Gegenstände, und dadurch reizen und fesseln sie uns, wir begreifen nicht das *Werden* dieses Baues, und dadurch treiben sie uns in die Enge. Obwohl wir selbst auf dem Wege unmerklichen Wachstums gemacht oder geformt sind, vermögen wir unsererseits auf diesem Wege nichts zu erschaffen.

*

Dies Muschelgehäuse, das ich in meinen Fingern halte und drehe, zeigt mir eine aus den einfachen Themen der Schraubenwindung und der Spirale zusammengeseţte Formentwicklung, zugleich aber drängt es mich in ein großes Staunen und Aufmerken; beide bewirken, was sie können: ganz äußerliche Wahrnehmungen und Feststellungen, kindliche Fragen, „dichterische" Vergleiche und Ansäţe zu törichten Theorien. Aber ich spüre schon, wie mein Geist den ganzen, noch verborgenen Schaţ der Antworten verschwommen vorausahnt, die — vor einem Dinge, das mich gefangennimmt und befragt — tief in mir aufzudämmern beginnen.

*

THE PRESENT LEGAL STATUS OF GERMANY

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THE PRESENT LEGAL STATUS OF GERMANY [1]

By F. A. Mann, LL.D. (Lond.)

I

The legal position of Germany, as it has developed since the summer of the year 1945, has so far attracted singularly little attention on the part of jurists. Although it is of a wholly unprecedented character, the only contribution to its clarification which is at present available comes from the pen of Professor Kelsen who, in 1944, published an article showing a remarkable degree of foresight,[2] and in July, 1945, made a brilliant analysis of the situation which had then been created for a month or so.[3]

It is unlikely that the difficulty of competing with Professor Kelsen is the only reason for such silence. There is probably a widespread feeling that the present phase in the evolution of Germany's legal status is a temporary one and therefore not in need of further research.

Such an attitude disregards the fact that, however soon they may be displaced by a permanent arrangement, the conditions which have existed for almost two years are bound to give rise to a host of practical problems. Although the underlying facts may disappear, legal acts performed on their basis may have to be scrutinised in years to come. Thus an arrest made in Germany by an official of Military Government in Germany may lead to an application for a writ of habeas corpus which would involve the question whether Germany or the British Zone of Occupation [4] can be said to be part of the dominions of the Crown.[5] A writ of certiorari directed against a decision of a British Military Government Court in Germany may impose upon a Divisional Court in England the duty of ascertaining whether or no the Military Government Court is a British Court. The effect of naturalisation purporting to confer German nationality and effected by British Military Government in the British Zone

[1] The substance of this paper was read on March 5, 1947, before the Grotius Society. Articles which appeared after that date could not be taken into account; this applies in particular to the article by Mr. R. Y. Jennings in *British Year Book of International Law*, 1946.
[2] 38 (1944), *American Journal of International Law*, 689.
[3] 39 (1945), *American Journal of International Law*, 518.
[4] British Military Government frequently speaks of 'Zone of Control'; see particularly Ordinance No. 4 (*Military Government Gazette, No.* 4, p. 5).
[5] If this cannot be said, the writ cannot issue: *Ex p. Anderson* (1861), 3 E. & E. 487; *Re Ning Yi-Ching* (1939–1940), 56 T.L.R. .

may have to be tested. The validity of the confiscation of British-owned property by Military Government may become an issue in an English Court. The last-mentioned example is perhaps particularly instructive. If a British official in Hamburg wrongfully confiscates the property of a British subject, and an action is brought against the official in an English Court, it would become necessary to decide whether the defendant acted as the agent of a German State or of the British Crown; in the latter event the defence of act of State would not be available [6]; in the former event the defendant could pray in aid the often enunciated, though perhaps assailable, principle that 'every sovereign State is bound to respect the independence of every other sovereign State and the Courts of one country will not sit in judgment on the acts of the Government of another done within its own territory'.[7]

Considerable practical importance for both international and municipal law, therefore, attaches to the determination of Germany's present legal status; even the established rule according to which in these matters municipal courts are to a large extent guided by statements provided by the Executive, renders it in no way futile to clarify the issues.

II

These issues involve an evaluation of Germany's international and constitutional position. In order to avoid confusion it is necessary at the outset to state certain matters with which this paper is not concerned.

When General Eisenhower led his Allied Expeditionary Force into Germany, he had the double capacity of Supreme Commander of the Allied Forces and of Military Governor.[8] Even now the Commander-in-Chief of the British Zone of Occupation exercises the distinct functions of Commander-in-Chief of the British Army of Occupation and of Military Governor. In so far, however, as the armed forces are concerned, they live under their own law. Their position is governed by the familiar rules of international law applicable to armies stationed in foreign territory.[9] They do not form part of the German administration. They are distinct from Military Government. Consequently they are subject neither to German nor

[6] *Johnstone* v. *Pedlar*, [1921] 2 A.C. 262, and the authorities there referred to.
[7] *Underhill* v. *Hernandez* (1897), 168 U.S. 250; cf. *Princess Paley Olga* v. *Weisz*, [1929] 1 K.B. 718, and numerous other cases discussed in 59 (1943) L.Q.R. 42, 155.
[8] See note 15 below.
[9] Oppenheim (-Lauterpacht), *International Law*, 5th ed., s. 445.

to Military Government law or courts,[10] but exclusively to their own military, naval or air force law which they took with them. Therefore a Military Court in the British Zone of Occupation is a British Military Court; British naval law lays down the conditions under which a British seaman may be arrested, and so forth.

Military Government, on the other hand, is exercised by (Civilian) Military Government Officers. Their position within the framework of German administration will have to be considered in the course of the following observation. If, and to the extent to which, they exercise the functions of Allied administration in Germany, their position is material to this paper. But the internal law under which they are organised and live should be recognised as a separate issue which is in no way dependent upon their external administrative work in Germany. It is submitted that, whatever may be the legal character of administrative functions discharged by a Military Government Officer, *e.g.* of a confiscation of property effected by him, internally Military Government of each of the Allied nations is an organisation which, like the army, lives under its own national law. Thus, the British Military Government Officer who writes a libellous letter about a colleague is subject to English law.[11] And a British Military Government Court which exercises jurisdiction over a British Military Government Officer [12] is, it is suggested, a British Court, though it may have quite a different character when it exercises jurisdiction over a German or a Swiss. A Maritime Court which, during the war, the Dutch Government was allowed to establish in England, was a Dutch Court.[13] If, during the war, the Dutch Government in London had a Dutchman arrested here, his remedy lay in the Dutch Courts and was determined by Dutch law.[14] Similarly, in its internal aspects and relationships the instrumentality of Government set up by the British in Germany is British. No other result would be consistent

[10] Art. II of Ordinance No. 2 gives Military Government Courts jurisdiction 'over all persons in the occupied territory except persons other than civilians who are subject to military, naval or air force laws'. Military Government Courts have no jurisdiction in matters other than criminal cases. It is quite true that under Art. VII (d) Military Government has the power to transfer to the jurisdiction of Military Government Courts any case or class of cases, but this cannot apply to civil cases. (See Art. II of Ordinance No. 2, below.) Except with the consent of Military Government no German court has jurisdiction in cases against any of the United Nations or its nationals: Law No. 2, Art. VI (SHAEF), as amended by British Zone Ordinance No. 29.

[11] See note in 9 (1946) Mod.L.R. 179 on the case of *Szalatny-Stacho* v. *Fink*, [1946] 1 All E.R. 303 (Henn Collins, J.); [1947] K.B. 1 (C.A.).

[12] See Ordinance No. 5, *Military Government Gazette No.* 4, p. 5.

[13] See the Allied Powers (Maritime Courts) Act, 1941, and Viscount Simon, *Journal of Comparative Legislation*, 3rd series, XXIV (1942) 1; 58 (1942) L.Q.R. 41.

[14] *Re Amand* (*No.* 2), [1942] 1 All E.R. 236.

with sound principle, the requirements of justice and the ideas which British civilian officers in Germany expect to be given effect to.

According to Ordinance No. 5, British civilians in Germany are subject to English Criminal Law; they cannot be tried for an offence against German law (which term, in this context, includes Military Government Law) except with the express authority of Military Government; and they cannot be arrested or detained by British police officers in Germany except in cases where British military police had the powers of arrest or detention of a member of the British armed forces under British Military Law. It is suggested that these provisions give expression to a general principle.

III

When the Western Allies entered Germany, General Eisenhower brought with him the fundamental Proclamation No. 1 which reads as follows [15]:

> Supreme legislative, judicial and executive authority and powers within the occupied territory are vested in me as Supreme Commander of the Allied Forces and as Military Governor, and the Military Government is established to exercise these powers under my direction.

This Proclamation, like all other enactments of General Eisenhower, remained in force within the British Zone after the dissolution of SHAEF,[16] but is, in fact, superseded by three documents which were issued in Berlin on June 5, 1945, and contain what must now be regarded as the paramount laws of Germany.[17]

The first is a 'Declaration' made by the Supreme Commands of the four Allies 'acting by authority of their respective Governments and in the interests of the United Nations'. It recites Germany's unconditional surrender, the absence of any central Government and the fact that it is necessary 'without prejudice

[15] *Military Government Gazette*, Germany, 21st Army Group Area of Control, No. 2, p. 1, Art. I of Proclamation No. 1, issued by Field-Marshal Lord Alexander in Italy read as follows: 'All powers of government and jurisdiction in occupied territories and over the inhabitants and final administrative responsibilities are vested in me, General Officer Commanding the Allied Forces and Military Governor, and in the Allied Military Government of occupied territory established to exercise the powers under my direction'. (See *British Year Book of International Law*, 1944, 155.) There is probably little practical difference between these two Proclamations. The question whether and to what extent they are in conformity with the traditional law relating to belligerent occupancy has now only historical interest.

[16] Ordinance No. 4.

[17] Cmd. 6648. The Declaration of Berlin mentioned in the text was amplified by Proclamation No. 2 concerning 'certain additional requirements imposed on Germany' (*Control Council Gazette No.* 1, p. 8). Under clause 48 any doubt as to the interpretation of the Declaration or regulations issued thereunder will be decided by the Allied Representatives.

to any subsequent decisions that may be taken respecting Germany to make provision for the cessation of any further hostilities on the part of the German armed forces, for the maintenance of order in Germany and for the administration of the country, and to announce the immediate requirements with which Germany must comply'. It then proceeds as follows:

> The Governments of the United Kingdom, the United States of America and the Union of Soviet Socialist Republics, and the Provisional Government of the French Republic, hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any State, municipal or local government or authority. The assumption, for the purpose stated above, of the said authority and power does not effect the annexation of Germany.
>
> The Governments of the United Kingdom, the United States of America and the Union of Soviet Socialist Republics and the Provisional Government of the French Republic will hereafter determine the boundaries of Germany or any part thereof and the status of Germany or of any area at present being part of German territory.

The second document is a 'Statement' according to which

> supreme authority in Germany will be exercised, on instructions from their Governments, by the British, United States, Soviet and French Commanders-in-Chief, each in his own zone of occupation, and also jointly, in matters affecting Germany as a whole. The four Commanders-in-Chief will together constitute the Control Council.

The third document is another Statement establishing the four zones of occupation.[18]

The supreme organ of Germany as a whole, therefore, is the Control Council. It consists of the four Commanders-in-Chief as political heads, and its work is being carried on by a quadripartite organisation, *viz.* the permanent Co-ordinating Committee and the

[18] Special provisions have been made for the area of 'Greater Berlin' which is being occupied by forces of the four Powers. An Inter-Allied Governing Authority, the Allied Kommandatura, has been established 'to direct jointly its administration'. The Allied Kommandatura, therefore, has only administrative but no legislative powers, except in so far as such powers are being delegated to it by the Control Council. The British Sector of Berlin is not included in the British Zone of Occupation (Ordinance No. 4, Art. III) so that British zonal legislation does not apply to it; it would seem to follow, *e.g.*, that Military Government Courts set up in the British Sector are without legal basis. Since the Kommandatura has no original legislative powers, British (and, similarly United States and French) zonal legislation does not apply to Berlin and, Berlin forms part of the Soviet zone, Soviet zonal legislation would appear to apply to Berlin; in practice, however, the administration of such legislation will be impossible without the consent of the Powers occupying the Sectors.

Control Staff comprising thirteen functional Directorates or Divisions (Military, Naval, Air, Transport, Political, Economic, Finance, Reparations, Deliveries and Restitution, Internal Affairs and Communications, Legal, Prisoners of War and Displaced Persons, Manpower)[19] these 'Ministries' have established numerous quadripartite Committees which prepare and assist in the work of the Directorates.

The supreme authority of the Control Council, however, is territorially limited: according to the Statement of Berlin the Commanders-in-Chief exercise 'supreme authority *in* Germany' only. Supreme authority in external matters is reserved to the Allied Governments. It was, therefore, fully consistent when the Agreement with Switzerland concerning the liquidation of German Property in Switzerland (Cmd. 6884) was made by the Allied Governments who 'claimed title to German property in Switzerland by reason of the capitulation of Germany and the exercise of supreme authority in Germany', or when, in the Treaties of Peace with the five satellite countries, provisions are contained which prima facie affect a third party, *i.e.* Germany; thus, it has been agreed that Italian property in Germany should no longer be treated as enemy property and should be restored 'in accordance with measures which will be determined by the Powers in occupation in Germany', that Italy waives most of her and her nationals' claims against Germany and German nationals, and that German assets in Italy are to be transferred in such manner 'as may be determined by those of the Powers occupying Germany which are empowered to dispose of the said assets'.[20]

In so far as enactments of the Control Council have not interfered with his discretion, each Commander-in-Chief as Military Governor is supreme within his zone of occupation. His authority undoubtedly includes legislation, and in the British Zone numerous enactments, called Ordinances, have in fact been issued, though this is to some extent different in the United States Zone where usually German authorities, controlled and guided by the Commander-in-Chief, enact legislation and where, consequently, a different conception has become apparent.[21] But while the Control Council's

[19] Statement of Berlin, clause 3; on the work of the Control Council see Anne Whyte, *Quadrupartite Rule in Berlin*, *International Affairs*, XXIII (1947) 30.

[20] Cmd. 7022. Art. 77 of the Treaty with Italy, Art. 28 of the Treaty with Roumania, Art. 26 of the Treaty with Bulgaria, Art. 30 of the Treaty with Hungary, Art. 28 of the Treaty with Finland.

[21] But see Ordinance No. 41 relating to the Establishment of a Central Legal Office for the British Zone and Ordinance No. 52 relating to the 'Constitution and Functions of the German Economic Administration for the British Zone' which involves a substantial transfer of authority to a German administrative body. As a Special Correspondent of *The Times*, who is known to possess great experience, said (March 4, 1947), 'United States theory is that all power

jurisdiction is unlimited, that of the Commanders-in-Chief is restricted not only *ratione loci*, but also *ratione materiae* : they have no jurisdiction in matters affecting Germany as a whole. Although the Statement of Berlin provides that the Control Council 'will ensure appropriate uniformity of action by the Commanders-in-Chief in their respective zones of occupation', conflicts are liable to arise. The difficulty results from the ambiguity of the phrase 'matters affecting Germany as a whole', 'questions intéressant l'ensemble de l'Allemagne'. Does it cover only matters which purport and are intended to affect Germany as a whole, or does it extend to matters the incidental effect of which may be felt in Germany as a whole? The new Municipal Code, *e.g.*, introduced in the British Zone by Ordinance No. 21, is a measure which, notwithstanding its great significance, is clearly of a strictly local character. But the British-American Agreement for the economic fusion of the United States and United Kingdom Zones [22] is a much more serious matter and has provoked some criticism on account of its far-reaching effects upon the other zones of occupation. If the French Commander-in-Chief introduced in his zone the French Civil Code in substitution for the German Civil Code, this would be an unequivocal example of a matter affecting Germany as a whole, although prima facie it would be territorial legislation. Probably the phrase will have to be given a wide interpretation so as to achieve the obviously desired object of uniformity.[23]

IV

The first question to which the preceding summary of the relevant texts gives rise is whether Germany can be said to be under belligerent occupation within the meaning of Articles 42 to 56 of the Hague Regulations.

Arguing before the Court of Appeal, the Attorney-General, Sir Hartley Shawcross, K.C., said: 'The position is that this country is now in belligerent occupation of Germany, with the Army of Occupation in control'.[24] If this were a considered statement of the strictly legal position and represented the true view, the consequences would be grave, for there cannot be any doubt that the

originates with the people. The bizonal agencies are therefore presumed to derive their authority from the consent of the Laender, acting through the Laenderrat, the free and equal association of the three Laender. British Military Government takes the probably more realistic view that the administrations are based on an agreement between two of the occupying powers and derive their authority clearly and squarely from Military Government'.

22 Cmd. 7001.

23 The validity of zonal legislation does not seem to be a matter which is withdrawn from the jurisdiction of German Courts, and it is likely to become an issue in proceedings outside Germany.

24 *R.* v. *Bottrill, ex p. Kuechenmeister*, [1947] 1 K.B. 41, at p. 45.

Allies have not kept, and have not shown the intention to keep, within the limits of the Hague Regulations. This follows not only from the Declaration of Berlin itself by which the Allied Governments rather than the Commanders-in-Chief assumed supreme authority,[25] but also from many subsequent pronouncements and enactments which cannot be supported by traditional law. In the particular case of Germany, it is true, a belligerent occupant would have had rights which prior to the rise of the fascist State were unthinkable, but which may be brought within the letter and spirit of established law. Thus, it may well be said that the repeal of Nazi legislation is permitted by the Hague Regulations, because this is legislation which an occupant is absolutely prevented from respecting.[26] It can also be contended that numerous measures taken for the purpose of demilitarisation, changing the political system of Germany and controlling the economic resources of a highly centralised totalitarian State are required for the maintenance and safety of the occupying Powers and the consummation of their victory. Many other enactments, though startling at first sight, can be justified by the object of restoring and ensuring public order and safety. But even if an interpretation of the Hague Regulations, which is both broad and adapted to the peculiar circumstances, renders a large part of Allied policy in Germany consistent with traditional law, there remains enough that cannot be fitted into its frame. The Declaration of Berlin, supplemented by Proclamation No. 2, as well as the Potsdam Agreement which, though it constitutes an agreement between the heads of government of three occupying Powers, must be considered as a basic document of German law, provide for matters which admittedly are requisite not for completing the victory over Germany, but for 'future peace and security' [27]; it is difficult to believe that the desired decentralisation of administration in Germany [28] is temporarily necessitated by the interests of military control; to place the City of Koenigsberg and the territories east of the Oder-Neisse line under Soviet and Polish administration respectively [29] far exceeds the limits within which a mere belligerent occupant could act; no belligerent occupant could withdraw diplomatic missions [30] or require 'German authorities and all persons in Germany' to hand over all gold, silver and platinum,[31] or acquire the right to have placed 'at the unrestricted disposal of

25 The phrase 'supreme authority' in itself would be inconclusive.

26 Art. 43.

27 Declaration of Berlin, Art. 13.

28 Potsdam Agreement, III, 9.

29 *Ibidem*, VI and IX.

30 Proclamation No. 2, 7 (c).

31 *Ibidem*, clause 15.

the Allied Representatives' the entire German shipping and the whole of the German inland transport system.[32] And if one looks at the legislation of the Control Council, one finds Law No. 4 about the reorganisation of the German judicial system, or Law No. 16 the marriage law, Law No. 36 about administrative courts or Law No. 38 amending section 204 of the German Code of Civil Procedure, and Law No. 46 about the dissolution of Prussia, all of which contain provisions in no way required for ensuring public order and safety. The establishment of new Laender with new Constitutions in the British and American Zones are prominent examples of zonal legislation which point in the same direction.

The Allies' failure to exercise the qualified rights of a belligerent occupant seems to be undeniable. As such it is not really relevant. For to say that, because there is a breach of the law, the law cannot apply, is not an admissible argument. The material question is why the Allies have an internationally recognisable right to behave otherwise than as belligerent occupants.

It would be unsatisfactory to make the answer dependent upon the existence or non-existence of a state of war. Some publicists would probably be inclined to say that, if the war has ended, Germany cannot, and that, if the war continues, she must needs be under belligerent occupation.[33] The latter proposition would involve a *petitio principii*; the former would overlook the fact that the rules relating to military occupation of enemy territory are minimum rules which extend to 'peaceful occupation' by virtue of an armistice or a treaty of peace.[34] Neither unconditional surrender in itself,[35] nor the mere absence of a central government, would prevent those rules from coming into operation—it would obviously lead to questionable results, if by eliminating the occupied country's government, a belligerent could enlarge his powers.[36] Finally, to invoke the conception of reprisals would discredit rather than promote the cause of international law.

Although neither the end of hostilities nor the unconditional surrender nor the disappearance of a central government could, in themselves, have entitled the Allied Governments to adopt an attitude other than that of a belligerent occupant, it is, in the peculiar

[32] *Ibidem*, clauses 28 and 29.

[33] Cf. 'E', *British Year Book of International Law*, 1938, 236; Sir Arnold McNair, *Legal Effects of War* (2nd ed.), pp. 342, 343.

[34] Oppenheim-Lauterpacht, *International Law*, II (6th ed., revised), p. 338, note 6. and p. 339, note 2; Feilchenfeld, *The International Economic Law of Belligerent Occupation* (1942), pp. 6, 108 *sqq*.

[35] Feilchenfeld, *l.c. passim*.

[36] The decision of Clauson, J., in *Bank of Ethiopia* v. *National Bank of Egypt*, [1937] Ch. 513, may be said to indicate a different view, but has singularly failed to arouse the approval of international lawyers and is indeed open to grave criticism. See Sir Arnold McNair, note 33 above.

situation of Germany in 1945, the co-existence of these three facts which provides an internationally recognisable justification for Allied action. The rules relating to belligerent occupation seek to establish a compromise between military necessities and the interests of the inhabitants. They presuppose an interplay between military and civilian authority. They assume the precariousness of the occupant's position which demands such protection as the legitimate needs of the civilian population permit. They are pervaded by the idea that the inhabitants are non-combatants with whose mode of life a belligerent should, and can afford to, interfere as little as possible. They are far removed from the atmosphere of a totalitarian State which forces children no less than the aged into its service. They expect, from both sides, a standard of conduct which becomes impracticable when every single activity of the occupied State expresses a doctrine the eradication of which is the very aim of the war. The unconditional surrender which the Allies had demanded for years had been preceded by the unconditional surrender of all nations allied with Germany except remote Japan, herself on the verge of surrender. It meant that the Allies were free to take all measures necessary to carry out their object. No German Government could have been formed to co-operate with a mere belligerent occupant. If the Allies had assumed only the role of belligerent occupants, they and the United Nations in whose interests they act, could not achieve their war aims, which go far beyond military victory; indeed, they would have failed to fulfil their duty and historic mission. It is the unique character of the circumstances which required and sanctioned a unique solution, a new departure.[37] It is submitted that it is more satisfactory and also in harmony with the spirit of international law as a living law to recognise the existence of a new experiment rather than so to stretch the words of the Hague Regulations that they sanction Allied practice in Germany.

V

Even if the Allies are not merely belligerent occupants, it cannot possibly be contended that any of the four zones of occupation is in any sense a dominion of the occupying Power, that the United Kingdom exercises jurisdiction in the British Zone, that the Commander-in-Chief as Military Governor of the British Zone is a representative of the British Government acting on its behalf, that

[37] Kelsen, 39 (1945) *American Journal of International Law* 518, arrives at the same conclusion and bases it on the absence of a central government and on his theory that Germany is no longer a State and that the war has ended. On the observations in the text see Friedmann, 3 (1940–1941) Mod.L.R. 177; *Grotius Transactions*, 1940, 211, and in other publications.

he or any officer or authority acting under his direction perform acts for which the United Kingdom bears legal, as opposed to political or parliamentary, responsibility. The true position is that the Commander-in-Chief as Military Governor of his Zone is the Delegate of the four Governments; it is by their authority that he exercises zonal jurisdiction the nature of which will have to be considered below.[38]

The four Governments have assumed 'supreme authority with respect to Germany'. This is the overriding pronouncement of the Declaration of Berlin. It follows that no single Government can claim supreme authority with respect to Germany or any part thereof. Such authority as the Commander-in-Chief of any Zone has is derived not from the Declaration of Berlin, but from the Statement of Berlin which deals with the *exercise* of the supreme authority *assumed* by the four Governments under the Declaration of Berlin. Such authority is being exercised jointly by the four Commanders-in-Chief constituting the Control Council in matters affecting Germany as a whole, and by each of them in his zone of occupation. Although the separation of supreme authority and its exercise cannot be regarded as a new development,[39] the four Governments, having assumed supreme authority with respect to Germany as a whole, would normally exercise it themselves. If they allow the Commanders-in-Chief to exercise it in their respective zones, this involves delegation and, in law, renders the delegate a representative of the delegant, *i.e.* the four Governments jointly rather than his own Government. None of the four Powers as such is invested with supreme authority or any divisible part of it. Each of them could have acquired or exercised it only, if, instead of appointing the Commanders-in-Chief, the Statement of Berlin had so provided. Consequently none of the four Governments could confer supreme authority in its zone to an official other than the Commander-in-Chief for the time being.

This conclusion could be nullified only by attributing wider significance than they merit to those words of the Statement according to which the Commanders-in-Chief exercise their authority 'on instructions from their Governments'. In fact, it could be nullified only by assuming that, having jointly assumed supreme authority, the four Governments have divided it zonally not only for the purpose of its exercise, but also for the purpose of divesting themselves of it and allocating to each of them what belongs to them jointly. It is submitted that there is no warrant for

[38] See p. 331.
[39] See, generally, Lauterpacht, *Private Law Sources and Analogies of International Law*, p. 189.

such a view, and that the subjection of the Commander-in-Chief to his Government's instructions is, in law, immaterial to his legal position. The High Commissioner of Palestine is subject to instructions from the British Government. But whatever the true view of the legal status of Palestine [40] may be, it cannot be suggested that the mere power of giving instructions makes Great Britain the Sovereign of Palestine or renders Palestine a part of Great Britain or establishes British jurisdiction in Palestine. The power of giving instructions is not irreconcilable with sovereignty over Palestine being vested in others than the mandatory Power. There is no reason in law why the power of giving instructions in the exercise of supreme authority should not be differentiated from the holding of such authority.

VI

The next question is whether Germany as a whole now so 'belongs' to the four occupant States as to necessitate the inference that they have placed her under their joint sovereignty and established a condominium, a new State the creation of which would entail many intricate problems of State succession.[41]

According to traditional doctrine it would be impossible to give an affirmative answer. The acquisition of territorial sovereignty could be achieved only by one of the five well-defined methods [42] of which subjugation alone would demand consideration. Subjugation would require conquest and annexation. Since the Declaration of Berlin expressly states that 'the assumption, for the purposes stated above, of the said authority and powers does not effect the annexation of Germany', subjugation would clearly have to be negatived.

Yet it is Professor Kelsen's thesis that the four Allies hold Germany under their joint sovereignty. In his view, subjugation is possible without annexation, which is normally understood as presupposing the conqueror's intention to hold the territory permanently for himself, to acquire both the legal and the beneficial title to the country:

> The establishment of territorial sovereignty does not depend on the new sovereign's intention to hold the territory for good. He may have the intention to cede the territory or part of it later on to another State. Such an intention does not prevent

[40] See Oppenheim-Lauterpacht, *International Law*, 5th ed., I, pp. 191, 197 *seq.*
[41] Kelsen, *l.c.*, p. 522, makes a gallant attempt at dealing with the problem of German nationality. But he does not mention the nationality of those Germans who at the material times were outside Germany and who, therefore, could not be said to have acquired the new German nationality which is implicit in Kelsen's remarks, but would be stateless (see 5 (1942) Mod.L.R. 218). Nor does Kelsen deal with any of the other problems of State succession.
[42] Oppenheim-Lauterpacht, 5th ed., I, s. 211.

> the acquisition of sovereignty. . . . If there is a difference at all between formal annexation and placing the territory under the conqueror's sovereignty without the latter's intention to hold it permanently, it is rather a political than a legal one. The rights and duties of the territorial sovereign are the same in both cases.[43]

It must be admitted that there is no *a priori* reason why the categories of methods of acquiring territorial sovereignty should be considered as closed. International law is not so rigid as to exclude new developments. It may well be, therefore that there exists a sixth method of acquiring territorial sovereignty, *viz.* conquest, and an intention to vest only the legal title to the territory in the conqueror who would hold it temporarily, pending further disposition, until he decides to hold it for himself or to retransfer or cede it so that the beneficial title would be in suspense.

A theory on these lines seems to be at the back of Professor Kelsen's mind,[44] but even if it is considered as a possible one, it could not actually apply to the case of Germany. Professor Kelsen is a little dogmatic on this point, and does not attach sufficient weight to the fact that in the last resort the problem must depend on the four Governments' intention as expressed in or to be inferred from the Declaration of Berlin. It is submitted that the text does not support the existence of an intention to acquire sovereignty.

Firstly, one would expect so important a result to have been unequivocally expressed, *e.g.* by the words that the four Powers assume 'all rights and *title*' over Germany.[45] The suppression of such a statement, even if primarily due to political reasons, cannot be without legal significance.

Secondly, it should be remembered that the first document by which the Big Three gave particulars of their intentions with regard to Germany, *i.e.* the Communiqué issued after the Crimean Conference in February, 1945, contained no hint of such an intention. It declared that it was the Allies' 'inflexible purpose' to destroy German militarism and Nazism, but not to 'destroy the people of Germany', that under agreed plans the forces of three Allies[46] would each occupy a separate zone of Germany, and that these plans provided for 'co-ordinated administration and control'. This indicates something less than the acquisition of territorial sovereignty.

Thirdly, it should be noted that by the Declaration of Berlin supreme authority was assumed by the *Governments* of the four

[43] *L.c.*, p. 521.
[44] His formulation is not too precise, but the reference to the legal position of Cuba after the Spanish-American war makes his views clear.
[45] See Art. 99 of the Treaty of Versailles.
[46] The French Government did not participate in the Conference.

nations, neither by the heads of the Allied States nor by the Allied States as such. In so far as the United Kingdom is concerned this wording is a little remarkable, though, in itself, it is certainly inconclusive. If the United Kingdom had desired to assume joint sovereignty over Germany, it would have been the better and perhaps more usual method for the Government of the United Kingdom to act expressly on behalf of the King as the nation's representative in the conduct of foreign affairs. Perhaps it is possible to find in this language an indication of the intention to assume supreme authority, not for the purpose of acquiring State sovereignty, but for the purpose of establishing governmental control.

Fourthly, by the Declaration of Berlin supreme authority was assumed only for three specified purposes, *viz.* 'to make provision for the cessation of any further hostilities on the part of the German armed forces, for the maintence of order in Germany, and for the administration of the country, and to announce the immediate requirements with which Germany must comply'. This was 'without prejudice to any subsequent decisions that may be taken respecting Germany' and, moreover, in another passage, the four Governments state that they 'will hereafter determine the boundaries of Germany or any part thereof and the status of Germany or of any area at present being part of German territory'. These reservations underline the limited and provisional character of Allied intentions, and indicate that, in connection with future decisions, territorial sovereignty may be acquired. If the Allies had already acquired it, those reservations would be superfluous.

Fifthly, the assumption of territorial sovereignty by the Allies would be so retrograde a development that very strong evidence would be required to support it. It is an accepted maxim of international law that belligerent occupancy does not confer or justify the assumption of territorial sovereignty. Even though the Allies are not merely belligerent occupants, they cannot be presumed to revert to a practice which more than a century ago was condemned by international law and discarded in practice.

In Austria, it is true, by virtue of an Inter-Allied Agreement of July 4, 1945, which was in force until June 28, 1946 (Cmd. 6958), an Allied Commission was in operation to *exercise* supreme authority; while its organisation was and, for its limited purposes, still is very similar to the German organisation, the Allies never *assumed* supreme authority in Austria. But it would not be permissible to put forward an *argumentum ex contrario* to the effect that the supreme authority assumed with respect to Germany must mean more than that governmental authority which in Austria was conferred by much less solemn words. The Declaration of Berlin

envisages a long-term arrangement, while the Austrian Agreement intended to set up machinery ' which will operate until the establishment of a freely elected Austrian Government recognised by the Four Powers ', and was therefore of a strictly temporary character. This difference justifies and explains the difference of formulation.

VII

If the four Governments have not acquired sovereignty either in their respective zones of occupation or over Germany as a whole, the question arises whether Germany is still a State. On this point it is necessary to make a distinction.

Germany certainly is not a sovereign State in the accepted sense of the law of nations.[47] It is an essential element of the conception of a sovereign State that the country is under the control of its own independent Government. Germany has no Government which is her own, or which is free from control over its internal administration or its foreign relations; even if it were possible to describe the Allied Control Council as a German Government, it would be subject to instructions given by the four Allied Governments.

Moreover, Germany maintains no relations with the world at large. According to the Statement of Berlin, it is true, ' liaison with the other United Nations Governments chiefly interested will be established through the appointment by such Governments of military missions (which may include civilian members) to the Control Council '.[48] This representation is so limited and one-sided that it is impossible to say that Germany maintains normal foreign relations, particularly since it has also been provided[49] that ' the Allied Representatives will regulate all matters affecting Germany's relations with other countries ', ' will give directions concerning the abrogation, bringing into force, revival or application of any treaty, convention or other international agreement, or any part or provision thereof, to which Germany is or has been a party ', and ' may require the withdrawal from Germany ' of neutral missions. German diplomatic missions have been recalled,[50] and it has been expressly declared that ' in virtue of the unconditional surrender of Germany, and as of the date of such surrender, the diplomatic, consular,

47 Kelsen, *l.c.*, p. 519, says that Germany is not a State. He does not draw the distinction made in the text, but obviously speaks only of statehood in international law, and, generally, is no doubt influenced to a large extent by his own theory of the State and of sovereignty.

48 Paragraph 5.

49 Proclamation No. 2, clauses 5–7. There is no authority for the view that treaties made by a sovereign State automatically lapse, if such State suffers ' une extinction partielle ' and becomes a dependent State.

50 *Ibidem.*

commercial and other relations of the German State with other States have ceased to exist '.

Pace Professor Kelson who would not accept the distinction,[51] it is submitted, however, that though she is not a State within the meaning of international law, Germany still is a State in the general sense of the term. In this connection it is unnecessary to embark upon a discussion which would lead into the depths of jurisprudence. It will be generally agreed that there exists a State, if a body of people, inhabiting a defined territory, is so organised under supreme civil rule and government as to constitute a coherent body politic.[52] These conditions are fulfilled in the case of Germany, provided the Allied Control Council can fairly be regarded as the Government of Germany.

Although the Control Council is not a German Government, it does constitute the Government of Germany, because it is vested with supreme authority in matters affecting Germany as a whole. This governmental authority of the Control Council, it is true, is limited to internal German affairs and is derived from the four Allied Governments which assumed supreme authority and then delegated[53] its exercise in Germany. But this only means that, admittedly and professedly, the Control Council is not a German Government. It is not the root of title, but the actual governmental function and authority that is decisive. Nor can any counter-argument be deduced from that passage of the Declaration of Berlin according to which the Allied Governments will hereafter determine ' the status (statut) of Germany or any area at present being part of German territory '. Whatever the liguistic connection

51 See note 47 and his writing on the State, Sovereignty, etc.

52 In this connection the use of the word ' sovereign ' should be avoided. The German State, if it exists, has of course internal sovereignty. This has no bearing upon the existence or non-existence of external sovereignty which is clearly missing, and without which Germany cannot be a sovereign State in the sense of international law. Kelsen's thesis (*l.c.*, p. 521) that ' Germany certainly has ceased to exist as a sovereign State and since the territory is not under Germany's own sovereignty, it would be no State's if it were not under the sovereignty of the occupant Powers ' is untenable and can only be explained by the fact that he has become a victim of the dangers attending the word ' sovereignty '.

53 This does not preclude the four Allied Governments from exercising supreme authority themselves, if they wish so to do. An example of such exercise of supreme authority is provided by the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis which was made on August 8, 1945, by the Governments of the United States of America, France, the United Kingdom and the U.S.S.R., ' acting in the interests of all the United Nations ' and to which the Charter of the International Military Tribunal is annexed (*American Journal of International Law* (*Official Documents*), 1945, 257). The Nurnberg Tribunal quite correctly said in its judgment: ' The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich had unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories had been recognised by the civilised world '.

between the word 'State' and the word 'status' may be,[54] the argument that because the determination of Germany's status is reserved she cannot at present be regarded as a State, would be too far-fetched to be attractive.

If the above submissions are accepted, it becomes possible to define the present status of Germany a little more precisely.

From the point of view of international law Germany is a dependent State. The circumstances are so unique, however, that any attempt at further classification is bound to fail. The position of the Allied Governments probably is that they exercise what certain publicists have described as co-imperium.[55] While in the case of a condominium a community of States has sovereignty over a territory belonging to them jointly, a co-imperium exists, if several States jointly exercise jurisdiction or governmental functions and powers in territory belonging to another State; the administration by Austria-Hungary of Bosnia and Herzegovina from 1878 to 1908, while the territory belonged to Turkey, is usually given as an example of such co-imperium.

The German State is not a new State.[56] It is the same State as that which existed immediately prior to the Declaration of Berlin. Its identity was preserved, though its status was impaired and reduced and it suffered what Fauchille would describe as an 'extinction partielle'.[57] Nor does it matter that a new Government has taken power. A change of Government, however revolutionary its origin may be, does not involve the formation of a new State.[58]

From the point of view of municipal law the Control Council performs and, indeed, intends to perform the functions of a German Government. It enacts German legislation. The acts of its executive officers are acts of the German State. Thus, by Law No. 5,[59] the German External Property Commission was established 'as an inter-governmental agency of the Control Council'; the law vests

54 See, *e.g.*, the summary given by Dowdall, 39 (1923) L.Q.R. 98.

55 Verdross, *Voelkerrecht*, pp. 128, 132; *Hague Recueil* 30 (1929), 275 *sqq.*, 396. Usually the term 'condominium' is used indiscriminately, but the distinction explained in the text seems logical and attractive. Cf. Art. 81 of the United Nations Charter according to which the administering authority exercising trusteeship 'may be one or more States'. 'Co-imperium' as opposed to 'condominium' is a type of fiduciary administration as explained by the Supreme Court of the U.S. in the decisions relating to the Status of Cuba in the treaty of 1898; see 108 U.S. 109, 120. Such fiduciary administration by England occurred, *e.g.*, in the case of Cyprus which from 1878 to 1914 was 'assigned to England in order to be occupied and administered'. The term seems to be an appropriate description of the present German situation.

56 Cf. Oppenheim-Lauterpacht, *International Law*, 5th ed., I, p. 145, note 1.

57 *Traité de droit international public*, I, pp. 373, 382 *sqq.*

58 *The Government of Spain* v. *Chancery Lane Deposit Co., Ltd.*; *The State of Spain* v. *The Same*, *British Year Book of International Law*, 1944, 195, 196.

59 *Gazette No.* 2, p. 27, and see the amendment of Art. III by Regulation No. 1 in *Gazette No.* 8, p. 160.

in the Commission 'all rights, titles and interests in respect of any property outside Germany' of certain categories of persons Arts. II and III), and confers powers upon it for the purpose of obtaining control over the property (Art. VII). Or by Law No. 9, the property and assets of I. G. Farbenindustrie have been vested in the Control Council and a Committee has been set up to deal with this property. If the External Property Commission exceeds its powers (*e.g.* by misinterpreting the terms 'rights, titles and interests') or if a creditor of I. G. Farbenindustrie claims against the Control Council,[60] the liability of individual members or of the German State is determined by the general German law.[61] And if the Control Council should engage in international trade, it would be the 'German Government' within the meaning of Art. 281 of the Treaty of Versailles and could not claim immunity where this Article is in force.[62]

Further, the Commander-in-Chief in his zone and his zonal authorities and officials are likewise representatives of the Government of Germany. The Commander-in-Chief is not the representative of the occupying State which has appointed him (see above, paragraph V). Nor is he a delegate of the Control Council, because in his zone he does not exercise the (delegated) authority of the Control Council, which is a distinct body exercising authority only in matters affecting Germany as a whole. The Commander-in-Chief, according to the Statement of Berlin, is entrusted with 'supreme authority in Germany . . . in his own zone of occupation'. This formulation is not, as one might think at first sight, contradictory or illogical. It clearly expresses the idea that locally the Commander-in-Chief is the supreme authority in Germany, the supreme representative of the German State, the Government of Germany. If he engages in international trade, Art. 281 of the Treaty of Versailles would apply to him.

The position of the German authorities can only be described in general terms. Broadly speaking, they are organs of the German State. The judgment of a German Court whose judges have sworn 'to obey the laws of Germany',[63] is a German judgment. The

60 See section 419 of the German Civil Code.

61 Under SHAEF Law No. 2, as amended (above note 10), no German Court can, without the consent of Military Government, deal with cases involving money claims 'against the German Government or any legal entity existing under public law'. Actions against the Control Council or the German State would be covered by this provision.

62 Immunity from local jurisdiction may be enjoyed by States which are not sovereign: cf., *e.g.*, *Sullivan* v. *State of Sao Paolo*, Annual Digest, 1941–1942, No. 50 (C.C.A., 2nd), on the one hand and *The Superintendent, Government Soap Factory* v. *Commissioner of Income Tax*, *ibidem*, No. 10 (Supreme Court of Ceylon), on the other hand.

63 This is so where SHAEF Law No. 2 (Art. V) applies.

naturalisation granted by a competent German authority is a valid German naturalisation. Yet it cannot be overlooked that as a result of the division of Germany into four zones, not everything done in Germany is being done by the authority of German law. There exists German law in so far as it comprises law enacted prior to June, 1945, and Control Council legislation. Zonal legislation, whether enacted by Military Government or German authorities, is not German law, but local law. This is of importance for many questions of private international law which may arise outside Germany, and has led to many difficulties inside Germany. The tax liability of an undertaking carrying on business in more than one zone; the effect of the dissolution of companies or the confiscation of property in a particular zone upon property situated in other zones; the treatment of criminals who have committed an offence under the law of one zone and are being apprehended in another zone—these are some of the problems with which German practice is being faced.

By and large the views propounded above seem to be in harmony with the attitude adopted by the Foreign Office in *R.* v. *Bottrill, ex p. Kuechenmeister.*[64] A German national who was being detained here in pursuance of an order made under the Royal Prerogative, applied for a writ of habeas corpus; before the Divisional Court his principal contention was that by virtue of the Declaration of Berlin Germany had ceased to be a State so that, being outside Germany at the relevant date, he became Stateless and could, therefore, not be interned as an enemy alien. The Court felt bound[65] by a certificate of the Secretary of State for Foreign Affairs which said, after referring to the Declaration of Berlin, that

> in consequence of this declaration Germany still exists as a State and German nationality as a nationality, but the Allied Control Commission (sic) are the agency through which the Government of Germany is carried on.

For the purpose of the proceedings it was unnecessary to certify whether Germany still is a sovereign State in the sense of international law. But the Secretary of State did certify that Germany was a State and that the Control Council was its Government.[66]

[64] *International Law Quarterly*, Vol. 1, p. 243, and [1946] 1 All E.R. 635. See also Sir Hartley Shawcross, K.C., M.P., *Hansard*, 1947, 1044.

[65] In *The Arantzazu Mendi*, [1939] A.C. 256, 258, the Secretary of State said in his certificate: 'The question whether the Nationalist Government is to be regarded as that of a foreign sovereign state appears to be a question of law to be answered in the light of the preceding statements and having regard to the particular issue or circumstances with respect to which the question is raised'. Whether a country is a sovereign State or merely a State cannot make any difference in this connection and it is therefore not certain whether in *Kuechenmeister's Case* the Court was really bound by the certificate on a question of law; see generally *Transactions of the Grotius Society*, 29 (1944) 143.

[66] In the same sense an Opinion of the Supreme Finance Court at Munich mentioned by G. A. Zinn, the Minister of Justice of Greater Hesse in his paper, 'Das Staatsrechtliche Problem Deutschlands' (*Sueddeutsche Juristen Zeitung*, II, 1947, 4). In the course of the discussion following this lecture, Dr. Paul Abel and Dr. G. Weis were good enough to draw the author's attention to two interesting decisions of the Austrian Supreme Court and the Court of Appeal in Zurich respectively. In the former case, which related to a question of jurisdiction in a matrimonial cause, it was held without extensive discussion that the German State and, consequently, German nationality, continued to exist: January 24, 1946, *Juristische Blaetter* 68 (1946), 142; see also January 28, 1946, *ibidem*, p. 100. The latter decision gave an affirmative answer to the question whether the Hague Conventions, exempting a German plaintiff from the duty of providing security for costs, were still in force as between Germany and Switzerland: December 1, 1945, *Schweizerische Juristenzeitung*, 1946, 89. also *Deutsche Rechts-Zeitschrift*, 1947, 31. The elaborate decision merits a short summary. The President of Switzerland had supplied the Court with a certificate to the effect that Germany was still a State and that Switzerland had not denounced the applicability of the Hague Conventions in the case of Germany. In the course of an independent investigation the Court found that Germany had not been annexed, because the Allies had not expressed an intention of annexation. Consequently, the Court said, 'the present situation can only be that of belligerent occupation'. But can it be said that Germany 'has lost her Government and, therefore, her character as a State, *i.e.*, a subject of international law'? The Court argues that a change of the régime does not involve the abolition of the State and concludes that 'the occupying powers exercise the authority of the German State by virtue of public international law. . . . In international law this is a novelty. But international law requires development. . . . The present situation in Germany corresponds most closely to a kind of fiduciary administration of the authority of the German State by the occupying powers'. It is doubtful whether the point before the Court could not have been dealt with on a simpler ground: see note 49 above. See also District Court at Hamburg, March 18, 1947, *Monatsschrift fuer Deutsches Recht*, 1947, 39.

VIII

There remains the question whether a state of war continues to exist between this country and Germany. This is a problem the gravity of which will be obvious to every international lawyer. As we realised during the time when 'non-belligerency' was fashionable, there is no halfway house between war and peace. Whichever decision is made, the dilemma is undeniable: If a state of war exists, the rights and duties of neutrals are in force. If there is peace, the belligerents' jurisdiction in prize has come to an end.

In *R.* v. *Bottrill, ex p. Kuechenmeister*,[67] the Secretary of State's certificate said that

> no treaty of peace or declaration of the Allied Powers having been made terminating the state of war with Germany, His Majesty is still in a state of war with Germany.

It is not known whether the war of which the certificate speaks is the war in the international sense or in the sense of municipal law. Before the Court of Appeal it was argued that, even if the applicant was still a German, he was not an enemy, because the war had ended, and that, therefore, he could not be detained under the Royal Prerogative. The Court held in effect that it was concerned

[67] *International Law Quarterly*, Vol. 1, p. 243; [1946] 1 All E.R. 635 (Divisional Court); [1947] 1 K.B. 41 (C.A.).

only with municipal law and that in municipal law a state of war unquestionably existed.[68]

Does it exist in international law? Professor Kelsen suggests[69] that 'Germany having ceased to exist as a State, the status of war has been terminated, because such a status can exist only between belligerent States'. It is difficult to say what is meant by 'belligerent States' in this context. Probably it is suggested that Germany is no longer a sovereign State, and that for this reason she has no capacity of waging war. But the doctrine that full sovereign States alone possess the legal qualification to become belligerents is too rigid. It is well known that belligerency does not necessarily presuppose sovereignty,[70] and even if only full sovereign States could *become* belligents, it would not follow that States which cease to enjoy full sovereignty *cease* to be belligerents.

In the absence of a treaty or declaration of peace or of subjugation there is only one type of termination of war which has to be considered, *viz.* simple cessation of hostilities,[71] a situation when belligerents drift into a state of peace. This can occur only on rare occasions, because the differences between war and peace are too great to allow an informal change at an undefinable moment.[72] Very strong evidence will have to be available before the termination of war in such a way can be affirmed.

In the case of Germany there is an outstanding fact which makes it difficult to think that the war is continuing. The Government of Germany is composed of the British, United States, Soviet and French Commanders-in-Chief. Can the United Kingdom really be at war with a State whose Government included Field Marshal Lord Montgomery and Sir Sholto Douglas, Marshal of the Royal Air Force, and supreme authority over whom has been assumed by this country jointly with its principal Allies?

IX

The following are the principal conclusions which are submitted:

1. Germany is not at present under belligerent occupation in the legal sense of the term.

[68] The case of *Kotzias* v. *Tyser*, [1920] 2 K.B. 69, relates to 'war' in the sense of municipal law. The same applies to Lord Macnaghten's dictum in *Janson* v. *Driefontein Consolidated Mines, Ltd.*, [1902] A.C. 484, 497, that the law 'knows nothing of an intermediate state which is neither the one nor the other, neither peace nor war'.

[69] *L.c.*, p. 519.

[70] Oppenheim (-Lauterpacht), 6th ed., revised, Vol. 2, sections 56, 74 *sqq.*; Wheaton (-Keith), *International Law*, 7th ed. (1944), II, 99.

[71] See, generally, Tansill, 38 (1922) L.Q.R. 26.

[72] See, in particular, Hyde, *International Law*, 2nd ed. (1945), III, 2385 *sqq.*

2. The four Powers have not assumed territorial sovereignty over Germany as a whole or their respective zones of occupation.

3. The four Governments have jointly assumed governmental sovereignty 'with respect to Germany'. They have reserved to themselves supreme authority over Germany's external affairs, but have delegated the exercise of 'supreme authority in Germany' to the four Commanders-in-Chief.

4. Although each of the Commanders-in-Chief is the delegate of the four Governments because he exercises their authority rather than that of his own Government, he is subject not to their control, but to the instructions of his own Government. Nor is he subject to the Control Council, whose authority extends only to matters affecting Germany as a whole.

5. Germany has ceased to be an independent sovereign State in the sense of international law, but continues to be a State.

6. The Government of Germany consists of the Control Council in matters affecting Germany as a whole, and of the four Commanders-in-Chief in their respective zones of occupation. It exercises authority 'in Germany' only.

7. Since the British Commander-in-Chief represents in his zone the Government of Germany, British administration in the British Zone of Occupation, though subject to the instructions of the British Government and, internally, to English law, constitutes a co-ordinated part of the Government of Germany.

8. The state of war (in the sense of international law) between this country and Germany (probably) came to an end on June 5, 1945.

THE PRESENT LEGAL STATUS OF GERMANY

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THE PRESENT LEGAL STATUS OF GERMANY [1]

By F. A. Mann, LL.D. (Lond.)

I

The legal position of Germany, as it has developed since the summer of the year 1945, has so far attracted singularly little attention on the part of jurists. Although it is of a wholly unprecedented character, the only contribution to its clarification which is at present available comes from the pen of Professor Kelsen who, in 1944, published an article showing a remarkable degree of foresight,[2] and in July, 1945, made a brilliant analysis of the situation which had then been created for a month or so.[3]

It is unlikely that the difficulty of competing with Professor Kelsen is the only reason for such silence. There is probably a widespread feeling that the present phase in the evolution of Germany's legal status is a temporary one and therefore not in need of further research.

Such an attitude disregards the fact that, however soon they may be displaced by a permanent arrangement, the conditions which have existed for almost two years are bound to give rise to a host of practical problems. Although the underlying facts may disappear, legal acts performed on their basis may have to be scrutinised in years to come. Thus an arrest made in Germany by an official of Military Government in Germany may lead to an application for a writ of habeas corpus which would involve the question whether Germany or the British Zone of Occupation [4] can be said to be part of the dominions of the Crown.[5] A writ of certiorari directed against a decision of a British Military Government Court in Germany may impose upon a Divisional Court in England the duty of ascertaining whether or no the Military Government Court is a British Court. The effect of naturalisation purporting to confer German nationality and effected by British Military Government in the British Zone

1 The substance of this paper was read on March 5, 1947, before the Grotius Society. Articles which appeared after that date could not be taken into account; this applies in particular to the article by Mr. R. Y. Jennings in *British Year Book of International Law*, 1946.
2 38 (1944), *American Journal of International Law*, 689.
3 39 (1945), *American Journal of International Law*, 518.
4 British Military Government frequently speaks of 'Zone of Control'; see particularly Ordinance No. 4 (*Military Government Gazette, No.* 4, p. 5).
5 If this cannot be said, the writ cannot issue: *Ex p. Anderson* (1861), 3 E. & E. 487; *Re Ning Yi-Ching* (1939–1940), 56 T.L.R. [illegible]

may have to be tested. The validity of the confiscation of British-owned property by Military Government may become an issue in an English Court. The last-mentioned example is perhaps particularly instructive. If a British official in Hamburg wrongfully confiscates the property of a British subject, and an action is brought against the official in an English Court, it would become necessary to decide whether the defendant acted as the agent of a German State or of the British Crown; in the latter event the defence of act of State would not be available [6]; in the former event the defendant could pray in aid the often enunciated, though perhaps assailable, principle that 'every sovereign State is bound to respect the independence of every other sovereign State and the Courts of one country will not sit in judgment on the acts of the Government of another done within its own territory'.[7]

Considerable practical importance for both international and municipal law, therefore, attaches to the determination of Germany's present legal status; even the established rule according to which in these matters municipal courts are to a large extent guided by statements provided by the Executive, renders it in no way futile to clarify the issues.

II

These issues involve an evaluation of Germany's international and constitutional position. In order to avoid confusion it is necessary at the outset to state certain matters with which this paper is not concerned.

When General Eisenhower led his Allied Expeditionary Force into Germany, he had the double capacity of Supreme Commander of the Allied Forces and of Military Governor.[8] Even now the Commander-in-Chief of the British Zone of Occupation exercises the distinct functions of Commander-in-Chief of the British Army of Occupation and of Military Governor. In so far, however, as the armed forces are concerned, they live under their own law. Their position is governed by the familiar rules of international law applicable to armies stationed in foreign territory.[9] They do not form part of the German administration. They are distinct from Military Government. Consequently they are subject neither to German nor

6 *Johnstone* v. *Pedlar*, [1921] 2 A.C. 262, and the authorities there referred to.
7 *Underhill* v. *Hernandez* (1897), 168 U.S. 250; cf. *Princess Paley Olga* v. *Weisz*, [1929] 1 K.B. 718, and numerous other cases discussed in 59 (1943) L.Q.R. 42, 155.
8 See note 15 below.
9 Oppenheim (-Lauterpacht), *International Law*, 5th ed., s. 445.

to Military Government law or courts,[10] but exclusively to their own military, naval or air force law which they took with them. Therefore a Military Court in the British Zone of Occupation is a British Military Court; British naval law lays down the conditions under which a British seaman may be arrested, and so forth.

Military Government, on the other hand, is exercised by (Civilian) Military Government Officers. Their position within the framework of German administration will have to be considered in the course of the following observation. If, and to the extent to which, they exercise the functions of Allied administration in Germany, their position is material to this paper. But the internal law under which they are organised and live should be recognised as a separate issue which is in no way dependent upon their external administrative work in Germany. It is submitted that, whatever may be the legal character of administrative functions discharged by a Military Government Officer, *e.g.* of a confiscation of property effected by him, internally Military Government of each of the Allied nations is an organisation which, like the army, lives under its own national law. Thus, the British Military Government Officer who writes a libellous letter about a colleague is subject to English law.[11] And a British Military Government Court which exercises jurisdiction over a British Military Government Officer [12] is, it is suggested, a British Court, though it may have quite a different character when it exercises jurisdiction over a German or a Swiss. A Maritime Court which, during the war, the Dutch Government was allowed to establish in England, was a Dutch Court.[13] If, during the war, the Dutch Government in London had a Dutchman arrested here, his remedy lay in the Dutch Courts and was determined by Dutch law.[14] Similarly, in its internal aspects and relationships the instrumentality of Government set up by the British in Germany is British. No other result would be consistent

[10] Art. II of Ordinance No. 2 gives Military Government Courts jurisdiction 'over all persons in the occupied territory except persons other than civilians who are subject to military, naval or air force laws'. Military Government Courts have no jurisdiction in matters other than criminal cases. It is quite true that under Art. VII (d) Military Government has the power to transfer to the jurisdiction of Military Government Courts any case or class of cases, but this cannot apply to civil cases. (See Art. II of Ordinance No. 2, below.) Except with the consent of Military Government no German court has jurisdiction in cases against any of the United Nations or its nationals: Law No. 2, Art. VI (SHAEF), as amended by British Zone Ordinance No. 29.

[11] See note in 9 (1946) Mod.L.R. 179 on the case of *Szalatny-Stacho* v. *Fink*, [1946] 1 All E.R. 303 (Henn Collins, J.); [1947] K.B. 1 (C.A.).

[12] See Ordinance No. 5, *Military Government Gazette No.* 4, p. 5.

[13] See the Allied Powers (Maritime Courts) Act, 1941, and Viscount Simon, *Journal of Comparative Legislation*, 3rd series, XXIV (1942) 1; 58 (1942) L.Q.R. 41.

[14] *Re Amand* (*No.* 2), [1942] 1 All E.R. 236.

with sound principle, the requirements of justice and the ideas which British civilian officers in Germany expect to be given effect to.

According to Ordinance No. 5, British civilians in Germany are subject to English Criminal Law; they cannot be tried for an offence against German law (which term, in this context, includes Military Government Law) except with the express authority of Military Government; and they cannot be arrested or detained by British police officers in Germany except in cases where British military police had the powers of arrest or detention of a member of the British armed forces under British Military Law. It is suggested that these provisions give expression to a general principle.

III

When the Western Allies entered Germany, General Eisenhower brought with him the fundamental Proclamation No. 1 which reads as follows [15]:

> Supreme legislative, judicial and executive authority and powers within the occupied territory are vested in me as Supreme Commander of the Allied Forces and as Military Governor, and the Military Government is established to exercise these powers under my direction.

This Proclamation, like all other enactments of General Eisenhower, remained in force within the British Zone after the dissolution of SHAEF,[16] but is, in fact, superseded by three documents which were issued in Berlin on June 5, 1945, and contain what must now be regarded as the paramount laws of Germany.[17]

The first is a 'Declaration' made by the Supreme Commands of the four Allies 'acting by authority of their respective Governments and in the interests of the United Nations'. It recites Germany's unconditional surrender, the absence of any central Government and the fact that it is necessary 'without prejudice

[15] *Military Government Gazette*, Germany, 21st Army Group Area of Control, No. 2, p. 1, Art. I of Proclamation No. 1, issued by Field-Marshal Lord Alexander in Italy read as follows: 'All powers of government and jurisdiction in occupied territories and over the inhabitants and final administrative responsibilities are vested in me, General Officer Commanding the Allied Forces and Military Governor, and in the Allied Military Government of occupied territory established to exercise the powers under my direction'. (See *British Year Book of International Law*, 1944, 155.) There is probably little practical difference between these two Proclamations. The question whether and to what extent they are in conformity with the traditional law relating to belligerent occupancy has now only historical interest.

[16] Ordinance No. 4.

[17] Cmd. 6648. The Declaration of Berlin mentioned in the text was amplified by Proclamation No. 2 concerning 'certain additional requirements imposed on Germany' (*Control Council Gazette No.* 1, p. 8). Under clause 48 any doubt as to the interpretation of the Declaration or regulations issued thereunder will be decided by the Allied Representatives.

to any subsequent decisions that may be taken respecting Germany to make provision for the cessation of any further hostilities on the part of the German armed forces, for the maintenance of order in Germany and for the administration of the country, and to announce the immediate requirements with which Germany must comply'. It then proceeds as follows:

> The Governments of the United Kingdom, the United States of America and the Union of Soviet Socialist Republics, and the Provisional Government of the French Republic, hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any State, municipal or local government or authority. The assumption, for the purpose stated above, of the said authority and power does not effect the annexation of Germany.
>
> The Governments of the United Kingdom, the United States of America and the Union of Soviet Socialist Republics and the Provisional Government of the French Republic will hereafter determine the boundaries of Germany or any part thereof and the status of Germany or of any area at present being part of German territory.

The second document is a 'Statement' according to which

> supreme authority in Germany will be exercised, on instructions from their Governments, by the British, United States, Soviet and French Commanders-in-Chief, each in his own zone of occupation, and also jointly, in matters affecting Germany as a whole. The four Commanders-in-Chief will together constitute the Control Council.

The third document is another Statement establishing the four zones of occupation.[18]

The supreme organ of Germany as a whole, therefore, is the Control Council. It consists of the four Commanders-in-Chief as political heads, and its work is being carried on by a quadripartite organisation, *viz.* the permanent Co-ordinating Committee and the

[18] Special provisions have been made for the area of 'Greater Berlin' which is being occupied by forces of the four Powers. An Inter-Allied Governing Authority, the Allied Kommandatura, has been established 'to direct jointly its administration'. The Allied Kommandatura, therefore, has only administrative but no legislative powers, except in so far as such powers are being delegated to it by the Control Council. The British Sector of Berlin is not included in the British Zone of Occupation (Ordinance No. 4, Art. III) so that British zonal legislation does not apply to it; it would seem to follow, *e.g.*, that Military Government Courts set up in the British Sector are without legal basis. Since the Kommandatura has no original legislative powers, British (and, similarly United States and French) zonal legislation does not apply to Berlin and, Berlin forms part of the Soviet zone, Soviet zonal legislation would appear to apply to Berlin; in practice, however, the administration of such legislation will be impossible without the consent of the Powers occupying the Sectors.

Control Staff comprising thirteen functional Directorates or Divisions (Military, Naval, Air, Transport, Political, Economic, Finance, Reparations, Deliveries and Restitution, Internal Affairs and Communications, Legal, Prisoners of War and Displaced Persons, Manpower)[19] these 'Ministries' have established numerous quadripartite Committees which prepare and assist in the work of the Directorates.

The supreme authority of the Control Council, however, is territorially limited: according to the Statement of Berlin the Commanders-in-Chief exercise 'supreme authority *in* Germany' only. Supreme authority in external matters is reserved to the Allied Governments. It was, therefore, fully consistent when the Agreement with Switzerland concerning the liquidation of German Property in Switzerland (Cmd. 6884) was made by the Allied Governments who 'claimed title to German property in Switzerland by reason of the capitulation of Germany and the exercise of supreme authority in Germany', or when, in the Treaties of Peace with the five satellite countries, provisions are contained which prima facie affect a third party, *i.e.* Germany; thus, it has been agreed that Italian property in Germany should no longer be treated as enemy property and should be restored 'in accordance with measures which will be determined by the Powers in occupation in Germany', that Italy waives most of her and her nationals' claims against Germany and German nationals, and that German assets in Italy are to be transferred in such manner 'as may be determined by those of the Powers occupying Germany which are empowered to dispose of the said assets'.[20]

In so far as enactments of the Control Council have not interfered with his discretion, each Commander-in-Chief as Military Governor is supreme within his zone of occupation. His authority undoubtedly includes legislation, and in the British Zone numerous enactments, called Ordinances, have in fact been issued, though this is to some extent different in the United States Zone where usually German authorities, controlled and guided by the Commander-in-Chief, enact legislation and where, consequently, a different conception has become apparent.[21] But while the Control Council's

[19] Statement of Berlin, clause 3; on the work of the Control Council see Anne Whyte, *Quadrupartite Rule in Berlin*, *International Affairs*, XXIII (1947) 30.

[20] Cmd. 7022. Art. 77 of the Treaty with Italy, Art. 28 of the Treaty with Roumania, Art. 26 of the Treaty with Bulgaria, Art. 30 of the Treaty with Hungary, Art. 28 of the Treaty with Finland.

[21] But see Ordinance No. 41 relating to the Establishment of a Central Legal Office for the British Zone and Ordinance No. 52 relating to the 'Constitution and Functions of the German Economic Administration for the British Zone' which involves a substantial transfer of authority to a German administrative body. As a Special Correspondent of *The Times*, who is known to possess great experience, said (March 4, 1947), 'United States theory is that all power

jurisdiction is unlimited, that of the Commanders-in-Chief is restricted not only *ratione loci*, but also *ratione materiae* : they have no jurisdiction in matters affecting Germany as a whole. Although the Statement of Berlin provides that the Control Council ' will ensure appropriate uniformity of action by the Commanders-in-Chief in their respective zones of occupation ', conflicts are liable to arise. The difficulty results from the ambiguity of the phrase ' matters affecting Germany as a whole ', ' questions intéressant l'ensemble de l'Allemagne '. Does it cover only matters which purport and are intended to affect Germany as a whole, or does it extend to matters the incidental effect of which may be felt in Germany as a whole? The new Municipal Code, *e.g.*, introduced in the British Zone by Ordinance No. 21, is a measure which, notwithstanding its great significance, is clearly of a strictly local character. But the British-American Agreement for the economic fusion of the United States and United Kingdom Zones [22] is a much more serious matter and has provoked some criticism on account of its far-reaching effects upon the other zones of occupation. If the French Commander-in-Chief introduced in his zone the French Civil Code in substitution for the German Civil Code, this would be an unequivocal example of a matter affecting Germany as a whole, although prima facie it would be territorial legislation. Probably the phrase will have to be given a wide interpretation so as to achieve the obviously desired object of uniformity.[23]

IV

The first question to which the preceding summary of the relevant texts gives rise is whether Germany can be said to be under belligerent occupation within the meaning of Articles 42 to 56 of the Hague Regulations.

Arguing before the Court of Appeal, the Attorney-General, Sir Hartley Shawcross, K.C., said: ' The position is that this country is now in belligerent occupation of Germany, with the Army of Occupation in control '.[24] If this were a considered statement of the strictly legal position and represented the true view, the consequences would be grave, for there cannot be any doubt that the

originates with the people. The bizonal agencies are therefore presumed to derive their authority from the consent of the Laender, acting through the Laenderrat, the free and equal association of the three Laender. British Military Government takes the probably more realistic view that the administrations are based on an agreement between two of the occupying powers and derive their authority clearly and squarely from Military Government '.

22 Cmd. 7001.

23 The validity of zonal legislation does not seem to be a matter which is withdrawn from the jurisdiction of German Courts, and it is likely to become an issue in proceedings outside Germany.

24 *R.* v. *Bottrill, ex p. Kuechenmeister*, [1947] 1 K.B. 41, at p. 45.

Allies have not kept, and have not shown the intention to keep, within the limits of the Hague Regulations. This follows not only from the Declaration of Berlin itself by which the Allied Governments rather than the Commanders-in-Chief assumed supreme authority,[25] but also from many subsequent pronouncements and enactments which cannot be supported by traditional law. In the particular case of Germany, it is true, a belligerent occupant would have had rights which prior to the rise of the fascist State were unthinkable, but which may be brought within the letter and spirit of established law. Thus, it may well be said that the repeal of Nazi legislation is permitted by the Hague Regulations, because this is legislation which an occupant is absolutely prevented from respecting.[26] It can also be contended that numerous measures taken for the purpose of demilitarisation, changing the political system of Germany and controlling the economic resources of a highly centralised totalitarian State are required for the maintenance and safety of the occupying Powers and the consummation of their victory. Many other enactments, though startling at first sight, can be justified by the object of restoring and ensuring public order and safety. But even if an interpretation of the Hague Regulations, which is both broad and adapted to the peculiar circumstances, renders a large part of Allied policy in Germany consistent with traditional law, there remains enough that cannot be fitted into its frame. The Declaration of Berlin, supplemented by Proclamation No. 2, as well as the Potsdam Agreement which, though it constitutes an agreement between the heads of government of three occupying Powers, must be considered as a basic document of German law, provide for matters which admittedly are requisite not for completing the victory over Germany, but for ' future peace and security ' [27]; it is difficult to believe that the desired decentralisation of administration in Germany [28] is temporarily necessitated by the interests of military control; to place the City of Koenigsberg and the territories east of the Oder-Neisse line under Soviet and Polish administration respectively [29] far exceeds the limits within which a mere belligerent occupant could act; no belligerent occupant could withdraw diplomatic missions [30] or require ' German authorities and all persons in Germany ' to hand over all gold, silver and platinum,[31] or acquire the right to have placed ' at the unrestricted disposal of

25 The phrase ' supreme authority ' in itself would be inconclusive.

26 Art. 43.

27 Declaration of Berlin, Art. 13.

28 Potsdam Agreement, III, 9.

29 *Ibidem*, VI and IX.

30 Proclamation No. 2, 7 (c).

31 *Ibidem*, clause 15.

the Allied Representatives' the entire German shipping and the whole of the German inland transport system.[32] And if one looks at the legislation of the Control Council, one finds Law No. 4 about the reorganisation of the German judicial system, or Law No. 16 the marriage law, Law No. 36 about administrative courts or Law No. 38 amending section 204 of the German Code of Civil Procedure, and Law No. 46 about the dissolution of Prussia, all of which contain provisions in no way required for ensuring public order and safety. The establishment of new Laender with new Constitutions in the British and American Zones are prominent examples of zonal legislation which point in the same direction.

The Allies' failure to exercise the qualified rights of a belligerent occupant seems to be undeniable. As such it is not really relevant. For to say that, because there is a breach of the law, the law cannot apply, is not an admissible argument. The material question is why the Allies have an internationally recognisable right to behave otherwise than as belligerent occupants.

It would be unsatisfactory to make the answer dependent upon the existence or non-existence of a state of war. Some publicists would probably be inclined to say that, if the war has ended, Germany cannot, and that, if the war continues, she must needs be under belligerent occupation.[33] The latter proposition would involve a *petitio principii*; the former would overlook the fact that the rules relating to military occupation of enemy territory are minimum rules which extend to 'peaceful occupation' by virtue of an armistice or a treaty of peace.[34] Neither unconditional surrender in itself,[35] nor the mere absence of a central government, would prevent those rules from coming into operation—it would obviously lead to questionable results, if by eliminating the occupied country's government, a belligerent could enlarge his powers.[36] Finally, to invoke the conception of reprisals would discredit rather than promote the cause of international law.

Although neither the end of hostilities nor the unconditional surrender nor the disappearance of a central government could, in themselves, have entitled the Allied Governments to adopt an attitude other than that of a belligerent occupant, it is, in the peculiar

[32] *Ibidem*, clauses 28 and 29.
[33] Cf. 'E', *British Year Book of International Law*, 1938, 236; Sir Arnold McNair, *Legal Effects of War* (2nd ed.), pp. 342, 343.
[34] Oppenheim-Lauterpacht, *International Law*, II (6th ed., revised), p. 338, note 6, and p. 339, note 2; Feilchenfeld, *The International Economic Law of Belligerent Occupation* (1942), pp. 6, 108 *sqq*.
[35] Feilchenfeld, *l.c. passim*.
[36] The decision of Clauson, J., in *Bank of Ethiopia* v. *National Bank of Egypt*, [1937] Ch. 513, may be said to indicate a different view, but has singularly failed to arouse the approval of international lawyers and is indeed open to grave criticism. See Sir Arnold McNair, note 33 above.

situation of Germany in 1945, the co-existence of these three facts which provides an internationally recognisable justification for Allied action. The rules relating to belligerent occupation seek to establish a compromise between military necessities and the interests of the inhabitants. They presuppose an interplay between military and civilian authority. They assume the precariousness of the occupant's position which demands such protection as the legitimate needs of the civilian population permit. They are pervaded by the idea that the inhabitants are non-combatants with whose mode of life a belligerent should, and can afford to, interfere as little as possible. They are far removed from the atmosphere of a totalitarian State which forces children no less than the aged into its service. They expect, from both sides, a standard of conduct which becomes impracticable when every single activity of the occupied State expresses a doctrine the eradication of which is the very aim of the war. The unconditional surrender which the Allies had demanded for years had been preceded by the unconditional surrender of all nations allied with Germany except remote Japan, herself on the verge of surrender. It meant that the Allies were free to take all measures necessary to carry out their object. No German Government could have been formed to co-operate with a mere belligerent occupant. If the Allies had assumed only the role of belligerent occupants, they and the United Nations in whose interests they act, could not achieve their war aims, which go far beyond military victory; indeed, they would have failed to fulfil their duty and historic mission. It is the unique character of the circumstances which required and sanctioned a unique solution, a new departure.[37] It is submitted that it is more satisfactory and also in harmony with the spirit of international law as a living law to recognise the existence of a new experiment rather than so to stretch the words of the Hague Regulations that they sanction Allied practice in Germany.

V

Even if the Allies are not merely belligerent occupants, it cannot possibly be contended that any of the four zones of occupation is in any sense a dominion of the occupying Power, that the United Kingdom exercises jurisdiction in the British Zone, that the Commander-in-Chief as Military Governor of the British Zone is a representative of the British Government acting on its behalf, that

[37] Kelsen, 39 (1945) *American Journal of International Law* 518, arrives at the same conclusion and bases it on the absence of a central government and on his theory that Germany is no longer a State and that the war has ended. On the observations in the text see Friedmann, 3 (1940–1941) Mod.L.R. 177; *Grotius Transactions*, 1940, 211, and in other publications.

he or any officer or authority acting under his direction perform acts for which the United Kingdom bears legal, as opposed to political or parliamentary, responsibility. The true position is that the Commander-in-Chief as Military Governor of his Zone is the Delegate of the four Governments; it is by their authority that he exercises zonal jurisdiction the nature of which will have to be considered below.[38]

The four Governments have assumed 'supreme authority with respect to Germany'. This is the overriding pronouncement of the Declaration of Berlin. It follows that no single Government can claim supreme authority with respect to Germany or any part thereof. Such authority as the Commander-in-Chief of any Zone has is derived not from the Declaration of Berlin, but from the Statement of Berlin which deals with the *exercise* of the supreme authority *assumed* by the four Governments under the Declaration of Berlin. Such authority is being exercised jointly by the four Commanders-in-Chief constituting the Control Council in matters affecting Germany as a whole, and by each of them in his zone of occupation. Although the separation of supreme authority and its exercise cannot be regarded as a new development,[39] the four Governments, having assumed supreme authority with respect to Germany as a whole, would normally exercise it themselves. If they allow the Commanders-in-Chief to exercise it in their respective zones, this involves delegation and, in law, renders the delegate a representative of the delegant, *i.e.* the four Governments jointly rather than his own Government. None of the four Powers as such is invested with supreme authority or any divisible part of it. Each of them could have acquired or exercised it only, if, instead of appointing the Commanders-in-Chief, the Statement of Berlin had so provided. Consequently none of the four Governments could confer supreme authority in its zone to an official other than the Commander-in-Chief for the time being.

This conclusion could be nullified only by attributing wider significance than they merit to those words of the Statement according to which the Commanders-in-Chief exercise their authority 'on instructions from their Governments'. In fact, it could be nullified only by assuming that, having jointly assumed supreme authority, the four Governments have divided it zonally not only for the purpose of its exercise, but also for the purpose of divesting themselves of it and allocating to each of them what belongs to them jointly. It is submitted that there is no warrant for

[38] See p. 331.
[39] See, generally, Lauterpacht, *Private Law Sources and Analogies of International Law*, p. 189.

such a view, and that the subjection of the Commander-in-Chief to his Government's instructions is, in law, immaterial to his legal position. The High Commissioner of Palestine is subject to instructions from the British Government. But whatever the true view of the legal status of Palestine [40] may be, it cannot be suggested that the mere power of giving instructions makes Great Britain the Sovereign of Palestine or renders Palestine a part of Great Britain or establishes British jurisdiction in Palestine. The power of giving instructions is not irreconcilable with sovereignty over Palestine being vested in others than the mandatory Power. There is no reason in law why the power of giving instructions in the exercise of supreme authority should not be differentiated from the holding of such authority.

VI

The next question is whether Germany as a whole now so 'belongs' to the four occupant States as to necessitate the inference that they have placed her under their joint sovereignty and established a condominium, a new State the creation of which would entail many intricate problems of State succession.[41]

According to traditional doctrine it would be impossible to give an affirmative answer. The acquisition of territorial sovereignty could be achieved only by one of the five well-defined methods [42] of which subjugation alone would demand consideration. Subjugation would require conquest and annexation. Since the Declaration of Berlin expressly states that 'the assumption, for the purposes stated above, of the said authority and powers does not effect the annexation of Germany', subjugation would clearly have to be negatived.

Yet it is Professor Kelsen's thesis that the four Allies hold Germany under their joint sovereignty. In his view, subjugation is possible without annexation, which is normally understood as presupposing the conqueror's intention to hold the territory permanently for himself, to acquire both the legal and the beneficial title to the country:

> The establishment of territorial sovereignty does not depend on the new sovereign's intention to hold the territory for good. He may have the intention to cede the territory or part of it later on to another State. Such an intention does not prevent

[40] See Oppenheim-Lauterpacht, *International Law*, 5th ed., I, pp. 191, 197 *seq.*
[41] Kelsen, *l.c.*, p. 522, makes a gallant attempt at dealing with the problem of German nationality. But he does not mention the nationality of those Germans who at the material times were outside Germany and who, therefore, could not be said to have acquired the new German nationality which is implicit in Kelsen's remarks, but would be stateless (see 5 (1942) Mod.L.R. 218). Nor does Kelsen deal with any of the other problems of State succession.
[42] Oppenheim-Lauterpacht, 5th ed., I, s. 211.

> the acquisition of sovereignty. . . . If there is a difference at all between formal annexation and placing the territory under the conqueror's sovereignty without the latter's intention to hold it permanently, it is rather a political than a legal one. The rights and duties of the territorial sovereign are the same in both cases.[43]

It must be admitted that there is no *a priori* reason why the categories of methods of acquiring territorial sovereignty should be considered as closed. International law is not so rigid as to exclude new developments. It may well be, therefore that there exists a sixth method of acquiring territorial sovereignty, *viz.* conquest, and an intention to vest only the legal title to the territory in the conqueror who would hold it temporarily, pending further disposition, until he decides to hold it for himself or to retransfer or cede it so that the beneficial title would be in suspense.

A theory on these lines seems to be at the back of Professor Kelsen's mind,[44] but even if it is considered as a possible one, it could not actually apply to the case of Germany. Professor Kelsen is a little dogmatic on this point, and does not attach sufficient weight to the fact that in the last resort the problem must depend on the four Governments' intention as expressed in or to be inferred from the Declaration of Berlin. It is submitted that the text does not support the existence of an intention to acquire sovereignty.

Firstly, one would expect so important a result to have been unequivocally expressed, *e.g.* by the words that the four Powers assume 'all rights and *title*' over Germany.[45] The suppression of such a statement, even if primarily due to political reasons, cannot be without legal significance.

Secondly, it should be remembered that the first document by which the Big Three gave particulars of their intentions with regard to Germany, *i.e.* the Communiqué issued after the Crimean Conference in February, 1945, contained no hint of such an intention. It declared that it was the Allies' 'inflexible purpose' to destroy German militarism and Nazism, but not to 'destroy the people of Germany', that under agreed plans the forces of three Allies [46] would each occupy a separate zone of Germany, and that these plans provided for 'co-ordinated administration and control'. This indicates something less than the acquisition of territorial sovereignty.

Thirdly, it should be noted that by the Declaration of Berlin supreme authority was assumed by the *Governments* of the four

[43] *L.c.*, p. 521.
[44] His formulation is not too precise, but the reference to the legal position of Cuba after the Spanish-American war makes his views clear.
[45] See Art. 99 of the Treaty of Versailles.
[46] The French Government did not participate in the Conference.

nations, neither by the heads of the Allied States nor by the Allied States as such. In so far as the United Kingdom is concerned this wording is a little remarkable, though, in itself, it is certainly inconclusive. If the United Kingdom had desired to assume joint sovereignty over Germany, it would have been the better and perhaps more usual method for the Government of the United Kingdom to act expressly on behalf of the King as the nation's representative in the conduct of foreign affairs. Perhaps it is possible to find in this language an indication of the intention to assume supreme authority, not for the purpose of acquiring State sovereignty, but for the purpose of establishing governmental control.

Fourthly, by the Declaration of Berlin supreme authority was assumed only for three specified purposes, *viz.* 'to make provision for the cessation of any further hostilities on the part of the German armed forces, for the maintence of order in Germany, and for the administration of the country, and to announce the immediate requirements with which Germany must comply'. This was 'without prejudice to any subsequent decisions that may be taken respecting Germany' and, moreover, in another passage, the four Governments state that they 'will hereafter determine the boundaries of Germany or any part thereof and the status of Germany or of any area at present being part of German territory'. These reservations underline the limited and provisional character of Allied intentions, and indicate that, in connection with future decisions, territorial sovereignty may be acquired. If the Allies had already acquired it, those reservations would be superfluous.

Fifthly, the assumption of territorial sovereignty by the Allies would be so retrograde a development that very strong evidence would be required to support it. It is an accepted maxim of international law that belligerent occupancy does not confer or justify the assumption of territorial sovereignty. Even though the Allies are not merely belligerent occupants, they cannot be presumed to revert to a practice which more than a century ago was condemned by international law and discarded in practice.

In Austria, it is true, by virtue of an Inter-Allied Agreement of July 4, 1945, which was in force until June 28, 1946 (Cmd. 6958), an Allied Commission was in operation to *exercise* supreme authority; while its organisation was and, for its limited purposes, still is very similar to the German organisation, the Allies never *assumed* supreme authority in Austria. But it would not be permissible to put forward an *argumentum ex contrario* to the effect that the supreme authority assumed with respect to Germany must mean more than that governmental authority which in Austria was conferred by much less solemn words. The Declaration of Berlin

envisages a long-term arrangement, while the Austrian Agreement intended to set up machinery ' which will operate until the establishment of a freely elected Austrian Government recognised by the Four Powers ', and was therefore of a strictly temporary character. This difference justifies and explains the difference of formulation.

VII

If the four Governments have not acquired sovereignty either in their respective zones of occupation or over Germany as a whole, the question arises whether Germany is still a State. On this point it is necessary to make a distinction.

Germany certainly is not a sovereign State in the accepted sense of the law of nations.[47] It is an essential element of the conception of a sovereign State that the country is under the control of its own independent Government. Germany has no Government which is her own, or which is free from control over its internal administration or its foreign relations; even if it were possible to describe the Allied Control Council as a German Government, it would be subject to instructions given by the four Allied Governments.

Moreover, Germany maintains no relations with the world at large. According to the Statement of Berlin, it is true, ' liaison with the other United Nations Governments chiefly interested will be established through the appointment by such Governments of military missions (which may include civilian members) to the Control Council '.[48] This representation is so limited and one-sided that it is impossible to say that Germany maintains normal foreign relations, particularly since it has also been provided[49] that ' the Allied Representatives will regulate all matters affecting Germany's relations with other countries ', ' will give directions concerning the abrogation, bringing into force, revival or application of any treaty, convention or other international agreement, or any part or provision thereof, to which Germany is or has been a party ', and ' may require the withdrawal from Germany ' of neutral missions. German diplomatic missions have been recalled,[50] and it has been expressly declared that ' in virtue of the unconditional surrender of Germany, and as of the date of such surrender, the diplomatic, consular,

47 Kelsen, *l.c.*, p. 519, says that Germany is not a State. He does not draw the distinction made in the text, but obviously speaks only of statehood in international law, and, generally, is no doubt influenced to a large extent by his own theory of the State and of sovereignty.

48 Paragraph 5.

49 Proclamation No. 2, clauses 5–7. There is no authority for the view that treaties made by a sovereign State automatically lapse, if such State suffers ' une extinction partielle ' and becomes a dependent State.

50 *Ibidem.*

commercial and other relations of the German State with other States have ceased to exist '.

Pace Professor Kelson who would not accept the distinction,[51] it is submitted, however, that though she is not a State within the meaning of international law, Germany still is a State in the general sense of the term. In this connection it is unnecessary to embark upon a discussion which would lead into the depths of jurisprudence. It will be generally agreed that there exists a State, if a body of people, inhabiting a defined territory, is so organised under supreme civil rule and government as to constitute a coherent body politic.[52] These conditions are fulfilled in the case of Germany, provided the Allied Control Council can fairly be regarded as the Government of Germany.

Although the Control Council is not a German Government, it does constitute the Government of Germany, because it is vested with supreme authority in matters affecting Germany as a whole. This governmental authority of the Control Council, it is true, is limited to internal German affairs and is derived from the four Allied Governments which assumed supreme authority and then delegated[53] its exercise in Germany. But this only means that, admittedly and professedly, the Control Council is not a German Government. It is not the root of title, but the actual governmental function and authority that is decisive. Nor can any counter-argument be deduced from that passage of the Declaration of Berlin according to which the Allied Governments will hereafter determine ' the status (statut) of Germany or any area at present being part of German territory '. Whatever the liguistic connection

51 See note 47 and his writing on the State, Sovereignty, etc.

52 In this connection the use of the word ' sovereign ' should be avoided. The German State, if it exists, has of course internal sovereignty. This has no bearing upon the existence or non-existence of external sovereignty which is clearly missing, and without which Germany cannot be a sovereign State in the sense of international law. Kelsen's thesis (*l.c.*, p. 521) that ' Germany certainly has ceased to exist as a sovereign State and since the territory is not under Germany's own sovereignty, it would be no State's if it were not under the sovereignty of the occupant Powers ' is untenable and can only be explained by the fact that he has become a victim of the dangers attending the word ' sovereignty '.

53 This does not preclude the four Allied Governments from exercising supreme authority themselves, if they wish so to do. An example of such exercise of supreme authority is provided by the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis which was made on August 8, 1945, by the Governments of the United States of America, France, the United Kingdom and the U.S.S.R., ' acting in the interests of all the United Nations ' and to which the Charter of the International Military Tribunal is annexed (*American Journal of International Law* (*Official Documents*), 1945, 257). The Nurnberg Tribunal quite correctly said in its judgment: ' The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich had unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories had been recognised by the civilised world '.

between the word 'State' and the word 'status' may be,[54] the argument that because the determination of Germany's status is reserved she cannot at present be regarded as a State, would be too far-fetched to be attractive.

If the above submissions are accepted, it becomes possible to define the present status of Germany a little more precisely.

From the point of view of international law Germany is a dependent State. The circumstances are so unique, however, that any attempt at further classification is bound to fail. The position of the Allied Governments probably is that they exercise what certain publicists have described as co-imperium.[55] While in the case of a condominium a community of States has sovereignty over a territory belonging to them jointly, a co-imperium exists, if several States jointly exercise jurisdiction or governmental functions and powers in territory belonging to another State; the administration by Austria-Hungary of Bosnia and Herzegovina from 1878 to 1908, while the territory belonged to Turkey, is usually given as an example of such co-imperium.

The German State is not a new State.[56] It is the same State as that which existed immediately prior to the Declaration of Berlin. Its identity was preserved, though its status was impaired and reduced and it suffered what Fauchille would describe as an 'extinction partielle'.[57] Nor does it matter that a new Government has taken power. A change of Government, however revolutionary its origin may be, does not involve the formation of a new State.[58]

From the point of view of municipal law the Control Council performs and, indeed, intends to perform the functions of a German Government. It enacts German legislation. The acts of its executive officers are acts of the German State. Thus, by Law No. 5,[59] the German External Property Commission was established 'as an inter-governmental agency of the Control Council'; the law vests

54 See, *e.g.*, the summary given by Dowdall, 39 (1923) L.Q.R. 98.

55 Verdross, *Voelkerrecht*, pp. 128, 132; *Hague Recueil* 30 (1929), 275 *sqq.*, 396. Usually the term 'condominium' is used indiscriminately, but the distinction explained in the text seems logical and attractive. Cf. Art. 81 of the United Nations Charter according to which the administering authority exercising trusteeship 'may be one or more States'. 'Co-imperium' as opposed to 'condominium' is a type of fiduciary administration as explained by the Supreme Court of the U.S. in the decisions relating to the Status of Cuba in the treaty of 1898; see 108 U.S. 109, 120. Such fiduciary administration by England occurred, *e.g.*, in the case of Cyprus which from 1878 to 1914 was 'assigned to England in order to be occupied and administered'. The term seems to be an appropriate description of the present German situation.

56 Cf. Oppenheim-Lauterpacht, *International Law*, 5th ed., I, p. 145, note 1.

57 *Traité de droit international public*, I, pp. 373, 382 *sqq.*

58 *The Government of Spain* v. *Chancery Lane Deposit Co., Ltd.*; *The State of Spain* v. *The Same*, *British Year Book of International Law*, 1944, 195, 196.

59 *Gazette No.* 2, p. 27, and see the amendment of Art. III by Regulation No. 1 in *Gazette No.* 8, p. 160.

in the Commission 'all rights, titles and interests in respect of any property outside Germany' of certain categories of persons Arts. II and III), and confers powers upon it for the purpose of obtaining control over the property (Art. VII). Or by Law No. 9, the property and assets of I. G. Farbenindustrie have been vested in the Control Council and a Committee has been set up to deal with this property. If the External Property Commission exceeds its powers (*e.g.* by misinterpreting the terms 'rights, titles and interests') or if a creditor of I. G. Farbenindustrie claims against the Control Council,[60] the liability of individual members or of the German State is determined by the general German law.[61] And if the Control Council should engage in international trade, it would be the 'German Government' within the meaning of Art. 281 of the Treaty of Versailles and could not claim immunity where this Article is in force.[62]

Further, the Commander-in-Chief in his zone and his zonal authorities and officials are likewise representatives of the Government of Germany. The Commander-in-Chief is not the representative of the occupying State which has appointed him (see above, paragraph V). Nor is he a delegate of the Control Council, because in his zone he does not exercise the (delegated) authority of the Control Council, which is a distinct body exercising authority only in matters affecting Germany as a whole. The Commander-in-Chief, according to the Statement of Berlin, is entrusted with 'supreme authority in Germany . . . in his own zone of occupation'. This formulation is not, as one might think at first sight, contradictory or illogical. It clearly expresses the idea that locally the Commander-in-Chief is the supreme authority in Germany, the supreme representative of the German State, the Government of Germany. If he engages in international trade, Art. 281 of the Treaty of Versailles would apply to him.

The position of the German authorities can only be described in general terms. Broadly speaking, they are organs of the German State. The judgment of a German Court whose judges have sworn 'to obey the laws of Germany',[63] is a German judgment. The

60 See section 419 of the German Civil Code.

61 Under SHAEF Law No. 2, as amended (above note 10), no German Court can, without the consent of Military Government, deal with cases involving money claims 'against the German Government or any legal entity existing under public law'. Actions against the Control Council or the German State would be covered by this provision.

62 Immunity from local jurisdiction may be enjoyed by States which are not sovereign: cf., *e.g.*, *Sullivan* v. *State of Sao Paolo*, Annual Digest, 1941–1942, No. 50 (C.C.A., 2nd), on the one hand and *The Superintendent, Government Soap Factory* v. *Commissioner of Income Tax*, *ibidem*, No. 10 (Supreme Court of Ceylon), on the other hand.

63 This is so where SHAEF Law No. 2 (Art. V) applies.

naturalisation granted by a competent German authority is a valid German naturalisation. Yet it cannot be overlooked that as a result of the division of Germany into four zones, not everything done in Germany is being done by the authority of German law. There exists German law in so far as it comprises law enacted prior to June, 1945, and Control Council legislation. Zonal legislation, whether enacted by Military Government or German authorities, is not German law, but local law. This is of importance for many questions of private international law which may arise outside Germany, and has led to many difficulties inside Germany. The tax liability of an undertaking carrying on business in more than one zone; the effect of the dissolution of companies or the confiscation of property in a particular zone upon property situated in other zones; the treatment of criminals who have committed an offence under the law of one zone and are being apprehended in another zone—these are some of the problems with which German practice is being faced.

By and large the views propounded above seem to be in harmony with the attitude adopted by the Foreign Office in *R.* v. *Bottrill, ex p. Kuechenmeister.*[64] A German national who was being detained here in pursuance of an order made under the Royal Prerogative, applied for a writ of habeas corpus; before the Divisional Court his principal contention was that by virtue of the Declaration of Berlin Germany had ceased to be a State so that, being outside Germany at the relevant date, he became Stateless and could, therefore, not be interned as an enemy alien. The Court felt bound[65] by a certificate of the Secretary of State for Foreign Affairs which said, after referring to the Declaration of Berlin, that

> in consequence of this declaration Germany still exists as a State and German nationality as a nationality, but the Allied Control Commission (sic) are the agency through which the Government of Germany is carried on.

For the purpose of the proceedings it was unnecessary to certify whether Germany still is a sovereign State in the sense of international law. But the Secretary of State did certify that Germany was a State and that the Control Council was its Government.[66]

[64] *International Law Quarterly*, Vol. 1, p. 243, and [1946] 1 All E.R. 635. See also Sir Hartley Shawcross, K.C., M.P., *Hansard*, 1947, 1044.

[65] In *The Arantzazu Mendi*, [1939] A.C. 256, 258, the Secretary of State said in his certificate: 'The question whether the Nationalist Government is to be regarded as that of a foreign sovereign state appears to be a question of law to be answered in the light of the preceding statements and having regard to the particular issue or circumstances with respect to which the question is raised'. Whether a country is a sovereign State or merely a State cannot make any difference in this connection and it is therefore not certain whether in *Kuechenmeister's Case* the Court was really bound by the certificate on a question of law; see generally *Transactions of the Grotius Society*, 29 (1944) 143.

[66] In the same sense an Opinion of the Supreme Finance Court at Munich mentioned by G. A. Zinn, the Minister of Justice of Greater Hesse in his paper, 'Das Staatsrechtliche Problem Deutschlands' (*Sueddeutsche Juristen Zeitung*, II, 1947, 4). In the course of the discussion following this lecture, Dr. Paul Abel and Dr. G. Weis were good enough to draw the author's attention to two interesting decisions of the Austrian Supreme Court and the Court of Appeal in Zurich respectively. In the former case, which related to a question of jurisdiction in a matrimonial cause, it was held without extensive discussion that the German State and, consequently, German nationality, continued to exist: January 24, 1946, *Juristische Blaetter* 68 (1946), 142; see also January 28, 1946, *ibidem*, p. 100. The latter decision gave an affirmative answer to the question whether the Hague Conventions, exempting a German plaintiff from the duty of providing security for costs, were still in force as between Germany and Switzerland: December 1, 1945, *Schweizerische Juristenzeitung*, 1946, 89, also *Deutsche Rechts-Zeitschrift*, 1947, 31. The elaborate decision merits a short summary. The President of Switzerland had supplied the Court with a certificate to the effect that Germany was still a State and that Switzerland had not denounced the applicability of the Hague Conventions in the case of Germany. In the course of an independent investigation the Court found that Germany had not been annexed, because the Allies had not expressed an intention of annexation. Consequently, the Court said, 'the present situation can only be that of belligerent occupation'. But can it be said that Germany 'has lost her Government and, therefore, her character as a State, *i.e.*, a subject of international law'? The Court argues that a change of the régime does not involve the abolition of the State and concludes that 'the occupying powers exercise the authority of the German State by virtue of public international law. . . . In international law this is a novelty. But international law requires development. . . . The present situation in Germany corresponds most closely to a kind of fiduciary administration of the authority of the German State by the occupying powers'. It is doubtful whether the point before the Court could not have been dealt with on a simpler ground: see note 49 above. See also District Court at Hamburg, March 18, 1947, *Monatsschrift fuer Deutsches Recht*, 1947, 39.

VIII

There remains the question whether a state of war continues to exist between this country and Germany. This is a problem the gravity of which will be obvious to every international lawyer. As we realised during the time when 'non-belligerency' was fashionable, there is no halfway house between war and peace. Whichever decision is made, the dilemma is undeniable: If a state of war exists, the rights and duties of neutrals are in force. If there is peace, the belligerents' jurisdiction in prize has come to an end.

In *R.* v. *Bottrill, ex p. Kuechenmeister*,[67] the Secretary of State's certificate said that

> no treaty of peace or declaration of the Allied Powers having been made terminating the state of war with Germany, His Majesty is still in a state of war with Germany.

It is not known whether the war of which the certificate speaks is the war in the international sense or in the sense of municipal law. Before the Court of Appeal it was argued that, even if the applicant was still a German, he was not an enemy, because the war had ended, and that, therefore, he could not be detained under the Royal Prerogative. The Court held in effect that it was concerned

[67] *International Law Quarterly*, Vol. 1, p. 243; [1946] 1 All E.R. 635 (Divisional Court); [1947] 1 K.B. 41 (C.A.).

only with municipal law and that in municipal law a state of war unquestionably existed.[68]

Does it exist in international law? Professor Kelsen suggests[69] that 'Germany having ceased to exist as a State, the status of war has been terminated, because such a status can exist only between belligerent States'. It is difficult to say what is meant by 'belligerent States' in this context. Probably it is suggested that Germany is no longer a sovereign State, and that for this reason she has no capacity of waging war. But the doctrine that full sovereign States alone possess the legal qualification to become belligerents is too rigid. It is well known that belligerency does not necessarily presuppose sovereignty,[70] and even if only full sovereign States could *become* belligents, it would not follow that States which cease to enjoy full sovereignty *cease* to be belligerents.

In the absence of a treaty or declaration of peace or of subjugation there is only one type of termination of war which has to be considered, *viz.* simple cessation of hostilities,[71] a situation when belligerents drift into a state of peace. This can occur only on rare occasions, because the differences between war and peace are too great to allow an informal change at an undefinable moment.[72] Very strong evidence will have to be available before the termination of war in such a way can be affirmed.

In the case of Germany there is an outstanding fact which makes it difficult to think that the war is continuing. The Government of Germany is composed of the British, United States, Soviet and French Commanders-in-Chief. Can the United Kingdom really be at war with a State whose Government included Field Marshal Lord Montgomery and Sir Sholto Douglas, Marshal of the Royal Air Force, and supreme authority over whom has been assumed by this country jointly with its principal Allies?

IX

The following are the principal conclusions which are submitted:

1. Germany is not at present under belligerent occupation in the legal sense of the term.

[68] The case of *Kotzias* v. *Tyser*, [1920] 2 K.B. 69, relates to 'war' in the sense of municipal law. The same applies to Lord Macnaghten's dictum in *Janson* v. *Driefontein Consolidated Mines, Ltd.*, [1902] A.C. 484, 497, that the law 'knows nothing of an intermediate state which is neither the one nor the other, neither peace nor war'.

[69] *L.c.*, p. 519.

[70] Oppenheim (-Lauterpacht), 6th ed., revised, Vol. 2, sections 56, 74 *sqq.*; Wheaton (-Keith), *International Law*, 7th ed. (1944), II, 99.

[71] See, generally, Tansill, 38 (1922) L.Q.R. 26.

[72] See, in particular, Hyde, *International Law*, 2nd ed. (1945), III, 2385 *sqq.*

2. The four Powers have not assumed territorial sovereignty over Germany as a whole or their respective zones of occupation.

3. The four Governments have jointly assumed governmental sovereignty 'with respect to Germany'. They have reserved to themselves supreme authority over Germany's external affairs, but have delegated the exercise of 'supreme authority in Germany' to the four Commanders-in-Chief.

4. Although each of the Commanders-in-Chief is the delegate of the four Governments because he exercises their authority rather than that of his own Government, he is subject not to their control, but to the instructions of his own Government. Nor is he subject to the Control Council, whose authority extends only to matters affecting Germany as a whole.

5. Germany has ceased to be an independent sovereign State in the sense of international law, but continues to be a State.

6. The Government of Germany consists of the Control Council in matters affecting Germany as a whole, and of the four Commanders-in-Chief in their respective zones of occupation. It exercises authority 'in Germany' only.

7. Since the British Commander-in-Chief represents in his zone the Government of Germany, British administration in the British Zone of Occupation, though subject to the instructions of the British Government and, internally, to English law, constitutes a co-ordinated part of the Government of Germany.

8. The state of war (in the sense of international law) between this country and Germany (probably) came to an end on June 5, 1945.

To Mr. Fried
with the author's
compliments

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"SUBJECT," "CITIZEN," "NATIONAL," AND "PERMANENT ALLEGIANCE"

MAXIMILIAN KOESSLER†

So long as nations retain sovereignty, while persons move or engage in transactions across geographic boundaries, the solution of many legal problems will require concepts hinged on the relation of individuals to governing states.[1] The purpose of the ensuing discussion is analysis of the key terms involved in determining the international status of persons: "subject," "citizen," "national," and "permanent allegiance."

Subject versus Citizen

Before the Declaration of Independence, "subject" and "denizen" [2] were the terms most frequently used in the United States in connections where "citizen" would now be the proper word. This was the natural usage in what then were British colonies, endowed with all the trimmings of the British legal order. Even after the Declaration of Independence, some states enacted constitutions designating as "subjects" the status which others identified by the term "inhabitants," while still others used "citizens" and "subjects" indiscriminately.[3] "Subjects" of the United States of America were referred to in the treaties signed by the Continental Congress with France (February 6, 1778) [4] and the Netherlands (October 8, 1782).[5] Although the term "citizen"

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1. It has been predicted that most postwar claims will involve issues of nationality. Hanna, *Nationality and War Claims* (1945) 45 Col. L. Rev. 301.

2. "Denizen," in English law, covered the status of alien-born individuals who had been naturalized by letters-patent of the King. They were English subjects *ex donatione regis*, or *donaisons*, hence "denizen." The right of the Crown to grant letters of denization subsisted after the British Nationality and Status of Aliens Act of 1914 (4 & 5 Geo. V, c. 17). See Case of Fries, 9 Fed. Cas. No. 5126, at 835 (C. C. D. Pa. 1799) (treason) for a discussion, by Circuit Justice Iredell, of the concept of denizen. And see 1 Piggott, Nationality (1907) 90; Chase, American Students' Blackstone (4th ed. 1914) 122; 1 Oppenheim, International Law (Lauterpacht's 5th ed. 1937) 526, n. 3.

3. McGovney, *American Citizenship* (1911) 11 Col. L. Rev. 231, 236–7.

4. 1 Malloy, Treaties (1910) 468, especially Arts. I, IV.

5. 2 Malloy, Treaties (1910) 1233, especially Arts. II, III. This agreement between two nations with republican forms of government referred on the one hand to "the subjects and inhabitants of the United States of America," on the other hand to "the subjects of the said States General of the United Netherlands." However, the Treaty of Paris of Sept. 3, 1783, marking the official termination of the war between this country and Great Britain, contained a discriminating terminology on the point involved. It referred to the "subjects of Great Britain" and to the "citizens of the United States." 1 Malloy, Treaties (1910) 586, Art. VIII.

appears as early as 1777 in the Articles of Confederation,[6] the use of "subject" as a synonym did not become obsolete before the enactment of the Federal Constitution (1787), which referred to citizens exclusively, both in relation to the United States and to the several states.[7] This change of usage resulted from an emerging political philosophy which abhorred any tinge of colonialism.[8] The term "subject" was brushed aside as a leftover from the feudal law,[9] where it referred to the vassals of a lord, bound by the duty of allegiance to respect him as their master.[10] However, one of the ingredients of the feudal theory of subjection survived: the concept of allegiance still forms a tautological

6. Art. IV, Articles of Confederation (precursor of the privileges and immunities clause of the present federal constitution), quoted by Commager (ed.), Documents of American History (2d ed. 1940) 111. See also Radin, *The Authenticated Full Faith and Credit Clause: Its History* (1944) 39 Ill. L. Rev. 1.

Concerning the privileges and immunities of citizens of the United States as distinguished from privileges and immunities of citizens of the several states, see Newman, *A Forgotten Right of United States Citizenship* (1945) 39 Ill. L. Rev. 367. And see Slaughter-House Cases, 16 Wall. 36 (U. S. 1873); Hague v. CIO, 307 U. S. 496 (1939); Edwards v. California, 314 U. S. 160 (1941), discussed by Rostow, *The Japanese American Cases—A Disaster* (1945) 54 Yale L. J. 489, 500, who cites Meyers, *Federal Privileges and Immunities: Application to Ingress and Egress* (1944) 29 Corn. L. Q. 489.

7. McGovney, *loc. cit. supra* note 3.

8. The general temper of that epoch is characterized by the perhaps apocryphal story of the plan to abandon English as the American language. Mencken, The American Language (1st ed. 1919) 36.

9. The Revolutionary attitude toward the feudal law is exemplified by the statement "Since the promulgation of Christianity, the two great systems of tyranny . . . are the *canon* and the *feudal* law. . . ." Hollis (ed.), The True Sentiment of America (1768) 111, 113, ascribed to John Adams by Warren, History of the American Bar (1911) 334.

The tendency to abandon feudal concepts in this field was not limited to America. The terms *citoyen* and *cittadino*, respectively constituting the French and Italian versions of "citizen," supplanted "subject" in those countries, with the qualifications discussed *infra* note 45 and related text. In Austria, *Untertan*, or subject, was replaced by *Staatsbuerger* (citizen). However, the phrase *sujets mixtes* (mixed subjects), at least in European technical usage, and probably also in this country, is the preferred designation of the status of persons with multiple nationality.

10. "Allegiance is the tie, or *ligamen*, which binds the subject to the king, in return for that protection which the king affords the subject . . . the name and the form are derived to us from our Gothic ancestors." I Bl. Comm. *366. See also Calvin's Case, 7 Co. 1a, 5a (77 Eng. R. 377, 382, K. B. 1608) where it is said with reference to Glanville that "as between the Sovereign and subject there is *duplex et reciprocum ligamen; quia sicut subditus regi tenetur ad obedientiam, ita rex subdito tenetur ad protectionem.* . . ." Follows then the famous passage: "Therefore it is truly said that *protectio trahit subjectionem, et subjectio protectionem.*" And see Dicey, A Digest of the Law of England with Reference to the Conflict of Laws (Keith's 5th ed. 1932) 896–7; Brierly, The Law of Nations (3d ed. 1942) 3–4. The orthodox theory of the reciprocal connection between allegiance and protection, although of doubtful reasoning, is vindicated in the otherwise startling doctrine enunciated in the treason case against "Lord Haw-Haw," Rex v. Joyce, 62 T. L. R. 57 (Ct. Cr. App. 1945); (1946) 46 Col. L. Rev. 319.

part [11] of our statutory definition of nationality.[12]

The term "citizen" supplanted "subject" in this country and others, although not in Great Britain,[13] by a process of lexicographic delineation. Even in the period immediately before the American Revolution, there was no such difference in connotation between "subject" and "citizen" as would predicate reserving the status of "citizen" to the people of a republic and "subject" to those under the sovereignty of a monarch. Distinguished French lawyers, writing during the *ancien régime*, seem to have found nothing preposterous in their occasional use of the term "citizen" with regard to the most absolutistically ruled subjects of the King of France.[14] During the middle ages, "citizens" lived in towns, and so were members of communities exempted from the then almost ubiquitous feudal system. [15] But, when the medieval system of government was replaced by the principles of territorial state sovereignty, "subject" and "citizen" came to be used as synonyms, at least by such eminent writers as Bodin [16] and Grotius,[17] although

11. In Baumgartner v. United States, 322 U. S. 665, 673 (1944), Mr. Justice Frankfurter, *per curiam*, after citing Schneiderman v. United States, 320 U. S. 118 (1943), and similar cases, announced:

> "Allegiance to this government and its laws, is a compendious phrase to describe those political and legal institutions that are the enduring features of American political society. We are here dealing with a test expressing a broad conception —a breadth appropriate to the nature of the subject matter, being nothing less than the bonds that tie Americans together in devotion to a common fealty."

And see note 68 *infra*.

12. Sec. 101(a) of the Nationality Act of 1940, 54 STAT. 1137, 8 U. S. C. § 501 (1940) reads: "The term 'national' means a person owing permanent allegiance to a state." Sec. 101 (b) elucidates: "The term 'national of the United States' means (1) a citizen of the United States, or (2) a person who, though not a citizen of the United States, owes permanent allegiance to the United States. It does not include an alien." The final phrase is cryptic. If "alien" means one who is not a national, the phrase is surplusage. If "alien" means one who is not a citizen, it is inconsistent with the fact that the Act establishes the possibility of nationality without citizenship. Quaere: Is there any third way of understanding that phrase?

13. " 'British subject' is an inclusive term, denoting all subjects of His Britannic Majesty, to whatever part of the Commonwealth they may belong. The term 'citizen' is applied to a person in respect of whom a particular member of the Commonwealth claims jurisdiction." STEWART, TREATY RELATIONS OF THE BRITISH COMMONWEALTH OF NATIONS (1939) 384.

14. See, *e.g.*, 3 D'AGUESSEAU, OEUVRES (1762) 117, 129, 130, 138. Pothier used the term *citoyen* even with regard to the class of serfs. 5/I. DUPIN (ed.), POTHIER, OEUVRES (TRAITÉ DES PERSONNES) (1831) Tit. 1, § 4.

15. CARR, THE GENERAL PRINCIPLES OF THE LAW OF CORPORATIONS (1905) 146, reprinted in 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY (1909) 161, 180, and McGovney, *supra* note 3, at 235.

16. BODIN, LES SIX LIVRES DE LA RÉPUBLIQUE (1576) Bk. 1, c. 6, conceives a *citoyen* as a free *sujet* under another person's sovereignty.

17. GROTIUS, DE JURE BELLI AC PACIS (1646), *e.g.*, in Bk. 2, c. 25, indifferently uses *civis* or citizen and *subditus* or subject, as designations of the same status. Similarly, HOBBES, ELEMENTA PHILOSOPHICA DE CIVE (1646) c. 5, § 6, says (writer's translation), "Each citizen, as well as each dependent corporation, is in relation to the holder of the sovereignty called a subject." Even a century later, VATTEL, LE DROIT DES GENS (1758) Bk. 2, c. 8, § 107; Bk. 3, c. 1, § 8 used "citizen" and "subject" as synonyms.

others, including Pufendorf [18] and Spinoza,[19] obviously inspired by a passage in Aristotle's *Politics*,[20] attempted to re-establish a distinction between those two terms.

Spinoza's abstractions remained without direct practical effect, until a passage in Rousseau's *Social Contract*, adapting and somewhat coloring, but not quoting, Spinoza's proposition,[21] provided the stimulus which made "citizens" the terminology for a self-governing people.[22] An English version of the passage reads, "With regard to the associates, they take collectively the name of *People*, and are individually called *Citizens*, as participating in the sovereign power, and *Subjects*, as subjected to the laws of the state." [23]

NATIONALITY AS THE STATUS OF BELONGING TO A STATE

"Nationality" is a young word. Its matrix, the French *nationalité*, appeared for the first time in the 1835 edition of the *Dictionnaire de l'Académie Française*.[24] It has at least two accepted denotations: (1) the status of belonging to a state; (2) the quality of membership in an ethnological group.[25] Nationality in the sense of belonging to a state

18. PUFENDORF, ELEMENTORUM JURISPRUDENTIAE UNIVERSALIS LIBRI DUO (1672) Bk. 1, Def. 3, § 9; Def. 8, § 4; Def. 12, § 6; DE JURE NATURAE ET GENTIUM LIBRI OCTO (1698) Bk. 7, c. 2, § 20; DE OFFICIO HOMINIS ET CIVIS JUXTA LEGEM NATURALEM LIBRI DUO (1673) Bk. 2, c. 6, § 13.

19. SPINOZA, TRACTATUS POLITICUS (1677) c. 3, said: ". . . [W]e call men Citizens, as far as they enjoy by the civil law all the advantages of the commonwealth, and Subjects, as far as they are bound to obey its ordinances or laws." 1 ELWES (tr.), THE CHIEF WORKS OF BENEDICT DE SPINOZA (rev. ed. 1900) 301.

20. "A citizen . . . is defined by nothing else so much as by the right to participate in judicial functions and in office . . . the definition of a citizen that we have given applies especially to citizenship in a democracy; under other forms of government it may hold good, but will not necessarily do so." ARISTOTLE, POLITICS (Rackham's trans. 1932) Bk. 3, c. 1. For the impact of this definition upon the DEFENSOR PACIS (1324), see 2 SCOTT, LAW, THE STATE AND THE INTERNATIONAL COMMUNITY (1939) 190. But *cf.* critical comments by Bodin, *loc. cit. supra* note 16.

21. According to Dreyfus-Brisac's note, in his edition of ROUSSEAU'S CONTRAT SOCIAL (1896) 354, 356.

22. JELLINEK, ALLGEMEINE STAATSLEHRE (1900) 366–7.

23. CONTRAT SOCIAL Bk. I, c. 6, contained in ANDREWS, IDEAL EMPIRES AND REPUBLICS (1901).

24. COGORDAN, LA NATIONALITÉ (1879) 2, n. 1; 3 LITTRÉ, DICTIONNAIRE DE LA LANGUE FRANÇAISE (1869) 692.

25. This duality of meaning derives from the parent-word, "nation." Contrast the answers to the question "What is a Nation?" The French Revolutionist, Abbé Sieyès, as quoted by SULZBACH, NATIONAL CONSCIOUSNESS (1943) 63, answered, "A body of associates living under one common law and represented by the same legislature." He obviously pointed to statehood. RENAN, QU'EST-CE QU'UNE NATION? (1882) 27, suggested (writer's

is a primarily legal concept, the existence of which in a certain person will be determined by such extrinsic tests as the applicable law prescribes. Nationality, ethnologically, while essentially a sociological conception with political implications,[26] may occasionally have a palpable legal effect.[27] Determination of ethnological nationality in a given case may be a touchy matter, since the standards are not universally recognized and are, at least partly, subjective rather than objective.

In its legal sense, the term "national" is often used as a general designation irrespective of whether the status of belonging to a state is examined with a view to certain rights and (or) duties under international law, or is looked upon as the basis of rights and duties, effective within the domestic sphere of a state. However, the trend is to reserve the term "national" for the designation of that status by virtue

translation): "The existence of a nation is a daily plebiscite." He certainly meant nation in the ethnological sense of the word, as did Shakespeare's Shylock: "He hates our sacred nation." THE MERCHANT OF VENICE, Act I, Scene 3. See GUÉRARD, THE FRANCE OF TOMORROW (1942) 33. In general see HAYES, ESSAYS ON NATIONALISM (1926) 4, 5; 2 WRIGHT, A STUDY OF WAR (1942) 996–7.

26. "Nationalism" may perhaps be described as the dynamic trend of a nation in the ethnological sense of the word to become a nation in the sense of independent statehood. See MACIVER, SOCIETY, A TEXTBOOK OF SOCIOLOGY (1937) 155. Compare Mancini's lecture, *Nationality as the Foundation of the Law of Nations* (1851), reprinted, MARGHIERI (ed.), DIRITTO INTERNAZIONALE DI P. S. MANCINI (1873) 1, with Lord Acton, *Nationality* (July, 1862) HOME AND FOREIGN REVIEW, reprinted, FIGGIS and LAURENCE (eds.), JOHN EMERICH DALBERG-ACTON (Lord Acton), THE HISTORY OF FREEDOM AND OTHER ESSAYS (1922) 270. See HAYES, ESSAYS ON NATIONALISM (1926) 4, 5; CARR, CONDITIONS OF PEACE (1942) 64–5; Hula, *National Self-Determination Reconsidered* (1943) 10 SOC. RES. 1; Friedmann, *The Disintegration of European Civilization and the Future of International Law* (1938) 2 MOD. L. REV. 194, 197.

27. Under Art. XIX of the Austrian constitution of 1867 [HUGELMANN, DAS NATIONALITÄTENRECHT DES ALTEN ÖSTERREICH (1934) 81–2], ethnological groups in the Austrian Empire were supposed to receive equal treatment in certain specified respects. Under Art. 80 of the peace treaty of St. Germain, the right of option among the succession-states of the Austrian monarchy depended to a measurable extent upon the ethnological quality of the optant. Again, in the case of modern forced exchange of populations, the "nationality" of a person carries radical legal consequences. According to Art. 2 of the German decree on the "Protectorate" of Bohemia and Moravia, March 16, 1939, the inhabitants of the Protectorate, who theretofore were Czechoslovakian citizens, became citizens of the Reich, if they were of German "nationality," otherwise citizens of the Protectorate. See JONES and MYERS (eds.), DOCUMENTS ON AMERICAN FOREIGN RELATIONS (1939) 299–301. By the German-Hungarian Protocol of August 20, 1940 (1941) 24 ZEITSCHRIFT FÜR VÖLKERRECHT 456, Hungary "acknowledged" the claim of the Reich to exercise protection over those inhabitants of Hungary, irrespective of their citizenship, who belonged to the German *Volksgruppe* (ethnological group) and were recognized as such by the leader of the German *Volksbund*, a Germano-nationalistic organization in Hungary. On this "agreement" and similar German treaties for the protection of the folk group (Volksgruppenschutzverträge), see MURPHY, NATIONAL SOCIALISM [U. S. Dep't of State, Pub. No. 1864 (1943)] 140–4. For the related topic of minority-treaties, see 1 SCHWARZENBERGER, INTERNATIONAL LAW (1945) 111–2 *et seq.*

of which a person, internationally, belongs to a certain state, and to speak of "citizenship" when the local status referred to is one of domestic rather than international law.

CITIZENSHIP VERSUS NATIONALITY

"Citizenship," in modern usage, is not a synonym of nationality or a term generally used for the status of belonging to a state, but means specifically the possession by the person under consideration, of the highest or at least of a certain higher category of political rights and (or) duties, established by the nation's or state's constitution. This conception, substantially amounting to a modern revival of an Aristotelian formulation, is defined by Moore: "Citizenship, strictly speaking, is a term of municipal law, and denotes the possession within the particular state of full civil and political rights, subject to special disqualifications, such as minority or sex. The conditions on which citizenship is acquired are regulated by municipal law." [28] However, since the list of the concrete rights and duties, that constitute "citizenship" in this specific sense, differs according to the country in question, it has also been said, ". . . [T]here is no universal definition of citizenship when citizenship ceases to be synonymous with nationality." [29]

Applications of "citizen" in the narrower sense, along the lines of Moore's definition, have occurred chiefly in connections where domestic status of nationals vary. The Mexican law apparently considers such special disqualifications as are inherent in minority as inconsistent with the concept of citizenship as distinguished from nationality.[30] In the United States there has been an issue as to whether the so-called "alien-vote," which for a time existed in certain states,[31] was tanta-

28. 3 MOORE, DIGEST OF INTERNATIONAL LAW (1906) 273. See 2 HYDE, INTERNATIONAL LAW (rev. ed. 1945) 1066–7, n. 6; 3 HACKWORTH, DIGEST OF INTERNATIONAL LAW (1942) 1; Harvard Research in International Law, *Nationality: Responsibility of States: Territorial Waters* (1929) 23 AM. J. INT. L. SPEC. SUPP. 24; Flournoy, *Nationality* (1933) 11 ENCYC. SOC. SCIENCES 249; GETTYS, THE LAW OF CITIZENSHIP IN THE UNITED STATES (1934) 3; McGovney, *Our Non-Citizen Nationals, Who Are They?* in RADIN AND KIDD, LEGAL ESSAYS (1935) 323; Wilson, *Gradations of Citizenship* (1939) 33 AM. J. INT. L. 146. An outstanding German monograph on the modern distinction between nationality and citizenship (Staatsangehörigkeit and Bürgerrecht) is LESSING, DAS RECHT DER STAATSANGEHÖRIGKEIT UND DIE ABERKENNUNG DER STAATSANGEHÖRIGKEIT ZU STRAF- UND SICHERUNGZWECKEN (1937). A pertinent discussion by a South-American scholar is: 2 MORENO QUINTANA, EL SISTEMA INTERNACIONAL AMERICANO (1926) 314–5.

29. McGovney, *supra* note 3, at 235.

30. Law of Nationality and Naturalisation of January 19, 1934, repealing the *lex Vallarta* of May 28, 1886. See Koessler, *The Reformed Mexican Nationality Law* (1943) 5 LA. L. REV. 420. In order to be a citizen, a Mexican must be over twenty-one years of age if not married and over eighteen years if married, with the further requirement, in either case, that he possesses the means of a decent living.

31. The alien vote existed as late as 1926 in Arkansas. See Aylsworth, *The Passing of Alien Suffrage* (1931) 25 AM. POL. SCI. REV. 114. For a contemporary survey of the various

mount to the possession of citizenship, a question which seems to have been finally decided in the negative.[32] A similar dispute arose with regard to a somewhat reverse proposition, namely, that since women may be citizens in this country, they should as such be entitled to the suffrage. While the Supreme Court of the United States decided in the negative,[33] an amendment to the federal constitution satisfied the claim of the feminists.[34]

The first precedent in the line of republican constitutions which used the term "citizen" substantially in the narrower sense, seems to be represented by the French constitutions of 1793, 1795 and 1799,[35] which, in contrast to the French constitution of 1791, distinguished between a *Français* generally and a *citoyen*. The latter term designated the Frenchman who possessed the qualifications prerequisite to the vote.[36] Citizenship in this sense was also mentioned in the original Code Napoléon.[37]

For a time during the nineteenth century, there was a tendency in France to distinguish between two kinds of naturalization. *Grande naturalisation* conferred the legal position of a *citoyen; petite naturalisation* made the former alien a Frenchman without the right to vote.[38] In this country, limited distinctions exist between the status of born and naturalized citizens in that only a born citizen may become President [39] or Vice-President [40] of the United States, while a naturalized citizen may expatriate himself by extended residence abroad.[41]

state laws on the alien vote see BERNHEIM, THE HISTORY OF THE LAW OF ALIENS FROM THE STANDPOINT OF COMPARATIVE JURISPRUDENCE (1885) 150.

32. Lanz v. Randall, 14 Fed. Cas. 1131, No. 8,080 (C. C. D. Minn. 1876); Minneapolis v. Reum, 56 Fed. 576 (C. C. A. 8th, 1893); Petition of Sproule, 19 F. Supp. 995 (S. D. Calif. 1937).

33. Minor v. Happersett, 21 Wall. 162 (U. S. 1874).

34. U. S. CONST. AMEND. XIX.

35. Printed in DUGUIT and MONNIER, LES CONSTITUTIONS ET LES PRINCIPALES LOIS POLITIQUES DE LA FRANCE DEPUIS 1789 (3rd ed. 1915) 66, 78, 118.

36. McGovney, *French Nationality Laws Imposing Nationality at Birth* (1911) 5 AM. J. INT. L. 325, 327.

37. Prior to the amendment of 1889, Art. 8 referred simply to a Frenchman (Français), while Art. 7 referred to the capacity of a citizen (qualité de citoyen), and provided that the exercise of civil rights should be independent therefrom. In view of the influence of French law upon the legal developments in Latin-American countries, it is fair to assume that constitutional provisions in those countries which employ the term "citizen" in a narrower sense may be traced to the French constitutions. See 2 MORENO QUINTANA, *loc. cit. supra* note 28.

38. Ancel, *The French Law of Naturalization* (1936) 10 TULANE L. REV. 231, 234.

39. U. S. CONST., Art. II, § 1.

40. U. S. CONST. AMEND. XII.

41. The Nationality Act of 1940 provides for loss of nationality by naturalized Americans who reside abroad for extended periods under specified conditions. 54 STAT. 1170, 8 U. S. C. §§ 804 *et seq.* (1940). The previous statute created only a rebuttable presumption of voluntary expatriation. 34 STAT. 1228–9 (1907), 8 U. S. C. § 17 (1940). Such loss of

Hitler's Secretary of State for the Interior, Stuckart, suggested as an anti-Semitic device the Nuremberg laws, which established a gradation among those who were simply *Staatsangehörigen* or nationals of the *Reich*, and those who possessed the racial qualities which were required for the possession of the privileged status of *Reichsbürger* or citizen of the *Reich*.[42] These laws substantially duplicated the sixteenth-century Spanish enactments, instigated by the Inquisition, which made the possession of Christian blood a requirement for the status of *civis pleni juris* or full citizenship.[43]

CITIZEN VERSUS COLONIAL SUBJECT; THE AMERICAN NON-CITIZEN NATIONAL

An application of political ethics not to be confounded with racial discrimination is a gradation of nationality employed by a country standing on a high level of civilization, which attaches to its sovereignty a territory with a backward population, to avoid granting the latter a full share in the self-government of the former.[44] For this reason

nationality should not be confused with revocation of nationality under 8 U. S. C. § 738, where naturalization was fraudulently procured. By § 738c, removal abroad within five years of naturalization is prima facie evidence of a lack of intention, at the time of naturalization, to become a permanent citizen of the United States.

The constitutionality of the current provisions for loss of nationality has not been passed on by the courts, and earlier cases [see, *e.g.*, Luria v. United States, 231 U. S. 9 (1913)] dealing with cancellation of naturalization under older laws are not necessarily in point. For a discussion of the problem, as it stood before the Nationality Act of 1940, see Flournoy, *Revision of Nationality Laws of the United States* (1940) 34 AM. J. INT. L. 36, 40–5. And see Osborn v. United States Bank, 9 Wheat. 738, 827 (U. S. 1824); United States v. Wong Kim Ark, 169 U. S. 649, 703 (1898); Johannessen v. United States, 225 U. S. 227, 241 (1912); Schneiderman v. United States, 320 U. S. 118 (1943); Baumgartner v. United States, 322 U. S. 665 (1944); Knauer v. United States, 66 Sup. Ct. 1304 (U. S. 1946). Related discussions are: Preuss, *Denaturalization on the Ground of Disloyalty* (1942) 36 AM. POL. SCI. REV. 701; CABLE, LOSS OF CITIZENSHIP: DENATURALIZATION: THE ALIEN IN WAR-TIME (1943) 12; Stein, *Revocation of Citizenship—"Denaturalization"* (1944) 28 MARQ. L. REV. 59; Burke, *Interpretative Results of Wartime Denaturalization Proceedings* (1944) 18 SO. CALIF. L. REV. 110; Note, *Recent Trends in Denaturalization in the United States and Abroad* (1944) 44 COL. L. REV. 736; Balch, *Denaturalization Based on Disloyalty and Disbelief in Constitutional Principles* (1945) 29 MINN. L. REV. 405.

42. Garner, *Recent German Nationality Legislation* (1936) 30 AM. J. INT. L. 96; JANOWSKY and FAGEN, INTERNATIONAL ASPECTS OF GERMAN RACIAL POLICIES (1937) 142–3; Loewenstein, *Government and Politics in Germany* in SHOTWELL, GOVERNMENTS OF CONTINENTAL EUROPE (1940) 514. For a Nazi view, see Koellreutter, *Grundfragen unserer Volks- und Staatsgestaltung* in MEIER-BENNECKENSTEIN, SCHRIFTENDER DEUTSCHEN HOCHSCHULE FÜR POLITIK (1936).

43. De Los Rios, *Spain in the Epoch of American Colonization* in GRIFFIN (ed.), CONCERNING LATIN AMERICAN CULTURE (1940) 25, 40–2.

44. The rationale is that the backward people must be "educated" to the art of self government. Kelsen in one of his earlier works considered this gradation inconsistent with democracy, as then defined by him. KELSEN, ALLGEMEINE STAATSLEHRE (1925) 161.

France and Italy distinguish between a citizen and a colonial subject.[45]

The Nationality Act of 1940 sanctions the distinction between American nationality, including American citizenship, and American nationality, devoid of American citizenship.[46] In terms of this statute, American citizenship embraces in addition to those privileges and (or) duties which are inherent in American nationality, such as the possibility of diplomatic protection by the United States [47] and the body of obligations customarily referred to as "permanent allegiance," [48] the existence of those rights which only a "citizen" enjoys under the Constitution. However, even recent legislation occasionally uses the term "citizen" in a wider sense embracing any American national.[49]

Filipinos, before the independence of the Philippine Islands, are the most conspicuous recent specimen of American non-citizen nationals.[50] It has been suggested that before a special statute made American Indians citizens, they should have been considered non-citizen nationals of the United States.[51] Lawyers who at an earlier period of American

45. See 1 NIBOYET, TRAITÉ DE DROIT INTERNATIONAL PRIVÉ FRANÇAIS (1938) 93; 2 *id.* at 2, 3; ROYAL INSTITUTE OF INTERNATIONAL AFFAIRS, THE FRENCH COLONIAL EMPIRE (Information Dep't Paper No. 25, London, 1940) 27; ROYAL INSTITUTE OF INTERNATIONAL AFFAIRS, THE ITALIAN COLONIAL EMPIRE (Information Dep't Paper No. 27, London, 1940) 55; Valeriani v. Amuna Bekri Sichera, 1935–1937 ANNUAL DIG. AND REP. OF PUB. INT. L. CAS. 283 (1935). The discussion of an analogous phenomenon in the Kingdom of the Netherlands by François, *Le Problème des Apatrides* (1935) 53 (III) ACADÉMIE DE DROIT INTERNATIONAL, RECEUIL DES COURS 283, 290, is probably antiquated, in view of later developments.

46. See note 12 *supra*. In MIXED CLAIMS COMMISSION, UNITED STATES AND GERMANY, ADMINISTRATIVE DECISIONS AND OPINIONS TO JUNE 30, 1925, Administrative Decision No. V (October 31, 1924) 193, the following rule was laid down:

> "The term 'American national' means a person wheresoever domiciled owing permanent allegiance to the United States of America, and embraces not only citizens of the United States but Indians and members of other aboriginal tribes or native peoples of the United States and of its territories and possessions."

See also HACKWORTH, *loc. cit. supra* note 28.

47. However, "protection may always be extended or withheld at the discretion of the Secretary of State." Jessup, *Revising Our Nationality Laws* (1934) 28 AM. J. INT. L. 104, 107.

48. But see discussion *infra*, p. 67 *et seq.*

49. "Citizen," as used by the Neutrality Act of 1939, included "any individual owing allegiance to the United States. . . ." 54 STAT. 12 (1939), 22 U. S. C. § 456 (1940). Within the meaning of this particular statute Filipinos, otherwise non-citizen nationals, were "citizens." See Suspine v. Compania Transatlantica Centro-Americana, S. A., 37 F. Supp. 268, 270–2, 1941 Am. Mar. Cas. 356, 360–2 (S. D. N. Y. 1941).

50. See HAYDEN, THE PHILIPPINES: A STUDY IN NATIONAL DEVELOPMENT (1942) 771, especially (on the Tydings-McDuffie Act) 807–8. For a recent judicial discussion of the status of the Philippine Islands in general, see Hooven & Allison Co. v. Evatt, 324 U. S. 652, 668, 677 (1945).

Need for new applications of this category may arise with regard to the native population of permanent bases acquired by this country following World War II.

51. McGovney, *op. cit. supra* note 28, at 344. See also the Administrative Decision No. V of the Mixed Claims Commission, United States and Germany, note 46 *supra*. But *cf. Ex parte* Crow Dog, 109 U. S. 556 (1883); Elk v. Wilkins, 112 U. S. 94 (1884); discussion by PRIEST, UNCLE SAM'S STEPCHILDREN (1942) 198.

history denied to native-born free Negroes the status of American citizens [52] but nevertheless held them eligible for the diplomatic protection of this country [53] seem not to have realized the technical possibility of construing their status as that of non-citizen nationals, although, with regard to declarant aliens or aliens with First Papers,[54] Secretary of State Marcy, in his note of September 26, 1853 concerning the Koszta affair, appears to have raised the point that a person may be a national of the United States, without being an American citizen.[55] The prevailing opinion seems to be that declarant aliens are not American nationals, since it has been settled that they are not within this country's diplomatic protection,[56] and those anomalies which previously singled out their conditions from that of other aliens no longer exist.

PERMANENT ALLEGIANCE

Reference to a duty of "permanent allegiance" is not a happy way of defining nationality in the sense of a status under international law. Such a definition envisions a specific distinction between the "permanent" relation of nationality and the "temporary allegiance" [57] required of resident aliens,[58] and so keeps alive the largely-abandoned maxim "once a subject, always a subject." [59] However, a national can now generally expatriate himself, at least by naturalization in another

52. Dred Scott v. Sandford, 19 How. 393 (U. S. 1857). And see SWISHER, AMERICAN CONSTITUTIONAL DEVELOPMENT (1943) 247.

53. See the paraphrase of Secretary of State Marcy's instruction of January 18, 1855 in the case of Lucien Mateo v. Mexico, 3 MOORE, INTERNATIONAL ARBITRATIONS 2461–2. That paraphrase reads in part: ". . . [I]n the view of high judicial authority, . . . persons of African descent could not be regarded as entitled to full rights of citizenship . . . Although . . . the consul could not certify that they were citizens of the United States, . . . he might certify that they were born in the United States and were free, and that the government would regard it as its duty to protect them, if wronged by a foreign government. . . ."

54. Koessler, *Rights and Duties of Declarant Aliens* (1942) 91 U. OF PA. L. REV. 321.

55. *Id.* at 324–5.

56. *Id.* at 328–9.

57. See Carlisle v. United States, 16 Wall. 147, 154 (U. S. 1872). *Cf.* Perkins v. Elg, 307 U. S. 325, 334 (1939), where "expatriation" is explained as "the voluntary renunciation or abandonment of nationality and allegiance," thus apparently separating "allegiance" from "nationality."

58. See De Jager v. Attorney General of Natal (1907) A. C. 326, critically discussed by Baty's note in (1908) 33 THE LAW MAGAZINE AND REVIEW 214. And see Rex v. Joyce, 62 T. L. R. 57 (Ct. Cr. App. 1945), (1946) 46 COL. L. REV. 319, where the doctrine of allegiance was applied to an alien possessing a fraudulently obtained passport issued by the sovereign claiming allegiance.

59. England abandoned the feudal concept of indissoluble subjection by legislation in 1870. See 1 WESTLAKE, INTERNATIONAL LAW (2d ed. 1910) 206, where it is said that "permanent allegiance" as a technical term for the tie between a state and its nationals does not mean that the tie cannot be severed, but "that so long as it continues it exists whether the national is for the moment in the territory of his state or abroad."

state;[60] most states make such denationalization automatic.[61] While the existence or absence of such a provision is generally a matter of domestic law, the so-called American doctrine of voluntary expatriation in effect postulates loss of original nationality on naturalization elsewhere as a principle of international law.[62] The American doctrine was substantially, if not in terms, enforced by the Franco-Turkish Mixed Arbitral Tribunal after the First World War,[63] although not granted acceptance at the Hague Conference of 1930.[64]

The term "allegiance" in itself has become archaic. In its feudal setting, "allegiance" denoted a reciprocal correlation of interconnected rights and duties. But in modern states the obligations of the national to the nation are unconditional, rather than contingent upon the state's compliance with corresponding duties. Only in isolated instances do modern writers consider the relation between the national and his state as contractual.[65] Furthermore, the national of a state is generally not entitled to claim protection as a matter of right. The state has a right, as against other states, to exercise diplomatic protection in his behalf, but not a duty toward the national.[66] In this country

60. See Flournoy, *Naturalization and Expatriation* (1922) 31 YALE L. J. 702, 848; Flournoy, *Expatriation* (1931) 6 ENCYC. SOC. SCIENCES 3; TSIANG, THE QUESTION OF EXPATRIATION IN AMERICA PRIOR TO 1907 (1942). See also Mackenzie v. Hare, 239 U. S. 299, 307 *et. seq.* (1915); *Ex parte* Griffin, 237 Fed. 445, 453 (N. D. N. Y. 1916).

61. See, *e.g.*, Section 401(a) of the Nationality Act of 1940, 54 STAT. 1168, 8 U. S. C. § 801(a) (1940). This is sometimes called the "French principle," because its first statutory enactment was contained in the French Constitution of September 3, 1791, Tit. II, Art. 6, § 1, reprinted, DUGUIT and MONNIER, *op. cit. supra* note 35, at 6.

62. This American policy found the most forceful legislative expression in the Expatriation Act of July 27, 1868; 15 STAT. 223 (1868), 8 U. S. C. § 800 (1940), partly quoted by Koessler, *op. cit. supra* note 30, at 427, n. 36. This Act has not been abrogated by the Nationality Act of 1940. For the recent repeal of a similar provision in the Mexican legislation, see *ibid.*

63. Apostolidis v. Turkish Government, 8 Recueil des Décisions des Tribunaux Arbitraux Mixtes 373, 375, ANNUAL DIGEST OF PUBLIC INTERNATIONAL LAW CASES (1927–1928) 312 (1928).

64. Flournoy, *Nationality Convention, Protocols and Recommendations Adopted by the First Conference on the Codification of International Law* (1930) 24 AM. J. INT. L. 467.

65. See, *e.g.*, 1 WEISS, DROIT INTERNATIONAL PRIVÉ (2d ed. 1907) 8. *Contra* (and in this expressing the general view): 1 NIBOYET, TRAITÉ DE DROIT INTERNATIONAL PRIVÉ FRANÇAIS (1938) 122–3.

66. See 1 OPPENHEIM, INTERNATIONAL LAW (Lauterpacht's 5th ed. 1937) 505. An apparent exception is Article 112 of the German Weimar constitution which reads "All German citizens within and without the boundaries of the Reich have the right of protection by the Reich against foreign countries." MCBAIN and ROGERS, THE NEW CONSTITUTIONS OF EUROPE (1922) 198. This provision was literally taken from Art. 3, § 6 of the previous (Imperial) German constitution, discussed in 1 LABAND, DAS STAATSRECHT DES DEUTSCHEN REICHES (5th ed. 1911) 152, and n. 2. Laband believed that Art. 3, § 6 of the Imperial Constitution was a right, technically, of the German citizen against the Reich. See Slaughter-House Cases, 16 Wall. 36, 79 (U. S. 1873). But see ISAY, DIE STAATSANGEHOERIGKEIT JURISTISCHER PERSONEN (1907) 37.

a definite practice has been established that in certain typical situations diplomatic protection should normally be denied in spite of the American nationality of the applicant.[67]

Deprived of one of the essential ingredients which went into its feudal meaning, namely of the subject's *right* to claim his lord's protection, and also *minus* the whole general background of the one-time feudal society, "permanent allegiance," referred to in a modern definition of nationality, cannot be more than a synonym for "nationality."[68] It has become a mystic concept which dims, instead of clarifying, definitions. Most people have a working knowledge of the meaning of "nationality," but even scholars are at a loss to explain "allegiance." Characteristically, the Harvard Research on Nationality suggests defining nationality as "the status of a natural person who is attached to the state by the tie of allegiance,"[69] and then muddies the picture by saying:

> "No attempt is made in this draft to define the meaning of allegiance. It may be observed, however, that the 'tie of allegiance' is a term in general use to denote the sum of the obligations of a natural person to the state to which he belongs. The draft itself does not spell out these obligations, since they are quite different in different societies."[70]

It seems desirable to eliminate "allegiance" from any technical use and redefine "nationality" in plain words meaning the status of belonging to a state for certain purposes of international law.[71]

THE DUAL NATURE OF SOVEREIGNTY

Another source of confusion in defining nationality is the concept that state sovereignty is personal as well as territorial.[72] The right-duty

67. SECKLER-HUDSON, STATELESSNESS (1934) 17.

68. Under this assumption, definitions of nationality, which explain the latter by referring to "permanent allegiance," are tautological, as suggested *supra*, p. 000. But they are, in this respect, not worse than some definitions not referring to "allegiance." See, *e.g.*, 1 PIGGOTT, NATIONALITY (1907) 6, and 1 OPPENHEIM, INTERNATIONAL LAW (Lauterpacht's 5th ed. 1937) 511.

69. Article 1(a) of the Harvard Draft (1929) 23 AM. J. INT. L., SPEC. SUPP. 13.

70. *Id.* at 23.

71. In passages where the English text of the Treaty of Versailles referred to "nationals," the French one did not always use the term *nationaux*, but sometimes synonymously employed the word *resortissants* which means "belonging to." Therefore ISAY, DIE PRIVATEN RECHTE UND INTERESSEN IM FRIEDENSVERTRAG (3rd ed. 1923) 46–7, challenged the correctness of the occasional attempt to distinguish, in the application of the Treaty of Versailles, between *nationaux* and *resortissants*. *Cf.* SCHWARZENBERGER, *op. cit. supra* note 27, at 155–6.

72. 1 ZITELMANN, INTERNATIONALES PRIVATRECHT (1912) 82. Of course, these two kinds of jurisdiction are merged into one in the case of nationals residing within the national territory.

relationship between states, with respect to a national of one, is a function of the personal sovereignty of the state over its nationals. However, the distinctions between personal and territorial sovereignty are flexible and not clearly delineated,[73] so that this concept does not contribute to defining nationality as an aggregate of specified rights and (or) duties.

Nationality as a Formal Category

Nationality is a formal legal category, consisting in a person's status of belonging to a state.[74] Error seems inherent in any attempt to define the conception by reference to "allegiance" or to any other specific right-duty relationship,[75] inasmuch as rights and (or) duties which are attributed to the status of national,[76] whether by international or domestic law, will vary geographically and temporally. The concept of nationality is no more than a formal frame, surrounding a picture of changeable character.[77]

For example, the most conspicuous international function of the nationality concept is the right of a state to extend protection to its nationals abroad.[78] In exceptional cases a state is permitted to exercise protection over individuals not its nationals,[79] or, conversely, it may be excluded from the right to protect those of its nationals who belong

73. How far a given state intends to stretch its personal jurisdiction or sovereignty with regard to nationals abroad is a matter of domestic law; whether its respective claim is justified, in relation to other states, is a matter of international law. Illustrative of the claim of the American domestic law concerning the extent of the personal sovereignty of this country over citizens abroad are Cook v. Tait, 265 U. S. 47 (1924) (taxability), and Blackmer v. United States, 284 U. S. 421 (1932) (subpoena served abroad).

74. McGovney, *supra* note 3, at 232–3. See also 2 Calvo, Le Droit International (5th ed. 1896) 24; Burckhardt, Die Organisation der Rechtsgemeinschaft (1927) 361–2.

75. This is one of the errors in Lessing's definition of nationality as the relation between an individual and a state by virtue of which the latter is entitled to protect the former abroad, and is bound, in addition, to permit his residence on its territory, with the resulting prohibition of banishment of a national from the whole national territory and the resulting duty of receiving back a national deported from a foreign state. Lessing, *op. cit. supra* note 28, at 148.

76. Nationality, as distinguished from citizenship (in the narrower sense referred to *supra*, p. 63.) though primarily a conception with an international function, is often borrowed as a convenient attachment for certain strictly domestic purposes, as in statutory provisions making nationality a requirement for admission to certain public offices or quasi-public or even private professions. Lessing, *op. cit. supra* note 28, at 148, n. 2, in this connection speaks of an "accessory" (*i.e.*, "secondary") effect of nationality.

77. Jellinek, System der Subjektiven Oeffentlichen Rechte (1905) 117.

78. "One of the most important and delicate of all international relationships, recognized immemorially as a responsibility of government, has to do with the protection of the just rights of a country's own nationals when those nationals are in another country." Hines v. Davidowitz, 312 U. S. 52, 64 (1941).

79. 1 Oppenheim, International Law (Lauterpacht's 5th ed. 1937) 514 *et seq.*

to a particular category.[80] But normally it is only through the intervention of the state of their nationality that private persons are able to obtain redress against injuries inflicted upon them by a foreign state in violation of international law.[81] However, there is a trend toward permitting private persons to raise international claims without the intermediate agency of a state.[82] Materialization of this proposition would render the institution of diplomatic protection obsolete, if not formally abolished. But nationality would remain a living concept as long as any legal consequences are attached to the status of belonging to a state.

As a further example, it is sometimes said—either unconditionally or with qualifications—that a country is prevented by international law from forcing military service upon nationals of another state. The validity of this statement appears doubtful, in view of numerous and important precedents to the contrary.[83] Assuming a restatement to harmonize international law with the practice of states which draft certain categories of aliens, nationality, though no longer implying the national's exemption from military service for a foreign state, would retain conceptual utility.

International Function of the Nationality Status versus Its Domestic Determination

According to the principle of the *domaine réservé*, the acquisition and loss of nationality is determined by domestic rather than by international law.[84] Of the numerous complications [85] that may result from

80. It is unlikely that any international tribunal would have recognized a Nazi claim of an alleged right to protect German Jews abroad.

81. Said the Permanent Court of International Justice in its judgment of February 28, 1939 concerning the *Panevezys-Saldutiskis Railway* case: ". . . [I]n the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection. . . ." P. C. I. J., Ser. A/B, No. 76 at 16 (1939).

82. See Hudson, The Permanent Court of International Justice, 1920–1942 (1943) 395–6; Wright, Human Rights and the World Order (1943) 16; Bisschop, *Nationality in International Law* (1943) 37 Am. J. Int. L. 320. However, Article 34 of the new Statute of the International Court of Justice, in part provides: "Only States may be parties in cases before the Court."

83. Koessler, *Rights and Duties of Declarant Aliens* (1942) 91 U. of Pa. L. Rev. 321, 329; Fitzhugh and Hyde, *The Drafting of Neutral Aliens by the United States* (1942) 36 Am. J. Int. L. 369; Delaney, *The Alien Enemy and the Draft* (1943) 12 Brooklyn L. Rev. 91; Koessler, *The Reformed Mexican Nationality Law* (1943) 5 La. L. Rev. 420, 428–9.

84. 3 Hackworth, Digest of International Law (1942) 1. A frequently cited dictum is the advisory opinion of the Permanent Court of International Justice, February 7, 1923, in the case of the Tunis-Morocco Nationality, P.C.I.J., Ser. B, No. 4 at 24 (1923). See also Question concerning the Acquisition of Polish Nationality, P.C.I.J., Ser. B, No. 7 at 16 (1923) and G. L. Solis v. The United Mexican States, U. S. Mex. Claims Comm., Oct. 3, 1928, Docket No. 3245, reprinted in (1929) 23 Am. J.Int. L. 454. See also the

this principle, the most important revolve around the "man without a country" [86] and the *sujet mixte*.[87] These anomalies are frequently caused by divergence between the *jus soli* and the *jus sanguinis*,[88] concurrently applicable to the same individual, pursuant to the principle of reserved domain, which in this respect would seem to become self-defeating. For example, an individual born in a country applying *jus sanguinis*, of parents who are nationals of a country applying *jus soli* would acquire neither the nationality of his country of birth nor the nationality of his parents, but be born as a stateless person. Conversely, an individual born in a *jus soli* country of parents who are nationals of a *jus sanguinis* country would be born with the *embarras de richesse* of possessing two nationalities. Double nationality may also be caused by the divergence between two domestic laws one of which

substantially identical statement in United States v. Wong Kim Ark, 169 U. S. 649,668 (1898), referred to in Perkins v. Elg, 307 U. S. 325, 329 (1939) and discussed by Hyde, *The Supreme Court of the United States as an Expositor of International Law* (1937) 18 THE BRITISH YEARBOOK OF INTERNATIONAL LAW 1, 13–4. Heinrich Triepel suggested that international law by *Blankettsaetze* assigned the determination of the nationality status to the several domestic laws. TRIEPEL, VÖLKERRECHT UND LANDESRECHT (1899) 220. Farther reaching than those attempts at harmonizing the domestic domain principle with the general system of international law, rather challenging the validity of the rule itself, is the following statement by an otherwise unorthodox British writer: "It is sometimes, indeed, laid down by authors in general terms, that a state has a right to say who are its subjects; but it is hardly necessary to demonstrate the absurdity of such proposition. The common sense of nations obviously limits the power of a nation to seize at pleasure the subjects of other states as its own." BATY, THE CANONS OF INTERNATIONAL LAW (1930) 356.

85. Kunz, *Zum Problem der doppelten Staatsangehoerigkeit* (1928) 2 ZEITSCHRIFT FUER OSTRECHT 401, 405, imagines the hypothetical case of an Austrian law declaring all Chinese, resident in Peking, to be Austrian nationals. WILLIAMS, ASPECTS OF MODERN INTERNATIONAL LAW (1939) 82, submits that "A state could hardly be entitled to enforce in its own courts as against its neighbours some peculiar doctrine of nationality which was in conflict with the general and customary rules of international intercourse. For example, an attempt by an English king in the seventeenth century to give effect to the traditional claim of the English monarchy to the Crown of France. . . ." Triepel, *Internationale Regelung der Staatsangehoerigkeit*, 1/1 (1929) ZEITSCHRIFT FUER AUSLAENDISCHES OEFFENTLICHES RECHT UND VOELKERRECHT 184, 196, suggests that it would have been against international law should Great Britain, in her Naturalization Act of 1870, have conferred British nationality upon all persons speaking English as their native tongue. He even ventures to guess that such legislation would have been followed by a declaration of war by the United States.

86. "Man without a country," as used here, means a technically stateless person, and not one in the situation of the central figure in Edward E. Hale's story "The Man Without A Country" (1863). See SECKLER-HUDSON, STATELESSNESS (1934).

87. See note 9 *supra* and SCHWARZENBERGER, *op. cit. supra* note 27, at 151.

88. Roughly described, *jus soli* attaches the nationality status to the fact of being born in a country, *jus sanguinis* to the fact of being the son of a national. In this country, and some others, a mixed system prevails, as appears from an inspection of the Nationality Act of 1940, 54 STAT. 1137 (1940), 8 U. S. C. § 501.

still sticks to the old rule "once a subject always a subject," while the naturalization practice of the other disregards that maxim.[89]

The *domaine réservé* principle in matters of nationality law also implies that whenever, by international custom or treaty, certain rights or duties of a state with regard to a given individual flow from the latter's condition of belonging to that state, a different category of people will be included according to whether the domestic rules concerning acquisition of nationality are governed by the *jus soli* or the *jus sanguinis*.

Qualifications of the domestic domain principle have been created by way of bilateral as well as multilateral treaties.[90] The existence of qualifications other than treaty provisions, has been alleged by various sources, but always in a vague language which does not represent a workable rule of practice.[91] Disregard of the principle in cases where its practical consequences would be absurd could be technically justified by recourse to the public policy clause or *ordre public* exception, which appears to be applicable beyond the sphere of the conflict of laws in the domestic field.[92] A similar line of approach is suggested by those who point to the legal reaction against abuses of the right of sovereignty.[93]

Domestic courts in several cases have shown readiness to disregard

89. SCHWARZENBERGER, *op. cit. supra* note 27, at 155.

90. Outstanding among the latter is the *Convention on Certain Questions Relating to the Conflict of Nationality Laws* (1930) 24 AM. J. INT. L., SPEC. SUPP. 192. However, only a few states, not including this country, have declared their adherence to it.

91. See memoranda submitted by various governments (especially the United States, Germany, and the Netherlands) in preparation of the Hague Conference of 1930, *supra* note 90, 1 LEAGUE OF NATIONS, BASES OF DISCUSSION DRAWN UP FOR THE CONFERENCE: NATIONALITY (1929) 16–8, and the pertinent statement in 23 AM. J. INT. L., SPEC. SUPP. (1929) 24, 26. But *cf.* 1 NIBOYET, TRAITÉ DE DROIT INTERNATIONAL PRIVÉ FRANÇAIS (1938) 101; 1 PIGGOTT, NATIONALITY (1907) 4; McGovney, *op. cit. supra* note 3, at 233. 2 HYDE, INTERNATIONAL LAW (2d rev. ed. 1945) 1066 seems to suggest a test of reasonableness of the domestic law. In the same sense: KUNZ, THE VIENNA SCHOOL AND INTERNATIONAL LAW (1934) 31.

Recently, an author even went to the extreme of submitting a rather casuistic list of types of attachment which, he believes, are the factual substratum required by customary international law, as a condition for the validity of domestic law conferring the respective state's nationality upon a given category of individuals. Lessing, *Los Momentos De Conexión En El Derecho De Nacionalidad*,(1942) 5 REVISTA ARGENTINA DE DERECHO INTERNACIONAL (2d Ser.) 150 *et seq.*, 316 *et seq.*

92. On the applicability of the public policy clause in the field of international law, see 4 NEUMAYER, INTERNATIONALES VERWALTUNGSRECHT (1936) 233; Lipstein, *Conflict of Laws Before International Tribunals* (1943) 29 TRANSACTIONS OF THE GROTIUS SOCIETY 51, 63.

93. Politis, *Le Problème des Limitations de la Souveraineté et la Théorie de l'Abus de Droits dans les Rapports Internationaux* (1925) 1 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 1, 77. The German Civil Code, § 226, very narrowly defined as an abuse of a right, an exercise thereof which is done for the mere purpose of doing harm to another person.

a foreign municipal law under which a self-exile, in spite of his own declared intention to the contrary,[94] would retain his nationality of origin.[95] Moreover, there have been cases where an individual, who had lost the nationality of a state under the latter's domestic law, was by a foreign court still considered its national.[96] Similarly, the Expatriation Act of the United States of July 27, 1868,[97] seems to announce the principle that this country will disregard any foreign nationality law under which an individual, irrespective of his American naturalization, still retains his nationality of origin.[98]

A general exception to the rule of domestic domain in matters of nationality law is represented by the prohibition of compulsory naturalization, which, according to textual authority, forms part of the prevailing customary international law. This prohibition means that no state is allowed to confer its nationality upon the nationals of another state, unless the individual himself asks for such a change of his status.[99] Reference may, in this connection, be made to the protests which the United States in several instances raised against Latin-American laws that had introduced automatic naturalization of certain classes of

94. For a comparative law study of the problem of renunciation or waiver of nationality see, OTTEN, DER VERSICHT AUF DIE STAATSANGEHÖRIGKEIT (1934). "Expatriation" has been defined as "the voluntary renunciation or abandonment of nationality and allegiance." Perkins v. Elg, 307 U. S. 325, 334 (1939). However, the normal usage of "expatriation" would seem to indicate loss of original nationality through naturalization in another country.

95. See Caignet v. Pettit, 2 Dallas (234 U. S. 1795); 3 MOORE, DIGEST OF INTERNATIONAL LAW (1906) 554; Rajdberg v. Lewi, Supreme Court of Poland, 1st Div., Oct. 31, 1927, ANNUAL DIGEST OF PUBLIC INTERNATIONAL LAW CASES (1927–8) 314–5; and the Argentine cases referred to by LESSING, *op. cit. supra* note 91, at 328, n. 93. But see Kurzinsky v. Kurzinsky, Tribunal Civil de la Seine, July 5, 1939, 34 REVUE CRITIQUE DE DROIT INTERNATIONAL 450, 452.

96. See the opinion of Phillimore, L. J., in *Ex parte* Weber (1916) 1 K. B. 280, 282–3 and of Earl Loreburn in the same case, House of Lords (1916) 1 A. C. 421, 425–6.

97. 15 STAT. 223 (1868), 8 U. S. C. § 800 (1940).

98. See *supra* note 62. In Elk v. Wilkins, 112 U. S. 94, 107 (1884) it was said that the Act of July 27, 1868, affirmed "the right of every man to expatriate himself from one country." The Act was intended primarily as a declaration of the position of this Government toward foreign-born persons who should have obtained naturalization as citizens of the United States, and thus made it clear that this Government no longer recognized the ancient feudal principle of indissoluble allegiance. Its language, however, appears to be broad enough to include not only the reverse picture, (*i.e.*, an American who obtains naturalization in foreign country) but also the case of a person expatriating himself from his country of origin, without simultaneously acquiring a new nationality, but rather with a view to becoming stateless. But no authority exists covering such an extended application of the Expatriation Act of 1868.

99. See BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD (1915) 535; 2 HYDE, INTERNATIONAL LAW (2d rev. ed. 1945) 1088. But *cf.* LESSING, *op. cit. supra* note 28, at 193.

aliens. The affected countries gradually eliminated those offensive statutory provisions.[100]

Customary international law has not yet developed an exception with regard to the population of a territory voluntarily or involuntarily changing its sovereign.[101] This general proposition is probably true also in the case of individuals who at the time of a foreign annexation of their home territory are residing abroad and thereupon remain abroad permanently.[102] The right of option, though often granted in treaties concerning cession of territories, is not established by customary international law.[103]

No exception from the principle of reserved domain is represented by the fact that, especially in modern times, the practice of enemy alien treatment very often disregards formal nationality, by generally exempting from that treatment certain categories of technically enemy, but really friendly, aliens,[104] and on the other hand subjecting to an extraordinary regime categories of nationals who are not trusted with regard to their loyalty.[105] In these cases it is not the domestic domain principle, but nationality itself which ceases to be a dominant factor.

CONCLUSION

This article has attempted to show that "nationality," as a conception of international law, does not mean any specific rights and (or)

100. The reformed nationality law of Mexico of January 19, 1934, dropped the provision contained in Art. 1/10 of the former law (*Lex Vallarta* of May 28, 1886). Under the latter, aliens acquiring real estate in Mexico and failing to make a declaration of retention of their nationality of origin, thereby automatically became Mexican nationals. See Koessler, *op. cit. supra* note 30, at 425.

101. But *cf.* Gettys, *The Effect of Changes of Sovereignty on Nationality* (1927) 21 AM. J. INT. L. 268 and FEILCHENFELD, PUBLIC DEBTS AND STATE SUCCESSION (1931).

102. But there is authority to the contrary. ". . . [I]t is a rule of international law that when a territory passes to a new sovereign it must, in case of doubt, be assumed that those inhabitants of the territory in question, who are not domiciled . . . there do not acquire the new nationality." Peinitsch v. German State (Germany-Jugoslavia Mixed Arbitral Tribunal, 1922) ANNUAL DIGEST OF PUBLIC INTERNATIONAL LAW CASES (1923–4) 227–8. And see HOFMANNSTHAL AND BERGER, INTERNATIONAL PROTECTION OF AXIS VICTIMS AND REVINDICATION OF THEIR PROPERTY RIGHTS (1942) 3; Hofmannsthal, *Austro-Hungarians* (1942) 36 AM. J. INT. L. 292, 293.

103. General discussions of the right of option are: 1 KUNZ, DIE VÖLKLERRECHTLICHE OPTION (1925); 2 *id.* (1928); WAMBAUGH, A MONOGRAPH ON PLEBISCITES (1920).

104. Koessler, *Enemy Alien Internment* (1942) 57 POL. SCI. Q. 98.

105. See Comment, *Alien Enemies and Japanese Americans* (1942) 51 YALE L. J. 1316, 1336. The restrictions applied to suspect ethnological or other groups of citizens should not be confused with punitive measures taken against "Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country, bent on hostile acts. . . ." United States *ex rel.* Quirin v. Cox (the *Haupt* case), 317 U. S. 1, 37–8 (1942).

duties, nor an aggregate of either or of both,[106] but is a purely formal proposition. It designates the status of a person's belonging to a state, with particular reference to international relations among states concerning this person. In a world divided into states it is the function of the nationality concept to apportion the global population among the several nations.[107] Each state has both a territorial and a personal sovereignty.[108] The "nationals" of a state are those who are under its personal sovereignty, that is attached to it irrespective of the fact of their physical presence at a given moment.[109] In a world without states (or if the "Cardenas doctrine" [110] were accepted as established international law) the nationality conception would lose its above-defined present meaning.[111] But a realistically anticipated future world will not be able to do away with the legal concept of nationality, though it may be expected that specific rules of international law will assume paramount importance among the factors determining the acquisition or loss of nationality, thus depriving the domestic domain principle of its present controlling importance. It would also seem to be no unreasonable guess that domicile rather than birthplace or filiation may in the future be the favorite fact of attachment for the acquisition of nationality.[112]

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106. But see the curious proposition in ISAY, DIE STAATSANGEHÖRIGKEIT DER JURISTICHEN PERSONEN (1907) 42, 44–5, substantially submitting that none of the specific criteria of nationality, usually ascribed to that concept, is characteristic or essential to it, but that their aggregate constitutes the essence of nationality.

107. BURCHARDT, DIE ORGANISATION DER RECHTSGEMEINSCHAFT (1927) 361–2; STEIGER, DIE STAATSANGEHOERIGKEIT DER HANDELSGHELISCHAFTEN (1931) 13–4.

108. "If one resolves the dualism of law and the state, if one recognizes the state as legal order, then the so-called elements of the state—territory and population—appear as the territorial and personal spheres of validity of the national legal order." Kelsen, *The Pure Theory of Law and Analytical Jurisprudence* (1941) 55 HARV. L. REV. 44, 65–6.

109. ISAY, *op. cit. supra* note 106, at 40.

110. According to Brown, *Cardenas Doctrine* (1940) 34 AM. J. INT. L. 300, a special commission of Mexican lawyers has thus formulated that doctrine:

> "Nationality, as a personal status, has full juridical effect only within local jurisdiction. It lacks extraterritoriality, and its effects are therefore suspended in every instance when a moral and physical person moves to foreign soil. . . ."

111. This idea seems to underlie the cryptic question which Dante ascribes to the ghost of Charles Martel: "Now, say, would it be worth for man on earth, if he were not a citizen?" VIII DIVINA COMEDIA, 115–6, referred to by SPANJAARD, NEDERLANDSCHE DIPLOMATIEKE EN ANDERE BESCHERMING IN DEN VREEMDE 1795–1924 (1925) xvi.

112. See Baty, *The Interconnection of Nationality and Domicile*, WIGMORE CELEBRATION, LEGAL ESSAYS (1919) 187, 197–8, reprinted (1919) 13 ILL. L. REV. 363, 373–4; BATY, THE CANONS OF INTERNATIONAL LAW (1930) 367.

STEPS TO DEFINE OFFENSES AGAINST THE LAW OF NATIONS

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Steps To Define Offenses Against the Law of Nations

Robert A. Bloom

PROBLEMS OF definition, always important and at times decisive for clarity, are triply compounded when dealing with the concept "offenses against the law of nations." Not only is a century to be covered, but the last quarter of it is *in futuro*, and at no time during its first three quarters did any significant consensus develop with regard to the meaning of offenses in international law. The period 1892-1992 represents a deepening in the meaning of "offenses," a broadening and indeed a vast change. This change has been and probably will be so great that it could be said that the difference in meaning over the century has been and will continue to be one of kind rather than of degree.

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Perhaps the most significant of the traditional public and non-public sources of international law in the development of the "offenses against the law of nations" concept has been the influence of history and national attitudes. It is quite obvious that certain ideas and institutions, however needed and even conceived of at any given time, will not become viable if the time is not ripe. Obviously, it took Nazi bestiality to make the Genocide Convention possible. In similar fashion, such historical forces sensitize international awareness of particular problems, emphasize the need for the creation of new, or the modification of old, offenses, and even help isolate constituent elements of offenses. This view of the role of history will be largely an implicit assumption of this contribution.

I. Emphasis on Control of War and Protection for Individuals Through State Responsibility (1892-1917)

Representing the last quarter-century of relative peace following

the Napoleonic era, this period ended in the catastrophe of World War I. Judging by the actions of contemporary statesmen, fearful expectation of just such a disaster must have been a dominant attitude. Because of this terrible foreboding, there existed a preoccupation with means to make more civilized the commencement and conduct of warfare. The goal was the drafting and ratification of relevant international conventions of which the Hague Conventions and Declarations of 1899[1] and 1907[2] were the most notable.

It takes little more than a glance at the titles of these declarations and conventions to enable one to evaluate the thinking and practical accomplishments of the nations involved. The drafters assumed that there would be future wars and that they would become progressively more terrible if not controlled.[3] Therefore, rules were adopted regarding such aspects as the limitation or prohibition of the use of certain weapons, the conduct of land and naval warfare, the determination of the qualifications of belligerents, and the treatment of the sick and wounded.

This is not the place to discuss the degree of compliance with the terms of these instruments by those ratifying them nor the extent to which they created new international law or were merely declaratory of existing law and custom.[4] From the viewpoint of

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[1] Convention for the Pacific Settlement of International Disputes, July 29, 1899, 32 Stat. 1779 (1901), T.S. No. 392; Convention Governing the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803 (1902), T.S. No. 403; Convention for the Adoption for Maritime Warfare of the Principles of the Geneva Conference, July 29, 1899, 32 Stat. 1827 (1901), T.S. No. 396; Declaration Concerning the Prohibition of Throwing Explosives From Balloons, July 29, 1899, 26 Martens Nouveau Recueil (ser. 2) 994; Declaration Concerning the Use of Gas in War, July 29, 1899, 26 Martens Nouveau Recueil (ser. 2) 998; Declaration Concerning the Prohibition of Bullets Which Expand or Flatten, July 29, 1899, 26 Martens Nouveau Recueil (ser. 2) 1002.

[2] Among the fourteen conventions and declarations relevant to this subject adopted at The Hague, October 18, 1907, are: Convention Concerning the Laws and Customs of War on Land, 36 Stat. 2277 (1910), T.S. No. 539; Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 36 Stat. 2310 (1910), T.S. No. 540; Convention Concerning Bombardment by Naval Forces in Time of War, 36 Stat. 2351 (1910), T.S. No. 542; Declaration Regarding the Prevention of Discharge of Projectiles and Explosives From Balloons, 36 Stat. 2439 (1910), T.S. No. 546.

[3] The introductory language of the Hague Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 2279 (1910), T.S. No. 539, 3 Martens Nouveau Recueil (ser. 3) 461 stated: "Considering that, while seeking means to preserve peace and prevent armed conflicts between nations, it is likewise necessary to bear in mind the case where an appeal to arms may be brought about by events which their solicitude could not avert . . . ."

[4] See the introductory language to the Hague Convention Respecting the Laws and Customs of War on Land, which includes the following:

> Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in

Martens clause

defining offenses, the efforts at The Hague can be seen as an attempt to control the methods of interstate warfare — long the central problem of public international law. Toward the end of a century of relative peace and just prior to the first demonstration that international war could threaten all civilization, it was not yet possible to agree that any limitations upon the basic power of states to resort to war should be imposed. The offenses defined at the Hague Conferences meant merely that once war was chosen as the end of national policy, the state was not completely free in the use of the means. It took the lessons of two more world disasters to make possible some official acts promoting the always-present idea that most wars themselves should be made illegal.

For similar reasons, the time was not yet propitious to agree upon (or perhaps even to widely conceive of) any offenses which could be committed by a state against its own nationals. In addition, the concept of national sovereignty was then still in its most undiluted form, preventing practical consideration of problems such as how far "superior orders" and an "act of state" should be recognized as defenses to allegations of breaches of the provisions of the Hague instruments and the reserved principles of the law of nations. Relevant to this theory of sovereignty was the assumption that only states could be the significant actors in international law. For example, Article 3 of the Fourth Hague Convention on Land War[5] reads:

> A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.[6]

So long as the individual was not seen as having his own international personality, offenses could not easily be defined as either giving him direct protection or imposing upon him direct responsibility.

However, in certain limited areas the "law of nations" imposed individual responsibility. While treaties may have played a part at some time and in certain aspects in the development of the individual responsibility concept, by 1892 the concept had passed into

the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience. *Id.* at 2279-80, 3 Martens Nouveau Recueil (ser. 3) at 464.

[5] *Id.* at 2277, 3 Martens Nouveau Recueil (ser. 3) at 461.

[6] *Id.* at 2290, 3 Martens Nouveau Recueil (ser. 3) at 479.

customary international law. Thus, in spite of the language and spirit of the Hague Conventions, the principle that individual soldiers could be criminally responsible for violations of the laws of war and be tried by enemy authorities was recognized.[7] Also within the individual responsibility category were such offenses as piracy and trade in slaves and narcotics.[8]

However, then and perhaps to a lesser extent now, the written and unwritten laws of war generally were applied to the individual by means of municipal law.[9] Many criminal acts such as rape were, of course, crimes whether committed in wartime or peacetime, and the controlling municipal law applied equally during both periods. However, the pressures of war also led to the creation of special legislative, administrative, and case law, particularly in such areas as internal security and economic crimes. Finally, wartime brought into play that aspect of municipal law which combined international and non-international elements — military codes and martial law.

In addition to the crucial problems of definition involved in war-related offenses, the area of state responsibility towards aliens was sufficiently developed during this quarter-century to be of interest as a basis of comparison with later evolution of the concept. The source of these rules may have been, to some degree, the desire of the strong powers to protect their citizens while abroad in weaker states. Yet, as Jessup states, international law in this area has been relatively successful in balancing conflicting interests.[10] The rules regarding state responsibility, discussed by Jessup, were probably more effectively imposed by the leading western powers at the turn of the century than is the case today. Jessup said:

> Two rules are generally accepted as starting points in the approach to the determination of a state's responsibility for an injury to an alien. The first of these is that the alien, by entering a foreign country, subjects himself to the local law. The second rule is that the state is not an insurer of the safety and lives of aliens. Offsetting the first rule is the concept of the international standard which qualifies the supremacy of the local law, including law administration, by asserting that the local law is not the last resort if it falls below the standard in general or in its application to the particular case. . . . The second rule is qualified by a set of subsidiary rules stating the conditions under which the state is liable

[7] FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 167 (1964).

[8] *Id.* at 167, 246.

[9] For a review of this area, see LACHS, WAR CRIMES 9-12 (1945).

[10] JESSUP, A MODERN LAW OF NATIONS 96 (1948).

> for an injury to an alien. In general, liability is predicated on fault (culpa).[11]

More relevant than the examination of the specific content of these rules is recognition of the concept that a state had certain legal responsibilities toward aliens which produced certain rules, the violation of which could be seen as offenses against the law of nations. The specific application of these rules, then as now, sought to protect the person and property of aliens.[12] It has probably always been true that violation of the principles designed to protect the alien's person as contrasted to those relating to the protection of his property, could be more readily defined as offenses, and with the increasing diversity of economic views and conceptions of property since the 1892-1917 period, it has become even more difficult to define property offenses.[13]

Another impact of the rules of state responsibility was, intentionally or not, to focus attention upon the individual. This enhanced individual international status even though, formally, the alien had to act through, and at the sole discretion of, his national state. It is probably impossible to accurately assess cause and effect in the sphere of international institutions and ideas. However, intuitively it seems that the theory and practice of state responsibility to aliens must have contributed to the atmosphere necessary for subsequent progress, not only in individual status but also in the shift of perspective represented today by such enactments as the United Nations Covenants and the European Convention[14] system which seek to give the individual certain rights in international law *against his own state.*

II. Emphasis on Initiating War and Protection Through Individual Responsibility (1967)

The growth and change of meaning of "offenses against the law of nations" has been most significant and progressively rapid

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[11] *Id.* at 103-04. (Footnotes omitted.) See also Borchard, The Diplomatic Protection of Citizens Abroad (1916).

[12] *Cf.* International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights, and Optional Protocol to the International Covenant on Civil and Political Rights, 21 U.N. GAOR, 3d Comm. 162-202, U.N. Doc. A/6546 (1966).

[13] For an example of these difficulties in relation to the expropriation of foreign property, see Banco Nacional v. Sabbatino, 307 F.2d 845 (2d Cir. 1962), *rev'd*, 376 U.S. 398 (1964).

[14] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, 224 [hereinafter cited as European Convention].

in the half-century between 1917 and 1967. A very basic question, the role of the individual in international law, received much attention and elicited important answers. This was crucial in developing the meaning of "offenses," since it was relevant to the problem of against whom, and by whom, an "offense" may be committed.

After events such as the two world wars, Articles 227, 297, and 304 of the Versailles Treaty,[15] the Leipzig Trials,[16] Article 5 of the German-Polish Convention for Upper Silesia,[17] the Nuremberg Trial,[18] several decisions of the World Court,[19] and the European Convention on Human Rights system;[20] the individual's status in international law has become more firm with regard to both rights and duties.[21] The two world-wide convulsions have shaken, if not

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15 Treaty of Peace Between the Allied and Associated Powers and Germany, arts. 227, 297, 304, June 28, 1919, in U.S. THE TREATY OF VERSAILLES AND AFTER (1947). Articles 297 and 304 authorized individual nationals of allied states to sue Germany before mixed arbitral tribunals for damages resulting from Germany's use of extraordinary war measures. *Id.* at 371, 547. Article 227 contemplated the trial of the Kaiser for violating international morality and the sanctity of treaties. This was the cornerstone for the modern practice of trial and punishment of individuals for violations of international law. *Id.* at 624.

16 For comment concerning the Leipzig Trials of German World War I criminals by the Supreme Court of the Reich, see GLUECK, WAR CRIMINALS, THEIR PROSECUTION AND PUNISHMENT (1944).

17 Erklärung der Deutschen und der Polnischen Regierung zu dem am 15.5.1922 in Genf geschlossenen Abkommen über Oberschleslen, unterzerchnet in Oppeln am 3.6.1922 (R.G.Bl. ii, s. 165). See STONE, INTERNATIONAL GUARANTEES OF MINORITY RIGHTS (1932). Of particular interest is the right of individual petition and how it developed before the Regional Commission and the League Council. *Id.* at 40-45.

18 Trial of the Major War Criminals Before the International Military Tribunal, Nov. 4, 1945 through Oct. 1, 1946, I NUREMBURG OFFICIAL DOCUMENTS (1947). The tribunal's judgment appears in *id.* at 171-366.

19 At times the case of Jurisdiction of the European Comm'n of the Danube, [1927] P.C.I.J., ser. B, No. 14, has been cited as enhancing the status of the individual in international law. See also Nottebohm Case, [1955] I.C.J. 4; Jurisdiction of the Courts of Danzig, [1928] P.C.I.J., ser. B, No. 15; Tunis and Morocco Nationality Decrees, [1923] P.C.I.J., ser. B, No. 4.

20 European Convention, Nov. 4, 1950, 213 U.N.T.S. 221, *in force* Sept. 3, 1953.

21 DROST, HUMAN RIGHTS AS LEGAL RIGHTS — THE REALIZATION OF INDIVIDUAL HUMAN RIGHTS IN POSITIVE INTERNATIONAL LAW — GENERAL DISCUSSION AND TENTATIVE SUGGESTIONS ON AN INTERNATIONAL SYSTEM OF HUMAN RIGHTS (1965); GLASER, INTRODUCTION A L'ETUDE DU DROIT INTERNATIONAL PENAL (1954); GLUECK, *op. cit. supra* note 16; KATZ, GOVERNMENT UNDER LAW AND THE INDIVIDUAL (1957); LAUTERPACHT, AN INTERNATIONAL BILL OF THE RIGHTS OF MAN (1945); NORGAARD, THE POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW (1962); POLITIS, THE NEW ASPECTS OF INTERNATIONAL LAW (1928); REMEC, THE POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW ACCORDING TO GROTIUS AND VATTEL (1960); Aufricht, *Personality in International Law*, 37 AM. POL. SCI. REV. 217 (1943); Kelsen, *Collective and Individual Responsibility in International Law With Particular Regard to the Punishment of War Criminals*, 31 CALIF. L. REV. 530 (1943);

yet toppled, the foundations of the state system known in the nineteenth century. The wars and their aftermaths have increased the dimensions of state interdependence, have demonstrated the horrors of unrestrained state sovereignty, and have been among the causes of the creation of great numbers of new states not entirely bound by Western European ideologies. All this has tended to weaken the national state and the "classical" rule associated with it, which declared that only states could be subjects of international law. The various treaties, conventions, and decisions discussed are some indication of the individual's emergence to a fuller international personality and the corresponding relative decline of the former completely dominating actor, the national state.

Without question, the national state is still the primary international personality. However, regarding individual responsibility for international offenses, Versailles, Leipzig, and Nuremberg tend to strip away the protective shroud of the state and expose the individual to responsibility. Similarly, the Upper Silesian Convention and the European Convention on Human Rights, *inter alia*, increase, directly or indirectly, the right, and more importantly, the power of the individual to protect himself from offenses. Thus, in 1967, we are in the midst of a dramatic transition from the nineteenth-century regime minimizing the individual's international personality to an expanded concept of international justice in which the individual can be both perpetrator and victim of international offenses.

A convenient, though not entirely comprehensive, point from which to observe the current content of "offenses against the law of nations" is the Nuremberg Charter and the Nuremberg Tribunal's scheme of "Crimes Against Humanity," "War Crimes," and "Crimes Against Peace."

A. Crimes Against Humanity

Article 6(c) of the Charter which bound the Nuremberg Tribunal defined crimes against humanity as:

> murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecution on political, racial or religious grounds in execution of or in connection with any crime within

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Korowicz, *The Problem of the International Personality of Individuals*, 50 AM. J. INT'L L. 533 (1956).

> the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated . . . .[22]

Most of these acts would be considered criminal under any system of law. However, this definition seems to make the relatively new category of "Crimes Against Humanity" somewhat unique because of the implicit emphasis upon the commission of acts on a vast scale and against groups. In other words, perhaps some acts within the definition — for example, persecution on political grounds — may not be criminal under municipal or international law when aimed at an individual, but when addressed to a "civilian population" they become an international crime.

This emphasis on the collective target was the natural reaction against defeated Nazism and crumbling colonialism, a reaction which has set the tone for almost all post-World War II activity involving international offenses. Obviously, the Genocide Convention,[23] adopted unanimously by the General Assembly on December 9, 1948, is another product of this reaction. The Convention defines genocide as:

> any of the following acts committed with intent to destroy, in whole or part, a national, ethnical, racial or religious group, as such: a) Killing members of the group; b) Causing serious bodily or mental harm to members of the group; c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; d) Imposing measures intended to prevent births within the group; e) Forcibly transferring children of the group to another group.[24]

Unlike Article 6(c) of the Nuremberg Charter, the Genocide Convention does not mention political groups. However, it is broader than Nuremberg in that the crime is clearly one that can be committed in time of peace or war.[25] In addition the Nuremberg and Genocide principles coincide in sweeping aside official, and even ruling, status as a defense.

A development converse to the collectivization of the victim in

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22 Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 1547 (1945), E.A.S. No. 472, at 4, [hereinafter cited as London Charter]. See also Wright, *War Criminals*, 39 AM. J. INT'L L. 257 (1945).

23 Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, *in force* Jan. 12, 1951, 78 U.N.T.S. 277.

24 *Id.* at 280.

25 *Ibid.*

these definitions has been the attempt of the London Charter and Nuremberg Judgment to introduce a collective element into the definition of "perpetrator" of the crime. Articles 9 and 10 of the London Charter[26] authorize the Tribunal to declare "a group or organization" criminal and then to find individual members guilty of crime because of membership in such a group or organization.[27] The judgment indicated that a criminal organization was similar to a criminal conspiracy since both involve cooperation for a common criminal purpose.[28] A group was seen as a wider and more embracing term than an organization, though the Tribunal imposed certain limitations upon the concept of criminal organization and group.[29]

Perhaps the greatest pertinent controversy regarding the definitions of the Nuremberg crimes has centered about the determination of the criminality of groups and organizations and the related concept of conspiracy. The difficulty apparently arises because of the relative unfamiliarity of non-common law legal systems with the concept of conspiracy. Even though the criminality of organizations was limited in the various substantial ways already indicated, many have had doubts about it. Kelsen felt that it represented retrogression to primitive notions of collective guilt.[30] Kelsen's fear is obviously well founded. Unless a limitation in addition to those imposed by the Nuremberg Tribunal is added, namely, the restriction of criminality to policymakers and leaders of criminal organizations, grave injustices could occur. It is noteworthy that on December 11, 1946, when the General Assembly unanimously adopted a resolution affirming the principles of the Charter and Judgment of the Nuremberg Tribunal, it omitted reference to the concept of criminal organization.[31] In addition, the concept of collective guilt runs counter to the increasing trend toward the individualization of

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26 London Charter, arts. 9, 10, 59 Stat. 1548, (1945) E.A.S. No. 472, at 5.

27 *Ibid.*

28 Judgment of the Tribunal, 1 NUREMBURG OFFICIAL DOCUMENTS 256 (1947).

29 Those limitations were: (1) it must have been "formed or used in connection with the commission of crimes denounced by the Charter"; (2) membership must have been, in general, voluntary and not as a result of conscription or physical pressure; (3) the criminal purpose and activities of the organization must have been so widespread and well known to members that it could be assumed that, in general, members were aware of them; (4) the period of membership involved was limited to the duration of the Second World War; and (5) it excluded certain sub-groups such as janitors and menial laborers, who had no direct part in the criminal acts of the main group. *Ibid.*

30 Kelsen, *Will the Judgment in the Nuremburg Trial Constitute a Precedent in International Law?*, 1 INT'L. L.Q. 153 (1947).

31 1 U.N. GAOR 188, U.N. Doc. A/64/Add.1 (1946).

rights and responsibilities, and no convincing reason for the allowance of such an exception has been presented.

Perhaps the most *effective* steps taken thus far in the twentieth century toward defining "offenses against the law of nations" within the general area of "Crimes Against Humanity" have been those involved with the creation of the European Convention for the Protection of Human Rights and Fundamental Freedoms,[32] its related institutions, and subsequent protocols.

The Convention consists of a preamble and sixty-six articles organized into five sections. The preamble refers to the United Nations Universal Declaration of Human Rights and resolves "to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration."[33] Article 1 contains the obligation of the parties to secure to everyone within their jurisdiction the rights and freedoms listed in section 1.[34]

The section 1 rights and freedoms are generally those "classic" civil and political rights which have become accepted in Western Europe and the Western Hemisphere during the past two hundred years.[35]

Two subsequent protocols are germane to our purposes. The first, signed in Paris on March 20, 1952, consists of six articles, of which three are relevant.[36] The first article deals with property rights and asserts that every national or legal person is entitled to

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[32] Nov. 4, 1950, *in force* Sept. 3, 1953, 213 U.N.T.S. 221. By November 28, 1950, the following had signed the Convention: Belgium, Denmark, France, German Federal Republic, Greece, Iceland, Ireland, Italy, Luxembourg, The Netherlands, Norway, Sweden, The Saar, Turkey, and the United Kingdom. U.N. YEARBOOK ON HUMAN RIGHTS FOR 1950, at 418 (1952).

[33] European Convention, Preamble, 213 U.N.T.S. 221, 224.

[34] *Ibid.*

[35] They cover the following: right to life protected by law with certain public interest limitations on this right (art. 2); punishment (art. 3); slavery and forced labor (art. 4); liberty and security of the person except in certain listed cases and in accordance with certain described procedures (art. 5); safeguards of a fair and public criminal trial and procedure (art. 6); prohibition against retroactive criminal guilt with limited exceptions (art. 7); respect for private and family life, home, and correspondence (art. 8); freedom of thought, conscience, and religion (art. 9); freedom of expression (art. 10); peaceful assembly and association (art. 11); marriage (art. 12); effective remedies against violations of Convention rights even if the violator was acting in official capacity (art 13); enjoyment of rights and freedoms without discrimination (art. 14); when derogation from the rights and freedoms is permissible (art. 15); possible limitation on political rights of aliens (art. 16); rebuttal of implication to destroy any of the rights and freedoms of the Convention (art. 17); and no restrictions for any purpose other than those prescribed (art. 18). European Convention, arts. 2-18, 213 U.N.T.S. 221, 224-34.

[36] For a convenient source of the text of the first Protocol see U.N. YEARBOOK ON HUMAN RIGHTS FOR 1952, at 411-12 (1954). The Protocol was in force May 18, 1954.

the peaceful enjoyment of his possessions and that "no one shall be deprived of his possessions except in the public interest and subject to the conditions provided by the law and by the general principles of international law."[37] Exceptions in the public interest are permitted regarding taxes, penalties, and control of property use. The second article deals with the right to education and provides a duty to respect the rights of parents to educate their children in accordance with their personal religious and philosophical convictions. The third article provides for free elections at reasonable intervals by secret ballot under circumstances ensuring free expression.

The fourth protocol consists of seven articles, the main purpose of which is to add four new rights to those of section 1 of, as well as protocol number 1 to, the European Convention. These four are: (1) abolition of imprisonment for inability to fulfill a contractual debt; (2) freedom of movement and choice of residence within the state, and freedom to leave any country subject to certain defined public interest exceptions; (3) prohibition of expulsion from, or denial of right of entry to, the territory of the state of which one is a national; and (4) prohibition of collective expulsion of aliens.[38]

Generally more significant than the rights defined in the Convention and in these protocols has been the relatively effective enforcement machinery provided by the Commission and the court, analysis of which is not pertinent here.

The most pressing question concerning the European Convention system is how relevant are its definitions of rights with regard to the problem of defining "offenses against the law of nations." Can the violation of these rights be considered offenses? If so, can they now, or will they in the future, be considered offenses against the law of nations?

An attempt to answer these questions on a more general level will be made later.[39] Specifically, the broad range of the European Convention rights makes some of them immediately relevant, and some of only future relevance. Whether seen from the vantage point of comparative law and "general principles of law recognized by civilized nations," of customary international law, or of widely held moral principles, rights such as those designed to protect life, outlaw slavery and forced labor, and ensure fair criminal trials are basic enough to fit any reasonable designation of "offenses." How-

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[37] *Id.* at 411.

[38] The text of the fourth Protocol, opened for signature in September of 1963, may be found in ROBERTSON, HUMAN RIGHTS IN EUROPE 265 (1963).

[39] See text accompanying notes 48-56 *infra.*

ever, when dealing with such rights as the protection of private property, the area may be so heavily infused with cultural bias that they are greatly reduced in their universal applicability.

Regarding the place of the European Convention rights in international law, it should be noted that the revolutionary aspect of the European Convention System is that it can protect a citizen against violation of the defined rights by his own state within a framework of international treaties and institutions. Thus while the system is limited because of its regional nature, it represents a dramatic and significant extension of international law in its protective aspects by inserting itself between the individual and his state.[40] Certainly for the member nations, violation of the Convention's rights can be said to constitute offenses against international law. To the extent that the rights involved can be said to be universally recognized, their statement and effective enforcement by these European states can only help strengthen the claim that these rights must be the basis of general offenses against the law of nations. Whether those rights which rest upon a more particularistic basis will ripen into the basis of such offenses cannot now be predicted with any confidence, but they can be seen as a reference point for future development.

Comparison with the long-debated and recently adopted United Nations Covenants on Human Rights can assist in determining the universality of the European Convention rights and illustrate another possible source for the definition of offenses.[41] The first

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[40] The power of the Commission to hear petitions from "any person, non-governmental organization, or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention," European Convention, art. 25, 213 U.N.T.S. 221, 236, depends on the deposit of a declaration by a signatory that it will be bound by the provisions of article 25 in which the cited language appears.

[41] The International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights as well as an Optional Protocol to the International Covenant on Civil and Political Rights were adopted by the United Nations General Assembly on December 16, 1966, after having been on the Assembly's agenda since 1954. These covenants were adopted unanimously; the Optional Protocol was adopted by a vote of 66 for (including most western European countries and the United States), 2 against (Niger and Togo) and several abstentions (including the Soviet Union and all other communist states represented). 21 U.N. GAOR 27-30, U.N. Doc. A/PV. 1496 (1966). For the language of the two Covenants and the Optional Protocol, see 21 U.N. GAOR, 3d Comm., 162-202, U.N. Doc. A/6546 (1966). The Optional Protocol provides for a very mild procedure by which the Human Rights Committee set up by the Covenant could receive certain limited communications from individuals claiming to be victims of violations of any of the Covenants' rights. Its powers would be limited to communicating to the state involved, receiving that state's written explanations or statements, and then forwarding its views to the state and individual concerned.

twenty-seven of the fifty-three articles of the Covenant on Civil and Political Rights[42] deal with substantive rights and the permissible derogations of them.[43]

A comparison of the *language* of the European Convention with the *language* of the Civil and Political Covenant reveals a very considerable similarity of wording, scope, and subject matter. However, the United Nations Covenant is more detailed in certain areas.[44] It can therefore be said that, so far as the European Covenants go, they do (in language at least, questions of meaning and implementation aside) express universal ideas about basic civil and political rights. The first protocol to the European Covenant, dealing with private property, can indeed be seen as an exception. On the other hand, the Civil and Political Covenant does have a stronger emphasis upon curbing discrimination based upon any form of personal status.

In addition, Article 1 of both United Nations Covenants provides, in identical language, for the right of self-determination of all peoples and for their freedom to dispose of their natural resources "without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law." This right represents a mixture of economic and political concepts and becomes involved in international polemics concerning expropriation. Logically, this involvement does not make such a right any less likely to become the basis of an offense against the law of nations. However, its insertion in the United Nations Covenants was clearly the result of the desires of the "underdeveloped nations" to protect their resources against "imperialistic nations." This desire was obviously not a strong factor among the signatories of the European Covenant. Thus, for this and other reasons, "self-determination" may be a less universal concept

[42] International Covenant on Civil and Political Rights, Dec. 16, 1966, 21 U.N. GAOR, 3d Comm. U.N. Doc. A/6546 (1966).

[43] These rights concern: self determination and local control of resources, enjoyment of rights without discrimination; "the inherent right to life" and limitations on the death penalty; torture and punishment; slavery and forced labor; liberty of person, arrest, and detention; treatment of detained persons; abolition of imprisonment for debt; freedom of movement within and between states; expulsion of aliens; criminal procedure; ex post facto laws and punishment; recognition before the law; interference with privacy, home, family, and correspondence; freedom of thought, conscience, and religion; freedom of expression; war propaganda and advocacy of discrimination; peaceful assembly; freedom of association; family and marriage; protection of children; freedom to participate in public affairs and to have free elections; equality before the law; and protection of minorities. *Ibid.*

[44] See, *e.g.*, *ibid.* (criminal procedure).

than most other rights expressed in both the European and United Nations Civil and Political Covenants.

Of the thirty-one articles of the Covenant on Economic, Social and Cultural Rights, ten describe the rights to be protected.[45] The concepts involved in this covenant are relatively imprecise and necessarily difficult to measure or implement. In addition, it is quite possible that there is a wider disparity of convictions and achievement regarding these rights than those expressed by the Civil and Political Covenant. Therefore, it seems far less likely that the Economic, Social and Cultural Covenant will be a feasible source for the definition of offenses.

During the League of Nations era, the development of international machinery to encourage economic and social cooperation was attempted, but little was done to define human rights or to devise effective means to promote them. However, the United Nations, from its beginning, has consistently striven to define and promote a broad range of human rights, though with variable results. The Universal Declaration and the attempts to translate it into the treaty law of international covenants probably held the spotlight. Ultimately it is quite likely that its work in other areas will have a greater cumulative impact on the promotion of human rights.

Some idea of the more successful efforts of the United Nations is given in General Assembly Resolution 2081 of December 20, 1965.[46] After noting that a previous resolution[47] had designated 1968 as the international year for human rights and asking member states and various organizations to devote 1968 to intensified efforts in the human rights area, the resolution invites all members to ratify, before 1968, the human rights conventions already concluded. The resolution called particular attention to conventions dealing with the abolition of slavery, forced labor, discrimination in employment, equal remuneration for men and women, freedom of association and of the right to organize, discrimination in education, genocide, political rights of women, and racial discrimination. The same resolution urged the conclusion of the draft Covenants on Civil, Political and Economic, Cultural and Social Rights just discussed, a covenant on the elimination of all forms of racial intoler-

[45] International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 21 U.N. GAOR 3d Comm., U.N. Doc. A/6546 (1966). Including article 1 just mentioned, these rights deal with areas such as: the right to work; "social security"; family and mothers; standard of living; education; and cultural life. *Ibid.*

[46] G.A. Res. 2081, 20 U.N. GAOR Supp. 14, at 44-45, U.N. Doc. A/6014 (1965).

[47] G.A. Res. 1961, 18 U.N. GAOR Supp. 15, at 43, U.N. Doc. A/5515 (1964).

ance, a covenant on freedom of information, and a draft declaration on the status of women so that such covenants could be open for ratification and accession before 1968.[48]

In sum, United Nations human rights efforts have been divided between comprehensive definitions of human rights in an International Bill translated into the form of two legally binding covenants, on the one hand, and numerous separate covenants enlarging upon some specific aspects of the comprehensive scheme (and adding some others) on the other.

Compared to the European Convention on Human Rights this United Nations activity has been on a far broader scale. However, this does not necessarily mean that the United Nations definitions of rights are so generally accepted as to be the basis of international offenses. First, many have not yet been widely ratified. Second, even though the two general United Nations Covenants are legally binding on the states which ratify them, no effective enforcement machinery is provided. Therefore, enforcement is left to the general sanctions of international law regarding treaties, which can be expected to be particularly ineffective here since the rights largely involve the relationship between the signatory state and its own subjects. Due to the omission of effective international enforcement machinery, the United Nations efforts were not subject to the discipline imposed upon the drafters of the European Convention Protocols by the European Convention's enforcement system of Commission, Court, and Executive Organ. This could very well have been responsible for the very broad range of subjects covered and for the frequently idealistically sweeping language employed by the United Nations.

Furthermore, with regard to the rights presented by the European Convention and, *a fortiori*, the United Nations efforts, there is a logical (and probably a practical political) gap between the recognition of certain rights, and the willingness to consider them as being so basic to international order as to deem violation of them "offenses against the law of nations." In any event, both the European Convention system and United Nations work in the human rights field can be seen as sources from which the definition of offenses can be derived when and if that logical and practical gap is bridged.

[48] Other human rights areas dealt with by the United Nations include: refugees and stateless persons, minorities, children, the right of asylum, apartheid, rights and duties of states including the right of diplomatic intervention, false and distorted news reports, consent to and minimum age of marriage, prisoners of war, and political prisoners.

In addition to the experience of Nuremberg and its related events and the work of the United Nations, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War[49] is another significant point from which to assess our current position in the definition of offenses in the "Crimes Against Humanity" classification. As Greenspan states:

> World War II brought to a head the need to regulate by law the treatment of civilian populations in time of war. The ruthless application of the doctrine of total war by the Axis powers inflicted vast losses and suffering on the civilian populations of powers against which they waged war. Heightening this cosmic tragedy were the devilish theories of race superiority which demanded the extermination of whole groups of civilian populations . . . . Such shocking crimes compelled the attention of international lawyers to the necessity for creating a comprehensive body of law to deal with such evils, which had hitherto been accorded cursory treatment in a few articles of the Hague Regulations. It is now realized that the laws of war should concern themselves as much with the civilian populations involved as with the armed forces conducting the hostilities.[50]

The Convention applies to armed conflicts with or without a formal declaration of war, to all cases of partial or total occupation of a party, and to all signatories to the Convention in their mutual relations, even if they are also engaged in conflict with a non-signatory.[51] Certain stated minimum rules of conduct bind a party even in case of civil wars within the territory of a party.[52] Essentially, persons protected by the Convention are those who, in case of conflict or occupation, are "in the hands of a Party to the conflict or Occupying Power of which they are not nationals."[53] The Convention specifies rights of protected persons and restraints upon conflicting states in great detail. Article 27 contains the crux of the matter by providing:

> Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall

[49] Aug. 12, 1949, [1955] 3 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287, *in force* Feb. 2, 1956.

[50] GREENSPAN, THE MODERN LAW OF LAND WARFARE 154 (1959).

[51] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 2, Aug. 12, 1949, [1955] 3 U.S.T. 3516, 3518, T.I.A.S. No. 3365, 57 U.N.T.S. 287, 288, *in force* Feb. 2, 1956.

[52] *Id.* art. 3, [1955] 3 U.S.T. at 3518, 3520, 75 U.N.T.S. at 288-90.

[53] *Id.* art. 4, [1955] 3 U.S.T. at 3520, 75 U.N.T.S. at 290.

> at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity. . . .
>
> Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.
>
> However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.[54]

This Convention brings the Hague system of 1899[55] and 1907[56] into step with the lessons taught by intervening history. However, it is based upon the identical assumption that there will be more wars and that therefore they should be humanized as much as possible. The irrelevance of most of the Convention to atomic war is obvious. However, we have had since 1949 and, unfortunately, will probably continue to have, non-atomic international and civil wars for which the Convention will be relevant. In addition, the rights and duties so extensively defined in the Convention clarify and expand the concept of international offenses regarding treatment of civilians in wartime.

B. Crimes Against Peace

A second Nuremberg category of crimes, "Crimes Against Peace," represents an attempt to change or at least supplement the assumption underlying the Hague[57] and Geneva Conventions.[58] The resort to certain kinds of war was itself to be made illegal, not just the inhumane waging of war. Article 6(a) of the London Charter[59] reads: "Crimes Against Peace: namely, planning, prepara-

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[54] *Id.* art. 27, [1955] 3 U.S.T. at 3536, 3538, 75 U.N.T.S. at 306.

[55] Hague Convention on the Settlement of International Disputes, July 20, 1899, 32 Stat. 1779 (1901), T.S. No. 392; Hague Convention on Maritime Warfare, July 20, 1899, 32 Stat. 1827 (1901), T.S. No. 396; Hague Convention on Laws and Customs of War on Land, July 20, 1899, 32 Stat. 1803 (1902), T.S. No. 403.

[56] Conventions on Naval Warfare, Oct. 18, 1907, 36 Stat. 2351-2439 (1910), T.S. Nos. 542-46; Convention on the Pacific Settlement of International Disputes, Oct. 18, 1907, 36 Stat. 2199 (1910), T.S. No. 536; Conventions on Land War, Oct. 18, 1907, 36 Stat. 2277-2310 (1910), T.S. Nos, 539-40; Convention on the Opening of Hostilities, Oct. 18, 1907, 36 Stat. 2259 (1910), T.S. No. 538; Convention on Submarine Contact Mines, Oct. 18, 1907, 36 Stat. 2332 (1910), T.S. No. 541; Convention on the Employment of Force for the Collection of Contract Debts, Oct. 18, 1907, 36 Stat. 2241 (1910), T.S. No. 537; Convention on the Discharge of Projectiles and Explosives From Balloons, Oct. 18, 1907, 36 Stat. 2439 (1910), T.S. No. 546.

[57] See material cited notes 1-2 *supra.*

[58] See Conventions cited notes 71-72 *infra.*

[59] London Charter, art. 6, Aug. 8, 1945, 59 Stat. 1544, 1547 (1945), E.A.S. No. 412, at 4.

tion, initiation or waging, of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing."[60]

A brief survey is not the place to attempt an exposition of the meaning of this momentous definition as interpreted by the Nuremberg and subsequent post-World War II war crimes tribunals, by the great number of commentators, or by United Nations bodies.[61] Stone has sketched the historical background of the Nuremberg definition as it relates to the Kellogg-Briand Pact, the League, and the United Nations system in remarkably precise language which requires little further comment.[62] Nevertheless, a discussion of some lessons of the past and problems of today involving resort to war may be useful.

The Kellogg-Briand Pact[63] failed to prevent war not only because it was violated but also because, in spite of its seemingly all-inclusive language, it left many loopholes and room for argument. For example, the right of "self-defense" remained; war could arguably still be waged against non-signatories, and war to enforce international obligations was arguably permitted. These and other gaps existed in the face of such phrases as: the parties condemn "recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another";[64] and "the settlement or solution of all disputes or conflicts of whatever nature or whatever origin they may be,

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60 *Ibid.*

61 DROST, THE CRIME OF STATE BOOK II GENOCIDE (1959); HARRIS, TYRANNY ON TRIAL — THE EVIDENCE AT NUREMBERG (1954); JACKSON, THE CASE AGAINST THE NAZI WAR CRIMINALS (1946); MAUGHAM, U.N.O. AND WAR CRIMES (1951); WOETZEL, THE NUREMBERG TRIALS IN INTERNATIONAL LAW (1960); Aroneau, *Les Droits de L'Homme et le Crime Contre L'Humanité*, 25 REVUE DE DRIOT INTERNATIONALE DE SCIENCES DIPLOMATIQUES ET POLITIQUES (A. Sottile) 187 (1947); Biddle, *Le Procès de Nuremberg*, 19 REVUE INTERNATIONALE DE DROIT PÉNAL 1 (1948); Ehard, *The Nuremberg Trial Against the Major War Criminals and International Law*, 43 AM. J. INT'L L. 223 (1949); Leventhal, *The Nuremberg Verdict*, 60 HARV. L. REV. 857 (1947); Schwelb, *Crimes Against Humanity*, 23 THE BRITISH YEARBOOK OF INT'L L. 178 (1946); Taylor, *The Nuremberg Trials*, 55 COLUM. L. REV. 488 (1955); Wright, *Legal Positivism and the Nuremberg Judgment*, 42 AM. J. INT'L L. 405 (1948).

62 STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 297-304, 331-33 (2d ed. 1959). See also SHOTWELL, WAR AS AN INSTRUMENT OF NATIONAL POLICY AND ITS RENUNCIATION IN THE PACT OF PARIS (1929).

63 General Treaty for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343 (1928), T.S. No. 796, 94 L.N.T.S. 57, *ratified* July 25, 1929.

64 *Id.* art. 1, 46 Stat. at 2345-46, T.S. No. 796, 94 L.N.T.S. at 63.

which may arise among them, shall never be sought except by pacific means."[65]

In 1947, the General Assembly requested the International Law Commission to formulate the principles of international law recognized in the Charter and Judgment of the Nuremberg Tribunal and to prepare a draft code of Offenses Against the Peace and Security of Mankind indicating the place of the Nuremberg Principles therein.[66] This attempt to draft such a code has been notably unsuccessful. It has foundered on the problem of whether to give a general or an enumerated definition. The enumerated approach was abandoned because of the difficulty of ever being sufficiently comprehensive and the undesirability of limiting in advance any future enforcement organ. However, little success has also been obtained with a general definition.[67]

The Kellogg-Briand Pact and the Draft Code of Offenses[68] experiences can justify several conclusions. First, it seems rather naive to expect that the desire to make resort to war an offense can be greatly assisted by the codification approach. This opinion is hopefully not determined by common law training alone, but by the recognition that the core issues are too all-encompassing, too little understood, and too enmeshed in basic political passions to be susceptible of simple legalistic categorization. Second, given such passions, such complexity, and the absence of effective international enforcement machinery, the desire to evade even the most perfectly drawn definition of the offense of illegal war in situations of self-perceived need will be overwhelming. Therefore, will it not breed disrespect for laws to define a crime with no reasonable prospect that it will significantly control the conduct of those purportedly subject to the definition?

On a more specific level, the key difficulty involved in attempting to define an offense of "Crimes Against Peace" or "illegal resort to war" is the meaning of "war" and "aggression." While the logical imperatives of the atomic age could support a definition which outlawed all resort to violence with no conceivable exception,

65 *Id.* art. 2, 46 Stat. at 2346, T.S. No. 796, 94 L.N.T.S. at 63.

66 Formulation of the Principles Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, G.A. Res. 177, 2 U.N. GAOR Supp. 9, at 111-12, U.N. Doc. A/519 (1947). For the text of the original Draft Code, see International Law Comm'n, Report, 6 U.N. GAOR Supp. 9, at 10-14, U.N. Doc. A/1858 (1951).

67 STONE, *op. cit. supra* note 62, at 334.

68 International Law Comm'n, Report, 6 U.N. GAOR Supp. No. 9, at 10-14, U.N. Doc. A/1858 (1951).

the political facts of international society render such an effort futile. It is not presently possible to take from the national state the right of self-defense, nor from the international community the right to employ violence to suppress a breach of the peace.

Therefore, it is not prohibition of the use of all violence, but mainly of aggressive violence, which has been the goal.[69] Thus, the issues raised here include: Can the definition of war and aggression be objective, or must the intent of the actor be considered? Can key definitions have any lasting meaning when they will probably be used defensively by the successful user of violence regardless of whether he was in fact the "aggressor"? How can there be established an impartial international enforcement or interpretive body to avoid the use of the offense in a purely might-makes-right manner? How far down the policy-making hierarchy can one go in imposing individual liability for commission of the offense of aggressive war? What should be the place of *nulla poena sine lege* once it is assumed that not all kinds of undesired violence can be clearly prohibited in advance? How far can the nation-state remain free to determine the "self-defense" character of its resort to violence before any attempt to define it is vitiated? An attempt to deal with some of these questions will be made in the final section of this paper.

C. *War Crimes*

> [T]he liberty of States to resort to war under customary international law is still a substantial liberty. With it there survives the continued importance in international law of the principles governing the conduct of belligerent States *inter se*, and of belligerents and neutral States and traders *vis-a-vis* each other.[70]

The first source of the modern written law of war is, of course, the four 1949 Geneva Conventions dealing with treatment of the Sick and Wounded on Land, or at Sea, Prisoners of War, and Civilian Persons in Time of War.[71] Space allows only a few general

69 For an excellent review of the problems of definition of war and aggression, see STONE, *op. cit. supra* note 62, at 304-06.

70 *Id.* at 303-04.

71 Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, [1955] 3 U.S.T. 3114, T.I.A.S. No. 3362, 15 U.N.T.S. 31, *in force* Feb. 2, 1956; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, [1955] 3 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85, *in force* Feb. 2, 1956; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 3 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135, *in force* Feb. 2, 1956; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, [1955] 3 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287, *in force* Feb. 2, 1956.

comments about these Conventions.[72] They represented an attempt to fill some gaps in prior conventions primarily revealed by the horrors of World War II and the international "incidents" of the 1930's.[73]

The responsibility of the individual for commission of war crimes, a principle of international customary law for many years, was made quite explicit by the Convention on the Sick and Wounded in the Field.[74] Provision is made for the transfer of such persons to another contracting party for trial.[75]

The four Geneva Conventions in general, and the language just quoted in the footnotes in particular, illustrate the organic growth of the definition of offenses. As already noted, at the time of the 1907 Hague Conventions, individual responsibility for war crimes was accepted. However, the principle was apparently of neither sufficient strength nor timeliness to be incorporated expressly in the Hague Conventions. The heinousness of the war crimes of World War II contributed to the pressures for clear recognition of individual responsibility which resulted in the Nuremberg Charter definition of War Crimes and the similar language of Article 50 of the Geneva "Wounded and Sick" Convention.[76]

72 For a comprehensive treatment of the Conventions, see GREENSPAN, *op. cit. supra* note 50, at 67-194. Greenspan does not cover the Maritime Convention. Stone's treatment is more analytical. STONE, *op. cit. supra* note 62, at 651-92.

73 Examples are: the addition of language to Article 12 of the Convention on Wounded and Sick in the Field, specifically prohibiting "biological experiments"; the broadening of the definition of Protected Persons in the Prisoner of War Convention to include members of resistance movements and the application of the latter Convention to many more conflict situations than were covered by the 1929 Geneva Convention on Prisoners of War which had been limited to *international war.* Convention on Prisoners of War, July 27, 1929, 47 Stat. 2021 (1929), T.S. No. 846, 118 L.N.T.S 343; *cf.* Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 3 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135.

74 Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, [1955] 3 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31, *in force* Oct. 21, 1950. "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts." *Id.* art. 49, [1955] 3 U.S.T. at 3146, 75 U.N.T.S. at 62.

75 Article 50 defines such grave breaches as

> [A]ny of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly. *Id.* art 50, [1955] 3 U.S.T. at 3146, 75 U.N.T.S. at 62.

76 Article 6(b) of the London Charter of August 8, 1945, defined war crimes as violations of the laws and customs of war, which,

> shall include, but not be limited to, murder, ill-treatment or deportation to slave labor, or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity. London Charter, art. 6(b), Aug. 8, 1945, 59 Stat. 1544, 1547 (1945), E.A.S. No. 472, at 4.

III. Emphasis on Expanded Definitions of International Offenses and Expanded Local and Regional Enforcement (1968-1992)

Roscoe Pound has posed questions fundamental to assessing the potential of efforts to develop universally acceptable definitions of "offenses against the law of nations." He asked:

> Can we find how to secure universal ideals of right and justice without, as a first step, setting up an omni-competent, universal, political organization of mankind? Are there individual claims to life and liberty, so general as to be substantially universally recognized and so possible to be secured by an international process of law? Does not the history of civilization teach us that there are . . . ? The common law as the legal order of the English-speaking world has no one politically organized society behind it. The Civil or modern Roman law, which long was and still is to no small extent the legal system of a great part of the world, has had no unified political organization behind it . . . . It has been assumed that to have a world law we must have a world state; that universal political organization must come before universal law. May it not be rather that universal law must precede the universal state which will undertake to put any required force behind it?[77]

While not necessarily agreeing with Pound's conclusion, the question "law or order first," is quite basic. Much depends upon definitions of the terms involved. If by "law" is meant normative principles explicitly consented to by official public authority, regardless of the empirical effect that they have on conduct, then we may be deceived into believing that "universal law" has been or can be achieved without preceding "universal order." The grim fate of the 1929 Geneva Convention on Prisoners of War[78] during World War II when the conditions of war underwent such drastic changes illustrates how superficial such "law" can be.[79]

On the other hand, regardless of formality or explicitness of recognition, it is conceivable that "law" can be both normatively and empirically effective among politically independent entities. Pound's example of Common and Roman Law, within their respec-

77 Pound, *Foreword* to KUTNER, WORLD HABEAS CORPUS at v, vi, vii (1962).

78 July 27, 1929, 47 Stat. 2021 (1929), T.S. No. 846, 118 L.N.T.S. 343.

79 See STONE, *op. cit. supra* note 62, at 652-53.

tive spheres,[80] is sound once one assumes the basic similarity of ideas and institutions (if not unity or organization) within each. Since there has not yet been universal political order, any progress thus far made in developing effective definitions must have been based upon some consensus concerning the need for, and intellectual content of, the legal controls represented by the definitions. The relative scarcity of such consensus has prevented more than a small number of offenses from achieving effective universality.

Perhaps the analogy of a coral reef, with its progressive growth by accumulation of numerous organisms, can help to guide speculation about the future growth of the definition of offenses. Thus far, only a tiny number of the marine zoophytes have sufficiently hardened and have been pushed above the water's surface to effective visibility. Some of these organisms are relatively senile and belong to species such as "piracy" and "trade in narcotics and slaves." Others have a more significant geneology with closer ties to the present, such as "state responsibility to aliens." There are also those well-known but controversial types called "war crimes" which have been above the surface for quite some time but are of widely varying shapes, colors, and potency.

Just below the surface are those which have become enmeshed in the structure of the reef but have not as yet reached the surface of universal visibility. These include "Crimes against the Peace" and "Crimes against Humanity" which have been troubled by amorphism, as well as the "European Convention Violations" which have been important, though confined to but one portion of the reef.

There are those species which have been living in the reef but which have not yet calcified into a permanent connection with it. These range from the "International Covenants on Civil and Political Rights" through the "Genocide Convention" to the "International Convention on the Elimination of All Forms of Racial Discrimination" and the "Draft Treaties on Freedom of Information."

Finally, there are those animals which have been living near the reef and which may add their substance to it, but which are still free swimming. These are called violations of "general principles of law," "moral and political philosophy," "natural law," or "social custom." Which of these organisms will prosper and emerge from the depths depends upon many factors, including the amiability of the environment and the position and type of predecessors which have calcified into the reef and upon whose remains future growth must build.

[80] Pound, *supra* note 77.

This analogy may lead to some specific comments on the central problem of this contribution. First, "international offenses," like the coral reef, grow organically, based upon prior development. The ties between the Nuremberg Judgment and the subsequent Genocide Convention, and between the relatively cautious and effective work of the European Commission on Human Rights and the subsequent creation of the European Court of Human Rights, are examples of such growth. Acceptance of the reality of organic growth should carry with it appreciation of a gradualistic approach to the development of the concept of offenses (to the extent that they are subject to conscious control at all). It was preferable to make acceptance of the European Court of Human Rights depend on a voluntary and separate act apart from ratification of the European Convention itself so that the first moves could be taken and given a chance to prove themselves.[81]

Second, ideas, like marine organisms, will not flourish unless the environment is friendly. The idea that those who determine the use of violence on the world scene should be subject to certain limitations has long been involved with religious thought and institutions, and with thinkers like Grotius and Suarez. However, no meaningful steps to implement these thoughts took place until war became a clear threat to all civilization and until there existed a relatively comprehensive forum for discussion of the problem. In brief, the store of truly original ideas is quite limited, and progress depends upon their fortunate combination and historical "ripeness."

What combination of ideas will be able to emerge in the next quarter-century regarding international offenses? It is likely that the trend of the last seventy-five years to increase the number and types of situations encompassed by the term "offense" will continue. For example, "war crimes" was broadened by one of the 1949 Geneva Conventions[82] to include more detailed provisions regarding mistreatment of civilian populations. *In futuro*, regardless of the debate upon the legality and precedent value of the Nuremberg Judgment, the United Nations' efforts to draft a code of offenses

[81] One authority, Bilder, is sympathetic to this approach. He advocates a flexible attitude towards human rights problems which would allow adherence to any human rights solution on a limited basis (hopefully to be enlarged) with liberal use of protocols, reservations, and optional clauses. He also favors the use of incentives as well as sanctions to promote human rights. See Bilder, *The International Promotion of Human Rights: A Current Assessment*, 58 AM. J. INT'L L. 728 (1964).

[82] See Conventions cited note 71 *supra*.

against the peace and security of mankind indicates some acceptance of the idea that "aggressive war" is the ultimate international offense. Whether such a code will ever be widely adopted or not, and regardless of its effectiveness even if so adopted, it will become increasingly difficult to assert freedom from some form of organized international judgment when force is used in international affairs.

The similarity in definition of those rights found in the European Covenant and the United Nations Civil and Political Covenant indicate that, on the verbal level at least, agreement upon the existence of certain basic human rights is possible. It is obvious that meanings of even clearly phrased rights can vary widely depending upon the motivation and background of the interpreter. In addition, methods used to enforce these rights are crucial to their real importance. Nevertheless, it can be expected that the longer the international community lives with even the verbal identity of such rights formulations, the easier it will become to claim that disregard of them constitutes an international offense. This type of "offense" should be considered international even if just on a comparative basis the definitions can be classified as general principles of law recognized by most nations. In addition, they should be so classified because they will have their origin in international conventions with at least some international enforcement, even if merely by reports and communication of views among nations and with an international organization.

Finally, relevant to the broadening of the content of "offenses," it seems quite possible that certain clearly "sub-universal" concepts will gain support and become raw material for new international offenses.[83] Likely prospects are in the economic area and may very well focus on problems like control of resources and manipulation of markets in basic commodities upon which the survival of whole societies can depend. The results of another political or economic upheaval such as have been all too frequent in the last seventy-five years could, of course, give impetus to areas as unforseeable now as genocide was not long before World War II.

Regarding the formal sources of development of definitions, the role of conventions and declarations will probably increase. International law and affairs are somewhat subject to phases of in-

[83] It has been an obvious assumption of this article that a right or value must gain more than local acceptance before its violation can be the basis of an international offense. It may be inherently fruitless and certainly beyond the scope of this contribution to delve into questions such as what constitutes sufficient acceptance and in what form must it be expressed before a right can be said to be "universal."

terest. World War I was followed by increased interest in protection of minorities. World War II naturally produced the intensive efforts to define and enhance human rights described in the second section of this paper. This broadened international interest in human rights is likely to continue for the next twenty-five years, and along with it will go a more frequent use of regional and universal conventions and declarations to embody any agreements that may be reached. This tendency will vary directly with the degree of international peace. Preoccupation with individual and group survival in an atomic era is not conducive to the development of new definitions of offenses, and it puts a hard-to-resist strain on the possibilities of respecting those already existing.

The prospects for the increased importance of international tribunals in the growth of the concept of offenses do not appear too bright. The International Court of Justice is not likely to be given much more of an opportunity than it has had in the past to decide basic human rights questions. If the European Court on Human Rights[84] becomes a viable institution, it could act as a catalyst for the development of similar courts in other regions. It may very well be that municipal courts will become the principal judicial creative force in the area. If regional organizations like the European Convention System grow, and if basic international human rights documents like the United Nations Covenants become widely adopted, there will be in effect in many nations a comprehensive list of internationally recognized basic rights. These rights must first be protected within municipal legal systems since it is not likely that the doctrine of exhaustion of local remedies will be relinquished in the near future.

If attention to definition and refinement of basic rights continues to be high, the role of "publicists" in this area should become increasingly significant. An intuitive assumption of this contribution has been that the major developments in the definition of offenses have been largely predetermined by relevant historical events and attitudes. The fear of impending war was probably the main factor in the calling of, and in the results of, the Hague Conferences of 1899 and 1907. The vogue of "self-determination" and its incomplete implementation by the post-World War I settlements produced great interest in the protection of minorities during the inter-

[84] The European Court on Human Rights came into effect on September 3, 1958, with the deposit of the eighth declaration pursuant to Article 46 of the European Convention on Human Rights, 6 EUROPEAN YEARBOOK, 1958, at 227.

war years. Once this bow to "historical determinism" has been made, it should be recognized that there is, of course, room for conscious creative effort by statesmen, lawyers, writers and other leaders of thought. This area of influence will vary directly with the rate of change in the concept of "offenses" since this should increase susceptibility to informed suggestion.

If publicists desire to maximize their influence in the international arena they should adopt a conscious "deculturalization" attitude. In addition to following the general rules of clear thinking such as examination of conscious assumptions, great effort should be made to discover and weigh unconscious guiding principles. The particularly dangerous ideas which too often *determine* the output of too many writers are those which are unstated and culturally acceptable at any given time. Whether the sanctions for *not* accepting these assumptions be moral, economic, physical, or otherwise, the attempt must be made to resist automatic surrender to them or else the result will be exercises in academic justification of the culturally expedient.

It is easier to laud martyrdom than to live it. However, does it take a martyr, particularly in a relatively "free" society, to criticize his nation's clear violation of the basic rights of his fellow citizens or of foreigners just because many of his fellow citizens raise no protest? How refreshing and conducive to the development of an international consensus it is when a scholar honestly attacks what he thinks is his own nation's dogmatic viewpoint on an issue relative to an international offense. In short, to avoid academic rationalization of national expediency, and to prevent unnecessary scholarly support for atomistic hardening of conflicting positions, the international publicist should place the burden of proof on the assumptions of his own culture. In this way the controlling historical mood can best be taken advantage of and possibly even diverted somewhat to desired goals.

In sum, since 1892 we have seen a great broadening and deepening of the traditional concept of international offenses. We now have the Nuremberg triad of "Crimes Against Peace," "War Crimes," and "Crimes Against Humanity" and the continuous filling in of each of these categories. In addition, there are the movements to define universal basic economic, political, social, and cultural rights. Some guesses at future development of these concepts both in content and source have been attempted. Is there a generalized definition of "offenses against the law of nations" which may be

useful as a bridge between the present and the future? The definition should be broader than the usual connotation of the word "crime." It should also not be so comprehensive as to include transient and non-universal fads. A suggested definition of an offense against the law of nations is: *any violation of an elemental individual, group, national or international value so basic and permanent in importance that the necessity for its protection is recognized by most of the recognized actors on the world scene.*

Falk

"Nuremberg" Principles
Letter d/L 6 1970
attached

WAR CRIMES AND INDIVIDUAL RESPONSIBILITY:

A LEGAL MEMORANDUM

The dramatic disclosure of the Songmy massacre has led to a public concern over the commission of war crimes in Vietnam by American military personnel. Such a concern is certainly appropriate, but insufficient if limited to inquiry and prosecution of the individual servicemen involved in the monstrous events that apparently took the lives of over 500 civilians in the Mylai # 4 hamlet of Songmy village on March 16, 1968. The Songmy massacre itself raises a serious basis for inquiry into the military and civilian command structure that was in charge of battlefield behavior at the time.

The evidence now available suggests that the armed forces have made efforts throughout the Vietnam War to suppress, rather than investigate and punish, the commission of war crimes by American personnel. The evidence also suggests a failure to protest or prevent the manifest and systematic commission of war crimes by the armed forces of the Saigon regime in South Vietnam.

The scope of proper inquiry is even broader than the prior paragraph suggests. The <u>official policies</u> developed for the pursuit of belligerent objectives in Vietnam appear to violate the same basic and minimum constraints on the conduct of war as were violated at Songmy. B-52 pattern raids against undefended villages and populated areas, "free bomb zones," forcible removal of civilian populations, defoliation and crop destruction, and

"search and destroy" missions have been sanctioned as official tactical policies of the United States Government. Each of these tactical policies appears to violate the international laws of war binding upon the United States by international treaties ratified by the U.S. Government with the advice and consent of the Senate. The overall conduct of the war in Vietnam by the U.S. armed forces involves a refusal to differentiate between combatants and non-combatants and between military and non-military targets. Detailed presentation of the acts of war in relation to the laws of war is available in a volume bearing the title In the Name of America published under the auspices of the Clergy and Laymen Concerned about Vietnam in January 1968, or several months before the Songmy massacre took place. Ample evidence of war crimes has been presented to the public and to its officials for some time without producing an official reaction or rectifying action. A comparable description of the acts of war that were involved in the bombardment of North Vietnam by American planes and naval vessels between February 1965 and October 1968 is available in a book by John Gerassi entitled North Vietnam: A Documentary.

The broad point, then, is that the United States Government has officially endorsed a series of battlefield activities that appear to qualify as war crimes. It would, therefore, be misleading to isolate the awful happening at Songmy from the overall conduct of the war. It is certainly true that the perpetrators of the massacre at Songmy are, if the allegations prove correct, guilty of the commission of war crimes, but it is also

true that their responsibility is mitigated to the extent that they were executing superior orders or were even carrying out the general line of official policy that established a moral climate in which the welfare of Vietnamese civilians is totally disregarded.

I. Personal Responsibility: Some Basic Propositions

The U.S. prosecutor at Nuremberg, Robert Jackson, emphasized that war crimes are war crimes no matter which country is guilty of them. The United States more than any other sovereign state took the lead in the movement to generalize the principles underlying the Nuremberg Judgment that was delivered against German war criminals after the end of World War II.

At the intiative of the United States the General Assembly of the United Nations unanimously affirmed "the principles of international law recognized by the Charter of the Nuremberg Tribunal" in Resolution 95(I). This Resolution was an official action of governments. At the direction of the Membership of the United Nations, the International Law Commission, an expert body containing international law experts from all of the principal legal systems in the world, formulated the Principles of Nuremberg in 1950.

These seven Principles of International Law are set forth below in full to indicate the basic standards of international responsibility governing the commission of war crimes.

Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal

As formulated by the International Law Commission, June-July, 1950.

Principle I

Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.

Principle II

The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

Principle III

The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible government official does not relieve him from responsibility under international law.

Principle IV

The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible for him.

Principle V

Any person charged with a crime under international law has the right to a fair trial on the facts and law.

Principle VI

The crimes hereinafter set out are punishable as crimes under international law:

a. Crimes against peace:

(i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;

(ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

b. War crimes:

Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities,

towns, or villages, or devastation not justified by military necessity.

c. Crimes against humanity:

Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connexion with any crime against peace or any war crime.

Principle VII

Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.

Neither the Nuremberg Judgment nor the Nuremberg Principles fix definite boundaries on personal responsibility. These boundaries will have to be drawn in the future as the circumstances of alleged violations of international law are tested by competent domestic and international tribunals. However, Principle IV makes it clear that superior orders are no defense in a prosecution for war crimes, provided the individual accused of criminal behavior had a moral choice available to him.

The Supreme Court upheld in The Matter of Yamashita 327 U.S. 1 (1945) a sentence of death against General Yamashita imposed at the end of World War II for acts committed by troops under his command. The determination of responsibility rested upon the obligation of General Yamashita for the maintenance of discipline by troops under his command, which discipline included the enforcement of the prohibition against the commission of war crimes. Thus General Yamashita was convicted even though he had no specific knowledge of the alleged war crimes, which mainly involved forbidden acts against the civilian population of the

Philippines in the closing days of World War II. Commentators have criticized the conviction of General Yamashita because it was difficult to maintain discipline under the conditions of defeat during which the war crimes were committed, but the imposition of responsibility sets a precedent for holding principal military and political officials responsible for acts committed under their command, especially when no diligent effort was made to inquire, punish, and prevent repetition. The Matter of Yamashita has an extraordinary relevance to the failure of the U.S. military command to secure adherence to minimum rules of international law by troops serving under their command. The following sentences from the majority opinion of Chief Justice Stone in The Matter of Yamashita has a particular bearing:

> It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commands would almost certainly result in violations which it is the purpose of the law of war to prevent. Its purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the commands of an invading army could with impunity neglect to take reasonable measures for their protection. Hence the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.
>
> [327 U.S. 1, 15]

The Field Manual of the Department of the Army, FM 27-10, adequately develops the principles of responsibility governing members of the armed forces. § 3 (b) makes it clear that "the law of war is binding not only upon States as such but also upon individuals and, in particular, the members of their armed forces."

The entire manual is based upon the acceptance by the United States of the obligation to conduct warfare in accordance with the international law of war. The substantive content of international law is contained in a series of international treaties that have been properly ratified by the United States:

(1) Hague Convention No. III of 18 October 1907, Relative to the Opening of Hostilities (36 Stat. 2259; Treaty Series 538).

(2) Hague Convention No. IV of 18 October 1907, Respecting the Laws and Customs of War on Land (36 Stat. 2277; Treaty Series 539), and the Annex thereto, embodying the Regulations Respecting the Laws and Customs of War on Land (36 Stat. 2295; Treaty Series 540).

(3) Hague Convention No. V of 18 October 1907, Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (36 Stat. 2310; Treaty Series 540).

(4) Hague Convention No. IX of 18 October 1907, Concerning Bombardment by Naval Forces in Time of War (36 Stat. 2351; Treaty Series 542).

(5) Hague Convention No. X of 18 October 1907, for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention (36 Stat. 2371; Treaty Series No. 543).

(6) Geneva Convention Relative to the Treatment of Prisoners of War of 27 July 1929 (47 Stat. 2021; Treaty Series 846).

(7) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field of 27 July 1929 (47 Stat. 2074; Treaty Series 847).

(8) Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments of 15 April 1935 (49 Stat. 3267; Treaty Series 899). Only the United States and a number of the American Republics are parties to this treaty.

(9) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949 (T.I.A.S. 3362).

(10) Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea of 12 August 1949 (T.I.A.S. 3363).

(11) Geneva Convention Relative to the Treatment of Prisoners of War os 12 August 1949 (T.I.A.S. 3364).

(12) Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (T.I.A.S. 3365).

These international treaties are listed in the Field Manual and are, in any event, part of "the supreme law of the land" by virtue of Article VI of the U.S. Constitution. Customary rules of international law governing warfare are also made applicable to the obligation of American servicemen.

Laws of War applicable in Civil War

It has sometimes been maintained that the laws of war do not apply to a civil war, which is a war within a state and thus outside the scope of international law. Some observers have argued that the Vietnam War represents a civil war between factions contending for political control of South Vietnam. Such an argument may accurately portray the principal basis of the conflict, but surely the extension of the combat theater to include North Vietnam, Laos, Thailand, Cambodia, and Okinawa removes any doubt about the international character of the war from a military and legal point of view. Nevertheless, even assuming for the sake of analysis that the war should be treated as a civil war, the laws of war are applicable to a limited extent, an extent great enough to cover the events at Songmy and the commission of many other alleged war crimes in Vietnam. [illegible]

recites Article 3 of the Geneva Conventions of 1949 which establishes a minimum set of obligations for civil war situations:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
> (b) taking of hostages;
> (c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
> (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
>
> (2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.
>
> The Parties to the conflict whould further endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

Such a limited applicability of the laws of war to the Vietnam War flies in the face of the official American contention that South Vietnam is a sovereign state that has been attacked by a foreign state, North Vietnam. This standard American contention repeated in President Nixon's speech of November 3, 1969 would

suggest that the United States Government must treat this conflict as one of international character to which the entire law of war applies.

Several provisions of the Field Manual clearly establish the obligation of the United States to apprehend and punish the commission of war crimes:

> §§ 506. Suppression of War Crimes
>
> a. Geneva Conventions of 1949. The Geneva Conventions of 1949 contain the following common undertakings:
>
> The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.
>
> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or ordering to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.
>
> Each High Contracting Party shall take measures necessary for the suppression of all acts contrary tp the provisions of the present Convention other than the grave breaches defined in the following Article.
>
> In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the reatment of Prisoners of War of August 12, 1949. (GWS art. 49; GWS Sea, art. 50; GPW, art. 129; GC, art. 146)
>
> b. Declaratory Character of Above Principles. The principles quoted in a, above, are declaratory of the obligations of belligerents under customary international law to take measures for the punishment of war crimes committed by all persons, including members of a belligerent's own armed forces.

c. Grave Breaches. "Grave breaches" of the Geneva Conventions of 1949 and other war crimes which are committed by enemy personnel or persons associated with the enemy are tried and punished by United States tribunals as violations of international law.

If committed by persons subject to United States military law, these "grave breaches" constitute acts punishable under the Uniform Code of Military Justice. Moreover, most of the acts designated as "grave breaches" are, if committed within the United States, violations of domestic law over which the civil courts can exercise jurisdiction.

§ 507. Universality of Jurisdiction

a. Victims of War Crimes. The jurisdiction of United States military tribunals in connection with war crimes is not limited to offenses committed against nationals of the United States but extends also to all offenses of this nature committed against nationals of allies and of cobelligerents and stateless persons.

b. Persons Charged with War Crimes. The United States normally punishes war crimes as such only if they are committed by enemy nationals or by persons serving the interests of the enemy State. Violations of the law of war committed by persons subject to the military law of the United States will usually constitute violations of the Uniform Code of Military Justice and, if so, will be prosecuted under that Code. Violations of the law of war committed within the United States by other persons will usually constitute violations of federal or state criminal law and preferably will be prosecuted under such law (see pars. 505 and 506). Commanding officers of United States troops must insure that war crimes committed by members of their forces against enemy personnel are promptly and adequately punished.

§ 508. Penal Sanctions

The punishment imposed for a violation of the law of war must be proportionate to the gravity of the offense. The death penalty may be imposed for grave breaches of the law. Corporal punishment is excluded. Punishments should be deterrent, and in imposing a sentence of imprisonment it is not necessary to take into consideration the end of the war, which does not of itself limit the imprisonment to be imposed.

Section IV. DEFENSES NOT AVAILABLE

§ 509. Defense of Superior Orders

a. The fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character of a war crime, nor does it constitute a defense in the trial of the accused individual, unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful. In all cases where the order is held not to constitute a defense to an allegation of a war crime, the fact that the individual was acting pursuant to orders may be considered in mitigation of punishment.

b. In considering the question whether a superior order consitutes a valid defense, the court shall take into consideration the fact that obedience to lawful military orders is the duty of every member of the armed forces; that the latter cannot be expected, in conditions of war discipline, to weigh scrupulously the legal merits of the orders received; that certain rules of warfare may be controversial; or that an act otherwise amounting to a war crime may be done in obedience to orders conceived as a measure of reprisal. At the same time it must be borne in mind that members of the armed forces are bound to obey only lawful orders (e.g. UCMJ, Art. 92).

§ 510. Government Officials

The fact that a person who committed an act which constitutes a war crime acted as the head of a State or as a responsible government official does not relieve him from responsibility for his act.

§ 511. Acts Not Punished in Domestic Law

The fact that domestic law does not impose a penalty for an act which consitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

These provisions make it amply clear that war crimes are to be prosecuted and punished and that responsibility is acknowledged to extend far beyond the level of the individuals who performed the physical acts that inflicted harm. In fact, the effectiveness of the law of war depends, above all else, on holding those in command and in policy-making positions responsible for the behavior of the

rank-and-file soldiers on the field of battle. The reports of neuropsychiatrists, trained in combat therapy, have suggested that unrestrained behavior by troops almost always has been tacitly authorized by commanding officers, authorized at least to the extent of conveying the absence of any propsect of punishment for the outrageous behavior. It would thus be a deception to punish the triggermen at Songmy without also looking further up the chain of command to identify the truer locus of responsibility.

II. Some Comments on the Songmy Massacre. The events took place on March 16, 1968. The Secretary of Defense admitted knowledge of these events eight months before their public disclosure.(=Feb. 1969) The disclosure resulted from the publication of a photograph of the massacre in the Cleveland Plain Dealer taken by Ronald Haeberle. The lapse of time, the existence of photographs, the report of the helicopter pilot, the large number of American personnel (approximately 80 men of Company C, First Battalion, Twentieth Infantry Division) involved in the incident creates a deep suspicion that news of the massacre was suppressed at various levels of command and that its disclosure was delayed at the highest levels of military and civilian government. The numerous other reports of atrocities connected with the war have also not been generally investigated or punished with seriousness. In fact, other evidence of atrocities has been ignored or deliberately suppressed by military authorities at all levels of the U.S.

command structure. See e.g. Daniel Lang, "Casualties of War," The New Yorker, October 18, 1969. and previous New Yorker articles

The massacre at Songmy exhibits a bestiality toward the sanctity of civilian lives that exceeds earlier atrocities as took place at Lidice or Guernica. At Lidice, Czechoslovakia, on June 10, 1942 the male population of the town was shot, women were taken off to concentration camps, and the children sent off to schools and families. At Songmy no one was spared. See Hutak, With Blood and with Iron. At Guernica bombs were dropped on an undefended Spanish village terrorizing and killing the inhabitants, a scene made universal by Picasso's horrifying mural commemorating the event. Such military tactics are daily employed by American forces in Vietnam. At Songmy civilians were systematically chosen; they were the intended victims of the act, not the uncertain, random victims of an air attack.

The Songmy massacre is the culmination of the policies of counterinsurgency warfare in South Vietnam. It is not, however, an isolated atrocity, as many other occurrences in South Vietnam have revealed a brutal disregard of Vietnamese civilians and have disclosed little or no effort by military commanders to punish and prevent this behavior. In addition, the Songmy massacre is consistent with the overall effort of "denying" the NLF its base of support among the civilian population of Vietnam, whether by the assassination of civilians alleged to be NLF cadres (from December 1967 to December 1968 18,393 such civilians were killed in the Phoenix Operation), by fire-bomb zone attacks against villages

culmination of counter-insurgency

Phoenix

in NLF-held territory, defoliation and crop destruction, and by search-and-destroy missions that involved the destruction of the homes and villages of many thousand Vietnamese civilians. It is estimated by the U.S. Senate Subcommittee on Refugees, chaired by Senator Edward Kennedy, that over 300,000 South Vietnamese civilians have been killed since the beginning of the war, mainly by U.S. airstrikes and artillery. Such a figure represents a number six times as great as American war dead, and suggests the indiscriminate use of weapons against the very people that the U.S. Government contends it is fighting the war to protect.

The massacre at Songmy stands out as a landmark atrocity in the history of warfare, and its occurrence represents a moral challenge to the entire American society. This challenge was summarized by Mrs. Anthony Meadlow, the mother of David Paul Meadlow, one of the killers at Songmy, in a simple sentence: "I sent them a good boy, and they made him a murderer." (NYT, Nov. 30, 1969, Sec. 4, p. 1). Another characteristic statement about the general character of the war was attributed to an army staff sergeant: "We are at war with the ten-year-old children. It may not be humanitarian, but that's what it's like." (NYT, Dec. 1, 1969, p. 12).

III. Personal Responsibility in Light of Songmy. The massacre at Songmy raises two broad sets of issues about personal responsibility for the commission of war crimes:

(1) The legal scope of personal responsibility for a specific act or pattern of belligerent conduct;

(2) The extra-legal scope of personal responsibility of citizens in relation to war crimes and to varying degrees of participation in an illegal war.

(1) The War Criminal: Scope of Responsibility

We have already suggested that evidence exists that many official battlefield policies relied upon by the United States in Vietnam amount to war crimes. These official policies should be investigated in light of the legal obligations of the United States and if found to be "illegal," then these policies should be ceased forthwith and those responsible for the policy and its execution should be prosecuted as war criminals by appropriate tribunals. These remarks definitely apply to the following war policies, and very likely to others: (1) the Phoenix Program; (2) aerial and naval bombardment of undefended villages; (3) destruction of crops and forests; (4) "search-and-destroy" missions; (5) "harassment and interdiction" fire; (6) forcible removal of civilian population; (7) reliance on a variety of weapons prohibited by treaty.

In addition, allegations of all war atrocities should be investigated and reported upon. These atrocities--committed in defiance of declared official policy-- should be punished. Responsibility should be imposed upon those who inflicted the harm, upon those who gave direct orders, and upon those who were in a position of command entrusted with overall battlefield decorum and with the prompt detection and punishment of war crimes committed within the scope of their authority.

Finally, political leaders who authorized illegal battlefield practices and policies, or who had knowledge of these practices and policies and failed to act are similarly responsible for the commission of war crimes. The following paragraph from the Majority Judgment of the Tokyo War Crimes Tribunal is relevant:

> A member of a Cabinet which collectively, as one of the principal organs of the Government, is responsible for the care of prisoners is not absolved from responsibility if, having knowledge of the commission of the crimes in the sense already discussed, and omitting or failing to secure the taking of measures to prevent the commission of such crimes in the future, he elects to continue as a member of the Cabinet. This is the position even though the Department of which he has the charge is not directly concerned with the care of prisoners. A Cabinet member may resign. If he has knowledge of ill-treatment of prisoners, is powerless to prevent future ill-treatment, but elects to remain in the Cabinet thereby continuing to participate in its collective responsibility for protection of prisoners he willingly assumes responsibility for any ill-treatment in the future.
>
> Army or Navy commanders can, by order, secure proper treatment and prevent ill-treatment of prisoners. So can Ministers of War and of the Navy. If crimes are committed against prisoners under their control, of the likely occurrence of which they had, or should have had knowledge in advance, they are responsible for those crimes. If, for example, it be shown that within the units under his command conventional war crimes have been committed of which he knew or should have known, a commander who takes no adequate steps to prevent the occurrence of such crimes in the future will be responsible for such future crimes.

The United States Government was directly associated with the development of a broad conception of criminal responsibility for the leadership of a state during war. A leader must take affirmative acts to prevent war crimes or dissociate himself from the government. If he fails to do one or the other, then by the very act of remaining in a government of a state guilty of

war crimes, he becomes a war criminal.

Finally, as both the Nuremberg and the Tokyo Judgments emphasize, a government official is a war criminal if he has participated in the initiation or execution of an illegal war of aggression. There are considerable grounds for regarding the United States involvement in the Vietnam War--wholly apart from the conduct of the war--as involving the violation of the UN Charter and other treaty obligations of the United States. See analysis of the legality of U.S. participation in the Lawyers Committee on American Policy Towards Vietnam, Fried, Rapporteur, Vietnam and International Law, O'Hare Publishers, 1967; see also R. A. Falk, ed., The Vietnam War and International Law, Vol. 1 & 2, Princeton Press, 1968, 1969. If U. S. participation in the war is found illegal, then the policy-makers responsible for the war during its various stages, would be subject to prosecution as alleged war criminals.

(2) Responsibility as a Citizen.

The idea of prosecuting war criminals involves using international law as a sword against violators in the military and civilian hierarchy of government. But the Nuremberg Principles imply a broader human responsibility to oppose an illegal war and illegal methods of warfare. There is nothing to suggest that the ordinary citizen, whether within or outside the armed forces, is potentially guilty of a war crime merely as a consequence of such a status. But

there are grounds to maintain that anyone who believes or has reason to believe that a war is being waged in violation of minimal canons of law and morality has an obligation of conscience to resist participation in and support of that war effort by every means at his disposal. In this respect, the Nuremberg Principles provide guidelines for citizens' conscience and a shield that can be used in the domestic legal system to interpose obligations under international law between the government and the society. Such a doctrine of interposition has been asserted in a large number of selective service cases by individuals refusing to enter the armed forces. This assertion has already enjoyed a limited success in the case of U.S. v Sission, the appeal from which is now before the U.S. Supreme Court.

The issue of personal conscience is raised for everyone in the United States. It is raised more directly for anyone called upon to serve in the armed forces. It is raised in a special way for parents of minor children who are conscripted into the armed forces. It is raised for all taxpayers whose payments are used to support the cost of the war effort. It is raised for all citizens who in various ways endorse the war policies of the Government. The circle of responsibility is drawn around all who have or should have knowledge of the illegal and immoral character of the war. The Songmy massacre puts every American on notice as to the character of the war. The imperatives of personal responsibility call upon each of us to search for effective means to bring the war to an immediate end.

And the circle of responsibility does not end at the border. Foreign governments and their populations are pledged by the Charter of the United Nations to oppose aggression and to take steps to punish the commission of war crimes. The cause of peace is indivisible, and all those governments and people concerned with Charter obligation have a legal and moral duty to oppose the continuation of the American involvement in Vietnam and to support the effort to identify, prohibit, and punish the commission of war crimes. The conscience of the entire world community is implicated by inaction, as well as by more explicit forms of support for U.S. policy.

V. Final Questions. Some may say that war crimes have been committed by both sides in Vietnam and, therefore, prosecution should be even-handed, and that North Vietnam and the Provisional Revolutionary Government should be called upon to prosecute their officials guilty of war crimes. Such a contention needs to be understood, however, in the overall context of the war, especially in relation to the identification of which side is the victim of aggression and which side is the aggressor. More narrowly, the allegation of war crimes by the other side does not operate as a legal defense against a war crimes indictment. This question was clearly litigated and decided at Nuremberg.

Others have argued that there can be no war crimes in Vietnam because war has never been "declared" by the U.S. Government.

The failure to declare war under these circumstances raises a substantial constitutional question, but it has no bearing upon the rights and duties of the United States under international law. A declaration of war is a matter of internal law, but the existence of combat circumstances is a condition of war that brings into play the full range of obligations under international law governing the conduct of a war.

VI. Conclusion. This memorandum is a very tentative statement of some implications of the Songmy disclosures. These disclosures suggest wider responsibilities in relation to Songmy, in relation to other war practices in Vietnam, and in relation to the war itself. These responsibilities include the clarification and identification of what sorts of behavior make one subject to prosecution as a potential war criminal. These responsibilities also range beyond the idea of criminal liability to encompass all Americans and, indeed, all peoples and governments in the world. We call upon people everywhere to investigate the actions of the United States in Vietnam and to relate their conscience to these actions. Such is the full call to responsible action in the wake of the Songmy disclosures.

Richard A. Falk

AR 7262 14/3

JHE FRIED; BOX 457; ADDENDA I BOXES; N.D

Box 8

Various Books in English, German & French

1. Julius Ofner (German) Law & Society - 1931
2. Josef Poppe - Lynkeus (German) War, Defense & State Constitution 1931
3. Leonhard Winkler (German) German Law in the Light of German Proverbs 1927
4. Recueils (Collection - French) - Intern Society of Penal Military Law & the Law of War - 4th Interna Congress Madrid 1967: Extradition for Milit Crimes
5. Collection of Photographs
6. US Govt. Print. Office - 1947; Nazi Conspiracy & Aggression
7. Intern Com) the Red Cross: Geneva Convention - 1949 (1950)
8. Crimes of War & Crimes ag. Humanity - Convention (French) adopted by UN Gen. Assembly 11/26/68. (Non-applicability of Stat. Limitation
9. Ratification of the Geneva Convention of 1949 (French)
10. Criminal Code - Emperor Charles V. 1532

Aa 7262 14/4

JH E FRIED PORPHYR-LYNKEUS, JOSEF KRIEG, WEHRPFLICHT UND STAATSVOLK FASSUNG (?)

JOSEF POPPER-LYNKEUS

KRIEG, WEHRPFLICHT UND STAATSVERFASSUNG

RIKOLA VERLAG

DIE GUTEN ROMANE DES RIKOLA VERLAGES:

Rudolf Hans Bartsch: Ein Landstreicher. 12.–31. Tausend.
Gisela Berger: Der wandelnde Tod.
Felix Braun: Die Taten des Herakles.
Egmont Colerus: Antarktis.
Egmont Colerus: Der dritte Weg.
Egmont Colerus: Weiße Magier.
Anders Eje: Die Juwelen der Primadonna.
Else Feldmann: Löwenzahn.
Leo Fischmann: Die gelbe Fahne.
Robert Hohlbaum: Der wilde Christian.
Arnold Höllriegel: Die Films der Prinzessin Fantoche.
Alma Johanna Koenig: Der heilige Palast.
Emil Lucka: Fredegund.
Gustav Meyrink: Der weiße Dominikaner. 20.–30. Tausend.
Leo Perutz: Die Geburt des Antichrist. 4.–10. Tausend.
Maria Peteani: Die Liebesleiter. 4.–11. Tausend.
Erwin Rieger: Die Zerrissenen.
Emil Scholl: Das Abenteuer.
Thaddäus Rittner: Geister in der Stadt.
Otto Soyka: Die Traumpeitsche. 4.–10. Tausend.

RIKOLA VERLAG * WIEN · MÜNCHEN · LEIPZIG

Durch jede gute Buchhandlung zu beziehen

PAUL BUSSON

Die Wiedergeburt des Melchior Dronte

Roman

7.–26. Tausend

RIKOLA VERLAG
Wien Leipzig München

Mit diesem Buche stellt sich Paul Busson den besten deutschen Erzählern an die Seite. Wie er das Problem der Seelenwanderung entwickelt, aus der Erinnerung seines Helden das Leben eines deutschen Edelmanns des 18. Jahrhunderts durch schauerliche, sinnliche Erlebnisse bis zum Tode auf dem Schafott schildert und in der Seele des Wiedergeborenen zur Läuterung emporführt, entfaltet Busson eine geniale Erzählergabe.

DIE PRESSE ÜBER BUSSONS ROMAN:

„In diesem Buch ist eine Fülle der Gesichte, die uns fast beängstigend umdrängt und uns dieses furchtbare blutige Leben in Hand und Sinn preßt, daß wir nicht davon ablassen können, daß wir im Banne einer höheren Macht zu stehen glauben." Hamburger Fremdenblatt

*

„Wenn man dieses aufwühlende Buch zu Ende gelesen hat, ist es, als würde man aus einem halbdunklen, schwülen Raum auf die Straße treten und nun taumelt man und muß sich die Mauern entlangtasten, ehe die Besinnung wiederkehrt." Neues Wiener Tagblatt

*

„Paul Busson gibt in dieser großen Erzählung sein bisher reifstes, künstlerisches Werk, stark, reich, kostbar in der Form. Auch rein sprachkünstlerisch ist dieser Roman ein Meisterwerk. Er ist in imponierender, farbenreicher, wundervoll plastischer Prosa geschrieben."
Ostseezeitung, Stettin

JOSEF POPPER-LYNKEUS

KRIEG, WEHRPFLICHT UND STAATSVERFASSUNG

JOSEF POPPER-LYNKEUS

KRIEG, WEHRPFLICHT UND STAATSVERFASSUNG

RIKOLA VERLAG
WIEN · BERLIN · LEIPZIG · MÜNCHEN
1921

Gesellschaft für Graphische Industrie, Wien, III. Rüdengasse 11.

Milton und Locke, Rousseau und Schiller sagen uns:
»Der Mensch ist frei geboren«. —
Was nützt es uns aber, frei geboren zu sein,
wenn wir gezwungen sterben müssen?

Vorwort.

Der trockene Titel, den ich diesem Werke vorsetze, gibt dem Leser eine genügende Kenntnis von dem, was der Hauptsache nach darin behandelt wird.

Zuerst kommt der Krieg daran, und im Grunde bilden der Krieg, seine Anlässe und seine Folgen das durch das ganze Buch laufende, wichtigste Thema. Dabei wird der Weltkrieg unserer Tage nur ganz kurz und nebenbei behandelt, mehr um ihn als ein Beispiel und für die Nutzanwendung auf meine Ansichten und Vorschläge zu verwerten, als um ihn an und für sich einer näheren Betrachtung zu unterziehen. Denn nur ungerne berührte ich dieses furchtbare und folgenschwere Ereignis. Es ging aber nicht wohl an, in einem Werke über den Krieg den größten aller Kriege als solchen zu ignorieren und um so weniger, als ich überzeugt bin, daß durch die Art meiner Behandlung die Nachwelt endlich eine absolut unparteiische Darstellung der relativen Schuld am Weltkriege bekommen wird. Meine Stellungnahme gegenüber den beiden feindlichen Mächtegruppen, derzufolge ich — wie auch schon in meinen beiden politischen Broschüren »Einige Gesichtspunkte für die Urheberschaft am Weltkriege« und »Friedensvorschläge, Schiedsgerichte und Völkerbund« ⟨Anzengruberverlag Wien 1917⟩ — die Mittelmächte als den im letzten Grunde defensiven und die Ententemächte als den aggressiven Teil ansehe, wird ohne Zweifel bei vielen Lesern, trotz aller meiner Mühe und Sorgfalt in Beschaffung und Beurteilung des einschlägigen Materiales, Widerspruch erregen. Aber diese meine Stellungnahme hat mit allen anderen Themen meines Buches gar nichts zu tun. Es wäre sehr zu bedauern, wenn der Leser durch die Divergenz seiner Ansichten mit den meinigen über die Schuld an diesem Kriege sich in der ruhigen Beurteilung meiner sonstigen Ausführungen stören ließe. Die

hier behandelten Themen sind ja auch unvergleichlich wichtiger als die Beantwortung der Frage, welcher Partei die Verantwortlichkeit in diesem Weltkriege zuzuschieben sei.

Sodann ging ich auf das Thema der allgemeinen Wehrpflicht näher ein, um zu zeigen, daß vom Standpunkte der Humanität wie der Gerechtigkeit aus die Wehrpflicht durch das System der Freiwilligkeit des Kriegsdienstes ersetzt werden sollte. Es ist zwar jüngsthin in Deutschland und Deutschösterreich die allgemeine Wehrpflicht aufgehoben worden und es könnte nun scheinen, als ob wenigstens für diese beiden Staaten meine Bemühung in diesem Werk überflüssig geworden wäre. Allein dem ist nicht so. Denn die Abschaffung der Wehrpflicht geschah auf Diktat der Entente und wenn es die Umstände einmal erlauben werden, so ist darauf zu rechnen, daß große und einflußreiche Teile der Bevölkerung dieser Staaten auf Wiederherstellung dieser Institution dringen werden. Und überdies ist sie ja auch in Frankreich, Italien, Spanien, Tschechoslowakei und anderen Staaten noch am Leben, meine Polemik gegen sie also sehr gerechtfertigt.

Ich bin also für Abschaffung jeder Art von Wehrpflicht, das ist von Kriegsdienstpflicht, unter Krieg auch Bürgerkrieg verstanden.

Für die zweckmäßigste Art der Durchführung dieses Gedankens halte ich die, ihn als Programm eines eigens einzuberufenden Staatenkongresses aufzustellen. Auf diesem Kongreß sollen die Staaten vereinbaren, für den Krieg nur Freiwillige zu verwenden und auch beschließen, die Detailbestimmungen, die ich für dieses ganze Wehrsystem vorschlage, durchzuführen.

Als notwendige Ergänzung soll, behufs Verhütung jeder Seeoberherrschaft und jedes Seekrieges überhaupt, auf demselben Staatenkongreß auch vereinbart werden, alle Kriegsschiffe bis auf einen zur Küstenverteidigung genügenden Rest, der die eigenen Hoheitsgewässer nicht verlassen darf, zu desarmieren, nur Freiwillige auszuheben und ferner die Strandbatterien von allen nicht im eigenen Lande liegenden Meerengen zu entfernen.

Da nun eine solche Reform Gegenstand politischer Bestrebungen und Agitationen sein muß, so war es zur gründlichen Beleuchtung dieses Programmes angezeigt, staatsrechtliche

Untersuchungen, weniger historischer als rechtsphilosophischer Art, anzustellen.

An diese Hauptthemen schließen sich, ziemlich naturgemäß, Betrachtungen über unser politisches und diplomatisches Regime, über Patriotismus, Nationalgefühl, das Verhältnis der Politik zur Moral u. a. an.

Wenn man irgend einen Krieg auch nur aus Beschreibungen in seinen Einzelheiten kennen gelernt oder gar die Schrecken des Weltkrieges unserer Tage miterlebt hat, so muß man, wenn selbst nicht persönlich mitbetroffen, doch aus menschlichem Mitgefühl heraus von höchster Entrüstung erfüllt sein, wenn man sieht, daß viele Schriftsteller den Krieg sogar glorifizieren. Meine schriftstellerische Begabung reicht beiweitem nicht hin, um meiner Empörung über die Mehrzahl der Kriegsphilosophen genügend kräftigen Ausdruck zu geben.

Hat doch ein holländischer Soziologe und Philosoph das Kriegführen u. a. damit rechtfertigen wollen, daß er sagt:

»Alle sehr große Kraftanstrengung hat etwas Erhebendes« — »Und das Blut? Ja, das ist doch nichts als eben ein Symbol der Anstrengung« — »Um himmelhoch jauchzen zu können«, nämlich nach einer gewonnenen Schlacht, »muß man erst zu Tode betrübt gewesen sein!« — »Den Grausamkeitsleiden stehen Grausamkeitsgenüsse gegenüber.«

Da soll doch gleich der Donner solchen philosophierenden Unmenschen auf ihr grausames Herz schlagen!

J. P. L.

Inhaltsverzeichnis.

ERSTER TEIL

I.

Zur vorläufigen Orientierung.

Niemand kann mit Sicherheit behaupten, daß das Kriegführen einmal gänzlich aufhören wird. Der Verfasser dieser Schrift bezweifelt es sogar.

Aber selbst wenn der Krieg als Massenerscheinung niemals aufhören sollte, so ist es doch — und wie man sehen wird, auf sehr einfache Weise — möglich, den Krieg, als Schicksal jedes Einzelnen betrachtet, und insoferne es um seine Gesundheit oder sein Leben geht, in absolut sicherer Weise aus der Welt zu schaffen.

Man braucht bloß den pflichtmäßigen Kriegsdienst, sowohl für die Landarmee als auch für die Marine und Luftfahrzeuge, durch den freiwilligen zu ersetzen und dieses einfache Prinzip aufrecht zu erhalten, unabhängig davon, was auch für Neuerungen in unseren politischen und sozialen Institutionen im Laufe der Zeit eingeführt werden mögen. Der freiwillige Kriegsdienst, den ich hier meine, hat nichts mit den verschiedenen Werbesystemen vergangener Zeiten zu tun; es gibt keinerlei Söldner, aber wohl ist jeder hiezu Taugliche aus bestimmten Altersjahrgängen verpflichtet, sich militärisch ausbilden zu lassen und eine gewisse Zeit hindurch einer Armee anzugehören, sei es einer Miliz- oder einer Kader-Armee. Im Falle eines beabsichtigten Krieges jedoch können die Mitglieder der Armee nicht gezwungen werden, ins Feld zu ziehen, sondern man muß es jedem Einzelnen überlassen, in jedem speziellen Falle, auf einen Aufruf des Staates ⟨der Regierung⟩ hin sich für den Kriegsdienst freiwillig anzubieten. Wer das nicht tut, bleibt vollkommen unbelästigt zu Hause.

Dies ist der Grundgedanke meines Programmes, wie ich es zum erstenmale im Jahre 1878 in dem Werke »Das Recht zu leben und die Pflicht zu sterben«, und zwar im Schlußkapitel veröffentlicht habe und auf das ich in den späteren Werken wiederholt zurückkam. In der vorliegenden Schrift wird nun dieser Vorschlag so eingehend behandelt, daß wohl volle Klarheit über ihn verbreitet, seine Anwendbarkeit in mannigfachen Situationen der Praxis gezeigt und jede ernstere Einwendung gegen ihn behoben werden dürfte.

Der Nutzen der Freiwilligkeitsinstitution wird nun darin bestehen, daß nicht nur jeder einzelne selbständig darüber entscheiden kann, ob er sich den Gefahren des Kriegsdienstes unterwerfen, also in dieser fundamentalen Frage von allen anderen Menschen unabhängig sein will, sondern es muß dann auch die Häufigkeit der Kriege überhaupt abnehmen. Denn sehr oft werden sich so Wenige freiwillig melden, daß die Politiker von einem beabsichtigten Kriege abstehen müssen, und andererseits werden die Politiker viel vorsichtiger und zurückhaltender in diplomatischen Intriguen und Agitationen ‹zu Kriegszwecken› sein, weil sie weder für den eigenen, noch für den anderen Staat im voraus wissen können, wie groß die Zahl der Freiwilligen sein würde, also jede sichere Grundlage für einen militärischen Kalkül fehlen wird.

Und ganz abgesehen von diesem Nutzen meines Vorschlages, involviert dieser auch das Prinzip einer vollkommenen politischen Gerechtigkeit. Denn ihm zufolge kann derjenige, der in einem gegebenen Falle für den Krieg ist, Krieg führen, das heißt ihn mitmachen, und wer gegen den Krieg ist, braucht ihn eben nicht mitmachen.

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Gelehrte Untersuchungen jeder Art sind im Nachfolgenden gänzlich ausgeschlossen, meine ganze Absicht geht nur dahin, den Menschen zu helfen, sich von einer ihrer furchtbarsten Geißeln zu befreien. Mein Werk ist kein wissenschaftliches, sondern ein rein praktisches. Gelehrsamkeit, Scharfsinn oder Geist möge man anderswo suchen.

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Wenn hier der Schutz vor den physischen Unbilden der Kriege, der infolge der Institution der Freiwilligkeit des Kriegsdienstes ermöglicht werden soll, proklamiert und verlangt wird, so liegt dieser Erwartung allerdings die Voraussetzung zugrunde, daß von den kriegführenden Heeren und Mächten das Völkerrecht gewahrt wird, daß also in erster Linie Nicht-Kombattanten vor jedem Angriff auf Leben, Gesundheit und soweit es die Kämpfe nicht notwendig erheischen, auch auf das Eigentum gesichert sind. Ist das der Fall, so hat die Zivilbevölkerung — von ausnahmsweisen oder doch seltenen militärischen Situationen abgesehen — nur durch die mehr oder weniger eingreifenden Verwirrungen und Störungen im wirtschaftlichen Leben zu leiden, und selbst diese Übelstände können vermieden werden, wenn man jene Einrichtungen trifft, die in meinem Werke »Die allgemeine Nährpflicht« vorgeschlagen sind.

Es handelt sich also auch noch, wenn mein Ziel wirklich erreicht werden soll, um das Vorhandensein und die Einhaltung eines, soweit als zur Zeit möglichen, gesitteten Völkerrechtes. Sei dieses aber wie immer beschaffen und werde es wie immer von den Staatsmännern oder von einzelnen Kriegsleuten verletzt, so bleibt doch bei Abschaffung des Kriegsdienstzwanges das fundamentale Resultat aufrecht, daß über das Risiko des Lebens oder der Gesundheit menschlicher Individuen, ich meine hier: der Soldaten, nicht ein Zwang durch den eigenen Staat, sondern niemand anderer als diese Individuen selbst zu entscheiden haben.

Und was das bedeutet, wird in den zehn- und hunderttausenden Fällen deutlich, die wir bei jedem Kriege, namentlich bei denen es sich nicht offensichtlich um eine notwendige Verteidigung handelt, beobachten können, wo die Soldaten zumeist nur aus Furcht vor den Zwangsmitteln des Staates in das Heer eintreten und mitkämpfen. Nicht zu sprechen von dem furchtbaren Gemütszustande, in dem sich die Angehörigen der wider Willen in das Feld ziehenden Soldaten befinden.

II.

Eine staatsrechtliche Betrachtung.

Wie Staaten überhaupt entstehen, wie die einzelnen Staaten entstanden sind, wie das Verhältnis des Staates zur Kultur beschaffen ist oder beschaffen sein soll, desgleichen sein Verhältnis zur Religion, und hundert andere Probleme und Fragen lasse ich in diesem Werke fast ganz unberührt, so wichtig sie an sich auch sein mögen.

Wenn wir, unbekümmert um alle Theorien und Systeme, die Menschen fragen, was sie denn eigentlich von einem Staate, in dem sie leben sollen, verlangen, so würden wohl viele erwidern oder mit folgender Antwort einverstanden sein:

Der Staat soll uns so wenig als möglich belästigen, aber andererseits uns, so sehr als es ohne Zwistigkeiten zwischen uns hervorzurufen und seiner Beschaffenheit nach möglich ist, fördern, das heißt unseren Wünschen und Idealen entgegenkommen.

Dieser allgemeine Satz wird noch näher präzisiert, wenn wir, auf Grund vielfacher Beobachtungen staatlicher Vorgänge, sagen:

Die möglichst geringe Belästigung soll darin bestehen, daß es jedem erwachsenen Menschen vergönnt sein muß, unter normalen Umständen seine Beschäftigung so einzurichten und seine Interessen so zu wählen, wie er es wünscht und so weit es eben mit den Notwendigkeiten der staatlichen Gesamtheit vereinbar ist. Wir, d. i. jeder einzelne, wollen nur in jenen Dingen und Situationen unser Glück suchen, die nur wir selbst als dazu geeignet beurteilen.

Daraus folgt, daß wir weder dem Übermut oder der Bosheit oder den Ansichten der Praktiker, noch der Tyrannei der Idealisten verschiedener Art unterworfen sein wollen. Meine

Tätigkeit, meine Ziele, meinen Zeitvertreib darf mir, wenn ich nur sonst meinen als notwendig erkannten Pflichten als Mensch und Staatsbürger nachkomme, niemand, also auch die Staatsgewalt nicht, stören. Was ich als meine Zufriedenheit oder als mein Glück anerkenne, muß also nicht gerade jene Art von Zufriedenheit und Glück sein, die andere oder die Staatsgewalt so nennen, es mag, wenn ich es so wünsche, auch sogar so geartet sein, daß andere es »Unglück« oder »Selbstquälerei« oder »Selbstopferung« nennen. Wenn zu meinem Glück eben sogenanntes Unglück gehört, wenn ich mich nach »Bitternissen sehne« und sie suche, so muß es mir ebenso frei stehen, demgemäß zu denken und zu handeln, wie wenn ich meine Tage in Saus und Braus verbringen wollte. Wenn ich wünsche und auch dafür agitiere, daß mein Staat ein nationaler oder religiöser, ein politisch tätiger oder ein politisch ganz untätiger sein soll, wenn ich für ihn Leben und Gesundheit riskieren will und diesen Schritt für etwas Großes und Erhabenes halte — so soll dies alles mir unbenommen bleiben.

Ich schreibe also hier gar nichts vor, d. h. ich wünsche, daß von Staat und Gesellschaft niemandem — außer im Bereich notwendiger Anforderungen an das Individuum im Interesse der Gesamtheit — in seine Lebensführung in anderer Weise eingegriffen werde, als durch Argumente. Mit meiner Auffassung von Staat und Gesellschaft ist daher selbst die allerlebhafteste Propaganda für irgendwelche Ideen, Moralsysteme, Ideologien und politische wie religiöse Theorien ganz gut vereinbar.

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Die von Stirner in dem Werke »Der Einzige und sein Eigentum« aufgestellte Maxime »Mir geht nichts über mich« und die nähere Ausführung dieses Gedankens erweckt den Anschein eines anarchistisch übertriebenen individualistischen Prinzips. Wie ich glaube, tut man Stirner mit einer solchen Auffassung Unrecht, obwohl er mitunter seine Sätze in etwas brüsker und aufreizender Form ausspricht.

So z. B. wenn er sagt: »Was aber kümmert mich das Gemeinwohl? Das Gemeinwohl als solches ist nicht mein Wohl, sondern nur die äußerste Spitze der Selbstverleugnung«, oder wenn er unaufhörlich vom »Einzigen« und vom »Egoisten« spricht, und am Schluß seines Werkes ausruft: »Was, bin ich dazu

n der Welt, um Ideen zu realisieren?« Allein man sieht namentlich aus Stirners Antikritiken ‹gegen Szelika, Feuerbach und Heß›, die John Henry Mackay unter dem Titel »Max Stirners Kleinere Schriften« herausgegeben hat, daß er mit seinem Worte »Egoismus« etwas ganz anderes als den vulgär sogenannten Egoismus meint. »Der Egoismus, wie ihn Stirner geltend macht«, heißt es dort ‹S. 144›, »ist kein Gegensatz zur Liebe, kein Gegensatz zum Denken, kein Feind eines süßen Liebeslebens, kein Feind der Hingebung und Aufopferung . . . kurz, kein Feind eines wirklichen Interesses. . . . Nur gegen das Uninteressante ist er gerichtet, nicht gegen die Liebe, sondern gegen die heilige Liebe . . . nicht gegen die Sozialisten, sondern gegen die heiligen Sozialisten usw.«

Dabei versteht Stirner unter »Interessant«, was im Interesse des Individuums gelegen ist, wobei also dieses einer Idee oder einem Gebot selbständig urteilend oder empfindend gegenübersteht, während als »heilig« alles das angesehen wird, was als über der Abschätzung und Beurteilung des einzelnen Individuums stehend ausgegeben wird, dem es also unbedingt unterworfen sein und wo es gar nichts dreinzureden haben soll.

Hiemit fällt aber der revolutionierende Eindruck des Stirnerschen Werkes zum größten Teile weg und die allgemeine Entrüstung darüber erscheint überflüssig. Sein Hauptverdienst wäre wohl darin gelegen, keine absolut geltenden Maximen und Vorschriften gelten lassen zu wollen und in solchen Fällen stets das Individuum zu Worte kommen zu lassen. Dann würde aber Stirners Forderung mit der von mir in diesem Werke vertretenen übereinstimmen, doch ist es auch möglich, daß ich, von meiner Idee zu sehr erfüllt, Stirner unrichtig auffasse. Ich lasse daher diese Frage, als zu unwichtig, dahingestellt sein.

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Damit der Staat uns möglichst wenig belästigt und uns doch in richtiger und gewünschter Weise fördern kann, sollen wir ihm, das heißt seiner Macht über uns, nur jene Aufgaben zuweisen, die durch andere weniger mächtige oder durch kleinere Vergesellschaftungen nicht ebenso gut gelöst werden können, wie durch ihn selbst.

Was aber diese Aufgaben selbst betrifft, so wäre es zweckmäßig, sie darnach zu unterscheiden, ob sie fundamentale oder nur sekundäre Angelegenheiten der Staatsangehörigen betreffen. Und insoweit es sich um Beschlußfassungen, also um die Gesetzgebung handelt, befolge man die Norm:

Für die sekundären, also weniger wichtigen Angelegenheiten hat die Volksrepräsentation, für die fundamentalen hat das ganze Volk durch ein Referendum zu entscheiden.

Von der Einführung dieser hie und da nahezu schon eingeführten Verfassungsform ist zu hoffen, daß durch sie die unaufhörlichen und oft so erbitterten Kämpfe und Sorgen, die das öffentliche und private Leben heute und seit jeher erfüllen, in hohem Maße abnehmen, viele sogar gänzlich aufhören werden. Und einige Überlegung macht das sehr plausibel.

Denn in den wichtigen Angelegenheiten, die ja alle betreffen, entscheiden auch alle, und zwar direkt, eine bessere Beruhigung über gefaßte Beschlüsse — soweit es auf das Formale ankommt — kann es aber offenbar nicht geben. Und die untergeordneten Bedürfnisse und Wünsche werden gewiß nicht entfernt in solchem Grade das politische Leben mit Streit und Kampf erfüllen wie heute, wenn einmal fundamentale Bedürfnisse befriedigt sind. Gerade die sekundären Angelegenheiten sind so zahlreich auf der Tagesordnung und sind so wenig und so selten einer objektiven Entscheidung zugänglich, daß man ihre Behandlung ganz zweckmäßig den Volksrepräsentanten, sozusagen im geschlossenen Raum, überlassen mag. Allerdings wäre auch zu wünschen, durch Wort und Schrift auf die Menschen dahin zu wirken, daß sie zur Erreichung eines besseren Friedens untereinander sekundäre Streitfragen nicht so ernst und wichtig nehmen, wie es gewöhnlich geschieht, und lieber auf die Erfüllung ihrer fundamentalen Bedürfnisse mit größerer Intensität und Beharrlichkeit bestehen, woran es, seltsamerweise, heute noch fehlt. Man denke z. B. an die endlosen Streitigkeiten, wenn eine neue Steuer oder Steuerskala oder wenn in gemischtsprachigen Ländern in irgend einem Bezirk diese oder jene Sprache in der Verwaltung eingeführt werden soll, aber an die Forderung einer garantierten Lebenshaltung durch den Staat denkt man nicht.

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Was ist nun eigentlich unter fundamentalen Bedürfnissen zu verstehen? Es sind dies vor allem solche, die die physische Existenz der Menschen betreffen und deren absolut sichere Befriedigung die Bevölkerung zu ihrer Zeit als notwendig ansieht. Die zwei wichtigsten hieher gehörigen Angelegenheiten, mit denen sich wohl eine nahe Zukunft befassen wird, werden die bedingungslose ökonomische Sicherung aller Staatsangehörigen und ihre Unantastbarkeit an Leben und Gesundheit ‹vom Schutze vor gefährlichen Individuen abgesehen› sein müssen.

Zwar nicht mehr so dringend wie solche Existenzfragen, aber doch zu den wichtigen, wenigstens quasi fundamentalen gehörig, sind die sogenannten Grundrechte in Verfassungsstaaten, die sich nicht direkt auf die physische Existenz beziehen, sondern in mehr negativer Weise polizeiliche und strafprozeßuale Schutzmaßregeln betreffen. Also: die positiven Einrichtungen zur Sicherung des Lebens, der Ehre, der Gesundheit, des Eigentums, sowie der Schutz der persönlichen Freiheit, die Freizügigkeit, Unverletzlichkeit des Hausrechts, Wahrung des Briefgeheimnisses ‹das alles unter normalen Umständen›, Glaubensfreiheit usw.

Offenbar lassen sich selbst diese Grundrechte nicht an Dringlichkeit vergleichen mit den zwei Existenzforderungen: mit dem positiven Rechte: Auf Sicherung vor wirtschaftlicher Not oder Sorge, dem negativen: Nicht zu einer Gefährdung des Lebens oder der Gesundheit zu Staatszwecken gezwungen werden zu dürfen, das ist unter anderem die Forderung nach Ersatz der Wehrpflicht durch ein spezielles System der Freiwilligkeit. Dieser Ansicht gemäß bemühte ich mich seit ungefähr vierzig Jahren, wenigstens um die theoretische Ausgestaltung der zugehörigen Programme, und sie wurden behandelt in den Werken: »Das Recht zu leben und die Pflicht zu sterben« ‹1878›, »Fundament eines neuen Staatsrechtes ‹1905›, »Voltaire« ‹1905›, »Das Individuum und die Bewertung menschlicher Existenzen« ‹1910›, »Die allgemeine Nährpflicht als Lösung der sozialen Frage« ‹1912›, und im letztgenannten Werke ist die Art der Durchführung des sozialen Programms sehr detailliert gegeben worden. Damit ist das eine Programm, die dringendste, positive, fundamentale Individualforderung von mir aus als erledigt anzusehen.

Das andere, das negative, der Ersatz der Wehrpflicht durch die Freiwilligkeit des Kriegsdienstes, soll nun in dem vorliegenden

Werke so eingehend, als ich es vermag, behandelt werden. Es ist gewiß von ebenso großer Wichtigkeit wie das wirtschaftliche, wenn es auch nicht alltäglich, wie dieses, aktuell wird.

Der Sinn dieses militärischen Programms ist aber in dem viel allgemeineren Grundsatz aller Gesittung gelegen:

Es habe jeder die Freiheit, Märtyrer seiner eigenen Ziele oder Ideale zu werden, aber niemand darf gezwungen werden, Märtyrer der Ziele oder Ideale anderer zu werden.

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Es ist nun sehr merkwürdig, daß gerade die wichtigste Frage, nämlich die nach der Pflicht, sein Leben darzubieten, falls die Staatsregierung es verlangt, bisher von allen Staatsrechtstheoretikern so auffallend leicht genommen wurde. Wenige Zeilen in den Werken über Rechtsphilosophie genügen ihnen. Aber die Untersuchungen über zweckmäßige Abstimmungsmethoden, über Zentralisation oder Dezentralisation, über Erweiterung der Gemeindeautonomie, über den Zensus für das Stimmrecht usw. usw. gehen ins endlose. Und wenn man bedenkt, welche furchtbaren Konsequenzen die Institution der Wehrpflicht ganz sicherlich hat, so möchte man fast glauben, es fehle den Staatstheoretikern alle Hochachtung vor menschlichen Existenzen in demselben Grade wie den Staatspraktikern. Von der unermeßlichen Wichtigkeit des Problems durchdrungen, habe ich daher versucht, in dem Werke »Das Individuum und die Bewertung menschlicher Existenzen«, es so sehr als es mir möglich war, zu analysieren und mein Programm der Abschaffung der Wehrpflicht und ihres Ersatzes durch die Freiwilligkeit zu vertiefen, nämlich ethisch zu begründen.

Auf dieses Werk verweise ich und rate, es als wichtige Ergänzung der vorliegenden Schrift zu betrachten und zu benützen.

Stellen wir uns einmal vor, jene beiden fundamentalen menschlichen Bedürfnisse, die ich in meinen Werken einem Studium unterworfen habe, wären in der Tat befriedigt, daß also jedes Individuum seine Lebenshaltung gesichert und seine physische Existenz nichts von den Staatsregierungen zu befürchten habe — wie könnten dann die Menschen aufatmen, in welchem relativ gesitteten Zustande der politischen Gemeinschaft würden sie dann

— von gewiß sehr seltenen Ausnahmszuständen abgesehen — ihr Leben verbringen, im Vergleich zu dem heutigen! Wenn wir von den mannigfaltigen unangenehmen Vorgängen und Aufregungen des Privatlebens absehen, so könnte für die Menschheit eine bisher unbekannte Ruhe des Gemütes eintreten, und eine unzählbare Menge der heute so häufigen unedlen oder geradezu schlechten Handlungen wird, aus Mangel an Anlässen und Motiven — wenn auch nicht infolge Besserung des menschlichen Charakters — unterbleiben und man wird dann sehen, daß die Menschen wenigstens in ihren Äußerungen — ohne Aufwand pädagogischer oder religiöser Mittel — eines hohen Grades von Harmlosigkeit fähig sind. Denn, wie ich es im Werke »Das Individuum« darlegte: Der soziale und ethische Fortschritt der Menschheit besteht hauptsächlich in dem der Institutionen und nicht in jenem der Privatmoral der einzelnen Individuen.

Setzen wir noch weiter voraus, daß es einmal gelingen werde, die Ethik auch in der Politik zur Geltung zu bringen und durch ein gesittetes Völkerrecht, das nicht nur auf dem Papiere steht, auch die Kriegführung zu humanisieren — zwei Aufgaben, deren Lösung an Schwierigkeit ihresgleichen sucht — dann; dann allerdings wäre jeder vor den meisten schlimmen Eingriffen der Natur und auch der Menschen wie durch eine eiserne Mauer geschützt und jedermann stünde es dann frei, so zu leben, wie es »sein Herz begehrt«.

Das muß das Ziel aller Bemühungen sein und die Staatskunst sollte es dahin bringen, daß es so werde.

Denn es muß gesagt werden: Der heutige Zustand der Gesellschaft ist unhaltbar. Es gibt Millionen und Millionen Menschen, die es endlich müde geworden sind, ganz gegen ihren Willen durch die mannigfaltigsten großen wie kleinen politischen Vorgänge, nicht nur in ihrem Behagen und ihrer Stimmung beunruhigt, sondern auch in der Sicherheit ihrer Lebenshaltung, ihrer persönlichen Sicherheit, selbst in ihrer ganzen physischen Existenz gefährdet zu werden.

Wie kommt ein friedliebender, ein Mensch z. B. ohne politische Tätigkeit dazu, in seiner ökonomischen oder leiblichen Existenz sich bedroht zu sehen, weil in irgend einem Winkel der Erde ein unscheinbarer Anlaß zu weiten kriegerischen Verwicklungen führen kann?

Wenn am Libanon sich Mönche streiten, wenn von Montenegrinern den Albanesen Hammel gestohlen werden, wenn ein Politiker, ein sogenannter Staatsmann oder Minister, irgend eines großen oder kleinen Staates behauptet, dieser könne ohne einen gewissen Hafen oder ohne freie Durchfahrt dort und dort nicht weiter existieren, so sind sofort, bei den komplizierten Beziehungen aller Mächte, allerlei Intrigen, erheuchelte oder echte Patriotismen, Egoismen und alle möglichen Fanatismen überhitzter Idealisten am Werk und ganz Europa kommt in Unruhe.

Trauriges Los der vielen Millionen Menschen! Sie müssen in Angst abwarten, was die Diplomaten untereinander abmachen, ob der oder jener Diplomat geschickter, schlauer, schlechter als der andere ist, ob die einflußreichen Faktoren wirklich Frieden oder Krieg wünschen, ob denn endlich die angekündigte Konferenz zusammentritt? Wann? Wo? Wie? Und so ins Endlose fort. Für Napoleon stand allerdings fest, daß in unserer Zeit Politik das Schicksal sei, er konnte das für objektiv richtig halten, da er als genialer Soldat alle Staaten und Völker durcheinanderwirbelte. Aber in einer gesitteten Gesellschaftsordnung darf eben Politik nicht das Schicksal sein, es mag jedem freistehen, sich in den politischen Wirbel zu begeben, dann macht er sie eben in gewissem Maße zu seinem Schicksal, wer das aber nicht will, muß unbehelligt von aller Politik bleiben können, und sein Leben wie immer nach seinem Behagen fortführen, zum Beispiel Tulpen ziehen oder Zahlenlehre studieren. Und wir können nur jene hochtrabenden Redensarten verlachen, die von »hoher« Politik in Ehrfurcht sprechen, oder solche Phrasen wie jene von Rodbertus: »Die Politik ist die königliche Kunst, den Willen des Weltgeistes zu erkennen und zu verwirklichen,« eine Narrheit, die offenbar der Hegelschen Terminologie vom »Weltgeist« und von »Volksgeistern« zu danken ist.

Was geht mich, der ich kein Politiker bin, der Libanon, der albanesische Hammel oder jenes Bedürfnis nach einem Hafen an? Und doch muß ich bei jeder solchen Affäre zittern! Das ist das Resultat der »Annäherung der Völker durch die Eisenbahnen«, der raschen Verständigung der Kabinette durch Telegraph und Telephon, der internationalen Kongresse und der religiösen Schulgesetzgebung.

Heute muß ich und jeder fürchten, mich oder meine Familie nicht ernähren zu können, wenn die Neujahrsrede eines Monarchen oder die Tischrede eines Ministers bei einem Festessen zweideutig oder direkt kriegerisch ausfällt, ja ich muß zittern, daß dadurch vielleicht ein Krieg angekündigt wird und Aussicht vorhanden ist, daß ich oder mein Sohn oder mein Bruder das Leben in die Schlacht tragen muß.

Alles das wäre unmöglich, wenn unsere Institutionen andere wären! Und doch rühren sich die Menschen nicht, um sie zu ändern und sie verbringen ihre Zeit damit, über die »Schlechtigkeit der Menschen« zu klagen, der doch durch Verbesserung unserer Gesetzgebung in so hohem Grade wirklich beizukommen wäre. Und was soll man erst dazu sagen, wenn es sich nicht um Mönche und Hammel, sondern um große staatliche Forderungen handelt und die halbe Menschheit in einem Weltkrieg, wie den jetzigen, hineingetrieben wird?

Millionen Menschen werden getötet oder verwundet, Millionen Menschen müssen hungern, weil — Frankreich seine militärische Gloire wieder gewinnen, Rußland sein Territorium noch größer haben wollte als es schon war, und weil England, dessen Finanzminister doch vor kurzem den bisher unerreichten blühenden Zustand seines Handels im Unterhause verkündigte — den deutschen Konkurrenten vernichten will, um noch reicher zu werden, als es schon ist.

Fragt man aber unseren größten Geschichtsphilosophen, so sagt er uns: »Die Weltgeschichte ist nichts als die Entwicklung des Begriffes der Freiheit«. . . . Von Athen bis — Rußland[1]!

Fragt man m i c h, so antworte ich: Wir sind erbärmliche Sklaven unserer elenden Institutionen und von dem Wahne befangen, sie und alles, was wir haben und tun, seien von der reinsten Vernunft und edlen Trieben eingegeben.

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Warum haben sich die Männer bisher so wenig energisch für eine Agitation zur Abschaffung der Wehrpflicht und zum Unschädlichmachen unserer verrotteten Institution der Diplomatie eingesetzt?

[1] Vor der jetzigen Revolution.

Und warum erheben sich nicht die Frauen, denen ihre Gatten, Söhne oder Brüder oder Geliebten weggeschossen oder verkrüppelt werden, gegen unsere unwürdigen politischen Zustände? All ihre Energie verwenden sie auf Erreichung des Stimmrechtes und der sonstigen bürgerlichen Gleichberechtigung. Ganz wohl! Sie tun recht daran. Aber es gibt eine viel dringendere Angelegenheit, es gilt, Menschenmord in Massen zu verhindern. Aber von solchen Bestrebungen — und sie wären schon o h n e Stimmrecht möglich — hört man fast nichts. Man sehe doch, wie die englischen Suffragettes agitierten, bloß um das Stimmrecht zu erobern, warum ahmen die festländischen Frauen ihnen bei Vermeidung ihrer brutalen Ausschreitungen nicht nach, um das unendlich wichtigere Ziel der Abschaffung der Wehrpflicht zu erreichen? Ja vor kurzem, als man auch in England die allgemeine Wehrpflicht einzuführen beabsichtigte und schon seit längerer Zeit dafür agitierte, rührten sich die Suffragettes noch immer nicht, für den Krieg gegen Deutschland haben sie sich freiwillig gemeldet, aber für seine Beendigung und gar für Verhinderung des erzwungenen Kriegsdienstes interessieren sie sich nicht, sondern im Gegenteile für seine Weiterführung.

So sehr überwiegt bei den Menschen das Interesse für politische Formen jenes für reale Reformen[1]!

[1] Dieser ganze Passus wurde während des Weltkrieges geschrieben, heute aber besteht er nicht mehr, denn seit ungefähr zwei Jahren hat die »Internationale Frauenliga für Frieden und Freiheit« die Sache sehr energisch in die Hand genommen, hält bereits mehrere Kongresse ab und bereitet soeben einen Weltkongreß in Wien vor.

III.

Unsere politischen Verhältnisse. — Unsere Diplomatie.

Da mein Programm zwar ein militärisches ist, aber mit der äußeren Politik in innigem Zusammenhange steht, so erscheint es notwendig, über den Einfluß unserer bestehenden politischen Verhältnisse speziell auf den Ausbruch von Kriegen und auf den Zustand der Gemüter im Hinblick auf die Kriegsbefürchtungen einige Worte zu sagen.

Selbst in unseren Tagen der großen geistigen Fortschritte und der angeblich sittlichen Erziehung der Menschen durch das nahezu 1900 Jahre bestehende Christentum, sind noch fast alle Motive und Veranlassungen zu Kriegen und kriegerischen Stimmungen wirksam, die im Laufe der Geschichte jemals zur Geltung gekommen waren, und neue kamen noch hinzu.

Es werden Kriege geführt oder kriegerische Spannungen erzeugt aus nationalen, religiösen, politischen, kulturellen, dynastischen, persönlichen, allgemein oder persönlich wirtschaftlichen, ja auch aus selbstlosen, idealen, an sich rein ethischen Gründen.

Vor allem ist es durchaus nicht richtig zu glauben, daß vorwiegend Monarchien, also ihre Regenten oder Regierungen, Kriege führen und daß, wie Kant meint, republikanische Verfassungen uns den ewigen Frieden bringen würden. Denn sowohl demokratische als auch aristokratische Republiken führten, und gar nicht selten, Kriege, wobei ich natürlich nicht jene aus Notwehr, sondern die ausgesprochen aggressiven Kriege im Auge habe. Man denke nur an das republikanische Rom, das ja gar nicht aufhörte, Offensivkriege zu führen und das nicht eher ruhte, als bis es, wie die Historiker sich pompös ausdrücken, den »ganzen Erdkreis« oder wenigstens seinen größten Teil sich

unterworfen hatte, was noch immer selbst den Schulbuben als etwas Bewundernswertes und Nachahmungswürdiges hingestellt wird. Man denke auch an die italienischen Republiken, besonders an Venedig, ferner an die französische Republik, nicht an jene des achtzehnten Jahrhunderts, so lange sie in der Defensive gegen die Monarchen des Festlandes und die Aristokratie Englands sich verteidigen mußte, sondern an jene unserer Zeit, die Jahrzente lang über der Revancheidee brütete, rüstete und im Jahre 1914 losbrach.

Es geht also ohne Könige und Fürsten auch!

Das hat schon, wenigstens soweit es die Bürgerkriege betrifft, David Hume hervorgehoben: »Wenn man«, sagt er, »immer die Schuld aller Unordnungen ohne Unterschied auf den König werfen wollte, so würde man einen schädlichen Irrtum in die Staatskunst einführen, welcher beständig zu einer Entschuldigung der Verräterei und des Aufruhrs dienen müßte, als wäre die Unruhe der Großen und die Raserei des Volkes nicht ebensowohl wie die Tyrannei der Fürsten ein Übel, dem die menschliche Gesellschaft unterworfen ist und welches in jedem wohleingerichteten Staat ebenso sorgfältig verhindert werden muß.«

Wir wissen ja aus vielfacher Erfahrung, daß nicht nur »Tyrannen, Große und rasende Völker« zum Kriege treiben. Es kommen — wenn wir weniger die sachlichen Veranlassungen als die Personen ins Auge fassen — noch Schriftsteller sowie Vertreter von Landwirtschaft, Handel und Industrie, Waffen-, Munitions- und Schiffslieferanten hinzu, die sich oft auf das Übertreiben von Rüstungen und auf das direkte oder indirekte Einfädeln von Kriegen sehr gut verstehen. Sodann kommen die Staatsvergrößerer, die Nationalitätsfanatiker und die Kulturverbreiter, welche unzivilisierte oder anders zivilisierte Völker ausrotten oder unterdrücken wollen, in Betracht. Nicht zuletzt, aber in unseren Tagen nicht mehr so offen und aufdringlich, leisten die Priester der beiden in Europa so mächtigen positiven Religionen das ihrige, um die Nationen zu Kriegen zu entflammen.

Das Schreckliche und höchst Widerwärtige in allen diesen Fällen ist aber im Grunde der Umstand, daß die eigentlichen Macher der Kriege, die Aufwühler, fast nie ihre physische Existenz einsetzen, sondern dies anderen überlassen, die entweder durch die staatlichen gesetzlichen Institutionen gezwungen oder

infolge wirtschaftlicher Notlagen ‹scheinbar freiwillig› oder durch Werbungslockungen ihre Haut zu Markte tragen. Daß jene Personen, die auf den Krieg hinarbeiten und ihn zum Ausbruch bringen, also die Staatsoberhäupter oder die mittelst Reden, Schriften oder Intriguen antreibenden Politiker beider Seiten nicht miteinander kämpfen, daß also der Krieg zwischen den an den Streitigkeiten meistens — wenn noch nicht verhetzt — uninteressierten Volksmassen, nicht durch ein einfaches Duell oder eine gründliche Schlägerei jener Personen ersetzt wird, und auch im Laufe der Kriegsgeschichte nur in den ältesten Zeiten, sonst fast niemals ersetzt wurde, müssen wir außerordentlich beklagen. Denn wenn es geschehen wäre, hätte die Weltgeschichte ein ungleich schöneres Gesicht als bisher.

Unser heutiges Regime wirkt so empörend auf ein gesittetes Gemüt, daß unlängst jemand den — allerdings vielleicht schwer realisierbaren — Gedanken aufwarf, alle jene, die überhaupt zu Kriegen treiben, und sei es sogar aus wirklich oder scheinbar ethischen Gründen, für ihre Agitation verantwortlich zu machen. »Wer«, meinte er, »den Krieg befürwortet, sei es durch bekannt gewordene politische Intriguen, durch Wort oder Schrift, in Versammlungen, Büchern, Pamphleten oder in Zeitungsartikeln, alle jene Personen sollen in Evidenz gehalten und bei wirklichem Beginn des Feldzuges unbedingt in die ersten Schlachtreihen eingestellt werden, es sei wer immer.« Lassen wir aber diesen vielleicht schwer ausführbaren Vorschlag auf sich beruhen, wir brauchen ihn nicht, aber er zeigt, welche Empörung, ja welche Wut gegen Überwältigung unser heutiger politischer Gesellschaftszustand erregt.

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Und dabei lassen sich noch viele von der Institution der allgemeinen Wehrpflicht täuschen und zu dem Glauben verleiten, durch sie sei der gewünschte Zustand der politischen Gerechtigkeit erreicht, denn die Kriege würden ja nunmehr vom »ganzen Volke«, also anscheinend mit seiner Zustimmung, geführt.

Nun gibt es wohl einzelne, aber höchst seltene Fälle, in denen eine ganze Nation oder doch ihr größter Teil einen Krieg führen will, zumeist in der Notwehr, wie es, um von der neueren Zeit zu sprechen, z. B. beim deutschen Befreiungskriege gegen Napoleon im Jahre 1813 der Fall war. Auch im Balkankriege der Bulgaren gegen die Türken im Jahre 1913 und im aggressiven

Kriege der Rumänen gegen die Bulgaren im zweiten Balkankriege handelte es sich um populäre, nationale Erhebungen. In diesen Fällen ging es beinahe ebenso zu wie in Japan im Jahre 1904 gegen Rußland.

Man kann hieraus lernen, daß selbst die Furcht vor der Möglichkeit von Tod oder Verwundung durch kriegerische Begeisterung überwunden werden kann; was an sich als eine merkwürdige, ja mitunter eine ethisch große Sache und — vor ihrer näheren Analyse — geradezu als ein Wunder in der menschlichen Psyche erscheinen kann.

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Die Echtheit und Gediegenheit dieses Aufopferungszustandes würde allerdings in jedem einzelnen Falle einer näheren Prüfung unterzogen werden müssen, bevor man ihn bewundert, denn er kann ja leicht eine bloße Folge von gesetzlichem Zwang, von Suggestion mannigfacher Art, oder auch von vollständigem Mangel an ernsterer Überlegung des drohenden Schicksals oder endlich eine Folge des Optimismus sein, man werde doch kein Unheil erleiden; mitunter genügt schon das Bedürfnis, zu raufen.

Erst dann könnte man des Willens zur heroischen Selbstopferung sicher sein, wenn ein auf dem Schlachtfelde schwer Verwundeter und ganz zur Besinnung gekommener trotz der ausgestandenen Schmerzen von neuem in den Kampf treten will. Solche Fälle sind gar nicht so selten, wie man glauben möchte.

Aber in der Regel verhält es sich ganz anders.

Nur in den seltensten Fällen, von Verteidigungskriegen abgesehen, ziehen die Wehrpflichtigen gerne, besser gesagt: ohne gezwungen zu sein, in den Krieg, und es sind beinahe nur die höheren Offiziere, und auch von diesen nur sehr wenige aus Patriotismus, sondern vorwiegend jene, die des zu erwartenden Avancements wegen es kaum erwarten können, ins Feld einzurücken.

Man darf sich auch nicht durch die mitunter vorkommende Tatsache täuschen lassen, daß bei gespannten politischen Verhältnissen sich in einer ganzen Nation eine heftige Kriegsbegeisterung kundgibt. Ein aufmerksamer Beobachter wird beinahe immer die trüben Quellen finden können, aus denen diese Begeisterung ihren Anstoß und ihre Förderung erhält. Ganz besonders charakteristisch ist es, daß solche Kriegslust vorwiegend

bei jenen Personen hervortritt, die nicht gezwungen sind, in den Krieg zu ziehen; die Soldaten selbst, von den höheren Offizieren abgesehen, bleiben immer ruhig und sehr verschlossen, wenn sie nicht zu sehr aufgehetzt wurden. Und wenn sie jubeln, so geschieht das vor dem Kriege und im Beginne des Feldzuges, nachher vergeht ihnen alsbald das Jubeln, selbst wenn sie scheinbar noch so patriotisch gesinnt waren.

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Ich habe das Wort Humes von der »Raserei des Volkes« zitiert. Über die Bedeutung dieser Raserei müssen wir uns klar werden.

Ähnlich wie Hume sagt auch Hegel: »Wenn man aber meint, Fürsten und Kabinette seien mehr der Leidenschaft unterworfen als Kammern, und wenn man deswegen in die Hände der letzteren die Entscheidung über Krieg und Frieden zu spielen sucht, so muß gesagt werden, daß oft ganze Nationen noch mehr wie ihre Fürsten enthusiasmiert und in Leidenschaft gesetzt werden können.«

Hier hat Hegel jedoch die Hauptsache nicht berücksichtigt. Er denkt nicht daran, daß ein großer Unterschied darin liegt, ob ein Krieg von einzelnen oder weniger Personen, also Fürsten und Kabinetten, oder ob er von einer ganzen Nation gewünscht und in Szene gesetzt wird. Im letzteren Fall hat nämlich die Nation alle schlimmen Kriegsfolgen nur sich selbst zuzuschreiben, und es ist nur noch der, allerdings ebenfalls wichtige, Übelstand vorhanden, daß zwar alle oder sehr viele Nichtkombattanten des enthusiasmierten Volkes einen Krieg wollen, die Soldaten selbst aber, die direkt und am meisten zu leiden haben, gar nicht gefragt werden und einfach — vermöge der heute noch bestehenden Wehrpflicht — marschieren müssen. Wenn aber der Monarch oder der maßgebende Politiker marschieren lassen will und das Militär dazu gezwungen wird, ins Feld zu rücken, so kann das Volk sich nicht mehr den — allerdings ungenügenden — Trost gönnen, daß es sein eigener Wille war, alles Kriegsunheil auf sich zu nehmen; namentlich die Soldaten sind in diesem Falle die blinden Werkzeuge des Willens einer Person oder weniger Personen, im besten Falle einiger hundert Volksrepräsentanten.

Daher ist im Grunde genommen, — wenn man jede

menschliche Existenz so hoch schätzt und achtet, wie man soll — auch kein wesentlicher Unterschied vorhanden, ob, wie das Hegel unterscheidet, »Monarchen oder Kammern« die Soldaten zwingen, in den Krieg zu ziehen. Gar niemand anderer als jeder einzelne Mann selbst soll über die Aufopferung seines Lebens und seiner Gesundheit zu entscheiden haben, d. h. selbst die scheinbar sehr demokratische Institution, daß die Parlamente über Krieg und Frieden entscheiden sollen, genügt noch lange nicht, und die noch mehr demokratische Einrichtung, daß das ganze Volk, also eine allgemeine Abstimmung ‹Referendum› darüber entscheiden soll, genügt auch noch nicht.

An diese meine Auffassung wird man sich gewöhnen müssen, wenn man vorwärts kommen will.

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Man hörte in neuerer Zeit öfters davon sprechen, daß jetzt »keine Kabinettskriege mehr geführt werden«. So sprach zum Beispiel Moltke und später der ehemalige deutsche Reichskanzler Bülow. Aber die Erfahrung zeigt uns gar nicht selten das Gegenteil.

Denn der deutsch-französische Krieg vom Jahre 1870 war ganz unzweifelhaft ein Kabinetts-, genauer gesprochen ein Boudoirkrieg; er wurde von der französischen Kaiserin Eugenie im Verein mit ihrem Beichtvater beschlossen; von der Kaiserin sowohl im Interesse ihrer Familie, als auch von ihr, der bigotten Spanierin, zugleich mit dem katholischen Geistlichen, zum Zwecke der erwarteten Demütigung und vielleicht, wenn es gelänge, sogar zur radikalen Vernichtung des protestantischen preußischen Staates und des Protestantismus überhaupt. Daß die Kaiserin es war, die den Krieg verlangte und sogar gegen den Willen Napoleons III. durchsetzte, hat Marschall Mac Mahon selbst bestätigt und der ehemalige deutsche Reichskanzler Hohenlohe berichtet in seinen Denkwürdigkeiten ‹unter dem 20. Juli 1874› von einem Besuche Thiers, wobei dieser erzählte, die Kaiserin Eugenie sei ebenso wie die ganze bonapartistische Partei der Ansicht gewesen, der Krieg von 1870/71 sei nötig, um das Prestige Napoleons herzustellen. Sie habe gesagt: »Mon fils ne regnera jamais si le prestige n'est pas rétabli par une guerre victorieuse.« Also Tausende und aber Tausende Menschen, Franzosen und Deutsche, mußten ihr Leben oder ihre Gesundheit

verlieren, damit der kaiserliche »fils regnera«! Und so wenig moralisches Gefühl besitzen die Menschen, daß sie dieser »trauernden kaiserlichen Witwe« mit aller Hochachtung begegnen, mit allem Respekt von ihr sprechen und in den Zeitungen schreiben, während sie einen Mörder gewöhnlichen Schlages, der nur einen Menschen um das Leben gebracht hat, nicht genug verabscheuen können und seine Hinrichtung verlangen.

Bekannt ist es auch, daß der Krieg Rußlands gegen Japan im Jahre 1904 hauptsächlich wegen Gewinnung eines warmen Hafens, aber auch von den Großfürsten mit Zustimmung des Zaren zu persönlichen, rein geschäftlichen Zwecken — nämlich zur Gewinnung großer holzreicher Gebiete — unternommen wurde, wobei der Zar sich dieses Unternehmens so sehr vor der Welt schämte, daß er die Fopperei nicht scheute, ausdrücklich zu erklären, er überlasse alle Verantwortung dafür dem Statthalter Alexieff, während er doch alle kriegerischen Vorbereitungen gestattete, die ja gegen seinen Willen unmöglich hätten getroffen werden können.

Ferner wissen wir, daß der verstorbene König Eduard VII. von England auch aus persönlichen Gründen, nämlich aus Abneigung gegen seinen Neffen Kaiser Wilkelm II., eine politische Isolierung und daher eine künftige Bekriegung Deutschlands betrieb.

Im Jahre 1904 hing es nur an einem Haar, daß ein neuer deutsch-französischer Krieg ausbrach, weil bei den Abmachungen mit England und Spanien Frankreich glaubte, sich um Deutschland nicht kümmern zu sollen und deswegen der deutsche Kaiser durch dieses allerdings absichtlich beleidigende Vorgehen des französischen Ministers des Äußern, Delcassé, verstimmt wurde. Wäre es nun wirklich zum Krieg gekommen, so hätten alle Wehrpflichtigen Deutschlands marschieren müssen. Waren nun alle diese Soldaten wirklich ebenfalls in solchem Grade »verstimmt«, daß sie deswegen gerne Leben oder Gesundheit riskiert hätten?

Wie es scheint, kommt den Europäern trotz aller Zeitungslektüre gar nicht zum Bewußtsein, wie sehr der dynastische und, allgemein, der persönliche Einfluß in die auswärtige Politik eingreift und in welch hohem Maße noch immer das Schicksal der Völker von solchen Faktoren abhängt.

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Furchtbar wirken auf jeden Menschenfreund die Mitteilungen, die Bismarck in seinen »Gedanken und Erinnerungen« macht.

Da erfährt man, daß im Jahre 1866 Krieg oder Frieden zwischen Preußen und Hannover damit zusammenhing, ob »die Heirat der hannoverschen Prinzessin Friederike mit unserem jungen Prinzen Albrecht« zustande kam. »Die Stellungnahme Württembergs beim Ausbruch des Krieges im Jahre 1870« war zu erklären aus den Stuttgarter Beziehungen zu Frankreich, die insbesondere durch die Vorliebe der Königin Wilhelmine von Holland, einer württembergischen Prinzessin, getragen waren. Man sieht, welch großen, ganz direkten Einfluß die Frauen an den verschiedenen Höfen noch immer auf Krieg und Frieden ausüben und die armen Soldaten müssen sich opfern, um den Hofintriguen zum Siege zu verhelfen. Ob aber nun Frauen oder Männer intriguieren, wir haben eben noch immer Kabinetts- und Boudoirkriege!

»Ähnlich wie die Empfindlichkeiten des russischen Hofes,« berichtet Bismarck weiter, »die sich vermöge der russischen Verwandtschaft der Königin Marie an den Verlust der hannoverschen Krone knüpften, ihr Gegengewicht in der Konzession fanden, die dem oldenburgischen Verwandten der russischen Dynastie auf territorialem und finanziellem Gebiet 1866 gemacht worden waren, bot sich 1870 die Möglichkeit, nicht nur der Dynastie, sondern auch dem russischen Reiche einen Dienst zu erweisen.« .... »Unsere Beziehungen zu Rußland beruhten wesentlich auf dem persönlichen Verhältnisse beider Monarchen zueinander und auf dessen richtiger Pflege durch höfische und diplomatische Geschicklichkeit, bzw. Gesinnung der beiderseitigen Vertreter.«

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Halten wir hier einen Augenblick inne und denken wir daran, was die Kriegs- und Staatsphilosophen uns über die Ursachen und über die Ziele der Kriege erzählen, z. B. über den »Kapitalismus« als Haupt-, ja als einzige Ursache, andere wieder über das Bestreben nach der »Erhöhung des Wohles der Völker« und dergleichen mehr. Was hörten wir aber soeben? Wir hörten von einer Friederike, von einer Wilhelmine, von einer Marie, früher von einer Eugenie, in jüngster Zeit hörte man genug von dem Einfluß einer Elena auf den König von

Italien, der durch sie zum Krieg gegen Österreich bestimmt wurde, von einer Zarin-Witwe Marie Paulowna, die schon seit langem auf den Krieg Rußlands gegen Deutschland und Österreich hinarbeitete. Und wie merkwürdig ist das doch! Man glaubt im großen Publikum, um Politik zu treiben, müsse man wenigstens in gewissem Grade historische und namentlich staatsrechtliche Studien getrieben haben. Aber wie man sieht, geht es ganz gut ohne solche Kenntnisse; denn es ist kaum anzunehmen, daß sich jene Friederike, Wilhelmine, Marie, Elena und die bigotte Spanierin Eugenie mit derlei Studien sehr angestrengt hätten.

Aber sie und die Männer ihrer Art machen doch »Geschichte«! Denn wenn ihre Intrigen reif geworden sind, müssen Millionen Menschen zufolge der »großen, wahrhaft demokratischen« Institution der Wehrpflicht in den Tod gehen. Jenen Damen liegt die »Verteidigung des Vaterlandes« gar so sehr am Herzen!

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Aus den Hohenloheschen Denkwürdigkeiten kann man besser als sonst irgendwo lernen, von welchen Kleinigkeiten, Launen, ehrgeizigen Trieben und dergleichen es abhängt, ob Kriege geführt werden oder nicht, und es ist kein Zweifel, daß es heute genau so zugeht wie damals, d. i. in den siebziger bis neunziger Jahren. Da gab es z. B. einen einflußreichen Mann, den General Waldersee, der immer zum Krieg gegen Frankreich trieb und von dem Bismarck sagte: »Waldersee wolle den Krieg, weil er fürchte, daß er zu alt werde, wenn der Friede zu lang dauere.« Und unter solchen Umständen müssen die armen Wehrpflichtigen den noch dazu erzwungenen Fahneneid auf die Kriegsartikel leisten! Die nichtaktiven Politiker, also die allergrößte Zahl der Menschen, daher auch die Soldaten, ahnen nicht, mit wie leichtem Sinn oft die Monarchen, Minister und politischen Agitatoren von einem Kriege sprechen: »wie auf einer frühlingslaunischen Sonntagslandpartie ehrsame Spießer vom Wetter.« Man spricht in den diplomatischen Kreisen fast immerfort vom Kriege, wenn nicht vom akuten, so doch wenigstens, wie der Herausgeber der »Friedenswarte«, A. H. Fried, sich sehr gut ausdrückt, »von dem Krieg als diplomatische Erwägung, als Befürchtung, als Kalkül, als Mahnung, als Spekulation, als Strafe, als Drohung, als Mittel zu allerhand — und darunter zu den trivialsten Zwecken«.

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»Es ist natürlich,« sagt Bismarck in seinen »Gedanken und Erinnerungen«, »daß in dem Generalstab der Armee nicht nur jüngere, strebsame Offiziere, sondern auch erfahrene Strategen das Bedürfnis haben, die Tüchtigkeit der von ihnen geleiteten Truppen und die eigene Befähigung zu dieser Leitung zu verwerten und in der Geschichte zur Anschauung zu bringen. Es wäre zu bedauern, wenn diese Wirkung kriegerischen Geistes in der Armee nicht stattfände; die Aufgabe, das Ergebnis derselben in den Schranken zu halten, auf welche das Friedensbedürfnis der Völker Anspruch hat, liegt den politischen, nicht den militärischen Spitzen des Staates ob. Daß sich der Generalstab und seine Chefs zur Zeit der Luxemburger Frage, während der von Gortschakow und Frankreich fingierten Krisis von 1875 und bis in die neueste Zeit hinein zur Gefährdung des Friedens haben verleiten lassen, liegt in dem notwendigen Geiste der Institution, den ich nicht missen möchte, und wird gefährlich unter einem Monarchen, dessen Politik das Augenmaß und die Widerstandsfähigkeit gegen einseitige und verfassungsmäßig unberechtigte Einflüsse fehlen.«

Bezüglich des furchtbaren russisch-türkischen Krieges im Jahre 1878 erzählt Bismarck: »von Oubril ... versicherte, es werde sich in dem Balkankriege nur um eine promenade militaire, um Beschäftigung des trop plein des Heeres und um Roßschweife und Georgskreuze handeln.« Und damit vergleiche man Dostojewskis Behauptung, es hätte sich hiebei um Befreiung von Slaven und um Rechtgläubigkeit gehandelt! Ferner: »Österreich« — es ist ein wahres Unglück, daß man bei Krieg und Frieden immer von »Österreich«, »Rußland«, »Frankreich«, anstatt von den betreffenden Personen spricht, die die Geschichte machen, als ob die Bewohner dieser Staaten auch nur im Traume an solche permanente Intrigen dächten! — »Österreich hatte mit lauter Freundschaftsversicherungen Europa gegen sie ‹die Russen› gehetzt. ... Ähnlich benimmt es sich mit uns und hat sich während des orientalischen Krieges scheußlich perfide benommen ... Vergessen Sie aber nicht, daß die Sünde stets wieder die Sünde gebiert und daß Österreich uns auch ein Sündenregister schlimmster Art vorhalten kann .... alles Repetitionen der Politik von 1793 bis 1805.«

»Napoleon III. sagte zu Bismarck, vielleicht werde

er unter Umständen zur Befriedigung des Nationalstolzes »une petite rectification des frontières« verlangen, könne aber ohne solche leben . . . wenn er wieder eines Krieges bedürfen ⟨!⟩ sollte, würde er denselben eher in der Richtung nach Italien suchen.«

»Eine direkte Bedrohung des Friedens«, heißt es weiter, »zwischen Deutschland und Rußland ist kaum auf anderem Wege möglich als durch künstliche Verhetzung oder durch den Ehrgeiz russischer oder deutscher Militärs von der Art Skobelews, die den Krieg wünschen, bevor sie zu alt werden, um sich darin auszuzeichnen.«

Wir hören auch von »Metternichs ⟨des Staatskanzlers⟩ finanziellen Beziehungen zum russischen Kaiser!« Und dergleichen mehr.

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Es ist nicht wenig demütigend und empörend, immer von neuem zu beobachten, wie das Wohl und Wehe ganzer Nationen und wie speziell die physische Integrität von zehn-, von hunderttausenden, heute von Millionen Menschen von dem Ehrgeiz oder von Familieninteressen einzelner Personen abhängen, seien es Mitglieder regierender Familien, seien es einzelne Politiker oder Militärs. »Diese persönlichen Beziehungen der Monarchen« — sagte am 9. November 1910 der österreichische Minister des Äußern, Freiherr von Ährenthal, in den Delegationen — »waren mit ein entscheidendes Moment bei der Erhaltung des Friedens im Frühjahr 1909, und ich gebe hier unserer Zuversicht Ausdruck, daß diese Beziehungen auch in der Zukunft eine starke Friedensgarantie bilden werden.«

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Eine noch tiefere Erniedrigung unserer politischen Kultur beweist eine leider ganz richtige Darstellung des Verhältnisses zwischen Deutschland und England im Jahre 1909, die in einer sehr einflußreichen österreichischen Zeitung publiziert wurde:

»Auf die Stimmung, die zwischen Deutschland und England geherrscht hat, ist ferner sicherlich die große persönliche Verstimmung von Einfluß gewesen, die jahrelang, wie man aus zahlreichen Anzeichen deutlich ersehen konnte, zwischen dem Kaiser Wilhelm und dem König Eduard bestanden hat. Über die Ursachen dieser Verstimmung existieren bisher nur unverbürgte Gerüchte. Erfreulicherweise sprechen zur Zeit wieder

alle Anzeichen dafür, daß die Beziehungen zwischen den beiden Souveränen sich gebessert haben.« Und nun höre man, wie diese Besserung zutage trat, es heißt nämlich weiter:

»Die letzten Anzeichen hat eben der Berliner Besuch des englischen Königspaares gebracht. Man hat den Kaiser Wilhelm und den König Eduard in der Öffentlichkeit ⟨!⟩ sehr freundlich miteinander verkehren gesehen. Kaiser Wilhelm hat das englische Königspaar mit großer Herzlichkeit aufgenommen, er hat in seinem Toast auf dem Hofdiner von der Königin als von seiner »geliebten Tante« gesprochen . . . usw.«

Freut euch, ihr Staatsbürger Deutschlands und Englands, konnte man ihnen damals zurufen, der deutsche Kaiser hat eine »Tante« und sogar eine »geliebte Tante«, nun könnt ihr beruhigt weiter leben und eure Soldaten können darauf rechnen, ihre gesunden Glieder zu behalten! Welches Glück für sie, daß eine solche Tante existierte!

Wie sehr die Völker, wenigstens jene Europas, nichts anderes als zitternde Sklaven einiger weniger Individuen sind, sieht man ganz deutlich aus den Äußerungen eines englischen Blattes ⟨des »Daily Telegraph«⟩ gelegentlich eines stattgefundenen Zarenbesuches. Rußland gebe, heißt es dort, sein ganzes Gewicht der Seite des status quo und wird es keiner Macht zu aggressiven Zwecken zukommen lassen. Die Demonstrationen in Cherbourg und Cowes seien daher nicht gegen die neulichen Festlichkeiten in Kiel gerichtet. Die Deutschen seien jetzt von dem Alp befreit, der die Tripelentente als eifriges Werkzeug diplomatischer Provokation und eines bewaffneten Angriffes erscheinen ließ. Das Nachlassen der Spannung zwischen dem Zweibund und dem Dreibund ermöglicht es den Völkern des Kontinents, tief zu atmen, während sie noch vor kurzer Zeit nach Luft rangen. Berlin wünscht den Draht nach Petersburg offen zu halten, und Petersburg wünscht ebenso keine Unterbrechung der Kommunikation.«

»Rußland«, »Berlin«, »Petersburg« — Wer ist dabei gemeint?

Hat vielleicht die ganze oder hat nur ein hundertstel der 170 Millionen zählenden Bevölkerung Rußlands »sein ganzes Gewicht der Seite des status quo« gegeben? Oder wünscht die Einwohnerschaft Berlins den »Draht nach Petersburg offen zu

halten« oder wünscht jene Petersburgs »keine Unterbrechung der Kommunikation?«

Nein, sie »geben kein Gewicht«, sie »wünschen« nichts, sie wissen nichts von irgend einem Draht, sie wollen nur Ruhe haben, und nur ein paar Dutzend Personen sind es, die »geben« und »wünschen«, und diese paar Personen machen das Wetter für Hunderte von Millionen Menschen.

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Was sind das für politische Institutionen, die so etwas möglich machen! Was für eine traurige Gesetzgebung — trotz der unaufhörlichen Verfassungskämpfe in Europa! — daß hunderttausende Soldaten Leben und Gesundheit verlieren müssen, wenn es jenen Personen gefällig ist!

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Aber auch an dem Gegenstück zu jenen monarchischen Einflüssen auf die Kriegs- und Friedensstimmungen in Europa fehlt es nicht. In dem jetzigen Weltkriege spielen die fürstlichen Verwandtschaften fast gar keine Rolle und die Bündnisse und Feindschaften schreiten über solche Familienbeziehungen ganz unbekümmert hinweg.

Hier eine kurze Zusammenstellung nach Zeitungen:

»Durch die Hinzuziehung Rumäniens in den Weltkrieg ist der seltsame Fall gegeben, daß ein Fürst aus dem Hohenzollernstamm gegen den Deutschen Kaiser verbündet ist. König Ferdinand von Rumänien entstammt bekanntlich dem Sigmaringener Zweige des Hohenzollerngeschlechtes, das übrigens in weiblicher Linie bereits am Kriege gegen Deutschland beteiligt ist, denn König Albert von Belgien ist ein Sohn einer Prinzessin von Hohenzollern-Sigmaringen und beide Könige, von Rumänien und Belgien, sind Neffen jenes Prinzen Leopold von Sigmaringen, der einst den Anlaß zum deutsch-französischen Kriege bot. Es ist ein Witz des Schicksals, daß Napoleon einst dem Onkel beider Könige nicht gestatten wollte, den Thron von Spanien einzunehmen, damit Deutschland nicht zu mächtig werde, während jetzt die Neffen dieses deutschen Prinzen gegen Deutschland mit Frankreich im Bunde kämpfen. Als dritter im Bunde, der durch Heirat mit einer Prinzessin von Hohenzollern-Sigmaringen dem Hause verwandt ist, hat sich der entthronte König von Portugal den Feinden Deutschlands angeschlossen .... Der König von

Italien ist der Enkel einer Prinzessin von Hessen-Darmstadt, der König von England ist der Enkel eines Koburger Prinzen ....«

Es ist gewiß, daß solche Personen, die vermöge des Bestehens der allgemeinen Wehrpflicht einen so unheilvollen Einfluß ausüben, nicht nur die Fürsten und ihre Ratgeber, sondern auch teils offizielle, teils ganz unoffizielle Personen sein können, die zum Kriege treiben, indem sie weite Kreise der Intelligenz und schließlich die großen Massen aufpeitschen oder direkt die Regierungskreise und die Fürsten für aggressive Kriege gewinnen. Wir sprachen schon oben davon. Es sind das schriftstellernde oder in kleineren, aber einflußreichen Kreisen bohrende Personen, Berufspolitiker, Nationalitäten- oder Rassenforscher, darunter auch sonst ganz friedliche Hochschulprofessoren, Kulturpolitiker, Industrie-, Handels- und Finanzbarone. Es ist ein besonderes Charakteristikum der neuesten Zeit, daß vom hohen Roß sogenannter wissenschaftlicher, historischer, geographischer und ethnographischer Betrachtungen herab Kriege als Notwendigkeit, ja als Wohltat hingestellt und auf diese Weise Hunderttausende Menschen getötet werden, die alle sich in ihrem ganzen Leben nicht hätten träumen lassen, daß diese Betrachtungen und Wünsche sie überhaupt etwas angehen.

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Da das nun so ist, so ist die nicht selten vorkommende Begeisterung eines ganzen Volkes, sogar für einen Angriffskrieg, leicht zu verstehen. Solchen kriegerischen Volksenthusiasmus, auch zu aggressiven Zwecken, haben wir ja in neuester Zeit mehrfach erlebt: wie schon gesagt, in Japan 1904, in Bulgarien und dann in Rumänien in den Jahren 1912 und 1913. Besonders interessant war der Zustand in Rumänien, wo die Massen, allerdings nur jene in den Städten, namentlich in der Hauptstadt, so sehr den Krieg mit Bulgarien verlangten ‹er hatte, nebenbei bemerkt, im vorhinein sehr günstige Chancen›, daß eine Revolution zu befürchten war, wenn der König nicht den Krieg erklärt hätte, ein Vorgang, der sich im Jahre 1916 genau wiederholte. Und doch wird gewiß niemand ernstlich glauben, daß das Verlangen nach einem Kriege aus der Initiative der Massen hervorgegangen sei. Die Sache war, wie fast immer, »gemacht«.

Es werden nur wenige Dutzend Personen gewesen sein, die mit Hilfe der Zeitungen das Volk in Erregung brachten. Das Gemüt der Massen ist eben, namentlich wenn es aufs Brutale geht, leicht zum Sieden zu bringen. Was immer man ihnen beharrlich vorspricht, wirkt und reißt sie endlich zum Enthusiasmus und dann zum Fanatismus hin, der jede Erwägung der schrecklichen Folgen eines Krieges niederhält.

Aus diesem allen sieht man, daß kriegerische Volksstimmung gar nichts für die wirkliche Gesinnung des Volkes, sondern bestenfalls nur einen momentanen Affekt beweist und besonders dann nicht, wenn es sich um aggressive Kriege handelt, nur in Fällen von Verteidigungs- und von Notwehrkriegen, zu denen sich auch viele Freiwillige melden, mag eine spontane Kriegsstimmung angenommen werden, so, wie schon bemerkt, im Jahre 1813 bei den deutschen Befreiungskriegen und in dem Kriege Japans gegen Rußland im Jahre 1904.

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Zwar hört es sich gut an: »Es ist eine Tugend, eine Pflicht, sich im Staatsdienste zu opfern«, »sein Vaterland zu verteidigen«, und man ist sehr geneigt, diejenigen, die es nicht oder nur gezwungen tun, oder jene, die solche Gesinnungen vertreten, für nicht nur feige, sondern auch für undankbar gegen den Staat, gegen ihr Vaterland, das ihnen so viel Gutes erweist, zu erklären. Allein man lasse sich nur nicht von schönen Phrasen ins Gedankenlose und ins Unheil führen.

Wenn es sich in der Tat immer um wirkliche Verteidigung des Vaterlandes oder um Behebung eines extremen Notstandes handeln würde, so fände sich gewiß nur bei wenigen ein Widerstreben, sich daran zu beteiligen, von Ausnahmsfällen: wie innerlich uneinige Parteien oder Nationalitäten eines und desselben Staates, abgesehen. In der Regel würden sich genug Freiwillige melden, denn es handelt sich ja um die Sicherheit aller, also auch jedes einzelnen.

Allein man gehe doch die Liste der Kriege durch! Wie viele wurden wegen beabsichtigter Verteidigung begonnen? Man muß schaudern, für welche Zwecke Menschenblut in Strömen geflossen ist.

Erinnern wir uns z. B. an den Krimkrieg des Jahres 1854. Der wurde vom russischen Kaiser Nikolaus I. angezettelt, um

Konstantinopel zu erringen, und andererseits von Napoleon III., um es Nikolaus zu vergelten, daß dieser ihn nicht als ebenbürtigen Monarchen »von Gottes Gnaden«, sondern »nur« von »Volkes Gnaden« gelten lassen wollte und weil er den Franzosenkaiser nicht mit: »Mein Bruder«, sondern: »Mein Cousin« ansprach. Aber noch mehr. Der Krieg wäre mit dem Tode Nikolaus' zu Ende gewesen, weil sein Nachfolger, Alexander II., im Grunde friedliebend war, aber Alexander glaubte, es dem Andenken seines Vaters und der »Ehre« Rußlands schuldig zu sein, den Krieg fortzusetzen! Und so kostete diese »Verteidigung des Vaterlandes« 250.000 Russen und 70.000 Franzosen das Leben!

Ein anderer Fall:

Es wurde seinerzeit offiziell bekannt, daß im Jahre 1862 der preußische Ministerpräsident dem österreichischen Staat einen gemeinsamen Krieg gegen Frankreich proponierte. Der österreichische Minister, Bruck, aber sagte, da der Staat Geld brauche und da Österreich »so viel wie gewiß« einen Krieg gegen Preußen gewinnen und daher Kriegsentschädigung bekommen würde, z. B. 500 Millionen, so müsse »vorher mit Preußen gerauft werden!«

In den achtziger Jahren des XIX. Jahrhunderts führte Frankreich, das seine im Jahre 1870 verlorene Gloire etwas auffrischen wolite, den großen Kolonialkrieg in Tonking, und deswegen mußten Tausende arme Teufel von Franzosen, denen es gar nicht um Gloire zu tun war, ihr Leben opfern, aber der damalige Minister Jules Ferry erwiderte in der Kammer den Opponenten, Frankreich müsse sich »Brot für unsere Kinder« versorgen.

Wie nützlich wäre es doch, eine Kriegsgeschichte, mindestens von Alexander dem Großen angefangen, abzufassen, nicht wie bisher als Bericht über militärische Begebenheiten, sondern in Hinsicht auf die Enthüllung der wirklichen Beweggründe aller Kriegsunternehmungen und die Gegenüberstellung der schon von Polybius sogenannten und von Grotius besprochenen »Vorwände«.

Unsere Diplomatie.

Wenn man die oben mitgeteilten Daten näher betrachtet, so wird man gewiß auf den Gedanken gebracht, daß eines der Hauptgebrechen unserer staatlichen Funktionen in dem Regime der auswärtigen Politik liegt, das man mit dem Worte »Diplomatie« bezeichnet. Und es ist auch unbestreitbar, daß alles Böse, von dem die Geschichte der inneren Politik tyrannischer Monarchen oder fanatischer Parteien berichtet, sich an fast ununterbrochener Rücksichtslosigkeit und Gewalttätigkeit nicht mit den Folgen unserer auswärtigen Politik vergleichen läßt. Wer daran zweifeln sollte, der braucht bloß an die Zustände Europas in den letzten zwei Jahrhunderten und ganz besonders an den jetzigen Weltkrieg und seine allmählige Entstehung zu denken, um mit Schrecken wahrzunehmen, daß wir trotz aller unserer Kultur noch nicht am Anfange einer humanen Zivilisation stehen.

Nicht genug, daß den meisten Menschen Aggressivität im Blut liegt, so daß unzählige Anlässe zum Streit und Krieg fortwährend im Keime gären, so wird diese unselige Tatsache noch dadurch unheilvoller, daß wir politische Methoden anwenden, die solche Anlässe viel rascher und öfter zur Entwicklung und Auslösung bringen, als es die Natur der Dinge ohne diese Methoden zustande brächte. Diese Methoden bilden dasjenige, was man die »Leitung der auswärtigen Politik« nennt, und die so sehr, schon aus sich heraus, Unheil heraufbeschwören, daß die leitenden, sogenannten Fachmänner als Privatpersonen sehr ehrenwert sein können, ja als Diplomaten nicht immer geradezu gewissenlos sein mögen, und daß diese Männer dennoch die Völker ins Unheil treiben, bloß dadurch, weil ihre Stellung

in der Sphäre politischer Gewohnheiten und ihre Unverantwortlichkeit es so mit sich bringen.

Was ich nun in den folgenden Zeilen sage, ist durchaus nichts Neues, im Gegenteile, es wurden die Gefahren unserer Behandlung auswärtiger Angelegenheiten namentlich jetzt, das heißt während und infolge des Weltkrieges von vielen sehr lebhaft hervorgehoben; ich möchte mir aber doch nicht versagen, einige Worte über diesen Gegenstand zu sprechen.

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Das Hauptgebrechen liegt darin, daß die Leitung der Geschäfte des Auswärtigen heute noch, wie ehemals zur Zeit des Absolutismus, von den Männern der Theorie wie von jenen der praktischen Politik als ein persönliches Vorrecht der Regierung, also umsomehr des Monarchen oder des Staatsoberhauptes angesehen wird.

Auswärtige Angelegenheiten und diplomatische Unterhandlungen überhaupt werden in den meisten Staaten als ein ausschließliches Privilegium der Exekutive, besser: der Obrigkeit angesehen. Ich erblicke darin einen Rest des absolutistischen Regimes, der wahrscheinlich sofort abgeworfen werden wird, sobald man beginnt, überhaupt auf diese schädliche und zugleich absurde Einrichtung ernstlich aufmerksam zu werden. Absurd besonders darum, weil die Parlamente wohl eifersüchtig darüber wachen, daß selbst geringfügige Angelegenheiten der Behandlung durch sie nicht entzogen werden, daß sie aber bei den doch so einflußreichen Vorgängen diplomatischer Natur ganz ausgeschaltet werden und dazu schweigen, so als ob das »Auswärtige« keine innere Angelegenheit wäre. Aber ich finde es selbstverständlich, daß Verträge mit fremden Staaten nicht ohne Zustimmung der Volksvertretungen abgeschlossen werden sollten, und daß keine Kriegserklärungen ohne Zustimmung des Volkes, nicht der bloßen Volksvertretung, sondern durch ein Referendum der gesamten männlichen und weiblichen Bevölkerung — und dann erst mit Berücksichtigung der Anzahl der freiwilligen Anmeldungen — erfolgen sollte.

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Entsprechend dem noch heute wie nur je vorherrschenden Charakter in der politischen Tätigkeit der sogenannten Staats-

männer und politisierenden Laien, unaufhörlich aggressive Pläne zu verfolgen, wird vor allem Verschwiegenheit, tiefes Geheimnis, als Haupterfordernis der diplomatischen Tätigkeit angesehen. Und bis auf den heutigen Tag wird, und meistens mit vollem Recht, im privaten wie im öffentlichen Leben unter einem »Diplomaten« ein Spitzbube verstanden, im privaten Leben einer, der für seinen eigenen Vorteil, im öffentlichen Leben jemand, der für seine Dynastie oder für seinen Staat Lumpereien begeht. Und weil man ihm — und er sich auch selbst — im letzteren Falle nicht den Vorwurf des Egoismus machen kann, so darf er umso gewissenloser der brutalen Natur im Menschen Luft machen, und das Resultat ist, daß auch in unseren Tagen Massenmorde mit vollkommen ruhigem Gewissen vorbereitet und endlich wirklich herbeigeführt werden.

»Verschwiegenheit!« Wegen der Möglichkeit, im Dunkeln Böses zu brauen, dürfen die Minister des Auswärtigen und das Staatsoberhaupt durch keine Kontrolle von anderer Seite beaufsichtigt werden!

Aber auch die »Schnelligkeit«, heißt es, sei für die diplomatische Tätigkeit oft notwendig, und die Schnelligkeit wäre gefährdet, wenn irgend welche Kontrollorgane dreinzusprechen hätten.

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Die Folge dieses Regimes der Führung auswärtiger Angelegenheiten ist natürlich die, daß man nie dessen sicher ist, daß die Politik der Regierung mit den wirklichen Volksinteressen oder -Wünschen übereinstimmt.

> »Selbst in England,« sagt Professor Korff, »gibt es keine Möglichkeit der konstanten und wirksamen Kontrolle der auswärtigen Politik und die Vertreter des Volkes sowohl als die Nation selbst bleiben geraume Zeit ohne Kenntnis dessen, was in den auswärtigen Ämtern vorgeht. In anderen Staaten steht es noch schlimmer: der Minister hat unter dem Deckmantel der notwendigen Verschwiegenheit freie Hand, sein Land in jedes ihm beliebige Unternehmen zu verwickeln. Wenn das Volk endlich die Einzelheiten erfährt, oder wenn dem Parlament die Tatsachen betreffs einer politischen Aktion mitgeteilt werden, ist es zu spät und das Land ist schon unabänderlich in irgend ein gefährliches Abenteuer verwickelt.«

Der Historiker Lord Bryce schrieb im Aufsatz »Kriegsbetrachtungen« ⟨Internationale Rundschau des Jahres 1916⟩:

> »Wie wenige Menschen sind es doch in jedem Staate, die über Krieg und Frieden zu entscheiden haben! Ja, in einigen von den kriegführenden Staaten wurde die letzte Entscheidung über Leben und Tod unzähliger Menschen von vier oder fünf, in anderen von sechs oder sieben Personen getroffen. Selbst in Großbritannien waren es in Wirklichkeit nicht einmal fünfundzwanzig, auf die es ankam; denn, wenn auch einige wenige Personen außerhalb des Kabinetts auf die Entscheidung einen Einfluß übten, so waren dafür nicht alle Mitglieder des Kabinetts als wirksame Faktoren tätig. Selbstverständlich müssen die Gefühle des Volkes berücksichtigt werden, selbst wo der Staat mehr oder weniger despotisch regiert wird; gegen das starke, klare Gefühl der Massen zu handeln, würden die wenigen, die herrschen, wohl nicht wagen. Aber praktisch stehen die Massen unter der Führung weniger; besonders in kritischen Zeiten wird ihre Meinung durch das Ansehen und die Ratschläge der wenigen geformt, denen zu vertrauen oder zu gehorchen sie gewohnt sind.«

Diesen Worten muß man noch hinzufügen, daß die Folgen solcher Geheimnistuerei, wie natürlich, noch schlimmer für die fremden Völker als für das eigene ausfallen und imstande sind, einen Weltbrand zu entzünden, wie wir ihn eben jetzt erlebten.

Als ein hieher gehöriges Beispiel sei auf eine Tatsache hingewiesen, die wohl als eine der schlimmsten politischen Intrigen bezeichnet werden muß, die jemals von europäischen Diplomaten arrangiert worden war. Es ist damit die Tatsache gemeint, die ganz unbestritten ist und von dem Arbeiterführer und Unterhausmitglied Philipp Snowden öffentlich stigmatisiert wurde, wonach die britische Regierung »ihr Siegel auf die Algeciras-Akte gesetzt hatte, die feierlich die Unabhängigkeit und Integrität Marokkos verkündete, aber von dieser Zeit an die systematische Verletzung jenes Dokumentes durch Frankreich übersehen und gutgeheißen hatte, in Übereinstimmung mit einer geheimen Abmachung, die zwei Jahre vorher getroffen worden war und durch die die Algeciras-Akte in Wirklichkeit ungültig gemacht worden waren. Als Herr Lloyd George seine ⟨drohende⟩ Rede gegen Deutschland hielt, hielten französische Truppen das Innere

Marokkos besetzt, wiederum in Übereinstimmung mit jenem geheimen Abkommen, von dem das britische Publikum nicht das Geringste wußte. Die Algeciras-Akte warden Staub und Asche.«

Wenn man selbst nur die wirklich publizierten diplomatischen Aktenstücke, die den heutigen Weltkrieg einleiteten, liest, so kommt man aus dem Erstaunen nicht heraus, dem Erstaunen darüber, was alles vorgegangen war, was alle Völker Europas nicht wußten und auch kaum ahnen konnten.

Aber wir erlebten als Folgen der für die Diplomatie »notwendigen« Schnelligkeit noch viel Schrecklicheres und dagegen sind vielleicht jene der »Verschwiegenheit« noch harmlos zu nennen. Es ist in der ganzen politischen Geschichte der Welt noch nicht dagewesen, daß, wie es Ende Juli und Anfangs August 1914 der Fall war, die kolossalste kriegerische Situation der Weltgeschichte mittels telegraphischer und telephonischer Depeschen auf die Spitze getrieben wurde, statt, dem Verantwortlichkeitsgefühl entsprechend, eben der enormen Wichtigkeit des Falles wegen, mit größter Langsamkeit, Bedächtigkeit und Gründlichkeit vorzugehen. Man lese doch z. B. das Deutsche Weißbuch. Wir sehen beinahe keinen anderen Meinungsaustausch zwischen den Monarchen und Diplomaten als jenen durch Telegramme und dabei handelt es sich nicht so sehr um militärische Ereignisse, als um rein politische Meinungen und Auffassungen von größter Tragweite. Den Gipfel der Gewissenlosigkeit erreichte in Beziehung auf »Schnelligkeit« der Meinungsaustausch zwischen Deutschland und England:

Am 30. Juli finden wir ein Telegramm des Prinzen Heinrich an den König von England und am selben Tag eines von diesem an Prinz Heinrich. Am 31. Juli vom Deutschen Kaiser an den englischen König und am 1. August von diesem an jenen. Am selben Tag, das ist dem 1. August 1914, um 11 Uhr vormittags, ein Telegramm des deutschen Botschafters in London an den deutschen Reichskanzler, weil der englische Minister des Auswärtigen, E. Grey, den Botschafter ans Telephon gerufen hatte, wobei es sich um nichts Geringeres gehandelt hatte als um die Frage, ob Deutschland »für den Fall, daß Frankreich neutral bliebe, in einem deutsch-russischen Krieg die Franzosen nicht angriffe«, wofür der Botschafter ⟨Lichnowsky⟩ die Ver-

antwortung übernahm. Um 1 Uhr 15 Minuten nachmittags sandte Lichnowsky ein zweites und um 1/2 6 Uhr abends ein drittes Telegramm, also drei in einem Tag, so eilig hatte es die Diplomatie! Und am selben Tage geht auf das erste Lichnowskysche Telegramm hin eine Depesche des Deutschen Kaisers an den König von England, und wiederum am selben Tag ein Telegramm des Reichskanzlers an Lichnowsky, und nochmals am selben Tag ein Telegramm des Königs von England an den Deutschen Kaiser des Inhalts, daß ein »Mißverständnis« bezüglich jener telephonischen »Unterhaltung« zwischen Grey und Lichnowsky vorliegen müsse!! Und am Tage darauf, am 2. August, kommt ein Telegramm Lichnowskys an den deutschen Reichskanzler, demzufolge jene »Anregungen« Greys »als völlig aussichtslos« aufgegeben sind.

Nun wird jeder ernste und gewissenhafte Mensch doch fragen: War bei so unendlich wichtigen Unterhandlungen denn wirklich solche Eile notwendig? Geschah es aus Leichtsinn? Geschah es mit Absicht? Darf man politische Unterhandlungen in einer Weise führen, die »Mißverständnisse« nicht ausschließt, ja, die sie wahrscheinlich macht?

Wenn der Leser solcher diplomatischer Berichte auch nur das geringste Gefühl für die Menschheit besitzt, wenn er den Inhalt aller dieser Machenschaften und die Art ihrer Auswicklung kennen lernt, so muß ihn in der Tat der Menschheit »ganzer Jammer« erfassen. Arme Soldaten aller Völker, ihr wißt ja gar nicht, auf welche Weise ihr zur Schlachtbank geführt werdet! Wisset, daß der heutige Weltkrieg durch Jahre hindurch im stillen vorbereitet und dann plötzlich entladen wurde, und daß die Details dieser Vorbereitung den Eindruck machen, als ob ein Schelmenroman von ungeheuerster Dimension hätte ausgesponnen werden sollen!

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Manche werden wohl glauben, daß solche Dinge nicht möglich wären, wenn in allen Staaten »echte« Volksvertretungen existieren würden, die vollkommene Redefreiheit besitzen. Allein zufolge des noch immer vorhandenen Privilegiums der Leiter der auswärtigen Politik ist es auch in Republiken so, daß die wehr-

pflichtige Bevölkerung durch den Willen einiger weniger Personen in einen Krieg hineingezwungen werden kann, dessen Notwendigkeit sie nicht einsieht, dessen diplomatische Vorbereitungen sie nie kannte und dessen Ziele ihr ebenso unbekannt sind. In der französischen Republik ist es nicht anders als z. B., in Rußland, wo einige Großfürsten, einige Damen des Hofes und ein paar Nationalisten die russischen Bauern, die friedlichsten Menschen der Welt, zum Massenmord und zum Gemordetwerden treiben konnten.

Was Frankreich betrifft, zitiere ich folgende Worte eines großen französischen Schriftstellers:

Am 31. Jänner des Jahres 1906 sprach Anatole France in einer öffentlichen Versammlung über diesen Punkt:

»Man sagt uns, daß wir Herren unserer Geschicke und souverän sind, weil wir unsere Stimmzettel in die Urne werfen. Man sagt uns, das wir kein persönliches Regiment zu fürchten haben, das uns ohne unser Wissen in kriegerische Abenteuer verwickeln könnte. In der Tat steht in unserer Verfassung von 1875: ‚Der Präsident der Republik verhandelt und ratifiziert die Verträge. Er teilt sie den Kammern mit, sobald das Interesse und die Sicherheit des Staates es erlauben.' So steht es im Text. Aber wie sieht die Anwendung in der Wirklichkeit aus? Das ‚Interesse und die Sicherheit des Staates' haben dem Präsidenten der Republik noch immer nicht erlaubt, den französisch-russischen Vertrag den Kammern bekanntzugeben ... Wohl sagt der Artikel IX unseres Verfassungsgesetzes: ‚Der Präsident der Republik kann den Krieg nur nach vorheriger Zustimmung der beiden Kammern erklären.' Eine schwache Bürgschaft, da es unter zivilisierten Völkern Gebrauch ist, die Feindseligkeiten vor der Kriegserklärung zu beginnen. Tatsächlich übt das französische Volk das Recht über Krieg und Frieden heute genau so aus wie in den Zeiten Napoleons und Ludwig XIV. Man sagt uns, man werde keinen Krieg beginnen, ohne uns vorher zu verständigen. Nun, eines Tages — es war genau Dienstag, der 6. Juni 1905 — da erfuhren wir bei unserem Erwachen, daß unser Minister der außwärtigen Angelegenheiten einen furchtbaren Zusammenstoß der Völker, die größten Schlachten des Zeitalters, vorbereitete, in aller Ruhe, in seinem Kabinett ...

und es war der Ministerpräsident, Herr Rouvier, der Senatoren und Deputierte davon verständigte. Er sagte ihnen, als ob es sich um eine selbstverständliche Sache handelte: ‚Herr Delcassé hatte eine Mine vom Quai d'Orsay nach der Wilhelmstraße gezogen. Hätte ich nicht den Fuß auf die Lunte gesetzt, wäre Europa gestern in die Luft geflogen.'«

Ferner berichtet Anatole France folgendes:

»Eines Abends, es ist noch nicht lange her, hörte ich eine interessante Unterredung. Ein alter Senator, etwas kriegerisch, setzte einer Gruppe junger Ärzte und Anwälte auseinander, daß die Ehre Frankreichs engagiert sei in einer Affäre, die gerade von unserer Diplomatie behandelt wurde. ‚Ich weiß es', fügte er mit Nachdruck bei. Und als man ihn fragte, woher, erwiderte er: ‚Ich weiß es durch die Indiskretion eines Attachés.'«

Das wäre also eine Ehre, über die man nicht urteilen kann, wenn man keine guten Beziehungen hat. Auch der Universitätsprofessor Gabriel Seailles sprach in dieser Versammlung:

»Die Souveränität der Nation ist heute nur ein Wort. Nun, wir protestieren dagegen, daß die auswärtige Politik in unserer Demokratie einer autokratischen Diplomatie anvertraut bleibe. Die Wurzel des Übels ist die Gleichgültigkeit des Volkes gegenüber den auswärtigen Angelegenheiten und die Unwissenheit, in der man es in Bezug auf diese Fragen erhält ... Es ist sicher, daß an dem Tage, da das Proletariat stark genug sein wird, seine Kräfte gegen den Krieg zu konzentrieren, das Ende der Kriege da sein wird.«

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Die Entrüstung beider Redner ist wohl begründet, allein weder der Vorschlag von France: »Die Interessen des Landes dürfen nicht mehr das Geheimnis des auswärtigen Amtes bleiben«, noch die Hoffnung von Seailles auf die Friedensbürgschaft durch ein mächtiges Proletariat können hier helfen, in beiden Fällen kann es Kriege geben, und stets kann es vorkommen, daß Kriege von einigen gewünscht, von anderen verabscheut werden, wie es auch beim Fall Delcassés gewesen wäre, denn dieser war nichts anderes als der Repräsentant der französischen nationalistischen und klerikal-feudalen Revanchepartei.

Dem einzelnen Wehrpflichtigen wird nicht dadurch geholfen, daß die Kammern alle diplomatischen Vorgänge erfahren, denn heute entscheiden bestenfalls doch nur die Kammer und nicht er selbst. Und wenn zufällig das Proletariat irgend einen Krieg, zum Beispiel gegen einen absoluten, antisozialistischen Staat führen will — wie z. B. im Jahre 1848 Marx und Engels einen Offensivkrieg gegen Rußland für notwendig hielten, und ihre Anhänger ihnen, wenn es die Umstände erlaubt hätten, gewiß gefolgt wären — so nützt es dem einzelnen, der sein Leben für diesen Zweck nicht riskieren will, ebenfalls nichts, daß das Proletariat stark genug ist. Es läßt sich auch sehr gut denken, daß ein ganz und gar sozialistisch organisiertes Frankreich, in dem die »Arbeiter« die Oberherrschaft besitzen, aus Deutschenhaß oder, von den katholischen Priestern aufgehetzt, aus Haß gegen den Protestantismus, Krieg gegen Deutschland führen will, und ähnliches läßt sich noch in vielen anderen Fällen denken. Es nützt alles nichts: Jeder einzelne muß in jedem einzelnen Falle entscheiden können, ob er einen Krieg mitmachen will oder nicht.

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Damit soll jedoch nicht gesagt sein, daß die Einführung der Freiwilligkeit Reformen in der Diplomatie überflüssig machen wird, denn die Freiwilligkeits-Institution erhält ihren Wert erst dann, wenn man schon nahe am Kriege steht. Unsere politischen Kartenmischer können aber durch ihre Gewissenlosigkeit Kriegsbefürchtungen, die an sich schon ein Unheil sind, und auch Situationen hervorrufen, die möglicherweise zu Kriegen selbst führen, falls sich genug Freiwillige zum Dienste im Feldheer melden. Daraus folgt, daß unser ganzes Regime der politischen Verhandlungen gründlich reformiert werden muß. Diese Reformen müssen sich in erster Linie gegen die zwei unheilvollen Prinzipien: Verschwiegenheit und Schnelligkeit . . . kehren.

In unübertroffener, ja vielleicht unerreichter Weise zeigte sich die vollkommen absolutistische Regierungsweise, das unbeschränkte Entscheiden und zugleich eine beinahe operettenhafte Intrige bei den diplomatischen Kriegsvorbereitungen Deutschlands vor dem österreichisch-serbischen Krieg im Jahre 1914. Angesichts des Berichtes des Dr. Mahlon und der Enthüllungen des bayrischen

Kriegsministeriums — auf die ich hier nur verweisen kann — kommt man aus dem Erstaunen nicht heraus und Entsetzen ergreift uns, wenn wenn wir an die Folgen für die Völker denken.

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Hiezu sei noch ein von den furchtbarsten Folgen begleiteter Fall angeführt aus den Vorgängen vor Ausbruch des jetzigen Weltkrieges, er betrifft die Diplomatie Englands: »Der deutsche Botschafter Fürst Lichnowsky« — heißt es in einem Briefe des Oxforder Kirchenhistorikers Dr. Frederik Cornwallis Conybeare — dem ich die Verantwortung für seinen Bericht überlassen muß — an die amerikanische Zeitschrift »Vital Issue« — »bot am 1. August 1914 in einem Gespräch mit dem Staatssekretär E. Grey freiwillig an, die Neutralität Belgiens zu respektieren und auch die Integrität Frankreichs sowie der französischen Kolonien zu garantieren und machte hierüber detaillierte Vorschläge. Als aber Lichnowsky außerdem noch um die Formulierung der Bedingungen ersuchte, unter denen England bereit wäre, neutral zu bleiben, da lehnte Grey alles und jedes unter dem Vorwande ab, seine Hände frei halten zu müssen. Lichnowsky mußte den Eindruck mit sich genommen haben, daß Grey unbedingt den Krieg wolle. Unser Kabinett hat natürlich erwartet, daß Grey unverzüglich jedes Zeichen der Nachgiebigkeit Deutschlands im Ministerrate vorbringen würde. Grey wußte jedoch, daß, wenn er die Lichnowskyschen Vorschläge übermitteln würde, unser Kabinett sie mit Freuden annehmen und ihm dadurch die Ausführung seiner Geheimverträge mit Frankreich und Rußland unmöglich machen würde. Was tat er nun? Am 1. August sagte er keinem einzigen seiner Kollegen etwas über diese Vorschläge, ebenso verheimlichte er sie vor dem ganzen Kabinett, als dieses am nächsten Morgen, dem 2. August, zusammentrat, und auf gleiche Weise unterschlug er sie dem House of Commons am 3. August. Dadurch stürzte er uns in diesen Krieg . . .«

Und das Unterhausmitglied Ramsay Mac Donald schrieb im »Labour Leader«, dem obigen gleichartig: »Hätte Sir Edward Grey im Unterhause alles gesagt, das heißt, hätte er auch das Anerbieten des deutschen Botschafters vom 1. August mitgeteilt, dann hätte er mit seiner Rede keine Kriegsstimmung hervorrufen können . . . Dieser Krieg ist ein Krieg der

Diplomaten und durch ein halbes Dutzend Männer verursacht worden.«

Hier sieht man deutlich, daß viele, ja hunderte Millionen Menschen das Opfer der Beschlüsse einiger weniger werden können und daß diese Behauptung durchaus keine leere Phrase ist.

Mit Recht konnte daher Kjellén sagen, daß »einige wenige Minister jetzt in einem heimlichen Konklave England in den folgenschwersten aller Kriege stürzen konnten, ohne daß die überwältigende Masse des Volkes eine Ahnung davon hatte«. Und Burgeß meint, es bestünden mehr Berührungspunkte zwischen der englischen und russischen Staatsform als man gewöhnlich glaubt, man braucht nur den Zaren durch das Unterhaus und den Kreis der Großfürsten durch das Kabinett zu ersetzen.

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Es ist aber doch sehr merkwürdig, daß die Völker, auch der freiesten Verfassungsstaaten, sich dessen so gar nicht bewußt sind, daß ihre auswärtigen Angelegenheiten noch immer so geführt werden, als ob der ausgesprochenste Despotismus noch bestünde. Alles wird von wenigen Personen und im Kabinett entschieden, und doch ist es wahr, wie Bagehot hervorhebt, daß Verträge ebenso wichtig sind wie die meisten Gesetze, also in beiden Fällen Zustimmung der Staatsbürger — in irgend einer Form — nötig, d. h. höchst wünschenswert sei. Man beachte doch, welche Ausnahmsstellung jeder Minister des Äußeren in den Ministerien einnimmt, er ist von allen Kämpfen so unberührt, als ob er Hofbeamter eines absoluten Monarchen wäre, und die Volksrepräsentanten zeigen selbst in ihren, ohnedies sehr seltenen, Bemerkungen zur äußeren Politik eine eigentümlich schüchterne und gebückte Haltung. Und ein Kurier des Ministeriums des Auswärtigen wird noch immer mit der Ehrfurcht betrachtet, als ob er Sr. Majestät dem König Briefe zu überbringen hätte.

Die natürliche Folge dieses Regimes ist dann leicht die, daß die Völker eine Überraschung erleben, wie im Juli des Jahres 1914, daß sie sich plötzlich in einen Weltkrieg hineingerissen sehen, der viele Millionen Menschenleben vernichtet, und daß sie die

ganze vorhergegangene Friedenszeit wie einen Traum empfinden, aus dem sie mit Schrecken erwachen, und nunmehr erst sehen, daß alle seit Jahren vorgegangenen politischen Verhandlungen ihnen kaum zum kleinsten Teile in ihrer Tragweite vorgeführt und deutlich gemacht wurden.

Es soll durchaus nicht verlangt werden, daß jedes Fachministerium ausgeschaltet werde und immer nur Majoritäten einer Volksvertretung oder eines speziellen Ausschusses derselben entscheiden, aber besprochen und beraten muß alles Wichtigere in der äußeren Politik unbedingt im konstitutionellen Geiste werden und in besonders wichtigen Angelegenheiten, wenn die Volksvertretung es verlangt, auch durch diese, mitunter durch eine direkte Volksabstimmung, die Entscheidung getroffen werden. Daß geheime Verträge oder Unterhandlungen nicht mehr vorkommen dürfen, ist selbstverständlich; es wird jetzt bereits vielfach gefordert und wurde schon vor mehr als hundert Jahren von Bentham verlangt.

IV.

Das Recht zur Kriegserklärung.

Mit der Frage der Wehrpflicht und der Freiwilligkeit steht jene des Rechtes zur Kriegserklärung in einer gewissen Beziehung, und wir müssen daher dieses Recht hier ebenfalls einer Betrachtung unterziehen. Man sieht ja leicht ein, daß ein kontinuierlicher Zusammenhang stattfindet zwischen den äußersten zwei Formen dieses Rechtes, nämlich zwischen dem Recht einer Person ⟨z. B. des Monarchen⟩, den Krieg zu erklären und hiedurch — solange die Wehrpflicht besteht — die Soldaten zum Kriegsdienst zu zwingen, und dem anderen Extrem: dem Recht jedes einzelnen Soldaten, über seinen Eintritt in das Feldheer zu entscheiden.

Auf je mehr Personen sich die Meinungsäußerung über eine Kriegsunternehmung erstreckt, desto gesitteter ist die Staatsverfassung in dieser Frage, und wenn das ganze Volk dreinzureden hat, so ist schon ein bedeutender Schritt nach vorwärts getan, und dies auch darum, weil dann auch mehr Heeresangehörige sich unter den entscheidenden Personen befinden können und andererseits, weil die Verantwortung für das Kriegsunheil eine verbreitetere ist. Das wäre aber noch bei weitem nicht genügend, es muß noch etwas Entscheidendes hinzukommen. Der letzte Schritt ist nämlich die Einführung der Freiwilligkeit, in welcher Institution dasjenige präzise erfüllt wird, was keine andere Methode erreichen kann, wenn man auch noch so sehr der Meinung wäre, sie erfülle bereits alle demokratischen Forderungen in genügendem Maße.

Der Fehler aller dieser Methoden beruht auf der Gewohnheit, immer und selbst in den fundamentalsten Angelegenheiten der Staatsbürger, Zahlenverhältnisse und entsprechende Abstimmungsmodalitäten entscheiden zu lassen, anstatt in den

wichtigsten Fragen das betroffene Individuum als solches zu sichern, also von jeder Abhängigkeit von anderen, seien es noch so große Majoritäten, freizuhalten.

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Es wird nun gut sein, zu erfahren, wie es mit dem Recht der Kriegserklärung, also auch bei der heute noch bestehenden Wehrpflicht mit dem Zwang zum Kriegsdienst, jetzt in den verschiedenen Staaten bestellt ist[1].

Ohne jede Einschränkung kann das Staatsoberhaupt den Krieg erklären in: Österreich-Ungarn, Dänemark, Griechenland, Japan, Rußland, England ⟨wo aber bisher keine allgemeine Wehrpflicht, sondern Freiwilligkeit als Werbesystem herrschte und erst in unserer Zeit die Wehrpflicht eingeführt wurde⟩. Das Staatsoberhaupt besitzt das Recht der Kriegserklärung, ist aber gehalten, »den Kammern alsbald von der Tatsache Mitteilung zu machen« ⟨was natürlich nahezu so viel wie nichts besagen will⟩ in: Belgien, Holland, Italien, Portugal, Spanien. Das Staatsoberhaupt bedarf zu einer Kriegserklärung der Zustimmung des Parlaments oder einer anderen konstitutionellen Körperschaft, oder dieses Recht steht nur den parlamentarischen Körperschaften zu, in: Deutschland ⟨Kaiser mit Bundesrat⟩, Frankreich ⟨der Präsident nach Einwilligung der beiden Kammern⟩, Schweden ⟨der König entscheidet, nachdem er den Staatsrat »gefragt« hat⟩, Norwegen ⟨wie Schweden⟩, Schweiz ⟨der Bund allein entscheidet über Krieg und Frieden⟩, Vereinigte Staaten ⟨der Kongreß⟩.

Und historisch dürften folgende Tatsachen von Interesse sein. In Sparta: Wurde das Kriegsaufgebot von den Ephoren erlassen, so brachte der König vor dem Auszuge dem Zeus ein Opfer dar. Das Recht der Kriegserklärung erhielt die in ihren Entschließungen ganz von den Ephoren geleitete Volksversammlung. Wobei zu bemerken ist, daß die ⟨5⟩ Ephoren jährlich vom Volke aus sämtlichen vollberechtigten Spartiaten gewählt wurden.

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1 Ich benütze hiebei eine kleine Zusammenstellung von Siemering, die im Jahre 1908 in Nr. 12 der »Friedenswarte« erschienen war. Sie ist heute, nach dem Weltkriege infolge eingetretener Änderungen in einzelnen Ländern nicht mehr vollständig gültig.

In Athen gab die Volksgemeinde, als Trägerin der Souveränität des Staates in allen Fragen der äußeren Politik wie der inneren Verwaltung die endgültige Entscheidung.

In Rom gehörte zur Kriegserklärung ein Volksbeschluß, aber der Senat hatte dabei doch ein gewichtiges Wort mitzureden.

Bei den Deutschen: »Nach den früher geltenden landesrechtlichen und nach den jetzigen reichsrechtlichen Bestimmungen ist die Volksvertretung von der Teilnahme an der unmittelbaren Entscheidung über Krieg und Frieden völlig ausgeschlossen. Dieser Rechtszustand steht demjenigen schroff gegenüber, welcher in der urgermanischen Zeit herrschte, wo allein das Volk die Entscheidung traf. In der germanischen Urzeit war allein die Volksversammlung, nicht etwa der König befugt, Beschlüsse über Beginn oder Nichtbeginn des Krieges, so wie Schließung oder Nichtschließung des Friedens zu fassen ... Wie bei allen Angelegenheiten mußte die Frage, ob Krieg, ob Frieden, zuerst vom Fürstenrate vorberaten werden. Natürlich herrschte die allgemeine Wehrpflicht«[1]. Es heißt ‹in dem unten zitierten Werke› weiter:

»Von politischen Parteien wird ein Mitwirkungsrecht ‹Deutsche Volkspartei vom 21. September 1895› oder sogar ein alleiniges Bestimmungsrecht ‹Erfurter Programm der sozialdemokratischen Partei Deutschlands› für die Volksvertretung gefordert. Indessen gegen die Gewährung sprechen erhebliche Bedenken. Eine Volksvertretung ist nicht in der Lage, in ausreichendem Maße diejenige Kenntnis von den vorhandenen Machtmitteln des Staates zu besitzen, welche die Vorbedingung einer fachgemäßen Entscheidung, ob Krieg oder nicht, sind ... Es ist oft vorteilhaft, den Krieg unvermutet zu eröffnen.«

Das Bedenken der militärischen Inkompetenz der Volksvertretung ist jedoch nicht stichhaltig, denn sie kann sich ja an die Fachmänner, z. B. vorerst den Kriegsminister und den Generalstabschef um Auskunft wenden, gerade so gut, wie heute der Monarch, der Präsident oder der Minister des Auswärtigen es tun müssen, die ja alle ebenfalls keine militärischen Sachverständigen sind.

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[1] Aus dem Werke: »Die Entscheidung über Krieg und Frieden nach germanischem Recht« von E. v. Hoffmann ‹1907›.

Ergänzend zum obigen sei folgendes bemerkt: Im November 1908 brachte die deutsche sozialdemokratische Partei »anläßlich des Zutagetretens höchst krasser Übelstände infolge der deutschen Reichsverfassung« einen Antrag auf Abänderung derselben ein, wonach zur Erklärung eines Krieges im Namen des Reiches außer der Zustimmung des Bundesrates auch die des Reichstages erforderlich sein soll. Der Antrag fiel vollständig durch. Einen analogen Antrag brachten die Sozialdemokraten im österreichischen Parlament am 3. Dezember 1908 ein, wonach dem Reichsrat die Entscheidung über Krieg und Frieden zustehen solle, mit demselben Mißerfolg.

Im Deutschen Reichstag wurde der sozialdemokratische Antrag von nationalliberaler Seite und in den liberalen Journalen in kühlster, mißachtender Weise behandelt, so daß sich nicht einmal eine ernsthaftere und eingehende Debatte entwickelte. Und in dem Organ mehrerer Friedensgesellschaften, der »Friedenswarte«, wurde die Bedeutung des sozialdemokratischen Antrages angezweifelt, und zwar deswegen, weil der Deutsche Kaiser für den Angriffskrieg der Zustimmung des Bundesrates und indirekt auch der Zustimmung des Reichstages bedarf, da dieser die Mittel zum Kriege zu bewilligen hat. Ich halte diese Begründung nicht für richtig, denn der Bundesrat ist im Wesen nach seiner Zusammensetzung eine Abordnung der regierenden Familien der deutschen Einzelstaaten, ist also schon aus diesem Grunde nicht kompetent, die Stimmung des deutschen Volkes auszudrücken, und überdies werden sich die Bevollmächtigten der kleinen Staaten gewiß nicht gegen die 17 Stimmen, welche die eventuell kriegerisch gesinnte preußische Regierung im Bundesrate besitzt, auflehnen oder zur Geltung bringen können.

Und was die Bewilligung der Geldmittel zu einer Kriegführung betrifft, so geschieht das immer post festum, also in einem Zeitpunkt, in dem ein Krieg bereits eine beschlossene Sache ist, die, wenn etwa der Reichstag die Geldmittel verweigern wollte, dennoch nicht mehr zu ändern wäre. Auch würde ein solcher Reichstag so sehr als »unpatriotisch« verschrieen werden, daß er kaum je den Mut hätte, die Mittel zu verweigern.

Und selbst die Notwendigkeit der Zustimmung des Reichstages in Form der Geldbewilligung fällt ganz weg, wenn als zur Kriegführung notwendige Mittel außerordentliche, über den

vom Reichstage bewilligten Etat hinausgehende Gelder verlangt wurden, denn die Beschaffung dieser Gelder kann auf verschiedene, wenn auch mitunter ungewöhnliche Weise seitens der Regierung arrangiert werden.

Zu diesem allen kommt noch, daß der Kaiser nach Artikel 11 der deutschen Reichsverfassung auch den Bundesrat nicht zu fragen brauchte, wenn »ein Angriff auf das Bundesgebiet oder dessen Küsten erfolgt«. Und ein solcher Angriff kann doch stets durch gewisse Methoden in der auswärtigen Politik sogar provoziert werden.

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Auf die im Deutschen Reichstage am 14. Dezember 1915 eingebrachte Interpellation, ob die Regierung bereit sei, die auswärtige Politik unter die Kontrolle der Öffentlichkeit zu stellen und einen Gesetzentwurf vorzulegen, der die Entscheidung über Krieg und Frieden der Öffentlichkeit überträgt, erwiderte Staatssekretär v. Jagow: Die Regierung ist nicht bereit, der Forderung zu entsprechen.

Seither wütete der Weltkrieg immer weiter und es ereignete sich, infolge der schrecklichen Situation Deutschlands, etwas Unerhörtes. Nämlich am 26. Oktober 1916 verhandelte der Deutsche Reichstag den Beschluß seines Hauptausschusses, wonach dieser ermächtigt wird, zur Beratung von Angelegenheiten der auswärtigen Politik und des Krieges auch während der Vertagung des Hauses zusammenzutreten. In der Debatte betonten sämtliche Redner die Notwendigkeit einer dauernden Verständigung zwischen dem Reichstag und der Reichsleitung über die Richtlinien der auswärtigen Politik und eine ständige Kontrolle über die Führung der auswärtigen Politik. Der Staatssekretär v. Jagow sprach eine prinzipielle Bereitschaft aus, den Wünschen des Hauses Rechnung zu tragen. Es wurde nur vom Staatssekretär v. Helfferich eine Verständigung von Fall zu Fall verlangt, wenn der Reichstag geschlossen wäre und das Bedürfnis für ein Zusammentreten des Ausschusses bestünde.

Alle diese Deutschland betreffenden Details haben seit Errichtung der Deutschen Republik natürlich nur historisches Interesse, können aber eventuell wieder ein sehr sachliches Interesse erhalten.

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Schließlich eine historische Notiz: Zuerst im modernen Europa waren es die Levellers in der ersten englischen Revolution, die in ihrem relativ radikalen Programm verlangten: Krieg und Frieden sollten von den Volksvertretern beschlossen werden. Zu Beginn der großen französischen Revolution stellte Villeneuve den gleichen Antrag. Und dieser Modus taucht, wie wir oben anführten, auch in neuester Zeit immer von neuem mit größerer oder geringerer Ausschließlichkeit auf. Wie in dieser Schrift schon oft gezeigt wurde, ist das Recht der Kriegserklärung durch Volksrepräsentanten noch lange nicht jene genügende Institution, die von der Gerechtigkeit und Humanität verlangt wird, und dennoch ist selbst dieser geringe Fortschritt in den meisten Staaten noch immer nicht zu erreichen.

V.

Ist es wahrscheinlich, daß das Kriegführen jemals aufhören wird?

Lange Zeit hindurch hieß es, Kriege seien jetzt unmöglich, weil die Völker wirtschaftlich in kompliziertester Weise voneinander abhängen, jetzt aber sagen umgekehrt die Sozialdemokraten, der Weltkrieg sei eine Folge des Kapitalismus, also ein im Grunde wirtschaftlicher und imperialistischer Krieg gewesen. In Wahrheit ist weder das eine noch das andere ausschließlich richtig: denn England führte jenen Krieg wohl als Kaufmannskrieg, Frankreich aber aus Gloire-Fanatismus, ähnlich war es bei Italien und teilweise selbst bei Rußland der Fall. Diese drei Staaten hatten also »ideale« und keine wirtschaftlichen Beweggründe. Ideale allerdings von jener Art, wie die Schatten in der Unterwelt, die Ulysses dort antrifft und welche Blut trinken müssen, um sich zu verkörpern.

Sehr belehrend ist die Tatsache, daß mitunter auch Sozialisten zur Kriegspartei gehörten, so z. B. während des Weltkrieges in England[1], und zwar riefen sie dort zu den Waffen gegen die Deutschen als industrielle Nebenbuhler Englands. Daraus folgt, daß, wenn es sich um die Sorge für die Ernährung eines Volkes handelt, sehr leicht Kriegsgelüste entstehen, selbst wenn der ganze Staat bereits sozialistisch eingerichtet wäre.

Und wenn das Prinzip der Freiwilligkeit nicht durchgeführt ist, an das die Sozialisten gar nicht denken und bisher auch nicht denken wollen, so sind wir dann genau auf dem heutigen Standpunkt, daß auch derjenige dennoch in den Krieg ziehen muß, der den Krieg irgendwie perhorresziert, entweder weil er

[1] Wie A. Blatschford in dem Arbeitsorgan »Clairen«.

ihn für aussichtslos hält oder weil er andere Wege für geeigneter ansieht, um der Not zu begegnen, oder endlich, weil er sein Brot überhaupt nicht mit Gefährdung seines Lebens oder seiner Gesundheit in Schlachten gewinnen will usw.

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Die irrtümliche Ansicht, daß Armeen und Kriege nur wegen wirtschaftlicher Zwecke geführt werden, wird merkwürdigerweise selbst von hervorragendsten Sozialisten geteilt und auf dem sozialistischen Kongreß zu Limoges ⟨im Jahre 1907⟩ meinte Jaurès, der Militarismus und der Imperialismus seien nichts »anderes, als eine organisierte Ausrüstung des Staates, um die Arbeiterklasse unter dem wirtschaftlichen und politischen Joche der Kapitalistenklasse zu erhalten«, aber davon, wie viele Kriege durch den Egoismus der Agrarier verschuldet werden, wird gar nicht gesprochen. Ich erinnere nur an den letzten österreichisch-serbischen Krieg. Nicht bloß der preußisch-österreichische und österreichisch-italienische im Jahre 1866, der russisch-türkische Krieg im Jahre 1878, auch der deutsch-französische ⟨vom Vatikan inspirierte und zugunsten der Napoleonischen Dynastie geführte⟩ im Jahre 1870 hatten mit der »Kapitalistenklasse« gar nichts zu tun und im Jahre 1908 drohte ein Krieg Österreich-Ungarns mit Serbien und Montenegro, von Seite Österreich-Ungarns unter anderen Gründen auf Veranlassung des Vatikans, der die orthodoxe Kirche schwächen und ein großes katholisches Kaisertum herstellen wollte, und auf Seite der beiden gegnerischen Staaten aus nationalen und agrarischen Gründen und um ihren Glauben gegen die Aggression der katholischen Kirche zu schützen.

Und was Frankreich betrifft, so war die Revanche-Idee, die doch gar nicht mit dem Kapitalismus zusammenhängt, in vielen stets lebendig und offen, bei fast allen latent. Selbst ein so freier und humaner Geist wie Clemenceau sagte im Senat ausdrücklich, daß »so viele französische Herzen diesen Gedanken an Revanche hegen« und sogar der Sozialist Jaurès schrieb in der »Humanité« am 15. Februar 1906: »Ich habe niemals auf die Bekräftigung des Rechtes verzichtet, aber ich glaube, daß Frankreich nicht von einem Kriege und dessen Zufällen die Wiederherstellung des Rechtes erwarten soll.« Also selbst ein so hochintelligenter und edler Internationalist hegt

geradeso wie seinerzeit Gambetta und alle französischen Nationalisten den Gedanken an die sogenannte »immanente Gerechtigkeit«, worunter der Wiedererwerb von Elsaß-Lothringen zu verstehen ist.

Stets, so meine ich, jedoch ohne es als sicher prophezeien zu wollen, und sage es mit größtem Bedauern, wird es Anlässe zu Kriegen und wird es auch wirklich Kriege geben, so lange eben die menschliche Natur — sei es durch äußere Umstände, sei es durch große moralische Ingenien von innen heraus — nicht wesentlich umgewandelt wird.

Es ist zwar unbedingt wahr, daß die Völker — von sehr kleinen Minderheiten abgesehen — trotz des in den Menschen, namentlich des Abendlandes, schlummernden Rauftriebes, dem sie sonst nur im Privatleben Luft machen, Kriege verabscheuen, oder sie doch nicht wünschen, sie haben, wie man so oft in Kriegszeiten liest, »Friedensbedürfnis«. Es hieß ja stets auch beim jetzigen Weltkriege, »das Volk wollte ja nicht den Krieg, es sind nur einige wenige Personen, die einen solchen herbeiführen«.

Gewiß ist es so. Aber eine geschickte Propaganda ermöglicht es einigen wenigen Personen, auch friedliebende Völker in kriegerische Gesinnungen, ja in Kampf und Wut und auch, wenn das nicht gelingt oder gar nicht versucht wird, vermöge der allgemeinen Wehrpflicht dennoch in den Krieg hineinzutreiben. Und es ist ebenso merkwürdig wie traurig, daß die Menschen stets den Anregungen zum Streit und endlich zum Krieg ungleich zugänglicher sind als den Ratschlägen und Bemühungen zum Frieden. Und was noch weiter hinzukommt, ist dies, daß sich in der ganzen Vergangenheit und bis auf den heutigen Tag kaum ein einziges Beispiel finden läßt, daß die Agitation für den Frieden auch nur entfernt so energisch betrieben wurde, wie die Propaganda für den Krieg, sei es im allgemeinen, sei es in einem speziellen Falle. Wir stoßen eben hier auf den Grundcharakter der menschlichen Natur, hauptsächlich der Europäer, daß der Trieb zum Raufen so stark und in jedem Augenblick so sprungbereit ist, daß er selbst auf den geringsten Antrieb hin zur bösen Tat führt. Wir dürfen auch nicht vergessen, daß jene Energie, die den meisten Menschen innewohnt, entweder die rein egoistische oder die nackte brutale Energie

ist, von Energie für das Gute ist im Leben der Menschen, ja, man kann sagen: im Leben der ganzen Menschheit, stets nur sehr wenig zu bemerken gewesen. Und das ist jedem so gut bekannt, daß er, wenn man von einem »energischen« Menschen spricht, stets sofort ein gewisses hartes, wenn nicht brutales Handeln — sei es auch nicht immer zu ausgesprochen unethischen Zwecken — voraussetzen wird. Ja es erscheint beinahe jedem lächerlich und ein innerer Widerspruch zu sein, einen beharrlich und in extremstem Grade im Guten tätigen und dabei sanften Menschen z. B., Jesus aus Nazareth oder Franz von Assisi, »energisch« zu nennen.

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Es ist nun auch vom Standpunkt der Menschenkenntnis aus interessant und andererseits wichtig für die Versuche, unsere Sitten zu verstehen und vielleicht auch zu verbessern, wenigstens oberflächlich zu beachten, welche Dinge und welche Ideen hinreichen, um in den Menschen die heftigsten Aufregungen und Haß und Verachtung gegen andere hervorzurufen.

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Es ist für den noch Unerfahrenen höchst überraschend, allmählich im Leben gewahr zu werden, welche ganz indifferente, ganz unschädliche, bloß konventionell bewertete Tatsachen hinreichen, um tiefe Antipathien zu erwecken und besonders, wenn man nur diese Tatsachen durch den Ton, durch die Ausdrucksweise, in dem man über sie spricht, durch Lachen, durch gewisse Grimassen, beharrlich genug als etwas Häßliches, ja Schlechtes hinzustellen bemüht ist.

Als es sich bald nach dem deutsch-französischen Kriege des Jahres 1870 den Franzosen darum handelte, Verachtung und Haß gegen die Deutschen und Sympathie für die Russen, auf deren Allianz man hinarbeitete, zu erwecken, benützte ein französisches Journal das Argument: Die deutschen Mädchen und Frauen seien nicht so »lauschig« wie die Russinnen und Französinnen. Es ist kaum zu bezweifeln, daß ein solches Argument genügt, um in so manchen Menschen wirksam zu Mißachtung oder gar Haß gegenüber den Deutschen vorzuarbeiten, denn analoge Denunziationen hört man sehr oft und

kann stets dabei den Ausdruck des erweckten Abscheues in den Gesichtern und Reden der Zuhörer beachten.

Der tiefe Haß der orthodoxen Russen gegen die katholischen Geistlichen hat seinen Hauptgrund in der Tatsache, daß diese keine Bärte tragen, es wird als Sünde betrachtet, sich rasieren zu lassen[1].

Manche Nationen sind anderen darum verhaßt, weil sie in öffentlichen Lokalen laut sprechen oder wirklich schreien. Das habe ich selbst oft bemerkt, wenn Magyaren in Restaurants oder in Sommerfrischen miteinander sprechen, die Entrüstung über den Lärm dieser »rohen« Nation war eine nicht geringe.

Ebenso ist es mit der Wirkung, die der Satzbau in der deutschen Sprache der Juden mancher Länder, namentlich des östlichen Europas, auf Deutsche hervorbringt, und ihre Bewegungen mit den Händen beim Sprechen werden schon gar als höchst Wichtiges, wenigstens sehr Bemerkenswertes und Widerwärtiges angesehen, verlacht und beschimpft. Und ich hörte einmal im Gasthause einen sogenannten Antisemiten über die Juden schimpfen und damit schließen: »Aber was kann man von einem Volke erwarten, das den Dativ mit dem Akkusativ verwechselt?« Bekannt ist es, wie nicht selten einander benachbarte Ortschaften oder kleine Kantone in Fehde geraten wegen Verschiedenheiten in den kleinlichsten Dingen oder Gewohnheiten.

Die Unterschiede der Dialekte sind oft die Ursache größter gegenseitiger Verachtung. Noch heftiger und beinahe unglaublich ist die Aufregung, ja oft die Wut, mit der z. B. ein Deutscher den jüdischen Jargon ‹in deutscher Sprache› oder die Aussprache oder Betonung des Deutschen durch einen Tschechen anhört. Wie von einem hohen wissenschaftlichen Standpunkt aus entrüstet man sich gegen die »Verderbnis der deutschen Sprache«, was man als ein großes Unglück für die ganze deutsche Kultur ansieht.

Ganz abgesehen davon, daß ein jeder und eine jede Nation das gleiche Recht, — das primitivste »Naturrecht« — hat, so zu sprechen, wie es ihnen beliebt, — während des Weltkrieges durfte man allerdings z. B. in Frankreich und selbst in der

[1] Die Russen glauben nämlich, »Gottes Ehrenbild« werde geschändet, wenn ein Mensch dieses Zierates — des Bartes — beraubt wird.

französischen Schweiz öffentlich durchaus nicht deutsch sprechen, ohne insultiert oder noch viel übler behandelt zu werden — glaubt man in seinem Haßbedürfnis, daß die Abänderungen einer Sprache, z. B. der »hoch«deutschen sogenannten klassischen Sprache, eventuell jener des Wörterbuches einer Akademie, bei gewissen Menschengruppen eine häßliche Eigentümlichkeit, eine eigene Art von Bosheit und Gemeinheit, eine Mißachtung der »natürlichen«, »edlen« Grundsprache sei. Indessen ist es doch eine physiologische Notwendigkeit der Sprach- und vielleicht auch der Gehörorgane bei jenen Menschen, einen Dialekt ganz unabsichtlich und unbewußt herauszubilden.

Nach meinen vielfachen Erfahrungen genügt ein sonst ganz harmloses, unliebenswürdiges Benehmen, eine von dem Gewohnten abweichende Art, gewisse Speisen zu bereiten, sowie das Genießen eigentümlicher Nahrungsmittel oder Gerichte bei anderen Völkern, um daraus auf einen niedrigeren Grad der Zivilisation bei ihnen zu schließen.

Alle diese so kleinlichen Anlässe bringen die Menschen in größere Aufregung, als etwa vorhandene oder bloß angedichtete Fehler. Wem schaden aber denn diese Dinge? Wem schadet es, wenn Menschen ihren Dialekt sprechen oder diese und jene Körperbewegungen während des Sprechens ausführen? Und doch spritzt so manchem oft die Wut aus den Augen, wenn er derlei, selbst bei anerkannt edlen Menschen eines fremden Stammes sieht und hört. Ja sogar die unberechenbar alten Unterschiede der Völkerstämme, wie der Griechen und Barbaren, mit all dem gegenseitigen Haß, der sie begleitete, scheinen — wie Sir Henry Maine meint — ihren Ursprung in weiter nichts gehabt zu haben, als in Abneigungen gegen verschiedene Sprechweisen.

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Diese Gewohnheit, einzelne Individuen oder eine Menschengruppe oder ganze Nationen aus solchen Gründen zu verachten, welche Verachtung unter begünstigenden Umständen leicht zur Verfolgung führt, nimmt natürlich immer größere Dimensionen an um je wichtigere Bestandteile der Kultur es sich handelt, zum Beispiel um Sprache, Kunst, Wissenschaft, Religion oder um politische Angelegenheiten.

Da hält beinahe jede Nation ihre Sprache entweder für die am meisten logische, oder für die wohlklingendste, oder kräftigste oder reichste, und ihre eigene Kunst ist der Kunst anderer Völker entweder überhaupt oder doch in gewissen Beziehungen unbedingt überlegen, ebenso geht es oft mit der Beurteilung der wissenschaftlichen Leistungen. Dabei handelt es sich nicht entfernt um vergleichende theoretische Kulturstudien, sondern bloß um das Hervorsuchen von — wahren oder scheinbaren — Vorzügen, auf die jeder Angehörige dieser bestimmten Nation stolz sein sollte. Das Resultat derartiger Vergleichungen ist nicht selten eine Degradation bisher allgemein aufs höchste bewunderter fremder Leistungen.

Da hieß es in diesen Tagen des Weltkrieges u. a. in den französischen Zeitungen, die Deutschen besäßen keine Schöpferkraft, sie könnten nur von anderen Gefundenes aufnehmen. Nun könnten die Deutschen erwidern, so ganz ohne Schöpferkraft seien Leibniz, Sebastian Bach, Kant, Goethe und Beethoven wohl doch nicht gewesen, und — um von der jüngsten Zeit zu sprechen — Schopenhauer, Richard Wagner und Nietzsche, die auch auf die Franzosen einen so großen Einfluß ausüben, besäßen wohl ebenfalls eine gewisse Schöpferkraft, die sich vielleicht mit jener aller geistreichen vierzig Unsterblichen der Pariser Akademie vergleichen ließe.

Aber: Sei es so!

Man kann zugeben, daß die Zahl der Talente, namentlich zweiten und niederen Ranges in der schönen Literatur, bei den Franzosen größer sei als bei den Deutschen. Sollen aber die Antipathien oder Sympathien zwischen zwei so hoch kultivierten Völkern wie den Deutschen und Franzosen davon abhängen, ob es einer französischen Polissonnerie gelingen wird, zu boshaftem Zweck nachzuweisen, daß z. B. Beethoven gar kein Deutscher, sondern von Geburt ein Holländer war? Oder ob einem deutschen Polisson irgend eine analoge Entdeckung gelingt?

Sogar im Gebiete der Musik machte sich in unseren Tagen der nationale Eigendünkel und Haß geltend. So schrieb zum Beispiel ein sehr geachteter französischer Komponist, St. Saëns, über den »Germanismus in der Musik« und später eine eigene Broschüre gegen Richerd Wagner in extrem chauvinistischem Sinne, und in analoger Tendenz ein deutscher Musiker »Über den Krieg und die deutsche Musik«.

Soll man sich denn überhaupt auf solche Zensuren ganzer Nationen einlassen? Gesetzt, es wäre jener Mangel an »Schöpferkraft« und noch mancher andere Mangel bei den Deutschen unbestritten vorhanden, ist das ein Grund, ihnen daraus einen Vorwurf zu machen oder gar, sie deswegen zu mißachten? Oder gar zu bekriegen? Und soll man etwa alle Völker der Erde, die — wie die Russen, Serben, Slowaken, Basken, Spanier usw. — vielleicht noch weniger Schöpferkraft als die Deutschen bewiesen haben, verachten und deshalb auch Krieg mit ihnen führen? Soll man die Leistungen der verschiedenen Nationen auf einer freien Wage abwägen oder nach der Elle messen, und sie, wenn das Ergebnis geringfügig ausfällt, dann mißachten?

Und warum sollten wir, konsequenter Weise, nicht überhaupt alle Menschen, auch jene unseres eigenen Volkes mißachten, auch unsere Eltern, wenn sie keine Akademieabhandlungen publizierten oder geniale Gedichte oder große Symphonien geschaffen haben?

Es ist noch nicht lange her, daß man in Sachen der Religion geradeso sprach wie jetzt über Kunst und Wissenschaft. Eine Flut von Schriften erschien, um nachzuweisen, daß »unsere« Religion die moralischeste oder die tiefsinnigste oder die für das »höhere« Leben geeignetste sei. Heute ist es damit viel stiller geworden, aber in anderen Gebieten hat sich für diese kindisch-boshafte Intoleranz ein ziemlich ausreichender Ersatz gefunden.

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Wenn es nun so mit dem Charakter der Menschen — in Europa — bestellt ist, wenn man bedenkt, wie leicht entzündbar sie für jede Propaganda des Hasses sind, kann man sich da noch sicher fühlen, daß sich nicht zu allen Zeiten Anlässe zu Kriegen ergeben werden? Gewiß zu allen Zeiten, so lange nicht unsere Gesittung eine höhere geworden ist.

Also nochmals: Ist es wahrscheinlich, daß die Kriege jemals aufhören werden?

Wenn wir für die Beantwortung dieser Frage an den Charakter leitender und agitierender Politiker, sowie an die eben besprochene leichte Erregbarkeit der Volksmassen und an die vielen großen und kleinen Anlässe und Anregungen zu Streit,

Mißachtung und zu Kriegen denken, so gelangen wir allerdings zu einem wenig tröstlichen Ausblick auf die Zukunft.

Zwar, den schädlichen Einfluß der Politiker wird man, wenn mein Programm durchgeführt wird oder wenn die Bestrebungen der Pazifisten gelingen, in hohem Grade verringern können, die Erregbarkeit der Massen und alle Anlässe zu Kriegen jedoch werden kaum jemals verschwinden, denn beides kann nicht durch neue Institutionen aus der Welt geschafft werden, sondern nur durch radikale Ethisierung der Menschen. Eine solche darf man zwar nicht als eine Unmöglichkeit hinstellen, aber jedenfalls als eine Aufgabe, die, wenn sie überhaupt je gelingt, zu ihrer Lösung ungeheure Zeiträume beanspruchen würde.

Wie kriegerisch erregbar die Menschen und ganze Völker sind, konnte man wohl deutlich genug aus den Vorgängen in unserer Zeit ersehen. Eine Zeit, die doch die versprochenen Früchte Jahrhunderte währender Bemühungen der positiven Religionen hätte pflücken sollen, ein Zeitalter, in dem doch alle Kultur einen Kulminationspunkt erreicht zu haben schien und in welcher zur Erwirkung friedlicher Gesinnung und friedlicher politischer Entwicklung so viele dankenswerte Bemühungen aufgewendet wurden! Ja, wie wir sehen, sind es gerade gewisse Seiten unserer Kultur, deren hohe Ausbildung die Kriegsstimmungen in höchstem Grade auslösen.

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Und was Anlässe und allgemeine Rechtfertigungen und sogar Lobpreisungen der Kriege betrifft, so wird die nachfolgende Liste sofort zeigen, wie gering die Chancen für friedliche Zustände sind.

Anlässe sind u. a. folgende:

Man hat Neuland nötig, um den Überschuß der Bevölkerung unterzubringen. Die Fahne wurde entehrt, man muß ihre Ehre wieder herstellen. Man will irgend einen politischen Zustand der Vergangenheit wieder herstellen. Man muß irgend ein politisches Ideal, das bisher noch nie erreicht wurde, verwirklichen. Man will Land oder Güter rauben, ohne sie eigentlich nötig zu haben. Man kann sich in der Tat nicht genügend ernähren, wenn man nicht fremde Staaten oder Völker besiegt. Man will dasselbe zu dem Zwecke, mehr Luxus genießen zu können. Man will seine

Handelsbilanz auf fremde Kosten verbessern ‹Kaufmannskriege›. Man hat das Bedürfnis der Rache an irgend einem Staate oder an diesem zugehörigen Personen oder Klassen. Religionshaß. Wiederherstellung der verlorenen Gloire. Gründung von Kolonien. Vereinigung stammverwandter Völker. Rassen- oder Nationalhaß. Dynastischer Ehrgeiz. Verteidigung gegen Angriffe. Wiedergewinnung der Freiheit gegenüber einer Unterdrückung durch äußere oder innere Mächte. Nackte Ruhmsucht. Nackte Kampflust. Langeweile durch einen langen Frieden. Man will das zu starke Anwachsen einer fremden Macht hindern. Das Bestreben, eine Vormacht zu werden, Hegemonie zu besitzen, eine gebührende Weltmachtstellung einzunehmen — die Würde des Staates zu wahren — die Sorge dafür, daß »die Welt den Stempel unseres Volkes trage und nicht den irgend eines anderen«. Erweiterung der Machtstellung. Spekulationsgeschäfte von Industriellen. Profitgier der Lieferanten von Heeresartikeln. Versuche von Dynastien, innere Gefahren zu beschwören. »Herstellung natürlicher Grenzen«.

Und hiezu kamen in unserer Zeit gelegentlich des Weltkrieges noch folgende »Anlässe« oder »Gründe«, Krieg zu führen:

»Die freie Entfaltung des menschlichen Geistes zu sichern« ‹nach der Äußerung des französischen Premierministers, im Namen der Mächtegruppe: Montenegro, Serbien, Rußland, Belgien, England und Frankreich›, »für Freiheit und Gerechtigkeit« ‹nach der Äußerung des Zaren›. »Zur Vernichtung des preußischen Militarismus« ‹nach den Worten der englischen und französischen Politiker›. »Für Sicherung der Demokratie« ‹nach Skizzen in Frankreich und England›. »Weil Deutschland allen auf die Zehen treten will« ‹Worte des russischen Ministers des Auswärtigen›. »Zum Zweck der Befreiung aller Völker von den Angriffen einer autokratischen Regierung« ‹Präsident der Vereinigten Staaten Wilson›.

Rechtfertigungen, Lobpreisungen und Anregungen gibt es u. a. folgende:

»Man muß ein klar bestimmtes und nationales Ziel besitzen, das die Phantasie gefangen nimmt«. Man muß zeigen, daß man eben das »bedeutendste Kulturvolk« sei. Der Krieg ist eine »entwicklungsgeschichtliche ‹oder: eine »biologische«› Notwendigkeit«. Friede »liefert uns einer langsamen Fäulnis aus«. Im Kriege »beweist ein Volk seine höchste Kraft und Lebensäußerung«.

Kriege »fördern den höchsten Zweck der Menschheit«. Der Krieg dient dazu, »um das Übergewicht für die wahren Elemente des Fortschritts zu gewinnen«. Eine höhere Kultur hat das Recht, »eine niedere zu unterwerfen«. Krieg ist »eine sittliche Forderung«. »Nur der nach erweiterter Machtsphäre strebende Staat schafft die Bedingungen, unter denen das Menschentum sich zu edelster Blüte entwickeln kann«. »Unsere Nation hat die und die historische Mission«. Krieg ist »der größte Machterweiterer und Lebenswecker, den die Geschichte der Menschheit kennt«. Es handelt sich um die »Erhaltung nationaler Eigenart«. Wir sollen »bestimmenden Einfluß im Konzert der Völker« anstreben. Krieg ist ein »Schmelztiegel« . . . . »Wo bei wachsender Kultur und steigendem materiellen Wohlleben der Kampf aufhört, wo die Kriegstüchtigkeit schwindet und der Wille nachläßt, sich unter allen Umständen zu behaupten, da gehen die Völker sehr bald ihrem Untergange entgegen und können sich weder politisch noch biologisch behaupten«. »Die großen Streitigkeiten der Völker sollen durch Schiedsgerichte, also durch Vergleiche, beigelegt werden? Einseitiges, beschränktes, formales Recht soll an die Stelle der geschichtlichen Entscheidungen gesetzt, dem schwachen soll die gleiche Daseinsberechtigung zugesprochen werden wie dem starken lebenskräftigen Volke? Das alles stellt einen anmaßlichen Eingriff dar in die natürlichen Entwicklungsgesetze, einen Eingriff, der nur zu den schlimmsten Folgen für die Gesamtmenschheit führen könnte«.

Ich trage absichtlich noch zwei Arten von Ursachen zu Kriegen nach, die heute und seit längerer Zeit schon gegenstandslos wurden:

Wenn ein Angehöriger einer dynastischen Familie einen Eheantrag stellt und einen Korb erhält. Und ferner, weil »irgend eine Auslegung einer göttlichen Weissagung Großes« von einem Kriege erhoffen läßt. Die letztere Ursache kann nach Grotius »zu großen Übeln« führen, es ist jedoch nicht ausgeschlossen, daß, wenn die religiösen Anregungen der neuesten Zeit lang genug fortgesetzt werden und dieser Kitzel wieder zur Wiederherstellung der früheren Macht positiver Religionen — oder einer derselben — führt, diese nach Grotius, »ungerechte Ursache zum Kriege« wieder zum Leben erwacht.

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Nun vergleiche man diese lange Reihe von Ursachen, Veranlassungen und Rechtfertigungen mit den von Grotius angegebenen Kriegsursachen. Wie weit sind wir hierin fortgeschritten!

Grotius unterscheidet »gerechte« und »ungerechte« Ursachen zum Kriege. Von gerechten, sagt er, werden drei — sage: nur drei — angenommen: Die Verteidigung, die Wiedererlangung des Genommenen und die Bestrafung. Und er zitiert hiebei Curtius, der von den skythischen Abiern sagt: »Es waren die rechtlichsten unter den Barbaren, denn sie bekriegten niemand, wenn sie nicht gereizt worden waren«. Welche Naivität bei diesen Barbaren! Nur Krieg zu führen, wenn man gereizt wird! Da sind wir ganz andere Leute! Die Franzosen zum Beispiel wurden im Jahre 1866 von niemandem, und auch von den Preußen nicht, gereizt, aber kaum hatten diese die Österreicher bei Sadowa besiegt, so verlangten schon die Franzosen »Revanche für Sadowa«, und hörten seitdem auch nicht auf sie zu verlangen und noch mehr vom Jahre 1870 an bis zum letzten Weltkrieg. Auch mit den Engländern können sich die skythischen Abier nicht vergleichen, denn jene wurden seit Jahrhunderten von niemandem gereizt, aber führten ununterbrochen Krieg.

Wir haben doch aber seit 1900 Jahren die Bergpredigt? Von der hatten die skythischen Abier leider keine Ahnung!

Von »ungerechten« Kriegen führt Grotius siebzehn an, aber wir Modernen sind da weit voraus, denn obige Liste enthält 30 Ursachen und 18 Anregungen oder Rechtfertigungen und sie ist gewiß bei weitem nicht erschöpfend.

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Wir behandeln in diesem Kapitel die Frage: »Ist es wahrscheinlich, daß das Kriegführen jemals aufhören wird?« Diese Frage kann aber ebensowenig gründlich genug beantwortet werden, wie die andere: Ob Aussicht vorhanden ist, beabsichtigte Kriegsunternehmungen hindern zu können — solange nicht Klarheit darüber herrscht, welcher Anteil der ‹sogenannten› natürlichen Entwicklung der sozialen und speziell politischen Verhältnisse, und andererseits einflußreichen Personen als Anregern der Kriege zuzuschreiben ist.

Es würde sehr schlimm um die Friedensaussichten stehen, wenn es wahr wäre, was in dem — verdienstvollen — Werke: »Die politischen Probleme des Weltkrieges« von K. Kjellén hierüber gesagt wird. Dort heißt es:

»Kriege sind Sache der Staaten und nicht einzelner Menschen. Das volkstümliche Urteil, das nach Verantwortlichen sucht, ist das Opfer eines Trugbildes. Das Leiden des Krieges muß nicht an der Unruhe unseres Herzens, sondern an den Leiden des Staates gemessen werden, da das Bedürfnis des Staates es hervorruft, nicht das einzelner Menschen .... Wir verstehen den Krieg als ein Spezifikum für die Staaten, durch das sie klarer als sonst mit ihren Bedürfnissen hervortreten, die keineswegs immer unmittelbar mit denen der ihnen unterstellten Einzelmenschen zusammenfallen«. .... Die Staaten seien, heißt es dann, nicht als wandelnde Verfassungsschemata oder Rechtssubjekte anzusehen, sondern »als große Lebewesen, als überindividuelle Persönlichkeiten, die im Guten und Schlechten von Lebenstrieben erfüllt sind ... jeder ist an seine Daseinsbedingungen gebunden, wie sie aus der Entwicklung und der äußeren Umgebung erwachsen sind«.

In diesen Sätzen ist präzise jene Ansicht ausgedrückt, die man die staatsbiologische nennen könnte. Anscheinend von hoher Warte aus, empfiehlt sie sich durch ihren naturwissenschaftlichen Anstrich und besitzt einen hohen Grad von aristokratisch-scientifischem Charakter, demgegenüber jede andere Auffassung der Dinge als rohe Empirie erscheint. Das zeigt sich besonders in der Beantwortung der Frage nach etwaigen verantwortlichen Urhebern der Kriege: »hier gilt es vielmehr«, sagt Kjellén,

> »die objektiven Faktoren in der weltumfassenden Umwälzung klarzulegen und festzustellen; die subjektiven sollen nicht geleugnet werden, aber sie fallen als irrationelle Reste von der Untersuchung ab«.

Daß es Fälle geben kann, in denen in der Tat Daseinsbedingungen einen Staat zum Kriegführen treiben, steht außer Zweifel. So wenn er sich gegen einen Angriff oder einen verhaßten Druck verteidigen will, man denke z. B. an die Kriege Spaniens und Deutschlands gegen Napoleon, ferner an Hungersituationen, infolge deren ein Staat oder ein Volk

überhaupt auf Raub ausgehen muß, wie vielleicht zurzeit der Völkerwanderung.

Aber alle solche Fälle sind die Minderheit. Beinahe alle Kriege der Europäer gegeneinander oder gegen exotische Völkerschaften haben sehr wenig oder gar nichts mit »Daseinsbedingungen« zu tun gehabt. Waren die Kriege Ludwigs XIV., waren überhaupt die sogenannten Erbfolgekriege Staatsnotwendigkeiten? Oder die ersten Kriege Friedrichs des Großen oder Napoleons? War der französische Krieg gegen Deutschland vom Jahre 1870 ein staatlicher Bedürfniskrieg oder jener im Jahre 1854 der Westmächte gegen Rußland? Der erstere war doch nur ein Pfaffen- und Familienkrieg, der andere ein Etikettekrieg!

Man kann daher mit voller Berechtigung behaupten, die staatsbiologische Auffassung der Kriege entspricht der Erfahrung nicht und wir werden diese Behauptung auch an dem gewaltigsten aller Kriege, nämlich den jetzigen Weltkrieg, nachweisen.

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Kjellén untersucht — in dem oben angeführten Werke — die »geopolitischen, ethnopolitischen, sozialpolitischen, verfassungs- und kulturpolitischen« Probleme dieses Weltkrieges und findet bei Rußland, England und Deutschland in der Hauptsache folgende Staatsnotwendigkeiten, die noch zu befriedigen sind: Bei Rußland ein warmer Hafen und die freie Ausfahrt in das Mittelländische Meer, bei England die »Zusammenschweißung« von Südafrika, Ägypten und Indien, bei Deutschland der Ausweg nach dem Orient, vornehmlich die Bagdadbahn.

Nun wurde meines Wissens während der ganzen Zeit des Weltkrieges und auch bei Beginn und Ankündigung desselben nicht ein einzigesmal von allen diesen Staatsnotwendigkeiten — laut — gesprochen, wenn auch die leitenden Politiker nicht aufhörten, unter anderem auch an diese Ziele zu denken[1], ja es ist geradeso, als ob sich die Politiker scheuen würden, von ihnen

[1] Erst im November 1916 sprach der russische Minister Trepow in der Duma ganz dezidiert von Konstantinopel als dem Kriegsziel Rußlands, und dies offenbar nur infolge der früheren Enthüllung eines solchen Übereinkommens mit den Westmächten und Italien durch den deutschen Reichskanzler am 9. November desselben Jahres im Deutschen Reichstag.

zu reden. Hingegen hörten wir unaufhörlich von Seite der Entente als Zweck oder Ursache und Veranlassung dieses Krieges behaupten: es handle sich darum, die »freie Entfaltung des menschlichen Geistes zu sichern«; es handle sich um »Freiheit und Gerechtigkeit«; es handle sich um »Vernichtung des preußischen Militarismus«, um »Sicherung der Demokratie«, einmal auch: »weil Deutschland allen auf die Zehen treten will« und dergleichen. Von Deutschland wird die Notwendigkeit der Verteidigung gegen die Entente angegeben, von Österreich die Verteidigung gegen Rußland.

Warum verschwiegen nun die Ententemächte ihre wahren Kriegsziele, die doch als nützliche vernünftige Ziele ihren Völkern ganz gut einleuchten müßten? Antwort: Weil alle die eben angeführten Phrasen geeigneter sind oder erscheinen, die Völker in Aufregung zu bringen, obwohl es beinahe ein Rätsel zu nennen ist, daß das so ist. Nur die geringe Zahl der Fachpolitiker wälzt jene Gedanken, die sie als staatliche Daseinsbedingungen ansehen oder ausgeben, jene Ziele oder Ideale, unaufhörlich in ihren intimeren Beratungen und in ihren nur für sie selbst bestimmten Schriften hin und her.

Man könnte nun glauben, die Fachpolitiker seien allein fähig, solche große staatliche Aufgaben oder Ideale zu erkennen und zu behandeln, die großen Massen aber könnten sich nicht zu solchen Höhen aufschwingen, »den politischen Blick über ganze Länder zu werfen« und »in ganzen Erdteilen zu denken«. Wir werden aber sofort sehen, ob in dem jetzigen Weltkriege wirklich staatliche Daseinsbedingungen eine Rolle spielen oder ob es sich nur um Pläne gewissenloser Politiker handelt, die Millionen Menschenleben leichten Herzens hinopfern, bloß um Luxusideen zu realisieren, die sie als Lebensbedingungen ihrer Staaten betrachten.

Um das zu beweisen, wollen wir die Situation der einzelnen jetzt kriegführenden Staaten näher studieren.

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Beginnen wir mit den Mittelmächten.

Österreich-Ungarn provozierte den Krieg mit dem unruhigen, aber von ihm auch sehr gequälten serbischen Nachbar, welchen Krieg es als eine Staatsnotwendigkeit ausgab. Bei Berücksichtigung der Verhältnisse auf dem Balkan, namentlich der Bedrohung durch Rußland, kann man vielleicht dieser Auffassung zustimmen, natürlich nicht vom Standpunkte des Ethikers, der jeden, besonders Angriffskrieg, vermeiden will, sondern vom Standpunkte der heute noch immer geltenden brutalen Prinzipien der Politik. Österreich wurde in seinem Vorhaben von Deutschland intensiv ermuntert, beide Regierungen riskierten dabei mit vollem Bewußtsein den Ausbruch eines Weltkrieges und es wird aus dem sofort folgenden erklärlich werden, wieso Deutschlands Regierung sich zu kriegerischem Auftreten entschließen konnte, nachdem sie 44 Jahre stets auf Erhaltung des Friedens, und das mitunter unter erschwerenden Bedingungen, bedacht war.

Als nun Rußland zugunsten Serbiens intervenierte, war der Weltkrieg da und der Krieg Österreichs ein Verteidigungskrieg, also in der Tat dann eine Staatsnotwendigkeit. Die Tatsache steht jedoch fest, daß speziell Ungarn die Serben wirtschaftlich auf das Äußerste bedrängte und auch nationalistisch reizte, und daß Österreich-Ungarn unbedingt den schrecklichen Reigen des Weltkrieges eröffnete[1].

Deutschland, das sich als von den gegen sich gerichteten Koalitionsverträgen und -Übereinkommen Rußlands, Frankreichs und Englands bedroht ansah, suchte zwischen Rußland und Österreich zu vermitteln, Rußland aber ordnete während dieser deutschen Vermittlungstätigkeit — wie das besonders aus dem Prozeß Suchomlinows unzweideutig hervorging — eine allgemeine Mobilisierung an. Die deutsche Regierung war daher gezwungen, Klarheit in die Situation zu bringen, mobilisierte ebenfalls und erklärte, nachdem Rußland auf eine Anfrage gar keine Antwort erteilte, ihm den Krieg.

Auch an Frankreich erging eine Anfrage. Nun hatte es allerdings seine Truppen auf zehn Kilometer von der Grenze zurückgezogen, was auf die Absicht schließen ließ, einen Krieg nicht zu beginnen, aber auf jene deutsche Anfrage erfolgte die Antwort, Frankreich werde tun, was in seinem »Interesse« liegt, und damit war die Absicht klar genug ausgedrückt, Rußland zu

[1] Über das welthistorische Verbrechen Österreich-Ungarns, resp. des damaligen Ministers Berchtold, das er mit der Absendung des Ultimatums an Serbien beging, sehe man auch die Betrachtung im XVI. Kapitel »Politik und Moral.«

unterstützen und sich nicht neutral zu verhalten. Frankreich konnte wohl konsequenterweise nicht anders handeln, denn seit 1892 hatte es schon ein Übereinkommen mit Rußland getroffen, das sich gegen Deutschland richtete und demzufolge es der russischen Regierung mehrere ‹ich glaube: 25› Milliarden vorstreckte, damit sie sich bis 1916 oder 1917 genügend für den Krieg vorbereite, welche Tatsache wie ein Damoklesschwert über den Mittelmächten schwebte und deren aggressives Vorgehen gegen Serbien erklärt. Auf die oben erwähnte Antwort Frankreichs begann Deutschland seinen völkerrechtswidrigen Einmarsch in Belgien und trat damit in den Weltkrieg ein. Soweit das mir zugängliche Material lehrt, führte Deutschland — nach allem Obigen — einen Verteidigungskrieg — und das deutsche Volk, mit geringen Ausnahmen, hielt ihn in der Tat für einen solchen, obwohl hie und da deutlich genug auch von den Aussichten Deutschlands in Asien gesprochen wurde.

Man könnte vielleicht von einem Präventivkrieg sprechen, allein diese Bezeichnung paßt hier wohl nicht, denn da jenes französisch-russische Abkommen vom Jahre 1892 einen bestimmten Termin, nämlich 1916 oder 1917, für die Vollendung der strategischen Bahnen und die Vervollständigung des Waffenmaterials aufstellt, so kann sich das Übereinkommen doch nicht auf das Abwarten einer feindlichen Offensive beziehen, das heißt in diesen Jahren war der russisch-französische antideutsche Krieg mit Sicherheit zu erwarten und in einem solchen Falle kann man nicht von einem etwa mutwilligen Präventivkrieg, sondern nur von einem rechtzeitigen Vorbeugungs-, also von einem Verteidigungskrieg sprechen[1].

Und da — was gewiß niemand bestreiten kann — ferner Österreich nie Miene machte, Teile von Rußland und ebensowenig Deutschland beabsichtigte, Teile von Frankreich oder Rußland sich anzueignen, so steht es fest, daß die Mittelmächte sich nur in der Defensive, in einem Notwehrzustand befanden, bei ihnen spielte in diesem Weltkrieg keinerlei anderes »Problem«, kein anderes Bedürfnis eines staatlichen »Lebewesens« mit, als die Verteidigung ihres nackten Daseins, und zwar gegen die

[1] Das, was hier gesagt wurde, gilt nur vom Standpunkte des gewöhnlichen Politikers, aber durchaus nicht von jenem des absoluten Ethikers.

Konspirationen einer Anzahl von rührigen und rücksichtslosen Politikern der Ententemächte. Mit vollster Deutlichkeit würde man allerdings hievon überzeugt sein, wenn die Ententemächte ihre Geheimarchive öffnen würden, wie das die Deutschen getan haben. Daß sie das aber beharrlich unterlassen, beweist nur ihr schlechtes Gewissen, damit zugleich ihr Schuldbewußtsein.

Nun treten wir aber an die anderen Staaten heran. Es sind das: Montenegro, Serbien, Belgien, Bulgarien, Rumänien, Italien, Rußland, England, Frankreich, die Türkei und Japan.

Daß Montenegro nicht von irgend welcher Daseinsbedingung zum Krieg gedrängt, sondern nur als slawischer Staat von Rußland dazu aufgefordert wurde, wird wohl von niemandem bestritten werden.

Bei Serbien schien neben ethnopolitischen Ambitionen in der Tat eine wirtschaftliche Staatsnotwendigkeit vorhanden, Krieg zu führen.

Belgien wurde von Deutschland in keiner Weise weder in seiner Unabhängigkeit noch in seiner Integrität, noch durch eventuelle materielle Schädigung — die Deutschland gutzumachen versprach — bedroht. Aber es hatte das volle Recht, sich gegen die Verletzung seiner ‹allerdings sehr fadenscheinigen› Neutralität zu wehren. Eine Daseinsbedingung jedoch war hiezu nicht vorhanden.

Bulgarien führte bloß einen Verteidigungskrieg gegen das eroberungssüchtige Serbien und Rumänien sowie gegen das ihnen verbündete Rußland.

Rumänien wollte eingestandenermaßen ein Großrumänien schaffen, wohl auch zugleich die »unterdrückten« Rumänen in Siebenbürgen »befreien«.

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Italien wurde wohl kurze Zeit vor dem Kriege von der österreichischen ‹klerikalen› Kriegspartei bedroht, die maßgebende Stelle in Österreich-Ungarn jedoch wollte keinen Krieg mit Italien führen. Was seitens der Italiener von österreichischer »Barbarei« gesprochen wurde, bezog sich nur auf längstvergangene Zeiten, und man darf doch, wenn man nicht Kriege in Permanenz führen will, nicht Tatsachen der Vergangenheit zur Begründung von Feindseligkeiten heranziehen? Wirtschaftliche Ursachen waren keine vorhanden. Also blieb als Grund des Krieges gegen

Österreich bloß die Vereinigung mit den Stammverwandten in Österreich und zugleich damit eine Vergrößerung des italienischen Staates nördlich und östlich der Adria übrig. Daß nationale Erweiterungs- und Eroberungskriege als solche keine Staatsnotwendigkeit sind, versteht sich von selbst, ausgenommen, es treiben wirkliche Daseinsbedingungen zur Erweiterung des Staatsgebiets und da das hier nicht der Fall ist, bleibt nur die »Erlösung« der Stammverwandten in Österreich, die einen Krieg rechtfertigen sollte.

Es ist nun gar keine Frage, daß es für eine Nation eine sehr angenehme Sache ist, die zugehörigen Nationalen mit dem bestehenden, noch dazu ganz einheitlichen Staate zu vereinigen. Das ist jedoch, wie die Geschichte und die Landkarte zeigen, nur in seltenen Fällen möglich, und es ist nicht entfernt eine Daseinsbedingung, alle Konnationalen staatlich zu umschließen: man kann ganz gut glücklich fortexistieren, wenn das auch nicht gelingt und man sich mit der Pflege kultureller Gemeinschaft begnügt, selbst wenn sie nicht in so vollkommener Weise durchgeführt werden könnte, wie bei einer gleichzeitigen politischen Vereinigung. Der italienische Staat könnte blühen und gedeihen wie nur je ein Staat geblüht hat, und er würde darin gewiß durch den Umstand durchaus nicht gehindert, daß eine große Zahl von Italienern in Nordamerika lebt, die nur nach langer Abwesenheit von der Heimat oder gar nie mehr nach Italien zurückkehren, also in gar keiner politischen Verbindung mit ihren nationalen Genossen leben. Es ist also kein Grund vorhanden, die italienischen Staatsbürger Österreichs, respektive die betreffenden Provinzen, an Italien anzugliedern, wenn es nicht auf friedlichem Wege geht, sondern nur mit Hunderttausenden von Menschenleben erkauft werden müßte.

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An dieser Stelle muß ich halt machen! Denn ich weiß, daß nicht einer unter Zehntausenden mit dieser meiner Ansicht einverstanden sein wird, unglaublich philiströs und beschränkt wird es ihm erscheinen, daß man nationalistische Sehnsüchte nicht mit selbst ungezählten menschlichen Existenzen soll befriedigen dürfen! An ein Widerlegen der Politiker und politischen Schriftsteller mit solchen Ansichten ist aber nicht zu denken, hier ist

es nur eine Frage der Gesittung, die entscheiden kann, und so lange die Bestrebungen, unsere politischen, wie religiösen, wie sozialen Ideale und Sehnsüchte zu realisieren, nicht ihren wilden und brutalen Charakter ablegen, ist keine Hilfe zu erwarten, als die, auch nur unvollkommene Einrichtung, den Zwang zum Kriegsdienst abzuschaffen. Man sah ja auch in dem jetzigen Weltkrieg, welchen Aufhetzereien und welchen anderen, sogar sehr unschönen Mitteln es mühevoll gelungen war, das italienische Volk für den Krieg zu begeistern, und ich dürfte mich kaum irren, wenn ich behaupte, daß es trotz dieser Aufpeitschung der Gemüter nicht gelungen wäre, genügend viele Soldaten auf die Beine zu bringen, wenn es keine Wehrpflicht gegeben hätte.

Selbstverständlich gilt das eben Gesagte auch für alle anderen Fälle und speziell für jene dieses Weltkrieges, in denen nationalistische Bestrebungen als Kriegsanlässe auftraten. Niemals wird ein ethischer Mensch zugeben, daß Erfüllung ethnopolitischer Wünsche eine Daseinsbedingung der Staaten und Menschenopfer wert sei. Das gilt also ebenso für den italienischen Krieg gegen Österreich wie für die nationalistischen Kriegsargumente der Russen, auf die wir sofort zu sprechen kommen.

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Rußlands aggressiver Krieg gegen Deutschland und Österreich wird durch eine ganze Reihe von Argumenten zu rechtfertigen gesucht, aber unter ihnen allen war keine Staatsnotwendigkeit, keine Daseinsbedingung zu finden. Was den russischen Kriegszielen seit jeher und bis heute zugrunde lag, war nackte, durch allerlei Vorwände verschleierte Eroberungssucht. Hat doch, wie der russische General Kuropatkin mitteilt, Rußland binnen 200 Jahren nicht weniger als 90 Eroberungskriege geführt. Schon seit Peter dem Großen und besonders unter Katharina II. verlangte Rußland ‹d. h. sie wie die politisch maßgebenden Kreise› den Besitz von Konstantinopel, damals wurde noch gar nicht von einer Vereinigung aller Slawen und auch nicht von Verbreitung der Rechtgläubigkeit gesprochen, sondern, wie es damals politische Manier war, kurz und gut Krieg ohne jede weitere Verbrämung beschlossen. Erst in neuester Zeit kam die panslawistische Bewegung. Wenn hiebei nur nationalistische oder Rasseneinigungsziele vorhanden waren,

die an sich gewiß nicht zu tadeln sind, falls sie nicht zu Kriegen führen, so sind das doch — wie oben bezüglich Italiens ausgeführt wurde — keine Daseinsbedingungen, besteht ja Rußland schon so lange, ohne alle Slawen unter seiner Herrschaft vereinigt zu haben. Erst seit ungefähr vierzig Jahren ist durch Danilewsky und Dostojewski der Gedanke des Großrussentums und durch diesen besonders die Idee der Ausbreitung der Rechtgläubigkeit in die politischen Bestrebungen hineingeworfen worden, ein Gedanke, gewiß auch nicht sehr geeignet, eine staatliche Notwendigkeit zu Kriegsunternehmungen zu begründen.

In allerjüngster Zeit wird aber, der modernen Auffassung gemäß, hauptsächlich ein wirtschaftliches Argument benützt, um die Notwendigkeit eines Krieges — gegen die Türkei, Deutschland und Österreich — zu beweisen, ein Argument, an das weder Peter, noch Katharina, noch Danilewsky, noch Dostojewski gedacht haben, obwohl diese darin alle einig waren, Rußland müsse größer werden als es stets war. In präzisester Weise machte ein russischer Gelehrter, Mitrofanoff, den heutigen Gedankengang der offiziellen russischen Kreise bekannt. Vor allem, heißt es bei ihm, sei »Rußlands Drang nach dem Süden eine historische, politische und wirtschaftliche Notwendigkeit« und daß »allein der Besitz der Dardanellen dieses Bedürfnis befriedigen kann«.

Nun gibt es aber überhaupt keine »historische« Notwendigkeit, es existiert niemand, der eine solche beweisen kann, wenn aggressive Politiker und Nationalisten oder sogenannte Geschichtsphilosophen solche Notwendigkeiten aufzeigen wollen, so ist die angewendete Argumentation immer nichts anderes, als bewußte oder unbewußte Gaukelei. Aber eine historische Tatsache ist es allerdings, und nicht eine solche Notwendigkeit — daß seit Peter dem Großen ein »Drang nach dem Süden« vorhanden war.

Von einer politischen Notwendigkeit ist, außer in den Köpfen der großrussischen Fanatiker, keine Spur zu finden. Im Gegenteil ist es die Ansicht unzähliger nichtrussischer Politiker, daß Rußland schon seit langem genug groß und reich an natürlichen Gütern und an verschiedenen Völkerschaften sei. Die »politische Notwendigkeit« ist eben nur eine Phrase, wie sie

seit jeher von ehrgeizigen Diplomaten oder politischen Schriftstellern so gerne gebraucht wird.

Nicht wertvoller ist aber die versuchte wirtschaftliche Rechtfertigung der Ambition auf Konstantinopel und die Meerengen durch folgendes Argument ‹Mitrofanoffs in den »Preußischen Jahrbüchern«›:

»Das ganze Budget Rußlands basiert auf dem Export nach dem Ausland, wird die Handelsbilanz passiv, so ist die russische Schatzkammer bankrott, indem sie nicht in der Lage sein wird, ihre enorme auswärtige Schuld zu verzinsen. Und zwei Drittel von diesem Export gehen durch die südlichen Häfen und somit durch die beiden türkischen Sunde. Ist dieser Ausgang versperrt, so stockt der ganze russische Handel, und die wirtschaftlichen Folgen werden unberechenbar. Nur der Besitz des Bosporus und der Dardanellen kann diesem unerträglichen Zustand ein Ende machen, da eine Großmacht wie Rußland, ihre Existenz nicht auf Zufälligkeiten und fremder Willkür aufbauen kann.«

Nun ist es ohne Zweifel angenehmer, den Weg für seine Ausfuhr im eigenen als in fremdem Besitz zu wissen; allein, wenn jeder Staat derartige Wünsche hätte und sie unbedingt erfüllt sehen wollte, käme man aus den kriegerischen Unternehmungen und also auch aus der Vernichtung unzähliger Menschenleben gar nicht heraus — was allerdings den echten Politikern nicht viel Skrupel machen würde. Andererseits ist es der Türkei niemals eingefallen, russischen Handelsschiffen die Durchfahrt durch die Meerengen zu verbieten, und sie wird es auch kaum jemals tun, ausgenommen, Rußland befinde sich im Kriege mit dem Sultan. Also halte es Frieden, so kann es sein Getreide ausführen und — seine Zinsenschuld bezahlen. Aber selbst wenn die Türkei jemals — aus »Willkür« etwa — die Dardanellen für Rußland sperren würde, so ist noch immer die Ausfuhr seiner Güter auf anderen Wegen möglich, ausgenommen, es führe nach mehreren Seiten zugleich Krieg, also wiederum: halte es doch Frieden! Und endlich ist es doch sicher, daß eine Absperrung der Meerengen nicht ewig dauern würde, ein oder wenige Jahre kann es Rußland und können auch die ausländischen Gläubiger den Zinsenverlust während dieser kurzen Zeit aushalten.

Wenn aber alle Stricke reißen, so wäre es noch immer ungleich zweckmäßiger, überhaupt gar keine Zinsen an das Ausland zu bezahlen als hunderttausende Menschen in den Tod zu schicken. Es würde schon wieder die Zeit kommen, dessen kann man sicher sein, wo das Ausland in Anbetracht des hohen Zinsenerträgnisses dem russischen Staate von neuem gerne Anlehen gewährt. Allerdings wäre es zweckmäßig, aus Vorsicht für alle Fälle, nicht gar zu viele Anlehen aufzunehmen, z. B. nicht so ungemein großes Kriegsmaterial aufzuhäufen, wie das in unserer Zeit der Fall war. Also folgt wiederum: halte demnach Rußland Frieden!

Wo fand sich nun in allem Angeführten eine Daseinsbedingung für Rußland, in den Weltkrieg einzutreten? . . . Wir sahen stets nur den Entschluß der maßgebenden Kreise, ihren politischen oder religiösen oder nationalen Lüsteleien und in etztem Grunde ihrem Expansionstrieb menschliche Existenzen ins Grenzenlose zum Opfer zu bringen. Und wie schön kam ihnen da die allgemeine Wehrpflicht zu statten! Arme, friedliebende russische Bauern[1]!

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Von England gilt bezüglich seines Zieles, das Land zwischen Ägyten und Indien unter seine Herrschaft zu bringen, um Indien besser zu sichern, genau dasselbe wie von Rußland betreffs der Dardanellen. Es wäre gewiß angenehmer, den Weg Arabien-Persien zu beherrschen, als ihn in fremden Händen zu wissen, es ist aber durchaus keine Staatsnotwendigkeit, deswegen Krieg zu führen. Noch viel weniger war es eine Daseinsbedingung, in den Weltkrieg einzutreten, um Deutschlands Handelskonkurrenz zu besiegen. Denn der Schatzminister ‹Lloyd-George› hatte ja kurz vor dem jetzigen Kriege im Unterhause mitgeteilt, daß es — entgegen den Befürchtungen der Schutzzöllner — England kommerziell nie so gut gegangen sei, wie in den letzten Jahren. Der jetzige Kaufmannskrieg war daher ein wahrer Eroberungskrieg und keine Staatsnotwendigkeit.

[1] Zufolge der Enthüllungen der Sowjet-Regierung der jünsten Tage aus dem russischen auswärtigen Ministerium fand am 6. März 1914 ein Ministerrat statt, in dem beschlossen wurde, als Rußlands historische Mission seine Herrschaft über die Meerengen auszudehnen und demgemäß die diplomatischen Vorbereitungen zu beginnen.

Suchen wir für Frankreich irgend eine Daseinsbedingung zu entdecken, der zuliebe es in den Weltkrieg eintrat, so finden wir gar nichts dergleichen, wohl aber eine sehnsüchtige Stimmung nach neuer Gloire, nach Befriedigung der Rache an Deutschland wegen der Niederlage im Jahre 1870 und wegen des Verlustes von Elsaß-Lothringen. Niemand, weder unter den Franzosen noch unter Nichtfranzosen, wird behaupten wollen, Frankreich könne ohne Elsaß-Lothringen, das noch dazu nur ein Siebentel französische und sechs Siebentel deutsche Bevölkerung hat, nicht existieren! Sind diese beiden Provinzen etwa eine Staatsnotwendigkeit für das französische »Lebewesen«, ein dringendes Bedürfnis für Frankreichs »überindividuelle Persönlichkeit[1]?«

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Japan mengte sich in einem schwächeren Grade, hauptsächlich durch Waffen- und Munitionslieferungen ‹so wie das neutrale Amerika› ebenfalls in den Weltkrieg ein, aber, wie allbekannt, nur aus Expansionsdrang, nicht aus staatlicher Notwendigkeit. Während es bis in die neueste Zeit sich von aller Welt beharrlich abschloß, kultiviert es jetzt das entgegengesetzte Extrem. Wenn die Bevölkerungszunahme Japans die Eroberung Koreas rechtfertigen konnte, so gilt eine solche Rechtfertigung nicht mehr, seitdem der Expansionsdrang sich nicht nur nach der Mandschurei, sondern jetzt auch nach China erstreckt. Von einer Daseinsbedingung, die zum Kriege trieb, kann gar keine Rede sein.

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Das Kriegsziel der Vereinigten Staaten, respektive ihres Präsidenten Wilson, war die Vernichtung des preußischen Militarismus und der Sieg »der Freiheit und des Rechtes«. Wenn nun dem so war, so wäre der Beweggrund des Eintrittes in den

[1] Anfang des Jahres 1921 wurde durch die Enthüllungen des seinerzeitigen französischen Gesandten Paléologue in Petersburg bekannt, daß im Jahre 1914 Frankreich, d. i. der Präsident der Republik Poincaré, nicht nur nichts zur Versöhnung zwischen Rußland und Österreich beitrug, sondern geradezu umgekehrt auf ihren Zwiespalt hinarbeitete. Man wußte das schon ziemlich sicher im Jahre 1914, man kann sagen: Mehr als Poincaré hat niemand zur Entfesselung des Weltkrieges beigetragen.

Weltkrieg in der Tat ein selbstloser und idealer gewesen, aber nicht: eine Staatsnotwendigkeit, da ja Amerika niemals etwas vom preußischen oder deutschen Militarismus zu fürchten hatte.

Das Resultat unserer Analyse der Motive dieses Weltkrieges ist also dieses: Serbien war ein Gegner Österreich-Ungarns aus wirtschaftlichen Gründen, deren Behebung als eine Staatsnotwendigkeit galt. Seine ethnopolitischen Ambitionen, Bosnien, Herzegowina und Südungarn mit dem serbischen Königreich zu vereinigen, kann ich nicht als Rechtfertigung eines Krieges gelten lassen, obwohl ich heute mit einer solchen Ansicht wohl ziemlich allein stehe. Es handelt sich ja hiebei nicht um Befreiung von unausstehlicher Bedrückung wie seinerzeit, als Garibaldi von den Neapolitanern gerufen wurde, um sie von dem bourbonischen Despotismus zu befreien. Aber trotz der eben bezeichneten Staatsnotwendigkeit wäre Serbien nicht zum Kriege gekommen, da es ja auf die österreichisch-ungarischen Bedingungen nach der Ermordung des österreichisch-ungarischen Thronfolgers eingehen wollte. Aber durch das Eingreifen Rußlands entstand nicht nur ein österreichisch-ungarisch-serbischer lokalisierter Krieg, sondern mit einem Sprunge zugleich auch schon der Weltkrieg.

Bulgarien trat in diesen Krieg in der Tat aus Staatsnotwendigkeit ein, denn wäre es nicht mit den Mittelmächten gegangen, so hätte es sich der Entente anschließen müssen.

Damit sind wir aber auch fertig. Kein Staat sonst begann den Krieg aus Staatsnotwendigkeit.

Auch in diesem Kriege, wie in den meisten, wenn auch nicht allen Kriegen, waren die Luxusziele als wirkliche Staatsnotwendigkeiten angesehen oder ausgegeben worden.

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Überhaupt wird man in den seltensten Fällen wirklich dringendste Staatsbedürfnisse als zwingende Gründe von Kriegsunternehmungen entdecken können. Lassen wir uns daher nicht von den übertriebenen Darstellungen imponieren, denen zufolge Kriege an den »Leiden des Staates« zu messen wären, und wonach die Staaten als »überindividuelle Persönlichkeiten« und »Lebewesen« so mächtige Daseinstriebe besitzen, die sich in Kriegen entladen, und dergleichen mehr.

Es sind zumeist Personen, die irgend ein mehr oder weniger einleuchtendes Ziel als etwas Notwendiges hinstellen, das es aber nicht ist, und es könnten ganz gut Jahrhunderte vergehen, bevor diese Ziele dringend werden, oder sie würden überhaupt nie so dringend, um Kriege zu rechtfertigen, wenn nicht einzelne Individuen sich solcher Ziele bemächtigen und die Menschheit ins Unheil stürzen würden.

Und wenn wir das wissen, so werden wir umsomehr Mut und Vertrauen haben, uns gegen Kriegsunternehmungen zu wehren. Es wird uns nicht mehr einfallen, Kriege wie Schicksalsfügungen, wie Naturnotwendigkeiten resigniert über uns ergehen zu lassen, sondern wir werden mit voller Zuversicht uns gegen sie zu schützen suchen.

Es gibt gewiß nicht viele, die aus freien Stücken ihr Leben wagen würden für einen warmen Hafen, für die »freie Ausfahrt ins Mittelländische Meer« und für derlei Kriegsziele, die alle ich nicht für wirkliche Staatsnotwendigkeit halten kann.

Dennoch sehen wir alle Tage, daß selbst sehr intelligente und sonst ethisch einwandfreie Personen in Schriften und Reden selbst solche furchtbare Ereignisse wie diesen Weltkrieg ganz gerechtfertigt finden, weil es sich um so »große« Dinge handelt, und die ungebildeten Menschen sprechen es ihnen nach, wobei ja doch alle das namenlose Unheil dieses Krieges genügend deutlich empfinden.

»Ein warmer Hafen«, »freie Ausfahrt in das Mittelländische Meer«, »Zusammenschweißung von Südafrika, Ägypten und Indien«, »eine Eisenbahnverbindung zwischen Kapstadt und Kairo« — das imponiert in solchem Maße, daß alles dagegen klein und unbedeutend erscheint. Es ist ein furchtbares Verhängnis, das größte Hemmnis für den Frieden der Völker, daß solche Dinge, besonders große räumliche Dimensionen in den politischen Zielen, auch selbst ehrliche führende Politiker und die politischen Schriftsteller ⟨und Kannegießer⟩ so betäuben, daß menschliche Existenzen in ihren Augen so viel wie nichts dagegen sind. Eine ganze Welt trennt leider in diesem Betracht die Denkweise fast aller Menschen von jener, die hier von mir vertreten wird, und alle so unheilvollen Erfahrungen des öffentlichen wie des privaten Lebens, die uns Kriege doch in so niederschmetternder Weise aufdrängen, vermögen jene barbarische Denkart nicht zu ver-

bessern! Und doch, was sind ganze Länder, was sind ganze Erdteile, was unser ganzer Planet gegen ein einziges Menschenleben?

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Das was an dem Beispiel des jetzigen Weltkrieges gezeigt wurde, trifft in unzähligen Kriegsfällen der Weltgeschichte zu, fast immer waren sie durch Personen ⟨oder Gruppen von Personen⟩ mit Absicht und ohne Staatsnotwendigkeit hervorgerufen. So daß es zur höchsten Belehrung dienen würde — ich wiederhole es — statt einer Geschichte der Kriege eine Analyse ihrer Entstehung zu verfassen, für jeden Historiker eine nicht übermäßig schwierige und sehr dankbare und interessante Aufgabe.

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Zu weiterer Erprobung dieser meiner ganzen Auffassung will ich noch ein anderes Beispiel anführen, das die Kriege Englands seit mehr als zwei Jahrhunderten betrifft.

Gelegentlich einer Untersuchung der Entstehung der hohen englischen Staatsschuld äußert sich ein »zahmes, sich parteilos haltendes Werk«, »Whitacker's Almanach« u. a. folgendermaßen[1]:

»Unter Wilhelm III. von Oranien setzten die Kriege Englands mit Frankreich zuerst wegen des pfälzischen, dann wegen der spanischen Erbfolge ein und hier war es der König selbst, der den Krieg herbeiführte, da sein Stammland, die Niederlande, stark an der Regelung interessiert war ... Auf den Thron stieg Anna, die Tochter des 1688 verjagten Jakob II.... der spanische Erbfolgekrieg ward jetzt erst mit voller Wucht geführt ... Unter Georg I. ward ein Krieg mit Spanien geführt, zu dessen Ausbruch festländische Interessen Georgs bestimmend beitrugen ... Neben dynastischen Interessen und Launen spielen nun Interessen der handeltreibenden und industriellen Bourgeoisie und der nach Gold und ertragreichen Staatsposten lüsternen Sprößlinge der grundbesitzenden Aristokratie eine immer größere Rolle bei der Anzettelung von

[1] Aus einem Aufsatz über Englands Kriege und Englands Staatsschuld von Eduard Bernstein in der Wiener »Arbeiter-Zeitung« vom 22. Juli 1916, von welchem Aufsatz hier nur einige wenige Stellen mitgeteilt werden.

Kriegen ... Ein starker Zuwachs der Staatsschuld ist dem Kriege mit Spanien um das »Recht auf Untersuchung« nämlich von fremden Handelsschiffen nach etwaiger Schmugglerware zu danken, der direkt dem vom Schutzzoll gezüchteten Handelsneid zu verdanken war ... 1776 beginnt der Unabhängigkeitskrieg der Amerikaner. Seine wirtschaftliche Ursache war folgende: Die Grundbesitzer setzten 1767 die Bodenabgaben von vier Schilling auf drei Schilling für das Pfund Sterling Neuerwert herab, lehnten aber die Abschätzung des Neuenwertes nach dem Jahresertrag ab. Das Volk war mit Zöllen und Akzisen überlastet und der Schatzkanzler wegen neuer Steuerquellen zum Ersatz für die Herabsetzung der Bodenabgabe in Verlegenheit. In seiner Bedrängnis sandte er seinen Steuereinheber nach Amerika und die Folge war der amerikanische Unabhängigkeitskrieg. Dieser Krieg war feig, unnötig und, freuen wir uns, es sagen zu können, unnütz, denn 1783 wurde die Unabhängigkeit der Vereinigten Staaten anerkannt ... Der Krieg mit dem revolutionären Frankreich, der sogenannte erste Jakobinerkrieg, ward, als die Jakobiner gestürzt waren, fortgesetzt gegen das Direktorium, das Konsulat und das Kaiserreich Frankreich ... Dieser furchtbare Krieg ... war gänzlich unnötig und entsprach unserer Einmischung in Dinge, welche das französische Volk ganz gut selbst hätte besorgen können. Unsere gesetzgebenden Grundherren wußten jedoch sehr gut, daß, wenn sie nicht die Freiheit in Frankreich erdrückten, sie nicht hoffen konnten, ihre ungerechten Privilegien in Britannien aufrecht zu erhalten. Der Ruf nach Reform war bereits erhoben worden, und daher stürzten sich unsere Gesetzgeber in einen ungerechten Krieg mit dem französischen Volk ... Sie liebten ihr Geburtsland im Grunde nur wegen der Bodenrente, die sie von ihm zogen und als der Krieg zu Ende kam, hungerten sie das Volk durch Kornzölle aus ... Neue Kriege ... zur Niederwerfung von Aufständischen in Kanada ... erster Krieg gegen China ... in Südafrika gegen die rebellischen Kaffernstämme ... Krimkrieg: Dieser Krieg, der völlig unnütz war ... es darf nicht vergessen werden, daß das Volk ob des Krimkrieges ebenso begeistert war, wie es über den gegenwärtigen ⟨1900—1901⟩ in Südafrika geführten Krieg ist ... jetzt aber wird uns von Lord Salisbury hinsichtlich des Krimkrieges erzählt,

daß wir »unser Geld auf das falsche Pferd« gesetzt haben . . . Kam der Burenkrieg . . . usw.«

So sahen die »Staatsnotwendigkeiten«, Kriege zu führen, aus und nun bedenke man, daß dabei Millionen Engländer und Nichtengländer getötet oder verkrüppelt oder krank wurden!

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Es ergibt sich daher umsomehr für alle Menschenfreunde die Aufgabe, alles mögliche zu versuchen, um Kriege seltener zu machen und — was nie vergessen werden darf — zugleich auf Vervollkommnung des Völkerrechtes und Sicherung seiner Beobachtung hinzuarbeiten.

Hoffen wir gerne, daß die Bemühungen der Pazifisten der verschiedenen Richtungen erfolgreich sein werden, es ist das sehr zu wünschen! Was jedoch der Verfasser dieses Werkes zu der wenigstens teilweisen Lösung der großen Aufgabe beitragen will, ist folgendes:

Zuvörderst möchte ich anregen, in ethischer Beziehung dahin zu wirken, daß man

1. von Jugend auf die größte Scheu hat, die physische Integrität irgend eines — uns nicht gefährlichen — Individuums zu verletzen. Mit der Mahnung der zehn Gebote: »Du sollst nicht töten« ist es lange nicht getan, denn dieser trockene Satz reicht für die mannigfaltigen Verhältnisse des Lebens nicht aus und bringt uns mitunter in stärksten Widerspruch zu elementaren Notwendigkeiten. Ich weise behufs des Verständnisses und der praktischen Anwendung dieser obersten aller ethischen Forderungen auf ihre Entwicklung hin, die ich in dem Werke »Das Individuum und die Bewertung menschlicher Existenzen« gegeben habe.

2. Dahin zu wirken, daß die Menschen sich gewöhnen, die Tausende von Unterschieden in der Kultur, von den geringfügigsten Tatsachen angefangen bis zu den bedeutsamsten, niemals als Anlaß zu Mißachtung oder gar Verfolgung der anderen zu betrachten — ausgenommen die uns schädlichen.

3. Ist es von wahrhaft fundamentaler Wichtigkeit, aus den Gemütern die Neigung zur Herrschsucht, den Trieb nach Macht und Glanz, die Bewunderung geglückter aggressiver Unternehmungen, namentlich der siegreichen Offensivkriege, zu beseitigen.

Wenn man die in diesem Kapitel aufgezählten Anlässe und Rechtfertigungen der Kriege genauer ansieht, so findet man, daß in den meisten derselben Herrschsucht und in Raufsucht ausgearteter Übermut die Hauptrolle spielen. Die Erziehung und der Unterricht der Jugend, speziell der Geschichtsunterricht, müssen daher wesentlich anders orientiert werden als bisher und bei dieser Reform ist es nicht notwendig, das Gefühl des Patriotismus abzuschwächen. Man möge fortfahren, die Sympathie für sein Vaterland und die Bereitwilligkeit, es gegen Angriffe zu verteidigen, zu stärken. Aber die Heldenverehrung in dem heutigen Sinne muß aufhören.

So oft aber auch das, was hier gefordert wird, schon gesagt wurde, so ist doch selbst von einem Anfang dieser Erhöhung unserer Kultur nichts zu bemerken. Mögen die Pazifisten und alle anderen gesitteten Menschen dieser Sache ihre erhöhte Aufmerksamkeit zuwenden!

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Man darf nicht glauben, daß solche Änderungen in den menschlichen Ansichten niemals erwartet werden dürfen. Es mag wohl lange dauern, bis eine richtige Erziehung der Jugend und Belehrung der Erwachsenen es zu einer solchen Änderung bringen, möglich ist sie jedenfalls, denn die heutigen unvernünftigen und unethischen Auffassungen und Handlungen, betreffend die Kulturunterschiede und Lebensgewohnheiten, sind durchaus keine notwendigen Bestandteile der menschlichen Natur, sie sind nur die Folge bornierter Erziehungs- und Unterrichtsmethoden. Noch mehr: im Beginne und vor der französischen Revolution und bei so manchen höher veranlagten Individuen früherer Zeiten war unsere häßliche Intoleranz überhaupt gar nicht vorhanden. Wenigstens für normale Fälle kann man auf eine gewisse Verbesserung unserer Sitten ganz wohl rechnen, es hängt nur von der Beharrlichkeit der ethischen Bemühungen der Erzieher, der Lehrer und der Schriftsteller ab.

Man darf eben nicht zu sehr an eine Unveränderlichkeit der Lebensanschauungen glauben, indem man, unberechtigterweise, viele, in gewissen Zeitaltern vorhandene menschliche Eigenschaften als unbedingt dem natürlichen Charakter der

Menschen zugehörig ansieht. Belehrend ist hier eine Stelle[1] in einem Werk aus dem 16. Jahrhunderte, in welchem eine Erörterung zwischen einem katholischen Staatsmann und einem Hugenotten über das Massakre der Bartholomäusnacht enthalten ist. Der Hugenotte fand es sehr bedauerlich, daß 700.000 Menschen getötet wurden. Der Katholik gab ihm recht, fügte aber hinzu: »Sie können von uns Katholiken nicht verlangen, daß wir Selbstmord verüben. Die Macht der Hugenotten war im Steigen, sobald der Staat euch gehört hätte, würdet ihr uns getötet haben, und um dem vorzubeugen, töteten wir euch«.

Der Hugenotte frug weiter, ob es dieses Massakres überhaupt bedurft hätte, worauf der Katholik erwiderte: »So lang die menschliche Natur so ist, werden die Menschen für die ihnen wichtigste Sache kämpfen: für ihre Religion. Dieser Instinkt geht bis zum Ursprung der Dinge zurück. Die menschliche Natur müßte bis zur Unkenntlichkeit verwandelt werden, um eine Veränderung zu bewirken.«

Aber heute, und schon seit langem ist diese Veränderung vorhanden, und — bis auf weiteres — kämpfen die Menschen durchaus nicht mehr für ihre Religion als für ihre »wichtigste Sache«, höchstens zum Schein, in Wirklichkeit jedoch für politische Ziele. Das meiste von dem, was man zur menschlichen Natur rechnet, ist im Grunde nur menschliche Kultur, also veränderlich.

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Und außer dieser ethischen Aufgabe befürworte ich noch eine politische, die relativ bald eine nicht zu verachtende Hilfe bringt, nämlich den Vorschlag, die Wehrpflicht durch die Freiwilligkeit zu ersetzen, den ich in diesem Werke bereits in der Einleitung in der »Vorläufigen Orientierung« angedeutet habe, nun in der nachfolgenden detaillierten Darstellung näher entwickeln und begründen will und der den wesentlichen Zweck dieser Schrift bildet.

Dieses mein Programm ist ganz unabhängig von irgend welchen Einrichtungen pazifistischer Natur, beide stören einander nicht, sondern neben den eventuellen pazifistischen Institutionen gewinnt die Bevölkerung bei Durchführung meines Vorschlages

[1] Die ich einem Aufsatz von Norman Angell entnehme.

eine Art Rückendeckung, falls jene doch einmal versagen sollten. Und es wird doch gewiß selbst der zuversichtlichste Pazifist oder Reformer kaum glauben, daß es, trotz aller seiner Reformen, niemals mehr Kriege geben und daß ein solcher Zustand, wenn je, auch in naher Zeit eintreten werde. Da tritt also die Institution der Freiwilligkeit in die Bresche und schützt jeden, der keinen Krieg wahrhaft mitmachen will, mit voller Sicherheit.

Es sei aber ausdrücklich hervorgehoben, daß alles, was die Behandlung von Verwundeten und Gefangenen sowie der Zivilbevölkerung im Kriege und allgemein das Eingreifen in privatrechtliche Verhältnisse betrifft, durch mein Programm nicht beeinflußt wird, hier kann nur eine humane Fortbildung des Völkerrechts und der Gesittung der Politiker wie der Gesittung der Menschen überhaupt helfen. Mögen sich hiezu die Berufenen alle Mühe geben.

VI.

Über pazifistische Vorschläge und die Aussichten auf Verbesserung des Völkerrechtes.

Das in dieser Schrift befürwortete System der Freiwilligkeit an Stelle der Wehrpflicht ist — das sieht man schon aus dem Kapitel »Zur vorläufigen Orientierung« — offenbar dem Wesen nach kein pazifistischer Vorschlag, wenn auch höchstwahrscheinlich die Folge seiner Einführung eine Verminderung der Kriegsfälle, also eine gesichertere Erhaltung des Friedenszustandes sein wird.

Denn pazifistische Vorschläge streben neue oder Verbesserungen schon bestehender Einrichtungen an, durch die entweder Anlässe zu kriegerischen Verwicklungen vermieden oder beginnende Streitfälle auf friedlichem Wege ausgetragen werden, während mein Programm erst dann zur Geltung kommt, wenn ein Krieg schon in Sicht ist und faktisch von irgend einer Seite beabsichtigt wird, weil — wirklich oder nur angeblich — alle Hilfsmittel, den Frieden zu erhalten, versagt haben.

Nun ist die Zahl der pazifistischen Vorschläge und Agitationen allerlei Art bereits eine sehr große und es wäre schon deswegen nicht möglich, sie hier anzuführen und eingehend zu besprechen. Es wäre auch nicht zweckmäßig, meine Propagandaschrift, die einen rein positiven Beitrag zur Kriegs- und Friedensfrage bieten will, durch Behandlung anderer solcher Beiträge zu durchbrechen und zu erweitern. Und dies umsomehr, als mein Vorschlag durchaus nicht seine Berechtigung auf Kosten anderer nachweisen will, denn er ist mit jedem anderen, also auch mit jedem pazifistischen Programm vollkommen vereinbar.

Wer sich über den Stand des Pazifismus unterrichten will, kann das daher nicht aus dieser meiner Schrift, sondern aus der pazifistischen Literatur, vielleicht am besten aus den Arbeiten des

in diesem Gebiet überaus verdienstvollen Schriftstellers A. H. Fried erreichen, besonders aus seinem »Handbuch der Friedensbewegung« und den zahlreichen Publikationen geringeren Umfangs oder aus dem fünften Bande des Blochschen Werkes »Der Krieg«.

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Obwohl eine eingehendere, namentlich kritische Behandlung des sogenannten Pazifismus in dieser Schrift überflüssig wäre, soll doch in wenigen Sätzen dem interessierten Leser dasjenige mitgeteilt werden, was jetzt von Pazifisten hauptsächlich angestrebt wird. Hier ist namentlich das »Schweizerische Komitee zum Studium der Grundlagen eines dauerhaften Friedensvertrages« zu nennen, sowie der Bund »Neues Vaterland« in Berlin, nicht minder der kürzlich verstorbene Pazifist A. H. Fried mit seinem Vorschlag eines »europäischen Zweckverbandes«.

Die hauptsächlichsten Vorschläge der Pazifisten sind[1]:

Ein engerer Zusammenschluß der zivilisierten Staaten zu einer internationalen Rechtsorganisation, die ihre Beziehungen auf Grundlagen der Gleichberechtigung und Selbständigkeit aller ihrer Glieder unter möglichster Ausschaltung der Gewaltanwendung regelt. Als Vorbedingung hiezu fordert das Schweizer Komitee die gegenseitige Garantierung des Besitzstandes . . . Ein ständiger internationaler Untersuchungs- und Vermittlungsrat wäre zu schaffen . . . eine Weigerung, sich dem gemeinsamen Willen der Vertragsmächte zu fügen, sei durch gemeinsame diplomatische, verkehrstechnische, wirtschaftliche oder selbst militärische Aktion zu brechen.

Die ganze auswärtige Politik, der Abschluß von Verträgen, die ganze Diplomatie sollen der Prüfung der Volksvertretung unterworfen werden. Abmachungen ohne diese Sanktion sollen nichtig sein. Das internationale Friedensbureau in Bern und die Union of democratic control verlangen, daß überhaupt alle Offensiv- und Defensivbündnisse völkerrechtlich verboten werden.

Jeder Nation soll ein unbeschränktes Selbstbestimmungsrecht zustehen.

Eine internationale Kontrolle soll das Maß der Rüstungen

[1] Ich benütze hiebei eine Zusammenstellung im »Freien Wort«.

feststellen, zum mindesten aber sei die ganze Waffenindustrie der Privatindustrie zu entziehen und ebenso wie die Waffenausfuhr unter staatliche Leitung zu nehmen.

Es wird ein Wiederaufbau des Völkerrechtes verlangt, namentlich die Reglementierung des Seekrieges mit der Abschaffung des Seebeuterechts, ferner des Luftkrieges, internationaler Schutz gegen Lüge und Verleumdung.

Möglichste Anwendung des Grundsatzes der »offenen Tür« und des Freihandels, eventuell internationale Leitung des Wettbewerbes auf dem Gebiet der Güterproduktion und -verteilung[1].

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Daß die Forderungen der Sozialdemokraten: »Allgemeine Volksbewaffnung«, »Entscheidung des Volkes über Krieg und Frieden« für die Lösung des Friedensproblems von sehr geringem Wert seien, sieht man gewiß nach allem von mir hier Gesagten vollkommen ein. Die Sozialisten machen den Fehler, daß sie glauben, wenn eine — noch so große — Majorität eine Entscheidung für einen Krieg, also über Tod und Leben der Soldaten trifft, daß diese nichts weiter dreinzureden, sondern einfach zu folgen haben. Aber nicht genug oft kann es gesagt werden: Wenn das ganze Volk den Krieg verlangt und auch nur ein einziger Soldat mit ihm nicht übereinstimmt und sich also den Gefahren des Schlachtfelds nicht aussetzen will, so wäre es die größte Barbarei — geradeso wie eine Ketzerverbrennung — ihn dazu zu zwingen.

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Damit nicht von den Kriegsfreunden gegen pazifistische Bestrebungen geltend gemacht werde, sie seien etwas ganz Neues und Unerhörtes, so will ich an eine alte Einrichtung der Römer erinnern, die von Numa Pompilius eingesetzt worden war. Nämlich an die Institution der Feciales, das waren Priester, die die Aufgabe hatten, Hüter des Friedens zu sein und über die Ursachen zu erkennen und zu entscheiden, welche mit Recht

[1] Ich möchte nicht unterlassen, hier auch auf die Abhandlung »Friedensmöglichkeiten« von Prof. Dr. Theodor Beer in Nr. 12 des Jahres 1915 der Züricher Monatsschrift »Das neue Europa«, herausgegeben von Dr. Paul Cohn, aufmerksam zu machen.

einen Krieg erfordern. Ja, in der Zeit des Camillus und des Krieges gegen die Gallier unter Brennus begingen die Fabier eine völkerrechtswidrige Handlung gegen einen gallischen Krieger und sowohl der Senat als die Feciales hielten das für ein Verbrechen und letztere rieten, daß der Senat das begangene Unrecht den Urheber büßen lassen und dadurch die andern davon befreien sollte. (Plutarch im Leben des Camillus[1].)

Eine Korporation — natürlich nicht von Priestern, sondern — von bejahrten, politisch und militärisch erfahrenen Männern, die vor jeder beabsichtigten Kriegsunternehmung über ihre Ausführung zu beraten hätten, wäre auch heute eine nützliche Institution.

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Es versteht sich von selbst, daß man auf eine allgemeine Abrüstung hinarbeiten soll. Zu dem vielen, das in dieser Beziehung pro und contra bereits bis zur Erschöpfung des Gegenstandes gesagt wurde, wüßte ich nichts von Wert hinzuzufügen. Nur eine Bemerkung möchte ich machen und das ist die, daß man bisher sonst immer unter Abrüstung jene der Landheere versteht, von den Kriegsflotten wird wenig gesprochen und doch ist nicht bloß deren relative Abrüstung, sondern ihre gänzliche Abschaffung viel dringender. Denn solange irgend ein Staat wie jetzt England, die Meere, also die ganze freie Erde, mit seiner Kriegsmarine und Befestigungen an den Meerengen beherrscht, sind andere Staaten stets in Gefahr, nicht nur wirtschaftlich gehemmt, sondern auch geradezu direkt ausgehungert zu werden, was durch Landheere nahezu ausgeschlossen ist.

Eine europäische Kommission müßte demnach kontrollieren, daß von allen Kriegsschiffen — ausgenommen die zur Küstenverteidigung notwendigen, die überdies die eigenen Hoheitsgewässer nicht verlassen dürfen — die Bestückung sowie die Torpedolanziervorrichtungen entfernt werden. Damit wäre die Abrüstung der Kriegsmarinen erledigt. Allerdings wird ein Staat, der stets auf Raub ausgeht, sich derselben widersetzen und irgendwelche oder auch gar keine Gründe dafür angeben.

[1] »Aber das Volk,« erzählt Plutarch weiter, »verspottete mit Frechheit die heiligen Gesetze.«

Es wird dann Sache der politischen und militärischen oder pazifistischen Agitation sein, diesen Widerstand zu brechen.

Wenn es gelingen würde, alle Staaten daraufhin zu vereinigen, die Bestückung, bzw. jede Art von Armierung von ihren Kriegsschiffen zu entfernen, so wären ein für allemal alle Seekriege abgeschafft, jeder Versuch einer Aushungerung und jede Störung des Handels über See unmöglich gemacht. Es darf, schon vom Standpunkt der einfachen Gerechtigkeit aus, der bisherige Zustand nicht weiter bestehen, denn alle Gewässer, die nicht vom festen Land eines und desselben Staates, wie Seen und Meerengen, umschlossen werden, sind frei »von Natur« und können nicht der Herrschaft irgend eines Staates unterliegen, der aus der Ferne seine Schiffe hinschicken kann oder dort Uferbefestigungen aufgeführt hat.

Ist aber einmal das erreicht, sind die Kriegsschiffe aller Nationen geblendet, d. h. ihrer Bestückung beraubt ‹oder anderweitig angriffsunfähig gemacht, eventuell versenkt›, so ist der Seeverkehr für kleine Staaten ebenso gesichert wie für die größten und dann kann niemand mehr sagen, er brauche eine starke Flotte, um seinen Seehandel zu schützen, denn er kann überhaupt von niemandem angegriffen werden, und es bleibt nur der Konkurrenzkampf auf wirtschaftlichem Gebiete allein noch bestehen.

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Es ist aufs höchste zu wünschen, daß die schätzenswerten Bemühungen der Pazifisten zum Ziele führen und daß man daher ihre verschiedenen Vorschläge nur mit Wohlwollen und nicht allzu kritisch abweisend besprechen möge, selbst wenn man gegen viele davon erheblich erscheinende Einwendungen erheben kann — wie das z. B. bei mir der Fall ist. — Denn man kann sich über die Berechtigung von Einwendungen leicht täuschen und es ist schon oft vorgekommen, daß Vorschläge, gegen die sehr stark erscheinende Bedenken erhoben worden waren, sich dennoch in der Praxis sehr gut bewährten. Also auch aus Gewissenhaftigkeit unterlasse ich daher jede eingehendere Polemik.

Nur einen, und zwar den populärsten und historisch am häufigsten erscheinenden pazifistischen Gedanken, von dessen praktischer Unbrauchbarkeit ich gar zu sehr überzeugt bin, möchte

ich doch einer Kritik unterwerfen, und ich tue dies einzig aus dem Grunde, um den pazifistischen Projektanten zu ersparen, Zeit und Mühe langwieriger Agitation aufzuwenden und um auf diese Weise besseren Vorschlägen den Weg frei zu machen.

Seit Heinrich IV. und Sully tauchte nämlich das Schiedsgerichtsprogramm in sehr verschiedenen Formen auf. Bei Heinrich IV. als gemeinsamer Conseil von 15 nahezu gleichstarken Staaten, an den die streitenden Teile zu appellieren hätten. Bei Grotius als Verbände der Staaten, in denen Streitigkeiten der Mächte durch ein Schiedsgericht der unbeteiligten Staaten erledigt werden sollten. Zur selben Zeit erscheint in den politischen Werken der Rat, daß die streitenden Staaten ihre Angelegenheiten dem Gerichte internationaler Tribunale unterbreiten möchten. Abbé St. Pierre schlägt einen allgemeinen Kongreß der europäischen Staaten vor, alle stellen Truppen zur Ausführung der Entscheidungen dieses Tribunals. Montesquieu bestreitet die Möglichkeit des Zustandekommens internationaler Gerichte und wünscht nur ein gutes Völkerrecht für Krieg und Frieden. Bentham jedoch wünscht sehr eindringlich eine ständige internationale Rechtsprechung. Auf dem Pariser Kongreß im Jahre 1856 befürwortete Lord Clarendon und resumierte Graf Walewski: »Vor Waffenentscheidung mögen sich die streitenden Mächte an die Vermittlung befreundeter Staaten wenden«. Als 1887 Lord Bristol ein Projekt für ein internationales Tribunal vorlegte, erwiderte Lord Salisbury: »Die Völker werden niemals Vertrauen zu der Unparteilichkeit des Tribunals haben und außerdem besteht keine kompetente Gewalt zur Ausführung seiner Entscheidungen«. Im Jahre 1890 unterzeichneten auf dem vom Präsidenten Harrison zusammenberufenen panamerikanischen Kongreß die meisten Staaten Zentral- und Südamerikas eine Vereinbarung, daß ihre Streitigkeiten durch ein Schiedsgericht europäischer Staaten geschlichtet werden sollen[1].

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Ohne eine nähere Untersuchung scheint es wohl eine sehr einfache Sache zu sein, an die Stelle der kriegerischen oder über-

1 Zusammengestellt nach Blochs Kriegsbuch.

haupt gewalttätigen Maßregeln eine Rechtsautorität irgend welcher Art zu setzen, sei es als Staatenkongreß oder als ad hoc eingesetzte Diplomatenkonferenz oder als ein richterliches Tribunal. Man könnte glauben, das müsse ebenso gut gehen, wie es gelungen ist, für die Privathändel der Individuen den Staat als oberste Autorität funktionieren zu lassen und auf diese Weise das politische Faustrecht abzuschaffen.

Dagegen macht nun ein politischer Schriftsteller ‹A. Christensen› die Einwendung, es gehe nicht, und zwar wegen der »Psychologie der Massen«. »Staaten sind Massen...« Die Massenseele, heißt es, »besteht aus den Eigenschaften, die alle die Masse ausmachenden Individuen gemeinsam sind, also aus ganz primitiven Regungen. Einer solchen psychischen Beschaffenheit muß eine primitive ethische Stufe entsprechen. Handelt es sich um einen Staat oder eine Nation, dann genügt es nicht, daß die besten Männer des Volkes von der moralischen Zulässigkeit oder Unzulässigkeit irgend einer staatlichen oder nationalen Aktion eine klare Vorstellung haben, sie können ja ihre Auffassung der Masse nicht beibringen, wenn diese Masse dafür nicht empfänglich ist . . .«

Aber die Massen haben ja bisher in der modernen Welt mit der Führung der Politik gar nichts zu tun. Sie wären allerdings eventuell nicht besser als ihre aktiven Politiker, aber diese sind wiederum nicht im geringsten besser als die Masse, vermöge ihrer größeren Fachkenntnis sogar viel befähigter zu unmoralischem und ungerechtem Vorgehen als diese. Die Masse weiß ja überhaupt nicht eher, welche Schlechtigkeiten von ihren Führern geplant und ausgeübt werden, als bis alles schon geschehen ist, und die Parlamente sind, wie alle Erfahrungen zeigen, nichts anderes als die stillen schmunzelnden Zuhörer der Mitteilungen ihrer Minister für auswärtige Angelegenheiten, welche durch die ‹normale› Tatsache ihrer Uneigennützigkeit, ihrer Sorge für das Staatsinteresse und die der ihren gleiche moralische Bedenkenlosigkeit aller vollständig gedeckt sind. Diese ganze Einwendung ist daher gegenstandslos.

Viel häufiger hört man jedoch das Bedenken gegen Schiedsgerichte erheben, es fehle ihnen das »wichtigste Wesensmerkmal des Rechts, nämlich die Erzwingbarkeit«.

Der Rechtslehrer Zitelmann sucht diese Einwendung,

die sich auf Völkerrecht wie auf Schiedsgerichte beziehen kann, folgendermaßen in seiner Abhandlung »Haben wir noch ein Völkerrecht?« zu widerlegen:

»Man denkt zunächst immer an das Privatrecht mit der Möglichkeit der Klage vor Gericht und der in der Ferne drohenden Gestalt des Gerichtsvollziehers, der die Zwangsvollstreckung vornimmt, man denkt auch an das Strafrecht mit seinem Gerichtsverfahren und der staatlichen Strafvollziehung, und so kommt man zu dem Gedanken: Recht sind nur die Sätze, die durch eine übergeordnete staatliche Gewalt erzwungen werden können. Aber der Gedanke, daß alles Recht zu seinem Dasein begrifflich einer übergeordneten staatlichen Zwangsgewalt bedürfe, ist ein Irrtum . . . In dem Verfassungsrecht finden wir ganz zweifellose Sätze, die überall als wahre Rechtssätze anerkannt sind, und denen doch die Erzwingbarkeit durch eine übergeordnete Gewalt fehlt. Und diese Sätze sind doch wirksam.«

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Gewiß sind diese Sätze meistens wirksam, aber gar nicht so selten auch unwirksam. Verfassungsbrüche, Wortbrüche von Potentaten und selbst Eidbrüche kennen wir zur Genüge, namentlich aus der neueren Geschichte, und doch besitzen Versprechungen und umsomehr eidliche Versicherungen von Potentaten noch mehr Autorität als Verfassungsbestimmungen! Denken wir z. B. an die neuere Geschichte der inneren Politik in Preußen, in Hannover, an den Eid Napoleons III. auf die französische republikanische Verfassung und an seinen Meineid, denken wir daran, daß nicht weniger als fünf russische Zaren die Verfassung Finnlands beschworen haben und daß der letztverflossene sie dennoch vernichtet hat. Und in der äußeren Politik sahen wir, daß im Jahre 1882 die englische Königin Viktoria sowie ihr Premierminister Gladstone dem Sultan die Zurückgabe des militärisch besetzten Ägypten versprachen, daß dieses Wort einer Königin ‹»an dem man nicht mäkeln soll«› niemals eingelöst und daß eben jetzt im Weltkriege Ägypten von England ohne alle Gewissensskrupel definitiv annektiert wurde.

Die Bemerkung Zitelmanns ist also nicht ausreichend und die Einwendung der mangelnden Erzwingbarkeit eines Schiedsspruches ist richtig.

Aber noch vor der Frage der Erzwingbarkeit, also des Mangels einer Schiedsgerichtsexekutive, sind zwei andere, wie mir scheint, unbehebbare Schwierigkeiten zu bedenken.

Die eine Schwierigkeit entsteht dadurch, daß es nicht selten geschehen wird ⟨und auch geschehen ist⟩, daß bei der Zusammenberufung eines Staatenkongresses oder eines Diplomatenkongresses einer oder mehrere Staaten der Einladung, und zwar je nach dem vorkommenden Falle oder aus allgemeineren Gründen, gar nicht folgen. So wie es ja auch fast Regel ist, daß, wie bei den Haager Konferenzen oder bei der Londoner Seerechtserklärung ⟨vom Jahre 1909⟩ diese und jene Macht einen Beschluß nicht mitunterschrieb, also nicht ratifizierte.

Bei dieser Gelegenheit sei auf die merkwürdige historische Tatsache aufmerksam gemacht, daß ⟨so weit ich weiß⟩ der erste historisch verzeichnete Friedenskongreß von Perikles zusammenberufen wurde und daß die eben hervorgehobene Schwierigkeit sich schon in diesem Falle ergab und den Kongreß unmöglich machte.

Es ist eine für die damalige Zeit hochbedeutende Tat, nur der Unternehmung der Haager Friedenskonferenz vergleichbar, daß Perikles die Idee hatte, eine öffentliche Einladung im Namen des attischen Staates »an alle Griechen in Europa und Asien zu richten«, »wodurch sie« — wie Plutarch mitteilt, »ersucht wurden, aus allen großen und kleinen Städten und wo sich Griechen aufhalten möchten, öffentliche Abgeordnete nach Athen zu einer allgemeinen Versammlung zu senden, in welcher man über die Wiederherstellung der von den Feinden zerstörten griechischen Tempel, über die Opfer, die man den Göttern für die Erhaltung Griechenlands angelobt und noch nicht dargebracht hätte, über die Sicherheit der Schiffahrt und über einen allgemeinen Frieden Beratschlagung pflegen wollte«. Wie man sieht, handelt es sich Perikles ohne Zweifel um hohe ethische Ziele der Politik von noch allgemeinerer Bedeutung als die Amphyktionie. Aber — »es kam nichts zustande, und die Städte schickten keine Abgeordnete, weil die Lacedämonier, wie man sagt, entgegen waren, und auch im Peleponnes dieser Vorschlag verworfen wurde«[1].

[1] Es stimmt sehr gut zu diesem humanen Vorgang, daß Perikles auch, trotz der Kriege, die er glaubte, führen zu müssen, dennoch kein eigentlicher Kriegsmann war. »Im Kriege erwarb er sich vornehmlich den Ruhm der Behutsamkeit. Er ließ sich nicht gern in eine Schlacht ein, wobei viel Unsicherheit und Gefahr war. Er sagte immer zu seinen Mitbürgern: Soviel auf ihn ankäme, sollten sie stets unsterblich bleiben. Und als er sich weigerte, gegen die eingebrochenen 60.000 gut bewaffneten Peloponnesier und Böotier eine Schlacht zu wagen, suchte er die auf einen Kampf ungeduldigen Krieger mit den Worten zu besänftigen: daß abgehauene Bäume bald wieder aufwüchsen, getötete Menschen aber nicht sobald wieder zu ersetzen wären.«

Und noch erhabener ist, was ebenfalls Plutarch erzählt, daß nämlich, als Perikles seinem Ende nahe war, die anwesenden Freunde seine Tugend, seine Taten und die vielen Trophäen als Feldherr rühmten, wobei sie glaubten, daß er das alles nicht hörte und schon Verstand und Sinne verloren hätte. Aber er hatte alles genau bemerkt und unterbrach sie mit diesen Worten: »Ich wundere mich, daß ihr bloß alles das erwähnt und rühmt, woran das Glück mit mir zugleich Teil hat und was schon viele Feldherren genossen haben. Das Schönste und Größte aber erwähnt ihr nicht, daß meinetwegen kein Athenienser ein schwarzes Kleid hat anziehen dürfen.«

Die zweite Schwierigkeit besteht darin, daß auf Unparteilichkeit in den Beschlußfassungen seitens irgendwelchen Schiedsgerichts nicht zu rechnen ist. Das Mißtrauen der Völker oder ihrer politischen Vertreter wurde in der neueren Zeit immer stärker und wird wohl auf lange Zeit hinaus unausrottbar sein.

Zwischen dem Zivil- und Strafrecht innerhalb des Staates und dem Versuch einer zwischenstaatlichen Gerichtsbarkeit besteht eben ein Unterschied, der zwar nur ein quantitativer, aber dennoch ein fundamentaler ist. Bei Streitigkeiten der Privatpersonen und den entstehenden Prozessen stehen auf der einen Seite einzelne Personen, die an dem Streit der Straffälle direkt beteiligt, und andererseits Millionen von Individuen, die daran ganz und gar unbeteiligt sind, so wie die Richter, die dabei ebenfalls uninteressiert sind oder sein sollen, widrigenfalls sie ⟨wie z. B. auch Geschworene⟩ von jeder Rechtsprechung zurückgewiesen werden. Diese Richter haben jene Millionen, die leicht unparteiisch sein können, weil die Sache sie nichts angeht und die höchstens das Interesse dabei haben, daß die Gerechtigkeit siegt, als Stütze und Garantie der Ausführung ihrer Rechtsfindung hinter sich.

Verschiedene, wenigstens zivilisierte Staaten gibt es jedoch nicht Millionen, sondern auf der ganzen Erde nur einige Dutzend. Es ist nun schon durch ihre geringe Zahl und durch die innigen Beziehungen aller Staaten untereinander ganz unmöglich, daß

irgendeiner von ihnen bei einem zwischenstaatlichen Streitfall ganz unparteiisch bleiben kann. Und diese Beziehungen sind ja schon infolge unserer ganzen Kulturentwicklung, wenn auch labile, so doch sehr innige und die Diplomaten verstehen es immer, diese Beziehungen im allgemeinen oder vorkommendenfalls in einem für ihren Staat günstigen Sinn zu gestalten. Das Resultat ist daher dies, daß das Schiedsgericht für unparteiische Entscheidungen nicht die geringste Sicherheit bietet.

Da man das immer mehr einsieht, so ist das Mißtrauen in eine internationale Rechtsautorität vollkommen begründet. Zu keiner Zeit wurde aber mehr dazu getan, das Vertrauen in Schiedsgerichte gründlichst zu erschüttern als in unseren Tagen, nämlich anläßlich der diplomatischen Vorbereitungen für den jetzigen Weltkrieg und auch während seiner Dauer.

Dazu kamen die Reden und Schriften der hervorragendsten Intelligenzen, namentlich von England und Frankreich, die zur höchsten Überraschung aller gesitteten Menschen das deutsche Volk mit Verleumdungen und boshaften Beurteilungen überschütteten. Die größten Verdienste als Männer der Wissenschaft und Kunst, die angesehensten sozialen Stellungen zeigten sich bei Angehörigen dieser beiden Staaten vereinbar mit dem tiefsten Haß und mit voller Unzugänglichkeit für ein gerechtes Urteil über ihre Gegner.

Und so kam es dahin, daß, wenn wirklich ein Tribunal aus Richtern aller oder einzelner Staaten errichtet werden sollte, kein noch so gelehrter, würdiger, bisher allgemein geachteter Mann in Europa gefunden werden könnte, dem die anderen Staaten irgend eine Unparteilichkeit zutrauen könnten.

Und selbstverständlich gilt das Gesagte auch von einem zu gründenden »Völkerbund«. Alle einzelnen Staaten sind durch Interessen oder Sympathien oder Antipathien miteinander verflochten. Und wenn beschlossen werden sollte, gegen einen »Friedensstörer« energisch vorzugehen, so müßte denn doch eine Konferenz der anderen Mächte vorhergehen, also eine Art »Tribunal«, auf dessen Unparteilichkeit wiederum nicht zu rechnen ist. Es ist daher auch der Vorschlag des englischen Staatssekretärs des Äußern, des Lord Grey, ohne praktischen Wert, einen Völkerbund zu gründen, in dem die Neutralen gemeinsam und mit Gewalt sich gegen den Friedensbrecher wehren und

dadurch ihn zur Innehaltung des Friedens zwingen sollen. Denn es gibt jetzt und wohl für lange Zeit keine Neutralen! Im gegebenen Falle sind sie es nicht oder sie bleiben es nicht.

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Wie überhaupt der jetzige Weltkrieg den Bankerott unserer moralischen Kultur und zugleich des Christentums in einer geradezu entsetzlichen Weise enthüllt hat. Von den zahllosen beweiskräftigen Vorkommnissen seien hier nur zwei solche angeführt, die wohl niemand vorher für möglich gehalten hätte.

Der eine Fall ist die Tatsache, daß ein hochgebildeter Franzose, ehemaliger Minister des Auswärtigen, Mitglied der Pariser Akademie und Verfasser eines sehr geschätzten Werkes über Kardinal Richelieu, nämlich Gabriel Hanoteaux, öffentlich erklärte: »Wir wollen nicht den Kölner Dom zerstören, aber alle deutschen Fabriken, Warenhäuser, Maschinen, Banken und Bahnhöfe.« So denkt heute ein führender Politiker über Völkerrecht!

Und vielleicht noch ein schlimmerer Fall, der das Christentum in bisher kaum übertroffener Weise bloßstellt, ist der eines belgischen Kardinals, nämlich des Erzbischofs Mercier von Mecheln, der in einem Hirtenbrief zum Trost der Bevölkerung sagt, es sei ja möglich, trotz aller militärischen Erfolge die Deutschen zu besiegen, denn Gott könne ja ansteckende Krankheiten über sie schicken. »Stellt vor allem euer Vertrauen auf Gott!« Es ist mir nicht bekannt, daß der Papst diese Äußerung irgendwie gerügt hätte.

Das waren nur Worte! Aber erst die Taten in diesem Weltkrieg, deren Gipfelpunkt die Aushungerung Deutschlands durch England bildet!

Man spricht mitunter von den Grausamkeiten Dschingischans und Tamerlans. Man schildert die Szene, wo Tamerlan zum Tor von Damaskus hinausreitet, um der Errichtung der Schädelpyramide aus 70.000 Schädeln erschlagener Feinde beizuwohnen. Aber die Aushungerung der ganzen deutschen Bevölkerung übertrifft das beiweitem, denn nach den Angaben des Physiologen Rubner sind während oder durch die englische Blockade an 800.000 Menschen, namentlich Greise, Kranke und Kinder, infolge der Unterernährung zugrunde gegangen!

Man sucht mitunter die englischen Politiker damit zu entschuldigen, daß man sagt, die Deutschen haben ja im Jahre 1871 Paris ebenfalls ausgehungert, wie man ja Festungen im Kriege oft aushungert. Allein vor allem sind die ethischen Ansichten in der Politik seit jenen fünfzig Jahren — wenigstens in Wort und Schrift — wesentlich fortgeschritten, und dann, was die Hauptsache ist: der Vergleich mit der Aushungerung von Paris paßt nicht. Denn Festungen, noch so groß, können evakuiert werden, man kann also so viele Menschen — und namentlich die Schwachen — entfernen, als man will. Aber einen ganzen Staat — von 66 Millionen Menschen — kann man nicht evakuieren, wohin sollte man denn gehen?

Ganz abgesehen davon, daß nach allen Begriffen vom geschriebenen wie ungeschriebenen Völkerrecht, namentlich seit Rousseau es ausdrücklich ausgesprochen hat, die Zivilbevölkerung vom Krieg nicht direkt leiden darf, es darf ja nicht einmal ihr Eigentum angetastet werden.

Was ist Tamerlan, was selbst Iwan der Schreckliche — der in Nischnij-Nowgorod wegen der freiheitlichen Bewegung 50.000 Menschen binnen sechs Wochen hinrichten ließ —, was sind selbst die Konzentrationslager Kitcheners gegen die Buren, in denen sich zum erstenmal die barbarische Kriegführung der Engländer gegen ein zivilisiertes, ja stammverwandtes Land hervorwagte — gegen die Hungertodmethode gegenüber 66 Millionen Menschen!

Tiefbetrübt muß jeder, der an dem menschlichen Fortschritt in ethischer Beziehung noch nicht verzweifelt, diese Tat betrachten, und es steht jedem frei, ob er das Große und Schöne, das England der Welt gegeben hat, ob er die Existenz von Shakespeare, Newton, Watt, Faraday, Darwin und anderen als Kompensation, ja als Entschuldigung jener Barbarei ansehen will oder nicht.

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Nun muß doch auch von dem »Völkerbund« gesprochen werden, der von der sogenannten Friedenskonferenz nach fast fünfjährigem Weltkrieg errichtet wurde.

Es ist aber ganz unnötig, über dieses Elaborat eingehend zu berichten, denn es erübrigt meinerseits jede ernste Kritik,

nachdem eine solche bereits vielfach von kompetentesten Beurteilern geübt wurde. Ich will hier nur die Ansichten eines anerkannten Völkerrechtslehrers und eines praktischen Staatsmannes in hoher Stellung anführen.

Der erstere, Professor Lammasch, sagt: »Seiner Idee nach sollte der Völkerbund eine Verbindung freier Völker sein, die sich nach eigener Wahl miteinander vereinigt haben, um Streitigkeiten unter ihnen auf friedliche Weise zu schlichten und ihr Wohl gegenseitig ohne nationalen Haß, ohne wirtschaftlichen Neid und ohne politische Selbstsucht zu fördern. Von diesem Ideal ist die ‚Liga der Nationen', wie sie in Paris ausgeheckt wurde, noch recht weit entfernt . . . . . Es ist ein Mißgriff, den Kriegsrat als eine Partei mit einigen nicht ausschlaggebenden Verstärkungen zum Zentralorgan des Völkerbundes zu machen. Nichts anderes aber ist es, wenn der zur Weltregierung und sogar zur Weltrechtspflege berufene Rat des Völkerbundes aus den neuen fünf Großmächten und aus den ihnen gegenüber gewiß nicht ganz unabhängigen Staaten Belgien, Griechenland, Brasilien und Spanien besteht . . . Das Allerwichtigste aber wäre für die Differenzen, die einer richterlichen oder schiedsrichterlichen Entscheidung nicht fähig sind, weil es dabei an jenen allgemeinen Normen fehlt, auf die eine solche Entscheidung sich stützen könnte, ein Organ zu schaffen, das das unbedingt erforderliche Vertrauen in seine Unparteilichkeit mit der ihm ebenso wesentlichen Autorität vereinigt. An der letzteren Eigenschaft wird es den Machern des Rates der neun Mächte nicht fehlen. Ob aber nicht an der ersteren? Seine Mitglieder werden Staatsmänner sein, die bei all ihren Entscheidungen notwendigerweise, pflichtgemäß, in erster Linie deren Rückwirkungen auf die Interessen des eigenen Staates berücksichtigen werden. Und gerade die Interessen der Großmächte umfassen die ganze Welt, daß sie kaum an irgend einem Konflikt zwischen anderen Staaten völlig unbeteiligt sein können. Ihre Einigung wird daher ebenso schwer zustande kommen und ihr Spruch daher ebenso oft den Charakter eines lahmen Kompromisses an sich tragen als die Beschlüsse der diplomatischen Konferenzen seligen oder unseligen Andenkens . . .

Nach dem Entwurf des Völkerbundes, wie er in Paris vorgeschlagen wurde, ist dieser Bund zunächst kein Bund der

Völker. Denn zahlreiche territoriale und wirtschaftliche Bestimmungen des Friedensvertrages, dessen integrierender Bestandteil der Völkerbund sein soll, sorgen dafür, daß die Völker, deren nationaler Antagonismus und deren ökonomische Rivalität zu den Hauptursachen des Krieges gehörten, auch fernerhin feindselig einander gegenüber stehen werden. Zudem haben die Völker in diesem Bund selbst nicht viel zu sagen. Nach wie vor bleiben sie durch die leitenden Staatsmänner und Diplomaten jenen Staaten untertan, denen sie nur allzu häufig mit Mißachtung ihrer nationalen Aspirationen zugeteilt wurden.«

Und der nordamerikanische Staatssekretär für das Auswärtige, Lansing, sprach sich amerikanischen Pressevertretern gegenüber über den Friedens- und den Völkerbund offen pessimistisch aus. Er erklärte, Optimismus sei nicht gerechtfertigt, die Weltpolitik werde in den nächsten Jahren gewaltig auf die Probe gestellt werden, man brauche eine entschlossene öffentliche Meinung als ein Hindernis für dunkle Pläne .... Man braucht übrigens, um den Wert der Pariser Bemühungen um Friedens- und Völkerbund zu beurteilen, bloß zu wissen, daß der englische General Haig in einer Rede in Aberdeen erklärte, jeder heranwachsende junge Engländer müsse im Gebrauch des Gewehres unterwiesen werden, damit, wenn die nächste große Probe komme, wie sie eines Tages sicher kommen werde, England eine Nation in Waffen sei, bereit und vorbereitet, sich dieser Probe gewachsen zu zeigen.

Und bezeichnend für den Wert, den die Entente ihrem Friedenselaborat selbst beimißt, ist die Tatsache, daß mit diesem zugleich ein Vertrag zwischen Frankreich, England und den Vereinigten Staaten abgeschlossen wurde, um Frankreich gegen einen deutschen Angriffskrieg zu schützen.

*

Es ist wohl unseren Zeitgenossen nicht genügend ins Bewußtsein gedrungen, daß die letzten Jahre blitzartig einen Zustand der europäischen Gesellschaft beleuchtet haben, der trotz des höchsten Triumphes der Wissenschaft und Technik, wie ich schon sagte, einen vollständigen Bankerott unserer menschlichen Kultur und besonders den Bankerott unserer positiven Religionen, speziell der christlichen, aufweist.

Und das trifft ganz besonders bei unseren intelligenten Schichten der Gesellschaft und viel weniger auf die ungebildeten Klassen zu. Nur in einem so brutalen Zeitalter, wie in dem heutigen, wagen es Männer, der Öffentlichkeit in zynischer und übermütiger Weise die bloße aggresive Kraft als Recht schaffend und ersetzend hinzustellen. Der preußische General Bernhardi schrieb:

»Recht hat in solchen Fällen, wer die Kraft hat, zu erhalten oder zu erobern. Die Kraft ist zugleich das höchste Recht und der Rechtszustand wird entschieden durch den Kraftmesser, den Krieg, der zugleich immer biologisch gerecht entscheidet, da seine Entscheidungen aus dem Wesen der Dinge selbst hervorgehen.« Aber auch die Niederwerfung und Tötung von Reisenden auf der Heerstraße durch Räuber — können diese sagen — sei eine »biologisch gerechte« Entscheidung und gehe »aus dem Wesen der Dinge selbst« hervor!

Und genau so wie Bernhardi sagte der englische General Lord Roberts, um Stimmung für einen Flottenüberfall auf Deutschland zu machen, eine starke Nation habe das Recht, eine schwächere zu überfallen.

*

Übrigens sei noch bemerkt, daß, wenn Hegel mit seiner Geschichtsphilosophie recht hätte, jedes Völkerrecht undenkbar wäre, da ja die höhere Macht, der Hegelsche »Weltgeist«, wann es ihm beliebt, alles über den Haufen werfen kann.

*

Wenn aber auch schon im vorhinein die Zweckmäßigkeit irgend eines pazifistischen Programms gerne zugestanden werden mag, so wird doch gewiß kein Vertreter eines solchen der Meinung sein, daß damit Kriege für alle Zeiten aus der Welt geschafft sein werden. Und in diesem Mangel eines jeden Friedensprogramms ist eben der Wert meines Vorschlages begründet, denn er ist — wie ich schon oben sagte — der Retter in der Not, wenn die politischen Zustände trotz aller Friedensbemühungen zum Krieg treiben. Ist das der Fall, so wird infolge des Freiwilligkeitsystems vielleicht dennoch ein Krieg unterbleiben,

weil sich zu wenig Kombattanten melden oder, wenn es deren genug gibt, also der Krieg wirklich ausbricht, so hat dann jeder einzelne alles eventuelle Unheil nur sich selbst zuzuschreiben und er leidet nicht wie heute auch noch unter dem demütigenden Gefühl, von anderen zum sicheren oder wahrscheinlichen Tode verurteilt worden zu sein.

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Sonderbarerweise erwarten trotz aller trüben Erfahrungen manche, daß Religion, speziell die christliche Religion, wenn sie wieder wie einstmals verbreitet und herrschend wäre, Kriege verhüten würde. Offenbar vergessen jene ganz die Tatsachen der politischen Kirchengeschichte, die das Gegenteil zeigen. Eine stärkere Religiosität als im XIII. Jahrhundert hat es in Europa kaum jemals gegeben, das war das Zeitalter des Thomas von Aquino und Innocenz III. Damals gab es geradezu dauernden Krieg, die Städte Italiens belauerten einander, um die Nachbarn zu überfallen, immerwährend gab es Belagerungen, die dann mit den fürchterlichsten Grausamkeiten endigten. Alles wimmelte von Mönchen, es herrschten — wie P. Sabatier, der Geschichtsschreiber des Franz von Assisi, berichtet — Simonie, Unsittlichkeit, Gemeinheit und Geiz, und dabei beschäftigte man sich unaufhörlich mit Himmel und Hölle!

VII.

Allgemeine Betrachtungen über die Wehrpflicht.

Man sagt, keine Regierung, selbst kein Monarch, sei imstande, heute — d. h. infolge der allgemeinen Wehrpflicht — einen Krieg zu führen, ohne der vollen Zustimmung seines Volkes sicher zu sein.

Nun ist in Rußland in der Tat die allgemeine Wehrpflicht ⟨seit 1874⟩ eingeführt worden, desgleichen in Österreich-Ungarn, in Deutschland und auch in dem republikanischen Frankreich. Das sind vier in der Kultur ihrer Völker weit voneinander verschiedene Staaten. Daß aber der Zar erst darüber nachgedacht hätte, ob sein Volk ihm »voll zustimme«, ehe er einen Krieg — sogar einen Eroberungskrieg — führte, sei es in Persien, sei es in Europa gegen die Türken, Deutschen oder Österreicher, das wird doch kein Mensch glauben! Zum Beispiel in dem jetzigen Weltkriege begnügte er sich mit der kriegerischen Agitation der Großfürsten, einiger Hofdamen und Panslawisten, alle diese dachten nicht entfernt daran und der Kaiser ebensowenig, ob die verschiedenen Völker Rußlands oder selbst die Masse der eigentlichen Russen, die großrussischen Bauern, dem Kriege zustimmen oder nicht. Er befahl und infolge der Wehrpflicht mußten nahezu acht Millionen ⟨oder mehr⟩ Bauern — harmlose, gutmütige Menschen, die von Politik keine Ahnung haben und am liebsten in ihren Dörfern geblieben wären — ausrücken und Leben und Gesundheit riskieren. Die eine Zarin-Mutter, Maria Paulowna, und der eine Großfürst Nikolai Nikolajewitsch hatten mehr Einfluß auf die Entscheidung über Krieg und Frieden, als die hundert Millionen russischer Bauern.

Im alten Österreich-Ungarn hätte es wohl niemals einen Krieg gegeben, dem alle seine Völker, respektive alle seine Nationali-

weil sich zu wenig Kombattanten melden oder, wenn es deren genug gibt, also der Krieg wirklich ausbricht, so hat dann jeder einzelne alles eventuelle Unheil nur sich selbst zuzuschreiben und er leidet nicht wie heute auch noch unter dem demütigenden Gefühl, von anderen zum sicheren oder wahrscheinlichen Tode verurteilt worden zu sein.

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täten zugestimmt hätten! Bald hätten die Slawen — wenn man wirklich die Bevölkerung über ihre Ansicht und Zustimmung befragt hätte — jeden Krieg gegen einen slawischen Feind, bald die Deutschen Österreichs einen Krieg gegen einen deutschen Feind perhorresziert, ebenso würden die Magyaren und die Rumänen und die Italiener ihren Sympathien oder Antipathien Rechnung getragen haben, und nur ganz ausnahmsweise, wahrscheinlich nie, hätten rein staatliche Erwägungen den Ausschlag gegeben, und selbst solche rein staatliche Gründe wären bei einem Teil der Bevölkerung günstig, bei einem anderen ungünstig für eine kriegerische Entscheidung ausgefallen. Das Resultat war aber doch in Wirklichkeit das, daß, wenn die Obrigkeit es so wollte, alle miteinander, ohne gefragt zu werden, Slawen wie Deutsche, Magyaren wie Rumänen und Italiener, ganz einfach marschieren mußten.

Was Deutschland betrifft, so wollen wir von dem jetzigen Weltkrieg sprechen, bei dem die Überzeugung, daß es sich um eine Verteidigung des aufs äußerste bedrohten Staates handle, so allgemein war, daß fast gar kein Wehrzwang notwendig gewesen wäre, auch mit dem System der Freiwilligkeit wären genug Krieger vorhanden gewesen und das ist dadurch bewiesen, daß in der Tat nahezu einundeinhalb Millionen Männer sich freiwillig gemeldet hatten. Allein, wenn eine solche Überzeugung der Notwehr nicht vorhanden ist?

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Wir erlebten in der jüngsten Zeit zwei solche Situationen: Das erstemal kündigte der Deutsche Kaiser den eventuellen Krieg gegen Frankreich an, als es sich um Marokko handelte und weil die französische Regierung ‹respektive ihr Minister Delcassé› Deutschland »beleidigte«. Das zweitemal, im Herbst 1909, als es sich um deutsche Deserteure der französischen Fremdenlegion in Casablanca handelte. Niemand kann einen Augenblick zweifeln, daß die deutsche wie auch die französische Armee hätten ins Feld rücken müssen, wenn diese Zwischenfälle nicht beigelegt worden wären, obwohl das Gros des deutschen wie auch des französischen Volkes, wenn befragt, sich zum allergrößten Teile gegen den Krieg wegen solcher Ursachen erklärt hätte. Und wie wäre das Resultat einer Abstimmung erst ausgefallen, wenn man

jene, die ihre Haut zu Markte hätten tragen müssen, nämlich: wenn man die Soldaten beider Staaten befragt hätte? Vielleicht keine einzige Division hätte man in Deutschland zusammengebracht und in Frankreich, trotz der Revanche-Idee, falls keine genügend lange währende Aufpeitschung angewendet worden wäre, nicht viel mehr.

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Man sieht also, daß die allgemeine Wehrpflicht Kriege und selbst Kriegsbefürchtungen gar nicht hindert. Ja, gerade das allgemeine Zittern vor einem Kriege, das in neuerer Zeit in ganz Europa zu bemerken war, und bei jedem politischen, noch so geringfügigen Ereignis stets von neuem begann, beweist ganz klar, wie wenig Vertrauen den Europäern die doch so gerühmte allgemeine Wehrpflicht bezüglich der Verhinderung von Kriegen einflößt.

Es ist daher unbegreiflich, wenn z. B. in einer pazifistischen Zeitschrift behauptet wurde, daß »heute das Volk der Faktor ist, der den Krieg erklärt«. Ganz abgesehen davon, daß, wenn es wahr wäre, das noch lange nicht genügen würde. Denn es ist leicht, für Krieg zu stimmen, wenn man zu Hause bleiben kann, die Soldaten selbst müßten für den Krieg sein, und zwar wiederum darf durchaus nicht eine eventuelle Majorität derselben alle anderen zwingen können, ins Feld zu rücken, sondern es müßte jeder für sich selbst entscheiden, ob er mitmacht oder nicht.

Was mit der allgemeinen Wehrpflicht erzwungen werden kann, sah man besonders deutlich schon im Jahre 1866 in Preußen. »Gegen alle populären Strömungen in Preußen und Deutschland« — sagt der Staatsrechtslehrer Hugo Preuß in dem Werke »Das deutsche Volk und die Politik« — »gegen Parlamente, Presse und öffentliche Meinung«, geschah der entscheidende Schritt zur kleindeutschen Einigung, sogar die preußischen Reserven und Landwehren zeigten sich bei der Mobilmachung zum ‚Bruderkrieg' vielfach widerwillig und schwierig, eine für Preußen unerhörte Tatsache. Über alle diese Widerstände siegte die Obrigkeitsregierung — also eben die allgemeine Wehrpflicht.

Das war nun ein Krieg, den derselbe Bismarck führte und erzwang, der am 6. Februar des Jahres 1888 im Deutschen Reichstag folgende seinem 1866er Verhalten ganz entgegengesetzte Rede hielt:

»Wenn wir einen Krieg mit der vollen Wirkung unserer Nationalkraft führen wollen, so muß es ein Krieg sein, mit dem alle, die ihn mitmachen, alle, die ihm Opfer bringen, kurz und gut, mit dem die ganze Nation einverstanden ist. Es muß ein Volkskrieg sein. Es muß ein Krieg sein, der mit dem Enthusiasmus geführt wird wie der von 1870, wo wir ruchlos angegriffen wurden. Es wird aber sehr schwer sein, den Provinzen, den Bundesstaaten und ihren Bevölkerungen das klar zu machen: Der Krieg ist unvermeidlich, er muß sein. Man wird fragen: Ja, seid ihr denn dessen so sicher? Wer weiß? Kurz, wenn wir schließlich zum Angriff kommen, so wird das ganze Gewicht der Imponderabilien, die viel schwerer wiegen als die materiellen Gewichte, auf Seite unserer Gegner sein, die wir angegriffen haben. Ein Krieg, zu dem wir nicht vom Volkswillen getragen werden, der wird geführt werden, wenn schließlich die verordnenden Obrigkeiten ihn für nötig halten und erklärt haben; er wird auch mit voller Schneid und vielleicht siegreich geführt werden, wenn man erst einmal Feuer bekommen und Blut gesehen hat; aber es wird nicht von Haus aus der Elan und das Feuer dahinter sein wie in einem Kriege, wenn wir angegriffen werden.«

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Durch die heute geltende Auffassung des Staatslebens werden, ganz ohne Not, die verwildertsten Maximen und die peinlichsten Situationen in das Leben eingeführt. Die Menschheit wird durch diese Staatsauffassung in solcher Art in geographisch abgegrenzte Gruppen abgeteilt und zwischen diesen verschiedenen Gruppen, das ist den Staaten, ein solcher Abgrund aufgerissen, als ob wir immerwährend wie in einer großen Festung leben sollten und wie wenn die eigentliche Bestimmung des Menschen die wäre, daß alle einem Staate Angehörige sich stets wie ein Igel zusammenrollen und gegen alle draußen Befindlichen nur ihre Stacheln kehren sollten.

Nun wird aber gewiß jeder ethisch höher und freier Blickende die Empfindung haben, daß wir wohl durch historische langsame Entwicklungen und durch allerlei Zufälle oder Ereignisse anderer Art in Staatsgruppen abgeteilt sind, daß aber diese Art, Menschen zu unterscheiden und zu trennen — von seltenen elementaren

Notwendigkeiten abgesehen — durchaus nicht eine so ausschließliche und so tiefgreifende zu sein braucht und auch nicht sein soll, wie man sie noch immer für nötig findet.

*

Es gibt, wie wohl jeder bestätigen wird, im eigenen Staat stets nur eine kleine Zahl von Menschen, denen man persönlich näher steht und für die man eine tiefere Sympathie empfindet; alle anderen kennt man nur, sozusagen, dem politischen Begriffe nach, und es kommt nicht selten vor, daß man mehr persönliche Beziehungen und innigere Sympathien zu Angehörigen anderer Staaten als zu denen des eigenen hat. Auf diese Weise bilden alle in den verschiedensten Staaten zerstreuten Menschen, die einander gewogen sind, eine eigene Art von großer Familie und es ist durchaus nicht einzusehen, warum im Falle, als einer oder mehrere in einem Staat irgend eine politische Idee fassen, irgend ein kriegerisches Ziel zu erreichen suchen, warum man mich — wenn ich nicht von deren Notwendigkeit überzeugt bin — soll zwingen können, gegen jene Menschen in fremden Staaten mit einemmale als Gegner, ja als Todfeind aufzutreten. Wie oft ist zudem der Verband mit dem eigenen Staate nur wie eine lästige Ehe, die man nicht mehr so leicht lösen kann!

Der Staatsverband darf nicht, wenigstens nicht in allen Fällen, das stärkste Band zwischen den Menschen sein und man muß die Grenzen der Macht der Staatsgewalt anders bestimmen als das bisher geschah.

Einer der größten Feldherrn, glühendsten Patrioten, aber dabei zugleich einer der tugendhaftesten Menschen aller Zeiten, Epaminondas nämlich, hielt es nicht für erlaubt — und Montaigne kann ihn dafür nicht genug bewundern — selbst um die Freiheit seines Vaterlandes zu erhalten, einen Menschen zu töten, ohne daß man sein Verbrechen untersucht habe. Er hielt auch dafür, man müsse in einer Schlacht vermeiden, auf seinen Freund zu stoßen und seiner schonen, wenn man ihn im feindlichen Heer anträfe, eine außerordentliche Höhe einer humanen Moral, die uns die Erzählung von Diomedes und Glaukos in der Ilias glaublich erscheinen läßt.

Nach der heute geltenden Auffassung würde Epaminondas verdienen, vor ein Kriegsgericht gestellt zu werden!

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Und nun aber das Furchtbarste von allem: Daß man überhaupt jemanden soll zwingen können, sein Leben zu riskieren und Menschen zu töten für Zwecke oder Ideale, die nicht er hat, sondern die andere haben! Es ist die größte Raserei, die bisher menschliche Institutionen hervorbrachten, es ist derselbe Fanatismus wie der religiöse, der offen erklärt, wie es im heutigen Staate wirklich geschieht: »Des Menschen Feinde werden seine eigenen Hausgenossen sein.«

Genau das ist die Situation, in der heute jeder in seinem Staate eingeklemmt ist, er muß Märtyrer für Zwecke oder Ideale sein, die andere hegen.

Weil also z. B. einige Personen in Rußland das sogenannte Testament Peters des Großen verwirklicht sehen wollten, mußten die armen russischen Bauern, die gutmütigsten und friedlichsten Menschen der Welt, ihr Leben verlieren!

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Zu Beginn des russisch-türkischen Krieges im Jahre 1878 sagte wohl der deutsche Reichskanzler, Fürst Bismarck, im Reichstage, wie oben angeführt wurde, er könne als Ratgeber des Kaisers, des Oberhauptes von vierzig Millionen Menschen, ihm nur dann zur Beteiligung an einem Kriege raten, wenn er sich der Zustimmung jener, die ihn mitmachen, aller, die ihm Opfer bringen, kurz und gut: der ganzen Nation, versichert halten könnte.

Das muß man wohl einen hohen, von einem übermächtigen Staatsmann nur selten ⟨oder nie⟩ eingenommenen Standpunkt nennen. Und dieser Ausspruch ist, wenn auch noch unvollständig, der Empfindung entsprechend, die dem hier aufgestellten Programm zugrunde liegt.

Allerdings fiel es dem Kanzler nicht ein und konnte ihm, dem Zeitalter und den Umständen nach, auch nicht einfallen, zu denken, man solle jedem einzelnen die Entscheidung über seinen Eintritt in das Feldheer überlassen, denn Bismarck stand ja ganz auf dem Boden des heutigen, noch sehr landesväterlich gefärbten Staatsrechtes. Er konnte auch schon darum nicht, in Konsequenz seines sonst so schönen Ausspruches im Reichstage, auf die Berücksichtigung jedes individuellen Willens verfallen, weil seinen Worten eigentlich der ethische Untergrund fehlte. Er dachte

eigentlich nur daran, bei »Zustimmung der ganzen Nation« einen Krieg mit mehr Wucht führen zu können, analog wie seine Arbeiterversicherung aufgefaßt werden muß, denn so viele Tugenden Bismarck auch als Privatmann und selbst auch in seiner Politik hatte, führte er jene große sozialpolitische Institution zum geringsten Teile aus Humanität und Liebe zu den Arbeitern ein, sondern aus rein innerpolitischen Gründen.

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In einer so wichtigen Angelegenheit, wie in der Frage des Kriegsdienstes, wo es sich um erzwungene Menschenopfer handelt, darf man sich jedoch nicht auf edlere, momentane Stimmungen oder das gute Gewissen irgend eines Staatsmannes oder Parlaments verlassen. Fürs erste ist man ja nie sicher, daß nur gewissenhafte Politiker, Minister oder Staatsoberhäupter oder Parlamente vorhanden sein werden, oder, daß der Staatsmann, der zu einer bestimmten Zeit einen mehr oder weniger, doch immerhin ethischen Standpunkt einnahm, ihn auch immer einnehmen werde. Hat doch derselbe Bismarck, wie gesagt, im Jahre 1866 den Krieg gegen Österreich und einige deutsche Staaten in der Tat gegen den Willen, also ganz »ohne Zustimmung der ganzen Nation« geführt.

Und selbst mit der Gewissenhaftigkeit der Politiker ist es noch nicht getan. Denn mit der größten Gewissenhaftigkeit hält der eine Staatsmann diese oder jene Situation für eine Kriegsunternehmung nicht für bestimmend genug, während ein anderer oder der maßgebende Armeechef, ebenfalls mit gutem Gewissen, entgegengesetzter Meinung ist.

Hüte man sich ja, ein Vorgehen, wie das der preußischen Obrigkeit im Jahre 1866, nachträglich damit zu rechtfertigen, daß man sich später mit dem siegreichen Kriege und seinen Früchten einverstanden erklärte. Denn einerseits hängt der militärische Erfolg vielfach vom Zufall ab, wäre also das Unternehmen unglücklich ausgefallen, so hätte man es gewiß niemals verziehen. Darf man aber die Beurteilung eines staatsrechtlichen Aktes von später eintretenden und oft zufälligen, d. h. nicht vorauszusehenden Umständen abhängen lassen?

Andererseits kann man doch immer in der Zukunft, nachdem ein Krieg schon längst vorbei ist, immer irgend etwas, gar

nicht Vorauszusehendes, hervorsuchen, was beweisen soll, der Krieg habe dennoch diese oder jene gute Folge gehabt. Und so käme es dann auf endlose Streitigkeiten darüber hinaus, ob der Krieg wirklich zweckmäßig war oder nicht, ganz abgesehen von der Verantwortlichkeit seines Urhebers. Aber — ohne allen Streit und ohne alle Meinungsverschiedenheit — schließlich werden doch alle zugeben müssen, daß Menschen von den Gewalten des eigenen Staates zum Tode oder zur Verkrüppelung gezwungen worden waren, ohne daß sie irgend ein Verbrechen begangen hatten!

Man muß eben die Berechtigung und den moralischen Wert einer Aktion, also auch einer staatlichen Aktion, im Moment ihrer Vollführung beurteilen, nicht aber das Urteil suspendieren, bis in der Zukunft etwa irgend ein Ereignis eingetreten oder nicht eingetreten ist. Und endlich:

Wer hat denn den im Kriege gesund gebliebenen oder später lebenden Staatsbürgern das Mandat gegeben, im Namen der Getöteten oder Erkrankten zu sprechen und sich ein entscheidendes Urteil über eine Kriegsunternehmung anzumaßen? Also z. B. den preußischen Krieg von 1866 für gerechtfertigt auszugeben, weil jene mit seinem Erfolg zufrieden sind? Man müßte zum mindesten die Opfer der Schlachten und des ganzen Krieges fragen oder fragen können, genauer und richtiger: Man hätte die Krieger vorher fragen müssen, ob sie ihre physische Integrität riskieren wollen oder nicht — d. h. wir sind beim Programm der Freiwilligkeit angekommen.

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Es ist fast unbegreiflich, daß nicht jedermann die unendliche Mißachtung seiner Individualität empfindet, die darin liegt, daß man ihn zur Gefahr des Verlustes seines Lebens oder seiner Gesundheit beordern kann. Ob das nun vermöge der früher bestandenen Konskription oder vermöge der allgemeinen Wehrpflicht geschieht, ist hier gleichgültig.

Andererseits heißt es: »Die Völker wollen keinen Krieg«, und nach allen Erfahrungen wollen auch die Soldaten — vor ihrer Verhetzung — keinen Krieg. Noch während sie einander als Gegner gegenüberstehen, verkehren sie oft ganz gutmütig, ohne Haß, miteinander und auch die Gefangenen werden meist freundlich

behandelt. Und doch töten die Menschen einander — allerdings auf Befehl. Wie ist diese Absurdität zu erklären? Einfach dadurch, daß in unseren Staatseinrichtungen ein Fehler vorhanden ist.

Die Obrigkeit entscheidet, anstatt derjenigen, die es am meisten angeht, d. h. anstatt der Soldaten.

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Mit welchen Augen die meisten Feldherren menschliche Existenzen betrachten und wie sie sie schätzen, zeigen einige ihrer Aussprüche sehr deutlich. Der »große« Condé meinte nach einer blutigen Schlacht: »Eine einzige Nacht in Paris macht alle Verluste wett«. Friedrich der Große, auf der Terrasse des Schlosses zu Sanssouci mit einem französischen Freunde promenierend, sagte zu ihm: »Diese schöne Oktobernacht wird meinem Preußen wieder recht viele Soldaten verschaffen«, und in der Schlacht bei Kolin rief er den Soldaten zu, die nicht mehr vorwärts wollten: »Ihr Hunde, wollt Ihr denn ewig leben?« Und Napoleon sagte im Jahre 1813 zu Metternich: »Was liegt mir an einer Million Soldaten? Die Französinnen werden immer genug neue gebären«.

Und wie diese Aussprüche, so sind zumeist auch die unausgesprochenen Gedanken jener beschaffen, die über Kriegsunternehmungen zu entscheiden haben, also auch der Politiker und Diplomaten, aber ihnen allen ist, wenn sie nicht aus persönlichen Gründen Krieg beschließen, kein Vorwurf zu machen, denn nur die Institutionen tragen an dieser maßlosen Menschenverachtung die Schuld, sie sind es, die ihnen ermöglichen, mit ruhigem Gewissen mit menschlichen Existenzen wie mit Schachfiguren zu rechnen.

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Erst mit der Anerkennung des Grundsatzes der Inkommensurabilität einer menschlichen Existenz gegenüber allem anderen, wird die menschliche Gesellschaft aus dem heutigen Zustand der Barberei in den der Gesittung eintreten. In der menschlichen Gesellschaft, d. i. in der mitsammenlebenden Anzahl von Individuen, deren Solidaritätsgefühl bis zu einem gewissen Grade ja unbestritten ist, kann jedoch von einer Unbedingtheit und

Schrankenlosigkeit der Solidarität keine Rede sein, und selbst der Hingebendste weiß und fühlt es, daß es Grenzen geben muß, über die hinaus jedes Individuum das Recht haben muß, taub zu sein, wenn ihn sogenannte gesellschaftliche Pflichten rufen. Und dieser Grenzzustand muß eben dahin präzisiert werden: daß die Haltung und die physische Integrität irgend eines, auch des nutzlosesten und unscheinbarsten — nur nicht lebensgefährlichen — Individuums zu irgend welchen Anforderungen und Zwecken des Staates oder der Gesellschaft, zu allen ihren Geboten, Maximen oder Idealen in einem vollständig inkommensurablen, weitaus überlegenen Verhältnisse steht — ausgenommen, diese Integrität wird freiwillig hingegeben. Wenn jemand das Opfer seines Lebens für den Staat oder die Gesellschaft für gering hält, so beweist das wohl eine große moralische Gesinnung, aber er unterwirft sich doch im Grunde nur dem von ihm selbst empfundenen und aufgestellten Gebote oder Ideale. Wenn aber andere, und seien es noch so viele Millionen an Zahl, verlangen, jemand, der diese Ansicht — im allgemeinen oder wenigstens in einem bestimmten Falle — nicht hat, solle sich der Gesellschaft dennoch opfern und wenn sie ihn also zwingen, das Opfer ihrer Ansicht, ihrer Auffassung zu werden, so tun sie genau dasselbe, was die Inquisition getan hat. Denn Tod oder Tortur, den religiösen Ansichten anderer zu lieb, ist moralisch in nichts verschieden vom Tod oder schmerzhafter Verkrüppelung im Kriege, wenn der Betroffene nicht freiwillig in die Schlacht ging.

Man soll jedes Individuum, wenn man es auch nicht liebt, so doch in seiner physischen Existenz aufs äußerste respektieren.

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So häufig hört man sagen: »Das Wohl der Gesamtheit steht über dem Wohle des einzelnen, das des Vaterlandes über dem des Einzelindividuums« und das hört sich gewiß sehr gut an. Allein was kann man nicht alles unter Wohl der Gesamtheit verstehen! Wenn es sich um die Verteidigung des Staates gegen Bedrohung seiner notwendigsten Lebensbedingungen handelt, so ist jener Satz allerdings darum richtig, weil dann das Wohl nämlich die Erhaltung der Existenz des Individuums und der Gesamtheit identisch sind, man mag also gerne sein Leben für

den Staat riskieren. Allein, wenn es sich z. B. um Ehre oder Würde des Staates, um Verwirklichung nationaler Bestrebungen, um Handelsvorteile ‹sekundärer Natur› handelt, sind diese Arten von »Wohl« des Vaterlandes wirklich dem Wohle des einzelnen, d. h. dem Leben desselben, überlegen? Welche Ungeheuerlichkeit, das zu glauben!

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So selbstverständlich, mir wenigstens, diese Zurückweisung zu sein scheint, so kann doch nicht geleugnet werden, daß sie eventuell erst in einer, vielleicht doch nahen Zukunft, bei der Majorität der Menschen zur Geltung kommen wird. Vor noch nicht langer Zeit waren selbst die edelsten Männer solchen Grundansichten verschlossen und ich will hiezu einige Beispiele anführen.

Es ist gewiß von nicht geringem Interesse zu erfahren, daß J. St. Mill für die allgemeine Wehrpflicht eintrat. In seinem Essay »Über die Freiheit« hatte Mill die Grundsätze der allgemeinen Wehrpflicht niedergelegt, und — wie ich einem Eingesendet in der »Times« ‹vom 27. August 1915› entnehme — in seinen während des deutsch-französischen Krieges geschriebenen Briefen darauf bestanden, daß England für alle tauglichen Männer das Schweizer Miliz-System einführen sollte. Es heißt dort weiter, es sei auch notorisch, daß in der ganzen Weltgeschichte kein Beispiel zu finden ist, daß eine Nation, die die allgemeine Wehrpflicht einführte, dadurch weniger frei im sozialen oder politischen Leben geworden ist als unter dem freiwilligen Dienste. Selbst der moderne Preuße genieße eine viel größere Freiheit jeder Art als seine Ahnen vor der Einführung der Wehrpflicht und das allgemeine Wahlrecht für den Reichstag sei eine direkte Konsequenz der vorher bestandenen allgemeinen Wehrpflicht.

Hiezu möchte ich bemerken, daß eben Mill, wie fast alle anderen politischen Schriftsteller und politischen Praktiker — mit Ausnahme derer im Jahre 1789 — die Empfindung für das Furchtbare, das im erzwungenen Kriegsdienst liegt, eben nicht besaßen und als der äußerste Fortschritt in diesem Gebiet erschien ihnen ein Milizsystem, es ist ja noch heute so und selbst Jaurès kam in seinem letzten Werke »Das Heer« nicht

darüber hinaus. Was aber die angebliche Tatsache betrifft, daß die Nationen trotz der Wehrpflicht frei sein können, ist die Wahrheit die, daß sie in der und jener Beziehung frei sein können, aber gerade bezüglich des Kriegsdienstes in der schlimmsten Sklaverei leben. Denn was für einen Wert können noch so viele freie Einzelinstitutionen besitzen, wenn man die Freiheit, Herr seines Lebens und seiner Gesundheit zu sein, entbehren muß?

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Ein anderes Beispiel ist folgendes, in dem kein Geringerer als Abraham Lincoln eine Rolle spielt:

In der englischen Zeitschrift »The Spectator« vom 14. August 1915 wurde für die Einführung der allgemeinen Wehrpflicht in England Propaganda gemacht und gesagt, daß der Dienstzwang nur eine Ergänzung des schon bestehenden Freiwilligensystems für den Fall der absoluten Notwendigkeit sei. Das wäre auch Lincolns Ansicht gewesen.

Lincoln sagte nämlich zu Beginn des Bürgerkrieges:

»Die territoriale Unversehrbarkeit des Landes kann ohne weitere Aushebung und Unterhaltung von Armeen nicht aufrecht erhalten werden. Eine Armee kann ohne Soldaten nicht existieren. Soldaten sind nur freiwillig oder unfreiwillig zu haben. Wir bekommen keine Freiwilligen mehr und sie unfreiwillig bekommen, heißt: Aushebung, Konskription. Wenn ihr die Tatsache bestreitet und wenn ihr behauptet, daß Leute freiwillig noch in genügender Zahl zu haben sind, so beweiset diese Behauptung, indem ihr selbst freiwillig in genügender Zahl eintretet und ich werde gerne die Zwangsaushebung fallen lassen. Doch, wenn auch nicht eine genügende Zahl, so doch einzelne von euch freiwillig eintreten wollen, so wird jeder dieser einzelnen für seine Person den Schrecken der Zwangsaushebung ausweichen und dabei nur das tun, was jeder von mindestens einer Million seiner männlichen Mitbrüder bereits getan hat. Sie haben ihre Arbeit und ihr Blut ebenso für euch hingegeben, wie für sich selbst. Soll denn all das lieber verloren sein, als daß auch ihr euren Teil auf euch nehmt?«

»Ich sage nicht, daß alle, welche den Kriegsdienst vermeiden wollen, unpatriotisch sind, aber ich glaube, daß jeder Patriot

bereitwillig es auf ein Gesetz ankommen lassen sollte, daß mit großer Sorgfalt gemacht ist, um volle Gerechtigkeit zu sichern. Der Grundsatz der Zwangsaushebung, einfach ein unfreiwilliger oder erzwungener Dienst, ist nicht neu. Er ist in allen Zeitaltern geübt worden... Worin liegt jetzt seine besondere Härte? Sollen wir vor den notwendigen Mitteln zurückschrecken, unsere freie Verwaltung aufrechtzuerhalten, Mittel, welche unsere Großväter anwendeten, um die freie Verwaltung zu errichten, oder die schon unsere Väter einmal anwandten, um sie aufrecht zu erhalten? Sind wir entartet, ist unserer Rasse die Männlichkeit abhanden gekommen?... Mit diesen Ansichten und auf diese Grundsätze gestützt, fühle ich mich gezwungen, euch zu sagen, daß es mein Ziel ist, das Zwangsaushebungsgesetz gewissenhaft ausgeübt zu sehen.«

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So sehr man sich aber über den Sieg der Nordstaaten über die sklavenhaltenden Südstaaten freuen mag, so ist doch durch das Inslebentreten des Zwangsaushebungsgesetzes ein Gewaltakt gegen alle jene Individuen begangen worden, die den Krieg sonst freiwillig nicht mitgemacht hätten. Da sich eben nicht genug Freiwillige gemeldet hatten, so beweist das nur, daß nicht genug Männer in den Nordstaaten vorhanden waren, die die kriegsmäßige Bewältigung der Südstaaten zum Zwecke der Beseitigung der Sklaverei für so notwendig und wünschenswert hielten, um dafür Leben und Gesundheit zu riskieren. Ich weiß sehr wohl, daß man heute nur an das humane Resultat jenes Bürgerkrieges denkt, aber ich muß hier das so oft Gesagte ⟨und im Buche »Das Individuum« eingehend Erörterte⟩ wiederholen: Kein noch so edles Ziel, keine noch so große Idee darf es erlauben, Menschen gewaltsam zum Kriegsdienst zu treiben. Man stelle sich doch vor, es werde seitens der Obrigkeit oder eines Parlaments oder der Volksmassen beabsichtigt, das heilige Grab zu erobern und vermöge der Wehrpflicht hunderttausende Menschen in einen solchen Krieg hineinzuzwingen — gewiß werden, wenigstens alle Freigeister gegen die Institution der Wehrpflicht auf das lebhafteste protestieren, dieselben Menschen, die Lincolns Zwangsgesetz vollkommen in Ordnung finden. Nur einen Moment in der neueren Zeit gab es, wo

nicht nur ein einzelner Mann, sondern eine ganze Volksvertretung die moralische Höhe erreichte, eine Wehrpflicht zu perhorreszieren. Das geschah allerdings in der Blütezeit der Menschheit.

Als es sich nämlich im Jahre 1789 um Verstärkung der französischen Armee handelte, da lehnte die Nationalversammlung fast einstimmig jede Konskription als despotisch ab und erklärte die freiwillige Einreihung für die einzige Rekrutierungsweise, die dem Wesen eines freien Volkes entspreche.

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Die freiwillige Einreihung in das Kriegsheer in Form der Werbung hatten wir bekanntlich in Europa, bevor seit der französischen Revolution und namentlich seit Napoleon die Konskription eingeführt wurde und wenn man von manchen Übelständen absieht, die noch teils in der Institution selbst und besonders in den damaligen Sitten, der herrschenden Unbildung und dem weniger ausgebildeten Völkerrecht ihre Wurzel hatten, so kann man sagen: wir haben mit Einführung der allgemeinen Wehrpflicht einen bedeutenden Rückschritt gemacht.

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Sowohl die allgemeine Aushebung in Frankreich zur Zeit der großen Revolution als die allgemeine Wehrpflicht in Preußen zur Zeit der Napoleonischen Fremdherrschaft entstanden in einem Moment, wo die Gefahr für die Erhaltung des ganzen Staates und seiner Unabhängigkeit vom Auslande eine sehr große war.

In Frankreich war dennoch wenig Neigung zum freiwilligen Kriegsdienst vorhanden, sogar der Aufruf von 1792: »La patrie en danger« brachte nicht Leute genug herein und der Konvent beschloß daher 1793 eine gezwungene Rekrutierung, die »levée en masse«, die alle jungen Männer vom 18. bis 25. Lebensjahr für die Dauer des Krieges zu den Waffen rief[1]. Das war der Moment der Entstehung der allgemeinen Wehrpflicht.

Selbst mit Berücksichtigung der damaligen außerordentlichen Umstände muß man dennoch den Konventbeschluß für einen ungerechten und gewalttätigen Schritt erklären. Denn vor allem waren ganze Provinzen, wie die Vendée, royalistisch, also anti-

[1] Siehe Max Jähns »Heeresverfassungen und Völkerleben« (1885).

revolutionär gesinnt und in den anderen Gebieten war offenbar ebenfalls die Überzeugung von der Notwendigkeit, in das Feldheer einzutreten, nicht so allgemein, um genug Freiwillige zu bringen. Und so sehr man für die Revolution eingenommen und selbst begeistert sein mag, — wie es zum Beispiel der Verfasser dieser Schrift ist — so muß man ehrlicherweise doch sagen, daß der Dienstzwang eine Ungerechtigkeit involvierte gegen alle jene Staatsbürger, die den Sieg der Koalition wünschten oder die überhaupt ihr Leben nicht einsetzen wollten, geschehe was da wolle. Vielleicht hätte ein abermaliger Aufruf an Freiwillige oder eine stärkere Agitation zum gewünschten Ziele geführt? Sei es aber wie immer, Ungerechtigkeit bleibt Ungerechtigkeit.

Der Wohlfahrtsausschuß sagte zur Begründung des Aufgebotes in Masse: »Jeder Bürger ist Soldat und verpflichtet, all seine Kraft, sein Eigentum und sein Leben zur Verteidigung des Vaterlandes zu verpfänden«, und dieser Gedanke liegt auch der allgemeinen Wehrpflicht von 1807 in Preußen zugrunde. Bei den damaligen, ganz außerordentlichen Umständen war — wie gesagt — ein Zwangsgesetz, wenn auch nicht gerecht, so doch begreiflich. Es wurde aber seit jener Zeit unserem ganzen Wehrsystem zugrunde gelegt und es ist nicht zu bezweifeln, daß im letzten Grunde die eben zitierte Motivierung des französischen Zwangsgesetzes direkt ein Ausfluß der Ansichten in Rousseaus »Gesellschaftsvertrag« waren und es ist wahrscheinlich, daß auch die im Jahre 1807 führenden Männer in Preußen von diesen patriotischen Ideen Rousseaus inspiriert waren.

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Rousseau war eben ganz erfüllt von den Erinnerungen an die antiken Republiken, namentlich an Sparta. Da es sich ihm in erster Linie um die Befreiung von dem damals herrschenden Absolutismus und die politische Gleichheit aller Staatsbürger handelte, so suchte er nach Beispielen, bei denen die Freiheit und Würde derselben bereits gewahrt worden waren, und da beging er nun den Fehler, diese Beispiele nicht nur in der angestrebten, sondern in jeder Beziehung als nachahmenswert hinzustellen. Auf diese Weise kam Rousseau dazu, die Allmacht der Staatsgewalt

zu verlangen und zugleich Patriotismus als höchstes menschliches Gefühl hinzustellen.

Ein derartiger Ideenkreis konnte wohl die Alten beherrschen, denn da sie von allen anderen Völkern durch ihre Staatsauffassung und nationalen Dünkel wie durch einen tiefen Graben abgegrenzt waren, so blieben ihre sozialen Empfindungen in dieser Beschränktheit stecken. Nur einzelne große Geister Griechenlands, namentlich die Stoiker, sowie einige große römische Kaiser durchbrachen bereits diese Schranken und in unserer Zeit ist gar kein Anlaß vorhanden, die antike Staatsauffassung überhaupt noch hochzuhalten.

Es ist weder theoretisch notwendig, noch praktisch zweckmäßig, zu verlangen, daß der Mensch im Staatsleben aufgehen solle.

Wir wollen überhaupt keine Ausschließlichkeiten statuieren und umsoweniger sie uns oder anderen aufdrängen. Es ist kulturelle Rückständigkeit zu glauben, daß nur das religiöse Leben das wahre und höchste sei und daß sich daher seinen Anforderungen alles andere unterordnen müsse. Ebensowenig ist es richtig, eine volle Hingabe an die eigene Nationalität oder an Kunst oder Wissenschaft als Gipfel menschlicher Daseinsweise anzuerkennen, und nackte Tyrannei wäre es, irgendwelche Bestimmungen zu treffen, die solche Ansprüche auf Präponderanz, zum Beispiel ähnlich wie die allgemeine Wehrpflicht im Gebiet des staatlichen Lebens in Konsequenz unserer übertriebenen Staatsveneration, zum praktischen Ausdruck bringen würden.

Wir sehen, wenn wir Gerechtigkeitsgefühl besitzen, mit Sympathie und auch philosophischem Interesse, wie vielfach und verschiedenartig die Wurzeln sind, mit denen jeder einzelne Mensch in dem Boden der gesamten Menschheit feststeht: wie die Fäden des Interesses und der Anhänglichkeit und des Wohlwollens von Individuum zu Individuum kreuz und quer, nach so vielen Richtungen, mitunter über ferne Länder und Erdteile hinweglaufen. Mit Wärme, ja oft mit tiefer Empfindung leben die einen in der Idee ihres Volkstums oder der Geschichte ihres Staates, die anderen mit Millionen Individuen in ihrer gemeinsamen Religion über alle nationalen und staatlichen Grenzen hinweg, ein »guter« Deutscher oder Slawe sympathisiert mit Deutschen oder Slawen in allen Reichen, ein »guter«

Katholik mit allen ebenso guten Katholiken der Erde und diese alle stehen, in bestimmter Beziehung, den in der Fremde Lebenden ihrer Art viel näher als den Tausenden und Millionen Angehörigen ihres eigenen Staates. Ebenso umschlingt ein unsichtbares Band die Gelehrten und Fachmänner aller Länder und so mancher Europäer liebt die konfutsianischen Literaten, Gelehrten und Mandarinen Chinas mehr als die meisten seiner Staatsgenossen. Ja, die meisten Menschen leben in mehreren dieser Empfindungskreisen zugleich, und was wir zu lassen und zu tun haben, ist nur dies:

Dies alles gelten zu lassen und soweit es an uns liegt, zu verhüten, daß diese Kreise sich gegenseitig stören, also zu bewirken, das Kollisionen so selten und so wenig heftig als möglich eintreten.

Das können wir erreichen, wenn wir strenge vermeiden, irgend einer dieser Empfindungsarten einen obersten Rang und eine oberste Macht zuzuweisen und also in dieser Beziehung unseren gewohnten Parteifanatismus spielen zu lassen.

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Nur eines muß unerschütterlich festgehalten werden:

Die Achtung jeder menschlichen unschädlichen Individualität, und ganz besonders die höchste Wertschätzung der physischen Integrität jedes Individuums, die — ausgenommen im Stande der Notwehr — sonst unter gar keinem Vorwande, mittelst gar keines Versuches einer Rechtfertigung durch Bezugnahme auf irgend welche Ideen, Ideale, Maximen oder Theorien, verletzt werden darf.

Endloses Unglück wird dadurch herbeigeführt, daß man diesen Grundsatz im Staatsrecht so vollständig ignoriert und es als selbstverständlich, ja als eine Art moralische Maxime ansieht, daß die Staatsregierungen selbst über Menschenleben, nach Gutdünken oder auf Grund ihrer politischen Erwägungen sollen verfügen können.

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Die unbegründete und der Gerechtigkeit widersprechende Ansicht ist heute noch eine allgemein geltende. Die Rechtsphilosophen gehen dabei von Staatstheorien aus, deren Willkür-

lichkeit ich in dem XI. Kapitel nachweisen werde. Die anderen, praktische Politiker wie die große Menge, halten an der Kompetenz der staatlichen Obrigkeit fest, weil sie an diese Tatsache eben gewohnt sind, überdies wird durch das immerwährende Lobpreisen der Hingabe des Lebens für den Staat nicht nur ein Recht desselben auf unser Leben sympatisch gemacht, sondern jeder Zweifel daran durch Einschmeichelung in das Gemüt ertötet. Viele sprechen für den erzwungenen Kriegsdienst nur darum, weil sie stets ängstlich um sich blicken und befürchten, irgend ein mächtiger Minister oder das Staatsoberhaupt oder ein Angeber würde es erfahren, wenn sie anders sprächen, was ihnen dann moralisch oder pekuniär schaden müßte. Auch hört man mitunter das Argument, wir müssen gegen den Staat, der uns schützt und sonst auch so vieles bietet, sogar — zum Beispiel wenn mein Programm der allgemeinen Nährpflicht durchgeführt würde — uns ernährt, dankbar sein, wir wollen daher alle unsere Kräfte, selbst unser Leben für ihn hingeben, wenn er es verlangt.

Nun weiß man schon aus dem privaten Leben, wie sehr Dankbarkeit an der Unbestimmtheit der Grenzen, wie weit sie gehen soll, leidet; aus all den eben angeführten Leistungen des Staates kann nicht mit der geringsten Beweiskraft deduziert werden, daß wir aus Dankbarkeit sein moralisches Recht auf unsere Lebensopferung anerkennen müssen. Und überhaupt: Gegen wen soll man denn eigentlich dankbar sein? Der Staat ist ja keine Person, noch weniger eine solche, die bloß aus Gnade und gutem Willen uns Wohltaten erweist — wenn auch mitunter von obrigkeitlichen Personen usurpatorisch in diesem Sinne gesprochen wird, was man sich unter Umständen leider gefallen lassen muß. Der Staat sind wir selbst, wir alle einzelnen Menschen zusammen, das ist die wahre Tatsache, um die niemand herumkommt. Wir sind insoweit vereinigt, sei es vermöge der Geburt, sei es auf andere Weise, um unser Leben in gewissen, ziemlich streng abgegrenzten Beziehungen und für sogenannte staatliche Aufgaben nach unserem Geschmacke einzurichten. Was soll also die Phrase von der Pflicht der Dankbarkeit bedeuten? Kann man denn gegen sich selbst dankbar sein?

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Nicht entfernt soll das Große geleugnet werden, das in dem Opfer des Lebens für den Staat liegt, vorausgesetzt, daß es freiwillig ‹und aus keinerlei persönlich egoistischen oder außerstaatlich wurzelnden Motiven› geschieht. Solche aus rein patriotischem Gefühl hervorgehende Taten sind aller Bewunderung wert, ohne daß wir aber darum das geringste Recht haben, anders Handelnde oder anders Gesinnte, besonders ohne nähere Kenntnis ihrer Motive zu tadeln.

Diese Andersdenkenden können ja wieder in anderen Beziehungen moralische Größe zeigen, es muß nicht bei allen Menschen, die wir hochzuachten Grund haben, gerade patriotische Größe sein; sie können vielleicht für wissenschaftliche Forschung oder für philantropische Zwecke irgend welcher Art ihr Leben wagen oder direkt und bewußt hingeben. Wer besitzt denn den absoluten Maßstab, um sagen zu können: »Diese Art von moralischer Größe ist die größte?«

Aber selbst dann, wenn jemand ohne alle Größe ist, gilt der Satz, daß man ihn niemals zum Lebensopfer zwingen darf — den Fall der Notwehr ausgenommen.

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Anders wäre es, wenn man nachweisen und jeden davon überzeugen könnte, daß die allgemeine Wehrpflicht eine staatliche Notwendigkeit sei und daß der Grad, die Intensität dieser Notwendigkeit ein so hoher sei, daß der einzelne gar keinen Grund haben könne, irgend etwas anderes für noch notwendiger und wichtiger zu halten, sei es sein eigenes Wohl, sei es irgend ein politisches oder kulturelles Ziel oder Ideal, das den obrigkeitlich geltenden Ansichten über Pflichten gegen den Staat widerspricht. Wenn man einen solchen Nachweis im gegebenen Falle zu führen imstande ist, so ist jede weitere Diskussion überflüssig und in letzter Instanz wäre damit das Prinzip der Freiwilligkeit in vollstem Maße verwirklicht; denn jeder folgt dann, wenn auch durch fremde Argumente vermittelt, doch in letztem Grunde seiner eigenen Überzeugung. Wenn das aber nicht gelingt, so hat der Wille zum Leben jedes einzelnen Individuums sein unbedingtes Vorrecht und niemand auf der Welt wird imstande sein, dieses Vorrecht überzeugend zu negieren.

Es wird zwar häufig der Satz zitiert: »Das Leben ist der Güter Höchstes nicht« und versucht, mit diesem Satz das Lebensopfer für den Staat sympathisch, ja begehrenswert zu machen. Es ist aber kein Grund vorhanden, nicht auch in vielen anderen, selbst in Fällen des Privatlebens mit dieser Lockidee sozusagen krebsen zu gehen und wenn sie wirken würde, könnte man sich auf sonderbare Konsequenzen für den menschlichen Verkehr gefaßt machen.

Nun, bisher hat jene Phrase doch noch keinen großen Erfolg aufzuweisen gehabt, und auch auf die Rekruten wenigstens innerlich, noch geringen Einfluß bewiesen. Aber rein sachlich gesprochen, es gibt ohne Zweifel Fälle, in denen der Mensch dieser Phrase gemäß handelt, ohne daß sie ihm erst vorgehalten zu werden braucht, er fühlt ihre Richtigkeit, ja ihre Notwendigkeit. Wenn man das Leben seiner Mutter oder seines Kindes durch den Angriff eines Menschen oder durch Feuersgefahr bedroht sieht, so wird sich kaum jemand erst besinnen, sein Leben zu ihrer Rettung zu wagen.

Es gibt aber viel mehr Fälle, in denen man nach dieser Maxime nicht handelt und nicht handeln will, selbst wenn man noch so ernstlich — vom physischen Zwang abgesehen — dazu aufgefordert wird und viel hängt dabei von der Individualität ab, manche ist zugänglicher, manche härter. Wegen unglücklicher Liebe nehmen sich noch heute, gerade wie zur Werterzeit, viele das Leben, diesen allen ist also das Leben der Güter Höchstes nicht.

Immer soll, das ist der Zweck unserer ganzen Digression, in jedem einzelnen Falle derjenige entscheiden, ob es das höchste Gut für ihn ist oder nicht, auf dessen Kosten es ginge. Also: Selbst das Leben ist der Güter Höchstes nicht — für denjenigen, der es freiwillig hergibt, hingegen ist es in der Tat das höchste Gut für den, dem man es wider seinem Willen nehmen will. Und das muß für den Kriegsdienst ebensogut gelten wie für alles andere.

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Je mehr man sich gegen das hier befürwortete Programm der Freiwilligkeit des Kriegsdienstes sträubt, desto mehr liefert man damit den Beweis — nicht nur für die Mißachtung menschlicher Existenzen — sondern auch dafür, daß man fürchtet, man könnte die Kriege, die man gerne führen möchte, ohne Zwangsdienst nicht führen, man gesteht also dadurch die Überzeugung ein, daß unsere Kriege fast immer gegen den Willen der Soldaten der allgemeinen Wehrpflicht unternommen wurden und weiterhin so unternommen werden sollen.

Und da dieses direkt nicht ausgesprochene Zugeständnis, daß in der Tat wie bisher Kriege geführt werden sollen, die nur von einer oder wenigen Personen beschlossen werden, deren Opfern aber hunderttausende Menschen gegen ihren Willen unterliegen, die tiefe Verderbnis des heutigen Wehrsystems und damit unserer Verfassung offenbart, so wird die Richtigkeit und Notwendigkeit meines Programms gerade von jenen am triftigsten bewiesen, die sich gegen dasselbe stemmen, und zwar eben dadurch, daß sie sich dagegen erklären.

VIII.

Behandlung der Wehrfrage auf Grundlage der Gerechtigkeit und Humanität.

Freiwilligkeit des Kriegsdienstes.

Um Mißverständnisse zu verhindern, hebe ich hervor, daß ich in meiner ganzen Deduktion über Heeresdienst und Wehrpflicht genau unterscheide zwischen Militärpflicht und Kriegsdienst- oder Wehrpflicht. Unter der ersteren verstehe ich bei den Kaderarmeen den Kasernendienst während so und so vieler, z. B. zweier oder dreier Jahre, und bei den Milizarmeen den vorgeschriebenen Besuch der Rekrutenschule behufs militärischer Ausbildung. Kriegsdienst- oder Wehrpflicht betrifft den Dienst als Wehrmann oder Soldat im Felde, wie es schon der Name besagt.

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Wenn es sich um die Bestimmung eines Staatsbürgers für den Kriegsdienst handelt und wir nach Gerechtigkeit und Humanität vorgehen wollen, so darf vor allem keine Rede davon sein, daß man eine solche Bestimmung einem abstrakten Gesetz überläßt, aber auch nicht irgend welchen einzelnen Personen oder einer Gruppe von Personen und ferner nicht irgend welcher Abstimmung, sei es von Vertretungskörpern, sei es des ganzen Volkes, und auch nicht der Abstimmung oder der Lösung unter den Militärpflichtigen als Korporation, sondern:

Nur jeder einzelne hat über die Bewahrung seiner physischen Integrität, d. i. hier darüber zu entschließen, ob er einen von der entscheidenden Staatsinstanz beabsichtigten Krieg mitmachen will oder nicht, niemand anderer. Also jeder für sich, niemand für ihn.

Es gibt also nur Freiwillige im Kriege.

Ein wichtiger Unterschied gegen die früheren Systeme von Freiwilligenanwerbungen ist aber in meinem Programm der, daß für die Friedenszeit die heutigen Methoden der allgemeinen Militärpflicht, sei es für eine Kader-, sei es für eine Milizarmee, aufrecht bleiben. Der Staat besitzt daher ein militärisch ausgebildetes, kriegstüchtiges, gesittetes Heer, geradeso wie heute.

Wird nun ein Krieg beabsichtigt, so wird sich durch Unterschrift jedes einzelnen Mitgliedes dieses Heeres zeigen, ob es die Situation als genügenden Anlaß erkennt, um im Feld seine Existenz oder seine Gesundheit zu riskieren. Wer das »Patriotismus« nennt, der soll seinen Patriotismus durch die Tat bewähren.

Will aber er oder sonst jemand andere zwingen, die nicht seiner Ansicht sind, ebenfalls mitzutun, so ist das nicht mehr Patriotismus, sondern faktisch das Gegenteil davon. Denn während er beabsichtigt und hofft, das Wohl des Staates zu sichern — welcher Staat doch kein abstrakter Begriff, sondern nichts anderes als eine Anzahl von Wesen aus Fleisch und Blut ist — schädigt er an Leib und Leben einen Teil dieser Anzahl, indem er sich anmaßt, seine Ansicht über Kriegsnotwendigkeiten als die absolut richtige auszugeben und darnach zu handeln. Er verletzt daher das Prinzip der Gleichberechtigung gerade in der allerwichtigsten Beziehung, nämlich hinsichtlich der physischen Existenz aller Menschen. Und er vindiziert ganz willkürlich dem Staat die Berechtigung, das Leben von Staatsbürgern auf die Ansicht irgend welcher Personen oder Personengruppen hin vernichten zu dürfen, und zwar solcher Staatsbürger, die doch gar keinen Anlaß zu einer Notwehr oder Schutzmaßregel gegen sie gegeben haben.

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Was die Forderung: »Entscheidung über Krieg und Frieden durch das Volk« betrifft, so muß ich dieselbe für gänzlich ungenügend erklären.

Zur Zeit, in der Rousseau seinen Gesellschaftsvertrag verfaßte, und noch einige Jahrzehnte nachher war es wohl am Platze, das »Volk« als ein einheitlich Ganzes dem Despoten oder

Monarchen überhaupt gegenüber zu stellen, dem »allgemeinen Volkswillen« alle Rechte zuzuschreiben und hievon das Heil des Staates ‹oder der »Gesellschaft«› zu erwarten. Wie kann man aber in unseren Tagen, ja schon seit der Schreckenszeit sich noch dieser Auffassung hingeben? Haben denn alle Mitglieder des Volkes einerlei Meinung, so daß das einzelne Individuum sicher sein kann, wenigstens in den fundamentalsten, in Existenzfragen, zur erwünschten Geltung zu kommen? Und andererseits: Ist es denn ausgemacht, daß immer die Majorität des Volkes, also zum Beispiel beim Referendum, besser als die Regierungsmänner das unbedingt Richtige und für den Staat Notwendige kennt? Wenn also eine Volksabstimmung einen Wert beanspruchen kann, so ist es doch gewiß nicht der der besseren politischen Einsicht. Nun nehme man noch die Tatsache hinzu, daß die Gesellschaft, also das »Volk«, besonders in unserer Zeit und namentlich in manchen Staaten in eine große Anzahl von Parteien oder Nationalitäten zersplittert ist, wo bleibt da der Wert der Volksabstimmung in einer so wichtigen Frage wie die Entscheidung über Krieg und Frieden?

Man könnte allerdings das eine sagen, daß es weniger demütigend ist, anstatt durch die Laune, den Affekt oder selbst durch die Erwägungen eines einzigen oder mehrerer Menschen ‹zum Beispiel eines Parlaments› durch die »Majestät« des ganzen Volkes in den Tod geschickt zu werden.

Dieser Trost ist beinahe etwas Reelles, kann aber niemandem genügen. Wenn man dem Schwerverwundeten sagen würde: »Ertrage deine Leiden und deine Verkrüppelung geduldig, du bist zwar gegen deinen Willen, aber ganz wie es sich gebührt zufolge einer Abstimmung des ganzen Volkes in den Krieg gegangen«, so dürfte ihm das wohl seinen Zustand nur wenig erleichtern und auch seine Wut über den an ihm verübten Zwang kaum stillen. Wenn man ihm aber sagen könnte: »Du bist ja freiwillig gegangen, nun mußt du die Folgen tragen, deren mögliches Eintreten du vorher kanntest«, so ist wohl Reue nicht ausgeschlossen, aber er wird wenigstens nicht noch den seelischen Schmerz der Empörung zu dulden haben, denn man ist nicht über seine eigenen Handlungen, sondern nur über die anderer empört.

Mitunter wurde die Ansicht ausgesprochen, unter anderen von Moltke, man möge es der »Volkserziehung« überlassen, einmal die »kriegerischen Gesinnungen auszurotten«. Nun hatte Moltke selbst sehr starke kriegerische Gesinnung, denn unter anderem drang er einige Jahre nach dem Kriege von 1870/71, als er das rasche Erstarken Frankreichs bemerkte, auf einen sofortigen neuen Krieg, damit es nicht zu gefährlich für Deutschland werde. Und Moltke hat doch ohne Zweifel eine mindestens ebenso gute Erziehung genossen wie jene, die er für das Volk der Zukunft anrät. Überdies erinnert dieser Ratschlag Moltkes sehr an die Art, Gesetzvorschläge in den Parlamenten dadurch zu beseitigen, daß man sie Kommissionen überweist, die mit der Beratung entweder nie anfangen oder nie zu Ende kommen. Jedenfalls müßte die Menschheit sehr lange warten, bis auf dem Wege der Volkserziehung ein pazifistisches Resultat erreicht würde.

Abgesehen davon, daß man an der Erreichung dieses Zieles nach dieser Methode sehr zweifeln kann, wäre es auch ein beschämendes Geständnis der Unzulänglichkeit aller unserer Staatsweisheit wie unserer Gesellschaftswissenschaft, wenn wir in Resignation zusehen müßten, wie bis in ferne Zukunft hin Menschen gerade durch unsere Institutionen gezwungen werden können, sich selbst und andere den größten physischen Qualen oder dem Verlust des Lebens auszusetzen.

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Die großen Volksmassen wollen im Grunde nur in den allerseltensten Fällen aus sich selbst heraus den Krieg. Aber sie sind leicht zu überreden und zu überhitzen, diese Überredungen und Aufpeitschungen sonst friedliebender Menschen gehen von nur wenigen Personen aus, von Mitgliedern regierender Familien, von Priestern, Chauvinisten, Journalisten, von Militärs, Industriellen und Politikern, das sind die Macher der nachher sogenannten Volksabstimmung und ihre Zahl braucht selbst in einem großen Staat nur sehr klein zu sein. Hundert Personen im ganzen genügen, um Hunderttausenden Kriegsbegeisterung zu suggerieren, und das Merkwürdige ist dabei eigentlich nur das schwache Gedächtnis der Menschen für die Leiden und Greuel eines Krieges, von denen sie doch so oft gehört und gelesen

haben, aber der Leichtsinn und der schlummernde Trieb nach Gewalttätigkeit in den Menschen erklären diese furchtbare Tatsache zur genüge.

Das Prinzip der Freiwilligkeit wird wohl nicht imstande sein, solche Leichtsinns- oder Brutalitätsanfälle gänzlich zu verhüten, aber es wird das Gute haben, daß jeder, der sich zum Kriegsdienst bereit erklärt, nur das Opfer seines eigenen Leichtsinns oder seines eigenen Willens, seiner Urteilskraft sein wird.

Heute aber kann es vorkommen, daß eine allgemeine kriegerische Volksstimme gar nicht vorhanden ist oder daß sie künstlich erzeugt wird oder mitunter, jedoch höchst selten, spontan auftritt, auf die sich dann die kriegwünschenden Politiker stützen, und die Folge ist jedenfalls die, daß die Militärpflichtigen — sei es einer Kader- oder Milizarmee — zugleich Kriegsdienstpflichtige werden, weil sie eben der heutigen Wehrpflicht unterworfen sind. Und das Furchtbare ist darin gelegen, daß andere es sein können, beziehungsweise heute sind, die den Krieg wünschen, und andere, die dessen Opfer werden müssen.

Gemäß meinem Programm aber wird niemandem ein Zwang angetan und, der Gerechtigkeit entsprechend, jeder Ansicht ermöglicht, sich in der Wirklichkeit zu manifestieren. Es wird wohl stets Leute, ja ganze Völker geben, die für Kriege leicht entflammt werden: mögen sie die Folgen ihrer Affekte, ihrer mitunter schönen patriotischen Gefühle tragen! In Japan zum Beispiel begingen viele Mütter Selbstmord, weil ihre Söhne nicht in den Krieg gegen Rußland mitziehen durften, ein Aufruf zum freiwilligen Eintritt in das Heer, d. h. die Anwendung meines Programms, hätte daher in Japan an der tatsächlichen Kriegführung gar nichts geändert, es hätten sich Militärpflichtige genug gemeldet, ja ihre Zahl wäre wahrscheinlich ebenso groß wie die der heute Kriegsdienstpflichtigen gewesen.

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Um einer falschen Auffassung meines Wehrprogramms zu begegnen, hebe ich ausdrücklich nochmals hervor, daß sich dasselbe nur auf den Dienst im Kriege, aber nicht auf die Militärpflicht im Frieden bezieht. Es wurde schon angegeben, daß schon darum ein Heer — Kader- oder Milizheer — vorhanden sein soll, um einen Krieg ernstlich und rasch führen zu können, falls

ein solcher für notwendig angesehen wird und wenn zugleich sich genug Freiwillige aus diesem Heer zum Kriegsdienst melden. Näher auf die Konstruktion und auf die eventuellen weiteren Vorteile des Soldatendienstes einzugehen, ist hier gänzlich überflüssig, und ich habe gar nichts dagegen, daß man — wie namentlich preußische Militärschriftsteller gerne hervorheben — den Militärdienst im Friedensstand nicht nur als eine Pflicht, sondern auch als eine »Wohltat« ansieht, »insofern, als das militärische Leben, wenn es von längerer Dauer ist, die Körperentwicklung befördert und weil das Heer die intellektuelle ⟨geistige und seelische Verfassung⟩ der Massen zu heben berufen ist«. Obwohl ich allerdings nicht glaube, daß das englische oder das amerikanische oder das Schweizervolk in der Körperentwicklung wie in der intellektuellen Verfassung hinter der des preußischen zurücksteht, wo doch die Schweizer ⟨bisher⟩ als Miliz nur kurzen Kasernendienst und die beiden anderen bisher nur geworbene Truppen in relativ geringer Anzahl kannten, und andererseits viele, unter anderem auch der preußische Oberhofprediger Brömel, behaupten, der Kasernendienst der Kaderarmee sei die »Schule aller Laster«. Da ich die Institution der Militärpflicht, d. h. der militärischen Ausbildung für eventuell zu führende Kriege beibehalte, so ist hiedurch im Verein mit dem Prinzip der Freiwilligkeit des Kriegsdienstes im Grunde der an sich richtige Gedanke in vollkommener Weise realisiert, daß der Staat sich an seine eigenen Bürger und nicht an ein Miets- oder an ein Söldnerheer wendet. Hiedurch kann überhaupt erst der wirkliche Wille der Staatsbürger, die das Hauptrisiko tragen, sei es bei einem Verteidigungs-, sei es bei einem Angriffskrieg, zum Ausdruck kommen. Er kann es aber nur unter der Voraussetzung, daß das in den Krieg ziehende Heer kein erzwungenes ist. Heute jedoch werden die Mitglieder des Kriegsheeres in der Tat von einer oder mehreren Personen zum Kriegsdienst zum allergrößten Teil gezwungen und die ganze Institution erweist sich dadurch sogar als viel ungerechter als jene der Anwerbung von doch jedenfalls relativ freiwilligen Söldnern, d. h. solchen Leuten, die den Solddienst einem ungenügenden bürgerlichen Erwerb vorziehen. Und auch die schon von Macchiavelli angeführte größere Leistungsfähigkeit von Soldaten der allgemeinen Wehrpflicht gegenüber Söldnerheeren tritt infolge des Zwanges

nicht so voll hervor, wie man es erhofft, ausgenommen der Krieg sei so populär, daß auch bei Freiwilligkeit des Kriegsdienstes das Bürgerheer sich ganz oder nahezu komplett aus der Friedensarmee der Bürger zusammensetzen würde, d. h. nicht geringer als das von Wehrpflichtigen wäre. Seit Macchiavelli den Gedanken der allgemeinen Wehrpflicht der modernen Welt verkündete und ihn namentlich dadurch begründete, daß in den punischen Kriegen das Übergewicht der römischen Bürgerheere sich über das punische Söldnertum deutlich offenbarte, wird immer wieder auf die Wehrlosigkeit der gemieteten Truppen gegenüber Bürgerheeren hingewiesen, es wird die Geschichte Karthagos, der griechischen Städte, der sizilischen Tyrannen angeführt, die alle Soldheere hatten und zugrunde gingen, während z. B. Rom ursprünglich jedes Söldnerelement aus seinem Heere ausschloß. Hiebei wird aber gewöhnlich vergessen, zu unterscheiden, ob die Söldner Angehörige fremder Staaten oder des eigenen Staates waren. Bei Macchiavelli war der Zweck seines Vorschlags der, Italien einig zu machen und es von den Ausländern zu befreien, also ein politischer, dabei setzte er ohne Zweifel allgemeine Zustimmung der Italiener zu seiner Tendenz voraus, ob aber der Wehrzwang gerecht gegen den einzelnen sei, das zu untersuchen lag ihm wie seiner Zeit und liegt auch noch unserer Zeit ganz ferne.

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Andererseits muß es offen gesagt werden, daß das System der Anwerbung, das in der Zeit der Renaissance gebräuchlich war, gar nicht so schlimm war, ja, gegenüber der allgemeinen Wehrpflicht hatte es sogar einen großen Vorzug, nicht in militärischer, aber in menschlicher Beziehung. Denn damals konnten sich die Kriegsheere nicht so massenhaft entwickeln, sie waren, wie schon Macchiavelli hervorhebt, käuflich und unverläßlich, so daß es oft gar nicht zu ernsten Schlachten kam und, was die Hauptsache ist, Dolch und Gift vertraten teilweise die Stelle der Schwerter und Kanonen und sie arbeiteten nur unter den sogenannten Spitzen des Staates, d. h. erstochen oder vergiftet zu werden traf nicht die Leute aus dem Volk, die, wie fast immer, ganz andere Sorgen hatten als Politik zu treiben. Sondern darin bestand eben das Geschäftsrisiko jener, die aus rastlosem Ehrgeiz

herrschen und erobern wollten, also der Mitglieder der aristokratischen Familien und der Kondottieri. Wenn derlei heute unter den Politikern Mode wäre, gäbe es weniger Kriegsbefürchtungen und unvergleichlich weniger Gefallene und Verwundete, ganz unabhängig davon, welches Wehrsystem wir eingeführt hätten. Jetzt sitzen die Politiker unbehelligt in gedeckter Stellung und rücken die Hunderttausende Wehrpflichtiger, wie ich schon oben sagte, auf Schlachtfeldern herum, als ob es — trotz aller konstitutionellen und republikanischen Verfassungen — Schachfiguren wären. Aber auch dann, wenn diejenigen, die über Krieg und Frieden entscheiden, ebenso exponiert wären wie die Wehrpflichtigen, so würde das die Barbarei des heutigen Wehrsystems nicht vermindern, mögen sie doch untereinander zanken, intriguieren, noch so guten Willens sein, ihrem Staat wirklich zu nützen, für große Zwecke zu wirken glauben, und zuletzt auch untereinander raufen, aber andere dürfen sie gegen deren Willen nicht in den Tod schicken.

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Wollen wir nun in der Kriegsfrage das allgemeine Wohl der Menschen im Gegensatz zu den heutigen furchtbaren Gesetzgebungen sichern, so müssen wir die bisherigen Ansichten vom Staate dahin korrigieren, daß er, wenn es sich nicht um den Schutz der nackten Existenz der Staatsangehörigen handelt, uns durch selbst noch so siegreiche Feldzüge niemals so viel Gutes erweisen kann, als er uns durch Beraubung unseres Lebens oder unserer Gesundheit, also unserer physischen Integrität, im Kriegsfalle Böses tut. Er, das heißt irgend welche Funktionäre oder Repräsentanten oder Gruppen der in bestimmten geographischen Grenzen lebenden Staatsbürger, soll von uns, die wir ja den Staat bilden, niemals die Vollmacht, sei es in welcher Form immer, bekommen, irgend jemanden zum Kriegsdienst zu zwingen.

Es ist daher nur eine Frage der höchsten Gerechtigkeit: nicht wie heute gerade nur die Ansicht der Kriegslustigen oder -Befürworter als oberste, entscheidende staatliche Instanz gelten zu lassen, andererseits aber: auch nicht die Ansicht der Kriegsunlustigen und Kriegsgegner, sondern nur jene des einzelnen Soldaten.

Vom Heerwesen und vom Kriegsdienst in dem gesitteten Zukunftsstaat.

In einem gesitteten Staate, in dessen sämtlichen Institutionen demnach die höchste Wertschätzung einer jeden menschlichen Existenz zu Tage treten und berücksichtigt werden muß, darf also niemand gezwungen werden, sein Leben oder seine Gesundheit in einem Kriege zu opfern oder zu riskieren. Es werden daher im Kriegsfalle nur jene zu den Waffen greifen, die, und zwar in dem eben vorhandenen Falle, freiwillig sich dazu bereit erklären, ihre physische Existenz oder ihre Gesundheit für die Erreichung irgend eines Zieles zu opfern, das ohne Gewalt gegen Angehörige anderer Völker oder Staaten nicht zu erreichen wäre.

Es hat also die faktische Verwendung der kriegstüchtigen Mannschaft durchaus nicht mehr kraft einer Ordre, käme sie von wem immer, einzutreten, sondern: Wenn die leitenden Personen einen Krieg für angezeigt halten, so ist ein Plebiszit zu veranstalten, nämlich ein Aufruf an das Volk, Männer und Frauen, zu richten, begleitet von einem deutlich abgefaßten, eventuell mit Auszügen aus politischen Aktenstücken belegten Exposé. Daraus soll, besonders nach öffentlichen Debatten darüber, jeder — halbwegs Intelligente — entnehmen können, wie die Dinge liegen, wie der bedrohliche Zustand entstanden sei und aus der im Exposé ebenfalls enthaltenen Darstellung soll man schließen können, was für gute oder schlimme Folgen bei Führung und bei Unterlassung dieses beabsichtigten Krieges wahrscheinlich zu erwarten seien.

Dieser Schritt an das gesamte Volk soll nicht deswegen geschehen, weil es von der Politik mehr versteht als irgend jemand anderer, als etwa die führenden Politiker, sondern weil viele Konsequenzen eines Krieges das ganze Volk treffen, dieses also sein Einverständnis hiezu ausdrücklich erklären, also gehört werden muß. Wie wir jetzt schon wissen, genügt das aber noch lange nicht.

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Die Forderung, in dem Kriegsaufruf auch die mutmaßlichen schlimmen Folgen der beabsichtigten Kriegführung und besonders

einer eventuellen Niederlage — wenigstens nach allen wichtigeren Beziehungen — anzuführen, ist gewiß wohl begründet, denn es wäre eine gewissenlose Fopperei, den Staatsangehörigen und Wehrfähigen bloß das mitzuteilen, was für den speziell zu beabsichtigenden Krieg spricht, wenn nicht auch das, was gegen denselben spricht. Also nicht nur seine politischen und wirtschaftlichen Folgen, sondern auch das Unangenehme, Lästige und Schreckliche jedes Krieges überhaupt und der speziellen Unternehmung insbesondere, zum Beispiel infolge der klimatischen Verhältnisse oder der Terrainbeschaffenheit auf dem Kriegsschauplatze, dürfen nicht verschwiegen werden. Es muß daher unbedingt als Anhang zu dem Aufruf nebst den Kriegsartikeln, auch eine durch Illustrationen verdeutlichte Schilderung der Kriegsgreuel, der Strapazen, der schmerzhaften Verwundungen, der so oft geradezu sachlich notwendigen Grausamkeit, sowie der für die Kriegführung überflüssigen, aber den meisten Menschen innewohnenden Bestialitäten, denen der Krieger mitunter seitens der feindlichen Truppen oder der feindlichen Bevölkerung ausgesetzt ist, mitgegeben werden. Ähnlich wie das schon heute manchmal die Friedensgesellschaften in öffentlichen Vorträgen, jedoch mit verhältnismäßig geringem Nutzen tun, denn einerseits sind nur selten Soldaten in solchen Versammlungen anwesend, ja der Besuch ist ihnen meistens untersagt, andererseits verraucht der Eindruck solcher Darstellungen in Friedenszeiten längst, bis es zu einem Kriege kommt. Wenn aber Freiwilligkeit des Eintritts in das Kriegsheer herrscht und überdies die Folgen davon recht anschaulich vorgeführt werden, so wird auch die gewandteste Argumentation in jenem Aufruf selten oder nicht so leicht imstande sein, die Wehrfähigen zu blenden, oder selbst bei ehrlichster politischer Absicht der Redakteure jenes Aufrufs zu einem leichtfertigen und darum unheilvollen Entschluß zu veranlassen. Sollten sich jedoch die leitenden Politiker nicht dazu hergeben wollen, die Kraft ihrer Argumentation durch Beigabe jenes Anhangs zu schwächen, so muß die Gesellschaft selbst dafür sorgen, durch Verbreitung von Flugblättern, die die Kriegsgreuel darstellen, die Wehrfähigen vor ihrem freiwilligen Eintritt in das Kriegsheer gründlich aufzuklären. Und es sei nur noch hinzugefügt, daß eine derartige Aufklärung, sei es durch die Regierenden selbst, sei es aus der Gesellschaft heraus, jedenfalls

gegeben werden muß, also selbst dann, wenn es sich um eine noch so populäre, oder zu den anscheinend edelsten Zwecken beabsichtigte Kriegsunternehmung handeln sollte.

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Diese Staatsschrift ist, wie man wohl einsieht, eine Angelegenheit von höchster Bedeutung: ich halte die Ausarbeitung, und zwar die gewissenhafteste Ausarbeitung derselben für die wichtigste aller Aufgaben, denen sich eine Staatskanzlei überhaupt unterziehen kann. Man braucht nur daran zu denken, daß auf Grund eines solchen Dokuments jeder einzelne Wehrfähige, zusammen also Hunderttausende, ja Millionen von Menschen über sich selbst das Todesurteil oder die Todesbedrohung aussprechen sollen. Man muß daher hiebei eine noch weitaus größere Gewissenhaftigkeit üben, als bei Abfassung der Justizakte an das Staatsoberhaupt wegen der Begnadigung eines zum Tode verurteilten Verbrechers..

Ganz gewiß wird beinahe jeder Wehrfähige jenen Kriegsaufruf, der ja auch an ihn ergeht, mit nicht geringer Aufmerksamkeit lesen — falls er überhaupt zu lesen und wenigstens einigermaßen die öffentlichen Reden und Debatten darüber zu verstehen imstande ist. Ja, jeder Wehrkandidat wird wahrscheinlich in seinem ganzen Leben kein Schriftstück mit solcher Vorsicht studieren wie jenes Exposé, das ihm die Gründe darlegt, aus denen er sich entschließen soll, seine Existenz zu riskieren! Und er wird wohl, da es sich um so Großes handelt, gründlich nachdenken und eventuell sich auch Rat erholen, ob zum Beispiel die Phrase von der »Verteidigung des Vaterlandes« oder des »Schutzes von Haus und Hof«, die gewöhnlich in den Wehrordnungen angewendet wird, in dem speziellen Falle nicht eine bloße Verdunkelung der tatsächlichen Vorgänge, der Intriguen der Politiker oder der Angehörigen der Dynastien oder überspannter Parteiführer oder was überhaupt von den gegebenen Gründen für die beabsichtigte Kriegsunternehmung zu halten sei. Vergessen wir nicht, daß die allerwenigsten Kriege der ganzen Weltgeschichte wirklich zum Zwecke der Verteidigung des Vaterlandes unternommen wurden, auf der angegriffenen Seite war es wohl — und auch das nicht immer — oft eine wirkliche Verteidigung, sie wurde ihr aber eben durch die

Aggression der anderen Seite aufgenötigt. Und in sehr vielen Fällen war der Krieg auf beiden Seiten keine »Verteidigung«, höchstens konnte man davon sprechen, wer zuerst den Krieg erklärte oder in Feindesland einrückte und so diesem den Anschein einer bloßen Verteidigung verlieh.

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Will oder kann der Armeeangehörige jenen Kriegsruf nicht erst lange prüfen, vielleicht auch niemanden um Aufklärungen ersuchen, sondern ist entschlossen, sich auf die Einsicht und Gewissenhaftigkeit der Regierenden zu verlassen, so steht es ihm ja frei, es wird in diesem Falle der Wehrfähige kraft seines Autoritätsglaubens entscheiden. In allen Fällen hat er also sein Schicksal in seiner eigenen Hand. Anderes wollen wir nicht.

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Dieser so, wie beschrieben wurde, abgefaßte Kriegsausruf wird sodann, in behördlich ganz unbehelligten, privaten und öffentlichen Versammlungen zum Gegenstand von Besprechungen gemacht. Man wendet sich ja heute an die Wähler, wenn neue Abgeordnete gewählt werden sollen und doch handelt es sich hiebei in letzer Instanz zumeist um relativ unbedeutende Dinge: um geringfügige Nuancen der Verfassung, um bloße Steuerfragen oder Sprachenfragen und dergleichen. Warum wollen wir ‹konstitutionell Gesinnte›, daß über solche Fragen jeder einzelne mitsprechen solle und nicht auch über die wichtigste, nämlich darüber, ob wir uns für diese oder jene Angelegenheit sollen totschlagen lassen?

Nach einer bestimmten Frist wird das ganze Volk, Männer und Frauen, zu einer Abstimmung darüber aufgefordert, ob es den beabsichtigten Krieg wünscht oder perhorresziert. Diese Volksabstimmung ist darin begründet, daß jeder Krieg, wie schon oben hervorgehoben wurde, für die Allgemeinheit, nicht nur für die Kombattanten, schlimme Folgen hat. Denn, ganz abgesehen von den verschiedenen Exzessen der feindlichen Krieger, vor denen man kaum je sicher sein wird, selbst wenn das Völkerrecht noch so sehr vervollkommnet wäre, so werden doch vorerst alle Angehörigen der getöteten oder der krank gewordenen

Krieger großem Kummer ausgesetzt, es werden ferner viele wertvolle Individuen aus allen Berufen vernichtet und es entsteht notwendigerweise auch durch jeden Krieg eine bedeutende wirtschaftliche Störung. Deshalb soll vor allem die gesamte Bevölkerung sich darüber aussprechen, ob sie gesonnen ist, sich durch den beabsichtigten Krieg allen diesen Übelständen auszusetzen oder nicht.

Da der Kriegsaufruf nun vor dieser Volksabstimmung der privaten und öffentlichen Diskussion unterzogen werden soll, so haben auch die Heeresangehörigen selbst Gelegenheit, sich über das Für und Gegen des Kriegsaufrufs gründlich zu instruieren. Fällt das Referendum negativ aus, so erfolgt kein weiterer Aufruf an die Soldaten und die ganze Kriegsabsicht fällt ins Wasser, wenn es für den Krieg lautet, so schreitet man zum Aufruf an die Heeresangehörigen, das sind die Angehörigen der militärisch ausgebildeten Miliz- oder Kader-Armee.

Keinesfalls darf der Appell an die Soldaten vor dem Referendum oder ohne ein solches Referendum stattfinden.

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Bei dem Vorgange, die Freiwilligen ‹aus den Reihen der Militärpflichtigen› für einen beabsichtigten Krieg zur Anmeldung aufzurufen, wäre wohl noch eine besondere Vorsichtmaßregel angezeigt. Es sollte nämlich eine zweimalige Aufforderung angeordnet werden in der Art, daß nach Verbreitung des Aufrufs eine vorläufige und eine Zeit ‹zum Beispiel acht Tage› nachher erst die definitive Anmeldung abverlangt würde. Der Grund hiefür ist der, daß so mancher in der ersten Aufwallung, zum Beispiel infolge eines geschickt stilisierten Manifestes, sich freiwillig melden und bald darauf bei ruhigerer Überlegung es bereuen würde. Eine solche Vorsicht wurde schon im Jahre 1851 von den Chartisten in England gefordert, und zwar sprachen sie, wie Lothar Bucher in seinem Werke über den Parlamentarismus mitteilt, den Grundsatz aus: »Keine Werbung ist verbindlich, wenn der Angeworbene seine Erklärung nicht frühestens nach acht Tagen vor der bürgerlichen Behörde wiederholt.«

Bezüglich der Abgabe dieser Unterschriften, d. h. der Erklärungen des freiwilligen Kriegsdienstes, wäre es zweckmäßig, die Bestimmung zu treffen, daß sie nie in Versammlungen

abgegeben und gesammelt werden dürfen, sondern daß jeder privatim, also unbeeinflußt von dem oft so berauschenden Eindruck von Reden in Gegenwart zahlreicher Personen, seine Erklärung an das Kriegsministerium oder an eine andere hiefür bestimmte Stelle, Behörde absende.

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Wer von den Heeresangehörigen durch seine Unterschrift sich als freiwilliger Wehrmann deklariert, der wird dadurch als zum aktiven Feldheere gehörig betrachtet und unterliegt sofort den Kriegsartikeln.

An jene, die sich nicht freiwillig gemeldet haben, hat der Staat weiter kein Recht, auch nicht das Recht, eine Taxe, gleichsam als Ersatz für den Kriegsdienst, zu erheben.

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Die Listen der Freiwilligen gehen an die Volksvertretung und von da an den Kriegsminister. Dieser und der Generalstab entscheiden, ob gute Aussicht vorhanden ist, mit der bestimmten Anzahl der Angemeldeten den beabsichtigten Krieg zu führen oder nicht.

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Wenn ein Krieg siegreich durchgeführt wird, so sind natürlich mehrfache und oft sehr bedeutende Vorteile für den Staat zu erwarten. Da könnte nun so mancher die Frage aufwerfen: »Wie kommen denn diejenigen, die im Referendum gegen eine Kriegführung gestimmt haben, dazu, die allgemeinen Früchte des Sieges ebenso mitzugenießen wie die anderen, die den Krieg befürworteten?« Darauf lautet die einfache Antwort: »Wie kommen bei einem unglücklichen Ausgang des Unternehmens jene, die in dem Referendum gegen dasselbe gestimmt hatten, dazu, die schlimmen Folgen, die den ganzen Staat treffen, ebenso mitzutragen, wie die an dem Kriege Schuldigen?« Es darf daher keine Partei der anderen irgend welche Vorhalte machen. Andererseits wird sich niemand darüber beschweren, wenn die siegreich oder geschlagen heimkehrenden Truppen in irgend einer Weise durch Geldbeträge, Titel oder gewisse soziale Bevorzugungen ‹die niemanden schädigen oder verletzen› belohnt werden.

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Es kann vorkommen, daß, wenn sich zu wenige Freiwillige melden und infolgedessen kein Krieg geführt werden kann, der gegnerische Staat umso aggressiver auftritt, dann stünde natürlich nichts im Wege, es mit einem neuerlichen Aufruf zu versuchen. Hat aber auch dieser kein genügendes Ergebnis, so wäre dadurch bewiesen, daß die Mehrzahl der Wehrkandidaten — die eben allein es sind, die ihre Haut zu Markte tragen — einen selbst demütigenden Frieden oder überhaupt einen Verzicht auf das durch einen Krieg zu erreichende Ziel ‹zum Beispiel eine Eroberung, einen Handelsvertrag, die Unterstützung von Religionsgenossen oder Ausbreitung irgend einer Konfession, sogar die Verteidigung des eigenen Staates usw.› dem Opfer ihrer physischen Existenz vorziehen. Meldet sich aber eine so große Anzahl von Wehrpflichtigen zum Kriegsdienst, daß die leitenden militärischen Fachmänner einen Krieg für aussichtsvoll halten, so wird er wohl geführt werden. Die Möglichkeit eines solchen Ausfalls der Abstimmung unter den Militärpflichtigen muß aber offenbar für die Heeresvorbereitungen bestimmend sein, denn wenn ein solcher Ernstfall eintritt, so muß alles bezüglich der Ausbildung der Wehrfähigen, ihrer Bewaffnung, der Lebensmittelvorräte usw. schon so getroffen worden sein, daß sie im Momente der Mobilmachung dem Freiwilligenheere eine siegverheißende Kriegführung möglich machen.

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Ohne Zweifel wird nach Durchführung meines militärischen Programms das Kriegführen, namentlich zu Anfang, ein schwierigeres Geschäft sein als heutzutage.

Schon das Mobilisieren wird durch die Vorbereitungen zur Volksabstimmung und in geringerem Grade nachher auch durch die unumgängliche Abstimmung der Wehrfähigen sehr verzögert. Ferner kann eine Schwierigkeit im Aufbau der Feldarmee dadurch entstehen, daß man erstens die absolute Größe derselben, d. h. die Anzahl der Freiwilligen, erst im letzten Moment erfährt, und zweitens, daß man auch die relativen Zahlen der Mannschaft für die einzelnen Waffengattungen nicht vorher kennt, so daß höchstwahrscheinlich das Verhältnis der einzelnen Truppenkategorien untereinander nicht nach den Berechnungen der Fachleute ausfallen dürfte.

Man könnte wohl erwidern, daß, wenn mein Programm in allen Staaten eingeführt wäre, die angeführten Schwierigkeiten für sie alle gelten, also durch sie in gleichem Maße als Erschwerungen auftreten würden. Das ist gewiß richtig, allein wir wollen diese Voraussetzungen absichtlich nicht machen und zeigen, daß man auch ohne sie ganz gut Krieg führen kann.

Es handelt sich also darum, sich auf diese Schwierigkeiten einzurichten. Was die Verzögerung der Mobilisierung durch die beiden Abstimmungen betrifft, so steht ja nichts im Wege, sie zeitig genug, d. h. noch während der diplomatischen Kampagne durchzuführen. Wenn der Gegner dadurch bewogen werden sollte, sofort einzugreifen, so hat er wohl, eventuell infolge seines Wehrgesetzes alter Art einen militärischen Vorsprung, dagegen jedoch den moralischen und sehr ausschlaggebenden Nachteil, mit »verfassungsmäßig« gezwungenen Soldaten ins Feld zu rücken, und ich stelle mir vor, daß sich die moralische Energie solcher Krieger zu freiwilligen Kriegen nahezu so verhalten dürfte, wie jene von Söldnern oder von Hilfstruppen zu freien und staatsbewußten Männern.

Die andere Schwierigkeit, nämlich das mögliche Mißverhältnis der einzelnen Waffenarten könnte vielleicht dadurch behoben werden, daß die Mannschaft in Friedenszeiten vielseitiger als heute ausgebildet würde, damit im Bedarfsfalle ein Teil zur Ausfüllung der Lücken in einer bestimmten Waffengattung verwendet werden könnte, so daß wenn sich zum Beispiel zu wenig Leute für die Infanterie, reichlich viele aber zur Artillerie gemeldet hätten, eine gewisse Anzahl von diesen zur Fußtruppe übersetzt würde.

Daß die Kriegsfachmänner sich trotz allem ganz gut in das Freiwilligkeitssystem einleben und bald die richtigen Maßnahmen für eine Kriegführung unter den neuen Umständen treffen werden, steht mir außer Zweifel. Auch das Regieren mit einer Volksvertretung ist schwieriger als das absolutistische Regiment — Cavour sagte analog, mit dem Belagerungszustand könne jeder Esel regieren — und doch haben sich sogar sehr selbstherrlich gewesene Monarchen mit dem konstitutionellen Prinzip abfinden müssen und es geht in der Tat ganz gut. Umsomehr wird die Akkommodation der Generalstäbe an das Freiwilligkeitssystem gelingen.

In letzter Instanz jedoch muß ausdrücklich und immer wieder hervorgehoben werden, daß kriegstechnische oder irgend welche andere Konsequenzen meines Programms, die das Kriegführen erschweren könnten, durchaus keine Bedeutung gegenüber dem Freiwilligkeitsprinzip selbst beanspruchen dürfen.

Allerdings, wie mir die Erfahrung zeigte, fühlt sich beinahe jeder, der dieses Prinzip seiner Beurteilung unterzieht, sofort gewissermaßen als Kriegsminister oder Generalstabschef, oder als edlerer Patriot, oder als objektiver Staatsmann und hält sich für berufen, von einem solchen Standpunkt aus — frei von jeder ethischen Empfindung — nicht nur alle möglichen Einwendungen zu erheben, sondern sie, und zwar auch die kleinlichsten, für entscheidend zu halten, indem seine Beurteilung mehr oder weniger unbewußt davon ausgeht, daß man durchaus das Kriegführen als die oberste Notwendigkeit und alles andere dagegen als sekundär ansehen müsse.

Demgegenüber sei wiederholt hervorgehoben, daß hier im Gegenteil als oberstes Prinzip die freie Entscheidung jedes Menschen über das Opfer seines Lebens aufgestellt wird, vor welchem Grundsatz alles andere, also auch das Kriegführen zurücktreten muß.

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Sollte sich ergeben, daß die freiwilligen Krieger oder ein Teil der nicht militärpflichtigen Bevölkerung gegen die nichtangemeldeten Wehrfähigen sich entrüsten und etwa auch empören, weil jene einen Krieg in dem besonderen Falle für die Allgemeinheit notwendig halten, so wäre das wohl eine Katastrophe, die aber ebenfalls nicht dazu führen darf, das Freiwilligkeitsprinzip außer Wirksamkeit zu setzen. Die Folge eines solchen Zwistes und Bürgerkrieges wäre ja nur die, daß eine Revolte und Verwirrung entstünde, die nur dem Feinde zustatten käme, so daß man gar bald einsehen würde, es sei immer noch das beste, niemanden zum Kriegsdienst zu zwingen. Kein Mensch hat ja auch nur entfernt das Recht oder das Privilegium, seine eigene Beurteilung einer politischen Situation als entscheidend für das Lebensopfer eines anderen anzusehen. Versucht man es aber dennoch, so hat dieser andere das Recht, einen solchen Versuch als Attentat auf sein Leben anzusehen und sich danach zu benehmen.

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Man sieht aus allem Bisherigen, daß das Heerwesen auch in einem Staate mit freiwilligem Kriegsdienst sehr ernst genommen werden kann und daß der Sinn der von mir geforderten Einrichtung, niemanden zum Kriege zwingen zu dürfen, durchaus nicht der ist, jeden Krieg unmöglich zu machen oder jede Kriegführung als etwas Niedriges, Verächtliches anzusehen. Der ewige Friede wäre wohl zu wünschen — ich spreche von seinen angeblichen Nachteilen an anderer Stelle — und wenn er stets zu bewahren wäre, so müßte man ihn gewiß als die größte Wohltat ansehen, weil er ja die Vernichtung von Menschenleben verhindern würde. Bevor jenes hohe Ziel des ewigen Friedens erreicht wird, woran man ja mit vielem Grunde zweifeln kann, muß aber jedenfalls wenigstens das erreicht werden, daß jeder Zwang zum Kriegsdienst ausgeschlossen wird und daß man es jedem einzelnen überläßt, die Argumente eines Aufrufs zum Kriege als für ihn bestimmend zum Eintritt ins Kriegsheer zu halten oder auch nicht.

Allerdings kann es aber doch Fälle geben, in denen selbst ethisch hochgesinnte, also das Leben von Menschen hochschätzende Männer keinen Frieden, sondern Krieg — natürlich nur mit Freiwilligen — wünschen und eventuell ihn auch mitmachen. So, wenn es sich um die Verteidigung der Freiheit im eigenen Staat oder auf Wunsch eines grausam unterdrückten Volkes nach Befreiung von seinen Bedrückern handelt.

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Höchst merkwürdig ist es, wie leicht man sich durch die doch so unbestimmte Phrase von der »Verteidigung des Vaterlandes« blenden ließ und dadurch die allgemeine Wehrpflicht so hoch stellte, sie als selbstverständlich und, wie namentlich Scharnhorst in seinem Entwurf für die Bildung einer Reservearmee, den Waffendienst, d. i. den Kriegsdienst als »Ehrenrecht« ansah. Ähnlich wie im preußischen Kantonreglement von 1792 stellte Scharnhorst als § 1 den Satz auf: »Alle Bewohner des Staates sind geborene Verteidiger desselben.« Während der deutschen Befreiungskriege konnte eine solche Ansicht gerechtfertigt erscheinen. Scharnhorst und seine Gesinnungsgenossen hatten nur das eine Ziel vor Augen, Deutschland von der Fremdherrschaft zu befreien. Aber als allgemein gültig darf man diesen Satz

nicht hinstellen, denn, wie schon früher hervorgehoben wurde, nicht immer werden Kriege zur Verteidigung geführt, ferner darf die Entscheidung hierüber niemand anderem als dem eventuellen Opfer derselben überlassen bleiben, und endlich ist es sogar im Falle einer wirklichen Verteidigung möglich, daß sehr viele Angehörige der Armee eine Niederlage des eigenen Staates herbeiwünschen, entweder weil sie mit seinen Institutionen unzufrieden sind und jene des Gegners herbeiwünschen oder weil sie sich mit der ihr gleichen oder stammverwandten Nationalität des gegnerischen Staates gerne vereinigen möchten oder aus irgendwelchen anderen Gründen. Wir sehen nach allem, daß der Ausdruck »Verteidigung des Vaterlandes« ein Mausefallenargument und keine Rechtfertigung der allgemeinen Wehrpflicht ist.

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Mitunter wird zugunsten des Wehrzwanges auf die alte Geschichte, mitunter auf Ansichten der Staatsmänner oder Philosophen hingewiesen. Allein in allen diesen Fällen lag eine Ansicht von der Omnipotenz des Staates gegenüber dem Individuum zugrunde, die wir nicht mehr akzeptieren können. Es ist überflüssig zu bemerken, weil es zu bekannt ist, daß wir heute überhaupt die staatsrechtlichen Ansichten der Griechen und Römer verwerfen. Und wenn auch so bedeutende Geister wie Macchiavelli und Spinoza, auf die sich unter anderen Treitschke beruft, den Gedanken der allgemeinen Wehrpflicht verteidigen, so kann oder besser gesagt soll uns das doch nicht dazu bewegen, Menschen den Ansichten anderer zuliebe — diese anderen mögen Monarchen, Minister, Parlamente oder noch so große Majoritäten der Bevölkerung sein — töten zu lassen, d. h. den Zwang zum Kriegsdienst aufrecht zu halten.

Diese »Ansichten anderer« können sehr mannigfaltiger Natur sein, sie können politische, sie können nationalistische, volkswirtschaftliche, ja — so sonderbar das in unserer Zeit noch erscheint — sie können auch religiöse oder spezifisch konfessionelle sein. Viel mehr Kriege, als in der Öffentlichkeit bekannt ist, wurden hauptsächlich durch geistliche Vertreter positiver Religionen geschürt und an den maßgebenden Orten zur Entschließung gebracht, um nur den bedeutendsten Fall der neueren Zeit zu

nennen, so war ja der deutsch-französische Krieg des Jahres 1870 ein hauptsächlich von den Klerikalen angezettelter Krieg.

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Wir verlangen hier, daß es jedem einzelnen Wehrfähigen zustehen solle, sich für oder gegen eine von den politischen und militärischen Fachmännern beabsichtigte und befürwortete Kriegsunternehmung zu entscheiden.

So sehr man nun mit Recht einwenden kann, daß der gewöhnliche Mensch, also auch der Wehrpflichtige, der Regel nach nicht so einsichtig sein wird wie die Fachmänner oder gar wie große Genies, z. B. Napoleon oder Friedrich der Große, welche die politischen Angelegenheiten leiten, so kann man andererseits entgegenhalten, daß die Fachmänner sich schon sehr oft geirrt haben, daß sie meistens untereinander nicht einig oder daß sie häufig unehrlich sind, ja in frivoler Weise zu Kriegen treiben, und daß ferner — von allem diesen abgesehen — es ungleich notwendiger ist, daß jedes Individuum in Fragen seiner physischen Existenz selbständig entscheidet, als daß wirklich irgend ein staatlicher Vorteil erreicht wird, der — ausgenommen die Existenz der Bevölkerung — immer und immer weit weniger wichtig ist als ein Menschenleben. Was bedeuten denn noch so große Erweiterungen des Staatsgebietes oder noch so günstige Handelsvorteile und dergleichen gegenüber der physischen Existenz auch nur eines einzigen Individuums, das leben will! So gut jeder Kranke seine Einwilligung zu einer lebensgefährlichen Operation verweigern kann, obwohl die tüchtigsten Ärzte, also Sachverständige, ihm dazu raten, so muß jedes wehrfähige Individuum die Vollmacht haben, nicht zu dem Opfer bereit zu sein, das selbst die sachverständigsten Politiker von ihm verlangen.

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Andererseits kann es auch vorkommen, daß von den Wehrfähigen ein Krieg gewünscht wird, daß z. B. eine mächtige Volksstimmung kriegerisch aufflammt, die sich auch der Wehrfähigen bemächtigt und diese nun von den leitenden Politikern eine Kriegsunternehmung verlangen. Dann werden die leitenden Fachmänner ihre Ansichten über Zweckmäßigkeit und über die militärischen Aussichten dieses Krieges äußern. Sollten sie zu-

stimmen, so wird der Krieg geführt, wenn nicht, so ist es doch möglich, daß sie von der Volksleidenschaft wider ihre eigene Einsicht zum Kriege getrieben werden, falls sie nicht ihre Stellen aufgeben, um jeder Verantwortung enthoben zu sein. Sollten dann die Sachen noch so schlimm ausfallen, so war es doch der eigene Wille, der jeden Angehörigen der Armee ins Unglück stürzte, und der Grundgedanke unseres Vorschlages ist ja eben der einer allseitigen Gerechtigkeit: Jeder soll nach seinem Gutdünken über sein Leben oder seine Gesundheit entscheiden können.

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Wie wird mein Programm der Freiwilligkeit des Kriegsdienstes in einem Falle wie dem folgenden durchgeführt?

Im Jahre 1908 entwickelte sich ein immer heftigerer Antagonismus zwischen dem Königreich Serbien und der österreichisch-ungarischen Monarchie. Es zeigte sich von allem Anfang an, daß Serbien infolge der Annexion Bosniens durch Österreich-Ungarn den Krieg wollte. Österreich traf daher entsprechende militärische Vorsichtsmaßregeln und mehrere Monate lang befanden sich seine Soldaten in Bosnien und namentlich an der bosnisch-serbischen Grenze auf dem Kriegsfuß, sie mußten dort — im Winter und in den Gebirgen — patrouillieren und jeden Augenblick gewärtig sein, von serbischen Guerillabanden angegriffen zu werden. Der Krieg war also noch nicht erklärt, aber die Situation der Soldaten war bereits nahezu die eines wirklichen Kriegsbeginnes und konnte jeden Augenblick in aller Form die eines faktischen Krieges werden. Wie soll nun dem Freiwilligkeitsprinzip in einem solchen Falle eines drohenden Krieges Genüge geschehen?

Ich glaube in der Weise, daß die Regierung Österreichs ‹das heißt allgemein des bedrohten Staates› von allem Anfang an, wenn die Situation gespannt wird, eine Umfrage, respektive einen Aufruf an die Bevölkerung und an die Armee richtet, damit sich alle jene melden, die eventuell zum Kriegsdienst bereit wären. Es steht nichts im Wege, wenn die Veranlassung zum Kriegführen später eine stärkere wird, eine nochmalige Umfrage zu halten, um vielleicht mehr Freiwillige zu bekommen, als sich in der anfänglich noch weniger drohenden Sachlage angemeldet hatten. Natürlich ist die Dislokation von Soldaten nach den

gefährdeten Orten erst nach dem Einlauf der Anmeldungen möglich, zumal auch die Zusammenstellung der Einheiten von diesen abhängt. Nun wird ohne Zweifel jeder höhere Offizier denken, hiedurch sei das Dreinfahren nicht wenig erschwert, allein alle die erwähnten Prozeduren können sehr rasch durchgeführt werden und — abermals sei es gesagt — schließlich verschwindet jedes derartige militär-technische oder politische Bedenken gegenüber der absoluten Notwendigkeit, von der barbarischen Sitte des Zwanges zum Kriegsdienst endlich einmal abzulassen.

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Eine wichtige Frage ist die folgende: Was sollen wir bezüglich der Verwendung der Armee bei inneren Unruhen festsetzen?

In meinem Wehrsystem können die Soldaten, obwohl sie zum Militärdienst im Frieden verpflichtet sind, dennoch nicht zum Kriegsdienst gezwungen, sondern sie müssen zuvor gefragt werden, ob sie in dem betreffenden Falle sich dazu freiwillig melden wollen. Nun aber nehmen wir an, es trete der Fall ein, daß die Exekutive, das Staatsoberhaupt oder der Kriegsminister oder ein untergeordneter Zivil- oder Militärbeamter irgend eines Ortes das Militär zum Niederschlagen von Unruhen, namentlich politischer oder sozialistischer oder konfessioneller Art, gebrauchen will, sollen die Soldaten dem Befehle Gehorsam schuldig sein?

Diesen Fall endgültig zu beantworten ist von einiger Schwierigkeit. Die Gegner des Zwanges sagen: »Wir lassen nicht auf unsere Brüder schießen«, setzen aber dabei voraus, daß das nicht »Brüder«, sondern ihre Gesinnungsgenossen sind; es steht also hier die Ursache und das Ziel der Revolte in Frage und von diesem Standpunkte aus wäre das Problem unlöslich, denn man kann ja nicht im vorhinein wissen, welcher Art irgend eine Revolte sein werde und überdies wäre die Beantwortung dann eine parteiliche.

Eine wirkungsvollere, weil gerechtere Argumentation ist die, daß man überhaupt gegen Staatsgenossen nicht gewaltsam vergehen solle, weil nahe Verwandte sich darunter befinden können. Gelegentlich eines Arbeiterstreiks in Frankreich wollte ein gemeiner Soldat nicht auf die Arbeiter schießen: »Ich sah meine Mutter im Haufen«, sagt er, »und konnte daher nicht

schießen.« Man könnte ihn schwerlich deswegen strafen, denn heute würde sich kein Staatsmann erlauben, von einem Staatsbürger zu verlangen, er möge z. B. seinen Vater töten, weil dessen Tod — angenommener Weise — den Staat vor einem großen Unheil bewahren würde, derlei brächte nur religiöser Fanatismus zustande, wie z. B. Calvin jemanden gezwungen haben soll, die eigene Mutter als Hexe zu verbrennen. Dergleichen ist nun aber für den einzelnen Soldaten wohl ein sehr starkes Argument, im großen aber doch nicht anwendbar, denn entweder können alle sagen, sie sähen ihre Mutter oder ihren Vater usw. in dem Haufen, selbst wenn es gar nicht wahr wäre, oder alle können sagen: Wir betrachten alle Staatsgenossen ⟨vielleicht auch: alle Menschen⟩ als Brüder.

Man könnte meinen, es gäbe Fälle, in denen gar kein Bedenken obwalten könne, daß man gewaltsam vorgehen müsse, so daß jeder schon von selbst bereit sein würde, »zu schießen«. Das wäre bei rein anarchistischen Unruhen der Fall, d. h. solchen, in denen Leben und Eigentum gefährdet wären, es geschehe das aus welcher Ursache immer. Aber selbst solche Angriffe auf Leben und Eigentum können höhere politische oder soziale Ursachen haben, so daß man es nicht immer bei solchen Exzessen mit sogenannten »gemeinen« Motiven zu tun hätte und es sogar sein könnte, daß die kommandierten Soldaten überlaufen. Alles dieses zusammengenommen, halte ich folgende Lösung des Problems für die richtige: Die Soldaten dürfen auch bei inneren Unruhen nicht zum Einschreiten gezwungen werden, sie können dazu aufgefordert werden, allein, wer nicht mittun will, dem muß es frei stehen. Und sollte die Gesellschaft befürchten, daß auf diese Weise kein genügender Schutz vor Revolten vorhanden wäre, so möge eine allgemeine Volksbewaffnung eingeführt, eventuell eine bürgerliche Miliz, eine Bürgerwehr errichtet werden, der alle Tauglichen über dem militärpflichtigen Alter angehören. Im Falle der Gefahr mögen Freiwillige dieser Miliz — jedes Mitglied hat sein Gewehr im Hause — einschreiten, also dem freiwilligen Teile des stehenden Heeres zu Hilfe kommen. Und da auch für diese Miliz das Prinzip der Freiwilligkeit gelten muß, so wird sich in jedem einzelnen Falle solcher Unruhen das Resultat des Kampfes darnach richten, auf welcher Seite sich die überwiegende Zahl oder Kraft befindet. Von der Art der

Beurteilung des Falles wird auch die Beteiligung auf beiden Seiten abhängen, es wird also dem Prinzip der Gerechtigkeit in vollstem Maße genügt. Wenn viele sich an der Niederschlagung des Aufstandes beteiligen, so wird das ein Beweis sein, daß wenigstens in dem Gebiete desselben die Majorität mit den Beweggründen der Revolte oder mit der Methode des Kampfes der Aufständischen usw. nicht einverstanden ist und umgekehrt.

Ohne Zweifel lassen sich Fälle denken, in denen man auch meinen hier gegebenen Vorschlag für unvollkommen halten würde, allein ich weiß keinen besseren und keinen gerechteren. Wer glaubt, einen besseren Vorschlag machen zu können, lege ihn vor, er möge aber bedenken, daß wohl bei jedem solchen Vorschlage besondere Fälle als Einwände aufgefunden werden können und daß eine vollkommene Unvoreingenommenheit gegenüber aufständischen Bewegungen, ja selbst gegenüber kleineren Exzessen, nur durch das Prinzip der Freiwilligkeit für das Militär wie für die Miliz gewahrt werden kann.

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Kurz gefaßt, ist also unser Reformgedanke folgender:

Allgemeine Militärpflicht behufs soldatischer Ausbildung. In jedem speziellen Falle eine Volksabstimmung der erwachsenen Männer und Frauen darüber, ob Krieg geführt werden soll, und bei zustimmendem Ergebnis derselben eine Abstimmung der Soldaten, jeder für sich selbst bezüglich des Eintrittes in das Feldheer.

Dieses Programm ist offenbar sowohl bei dem Vorhandensein eines Kader- als auch eines Milizsystems durchführbar und es erlaubt auch die Geltendmachung einer vollen Bewaffnung des ganzen Volkes. Ich würde das Milizsystem jenem der Kaderarmee unbedingt vorziehen.

Sollte einmal eine vollständige Abrüstung vorgenommen werden, so wird wohl weder eine Kaderarmee noch ein Milizheer vorhanden sein, allein, angesichts eventueller innerer Ruhestörungen wird doch eine Art Polizeitruppe oder Bürgerwehr errichtet werden. Und auch für diese muß das Freiwilligkeitsprinzip gelten, wenigstens was das Eingreifen in einen Kampf betrifft. Was die Ausbildung betrifft, so mag sie so geringfügig wie immer sein, auf diese kommt es uns hier überhaupt nicht an.

Manche glauben, daß es nicht einmal eines Polizeiheeres oder einer Bürgerwehr bedürfen werde, indem die Menschen früher oder später von nichts als Liebe zueinander erfüllt sein werden. In diesem Falle ist natürlich jede Wehrbetrachtung überflüssig.

Nicht zu übersehen ist, daß mein Programm zur Durchführung wahrscheinlich viel weniger Zeit und gewiß weniger Mühe benötigen wird als irgend ein pazifistischer Vorschlag, andererseits ist es, was Abschaffung oder Verminderung der Kriege betrifft, gewiß ein unvollkommenes und nur in der Beziehung vollkommen, als, der Gerechtigkeit entsprechend, alles direkte Kriegsunheil nur jene betrifft, die es auf sich nehmen, d. h. in das Kriegsheer freiwillig eintreten.

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Ich will hier auch einem Vorschlage einige Worte widmen, der vielleicht von so manchem, namentlich von Militärs, gemacht werden könnte, nämlich dem: Schon bei der Assentierung jedem Militärfähigen die Frage vorzulegen, ob er auch für immer wehrpflichtig sein, d. h. als Soldat im Kriege dienen wolle. Hiedurch, könnte man anführen, hätte man die Vorteile eines nach Zahl und Art genau bestimmten Heeres gewonnen und dennoch wäre das Prinzip der Freiwilligkeit hiebei gewahrt.

Diese Variante des Freiwilligkeitsprinzip ist jedoch — außer für Offiziere, die unbedingt aktiv bleiben sollen — zu verwerfen. Schon vom Standpunkte der Militärs, d. h. der Befürworter oder Liebhaber des Krieges aus, wäre der Nachteil vorhanden, daß bei einer Umfrage gelegentlich der Rekrutierung, also in der Regel während des Friedens, sich viel weniger Leute kriegsdienstpflichtig erklären werden, als z. B. bei einem Befreiungskriege oder überhaupt bei einer politischen Situation, die eine populäre Kriegsstimmung hervorbringt, der Fall wäre.

Soll unser Programm sinngemäß durchgeführt werden, so ist strenge darauf zu achten, daß jene Abstimmung unter den Wehrfähigen über den Eintritt in ein Kriegsheer sich immer nur auf jeden gegebenen Fall und durchaus nicht auf alle Fälle im vorhinein beziehen darf, denn es wäre ohne Sinn, sich zu binden und sich für immer als Kriegsmann zu deklarieren, anstatt von Fall zu Fall sich nach der politischen Situation und den persönlichen Umständen zu richten, wo doch im Laufe der Zeit so

verschiedenartige politische Konstellationen sich entwickeln und es z. B. geschehen kann, daß das einemal ehrlich eine Verteidigung des Vaterlandes, ein andermal aber z. B. eine militärische Unterstützung irgend eines der herrschenden Dynastie-Verwandten verlangt werden wird, der gerne irgendwo eine selbständig regierende Familie gründen möchte.

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Hier möchte ich noch auf einen Umstand aufmerksam machen, der stets ganz unbeachtet bleibt und dies wahrscheinlich deswegen, weil seine Berücksichtigung so gar nicht in eine »Philosophie des Krieges« hineinpaßt und nur »menschlich« von Interesse ist, daher für den »höheren« Standpunkt des Kriegsphilosophen zu geringfügig erscheint.

Es ist nämlich ganz erstaunlich, welchen philosophischen Einfluß auf die Stimmung einer ganzen kriegführenden Bevölkerung die Art der Gesinnung der Krieger hat, also je nachdem sie eine erzwungene oder eine freiwillige ist.

Daß dem Soldaten ganz anders zumute ist, wenn er von der Notwendigkeit eines Kriegsunternehmens so sehr überzeugt ist, daß er sich freiwillig zum Kriegsdienst meldet, als wenn er gar nicht gefragt wird und von jener Notwendigkeit nicht überzeugt ist, versteht sich von selbst. Und den Unterschied zwischen diesen zwei Stimmungen des Krieges wird nur der brutalste Politiker oder Feldherr ignorieren oder gering achten. Aber noch viel mehr: Die Angehörigen der verwundeten oder gar getöteten Soldaten werden, wenn diese angesichts einer allgemeinen Überzeugung von der Führung des Krieges aus Notwendigkeit — und nicht aus Leichtsinn oder militärischem Ehrgeiz — sich frei gemeldet hatten, einen unvergleichlich geringeren Schmerz über das eingetretene Unglück empfinden als das heute der Fall ist.

Heute frägt der verkrüppelte Soldat in den meisten Staaten, die einen nicht aufgezwungenen Krieg führen, sich selbst und andere unaufhörlich: »Wofür?« »Wofür mußte ich meinen Fuß verlieren?« »Wofür erblinden?« Und seine Angehörigen tun dasselbe. »Wofür hat er sterben müssen?« »Ist das gerecht, daß er zeitlebens Krüppel bleibt, weil Rußland Konstantinopel oder Frankreich Elsaß-Lothringen will?« Wenn heute eine Mutter oder ein Vater ihren Sohn dem Tode nahe sehen, wie nichtig,

ja wie empörend scheint es ihnen fast immer, wenn man ihnen sagt: »Er hat geholfen, jenen feindlichen Staat zu demütigen, unser Prestige zu erhöhen, eine Provinz zu erobern«, wie frivol erscheinen solche Reden angesichts des bevorstehenden Verlustes jenes Menschenlebens! Gerade so, wie wenn während des Todeskampfes eines geliebten Wesens jemand mit dem Troste oder mit der bloßen Neuigkeit kommen wollte, man habe soeben eine ganz außerordentliche wissenschaftliche Entdeckung gemacht, einen neuen Planeten, ein neues chemisches Element und etwa noch viel Größeres gefunden, das Leben sei doch so schön, so interessant und es gebe genug Trost für alles Unheil, das uns trifft.

Vielleicht würde man mit einem derbsten Hinauswurf antworten!

Wenn aber, sei es auch beim Bestehen einer Wehrpflicht, ein starkes patriotisches Gefühl, oder wenn das eigene Urteil — z. B. wenn es sich um Verteidigung von Haus und Hof zu handeln scheint — einen den Krieg mitmachen heißt und zum freiwilligen Felddienst treibt, so werden selbst die nächsten Angehörigen und Freunde des Verstorbenen, des eben Sterbenden oder des Verwundeten bei allem Mitleid und Kummer etwas Beruhigendes und Tröstendes fühlen, ja man wird auf die Kriegsleistung des Soldaten stolz sein, und noch lange nach dem Kriege davon erzählen. Ein bisher ungekanntes Solidaritätsgefühl wird entstehen und einen erfüllen. Er hat eine große und schwere Aufgabe zum wirklichen Nutzen für »uns alle« erwählt und auch ehrlich zu lösen unternommen, dafür seine Gesundheit, sein Leben geopfert! Das wird gedacht oder gesagt werden.

Nun denke man, daß es sich um Hunderttausende oder Millionen solcher Angehöriger verunglückter Krieger handelt und fühle nach, welcher Segen durch die Institution der Freiwilligkeit auch in dieser Beziehung entstünde.

Ich weiß zwar, daß der »tapfere General« und der »objektive nüchterne Politiker«, wahrscheinlich auch so mancher moderne Kriegsphilosoph, solche Betrachtungen für sentimental und für überflüssig ansehen wird, auf solche Barbaren wird die künftige Menschheit jedoch keine Rücksicht nehmen.

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Allerdings ist mit all dem Bisherigen vom höheren ethischen Standpunkte aus der Gegenstand noch nicht erledigt, denn es handelt sich ja nicht nur um die Opferung des eigenen Lebens, sondern auch um jenes der fremden, nämlich der gegnerischen Leben, denen man als bewußter Gegner entgegentritt. Mit dieser wichtigen Frage befassen wir uns jedoch hier noch nicht.

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Obwohl wir oben das Wort »Aufruf zum Kriegsdienst«, also gewissermaßen: »Werbung« für den Kriegsdienst gebrauchten, so ist doch ein großer Unterschied gegen die Werbung in früheren Zeiten, namentlich im XVII. und XVIII. Jahrhundert, vorhanden. Denn sowohl das Menschenmaterial als auch die Art der Ausbildung sind wesentlich anders.

Um es nochmals zu erklären: Nach unserem Vorschlage werden Soldaten nicht aufs Geratewohl und zumeist aus der Hefe des Volkes angeworben, sondern die Militärpflicht ist für gewisse Altersstufen ganz so wie heute eine allgemeine, und alles, was sich während der Friedenszeit auf das Heerwesen bezieht, also auch die militärische Ausbildung, kann so bleiben wie es heute ist. Nur in dem Moment eines beabsichtigten Krieges tritt der radikale Unterschied gegen heute hervor: Daß man alle diese Wehrfähigen — nach erfolgter Zustimmung der erwachsenen männlichen und weiblichen Bevölkerung — erst fragen muß, ob sie den Krieg mitmachen wollen oder nicht.

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Nun handelt es sich noch um die Klarstellung der sachlichen Beziehungen, in der die verbesserte Wehrordnung zu der von mir in dem Werke »Die allgemeine Nährpflicht« vorgeschlagenen wirtschaftlichen Minimum-Institution stehen würde. Über diesen Punkt habe ich mich in jenem Werke eingehend geäußert und ich verweise daher auf dieses.

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Noch will ich, um nur ja jedes Mißverständnis zu beseitigen, eigens hervorheben, daß hier der Wert mancher, aber nicht aller Empfindungen, welche die Menschen kriegslustig machen, weder an und für sich noch im Verhältnis zu anderen Empfindungen und

Bedürfnissen herabgesetzt werden soll. Auf was ich das größte Gewicht lege, ist dies, daß es nicht geduldet werden darf, daß diejenigen, die sich kriegerischen Affekten hingeben, die anderen, die diese Empfindungen nicht teilen, zu sich hinüberzwingen wollen, und zwar gewöhnlich unter dem intoleranten, ja frechen Vorgeben, ihre Empfindungen seien allein die berechtigten, die edleren, moralisch höherstehenden, nur sie seien die wahren und treuen Anhänger des Staates, die allein einsichtsvollen, und alles dies in solchem Grade und mit solcher Sicherheit, daß sie Menschen mit anderen Ansichten selbst mit physischer Gewalt ihren eigenen unterwerfen dürfen. Ich nehme mich also hier nur der bisher Unterdrückten und Vergewaltigten an und nicht ich, respektive mein Wehrprogramm ist ungerecht, sondern umgekehrt: Ich will nur Ungerechtigkeit verhüten. Gibt es denn etwas Furchtbareres, als zu sehen, wie sogar noch in unseren Tagen durch Intriguen der Diplomaten oder durch den Ehrgeiz einiger maßgebender Personen der Exekutive oder durch das Poltern einiger brutaler Chauvinisten Hunderttausende in einen Krieg hineingetrieben werden, die in der gegebenen Situation nicht im entferntesten einen genügenden Anlaß sehen, ihr Leben zu riskieren?

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»Was ist selbst das Höchste, das ein glücklicher Krieg — der kein Verteidigungskrieg ist — bringen kann?«

Immer sollte man sich diese Frage vorlegen, wenn man die Übersicht über die Rangordnung der Staatsinstitutionen nicht verlieren will, das bezieht sich aber selbstverständlich immer nur auf jene, die überhaupt diese Dinge einer Beurteilung, also der Vernunft unterwerfen wollen; aber nicht auf die anderen, die ihren Gefühlen allein folgen und von einer näheren Untersuchung der kritischen Situationen nichts wissen wollen.

Wenn aber selbst die Erwägungen durch die Vernunft bei verschiedenen Personen zu verschiedenen Resultaten führen, wenn also die einen zu dem Schluß gelangen, dieser Krieg sei notwendig oder sehr nützlich, die anderen aber, es sei das nicht der Fall, so ist es ohnedies selbstverständlich, daß logische Diskussionen nicht durch Gewalt irgendwelcher Art entschieden werden; jene mögen also nur in den Krieg gehen, diese jedoch werden zu Hause bleiben. Durch die Tat, d. h. durch das

Riskieren ihres Lebens, werden die ersteren beweisen, daß sie ihre Schlußfolgerungen und Erwägungen — subjektiv genommen — gründlich genug vorgenommen haben. Auf diese Weise werden die Kriegsheere aus zweierlei Arten von Leuten bestehen:

Aus jenen, die ohne weitere Überlegung ihren Affekten ‹Staatsgefühl, Loyalität, Nationalgefühl usw.› folgen und aus jenen Individuen, die die Situation als Politiker oder als Anhänger irgend eines z. B. volkswirtschaftlichen Systems studierten und zufolge ihres Studiums sich ebenfalls für den Krieg erklären. Zu Hause bleiben werden aber von den Wehrfähigen solche, die entweder gar keinem anderen Affekt als den der Selbsterhaltung nachgeben, die sogenannten »Feiglinge«, oder jene, die durch ihr Studium der Situation zu Gegnern einer Kriegsunternehmung gemacht wurden, oder endlich solche, die eine Niederlage ihres eigenen Staates herbeiwünschen.

Was die Feiglinge betrifft, so kann ihnen wohl von den Patrioten ihr Mangel an Vaterlandsliebe und Opferbereitschaft — und selbst dies nicht immer als niedrige Gesinnung — nicht aber ihre Feigheit als solche, also ihre Liebe zum Leben oder zu ihrer physischen Integrität überhaupt vorgehalten werden. Mangel an Mut ist ebensowenig eine häßliche Eigenschaft wie die Gewohnheit großer Vorsicht überhaupt. Selbst der tapferste Held wird einem Bären im Walde und einem Tiger ausweichen und niemand wird ihn deswegen verachten. Der Feigling betrachtet eben feindliche Krieger genau so wie alle Menschen Bären und Tiger betrachten.

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Wenden wir unser Programm des freiwilligen Kriegsdienstes auf einen praktischen Fall, nämlich auf den Zustand Europas unmittelbar vor dem Ausbruch des jetzigen Weltkrieges an und setzen also die politische Situation genau so beschaffen voraus, wie sie es faktisch Ende Juli 1914 war.

Wie hätte sich, wenn es keine Wehrpflicht, sondern nur freiwilligen Kriegsdienst gegeben hätte, gegenüber dem in Wirklichkeit ausgebrochenen Weltkrieg die Situation gestaltet?

In Rußland, welches damals den Stein ins Rollen brachte, indem es durch die Hofpartei gegen den Willen des Zaren den lokalen österreichisch-serbischen Konflikt zu einem europäischen

machte und eine allgemeine Mobilisation noch während der Unterhandlungen anordnete, wären nur sehr wenige für den Krieg zu haben gewesen. Denn die russischen Bauern sind überhaupt jedem Krieg abgeneigt und die Agitation der Popen hätte, bei vorausgesetzter freier öffentlicher Diskussion über den Krieg, kaum viel ausgerichtet besonders darum, weil die Lehren Tolstois bereits große Verbreitung und Ansehen genießen. Unter den Mittelklassen würden sich gewiß wenige gefunden haben, die ‹für Serbien› gegen Österreich so erbittert waren, daß sie freiwillig ihre Haut zu Markte getragen hätten. Und wenn sich trotzdem Leute genug gefunden hätten, so hätten sich doch beinahe gewiß bei etwas längerer Dauer eines resultatlosen Krieges, wo es sich um Ersatz der Verluste handelt, keine Soldaten mehr gemeldet.

In England wäre es so gewesen, wie es faktisch war, daß die Männer nicht recht hätten heran wollen, denn dort bestand keine Wehrpflicht und erst im Mai 1916 wurde sie, um nur durchzuhalten, eingeführt und die genügende Mannschaft aufgebracht.

In Frankreich hätten sich wahrscheinlich viel weniger Leute angemeldet als zufolge des Zwanges eingestellt wurden. Und bei langer Dauer eines resultatlosen Krieges wäre auf eine freiwillige Ergänzung der Verluste oder gar Verstärkung der Armee kaum zu rechnen gewesen. Man darf nämlich dabei nicht vergessen, daß bei der Freiwilligkeitsinstitution auch vollkommene Diskussionsfreiheit, also für und wider den Krieg, vorausgesetzt wird, daher der Einfluß der aufpeitschenden kriegerischen Agitation durch eine gegnerische Agitation mehr oder weniger kompensiert worden wäre.

In Italien hätten sich ebenfalls bei freier öffentlicher Diskussion über den Krieg nur sehr wenige gemeldet, denn man sah ja sehr deutlich, wie man das Volk hetzen und Gegner des Krieges in gewalttätigster Weise zum Schweigen bringen mußte.

In Deutschland hätten die Polen, Elsässer und Dänen sich abseits gehalten, aber die Deutschen — auch die Welfen — also der weitaus überwiegende Teil der Bevölkerung, hätten sich, wenn sie wie jetzt von der Notwendigkeit der Verteidigung überzeugt gewesen wären, gerade so oder beinahe so zahlreich freiwillig gemeldet wie beim Bestehen der allgemeinen Wehrpflicht.

In Österreich-Ungarn wären die Slawen, Rumänen und Italiener zu Hause geblieben, die Deutschen und Magyaren hätten sich gemeldet, die ersteren mindestens zum größten Teile, die letzteren vollzählig, geradeso wie bei Geltung des Wehrzwanges.

Die Serben, Montenegriner, Türken und Bulgaren hätten sich in ziemlich gleicher Anzahl wie bei Geltung der Wehrpflicht freiwillig gemeldet, von den Rumänen wären die Bauern, also der größte Teil des Volkes, nicht gegangen.

Das Resultat wäre also dieses:

Der allgemeine Krieg wäre, namentlich wegen der zu geringfügigen Anmeldungen in Rußland, England und in Österreich, aber auch in Frankreich, Italien und Rumänien, entweder unterblieben, oder mit viel kleineren Armeen geführt worden und höchstwahrscheinlich hätte er bei weitem nicht so lange gedauert, wie er wirklich gedauert hat.

Nur einen Punkt müssen wir hier noch in Erwägung ziehen. Der Seekrieg Englands gegen Deutschland ‹und Österreich› hängt ja in keiner Weise von den Kriegen der anderen deutschfeindlichen Mächte ab. Er hätte daher ganz gut zum Zwecke der Aushungerung der Mittelmächte fortgeführt werden können, selbst wenn die Landkämpfe schon aufgehört hätten.

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Bisher handelte es sich in unseren Ausführungen lediglich um das Verhalten bei einer beabsichtigten Kriegsunternehmung.

Sehr wichtig ist es aber auch, zu wissen und Vorschläge zu machen über die zwei Fragen: Wer soll befugt sein einzugreifen, um einen Krieg zu beenden? Und wer soll bevollmächtigt sein, den Frieden zu schließen, also seine Bedingungen aufzustellen und für den Staat zu akzeptieren.

Zur ersten Frage mache ich folgenden Vorschlag: Falls sich in der öffentlichen Meinung Kriegsmüdigkeit bemerkbar macht, so mag ein Referendum darüber entscheiden, ob die Kriegführung tunlichst bald beendet werden soll. Die Fachleute müssen daher in diesem Falle Friedensunterhandlungen anknüpfen und die Entscheidung über die Annahme der Bedingungen, welche die Regierung mit der gegnerischen Partei vereinbart hat, steht der Volksvertretung zu, womit auch die zweite Frage beantwortet ist.

Und die Herbeiführung jenes Referendums kann durch die Regierung oder durch das Parlament oder durch eine Initiative veranlaßt werden, wobei die Benützung der Initiative für solche Fälle nicht hoch genug bewertet werden kann, denn es scheint, daß auf keine richtigere Weise der Volkstimmung Ausdruck und Einfluß in einer so wichtigen Angelegenheit, wie es das Aufhören eines niederdrückenden und kräfteverzehrenden Krieges ist, gegeben werden kann, als durch Einräumung der Initiative und nachherige Volksabstimmung.

IX.

Widerlegung von Einwendungen gegen das Prinzip der Freiwilligkeit.

Sollte sich jemand, trotz allem bisher Gesagten, vor dem Programm der Freiwilligkeit im Kriege gar zu sehr entsetzen, so sei er darauf aufmerksam gemacht, daß es, wie ich Schmoller entnehme, »bis zum Jahre 1700 überall in Europa als Grundsatz galt, daß zum Eintritt in die stehende Armee niemand gezwungen werden kann«. Und ein großer Staatsphilosoph, nämlich Hobbes im »Leviathan«, sagt: »Es ist ein unveräußerliches Recht, außer im Falle der allgemeinen Not, sich dem Kriegsdienste zu verweigern, wenn man einen guten Stellvertreter beschaffen kann.« Die Frage der Stellvertretung kann hier offen gelassen werden, es ist genug und sehr wichtig, daß ein Staatsphilosoph, der den Staat im höchstem Maße absolutistisch aufbaut und jeden Staatsbürger der Regierung vollständig unterwirft, von einer Verweigerung des Kriegsdienstes überhaupt spricht. Und es sei auch hier die merkwürdige Tatsache angeführt, daß schon im Jahre 1395 die Wiclifiten dem englischen Parlament eine Petition überreichten, in der sie — neben einer Anzahl von kirchlichen Forderungen u. a. geltend machten:

»Daß jemanden das Leben nehmen, sei es nun im Kriege oder auf dem Wege der Gerechtigkeit, eine der Lehre des Evangeliums zuwiderlaufende Sache sei.«

Man bedenke auch folgendes: Niemand wird es für möglich halten, einen Gesetzentwurf auch nur vorzuschlagen, geschweige ihn heute durchzuführen, demzufolge z. B. die Vivisektion eines Menschen vorgenommen werden könnte, wenn das Staatsinteresse es fordern würde — wir machen absichtlich

eine solche sonderbare Annahme, daß etwa ein siegreicher Feind die Kaprize hätte, nur unter dieser Bedingung Frieden zu schließen. Oder daß ein Sohn seine Mutter erschlagen müsse, wenn der Staat es aus irgend einem Grunde verlangt. Zu solchen Konsequenzen führen aber Rousseau, Hegel und alle mit ihnen, die die Staatsmacht über alle Bedenken hinweg proklamieren.

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Wenn man aber den Vorschlag der Freiwilligkeit für den Kriegsdienst dennoch als etwas Sonderbares, ja Unvernünftiges und Abnormes ansehen sollte, so sei darauf hingewiesen, daß — wie ich Lothar Buchers Werk über den Parlamentarismus entnehme — in den alten englischen Parlamenten das Gesetz galt, daß, wenn es sich um Bewilligung von Steuern handelte, jene Bezirke nicht verpflichtet waren zu zahlen, deren Vertreter nicht eingewilligt hatten. Wenn es nun bei Steuerleistungen so galt, warum soll es nicht bei dem noch ungleich wichtigeren, respektive härteren Kriegsdienst Geltung haben?

Da Steuern eine Angelegenheit der Gesamtheit, d. h. des Staates sind, so sieht man hier den Grundsatz verwirklicht, daß nicht immer Forderungen des Staates jene des Individuums dominieren dürfen. Die jeweiligen politischen und kulturellen Verhältnisse entscheiden darüber, bei welchen Angelegenheiten solche Schranken etabliert werden sollen, die vom Staat nicht überschritten werden dürfen.

Hier nun wird befürwortet, eine solche Schranke in Wehrangelegenheiten aufzurichten und in dieser Beziehung sich nicht der Maxime zu unterwerfen, daß immer Forderungen oder Interessen, die angeblich der Allgemeinheit zugute kommen, jenen des Einzelindividuums vorangehen. Wir besitzen ja ohnedies bereits in mehrfachen Beziehungen ein solches Regime, in welchem das Individuum Sieger über das allgemeine Interesse bleibt.

So z. B. haben wir in unserer Strafprozeßordnung die Bestimmung, daß man niemanden zur Zeugenaussage gegen seine Eltern oder nächsten Verwandten zwingen darf, selbst dann nicht, wenn seine Aussage das alleinige Mittel wäre, den Tatbestand aufzudecken. Ebensowenig dürfte man heute die Tortur einführen, selbst wenn man sie, etwa in einem besonderen Falle, für nützlich für das Beweisverfahren halten würde.

Es ist belehrend, daß selbst Cicero, der doch ein durch und durch staatstreuer Mann, ja noch mehr, von einem echten Patrictismus erfüllt war, an einer Stelle sagt, nicht alles sei dem Staate zu tun erlaubt. Wenn ein Römer so spricht, so können wir es ihm getrost nachsagen.

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Von der Forderung, die ich hier aufstelle: Niemanden zum Kriegdienst zwingen zu dürfen, werden wohl viele nicht wenig frappiert sein. Die einen bloß aus Anhänglichkeit an bisher gewohnte Ansichten. Andere werden erschrecken und sich furchtsam umsehen, ob man sie nicht bei irgend einem »hohen Herrn« denunzieren würde, wenn sie meiner Ansicht, die ihnen im Grunde sympathisch ist, auch nur in schüchternster Weise zustimmen wollten. Oder man hat Furcht vor dem Geschrei der sogenannten Patrioten. Endlich glauben viele, die staatsmännische Einsicht sei stets auf Seite derjenigen, die prinzipiell für Kriege und Kriegsdienstzwang plädieren.

Diese letzteren bilden wohl die Majorität aller Gegner meines Programms und es erscheint darum besonders wichtig, ihnen ihren Irrtum zu benehmen.

Nicht um die Frage — vielleicht kann man sagen: um die Utopie — des ewigen Friedens handelt es sich hier, sondern um eine ganz einfache Rechtsfrage, nämlich um die Frage: Sollen immer jene, die für einen Krieg sind, andere, die dagegen sind, zu ihrer Ansicht zwingen dürfen? Oder soll es nicht vielmehr jedem frei stehen, in einer Lebensfrage nach seiner eigenen Ansicht zu entscheiden und zu handeln?

Ist übrigens die heutige Wehrgesetzgebung eine der allgemeinen Stimmung entsprechende, ist sie also eine ehrliche Institution, so wird die Realisierung meines Vorschlages gar keine Änderung der politisch-militärischen Situation herbeiführen, und es ist alles gut. Ist dies aber nicht der Fall und befürchtet man, daß die individuelle Freiheit der Entschließung in der Kriegsdienstfrage sehr oft Kriege unmöglich machen würde, so ist damit die heutige Gesetzgebung gerichtet. Denn damit wäre bewiesen, daß ihr nur Furcht vor angedrohten Strafen und bei dem Befürworten des Wehrzwanges allgemeine Heuchelei zugrunde liegen.

Sehr bestechend zugunsten des erzwungenen Kriegsdienstes ist der Satz, der schon im preußischen Kantonreglement von 1792 ausgesprochen wurde: »Niemand, der den Schutz des Staates genießt, kann sich der Verpflichtung entziehen, denselben zu verteidigen.«

Und ebenso der preußische Kriegsartikel Nr. 19 vom Jahre 1844: »Der ehrenvolle Beruf des Soldaten, seinen König und das Vaterland gegen die Feinde desselben zu verteidigen, erfordert von ihm Mühe und Tapferkeit.«

Nun werden aber, wie ich hier wiederholen will, die meisten Kriege wenigstens von der einen Seite gar nicht zur Verteidigung, sondern aus ganz anderen Motiven geführt — man denke z. B. an die ersten Feldzüge Friedrich des Großen — und doch verlangt der obige Satz die »Verpflichtung« zum Kriegsdienst. Wer soll nun entscheiden, ob es sich im gegebenen Fall wirklich um Schutz handelt? Das kann doch nur jeder, der für seine Auffassung eventuell mit seinem Leben einstehen soll, für sich selbst entscheiden. Aber noch mehr: Es kann ja Fälle geben, in denen viele den Schutz des Staates vor einem bestimmten Feinde gar nicht begehren, sondern gar nicht erwarten können, ihn siegen zu sehen; warum sollen diese dann den Staat »verteidigen« helfen?

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Sehr bestechend ist es, wenn ein Gegner der Freiwilligkeit voll Pathos ausruft: »Aber wenn es sich um eine Staatsnotwendigkeit handelt, ist doch ein Zwang zum Kriegsdienst notwendig!« Hierauf ist zu erwidern: Staatsnotwendigkeit ist ein ganz unbestimmter Begriff, es ist ja nicht so, als ob objektiv feststünde, was unter den gegebenen Umständen notwendig sei. In der Politik gibt es keinen Beweis für irgend eine Ansicht, wie das in den exakten Wissenschaften möglich ist, und wenn auch jemand noch so heftig und pathetisch von einer Staatsnotwendigkeit spricht, so muß man doch immer fragen: Wer soll darüber entscheiden, daß eine solche Notwendigkeit vorhanden ist? Jener Gegner der Freiwilligkeit hat gewiß die Meinung und Überzeugung, die Staatsnotwendigkeit sei außer Zweifel und er denkt gar nicht daran, daß Personen darüber zu entscheiden haben.

Wenn also nicht jeder einzelne Soldat — nach gehöriger Belehrung und stattgefundener Kontroverse — darüben zu

entscheiden hätte, so müßte man es dem Monarchen oder Minister oder der Volksvertretung überlassen, d. h. die heutige Sklaverei bliebe aufrecht, derzufolge Menschenleben den Ansichten, dem Willen anderer preisgegeben werden. Und dazu denke man noch daran, was alles von »Staatsmännern« als Staatsnotwendigkeit hingestellt wurde und gewiß auch in Zukunft hingestellt werden dürfte!

Es darf aber auch nicht verschwiegen werden, daß die Überzeugung von der Notwendigkeit einer allgemeinen Wehr- als Kriegsdienstpflicht durchaus nicht so tief wurzelt oder so unangefochten existiert, wie ihre Verteidiger behaupten. Selbst der chauvinistisch fühlende deutsche Politiker Heinrich von Treitschke sagte irgendwo: »Sein Gewissen kann kein denkendes Wesen opfern, darum gilt auch vom Fahneneid, daß der Fall eintreten kann, daß einer um seines Gewissens willen nicht mehr gehorcht.«

Und in allerneuester Zeit begab es sich, daß in dem Momente, als der Sultan des türkischen Reiches eine moderne konstitutionelle Verfassung gab, Gleichheit aller Religionen und der Bürgerrechte und damit auch die allgemeine Wehrpflicht proklamierte, die Christen, die bisher vom Militärdienst befreit waren, mit dieser Neuerung unzufrieden waren und in der Tat auch im türkisch-bulgarischen Kriege zum Feinde hinüberliefen. Und doch sprechen sie in den anderen Ländern ‹des Kontinents› von der »ruhmvollen Pflicht«, seinem Staate das Leben zu opfern, und bezeichnen den Wehrdienst sogar, um ihn umso ehrenhafter erscheinen zu lassen, als ihr »Bürgerrecht«, als Ehre und selbst als »Wohltat«.

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Eine gewohnheitsmäßige Art, zu urteilen, wird darüber lächeln, daß man jeden einzelnen, zusammen also das »Volk« der Wehrfähigen durch Zustimmung oder Nichtzustimmung darüber soll entscheiden, es also von ihm soll abhängen lassen, ob ein beabsichtigter Krieg geführt werden kann oder nicht. »Auf diese Weise könnte man oft selbst den ‚gerechtesten' ja selbst einen ‚notwendigen' Krieg nicht führen, wenn sich zu wenig Freiwillige melden!« Man denkt hiebei an die politische Unbildung, an den Egoismus und an die Feigheit der Menschen.

Aber, selbst wenn niemand von den gefragten Militärpflichtigen fähig wäre, darüber zu urteilen, ob dieser bestimmte Krieg vorteilhaft oder gerecht oder notwendig sei, — so ist doch gewiß der Einzelne kompetent, und zwar als der einzige kompetent, darüber zu urteilen, ob dieser oder irgend ein Krieg für ihn wert sei, Leben oder Gesundheit zu riskieren.

Wer das bezweifelt oder ignorieren will und von dem wichtigeren Interesse des Ganzen gegenüber jenem des Einzelnen spricht, der spielt nur mit den Begriffen »Staat«, »Gesamtheit«, »Ganzes« oder er hat noch die Untertanengesinnung im Leibe, die der Obrigkeit selbst die Existenzen von Hunderttausenden zu opfern bereit ist.

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Man könnte gegen das Prinzip der Freiwilligkeit einwenden: Wenn vermöge meines ökonomischen ‹sozialen› Programms für die Minimumarmee, sowie eventuell auch für Feuer- und Wasserwehr, d. h. wenn es an Freiwilligen mangelt, der Zwang herrschen soll, warum nicht auch für Verteidigung des Vaterlandes? Die Antwort darauf ist die, daß man bei der Frage der Ernährung, der Versicherung vor Feuer- und Wasserschaden, über ihre Nützlichkeit, sogar Unentbehrlichkeit niemals im Zweifel ist, aber bei der Frage, ob ein Krieg geführt werden soll, nicht nur von jedem Einzelnen an dessen Nützlichkeit und Notwendigkeit gezweifelt, ja oft das Gegenteil geglaubt werden kann, sondern die sogenannten politischen und militärischen Autoritäten untereinander nicht derselben Meinung sind. Und dazu kommt, daß weder mit dem Dienst in der Minimumarmee, noch mit der Feuer- und Wasserwehr direkt und prinzipiell das Risiko des Todes oder der Erkrankung und die Tötung anderer verbunden ist.

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Man sagt mitunter: Im Falle des bloß freiwilligen Kriegsdienstes bliebe das rückständigste Volk am wehrhaftesten, weil es kriegerischer gesinnt wäre. Vielleicht auch nicht, letzteres darum, weil selbst sonst hochkultivierte Völker Lust am Kriege haben können. Denken wir z. B. daran, wie die Ritter und später der französische Adel aus dem Wohlleben heraus und ausgerüstet mit Geist und Bildung Kriegsdienste suchten, ja förmlich von Hof zu Hof wanderten und sich als Offiziere, gleichviel gegen wen

immer anboten. Andererseits wollen wir annehmen, daß wirklich ein rückständiges Volk, in unserer Nachbarschaft sogar, wehrhafter sei als wir, die wir eine höhere Kultur besitzen. Man besorgt nun, daß wir unterjocht und unsere höhere Kultur verlieren würden. Dann mögen doch alle diejenigen, die ihre Kultur über alles stellen, sich freiwillig zum Kriegsdienst melden, wer aber eine solche Unterjochung und Minderung seiner Kultur lieber riskiert als Leben oder Gesundheit, der bleibt eben zu Hause. Aber so meinen es die ersteren nicht, sie wollen die anderen zwingen, ebenfalls der Kultur wegen Kriegsdienst zu leisten. Jedoch mit welchem Recht? Wer darf mir vorschreiben, wie hoch ich meine Kultur einschätzen soll? Ebensogut könnte man verlangen, jedermann müsse seine Religion, seine Kunstanschauung, seine Sprache gegen eine anders geartete Nation mit dem Leben verteidigen, die es sich etwa einfallen ließe, uns zu bekriegen, nicht zu vergessen, daß sich ja immer leicht etwas finden läßt, was kampflustige Menschen, was Raufbolde als das heiligste unserer Gefühle hinstellen, um zum Krieg zu treiben. Dann wären wir in der Tat nie unseres Lebens sicher.

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Man könnte besorgen, daß bei Durchführung meines Programms gelegentlich des Aufrufs zur freiwilligen Anmeldung der Armeemitglieder für den bevorstehenden Kriegsdienst ähnliche Methoden von Seite der kriegslustigen Partei oder der eventuell ebenso gesinnten Regierung angewendet würden, wie im XVII. und XVIII. Jahrhundert, als die Truppen aus der Masse angeworben wurden, und wie sie jüngsthin im letzten Burenkrieg von den Engländern und auch im jetzigen Weltkrieg in England praktiziert wurden. Da werden Werbetische in den Markthallen und Theatern aufgestellt, Militärmusiken spielen packende Märsche und Weisen, große Plakate in auffallendsten Ausstattungen flunkern mit Titeln ihrer Truppenkörper, schildern ihre Heldentaten und dergleichen mehr. Es waren zumeist beschäftigungslose Leute, die sich anwerben ließen und man suchte dabei die Soldaten durch Anbot eines hohen Soldes zu gewinnen. Wenn man sich nun einfallen ließe, mit solchen Mitteln zu arbeiten, so würde man ganz besonders bei meiner Staatskonstruktion der »allgemeinen Nährpflicht« nur Fiasko machen

oder doch nur sehr wenig erreichen. Denn wenn alle Staatsangehörigen ökonomisch gesichert sind, so ist niemand in der Lage der beschäftigungs-, d. h. erwerbslosen Leute von heute und also nicht gezwungen, gegen Geld sein Leben zu verkaufen. Ferner ist aus diesem Grunde und vermöge der allgemeinen Militärpflicht das Menschenmaterial ein viel gesitteteres als jenes der bisherigen Söldnerheere, nämlich geradeso gesittet wie die Armeen heute sind. Und endlich muß es ja, wenn auch die allgemeine Versorgung nicht eingeführt wäre, dem Geist meines Programms entsprechend jedem freistehen, vor dem Eintritt in das Kriegsheer durch Wort, Schrift und allenfalls auch durch öffentliche Agitation zu warnen.

Aber es muß zugestanden werden, daß man selbst bei Durchführung des Freiwilligenprinzips vor dem aufreizenden und bestechenden Einfluß unlauterer Mittel, namentlich des Geldes, niemals sicher sein wird. Jetzt in dem Weltkrieg erlebten wir es, daß man, anstatt Werbetische aufzustellen und alkoholische Getränke und armseliges Handgeld zu verwenden, um die armen Teufel ins Heer zu locken, einfach hohe Funktionäre, Journalisten, Volksredner und Gassenschreier mit mehr oder weniger hohen Summen bedachte, um für Krieg und bestimmte Allianzen Stimmung zu machen. Es kann nun wohl sein, daß das auch im Staate mit Freiwilligkeit geschehen wird und dadurch die Wehrfähigen betäubt werden und sich anmelden, weil die Kriegsgegner höchstwahrscheinlich zum Zwecke der Gegenagitation weniger Geld besitzen oder aufwenden werden als die Kriegsintriganten[1]. Die Wehrfähigen selbst wird man allerdings durch Geld nicht zur Anmeldung bewegen können, denn bei der ökonomischen Sicherheit aller Staatsbürger müßte der Betrag für den einzelnen Mann ein ziemlich hoher sein und bei der Anzahl derselben wäre der Geldaufwand wohl unerschwinglich groß.

Den Satz »Wollen alle an der Freiheit partizipieren, so müssen sie aber auch alle ihren Tribut in der Form der allgemeinen Dienstpflicht zollen« ⟨L. Stein im »Sinn des Lebens«⟩

[1] Zu Beginn des Weltkrieges ordnete der Minister des Außern eines großen Staates bei seinem Agenten in Paris an, 20.000 Gulden an Journale in Paris zu verteilen, um dort günstige Stimmung zu machen. Der Agent mußte nicht wenig über diese Naivität lachen, denn schon früher hatte ein anderer Staat zu gleichen Zwecken zwölf Millionen ⟨Rubel⟩ nach Paris geschickt.

und andere analoge Sätze, die die Dienstpflicht vom Standpunkt des Tausches oder der Kompensation gegenüber den durch den Staat dargebotenen Vorteilen betrachten, muß man für prinzipiell unanwendbar und unberechtigt ansehen.

Denn es herrscht zwischen Dienstpflicht und Freiheit gar kein notwendiger Zusammenhang, es hat Zeiten ohne Freiheit, aber mit Dienstpflicht ⟨Konskription⟩ gegeben, und es gibt Staaten ⟨z. B. England⟩, in denen bisher Freiheit ohne Dienstpflicht vorhanden war. Ferner steckt in jenem Satz die Vorstellung latent, als ob irgend jemand Mächtiger, der die Staatsgewalt in Händen hat, zu uns sprechen würde: »Wollt ihr Freiheit, so verlange ich dafür allgemeine Dienstpflicht.« Diese Knechtsvorstellung spielt überhaupt selbst in den Volksvertretungen bei jeder radikaleren Gesetzvorlage, natürlich besonders in Monarchien, eine Rolle. Allein, wer ist denn jener, der etwas wünscht und der etwas bietet? Wir selbst und nur wir selbst, wir Staatsbürger sind es, die wir uns den Staat, d. h. die Gesetze und Reformen so einrichten wollen, wie es uns behagt, und in dem hier gegebenen Falle wollen wir uns eben nicht nur freiheitliche Institutionen einrichten, sondern auch Freiwilligkeit des Kriegsdienstes. Von einem Kauf des einen ⟨der Freiheit⟩ durch das Verzichten auf das andere ⟨Freiwilligkeit⟩, von einem Tauschgeschäft kann gar keine Rede sein.

Ich möchte bei dieser Gelegenheit auch auf das nahezu Sklavische und auf den Widersinn aufmerksam machen, der darin liegt, daß bei einer Geldbewilligung oder bei einer Zustimmung zu einer wichtigen Regierungsvorlage oft der Monarch oder der Minister den Volksrepräsentanten seinen »Dank« und sogar seine »Anerkennung« ausspricht, wo doch eine solche Bewilligung und Zustimmung immer im Interesse des ganzen Volkes geschieht oder geschehen soll! Eine Belobung könnte höchstens eben von dem Volke ausgehen, so wie es jetzt aber üblich ist, macht es den Eindruck, als ob der Monarch oder Minister als Schulmeister zu Schülern sprechen würde, die ihre Aufgaben gut gemacht haben. Das Umgekehrte hätte eher einen Sinn, daß nämlich die Volksvertretung einer bewiesenen besonders großen Tüchtigkeit des Monarchen oder Ministers ihre Anerkennung — aber nicht einen Dank — ausspricht.

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Man könnte gegen mein Programm der Freiwilligkeit einwenden: Es setze voraus, daß alle Staaten gleichzeitig diese Reform durchführen, sonst könnte der Staat, der die Freiwilligkeit zuerst eingeführt hat, die Beute der anderen werden. Diese Einwendung entbehrt jedoch jeder praktischen Bedeutung. Wenn Gleichzeitigkeit in militärischen Fortschritten oder Rückschritten eine Bedingung der Sicherheit der Staaten wäre, so wäre kein einziger auch nur einen Tag seiner Existenz sicher, denn solche Änderungen finden ja niemals gleichzeitig und in gleichem Maße statt.

Irgend ein beliebiger einzelner — in sich konsolidierter — Staat kann ohne jede Gefahr mit dem System des freiwilligen Kriegsdienstes beginnen. Denn es wäre eine aller Erfahrung widersprechende Befürchtung, daß im Moment der Einführung der Freiwilligkeit des Kriegsdienstes nun auch sofort irgend ein anderer Staat sich erheben und den so reformierten Staat überfallen würde. Ein Krieg, und selbst ein siegreich durchgeführter, ist ja kein Scherz, er muß wohl überlegt werden und man müßte sehr sicher in seiner Annahme sein, daß der zu überfallende Staat so wenig Freiwillige aufbringen werde, daß er mit Leichtigkeit besiegt werden kann. Wer kann aber das Resultat einer Umfrage an die Wehrfähigen im vorhinein wissen? Niemand.

Und ist der Vorwand zum Aggresivkriege gegen jenen Reformstaat auch nur halbwegs ein frivoler, so wird sich höchstwahrscheinlich die Volksstimmung in demselben so empören, daß die Anzahl der Freiwilligen eine sehr große, vielleicht eine ebenso große wird wie beim heutigen Zwangskriegsdienst. Wäre das aber nicht der Fall, so würde es nur beweisen, daß die Wehrfähigen des Reformstaates sich lieber besiegen lassen, als ihre physische Existenz hinzuopfern; dagegen etwas einzuwenden hat aber niemand das Recht, denn das hieße, wiederum den Zwangsdienst herbeiwünschen. Zudem bedenke man noch den Umstand, daß keine einzige militärisch bedeutungsvolle Neuerung je von allen Staaten zugleich eingeführt wurde. Auch eine so radikale Neuerung wie die allgemeine Wehrpflicht wurde in den einzelnen Staaten nicht gleichzeitig eingeführt. Es geschah dies 1868 in Österreich, 1872 in Frankreich, 1874 in Rußland, 1875 in Italien. Wenn irgend ein Staat mit der Herabsetzung der Dienstzeit — von der die Fachmänner ebenfalls stets gegenüber dem stehenden

Heer mit langer Dienstzeit eine Schwächung der Armee und ihrer militärischen Ausbildung besorgten — anderen Staaten voranging, so war das doch nie eine Veranlassung, nunmehr sofort von Nachbarstaaten ‹mit längerer Dienstzeit› angegriffen zu werden. Und wenn ein Staat einem anderen in irgend einer Waffe, z. B. der Feldartillerie, voraus war, so genügte das jenem doch nicht, bloß auf Grund dieses militärischen Vorzugs sofort einen Krieg zu beginnen. Ein solcher Umstand kann höchstens mitbestimmend für eine Kriegsunternehmung sein — wie das vielleicht im österreichisch-preußischen Krieg im Jahre 1866 beim neuen Zündnadelgewehr für Preußen der Fall war —, aber in unseren Tagen muß jede Kriegsunternehmung lange vorher überlegt, historisch oder politisch vielfach vorbereitet sein; ein militärischer Vorzug kann eben nur der letzte Tropfen sein, der das Gefäß zum Überlaufen bringt, und es kann daher der bedrohte Staat Zeit genug finden, sich anderweitig militärisch oder politisch vorzubereiten. Nun ist aber die Freiwilligkeit gegenüber dem Zwang ins Kriegsheer an und für sich überhaupt gar kein militärischer Nachteil, sie kann eher moralische Stärkung eines Heeres genannt werden; denn darüber herrscht wohl ziemlich einstimmig die Ansicht, daß die Quantität einer Armee allein nicht entscheidet, sondern in weit höherem Maße die Begeisterung, die Überzeugung von der Notwendigkeit eines Krieges, die die Soldaten erfüllt.

Noch mehr: Eine militärische Gleichheit ist zwischen den Staaten überhaupt nie vorhanden und auch nie möglich; trotzdem wird diese Ungleichheit, wie wir sehen, nicht dazu benützt, den Krieg in Permanenz zu erklären, wie es doch der Fall sein müßte, wenn Ungleichheiten gefährlich für den Frieden wären. Die Ungewißheit des Resultats jedes Krieges, die eventuellen politischen Allianzen der schwächeren Staaten und das Unheil, welches selbst ein glücklicher Krieg dem siegreichen Staat bringt, verhindern meistens die Entschließungen, Kriege wegen irgend einer militärischen Ungleichheit zu beginnen.

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Ob man diesen Argumenten Beifall schenkt oder nicht, so wird man doch nun meinem jetzt folgenden Vorschlag für die Durchführung meines Freiwilligkeitsprogrammes höchstwahrscheinlich

gerne zustimmen. Es wäre nämlich, um eine Gleichzeitigkeit in der Durchführung dieses Programmes herbeizuführen, zweckmäßig, einen Staatenkongreß einzuberufen, auf welchem vereinbart werden soll, die Wehrpflicht abzuschaffen und das System der Freiwilligkeit wohl am besten mit seinen hier dargestellten Detailbestimmungen durchzuführen.

Wenn eine kräftige Agitation unter den Volksmassen in allen Ländern vorhergegangen sein wird, so ist zu erwarten, daß kaum ein Staat wagen wird, eine solche Vereinbarung nicht zu ratifizieren.

Auf demselben Kongreß soll aber noch ein zweites Programm vereinbart werden. Um nämlich jede Seeoberherrschaft und Seekriege überhaupt unmöglich zu machen, soll vereinbart werden: alle Kriegsschiffe — bis auf jene für die Küstenverteidigung notwendigen — zu desarmieren, nur freiwillige Seesoldaten auszuheben, respektive zu verwenden und die Strandbatterien von allen Meerengen zu entfernen.

Gegen diesen Vorschlag kann niemand eine ehrliche Einwendung erheben, denn kein einziger Staat hat dann zu befürchten, daß ihn irgend eine Flotte eines einzelnen oder mehrerer alliierter Staaten angreifen wird. Also kann auch England nach Desarmierung seiner wie aller andereren Kriegsschiffe seine Zustimmung geben, ausgenommen, es wolle seine gewalttätige Seepolitik fortsetzen. Gegen diese Absicht dürften sich aber vielleicht hinreichende Gegenkräfte finden lassen.

Vielleicht besser und präziser als durch alle so vielfachen Auseinandersetzungen in dieser Schrift wird man meine Grundanschauung über Krieg und Wehrpflicht erkennen, wenn ich im nachstehenden eine der meinen entgegengesetzte Ansicht zu beleuchten suche, die von einem meiner Freunde, einem der edelsten Männer und kräftigsten philosophischen Köpfe Deutschlands, als Einwendung an einen anderen Freund geschrieben wurde.

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»Von den Popperschen Ideen ist mir eine unmöglich: das Aufgeben des Kriegszwanges. Hier geht Popper zu weit. Er setzt da Menschen voraus, die geistig so frei sind, daß sie unabhängig von ihrer soziologischen Stellung über sich entscheiden können. Wo sind diese Leute? Demokratie ist ein fernes Ideal.

Popper steht noch unter der rationalistischen Einwirkung des Programms der Revolution von 1789. Wir haben doch aber inzwischen gelernt, jene Menschenrechte als Entwicklungsziele zu erkennen, die nicht mit einem Male verwirklicht werden können, sondern denen die Menschheit nur langsam entgegenreift.

Das Poppersche Motiv vergesse ich keinen Augenblick: Es ist der für ihn absolute Wert des Menschenlebens. Aber auch das halte ich nur für ein noch fernes Ideal. Wo kämen wir hin, wenn wir jedem gestatten wollten, die Waffen niederzulegen, wenn es ihm paßt? In den meisten Fällen würde das aus Feigheit und nicht aus sittlichen Erwägungen geschehen und wohl niemals aus sittlich haltbaren Erwägungen. Man darf nie vergessen, daß das Individuum unabtrennbares Glied einer Gemeinschaft, gleichsam in die Gemeinschaft eingebettet ist. Sie ist seine physische und geistige Existenzbedingung und sie kann ihre eigene Existenz nicht von willkürlichen Entscheidungen unreifer Menschen abhängig machen.«

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Ich erwidere vor allem, daß, um seine physische Integrität, ja sein Leben über alles zu stellen, es durchaus nicht notwendig ist, »geistig frei« zu sein. Sowohl der geistig Freie wie Unfreie sind vollkommen kompetent, das Opfer ihres Lebens zu verweigern, es handelt sich eben um nichts anderes als um das Vorhandensein von Lebensgefühl und Lebenslust. Wie stark dieses Gefühl und diese Lust sind, hängt von dem bestimmten Individuum ab und es ist das oberste Menschenrecht, jedem ohne Ausnahme zu gestatten, sich diesem inneren Zustande gemäß zu verhalten. Weder Bildung, noch Talent, noch irgend etwas anderes darf da erlauben, zwischen den Menschen einen Unterschied in der Beurteilung dieses Verhaltens zu machen.

Demokratie ist durchaus kein gar so »fernes Ideal«. Wie viel Demokratie haben wir schon, an die man, wenigstens in gewissen Staaten, vor wenigen Jahrzehnten noch nicht gedacht hat! Warum sollen wir uns mit Absicht Schranken in der Weiterführung demokratischer Institutionen auferlegen? Es hängt ja nur von uns ab, immer mehr nützliche Einrichtungen zu treffen, die zum Glück der Menschen beitragen und dazu gehört doch gewiß die Befreiung vom Kriegsdienstzwang. Und

es ist auch, wie meine Ausführungen wohl beweisen, gar kein objektiver Grund vorhanden, uns von diesem Fortschritt abhalten zu lassen.

Es kommt nicht darauf an, ob man das Opfer seines Lebens aus »sittlich haltbaren Erwägungen« oder aus »Feigheit« verweigert. Wenn irgend eine Regierung Krieg führen will, um die Ehre des Staates »wieder herzustellen«, die durch irgend einen Akt politischer Polissonnerie verletzt wurde, oder um einen Weg nach Indien frei zu bekommen und dergleichen, so kann man dem Dienstverweigerer nur recht geben oder wenigstens ihn nicht unsittlich und nicht feig nennen. Und was Feigheit speziell betrifft, so habe ich an anderer Stelle dieses Buches gezeigt, daß wir alle je nach den Umständen feig sind und daß gar kein Grund vorhanden ist, in der Lust weiterzuleben, etwas Tadelnswertes zu sehen, obwohl die Bereitwilligkeit, sich in jedem Falle für die Gesamtheit zu opfern, sehr zu loben, aber allerdings nicht jedermanns Sache ist.

Es ist eine sehr gefährliche Ansicht, zu glauben, daß das Individuum »in die Gemeinschaft eingebettet ist«. Das ist nur in gewissen Beziehungen der Fall, z. B. wenn es sich um die Verteidigung gegen einen Feind auf Tod und Leben handelt. Aber in vielen anderen Beziehungen ist es schon heute nicht der Fall und es hängt nur von uns ab, die Gebiete der Unabhängigkeit vom Staate zu vermehren, wenn es uns nützlich scheint.

Ob die »Existenz der Gemeinschaft« wirklich gefährdet ist, das zu beurteilen muß demjenigen überlassen werden, dessen Aufopferung man verlangt und nicht der Obrigkeit oder irgend welchen anderen Personen. Und jene Menschen, die sich nicht opfern wollen, fällen durchaus keine »willkürlichen« Entscheidungen, sondern es ist ja für sie die ernsteste Sache von der Welt. Nicht nur unreife, sondern auch höchst »reife« Individuen und diese auch im jetzigen Weltkriege und in gewissen Staaten in sehr großer Anzahl wollten nicht ins Feld, wenn und weil sie nicht von der Notwendigkeit des speziellen Krieges überzeugt waren. Man kann in Fällen von mutwilligen oder nicht notwendigen Kriegen überhaupt nicht davon sprechen, daß das Individuum in der Gemeinschaft seine »physische und geistige Existenzbedingung« hat, im Gegenteil, in den eben angeführten

Fällen raubt die durch eine Obrigkeit oder Menschengruppe oder kriegsbegeisterte Volksmasse repräsentierte Gemeinschaft dem Individuum seine Existenz geradezu, wenn es zum Felddienst gezwungen wird. Was aber die »geistige« Existenzbedingung betrifft, so darf man den Staat nicht mit der Gesellschaft verwechseln. Alles, was Kultur, also alles Geistige betrifft, verdankt man der Gesellschaft, der Staat sorgt nur für die Disziplin und äußerliche Form, so wie er auch für die Sicherheit und Ordnung aller gesellschaftlichen Bestrebungen als Wächter der Sicherheit des ganzen Staatsgebildes sorgt, dies alles nur in mechanischer Art und Weise. Daher kann man von einem Lebensopfer für die Gesellschaft gar nicht sprechen, sie verlangt es ja auch gar nicht. Es ist nur der Staat, der mitunter unser Leben verlangt und im Grunde nicht der Staat, sondern die Personen, die die Notwendigkeit unserer Hingabe behaupten und die die Macht in Händen haben. Der Einsicht und dem ehrlichen Glauben dieser Personen mögen wir uns unterwerfen oder auch nicht.

Das muß uns freigestellt sein!

X.

Durchführung des Programms der Freiwilligkeit.

Der Ersatz der heutigen Wehrpflicht durch die Institution der Freiwilligkeit findet mit dem Tage statt, an dem das Volk selbst ‹d. h. durch ein Referendum› die Bestimmung trifft, daß das Kriegsheer aus den Reihen der Militärpflichtigen nur auf Grundlage der freiwilligen Anmeldung zusammenzusetzen ist.

Das gilt sowohl für den Fall des Bestehens von Kaderheeren als auch von Milizheeren.

Eine solche grundstürzende Proklamation setzt natürlich eine vielleicht lange vorhergegangene Agitation zugunsten ihres Prinzips voraus, aber mit der Art und Form dieser Agitation sich zu befassen, die von Land zu Land anders sein kann, ist nicht die Aufgabe dieser Schrift. Es mag hervorgehoben werden, daß die Bewegung für Freiwilligkeit und dieses Programm selbst, nur indirekt pazifistisch ist, weil sie im Grunde nur die Erfüllung des Gerechtigkeitsprinzips ist, wonach niemand, also auch keine noch so große Majorität oder keine Staatsregierung das Recht hat, ihre eigenen Ansichten über politische Dinge, die auf Tod und Leben gehen, anderen aufzudrängen. Die Folge dieser Erfüllung wird allerdings auch eine, wenigstens partiell, wenn auch nicht vollkommen, pazifistische sein. Was in dieser Beziehung noch mehr verlangt werden mag, ist Aufgabe der direkt pazifistischen Programme, die sich jetzt ziemlich vermehren und denen volles Gelingen ihrer menschenfreundlichen Absichten sehr zu wünschen ist.

Was jetzt nottut, ist also das Vorhandensein einer genügend verbreiteten, gegen den Wehrzwang gerichteten Gesinnung, die immer mehr Einfluß auf die innere Politik der Staaten zu gewinnen vermag. Und dabei darf eine langsame Entwicklung

der Agitation durchaus nicht entmutigen, für den Anfang genügen schon sehr wenige ernste und beharrlich tätige Individuen. Es sei daran erinnert, in welcher Weise die Aufhebung der Sklaverei in den Vereinigten Staaten Nordamerikas realisiert wurde. Die ganze Agitation führt sich in der Hauptsache auf zwei Personen, nämlich auf die Brüder Garrison zurück, die mehr als dreißig Jahre lang, trotz der vehementesten Gegnerschaft und ohne Furcht vor Bedrohung ihres Lebens, für die Idee der Antisklaverei in Wort und Schrift arbeiteten. An dem Tage, an welchem endlich Lincoln die Aufhebung der Sklaverei proklamierte, stellte William Lloyd Garrison das Erscheinen seiner Zeitung, »als nunmehr überflüssig«, ein. Man ahme nun in der Frage der Befreiung von dem erzwungenen Kriegsdienst diese echt anglikanische Beharrlichkeit nach.

Bisher ist in unserem öffentlichen Leben noch kaum ein Anfang der hier gewünschten Agitation gemacht worden. Die einzige hieher gehörige Tatsache war das heftige, allerdings vergebliche Sträuben eines Teiles der englischen Bevölkerung gegen die beabsichtigte Einführung der Wehrpflicht.

Man könnte wohl die Frage aufwerfen, ob sich die Agitation direkt auf die Freiwilligkeit beziehen oder ob man versuchen soll, sich ihr allmählich durch Zwischeninstitutionen zu nähern, zu dem Zwecke, die Anhänger des Bestehenden nicht zu sehr vor den Kopf zu stoßen.

Eine solche Methode des allmählichen Überganges wäre zum Beispiel die, daß man zuerst die Erklärung von Krieg und Frieden dem »Staatsoberhaupte« aus der Hand nimmt und der Volksvertretung zuweist, was ja, wie aus dem Kapitel über »Das Recht zur Kriegserklärung« zu ersehen, in einigen Staaten schon jetzt eingeführt ist. Nehmen wir an, es wäre erreicht, daß die Volksvertretung das Recht der Kriegserklärung in die Hand bekommen hat, so könnte der nächste Schritt der sein, es dem Volke selbst vermöge eines irgendwie qualifizierten Abstimmungsmodus zu übergeben, letztlich in Form des Referendums, wobei auch Frauen mitzustimmen hätten. Hat man es so weit gebracht, so strebt man später an, nach dem positiven Ausfall des Referendums, mit dem Beschluß einer Kriegserklärung ‹respektive einem Kriegsbeschluß überhaupt› die Majorität ‹z. B. zwei Drittelmajorität› aller Heeresangehörigen zu bevollmächtigen, da es ja

doch eigentlich diese am meisten angeht. Und endlich würde man es dahin zu bringen suchen, daß jeder einzelne Heeresangehörige ⟨also z. B. jeder Milizmann⟩ selbst zu entscheiden hat, ob er einen beabsichtigten Feldzug mitmachen will oder nicht, daß also dann das hier befürwortete Freiwilligkeitsprogramm durchgeführt wäre.

Es kann ja sein, daß da oder dort ein solcher sanfterer und allmählicher Weg dem direkten der Umstände, das heißt der Gegnerschaft halber vorgezogen werden muß. Jedoch a priori darf man, wie ich glaube, nicht voraussetzen, daß eine solche zögernde Methode die praktischere sein müsse. Denn es ist sehr wahrscheinlich, daß die innere Triebkraft der Agitation viel stärker sein würde, wenn jeder Staatsbürger weiß, daß nur er selbst über seine ganze physische Existenz zu verfügen hat, als wenn er weiß, daß zwar nicht er selbst, sondern irgend eine Korporation dieses Recht besitzt. Der letztere Fall wird wohl jedem mehr wie ein politisch formaler als ein tatsächlich nützlicher erscheinen.

Daher wäre anzuraten, wenn es nur halbwegs die Umstände gestatten, das direkte Losgehen auf das Endziel als den praktischeren Weg zu betrachten und sich an die schönen und richtigen Worte Thomas Münzers zu erinnern, der von Luther als dem »Leisetreter« und dem »sanften Fleisch von Wittenberg« zu sprechen pflegte.

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Sind in mehreren großen Staaten die Gesinnungen der Staatsbürger für das Freiwilligkeitsprogramm gewonnen, so hat womöglich ein Staatenkongreß eine Vereinbarung für die Durchführung zu treffen und gleichzeitig die im neunten Kapitel ebenfalls vorgeschlagene Reduktion aller Kriegsmittel für Seekriege zu veranlassen.

Eine totale Abrüstung der Landheere ist heute und wahrscheinlich für immer undenkbar, denn es entscheiden hier innere und äußere Vorgänge, für Seestreitkräfte nur äußere.

ZWEITER TEIL.

XI.

Der Staat.

I. Kritik der bedeutendsten Staatstheorien, besonders in Hinsicht auf die Wehrpflicht.

Die Meinung, daß die allgemeine Wehrpflicht eine gute, zweckmäßige, ja beinahe selbstverständliche Institution und eine notwendige Konsequenz einer richtigen Auffassung des Staates und seiner Aufgaben sei, ist so verbreitet und so festgewurzelt, daß es hier, wo die Abschaffung der Wehrpflicht befürwortet wird, notwendig scheint, auch über den »Staat« allgemeinere Bemerkungen zu machen. Diese Bemerkungen bilden in ihrer Weitläufigkeit zusammen eine wohl sehr umfangreiche Digression, die gewiß nicht sehr unterhaltend ist, die ich aber der Wichtigkeit der Sache, nämlich der Festigung meines Programms wegen nicht unterdrücken darf.

Es sollen hier nun die wichtigsten Staatstheorien besprochen und in ihren Beziehungen zur Wehrpflicht kritisiert werden. Und ich beginne mit jener Auffassung des Staates, die ihn als Resultat eines Vertrages seiner ursprünglich souveränen Glieder oder als Rechtsform eines Vertrages in verschiedenen Varianten hinstellt.

Die Vertragstheorie dürfte wohl zuerst von Protagoras aufgestellt worden sein[1]. Sodann behaupteten die Epikuräer, der Staat entstünde durch einen Vertrag der sozialen Atome, das heißt der Individuen, zum Zweck der Sicherung vor gegenseitigen

[1] Die in diesem Passus enthaltenen historischen Daten, namentlich jene aus älteren Zeiten, entnehme ich zum Teile den Schriften von G. Jellinek, und zwar den Werken »Die Erklärung der Menschen- und Bürgerrechte« und »Das Recht des modernen Staates« (1. Band: Allgemeine Staatslehre).

Beschädigungen. Sehr merkwürdig ist es, daß schon im alten Testament von einem Bund — also Vertrag — Gottes mit seinem Volke, wie auch von einem Bund Davids mit Israel gesprochen und diese Vorstellung in der Bibel in vielen Konsequenzen durchgeführt wird, und nicht minder merkwürdig ist der Einfluß dieser biblischen Vorstellung eines Vertrages im XVI. und XVII. Jahrhundert auf die innere Politik Englands, wo durch Anwendung dieser Lehre unter den independenten Puritanern die Anschauung entstand, daß, wie die christliche Gemeinde — nach Calvins Grundsätzen —, so auch der Staat auf einem Covenant, einem Gesellschaftsvertrage beruhe, der von allen Mitgliedern des Gemeinwesens einstimmig abgeschlossen werden müsse. Man sieht hieraus — und diese Tatsache ist gewiß nur den wenigsten, nämlich den staatsrechtlich Beflissenen bekannt — daß das alte Testament auf unsere Staatstheorien und auch auf die politischen Bewegungen und Gestaltungen bis auf die neuere Zeit herab einen wesentlichen, ja vielleicht den Haupteinfluß ausgeübt hat[1].

Die wissenschaftliche Bearbeitung der staatsrechtlichen Vertragstheorie begann erst mit Hobbes.

Bei Hobbes ist die Staatsbildung ungefähr eine solche, als ob eine sich gegenseitig zerfleischende Volksmenge unter ein schützendes Dach flüchten, dort den Herrn des Hauses kniefällig bitten würde, sie streng zu reglementieren, und ihm versichern würde, sie sei im vorhinein mit allem, was er mit ihr tun wolle, gänzlich einverstanden. Man kann doch aber nicht annehmen, daß die Menschen so sehr den Kopf verloren haben werden, um sich mit Haut und Haar irgend jemandem auszuliefern? Wohl sagt Hobbes: »Es sind Fälle möglich, wo man den Gehorsam verweigern darf, weil sie nicht in der ursprünglichen Übertragung der Rechte liegen«, »aber«, setzt er gleich hinzu, »dem Regierenden bleibt das Recht, die Widerspenstigen zu töten.«

So kann aber kein geordneter Staat gedacht werden, wenn die Grenzen der ursprünglichen Übertragung einerseits nicht fixiert wurden und auch nicht fixiert werden können, weil man ja niemals alle Möglichkeiten voraus wissen kann und andererseits

[1] In England war es die Bibel, im neueren Frankreich die politische Literatur der Griechen und Römer.

die rohe Gewalt und nicht die Überzeugung von der Gerechtigkeit der Forderungen der Staatsgewalt als letztes und entscheidendes hingestellt wird. Nach Hobbes müßte eigentlich in jedem Augenblick das Recht der Oberherrschaft durch faktische Gewaltausübung bewiesen werden und alles, was dieser geniale Staatsphilosoph aufbaut, ist eigentlich mehr eine eigentümliche Zähmung einer »wild gewordenen Menagerie«, als eine Organisation einer Anzahl von Menschen, die nicht nur Wildheit, sondern gewiß auch etwas Rechtsgefühl und etwas Hang nach Gesittung in sich haben[1].

Aber Hobbes opfert doch nicht so unbedingt das Leben der Staatsbürger den »Regierenden«, wie es nach seiner allgemeinen Staatstheorie den Anschein hat. Denn schon der Satz, den er im »Leviathan« über den »erzwungenen Kriegsdienst« aufstellt, zeigt, daß er dem einzelnen ein Recht auf sein Leben zu wahren sucht, obwohl er allerdings darin noch nicht weit genug geht, nämlich nicht dieses Recht allgemein und bedingungslos zuspricht. Hobbes sagt dort: »Es ist ein unveräußerliches Recht, außer im Fall der allgemeinen Not, sich dem Kriegsdienst zu verweigern, wenn man einen guten Stellvertreter beschaffen kann.« Das »sich verweigern« drückt doch aus, daß die Entscheidung darüber, ob tatsächlich der Fall einer allgemeinen Not vorliege, beim Verweigerer und nicht bei der Regierung liege, denn wenn eine Regierung Krieg führen will, wird sie niemals zugeben, daß keine allgemeine Not vorhanden sei.

Überdies muß, schon weil der Begriff einer allgemeinen Not nicht für immer präzisiert werden kann, von der Voraussetzung, daß die Regierung zu entscheiden habe, abgesehen werden.

Übrigens sagt Hobbes auch ganz entschieden: »Die Grenzen der Souveränität, also die ‚Freiheit des Individuums' werden definiert als diejenigen individuellen Befugnisse und Rechte, welche man nicht durch irgend einen Vertrag aufgeben kann. So kann

[1] Hier ist es sehr interessant, an einen Ausspruch von Leibniz (in einem Brief aus dem Jahre 1711) zu erinnern, er sagt dort: »Der Staat ist weniger notwendig, als es Hobbes meint . . . Es ist eine souveräne Ungerechtigkeit, jene für Barbaren zu halten, die keine Magistratur besitzen . . . . . Sie bewahren gewöhnlich einen gewissen Grad von Humanität, sie sind uns selbst in manchen Beziehungen überlegen, z. B. Geiz und Ehrgeiz sind ihnen unbekannt . . .«

sich keiner zum Selbstmord verpflichten oder zur Selbstanklage.« Da nun der Eintritt in ein Kriegsheer einem potentiellen Selbstmord gleichkommt, so ist also der Zwang hiezu durch die Souveränität ungerechtfertigt. Man kann also nach diesem allem, selbst nach Hobbes' Staatsauffassung, meiner Tendenz ganz wohl zustimmen, freiwilligen Kriegsdienst einzuführen.

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Spinoza aber deduziert die unbedingte Unterwerfung folgendermaßen [1]:

»Ohne den geringsten Widerspruch mit dem Naturrecht ‹wonach Recht gleich Macht ist› kann eine Genossenschaft gebildet und jeder Vertrag stets aufs genaueste beobachtet werden, wenn nämlich jeder alle Gewalt, die er hat, auf die Genossenschaft überträgt . . . . . Hieraus folgt, daß die höchste Macht an kein Gesetz gebunden sei, sondern daß ihr alle in allem gehorchen müssen, denn hiezu mußten sich alle stillschweigend oder ausdrücklich verbinden, als sie alle ihre Macht, sich zu verteidigen, d. h. all ihr Recht, auf sie übertrugen. Denn wenn sie sich etwas vorbehalten wollten, so müßten sie auch zugleich darauf Bedacht nehmen, wie sie es mit Sicherheit verteidigen könnten, da sie dieses aber nicht getan haben und auch nicht ohne Trennung und folglich auch nicht ohne Zerstörung der Regierung hätten tun können, so haben sie sich dadurch dem Ermessen der höchsten Gewalt absolut unterworfen. Da sie dieses absolut getan haben, und zwar ‹wie wir schon gezeigt› sowohl durch die Notwendigkeit gezwungen als durch die Vernunft bewogen, so folgt, daß, wenn wir nicht Feinde der Regierung sein und nicht gegen die Vernunft handeln wollen, welche die Regierung aus allen Kräften zu verteidigen rät, daß wir auch verbunden sind, alle Befehle der höchsten Gewalt, wenn sie auch das Widersinnigste befehle, absolut zu vollziehen, denn auch die Vernunft gebietet, dergleichen zu vollziehen, daß wir von zwei Übeln das geringere wählen.«

Hierauf ist zu erwidern, daß es durchaus nicht der Vernunft entspricht, alle Gewalt, also die Gewalt über alles, demnach auch

[1] Siehe seinen theologisch-politischen Traktat. ‹16. Kapitel.›

über unser Leben, irgend wem oder irgend einer Genossenschaft zu übertragen. Und es ist auch nicht das kleinere Übel, sich absolut zu unterwerfen, denn es kann Befehle der Staatsgewalt geben, die so schlimme Folgen für uns haben, z. B. die Forderung unseres Lebens zum Zwecke eines Krieges, dessen Notwendigkeit uns nicht einleuchtet, daß alle Vorteile der Unterwerfung dagegen verschwinden.

Das, was ich eben sagte, gilt von jeder Regierungsform, also auch von der von Spinoza ‹mit Recht› so sehr gerühmten demokratischen. Wenn z. B. in der heutigen französischen Republik die Obrigkeit, bzw. das Parlament einen Krieg zur Wiedereroberung Elsaß-Lothringens oder, um Madagaskar »zu züchtigen«, beschließt, so ist ein solcher Beschluß, politisch genommen, nicht widersinnig, man braucht auch nicht ein »Feind der Regierung« zu sein und durchaus nicht »gegen die Vernunft handeln zu wollen«, und doch kann man gegen einen solchen Krieg sein und wünschen, womöglich vom Kriegsdienst befreit zu sein, weil man eben den Verlust zweier Provinzen für das »geringere Übel« gegenüber der Verkrüppelung oder dem Tod auf dem Schlachtfelde hält.

Spinoza durchbricht aber auch seine eigene These. Zuerst durch den Satz:

»Hiezu kommt, daß man diese Gefahr, sich der Herrschaft und dem Ermessen eines anderen zu unterwerfen, leicht übernehmen kann, denn den höchsten Gewalten kommt dieses Recht, alles, was sie wollen, zu gebieten, wie wir gezeigt, nur so lange zu, als sie wirklich die höchste Gewalt haben, verlieren sie sie, so verlieren sie auch zugleich das Recht, alles zu gebieten, und es fällt auf den oder die, die es erlangt haben und behaupten können.«

Es ist nun durchaus nicht notwendig, daß in solchen schweren Fällen ein Wechsel im Besitze der höchsten Gewalt eintritt, wenn eine genügend starke Agitation einen Wunsch nach irgendwelchen positiven Reformen oder eine sehr starke Opposition gegen irgend einen ‹etwa widersinnigen› Befehl hervorruft, so muß die »höchste Gewalt« einfach in diesem oder jenem Falle nachgeben, kann aber im übrigen dennoch eine höchste Gewalt bleiben. Jedenfalls denkt hier Spinoza nicht mehr an eine absolute Unterwerfung, da er sogar eine so radikale

Umwälzung wie es ein Sturz der bestehenden Obrigkeit ist, als möglichen Fall annimmt.

Spinoza meint auch, es könne nur selten geschehen, »daß die höchsten Gewalten sehr Widersinniges befehlen, denn es ist ihr höchstes Obliegen, sich vorzusehen, die Regierung zu behaupten, nach dem gemeinen Besten zu trachten und alles nach dem Ausspruche der Vernunft zu regieren.«

Dagegen muß man einwenden, daß nach der Meinung vieler »Untertanen« mitunter wirklich Unvernünftiges durch die Obrigkeit verlangt werden mag. Andererseits kann die Vernunft nicht als Maßstab für staatliche Befehle angewendet werden, denn niemand kann apodiktisch entscheiden, ob irgend ein Befehl vernünftig sei oder nicht und überdies hält gewöhnlich jede Partei ihre Ansicht für die vernünftige; endlich wendet sich sehr oft das Gefühl gegen einen Befehl oder eine Institution, ohne daß die Vernunft als Zeuge herbeigerufen wird. Das ist z. B. bei der Opposition gegen die allgemeine Wehrpflicht oder gegen gewisse Arten der Besteuerung der Fall.

Aber, wenn ich so sagen darf, das Gewissen drückt Spinoza ⟨geradeso wie Hobbes⟩ so sehr, daß er es ⟨im 17. Kapitel⟩ direkt ausspricht, daß seine »Betrachtung« . . . »über das Recht der höchsten Gewalten auf alles . . . . vielfach bloß theoretisch bleibt.«

»Denn,« fährt er fort, »kein Mensch wird jemals seine Gewalt und folglich auch sein Recht einem anderen dergestalt übertragen können, daß er aufhörte, Mensch zu sein . . . . Und wahrlich, wenn die Menschen ihres natürlichen Rechtes dergestalt beraubt werden könnten, daß sie künftig weiter nichts zu tun vermöchten, als was diejenigen wollten, die das höchste Recht besitzen, dann dürfte man ja ungestraft auf das schändlichste gegen die Untertanen verfahren, was, wie ich glaube, niemand einfallen wird. Man muß also zugeben, daß sich jeder vieles von seinem Rechte vorbehalten habe, welches deswegen von keines anderen, sondern von seinem eigenen Entschlusse abhängt.«

Es ist nun gar nicht notwendig, daß die Staatsgewalt gegen die Untertanen »schändlich« verfahre, es genügt, daß sie etwas verlange, was jenen auf das Äußerste widerstrebt, um einzusehen, daß es »Niemandem« oder sehr vielen nicht »einfallen

wird«, zuzustimmen, also sich in solchen Fällen der höchsten Gewalt absolut unterworfen zu fühlen. Es steht also, selbst wenn man Spinozas Vertragstheorie akzeptiert, nichts im Wege, den Zwang zum Kriegsdienst von den Verpflichtungen gegen den Staat auszuschalten und sich das Recht auf sein Leben und seine Gesundheit »vorzubehalten«.

Und ferner und noch mehr kommt Spinoza dieser Auffassung prinzipiell entgegen, wenn er[1] sagt: »Zudem kommt noch in Betrachtung, daß das, worüber die Menschen Unwillen empfinden, nicht zum Recht des Staates gehört.«

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Es ist also auch nach dieser Auffassung gar kein Grund, die Abschaffung der Wehrpflicht als staatsrechtswidrig zu perhorreszieren. Und es genügt, daß die Menschen einmal über diesen Zwang zum Kriegsdienst »Unwillen empfinden«, damit die Wehrpflicht nicht mehr zum »Recht des Staates gehört.«

Und auch Lockes Ansichten gemäß muß die Wehrpflicht nicht eingeführt werden, denn er sagt:

»Jeder gibt seine wirkliche Macht zugunsten der Gemeinschaft auf, aber nicht absolut, sondern nur für besondere und beschränkte Zwecke . . . . Die Souveränität der Gesellschaft ist nicht absolut, sondern auf die Zwecke beschränkt, zu welchen sie verliehen war.«

Wenn die Staatsbürger also die Wehrpflicht nicht als Staatszweck ansehen wollen, so darf sie nicht eingeführt werden.

Aber Locke spricht es auch ausdrücklich aus, daß niemand im Staat das Recht hat, einem Staatsangehörigen das Leben zu nehmen, und daß man überhaupt nur in einem Falle die absolute Vollmacht hiezu habe, nämlich: Wenn man ungerechterweise durch Kriegsleute angegriffen wird. In Lockes »Two treatises of government« ⟨dessen französische Übersetzung ich benütze⟩ wird an verschiedenen Stellen energisch behauptet, niemand habe die »absolute und willkürliche« Vollmacht, einem anderen das Leben zu nehmen, und im 14. Kapitel heißt es: »Kein anderes Ziel dürfen die Beamten und Fürsten ins Auge fassen, als die Erhaltung der Mitglieder der Gesellschaft, die Erhaltung ihres

[1] In der Abhandlung über Politik ⟨3. Kapitel⟩.

Lebens, ihrer Freiheit und des Eigentums, ihre Macht darf legitimerweise nicht die absolute und willkürliche Macht bezüglich ihres Lebens und Eigentums sein.«

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Auf die Vernünftigkeit der Staatsgewalt sich zu verlassen, wie dies Spinoza vorschlägt, rät auch Rousseau in seinem Contrat Social. Dieser enthält eine Deduktion, aus der, sozusagen mathematisch, folgen soll, daß das Individuum vollständig von der Staatshoheit abhängt, und folgendes sind die Hauptsätze, in denen das zu beweisen gesucht wird und aus denen seine so einflußreich gewordene Auffassung vom Staat und speziell seinem Recht auf das Leben jedes Staatsbürgers folgen soll.

Das Fundament von Rousseaus staatsrechtlichem Gebäude bildet der Satz:

»Da kein Mensch eine natürliche Gewalt über seinesgleichen hat und da die Stärke kein Recht gewährt, so bleiben also die Verträge als die einzige Grundlage jeder rechtmäßigen Gewalt unter den Menschen übrig.«

Hiemit hat sich Rousseau den Weg für die weitere Behandlung und Diskussion eines Staatsvertrages als Grundlage alles folgenden gebahnt und wir haben es in seinem Buche, ganz so wie bei Spinoza, immer mit der Auslegung eines solchen Vertrages zu tun[1].

[1] Im Contrat Social finden sich merkwürdige Übereinstimmungen mit dem theologisch-politischen Traktat, sogar in einzelnen Sätzen und Wendungen. Spinoza wie Rousseau waren in einer Republik geboren und in beiden genannten Werken wird der Vorzug der demokratischen Einrichtungen hervorgehoben, in beiden wird das Prinzip der politischen ⟨bürgerlichen⟩ Gleichheit aller Staatsangehörigen hoch gehalten. Dennoch hatte das Werk Spinozas nicht entfernt die große Wirkung auf die politischen Gesinnungen und Ereignisse, wie jenes Rousseaus. Die Zeit war damals eben noch nicht reif, die Holländer hatten nicht das Feuer der späteren Franzosen und selbst bei der Lektüre von Spinozas Traktat wird man lange nicht so erwärmt, hingerissen, ja revolutioniert, wie von den in tiefste Empfindung getauchten Thesen Rousseaus, dessen Temperament und stilistische Kraft nicht ihresgleichen hatten. Früher als Rousseau und Spinoza hatte jedoch Hobbes die Gleichheit der Menschen »von Natur aus« behauptet und diese Ansicht mit größerer Kraft als alle seine Nachfolger, wie ich glaube, in unbestreitbarer Argumentation, zu beweisen gesucht. ⟨Siehe mein Werk: »Das Individuum«, Seite 171.⟩

Nun heißt es weiter:

»Scheidet man also vom Gesellschaftsvertrage alles aus, was nicht zu seinem Wesen gehört, so wird man sich überzeugen, daß er sich in folgende Worte zusammenfassen läßt: Jeder von uns stellt gemeinschaftlich seine Person und seine ganze Kraft unter die oberste Leitung des allgemeinen Willens, und wir nehmen jedes Mitglied als untrennbaren Teil des Ganzen auf.« .... »Diese öffentliche Person, welche sich auf solche Weise aus der Vereinigung aller übrigen bildet, wurde ehemals Stadt genannt und heißt jetzt Republik oder Staatskörper. Seine Mitglieder nennen ihn im leidenden ⟨passiven, d. Autor⟩ Zustande »Staat«, im tätigen Zustande »Oberhaupt«.

Und viel später spricht Rousseau von der »Regierung im allgemeinen«, die er als »vermittelnden Körper« ansieht, der zwischen den »Untertanen und dem Staatsoberhaupte zu ihrer gegenseitigen Verbindung eingesetzt und mit der Vollziehung der Gesetze und der Aufrechterhaltung der bürgerlichen wie der politischen Freiheit betraut ist.« Rousseau bringt also hier, und zwar notgedrungen, ein neues Glied in die staatliche Organisation hinein, durch das ohne Zweifel ihr schönes Bild sehr gestört wird, und auch eine spezielle Bezeichnung derselben, indem er sagt:

»Als Regierung oder höchste Verwaltung bezeichne ich also die rechtmäßige Ausübung der vollziehenden Gewalt, und Fürst oder Obrigkeit nenne ich den Mann oder die Behörde, welche mit dieser Verwaltung betraut ist.«

Wer auch nur einigermaßen den Gang der politischen Bewegungen beobachtet, wird sofort einsehen, daß die Existenz einer »Obrigkeit« zur Seite und trotz eines »Oberhauptes« für die Freiheit und oft auch für die Gleichheit der Staatsbürger sehr gefährlich werden kann und daß man, da eine Obrigkeit doch wohl nicht zu entbehren ist, in der Frage der Hingabe »aller« Rechte an die Allgemeinheit äußerst vorsichtig sein muß, was später noch klarer dargelegt werden soll, wenn wir uns jenen »Fürsten« näher ansehen werden.

Nun kommen wir unserem Thema, dem Rechte über Leben und Tod der Staatsbürger, näher. Im 4. Kapitel des 2. Buches des Contrat Social, das »Grenzen der oberherrlichen Macht« überschrieben ist, sagt Rousseau:

»Man gesteht zu, daß durch den Gesellschaftsvertrag jeder von seiner Macht, seinem Vermögen und seiner Freiheit nur den Teil veräußert, welchen das Gemeinwesen nötig hat, aber man muß auch zugestehen, daß das Staatsoberhaupt allein die Höhe des abzutretenden Teiles bestimmen darf.« »Alle Dienste, die der Staatsbürger dem Staate zu leisten vermag, ist er ihm schuldig, sobald das Staatsoberhaupt sie verlangt, dagegen kann das Staatsoberhaupt von seiner Seite aus die Untertanen mit keiner dem Gemeinwesen unnützen Fessel belasten, ja es kann es nicht einmal wollen, denn nach dem Gesetz der Vernunft geschieht ebensowenig wie nach dem Gesetz der Natur etwas ohne Ursache.«

Diesen Worten zufolge stünde nichts im Wege, jedem die Entscheidung über die Opferung seines Lebens und seiner Gesundheit zu überlassen, also unter anderem die Wehrpflicht abzuschaffen, falls man zeigen kann, daß das Gemeinwesen sie nicht »nötig hat« und daß sie also die Untertanen mit einer »unnützen Fessel« belastet. Dies zu behaupten oder zu widerlegen, muß Gegenstand einer speziellen Untersuchung sein, wie sie eben in dieser meiner Schrift angestellt wird.

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Umso auffallender ist die unrichtige Art, in der im 5. Kapitel des 2. Buches dieses wichtige Problem behandelt wird. Der hier entscheidende Passus lautet:

»Der Gesellschaftsvertrag bezweckt die Erhaltung derer, die ihn abschließen. Wer den Zweck will, ist auch mit den Mitteln einverstanden, und diese Mittel lassen sich von einigen Gefahren, ja sogar von einigen Verlusten gar nicht trennen. Wer sein Leben auf Kosten anderer erhalten will, muß es, sobald es nötig ist, auch für sie hingeben. Der Staatsbürger ist deshalb auch nicht länger Richter über die Gefahr, welcher er sich auf Verlangen des Gesetzes aussetzen soll, und wenn der Fürst ihm gesagt hat: ‚Dein Tod ist für den Staat erforderlich', so muß er sterben, da er nur auf diese Bedingung hin bisher in Sicherheit gelebt hat und sein Leben nicht mehr ausschließlich eine Wohltat der Natur, sondern ein ihm bedingungsweise bewilligtes Geschenk des Staates ist.«

Nun faßte man zur Zeit Rousseaus den Begriff »Gesellschaftsvertrag« als einen solchen von historischer Bedeutung auf und viele, unter anderen auch David Hume, suchten nachzuweisen, daß die Staaten nicht auf dem Weg des Vertrages entstanden seien. Das ist jedoch eine Frage, die für uns hier nur eine theoretische Bedeutung hat und uns für anzustrebende Reformen gänzlich gleichgültig läßt. Besser und mehr für die Beurteilung von neuen staatsrechtlichen Vorschlägen ist schon die Ansicht geeignet, es handle sich gar nicht um die Staatsentstehung, sondern es herrsche zwischen den Staatsbürgern und dem ganzen Staat, dem »Staatsoberhaupt«, stets eine solche Beziehung, als ob ein solcher Vertrag, d. h. ein nicht auf ein Gewohnheits-, Gemüts- oder Autoritätsverhältnis, sondern auf einem vernünftigen Kalkül beruhendes Verhältnis, bestünde.

Der historischen Wahrheit entsprechend muß aber doch — namentlich gegen Hume — angeführt werden, daß es wirklich eine Entstehung eines Staates, bzw. einer Staatsverfassung, auf Grund eines Vertrages, und zwar in neuerer Zeit, gegeben hat.

Am 20. November des Jahres 1772 wurde nämlich von den versammelten Bürgern Bostons auf den Antrag Samuel Adams ein von ihm ausgearbeiteter Entwurf einer Erklärung der Rechte der Kolonisten als Menschen, Christen und Bürger beschlossen. In dieser Erklärung heißt es — unter Berufung auf Locke — daß die Menschen durch freiwillige Übereinstimmung in den Staat traten und daß sie das Recht haben, vorher Bedingungen und Beschränkungen des Staates in einem billigen Urvertrage aufzustellen und über deren Ausführung zu wachen. ‹Siehe Jellineks »Erklärung der Menschen- und Bürgerrechte«.›

Am besten ist es aber, wenn wir auf jede hypothetische Ausdrucksweise verzichten und einfach und konkret von Pflichten und Rechten jedes einzelnen Individuums gegenüber der Gesamtheit sprechen, welche sich durch irgend eine Art von Gesetzgebung äußert und diese Gesetze durch eine Obrigkeit, Rousseaus »Fürsten«, bewachen und vollziehen läßt.

Es ist nun ganz und gar nicht einzusehen, warum wir uns auf ein solches Verhältnis zum Staat, wie Rousseau es schildert, einlassen sollen. Wir verlangen, daß ‹falls mein Programm sich in den Gesinnungen festgesetzt und mit genügender Kraft gefordert wird› eine Gesetzgebung, also eine Institution realisiert wird, derzufolge der Fürst gar nicht das Recht haben

soll, uns zum Lebensopfer zu zwingen. Der »Fürst« oder die »Obrigkeit« darf doch nicht mehr an Opfern von den Staatsbürgern verlangen, als das »Staatsoberhaupt« — das sind wir in unserer Vereinigung — gestattet und kann daher gar nicht unser Lebensopfer anbefehlen, wenn wir eben einen solchen Zwang aus unseren Gesetzen ausgeschaltet haben.

Die Annahme Rousseaus, daß der Staatsbürger überhaupt auf Opferung seiner Existenz für den Staat rechnen muß, weil er »nur unter dieser Bedingung bisher in Sicherheit gelebt hat«, ist eine ganz willkürliche; der Verfasser des »Gesellschaftsvertrages« konnte ja nicht wissen, ob der Vertrag und ob jeder Vertrag eine solche Bestimmung enthalten würde, sei es bei der Gründung des Staates, sei es im Laufe der zeitlichen Umänderungen eines solchen Vertrages, sei es bei verschiedenen Völkern. Und es ist doch wenigstens in unseren Tagen gewiß, daß wir durchaus nicht im Sinn haben müssen, uns mit Haut und Haar dem Staat oder seiner Vertretung auszuliefern, wir wollen also lange nicht »alle« Dienste des Staates leisten. Die Menschen haben schon so viele Schranken zwischen jedem einzelnen und der Staatsgewalt aufgerichtet, sie werden wahrscheinlich noch weitere Schranken aufrichten und die wichtigste wird eben jene sein, die den Staat verhindert, über unsere physische Integrität zu gebieten [1], dann mag der »Fürst« sagen, was er will, es wird doch jeder allein entscheiden, ob er sein Leben riskieren oder direkt opfern will. Mit diesem Prinzip kann, wie man aus dieser Schrift ersehen wird, der Staat sehr gut bestehen, anders sollte er gar nicht beschaffen sein.

Der bestechendste Satz, auf dem die oben zitierte Argumentation Rousseaus basiert, ist jedoch offenbar folgender: »Wer sein Leben auf Kosten anderer erhalten will, muß es, sobald es nötig ist, auch für sie hingeben.« Es ist aber nicht richtig, daß man sein Leben »auf Kosten anderer« erhalten will, denn wenn jeder nur freiwillig sich zum Kriegsdienst meldet, so wird ja niemand gezwungen, sich zu opfern, er kann also, wenn es ihm nicht gut bekommt, auch niemandem Vorwürfe machen, daß dieser auf seine Kosten lebe. Und was das betrifft, daß

[1] Ich spreche hier natürlich nicht von der Behandlung ganz besonderer, lebensgefährlicher Personen, denen ganz gewiß nicht anders als durch Tötung beizukommen wäre.

man nur auf Grund der Bedingung, sich auf Geheiß zu opfern, »bisher in Sicherheit gelebt hat«, so muß das nicht gerade durch einen erzwungenen Kriegsdienst ermöglicht werden, sondern, wenn dem Staat solche Gefahren drohen, daß die Sicherheit in der Tat gefährdet würde, so werden sich, wenn man davon überzeugt ist oder wurde, sicherlich genug freiwillige Verteidiger dieser Sicherheit finden, ausgenommen, wie schon erwähnt, man hat besondere Gründe, die Gefährdung der Sicherheit hinzunehmen, sogar mit ihr einverstanden zu sein — worüber nur jeder einzelne zu entscheiden das Recht hat.

Es ist ein von der Wirklichkeit gar zu sehr abstrahierender Gedankengang, wenn Rousseau im 4. Kapitel sagt: »Im Gesellschaftsvertrag haben sie ⟨die Einzelnen⟩ nur einen vorteilhaften Tausch gemacht, indem sie für eine unsichere und ungewisse Lebensweise eine bessere und gesichertere . . . eintauschen. Sogar ihr Leben, welches sie nun dem Staat geweiht, wird von demselben beständig geschützt, und was tun sie, wenn sie es zu seiner Verteidigung der Gefahr aussetzen, anderes, als daß sie ihm das von ihm Erhaltene zurückerstatten? . . . . . Im Notfall müssen allerdings alle für das Vaterland kämpfen, aber niemand braucht auch für sich selbst zu kämpfen.«

Rousseau setzt hier voraus, daß es sich bei jedem Krieg um den Kampf fürs »Vaterland« handelt, also namentlich um seine Verteidigung. Aber meistens sind es, wenigstens auf einer Seite, Aggressivkriege und der »Fürst« behauptet, der Tod der Staatsbürger sei für den Staat notwendig, obwohl es sich in Wirklichkeit nach der Auffassung vieler oder vielleicht aller Staatsangehörigen nicht entfernt um eine wirkliche Existenzfrage des Staates handelt. Welche unpraktische Auffassung liegt, wenn man vom Krieg im allgemeinen spricht, in diesen Worten: »Für das Vaterland kämpfen!« Auch heute benützt man noch immer diese bestechende Kombination der Worte »Land« und »Vater«, um die Vorstellung einer Fürsorge gemütvollster Art seitens der Staatsregierungen zu suggerieren. Und was sehen wir immer von neuem?

Noch immer sind es einige wenige Personen, die die Kriege vom Zaun brechen und für ihre folgenschweren Aspirationen sollen dann andere Menschen Leben oder Gesundheit opfern!

So viel auch Rousseau für die Erweckung des Freiheits- und namentlich Gleichheitsgefühls getan hat, so viel hat er andererseits verdorben, und zwar dadurch, daß er beim Patriotismus, als dem vermeintlich höchsten der politisch-sozialen Gefühle, stehen geblieben ist.

Begeistert von den Schilderungen der antiken Staaten und als Bürger der Genfer Republik, die nach Calvins strengen Grundsätzen aufgebaut war, vertrat er in seiner Auffassung stets den fanatischesten Staatsgedanken. Er fühlte nicht, daß man den Blick einerseits bis zum Individuum zurück und andererseits über die Staatsgrenzen hinaus nach allen Staaten und Völkern hin erweitern soll und daß der eigene Staat — wie auch die Familie — nur als Zwischengebilde zwischen diesen beiden angesehen werden sollte, das nur in besonderen Fällen, z. B. beim Angriff durch andere Staaten, dominieren darf. Weil Rousseau diese Empfindung nicht hatte, so lieferte er dem Staate das Leben des Individuums unbedingt aus, ordnete alle seine Empfindungen jener des Patriotismus unter und erklärte überdies ausdrücklich, Patriotismus und Humanität seien zwei unvereinbare Tugenden. Diese so einflußreiche barbarische Maxime verdanken wir also Rousseau, der ja auch, obwohl selbst hoch kultiviert, doch kulturellen Fortschritten so feindselig gegenüberstand. In ihm steckt der Geist Calvins, nur weniger auf das Religiöse und viel stärker auf das Politische gerichtet, und es ist bezeichnend, daß er sogar ein »bürgerliches Glaubensbekenntnis« in seinem Staatsideal festgesetzt sehen will!

Nicht zu sprechen von dem ⟨mindestens »kindisch« zu nennenden⟩ Inhalt, mit dem er tief, tief, z. B. unter Spinoza, unter Voltaire und Diderot und noch vielen anderen steht, in welchem er als »positive und untrügliche« Glaubenssätze hinstellt: »Das Dasein einer allmächtigen, weisen, wohltätigen Gottheit, einer alles umfassenden Vorsehung, ein zukünftiges Leben, die Belohnung der Gerechten und Bestrafung der Gottlosen.« Also nicht von diesen »untrüglichen« Glaubenssätzen, aber davon soll gesprochen werden, daß Rousseau jeden, der an diese Sätze nicht glaubt, verbannt wissen will. Und warum? »Weil er unfähig ist, Gesetze und Gerechtigkeit aufrichtig zu lieben und im Notfall sein Leben seiner Pflicht zu opfern.«

Es spricht aber doch die Erfahrung aller Zeiten gegen

diese letzte Behauptung. Wir sehen ja in der Geschichte der Kriege, wie tapfer Männer und ganze Völker ihr Leben einsetzten, die das alles nicht glaubten, nicht einmal die Juden zur Zeit der Makkabäer glaubten daran. Daß Alexanders mazedonisches Heer, daß die Griechen, die Römer, die Germanen, die Hunnen und so viele andere es glaubten, kann man wohl auch nicht voraussetzen. Und ebenso sonderbar wie grausam wäre es, jemanden aus einem Staat zu verbannen, weil er gewisse, willkürlich aufgestellte, ihm geradezu absurd und lächerlich erscheinende Dogmen — mitunter trotz seines besten Willens — nicht für wahr halten kann, also für eine bloße Denkrichtung zu strafen, ohne daß irgend eine schlimme Tat begangen worden wäre, eine echt Calvinsche Zensur!

Und noch mehr »Calvin«: Rousseau geht so weit, zu sagen, »sobald sich jemand nach öffentlicher Anerkennung dieser bürgerlichen Glaubensartikel doch als Ungläubiger zu erkennen gibt, so verdient er die Todesstrafe«. Geradeso wie Calvin, der in seinen »Institutionen« Blasphemie und Abgötterei mit der Todesstrafe bedrohte, woran ja auch Servet glauben mußte[1].

Alles dies vergesse man niemals! Bei jeder passenden Gelegenheit erinnere man sich, zu welchen Barbareien, Brutalitäten, Grausamkeiten, selbst bei den edelsten oder genialsten Menschen ideale Erhitzung und fanatische Theorien führen können, wenn sie nicht den Grundsatz aller Moral, nämlich: die über alles siegende Hochachtung vor der menschlichen Individualexistenz besitzen.

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[1] Der praktisch gewordene Rousseau tauchte bald nach seinem Tode in der französischen Revolution als Robespierre auf. Hätte Rousseau zu jener Zeit gelebt, so hätte er geradeso verfahren wie Robespierre: Dieselbe durch Uneigennützigkeit gewappnete harte politische Tugend, denselben Glauben an einen persönlichen Gott, die offizielle Einführung der Anbetung eines höchsten Wesens hätte auch Rousseau angeordnet haben können und die Tötung politischer Gegner hat Robespierre ganz im Geiste Rousseaus, und zwar mit dem gleichen ruhigen Gewissen durchgeführt. Diese Wiedergeburt Rousseaus in politischer und religiöser Beziehung ist eine Merkwürdigkeit.

Robespierre war schon als ganz junger Mensch ein Bewunderer Rousseaus. Er besuchte ihn in Ermenonville kurz vor dessen Tode, nur ausnahmsweise wurde er vorgelassen und wie er sich Rousseau näherte, sprach ihn dieser ungefähr mit den Worten an: »Ich glaube mich auf Physiognomien einigermaßen zu verstehen, in Ihnen finde ich den wahrhaftig ehrlichen und ernsten Menschen.«

Auch Plato setzte in seinem Werke: »Die Gesetze« die Todesstrafe darauf, wenn jemand hartnäckig nicht glaubt, daß — die Götter sich um uns kümmern. Zuerst soll er fünf Jahre in einem »Besserungshaus« verbringen, wo er »bekehrt und seine Seele gerettet werden soll«, und wenn er auch dann noch nicht »zur Vernunft« (!) gekommen ist — soll er mit dem Tode bestraft werden. Das verlangt derselbe Plato, der die Ermordung des Sokrates vor sich sah!

Hier sehen wir also drei Männer, die zu den bedeutendsten Ingenien der Menschheit gehören, die — namentlich Plato und Rousseau — von niemandem in der Gabe übertroffen wurden, die Menschen in ideale Regionen zu erheben, Begeisterung für Schönheit und Tugend zu erwecken[1], aber eines fehlte ihnen und gerade das allerwichtigste: Die unbegrenzte Hochachtung vor menschlichen Existenzen, die Scheu vor Vernichtung von Menschenleben. Dieser eine Mangel machte Plato wie Rousseau in manchen ihrer Schriften und Calvin auch in seinen Handlungen zu grausamen Gesetzgebern.

Nein! Wir können eine Staatstheorie nicht brauchen, derzufolge Menschen geopfert werden, wenn der »Fürst« es verlangt!

*

Nach Edmund Burke ist der Staat kein Zweckverband, sondern eine über die Spanne der Einzelgeneration weit hinausgehende Lebensgemeinschaft.

Und ähnlich betrachten Novalis und Adam Müller den Staat als eine Individualität, der Staat, meinen sie, sei ein »Lebewesen, das in allen seinen Gliedern von Vitalität und Geist überquillt«. Diese Auffassung kann niemandem verwehrt werden und sie kann namentlich dann von vielen akzeptiert werden, wenn der Staat ganz und gar, also innerhalb seiner geographischen Grenzen und auch an allen Stellen seines Herrschgebietes, von einer einzigen Nationalität und noch mehr, wenn er zugleich von einer einheitlichen Religion erfüllt ist. Novalis wie Ad. Müller machten diese Einschränkungen nicht. Müller sagt, im Gegensatz zu Schlözer und so wie Burke, der

[1] Vier Männer sind es, die den Europäern den hoheitsvollen Idealismus gebracht haben: Plato, Jesus, Rousseau und Schiller. Das sind die vier Idealisten, hoch über den vier Evangelisten.

Staat sei keine bloße Manufaktur oder Assekuranzanstalt, er ist die »innige Verbindung der gesamten physischen und geistigen Bedürfnisse . . . eine Allianz der vorangegangenen Generationen mit den nachfolgenden oder umgekehrt«.

Dies alles hört sich sehr schön an, kann weder bewiesen noch widerlegt werden und ist für denjenigen, der diese Ansicht teilt, wirklich schön. Es liegt Gemüt darin.

Allein sie wird von sehr vielen nicht geteilt. Entweder entbehren sie diese Art von Staatsgefühl, oder es wendet sich ihr Intellekt dagegen, und das aus mannigfachen Gründen. Sei es infolge der Kenntnis der politischen Geschichte ihres (oder jedes) Staates, die jede Gemütsauffassung ausschließt, sei es infolge der bestehenden Staatseinrichtungen, die nur zu oft jeder Verbesserung mit dem Hinweis auf den konservativen Charakter des »organischen« Staatsgebildes, auf die »Allianz der vorangegangenen mit den nachfolgenden« entzogen werden und dergleichen mehr.

Will man daher eine Staatsauffassung empfehlen, die alle Staatsbürger annehmen können, so bleibt wohl, wie man sehen wird, nur jene aufrecht, die in dieser Schrift (im 14. Kapitel) entwickelt wird.

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In der großen Frage der Wehrpflicht gehört Kant zu jenen wenigen, die dieses wichtigste aller Probleme des inneren Staatsrechtes mit Eindringlichkeit und mit von Theorien unbeeinflußtem großen Temperament behandelten.

»Es erhebt sich die Frage,« sagt Kant, »welches Recht hat der Staat gegen seine eigenen Untertanen, sie zum Kriege gegen andere Staaten zu brauchen, ihre Güter, ja ihr Leben dabei aufzuwenden oder aufs Spiel zu setzen: so daß es nicht von ihrem eigenen Urteil abhängt, ob sie in den Krieg ziehen wollen oder nicht, sondern der Oberbefehl des Souveräns sie hineinschicken darf? Dieses Recht scheint sich leicht dartun zu lassen, nämlich aus dem Rechte, mit dem Seinen (Eigentum) zu tun, was man will. Dieser Rechtsgrund aber gilt zwar freilich in Ansehung der Tiere, die ein Eigentum des Menschen sein können, will sich aber schlechterdings nicht auf den Menschen, vornehmlich als Staatsbürger, anwenden lassen, der im Staate immer als mitgesetzgebendes Glied betrachtet werden muß (nicht

bloß als Mittel, sondern als Zweck an sich selbst› und der also zum Kriegführen nicht allein überhaupt, sondern auch zu jeder besonderen Kriegserklärung, vermittelst seiner Repräsentanten, seine freie Beistimmung geben muß, unter welcher einschränkenden Bedingung allein der Staat über seinen gefahrvollen Dienst disponieren kann. Wir werden also wohl dieses Recht von der Pflicht des Souveräns gegen das Volk ‹nicht umgekehrt› abzuleiten haben, wobei dieses dafür angesehen werden muß, daß es seine Stimme dazu gegeben habe, in welcher Qualität es, obzwar passiv ‹mit sich machen läßt› doch auch selbsttätig ist, und den Souverän selbst vorstellt.«

Diese prachtvolle Hinstellung der großen Frage, die uns hier beschäftigt, bedarf einer wesentlichen Weiterführung. Und diese besteht darin, daß es durchaus nicht genügt, die Volksrepräsentanten über die Kriegführung entscheiden zu lassen, also sich von ihnen zum Eintritt in das Kriegsheer zwingen zu lassen, sondern es muß jedem einzelnen Kriegstauglichen überlassen bleiben, ob er den Feldzug mitmachen will oder nicht.

Wir müssen bedenken, daß, bevor ein Krieg gegen die Angehörigen eines fremden Staates begonnen wird, eigentlich vorher schon ein Krieg gegen viele, oft sehr viele, eigene Staatsangehörige geführt wird, indem nämlich zufolge unserer heutigen Institutionen in den meisten Ländern, die für den Krieg Stimmenden und Entscheidenden — seien es wenige oder viele — die anderen, einer Kriegführung innerlich Nichtzustimmenden in der wichtigsten aller Fragen niederringen, und diese Ungerechtigkeit wäre natürlich auch dann vorhanden, wenn die Volksrepräsentanten, und nicht etwa ein absoluter Fürst, zu entscheiden haben. Selbst wenn alle Mitglieder der Repräsentanz derselben Meinung wären und also, über die Köpfe der Soldaten hinweg, sie zum Kriegsdienst zwingen, ist damit gar nichts gewonnen. Wer von den Soldaten sein Leben, in dem gegebenen Falle, nicht opfern oder riskieren will, dem muß eine abstimmende Volksrepräsentanz oder selbst ein ganzes Volk, das etwa im Referendum einen Krieg beschließt, gerade so gut als Tyrann erscheinen wie irgend ein Despot — es bleibt also auf Kants Frage: »Welches Recht hat der Staat gegen seine eigenen Untertanen, sie zum Kriege gegen andere Staaten zu brauchen?« nur die eine Antwort übrig: Gar keines! Und auch niemand anderer

hat ein solches Recht, es gibt überhaupt für Opferung des Lebens kein Recht, sondern nur den freien Entschluß jedes Individuums also: Freiwilligkeit.

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Wenn man Hegels prinzipielle Auffassung des Staates kennt, so kann man sich sofort vorstellen, daß er unbedenklich die Staatsbürger dem Wehrzwang unterwerfen wird. Hegels Kraft besteht in der genialen Aufstellung weit umfassender Schemata, — die, obgleich nicht beweisbar, so doch plausibel und sogar einschmeichelnd erscheinen — wenn man aus Mangel an Einsicht in ihre Willkürlichkeit oder aus Mangel an Kenntnissen oder in szientifischer Gutmütigkeit nicht an die dem Schema widersprechenden Tatsachen denkt.

Nach Hegel ist der Staat »die Wirklichkeit der sittlichen Idee«[1]. Wenn Hegels Satz wahr wäre, so folgt schon ohne weiters daraus eine so imponierende Höhe der Staatsinstitution, daß sie uns zu jeder verlangten Hingabe verpflichten könnte. Der Staat ist aber, nach Hegel, auch »als die Wirklichkeit des substantiellen Willens, die er in dem zu seiner Allgemeinheit erhobenen besonderen Selbstbewußtsein hat, das an und für sich Vernünftige.« Natürlich ist man vollkommen berechtigt, zu fragen: Woher weiß man, daß der Staat ein »substantieller« Wille sei? Was ist denn das: »ein substantieller Wille«? Woran erkennt man denn, daß ein ganzer Staat ein »zur Allgemeinheit erhobenes Selbstbewußtsein« hat? Und wie kann man, angesichts der schrecklichen Erfahrungen aller Jahrhunderte, den Staat, also jeden Staat, als das »an und für sich Vernünftige« betrachten? Nur wenn man sophistischerweise sagt: Alles was ist, ist vernünftig und, ähnlich wie bei dem Begriffe »sittlich«, versteckterweise unter »vernünftig« etwas ganz anderes versteht, als was alle Welt darunter versteht.

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[1] Auch Lassalle meint, ähnlich wie Hegel, der Staat sei »die Einheit der Individuen in einem sittlichen Ganzen.« Nun aber zeigte alle Erfahrung der politischen Geschichte und zeigen es auch die allermeisten staatsphilosophischen Theorien, daß der Staat ganz jenseits dessen steht, was wir »sittlich« zu nennen gewöhnt sind, denken wir an den russischen Staat und an Hegels Rechtslehre. Wie konnte also Lassalle den Ausdruck »sittlich« gebrauchen? Nur dann, wenn man unter dieser Bezeichnung versteckt etwas ganz anderes versteht, als man seit jeher verstanden hat.

Nach Hegel ist, wie gesagt, »der Staat das vorhandene, wirklich sittliche Leben. Denn er ist die Einheit des allgemeinen wesentlichen Wollens.« Nun ist Dahomey ein Staat, ebenso Rußland, wie steht es dort mit dem »sittlichen Leben«? Und wie steht es selbst in den zivilisiertesten Staaten mit der »Einheit« des allgemeinen Wollens? Eine solche Einheit gibt es ja nicht, sind diese Staaten deswegen kein sittliches Leben? Wie man sieht, denkt Hegel nur an seinen Begriff vom Staat und ignoriert seine tatsächliche Beschaffenheit.

Dementsprechend stellt Hegel den wertlosen Satz auf: »Das Allgemeine ist im Staat in den Gesetzen, in allgemeinen und vernünftigen Bestimmungen.« Sind aber alle Gesetze vernünftig? Und wer soll darüber entscheiden? Die Gesetze sind nur etwas äußerliches, aber die Gesinnungen und Handlungen bezüglich der Gesetze sind das Allgemeine, durchaus nicht Einheitliche, was den Staat ausmacht.

»Was den Staat ausmacht, ist Sache der gebildeten Erkenntnis.« Wie ist es aber, wenn, wie in Wirklichkeit, die Erkenntnisse der Gebildeten untereinander nicht übereinstimmen?

Die ganze Staatsauffassung Hegels ist, wie man sieht, theoretisch genommen, ganz willkürlich und an der Erfahrung gemessen, tatsachenfremd, also im ganzen und großen unbrauchbar.

Die auf Riesenstelzen einherschreitende — sehr geniale — Geschichtsphilosophie Hegels gelangte auch zu dem Satze: »Die Weltgeschichte ist der Fortschritt im Bewußtsein der Freiheit.« Es ist doch ein seltsamer Fortschritt von der atheniensischen Republik zum eben verflossenen zarischen russischen Reich oder zum preußischen Freiheitsbewußtsein zu Hegels Zeit oder in den fünfziger Jahren des XIX. Jahrhunderts!

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Die einfachste und ganz berechtigte Art, solche philosophische Trapezkunststücke zu widerlegen und von sich zu weisen, ist allerdings die, einfach zu sagen: »Dies alles glaube ich nicht«. Allein es ist furchtbar, zu sehen, daß gerade von solchen und ähnlichen willkürlichen Konstruktionen die Meinungen vieler und einflußreicher Menschen in höchst wichtigen Problemen, und in letzter Instanz auch die Regierungsmaximen ganzer Staaten,

beeinflußt werden. Und es ist mir geradezu widerlich und recht betrüblich, mich mit solchen grundlosen Spekulationen befassen zu müssen, wo es sich doch um Rettung der Menschen vor dem Zwang zum Tode oder zum physischen Verderben handelt!

Bei Hegel wird das Individuum dem Staatsbegriff total hingeopfert. Das »Interesse des Einzelnen,« meint Hegel, ist gar nicht der letzte Zweck des Staates, sondern »indem er objektiver Geist ist, so hat das Individuum selbst nur Objektivität, Wahrheit und Sittlichkeit, als es ein Glied desselben ist.« Was soll das aber heißen: ein objektiver Geist? Wieso überhaupt »Geist«? Und welche Willkürlichkeit, ja Absurdität ist es doch, dem Individuum, welches etwa einsam auf einer Insel lebt, Objektivität, und wenn es dort nur wenige gibt, die zum Beispiel eine Familie, aber noch keinen Staat bilden, Wahrheit und Sittlichkeit abzusprechen!

Nun aber beachte man die Worte Hegels, in denen das Individuum direkt der Wehrpflicht ausgeliefert wird:

»Eine Menschenmenge kann sich nur einen Staat nennen, wenn sie zur gemeinschaftlichen Verteidigung der Gesamtheit ihres Eigentums verbunden ist . . . durch wirkliches Wehren sich verteidigt.« »Die Einheit der Staatsmacht zum allgemeinen Zweck der Verteidigung ist das Wesentliche eines Staates.« Diese Behauptung bedarf vor allem einer Vervollständigung: So lange die Verteidigung, respektive der Kriegsdienst überhaupt, von der Staatsexekutive, wie heute, erzwungen wird, kann man nicht von einem »Wesentlichen« des Staates sprechen, denn man weiß ja nicht, ob bei allen oder bei wie vielen Kriegern ein Staatsgefühl vorhanden ist und bei den Nichtkombattanten weiß man es natürlich erst recht nicht. Erst dann, wenn die Institution der Freiwilligkeit vorhanden ist und sich alle nach den Wehrgesetzen zum Kriegsdienst Registrierten oder eine große Majorität für den gerade beabsichtigten Feldzug melden, ist bewiesen, daß alle diese sich jetzt und diesmal für die Gesamtheit, den Staat, opfern wollen, ihn also als etwas sie in höchstem Maße Bindendes anerkennen, und so kann man genauer eigentlich sagen: Nicht die Einheit der Staatsmacht ist das Wesentliche eines Staates, sondern: wenn in einem gegebenen Falle die Einheit der Staatsmacht sich durch ausschlaggebende Freiwilligenmeldung manifestiert, so beweist dies in diesem

Moment oder zu dieser Zeit — das Vorhandensein eines Staatswesens, je weniger sich für den Kriegsdienst anmelden, desto schwächer ist die Staatsidee verwirklicht.

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Hegel, ebenso wie viele andere, weist jeden Gedanken an eine privatrechtliche Staatsauffassung, also den Gesellschaftsvertrag, mit größter Energie zurück, ohne daß, wie bei allen derartigen Problemen, von ihm irgend ein Beweis geliefert wird. Man muß, um Hegels Ansicht gelten zu lassen, eben von einem nahezu mystischen Schauer vor irgend einer Staatsheiligkeit erfüllt sein, den von Obrigkeitsdevotion freie Geister eben nicht mitempfinden. Und ein Mann, der als Staatsphilosoph Hegel nicht nur ebenbürtig, sondern als mutiger und origineller Denker ihm sogar überlegen ist, nämlich der im Anfang des XVII. Jahrhunderts wirkende Althusius, führte — wie Otto Gierke in seinem Werke über Althusius darlegt — »seinen Begriff des Sozialvertrages in seiner im Grunde alles öffentliche Recht in Privatrecht auflösenden Fundamentalgestalt durch.« Das mögen jene beherzigen, die da meinen, es verstehe sich von selbst und sei allein der Vernunft entsprechend, Staatsrecht nicht privatrechtlich zu konstruieren.

Die ganze Vorstellung Hegels vom Staat als einer »individuellen Totalität« scheitert an der Erfahrung vollständig. Hegel erläutert diese Auffassung dahin, es hänge die Verfassung eines Volkes innigst zusammen mit seiner Religion, Philosophie und Kunst und mache mit ihnen und allem äußeren: Klima, Weltstellung, Nachbarn eine Substanz, einen Geist aus! Wir wissen aber, daß viele Staaten Völkergruppen enthalten mit untereinander gänzlich verschiedener Religion, Kunst und eventuell auch Philosophie, so die Vereinigten Staaten Nordamerikas in Hinblick auf die Religion und Rußland wie Österreich ebenso. Es fehlt also die »natürliche« Beziehung zur Verfassung solcher Staaten. Und was noch mehr dagegen spricht, ist dies, daß im Laufe der Zeit wichtige Änderungen der Verfassung vorkommen, ohne daß die Religion oder Kunst sich ändern, z. B. in England, in Österreich, in Portugal. Von einer von Hegel behaupteten Einheit oder Totalität jedes Staates kann daher keine Rede sein.

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Ganz ausdrücklich verlangt Hegel den Wehrzwang auch in folgenden Sätzen: »Es ist notwendig, daß das Endliche, Besitz und Leben, als Zufälliges gesetzt werde, weil dies der Begriff des Endlichen ist. Diese Notwendigkeit hat einerseits die Gestalt von Naturgewalt und alles Endliche ist sterblich und vergänglich. Im sittlichen Wesen aber, dem Staate, wird der Natur diese Gewalt abgenommen und die Notwendigkeit zum Werke der Freiheit, einem Sittlichen, erhoben.« Und ferner meint Hegel: »Indem die Aufopferung für die Idee des Staates das substantielle Verhältnis aller und hiemit allgemeine Pflicht ist, so wird es zugleich als die eine Seite der Idealität gegen die Realität des besonderen Bestehens, selbst zu einem besonderen Verhältnis« usw.

Nun fragt man, wieso es »notwendig« ist, daß das Endliche als Zufälliges gesetzt werde, vielmehr könnte man ja glauben, es gebe gar nichts Zufälliges und es sei ohne Sinn, das »Endliche« erst »setzen« zu sollen. Und was soll das heißen: »Das substantielle Verhältnis?« Und wieso ist »hiemit« die Aufopferung allgemeine Pflicht?

Auf Grund solchen metaphysischen Hokuspokus sollen tausende und abertausende Menschen wider ihren Willen ihr Leben verlieren! Kann den Philosophen, die so gewissenlos argumentieren, auch nur eine Spur von Hochachtung menschlicher Existenzen zugesprochen werden?

Und es ist ferner eine traurige Konsequenz der Hegelschen Auffassung, wonach der Staat »die erscheinende Wirklichkeit des Sittlichen selbst« sei, daß es eine über den Staat hinausgreifende zwischenstaatliche Ethik nicht geben könne. Mit dieser Ansicht wäre der Staatenkrieg in Permanenz erklärt, wie ja in der Tat nach Hegel das Völkerleben von »höheren Mächten«, vom »Weltgeist«, vom »Geist der Geschichte« jenseits von Gut und Böse gelenkt wird. Wenn aber schon so ein Weltgeist vorhanden ist, so ist nicht einzusehen, warum nicht er selbst oder eine andere Kategorie von Naturgeist auch die Privathandlungen der Menschen lenken soll, und zwar ebenfalls jenseits von Gut und Böse, d. h. es kann dann auch eine zwischenindividuelle Ethik nicht geben. Und wenn man an diesen Privatweltgeist nicht glauben wollte, so steht es auch jedem frei, an der Existenz des Staatenweltgeistes zu zweifeln oder

sie kurz nicht zuzugeben. Sobald es sich um die ganze Welt handelt, sind Staaten von keiner höheren Wichtigkeit und Bedeutung als Individuen.

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Je mehr Gelehrsamkeit und je höhere Standpunkte die Philosophen und Juristen scheinbar anstreben, desto widersprechender aller Erfahrung und Vernunft wird gewöhnlich ihre Staatsauffassung und als Folge davon: desto rücksichtsloser werden die Staatsbürger den Zwecken der Regierungen und den Ideologien der Staatsphilosophen ausgeliefert.

So definierte Schelling den Staat als »das unmittelbare und sichtbare Bild des absoluten Lebens, d. h. als Gestaltung Gottes.« Was ist denn das für ein Ding: »das absolute Leben?« Und was soll man unter »Gott« verstehen? Es gibt ja so viele, sehr verschiedene Vorstellungen von Gott? Ist der Staat eine Gestaltung des Gottes der Juden, der Christen, der Mohammedaner? Spinozas?

Savigny wiederum meint: »Der Staat ist die leibliche Gestalt der geistigen Volksgemeinschaft.« Wie ist es aber, wenn es in dem oder jenem Staate gar keine Volksgemeinschaft gibt? Und das ist doch der Fall, wenn in demselben Staate mehrere Völker eingeschlossen sind, die von einer »geistigen« Gemeinschaft nicht einmal etwas wissen wollen. Savigny dachte wahrscheinlich an Preußen, und die Polen in Preußen zählten für ihn einfach nicht. Und wo ist die geistige Volksgemeinschaft in Österreich? In Rußland? Ja, auch in England, mit seinen Iren und Indern? Man wird aber doch nicht behaupten wollen, Österreich, Rußland und England seien keine richtigen »Staaten«?

Und selbst in einem und demselben Staate, dessen Angehörige gleiche Sprache und gleiche Religion besitzen, gibt es sehr selten eine geistige Volksgemeinschaft, wohl aber verschiedene Klassen, Parteien und Gruppen, die gar keine geistige Gemeinschaft, sondern nur eine minimale Gleichartigkeit rein politischer Natur besitzen.

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Jede Staatsauffassung, die das Wesen des Staates in irgend einer allgemein gültigen Abstraktion sehen will, treibt Staatsmystik, die, wie jede Mystik, einer objektiven Prüfung

unzugänglich und auf die bestehenden Staaten unanwendbar ist. Was man auch immer gegen Rousseaus Staatskonstruktion einwenden kann, das eine große Verdienst muß man ihm — wie auch zum Beispiel Hobbes — zusprechen: Wenn auch nicht ohne manche Unklarheit[1] — von Mystik ist sie frei! Aber selbst Rousseaus Grundgedanke, den er selbst nicht ohne nahezu unverständliche Subtilität behandeln konnte, nämlich den »einheitlichen Staatswillen«, hat man weiter ausgesponnen und einer ganz unrealen Komplikation unterworfen.

Rohmer und Bluntschli glaubten, den von Rousseau vergebens versuchten einheitlichen Staatswillen gefunden zu haben. Es heißt bei Bluntschli: »Wir alle haben den Gegensatz des Gesamt- und individuellen Willens in uns selber, nämlich den Gegensatz des Rassen- und Individualgeistes.« Der Rassewille soll nun der »allgemeine« Wille sein und in der Staats- und Rechtsordnung soll sich das Gesamtbewußtsein und der Gesamtwille des Volkes, in dem Individualleben aber die persönliche Freiheit des einzelnen entfalten. Abermals fragen wir: Wenn in einem Staate wie Österreich mehr als ein halbes Dutzend verschiedener Nationalitäten leben oder in Rußland noch ungleich mehr Rassen vorhanden sind, wo gibt es da einen Rassen-, also »allgemeinen« Willen? Bluntschli meint: in der Staats- und Rechtsordnung. Aber diese kommt fast nie durch einen allgemeinen Willen zustande, stets sind es einige wenige Personen oder eine Gruppe von Juristen oder, wenn Parlamente beschließen, mächtige Parteien oder doch nur einige hundert Volksrepräsentanten, die die Gesetze geben.

In der »Gesamtdarstellung des Staatsrechtes« von Bluntschli ⟨Bd. I, S. 35⟩ heißt es zwar: »Der Staat soll keine vollkommene Herrschaft über das Individuum haben, das Individuum mit seinem Leben gehört nicht ausschließlich der Gemeinschaft mit anderen Individuen an. Die Autorität des Staates erstreckt sich daher nicht weiter als die Interessen der Gemeinschaft und das Nebeneinanderbestehen und Zusammenleben der Menschen es erfordern.« Der letzte Satz ist jedoch so unbestimmt gehalten, daß man durch ihn unsere Frage nicht beantworten kann, denn wer kann autoritativ entscheiden, wann

[1] Man sehe zum Beispiel das dritte Kapitel des zweiten Buches und das erste Kapitel des vierten Buches im Contrat Social.

die »Interessen der Gemeinschaft« das Leben von Staatsbürgern erfordern?

Der, selbst als ehrlich vorausgesetzte, Staatsmann mag wohl glauben, es handle sich im gegebenen Falle beim Zwang zum Kriegsdienste stets um ein so klares und wichtiges Staatsinteresse, daß es sich von selbst verstehe, dem Aufrufe zum Eintritt in das Kriegsheer zu folgen, es handle sich also um ein Staatsinteresse und um ein Ziel, das auch mit der Existenz Tausender und Hunderttausender von Menschen mit gutem Gewissen erkauft werden darf. Aber jener Staatsmann stellt sich, wie es eben bei uns üblich ist, nicht die Frage: Wieso denn jemandem, also auch ihm, moralisch genommen, das Recht zustehe, hier die Entscheidung zu treffen und andere nach seiner Entscheidung zum Lebensopfer zu zwingen? Er begnügt sich mit dem formalen Recht, das ihm die Staatsverfassung an die Hand gibt und betrachtet sich eben als Exekutive eines mystischen Organismus, »Staat« genannt, dem alle Individuen sich bis aufs äußerste zu unterwerfen haben.

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An einer anderen Stelle spricht sich der Vertreter des sogenannten Bourgeois-Liberalismus über das uns hier beschäftigende Problem folgendermaßen aus ⟨Bd. II, S. 349⟩:

»Nicht immer geht Volkswohlfahrt und Privatwohlfahrt parallel, von Zeit zu Zeit ist der Staat genötigt, zu seiner Rettung oder im Interesse der künftigen Geschlechter harte Zumutungen an die gegenwärtigen Privaten zu machen und ihnen schwere Leiden aufzubürden.«

Hienach wäre also der erzwungene Kriegsdienst erlaubt oder wenigstens gerechtfertigt. Aber es ist auch hier stillschweigend die falsche Voraussetzung gemacht, daß erstens nicht nur die Staatsfunktionäre oder Volksvertreter zu entscheiden und andere dieser Entscheidung zu gehorchen haben, ob der Fall der »Rettung oder des Interesses der künftigen Geschlechter« in der Tat gegeben sei, sondern auch, daß zweitens die Verfolgung dieses Interesses das Opfer von zehntausenden menschlicher Existenzen, ja auch nur das Opfer eines Menschenlebens, wert sei.

Es ist aber schon an sich unmöglich, daß jemand, der in seiner Amtsstube ruhig arbeitet oder der bloß in die Zeitung

schreibt oder über Staatsrecht spekuliert — falls diese Personen nicht in der furchtbaren Situation sind, selbst geopfert zu werden oder nur in solche Gefahr zu kommen — über eine Kriegserklärung so ernst und mit so viel Verantwortungsgefühl nachdenkt wie jene, die eine Kriegserklärung nicht nur gegen Angehörige eines anderen Staates, sondern auch als gegen sich selbst gerichtet ansehen müssen, d. i. wie die Soldaten.

Wie hoch aber die Wichtigkeit der Gründe einer Kriegsunternehmung von ihren eventuellen Opfern geschätzt wird, kann sich nur dann zeigen, wenn die Soldaten sich freiwillig zum Felddienst melden sollen. Da erst wird klar ersehen werden, was davon zu halten ist: Ob das Erobern neuer Provinzen, die Gewinnung eines neuen Absatzgebietes, die Befreiung einer Nation usw. jemandem so wichtig erscheint, daß er dafür gerne sein Leben riskieren möchte.

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Der oben zitierte Staatsrechtslehrer hat auch in seinem Werke ⟨Bd. II., S. 665⟩ folgende interessante Stelle: »Wohl darf der Staat über das Gut und Blut seiner Angehörigen verfügen, wenn das nötig ist zur Erhaltung des Ganzen,« womit der Zwang zum Kriegsdienst direkt befürwortet erscheint, als Erläuterung folgt jedoch der Satz: »Aber wenn der Regent aus Laune mit dem Leben eines Untertanen spielen wollte oder nach seinem Vermögen gelüstete und willkürlich nach diesem griffe oder sein Familienrecht antastete und sein Weib oder seine Tochter frevelnd zum Genuß begehrte, ... so wäre der Bürger in keiner Weise zum Gehorsam verpflichtet.«

Gibt es jedoch zugestandenenmaßen einmal Fälle, in denen der Bürger in keiner Weise zum Gehorsam verpflichtet ist, so handelt es sich nur noch um Verallgemeinerung dieses Prinzips. Und man kann fragen, ob denn eine Kriegsunternehmung aus irgend welchen persönlichen Gründen, im Affekt des Zornes, der Rachsucht, des Ehrgeizes eines Ministers, einer Volksvertretung, nicht noch weitaus mehr Ungehorsam rechtfertigen könne, als »Antastung des Familienrechtes« oder des »Vermögens« dies tun. Und wer, muß man abermals fragen, wer soll entscheiden, ob der Fall so liegt? Doch nicht jener Fürst oder Minister oder jene Volksvertretung?

Man nennt immer die Kriegslustigen »Patrioten«. Das sind in jedem Falle Leute, die den wehrfähigen Staatsbürgern von gegenteiligen Ansichten ebenso als gefährliche Gegner entgegentreten, wie nur irgend ein äußerer Feind, der Zweck mag welcher immer und auch noch so selbstlos sein.

Wenn ich nicht der Meinung bin, daß das Kreuz auf der Sophienmoschee aufgepflanzt werden muß, so mögen sich meinetwegen hunderttausend andere dafür mit ihrem Leben einsetzen, den Ruhm, ihr Leben für eine »Idee«, also selbstlos einzusetzen, will ich ihnen durchaus nicht streitig machen — aber ich selbst verzichte darauf.

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Wir legen den Befürwortern der Wehrpflicht folgende Frage vor: Gesetzt, man würde jemandem versprechen, ihm oder seinen Angehörigen oder seinen Nachkommen würde dieses oder jenes große und seltenste Glück, sagen wir ein Haupttreffer, zuteil werden, unter der Bedingung, daß er aus einer Pistole aus nicht zu großer Entfernung auf sich schießen lasse, der Zufall könnte ihm ja günstig sein und er mit heiler Haut davon kommen.

Wird sich so leicht jemand finden, der auf einen solchen Vorschlag eingehen würde? Ich glaube nicht!

Noch weniger würde sich jemand freiwillig dazu hergeben, sich in ein Bajonettgefecht einzulassen, wenn man ihm in überzeugender Weise versichern würde, das genüge, damit alle Mitlebenden seines Staates, ja der ganzen Erde, und meinetwegen auch die nächsten Generationen eine Reihe von Bequemlichkeiten, wirtschaftlichen Vorteilen oder Fortschritten der Kultur gewinnen. Der Angesprochene würde einem — von seltensten Ausnahmen abgesehen — ins Gesicht lachen.

Aber genau solche Anträge stellt man uns heute, wenn die Staatsbürger in den Krieg gezwungen werden und wenn es sich nicht direkt um Verteidigung von Leib und Leben gegen äußere Feinde handelt. Nur sagt man dies alles nicht zu jedem einzelnen unter vier Augen, sondern zu hunderttausend Menschen gleichzeitig, und in Form eines Beschlusses und Befehls.

Was nun im Einzelfalle für absurd gehalten wird, halten die Verfechter des Wehrzwanges für richtig, ja für selbstverständlich! Wieso wird aus vervielfachtem Unsinn Vernunft?

Oder hat sich irgend etwas geändert, wenn der Einzelantrag in einen Massenantrag übergeht, wo doch nur ein Unterschied in der Zahl besteht?

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In der Tat glaubt man das! Ohne alle Berechtigung wird ein Staatsakt auf seine Vernunft und auf seine Rechtfertigung hin ganz anders angesehen als ein Privatakt. Wenn man von »Staatszwecken« spricht, meint man sofort, ein Wesen höherer Art habe gesprochen. Sagt irgend eine Staatsbehörde: »Der Staat verlangt dies und das« . . . . . »ohne jenes kann der Staat nicht existieren«, so tritt sogleich bei den meisten Menschen eine solche Betäubung ein, eine solche Erhitzung des Kopfes, eine solche Lähmung des Denkvermögens, daß man ganz vergißt, daß, seit die Welt besteht, bis heute noch niemals ein »Staat« irgend etwas, und sei es auch das Geringste, verlangt oder verboten hat. Es sind immer Menschen, Personen, die etwas befehlen, verlangen oder verbieten. Spricht man das Wort »Staat« aus, so wird fast allen so schwindlig zumute, wie — nach Schopenhauers Bemerkung — den Deutschen bei dem Worte »Idee«, es kommt ihnen vor, »als ob sie in einem Luftballon aufsteigen würden«.

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Wenn jemand das unbedingte Recht des Staates auf das Leben seiner Angehörigen nicht anerkennt, so haftet ihm eine gewisse Mißachtung wie wegen eines ethischen Defekts an, eine Mißachtung, die nicht nur durch einen mystischen Respekt vor dem Staatsbegriff, sondern auch aus einem falschen Schlußverfahren entsteht. Und nicht nur die Politiker und die große Masse mißachten eine solche Gesinnung, sondern fast jeder achtet sich selbst weniger, wenn er sich auf dieser Denkweise ertappt. Man schließt nämlich so: »Da das Sichopfern eine edle Tat ist, so muß das Sicherhaltenwollen etwas Egoistisches gemeiner Art sein.« Daß man aber mit einer solchen Deduktion jeden Augenblick Tausende von Menschen zu einer Selbstopferung und selbst für die unreifsten Ideen überreden könnte, überlegt man nicht. Und ebensowenig denkt man daran, daß es unzählig viele Arten gibt, edle Taten auszuüben und Opfer, selbst des Lebens, zu bringen, sie müssen ja nicht immer den »Staat« betreffen.

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Unrichtig, willkürlich und ganz brutal ist die Auffassung des Staates bei Treitschke, wenn er — in seinen »Vorlesungen über Politik« — sagt, das Wesen des Staates sei Macht und daher sei die erste Pflicht des Staates, für seine Macht zu sorgen.

Das ist beinahe noch einseitiger als Hegels Überschätzung der Wehrkraft des Staates. Gewiß ist Macht für einen Staat notwendig und umsomehr, je anarchischer die zwischenstaatlichen Beziehungen sind, aber nur zur Verteidigung, also als notwendiges Übel ist Macht oder wenigstens Schutz durch andere stärkere Staaten jedem Staat notwendig. Ein notwendiges Übel kann man aber nicht »Wesen« des Staates nennen. Hat er denn keine weiteren Aufgaben als seine Macht? Sollen wir vielleicht im spartanischen Staat unser Ideal erblicken?

Etwas gesitteter stellt sich Treitschke in seiner »Politik« die Aufgaben des Staates vor. Dieser sei, meint er, »berufen zu positiven Leistungen für die Erziehung des Menschengeschlechts und sein letzter Zweck ist, daß ein Volk in ihm und durch ihn zu einem wirklichen Charakter sich ausbilde«. Offenbar vergaß Treitschke hiebei, daß ein Staat mit gemischter Bevölkerung, wie zum Beispiel das von Deutschen, Dänen, Slawen und auch Franzosen bewohnte Deutschland, oder das aus Hunderten von Völkerschaften zusammengesetzte Rußland wohl kaum jemals zu einem einheitlichen »wirklichen« Charakter seiner Bevölkerung gelangen könne. Und als Kardinalpunkt der Politik erkannte Treitschke das »Erhaltungs- und Machtbestreben« des Staates, Machtbestreben involviert ehrgeizige und Eroberungspolitik, diese aber kann nicht als Ziel einer »sittlichen« Gemeinschaft, wie Treitschke den Staat nennt, akzeptiert werden. Übrigens hört man den Verfasser der »Politik« von allen anderen Aufgaben reden, nur nicht von der Sicherung der ökonomischen Existenz aller Staatsangehörigen; offenbar erschien ihm eine solche Aufgabe nicht »ideal« genug.

Was nun die Frage der Wehrpflicht betrifft, so sagt selbst ein solcher Staatsanbeter wie Treitschke in seinem Essay »Die Freiheit«: »Doch ein Staat, beherrscht von einer durch die Mehrheit des Volkes getragenen Regierung, mit einem Parlament, mit unabhängigen Gerichten, mit Kreisen und Gemeinden, die sich selber verwalten, ist mit alledem noch nicht frei. Er muß seinem Wirken eine Schranke setzen, er muß anerkennen: Es

gibt persönliche Güter, so hoch und unantastbar, daß der Staat sie nimmer sich unterwerfen darf.« Das wäre ja ganz plausibel.

Aber im Gegensatz zu diesem Gedanken sagt Treitschke in demselben Essay: ». . . Und wieder besteht für den einzelnen die physische Notwendigkeit und die sittliche Pflicht, an einem Staate teilzunehmen und ihm jedes persönliche Opfer zu bringen, das die Erhaltung der Gesamtheit fordert, sogar das Opfer des Lebens.« Hier fehlt aber, wie gewöhnlich, die Beantwortung der Frage: Wer soll darüber entscheiden, ob es sich wirklich um die »Erhaltung der Gesamtheit« handelt, der zuliebe der Staatsbürger, bzw. der Armeeangehörige sein Leben opfern soll? Treitschke meint gewiß, die Obrigkeit habe zu entscheiden, ich aber fordere, jeder einzelne. Zwischen diesen beiden Ansichten liegt eine Welt und selbst wenn Treitschke an eine Entscheidung durch das Parlament gedacht hätte, wäre es nicht anders. Man sieht hier deutlich, wie wenig die Staatsrechtphilosophen und Politiker der Realität der Dinge ins Auge sehen und wie sehr sie sich mit abstrakten Begriffen und Deduktionen begnügen, die sie nicht ernst genug mit den Details des praktischen Lebens vergleichen.

Sehr schwach ist Treitschkes Begründung der Forderung des Lebensopfers der Staatsbürger. Er meint, der Mensch unterliege dieser Pflicht nicht bloß darum, weil er nur als ein Bürger ein ganzer Mensch werden kann, sondern auch, weil es ein historisches Gebot ist, daß die Menschheit Staaten, schöne und gute Staaten bilde.

Es ist aber unrichtig, daß nur ein »Bürger« ein ganzer Mensch werden könne, denn auch ein Einsiedler oder Mönch — den man doch keinen »Bürger« im strengen Sinne des Wortes nennen kann — ist ein ganzer Mensch, nur anderer, vielleicht mitunter höherer Art als ein gewöhnlicher Bürger, und für die höhere moralische Kultur der Menschheit wiegt, nach meiner Meinung wenigstens, ein Franz von Assisi viele Dutzend Treitschkes auf. Und andererseits gibt es überhaupt kein »historisches Gebot«, es kann ja überdies auch Fälle geben, in denen mehrere oder viele Staatsbürger ihr Leben dem Staate gerade darum nicht opfern wollen, weil sie hoffen, nach seinem Zusammenbruch, wenn also die »Erhaltung der Gesamtheit« verloren geht, eine schönere und bessere Staatsbildung zu erleben.

XII.

Der Staat.

II. Über die Auffassung des Staates als Organismus.

In neuerer Zeit gewinnt die Auffassung immer mehr an Kraft, daß Staatszwecke das Wohl der Individuen überwiegen.

Diese Ansicht, die schon von Rousseau und dann von Hegel energisch vertreten wurde, verstärkte sich in dem Maße immer mehr, als die militärischen Rüstungen fast aller Staaten größer wurden und es sich in den letzten Jahren namentlich darum handelt, recht viele Soldaten zu bekommen. Die Losung gilt also vielfach: Nur recht viele Kinder erzeugen! Ob die Mütter dadurch physisch herabkommen, ob die wirtschaftlichen Sorgen kinderreicher Familien noch so niederdrückend werden und ob auch die ganze Bevölkerung sich umso schwerer ernähren wird, je zahlreicher — über eine gewisse Grenze hinaus — sie ist, dies alles kümmert die jetzigen Staatsphilosophen und Politiker nicht, es handelt sich ihnen nur um viele Soldaten.

»Wenn man die Größe und die Ausdehnung des Vaterlandes wünscht, die Entwicklung unserer Zivilisation und unserer Ideen durch die Welt, so darf man sich über die Fruchtbarkeit der Armen und Elenden nicht beklagen. Was mich betrifft, anstatt mich um das Individuum zu kümmern, kümmere ich mich nur um die Kollektivität.«

Dies schrieb ein sonst durch Humanität ausgezeichneter Gelehrter, Charles Richet, in einem Essay, der im Jahre 1883 in der »Revue des deux mondes« erschienen war. Es ist merkwürdig genug, daß Richet die Entwicklung der französischen Zivilisation und Ideen »durch die Welt« sich nicht anders vorstellen kann als durch »Ausdehnung« des Vaterlandes, also in

letzter Instanz durch — Soldaten. So denkt ein französischer Gelehrter des XIX. Jahrhunderts. Wie hat doch der Verlust von Elsaß-Lothringen das kulturelle Niveau dieser sonst ausgezeichneten Nation heruntergebracht!

»Mir scheint es,« fährt Richet fort, »daß der Mensch eine Art primäres lebendiges Material sei, aus welchem sich die Bestimmung der Nation herausbildet, und wenn ich zu wählen hätte, so würde ich Frankreich den Franzosen vorziehen.«

Der Historiker Eduard Meyer schrieb ‹in seinem Werk über England›: »Für viele ist nicht nur im politischen Denken, sondern unmittelbar in der Empfindung jedes Staatsbürgers, der Staat die höchste, alle Kräfte des gesamten von der Gebietsgrenze umschlossenen Volks zu aktiver Wirksamkeit zusammenfassende Einheit, die unentbehrliche Voraussetzung des Lebens und der Tätigkeit jedes einzelnen und eben darum berechtigt und verpflichtet, die volle Hingabe eines jeden für seine Aufgaben zu fordern. Er ist unendlich viel mehr als lediglich die Gesamtsumme aller in ihm beschlossenen Individuen, er hat ein Leben für sich, seine Aufgaben sind unvergänglich, seine Existenz ist der Idee nach — falls er nicht durch Gewalt von außen zertrümmert wird — ewig, alle Generationen nach rückwärts und vorwärts zu einer Einheit, zu einem gewaltigen geschichtlichen Lebewesen zusammenfassend.«

In dem Bestreben, im Staat etwas Über- und Außerindividuelles entdecken zu können, wendet Bluntschli folgenden Kunstgriff an. Er spricht von dem »weit verbreiteten Irrtum«, daß — wie Rousseau meinte — der Staat nur als eine willkürliche Einrichtung der Individuen erklärt wird, welche, um mehr Sicherheit zu erreichen, durch einen Gesellschaftsvertrag zusammentreten. »In ihrer konsequenten Darstellung«, fährt Bluntschli fort, »sagt diese atomistische Staatslehre: Die Individuen allein sind Grund und Zweck des Staates, er hat kein Leben in sich, keinen eigenen Zweck. Die deutsche historische Rechtsschule machte aber aufmerksam auf die organische Natur des Staates. Eine Statue bestehe ja nicht bloß aus der Summe der einzelnen Marmorkörner und das Gemälde aus der Summe der einzelnen Ölfarbenflecken.«

Dieser Vergleich ist sehr bestechend und zeigt, wie hartnäckig das Bestreben ist, eine Art übermenschliches Wesen aus

dem Staat zu machen, dessen Geboten dann die einzelnen Individuen unbedingt gehorchen müssen. Es ist geradezu schrecklich, daß die Menschen sich von solchen falschen Analogien dumm machen und fangen lassen und sich ihren äußersten Konsequenzen — bis zum Lebensopfer — unterwerfen! Es sei daher hier der Grundfehler in diesem Vergleich aufgezeigt. Marmorkörner werden da in Analogie mit menschlichen Individuen gesetzt, wo doch jene — soweit wir beobachten können — gar kein Selbstbewußtsein, keine individuelle Empfindung und keinen Willen haben, wie sie doch die Menschen im Staat besitzen, und es ist ganz unberechtigt, vom Einzelmenschen auf ein großes Empfindendes, nämlich den Staat überzugehen, wie man von der Zelle auf den Menschen übergeht. Das Empfindende und Bewußte ist stets nur der einzelne, ganze Mensch, gegenüber den Zellen steht er am Ende der Betrachtung und der Zusammenfassung, gegenüber dem Staat steht er am Anfang der zusammenfassenden Betrachtung, und Zelle und Marmorkorn besitzen ebensowenig wie ein Staat, mindestens soweit wir wissen, ein Selbstbewußtsein. Irgend eine supponierte Bedeutung des Staates, z. B. eine historische oder eine sittliche, kann nicht er selbst empfinden oder behaupten, sondern immer nur der einzelne Mensch, der Philosoph oder der Jurist oder der Historiker oder der Staatsmann, noch nie bisher hat ein Staat etwas von sich selbst behauptet oder gewußt. Und wenn noch so viele Staatsangehörige in der Auffassung ihres Staates oder des Staates überhaupt übereinstimmen, so haben eben viele einzelne Individuen diese oder jene Auffassung, aber niemals hat sie eine Summe, die etwas anderes wäre als eine rein arithmetische Größe. Spricht man also von einem »Leben des Staates«, so kann damit nichts anderes gemeint sein, als das Leben einer Summe von Individuen, die aber nicht isoliert sind, sondern in mehrfachen Beziehungen zueinander stehen und auf demselben geographisch-politischen Fleck unseres Planeten existieren.

Das ist eben dabei wohl zu beachten, daß, wenn, wie in vorliegendem Werk, der Staat als eine Summe von Einzelmenschen und nicht als eine etwa nach Menschenart organisierte Einheit ‹mit Selbst- oder mit Unterbewußtsein oder mit Instinkt› aufgefaßt wird, daß also unter diesen Einzelmenschen durchaus nicht isolierte Individuen verstanden werden, was allerdings

unrichtig wäre und welchen Fehler die Gegner unserer Auffassung ihr fälschlich unterschieben. Sondern diese Einzelmenschen sind nicht gegeneinander abgeschlossen, es kleben und haften gewissermaßen an jedem mehr oder weniger Fäden und Bänder, durch die er mit den anderen Individuen verbunden ist, und zwar nicht nur mit Individuen seines Staates, sondern auch mit denen anderer Staaten und mit denen der ganzen natürlichen Umgebung. Individuen im Staat — wie überhaupt in jeder Korporation — sind eben anders als Individuen, die als Einsiedler leben. Man kann daher mit vollem Recht vom Staat als der »Summe« seiner, nicht als isoliert gedachten Angehörigen sprechen und darf auch, wenn man vorurteilslos bleiben will, nicht anders sprechen. Also über Individuen kommt man nicht hinaus, ein großes Über-Individuum gibt es nicht.

Hieraus folgt gegenüber den Staatsromantikern und -mystikern, daß, wenn man von Tradition, von Vergangenheit oder Zukunft eines Staates, von seiner »individuellen Totalität« spricht, dies sich nicht auf ein eigentümliches Gebilde oder Wesen, auf ein »Werkzeug des Weltgeistes« und dergleichen bezieht, sondern einfach auf die ererbten und erworbenen Eigenschaften und Aspirationen der sämtlichen lebenden Staatsangehörigen.

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Es scheint wohl philosophisch interessant zu sein, eine Ähnlichkeit des Staates mit einem Organismus zu untersuchen und zu verfolgen. Sie ist aber, trotz aller aufgewendeten Mühe, nicht nachgewiesen worden und die breiten Meditationen hierüber sind meistens nur kindische Spiele des Systemgeistes. Und nun läßt man sich sogar noch einfallen, solche theoretische Spinngewebe staatsarchitektonisch verwerten zu wollen.

Schon der historisch wohl erste Fall einer solchen Vergleichung, das Gesetzbuch des Manu, hat über Millionen von Menschen großes Unheil gebracht. Seine Idee, daß die Brahmanen aus dem Mund, die Krieger aus den Armen Brahmas hervorgegangen seien, brachte eine für alle Zeiten geheiligte Kasteneinteilung zuwege. Das Los des Paria ist dieser heiligen Analogie zu danken.

Und ebenso ist es mit der Edda, den Volkssagen der Germanen, derzufolge die Erbstände kraft göttlicher Zeugung zu Recht bestehen.

Ein anderer Fall im praktischen Staatsleben war des Menenius Agrippa berühmte Vergleichung des Staates mit einem menschlichen Körper, der Patrizier mit dem Magen und der Plebejer mit seinen anderen Organen. Die Plebejer, die zur Zeit dieser ersten Auswanderung auf den heiligen Berg zogen und damit wohl den ersten historisch beglaubigten großen Streik unternahmen, befanden sich in einer elenden wirtschaftlichen Lage, in Not und in Schulden, und es heißt, sie hätten sich durch diesen Vergleich beruhigen lassen und den Streik aufgegeben. Wenn aber wirklich zu ihrer Besänftigung nichts anderes geschehen wäre als diese Argumentation des Agrippa, so müssen die römischen Plebejer sehr naiv gewesen sein, wenn sie sich durch ein solches Gleichnis beschwichtigen ließen, da aber die Römer zu jeder Zeit alles eher als naiv waren, so glaube ich diese ganze Geschichte nicht.

Hat sich denn unter all den Tausenden der Plebejer niemand gefunden, der dem Menenius zugerufen hätte: Es sei so! Ihr seid bisher der Magen und wir die anderen Glieder. Nun aber werden wir tauschen. Ihr werdet die anderen Glieder und wir wollen der Magen sein!?

Und es sei gleich an dieser Stelle gesagt, darin hinkt eben der ganze Vergleich: Bei einem Organismus hat man noch niemals bemerkt, daß irgend ein Teil mit einem anderen tauschen möchte.

Es ist daher auch ohne jede Bedeutung, wenn Plato ⟨in seiner »Republik«⟩ den Staat mit einem großen menschlichen Individuum vergleicht und sagt, er sei umso besser, je mehr er sich in seiner Einrichtung den Menschen nähert, so daß, wenn »ein Teil leidet, es der ganze Staatskörper empfindet«. Wenn damit nichts anderes gemeint ist, als eine ⟨begrenzte⟩ Solidarität aller Staatsangehörigen, so kann man damit einverstanden sein, obwohl dazu das Heranziehen des Begriffes »Organismus« ganz überflüssig ist.

Aber für unser heutiges Empfinden durchaus nicht harmlos, sondern von schlimmen Konsequenzen für die Selbständigkeit der Individuen ist der Satz des Aristoteles ⟨im zweiten Kapitel des ersten Buches seiner »Politik«⟩, nach welchem, dem griechischen Staatsbegriff entsprechend, das gewöhnliche, nicht hochbegabte Individuum fast gar kein eigenes Leben führt. Es heißt nämlich dort:

»Obgleich die Familie aus einzelnen Menschen und die Stadt aus mehreren Familien besteht, so kann man doch in gewisser Absicht sagen, daß die Stadt oder das Gemeinwesen das erste und ursprüngliche sei und daß die Familie und der einzelne Mensch nur davon abgeleitete Wesen sind. Denn das Ganze ist notwendig das Fundament der Teile und muß also als selbständiger und ursprünglicher betrachtet werden.«

Gewiß ist das Gemeinwesen früher vorhanden als das einzelne Individuum, das in diese schon bestehende Gesamtheit hineingeboren wird, allein daraus folgt durchaus nicht alles das, was die griechische Auffassung des Verhältnisses zwischen Staat und Individuum festgestellt und was Aristoteles geschildert hat. Beweis dafür die einfache Tatsache, daß das Hineingeborenwerden in ein bestehendes Gemeinwesen heute genau so stattfindet wie damals und daß doch das gegenseitige Verhältnis in neuerer Zeit grundsätzlich verschieden aufgefaßt wird, obwohl nicht zu leugnen ist, daß in allerneuester Zeit eine Lockerung in dieser Auffassung stattgefunden hat. Aber wichtig erscheint mir hier, darauf aufmerksam zu machen, daß Aristoteles in dem zitierten Satz eine unberechtigte Identifizierung zwischen dem Begriff »Erste und Ursprüngliche« und dem anderen »Selbständig« vorgenommen hat, der erste bezieht sich bloß auf die Zeit ⟨der Geburt des Individuums⟩, der zweite auf die Wertschätzung. Ich hebe das hervor, weil die Menschen ungemein leicht dazu zu haben sind, solchen Gedankensprüngen zuliebe die weitesttragenden praktischen Konsequenzen zu ziehen. Wir haben eben hier ein eklatantes Beispiel einer echten, später sogenannten scholastischen Argumentation vor uns.

Am deutlichsten vielleicht erkennt man den Unterschied zwischen der antiken und unserer Staatsauffassung in dem Ausspruch des Aristoteles ⟨im siebenten Buch, neuntes Kapitel⟩: »Bauern und Handwerker und Taglöhner müssen in einem Staat vorhanden sein: aber wahre Staatsglieder sind nur die, welche die Waffen führen und welche über die Sachen des Staates ratschlagen.« Das Vorhandensein der Sklaverei im Altertum haben auch neuere Staaten, sogar bis vor kurzer Zeit, mit ihm gemein, eine solche Unterscheidung der Staatsangehörigen in wahre und nichtwahre Staatsglieder liegt uns aber schon seit langem ferne.

Von wie geringem Wert aber solche Analogien sind — ob man nun den Staat mit einem lebenden Körper oder mit einer Maschine oder, wie es Horaz tut, mit einem Schiff usw. vergleicht — sieht man am besten daraus, daß Aristoteles selbst sie verwirft, wenn sie ihm solche Vorschläge stützen sollen, die ihm antipathisch sind. Denn gegen einen Vorschlag Platos in seiner »Republik« bemerkt Aristoteles ‹im dritten Kapitel des zweiten Buches der »Politik«›:

»Die Vergleichung mit den Tieren, durch welche Sokrates zu bestätigen sucht, daß es der Natur am gemäßesten ist, dem weiblichen Geschlecht einerlei Verrichtungen mit dem männlichen zu geben, ist unpassend und beweist nichts, da die Bestimmung und Geschäfte der Menschen von der Bestimmung und der Tätigkeit der Tiere so weit verschieden sind . . . .« [1].

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Überhaupt ist die Analogisierung des Staates mit einem lebenden Menschen gerade in der wichtigsten Beziehung unbrauchbar. Denn der Mensch hat außer den besonderen Empfindungen in seinen einzelnen Gliedern und Organen auch ein Ganzheits-, sogenanntes Allgemeingefühl, desgleichen im Staate nirgends zu finden ist. Der »Staat« ist ein abstrakter Begriff, der eben nie empfinden kann, das einzig Empfindende sind immer nur einzelne Individuen, anderswo hat man noch nie eine Empfindung wahrgenommen.

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Ferner sollen die Analogiensucher beachten, daß im menschlichen ‹wie tierischen› Organismus nichts der Auswanderungsfreiheit Ähnliches existiert. Dazu kommt noch dies, daß die ausgewanderten Elemente des Staates, nämlich die Individuen — welche man so gerne mit der Zelle eines Organismus vergleicht — sich in einem neuen Staat sofort ohne jeden »organischen Prozeß« einfügen können.

Am radikalsten aber spricht jedenfalls ein schon hervorgehobener Umstand gegen die organische Staatsauffassung. Bei einem wirklichen Organismus wurde noch nie beobachtet, daß seine Einzelteile den Wunsch hegen, einander gleich zu werden oder mit anderen zu tauschen, was doch bei uns in Staat und

[1] Für die beiden Zitate benütze ich die Garvesche Übersetzung.

Gesellschaft in so reichem Maße geschieht. Und gerade in dieser Tatsache, die ja die Charakteristik der politischen und sozialen Bewegungen bildet, kann man nicht ganz grundlos einen Beweis für den bloß mechanischen Habitus des Staates erblicken. Da ist aber durchaus nicht gemeint, daß die Individuen ohne jede Gemeinsamkeit dahinleben wollen, wie es fälschlich so manche Gegner des Gleichheitsgedankens darstellen, welche dabei dann in tadelndem Sinne von »Atomismus« sprechen. Aber selbst die Berechtigung dieser Bezeichnung zugegeben, wird gewöhnlich vergessen oder nicht gewußt, daß, so viel wir bisher wissen, auch die sogenannten Atome keine ganz isolierten Dinge sind, sondern mit allerlei bekannten und unbekannten Kräften aufeinander wirken. Mit all diesem soll nur gesagt sein, daß dem Staat eine Gesamt- und Einheitsempfindung nach Analogie unserer Ich-Empfindung nicht zugesprochen werden kann.

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Den Staat vermöge einer Fiktion als eine moralische Person aufzufassen, könnte höchstens in demselben Sinn gestattet sein, wie man ihn als juristische Person auffaßt, also nur symbolisch, nicht als ein so geartetes einheitliches Wesen. Und wenn von manchen ‹wie Bluntschli› es als Verdienst der deutschen historischen Rechtsschule bezeichnet wird, die organische Natur des Staates erkannt zu haben, so kann man schon deswegen damit nicht übereinstimmen, weil viele Tatsachen der Geschichte so sehr gegen diese Anschauung sprechen.

In der Tat: Nach den unzähligen Kriegen bestimmten die ebenso unzähligen Friedensschlüsse fast ausnahmslos einen Gebietswechsel. Ganze Länder, Provinzen oder Städte kamen da mit einem Federstrich von dem einen Staat an den anderen und meistens fügten sie sich sofort den Gesetzen des neuen Staatsverbandes. Kann man einen solchen Vorgang auch nur entfernt einen organischen Vorgang nennen? Und da eine solche Unterwerfung fast immer nur durch Zwang geschieht und ein wirkliches zufriedenes Einleben in das neue Staatsregime stets lange Zeit braucht, so würde gemäß der organistischen Staatsauffassung folgen, daß während solcher Zeiten gar kein Staatsverband existiere, sondern nur in jenen, wo altgewordene Gewalt bereits als Recht empfunden wird.

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In neuerer Zeit wurde dem Streben nach naturwissenschaftlicher Auffassung des Staates, um auf ihrer Grundlage Schlüsse für den Wert praktischer Institutionen zu ziehen, eine bedeutende Ausdehnung gegeben. Man versucht insbesondere den Darwinismus, allgemeiner die Entwicklungslehre, auf die Erkenntnis des Staatsverbandes anzuwenden. In den meisten Fällen hatte diese Betrachtungsweise zur Folge, daß die Empfindung und das Interesse für das reale Einzelindividuum geschwächt, mitunter ganz erstickt wurden[1]. So z. B. behandelt ein Aufsatz eines französischen Schriftstellers die Frage: »Was ist die öffentliche Pflicht der Wohltätigkeit vom Standpunkt des Darwinismus?«

Es muß nun ganz entschieden ausgesprochen werden — und ich habe es, wie ich glaube, nachgewiesen — daß diese ganze biologische Staatsauffassung nicht nur eine scheinwissenschaftliche, sondern noch weit mehr eine staatsrechtlich wertlose und in ethischer Beziehung schädliche sei.

Man kann und muß ganz wohl eine »Entwicklung« des Staates, der Gesellschaft, der ganzen Welt zugeben, denn alles ändert sich fortwährend und jede Änderung kann man auch »Entwicklung« nennen. Keinerlei Theorie der Entwicklung aber vermag uns zu hindern, in die Entwicklung durch Willensakte einzugreifen, bei denen wir uns durch Vernunft und ethische Gesinnung leiten lassen. Unsere Maßregeln dürfen nur nicht festgestellten Naturgesetzen widersprechen, zu solchen Gesetzen gehören aber die staatsbiologischen — wenigstens bis jetzt — durchaus nicht. Übrigens lehren uns schon die Erfahrungen, die wir mit unseren Reformversuchen machen, bald genug, ob sie wirklichen Naturgesetzen widersprechen.

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Es ist wohl wahr, in neuerer Zeit können viele sich den Staat gar nicht anders als unter dem Bilde eines Organismus vorstellen. Allem, was ich schon in dieser Schrift und besonders in meinem Werke »Die allgemeine Nährpflicht« hierüber gesagt habe, füge ich zur Aufklärung und Befreiung von dieser irrigerweise von vielen als unbedingt richtig vorausgesetzten Anschauung hinzu, daß viele Staatsrechtslehrer den Staat als einen

[1] Man vergleiche hiezu in meinen Werken »Die allgemeine Nährpflicht« und »Das Individuum« die Bemerkungen, welche sich besonders gegen Spencer richten.

Mechanismus, als Maschine betrachteten, wie z. B. Schlözer und Kant. Und noch mehr sieht man, daß die Auffassung als Organismus keine psychisch notwendige und natürliche, sondern nur eine konventionelle ist, wenn man erfährt, daß der am Ende des XVII. Jahrhunderts lebende bedeutende Staatsrechtslehrer Horn »jede Auffassung der Gemeinschaft als eines organischen Ganzen«, ja »sogar den Begriff der juristischen Person verwarf«. ⟨Gierke, »Althusius«.⟩

Zufolge der hier vertretenen, später noch viel eingehender dargelegten Staatstheorie muß man auch die prinzipielle Unrichtigkeit der Auffassung einsehen, derzufolge das Volk als eine unsterbliche und im Wechsel der Glieder identische universitas fortdauere, daher der »Urvertrag« auch für spätere Generationen verbindlich sei, »das Volk von heute sei ja dasselbe Volk, welches ehemals sich rechtsgültig verpflichtet habe.«

Abgesehen davon, daß wir uns zu keiner Zeit um einen Urvertrag, selbst wenn ein solcher nachgewiesen werden könnte, zu kümmern brauchen, ist es auch unrichtig, daß das Volk von heute dasselbe sei wie zu irgend einer früheren Zeit. Es ändert sich ja so vieles im Laufe der Geschichte! Wie kann man da sagen, das Volk bleibe sich gleich? Wenn wir uns an die Wirklichkeit halten, so müssen wir im Gegenteil sagen, ein Volk ändert sich von Tag zu Tag, nur werde gewöhnlich diese Änderung erst nach etwas längerer Zeit bemerkbar, mitunter schlummere gleichsam die Änderung unter der Oberfläche des täglichen Lebens und breche dann plötzlich hervor. Es gibt im Leben einer Staatsbevölkerung immerwährend eine ungeheure Anzahl ganz kleiner Revolten, sei es in Wort, Schrift, in bloßen Gedanken oder in Handlungen, d. i. in Vergehen und Verbrechen. In dieser Weise geht das Leben des Volkes weiter, wobei manches lange fortbesteht, manches neu auftaucht und als Resultat entsteht ein Konglomerat, eine Anhäufung von Individuen, welche man mit einem Wort Volk oder Staat bezeichnet, so wie man die unzähligen Wasserteilchen, die untereinander an Dichte, Geschwindigkeit, Reinheit, Temperatur sehr verschieden sind, mit dem Wort »Strom« bezeichnet. In beiden Gebilden kann von keiner Persönlichkeit dieser Anhäufung, nur von einer Summe von Einzelteilen und von einem gemeinsamen Namen die Rede sein.

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Einen Staat als einen großen »beseelten« Körper betrachten, ist also ebenso unberechtigt, wie einen Strom als eine beseelte Masse anzusehen, er ist allerdings in beständiger Bewegung und Änderung, die »Beseelung« besteht aber einfach darin, daß zwischen Ursprung und Ende des Stromlaufes eine Niveaudifferenz und überall die Schwerkraft vorhanden ist.

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Ganz entgegen der zumeist und auch heute herrschenden Auffassung des Staates als eines überindividuellen, organischen Ganzen, wie sie namentlich schon Burke und Adam Müller besaßen, sagte ⟨der oben erwähnte⟩ Horn im XVII. Jahrhundert, der Staat sei nichts »als eine Summe von Einzelwesen und daß ⟨selbst⟩ ein Vertrag nicht die Macht habe, eine Vielheit zur Einheit, eine Menschenmenge zu einem realen Ganzen zu machen«. Ebenso dachte sich Schlözer das Volk »als die Summe aller einzelnen Menschenkinder«[1] und selbst Rousseaus souveräne »Staatspersönlichkeit« ist nichts als die Summe der in jedem Augenblick vorhandenen Individuen. Mit diesen Auffassungen stimmt die meine vollkommen überein.

Der Ansicht, der Staat sei nicht eine bloße Summe von einzelnen Individuen, sondern vermöge einer sogenannten »schöpferischen Synthese« etwas ganz anderes, Höheres, eine besondere Art organischen Wesens, liegt nur eine sich einschmeichelnde, phantastische Idee metaphysischen Charakters zugrunde. Das Wort Summe, das eigentlich nicht adäquat ist, verleitet zu diesem Fehlgedanken. Wenn man anstatt Summe sagen würde, eine Resultante unzähliger Individualleben und -bestrebungen verschiedenster Art, geradeso wie man nicht von der Summe einer Anzahl von mechanischen, wenigstens in ihren Größen und Richtungen verschiedenen Kräften, sondern von ihrer Gesamtwirkung, ihrer Resultante spricht, ohne an irgend etwas Schöpferisches ihrer Gleichzeitigkeit zu denken — so ist es auch bei Betrachtung eines Staates. Alle Einzelkräfte liefern, ohne im geringsten »schöpferisch« zu sein, ein Staatsleben als Resultierende, die nur nicht mit so einfachen Worten präzisiert werden kann wie bei jenen mechanischen Kräften.

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[1] Diese Daten entnehme ich Gierkes »Althusius«.

Schließlich sei noch auf folgende Tatsache hingewiesen. Wenn man einen Organismus so definiert, daß jeder seiner Teile allein, d. h. isoliert vom Ganzen, in seinem Wesen nicht verstanden werden kann und daß alle Teile zugleich als Mittel und Zweck funktionieren, auch ein Gewölbe ein Organismus wäre. Denn jeder Stein für sich ist in Beziehung auf seine Form unverständlich, und er ist zugleich Mittel und Zweck, denn er trägt zum Zweck der Tragfähigkeit des Ganzen bei und alle anderen Teile halten ihn selbst an seiner Stelle fest, damit er nicht falle. Jeder Stein wirkt also für das Ganze und dadurch auch für sich selbst. Man kann daher, wenn man will, den Staat anstatt mit einem Organismus auch mit einem Gewölbe oder, wenn man will, auch mit der Kette einer Kettenbrücke vergleichen. Ja noch inniger wäre vielleicht der Vergleich eines Staates mit einer Korallenbank, denn diese besteht aus zahlreichen Organismen, die gemeinsam arbeiten, um aus dem Meer emporzutauchen, man wird aber doch gewiß nicht behaupten, daß sie ein gemeinsames Bewußtsein haben und eine organische Einheit darstellen.

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Mit der Auffassung des Staates als eines »Organismus« oder »Über-Organismus« ist aber auch überhaupt gar nichts gewonnen, denn man kann auf Grund dieses Vergleiches in keinem einzigen Punkt vernünftige Entscheidungen treffen, ohne sie in jedem einzelnen Falle einer fachlichen Kritik aus sich selbst so zu unterwerfen, als ob jene Analogie gar nicht angenommen worden wäre.

Abgesehen davon, daß wir heute noch gar keine präzise Definition des Organismus besitzen — wie dies z. B. Wundt, der eine solche Definition aufstellte, doch selbst zugab — war die bisherige Folge dieser Analogie meist nur die, daß man in sehr leichtfertiger Weise theoretische Vorschläge machte und Ansichten als unbestreitbar nur auf Grund dieses Vergleiches aufstellte, die der Kritik keinen Augenblick standhalten. Und infolge der eigentlichen Unbestimmtheit dieses Vergleiches kann man daher auch ganz nach Belieben Konsequenzen staatsrechtlicher Natur aus demselben ziehen und z. B. bald aristokratische, bald demokratische Verfassungen als der Natur eines Organismus entsprechend, als notwendig oder als unpassend hinstellen.

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Man mag sich wundern, daß hier soviel über die Auffassung des Staates als Organismus gesprochen und dagegen polemisiert wird. Was liege daran, mag man glauben, ob man den Staat so oder so auffaßt? Allein es ist nicht gleichgültig! Denn die Konservativen stützen ihre Argumente gegen noch so sehr gewünschte Reformen, die nicht ihnen zugute kämen, fast immer weniger auf fachliche Überlegung als auf die willkürliche Definition des Staates als Organismus und auf das ebenso willkürlich von ihnen angenommene Tempo, in welchem Veränderungen darin vor sich gehen sollen.

XIII.

Der Staat.

III. Eine Staatslehre.

Eine voraussetzungs- und vorurteilslose sowie der Wirklichkeit entsprechende Ansicht vom Staate muß selbstverständlich für alle Angehörigen aller Staaten gültig sein.

Daraus folgt sofort, daß die Auffassungen des Staates als eines »Lebewesens«, als eines »organischen Gebildes«, als eines »sittlichen Ganzen eigener Art«, als einer »zusammenhängenden, von Generation zu Generation kontinuierlichen, stetigen Einheit« und dergleichen unbrauchbar sind. Denn wie kann man glauben, daß etwa Länder oder Provinzen, die doch fast immer auf dem Wege der Politik oder der Kriege oder der Heiraten einem schon bestehenden Staate angeschlossen werden, sich in diesen Auffassungen würden subsummieren lassen? Kann man zum Beispiel voraussetzen, daß die Polen, Dänen und Elsäßer als Teile eines staatlichen Organismus, nämlich Deutschlands, betrachtet werden können oder sich selbst als solche betrachten? Oder passen jene Auffassungen auf die Finnländer, Polen und alle Ukrainer, die doch alle zum russischen Staate gehörten?

Man kann daher von solchen Teilen nicht verlangen, daß sie in einem Gemütsverhältnis zu ihrem Staate stehen, daß sie ein Staatsgefühl besitzen und gar ihr Leben für ihn gerne opfern. Tun sie es dennoch, so werden es immer besondere Umstände erklärlich machen, z. B. ein starker Zwang oder ein gewisses Kalkül über die Nützlichkeit ihrer Opferbereitschaft in dieser oder jener Art.

Es bleibt daher, um den Staat richtig zu definieren, nichts anderes übrig, als ihn zu beschreiben und zu sagen:

Der Staat ist eine in mehrfachen Beziehungen mit der größten physischen Gewalt ausgerüstete Zwangsinstitution; diese Institution erstreckt sich auf alle eingeborenen oder angemeldeten Bewohner eines geographisch abgegrenzten Gebietes. Und alle diese Staatsangehörigen leben, im normalen Zustande, miteinander in einem beharrlichen dynamischen Gleichgewicht zwischen zahlreichen mehr oder weniger stillschweigenden oder lauten Verträglichkeiten und Unverträglichkeiten.

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Es ist ein Grundfehler der Staatsrechtsphilosophen, eine für immer geltende Definition des Staates zu dem Zwecke zu geben, um seine Aufgaben oder sogenannten Missionen zu präzisieren. Man vergißt dabei, daß die verschiedenen Zeitalter und Nationen in den Forderungen für die staatlichen Agenden voneinander bedeutend abweichen, und daß es bezüglich der ihm zuzuweisenden Aufgaben nur eine negative Definition des Staates geben kann, nämlich die, daß man dem Staate, als dem umfassendsten und mit der größten physischen Gewalt ausgestatteten Komplex der Bevölkerung eines und desselben Landes, nur jene Tätigkeit überweisen soll, die durch eine andere Art oder durch eine kleinere Gruppe von Menschen nicht so zweckmäßig durchgeführt werden kann wie durch ihn[1]. Man denke hier z. B. an die Frage nach der Einführung eines Staatssozialismus an Stelle der vollen wirtschaftlichen Freiheit. Natürlich kann je nach Umständen darüber Streit herrschen, ob in einem bestimmten Falle die eine oder die andere Methode zweckmäßiger sei, wird aber für Inanspruchnahme des Staates entschieden, so muß bei einem solchen Vergleiche der Vorzug des Staates wenigstens vorausgesetzt worden sein, man kann sich auch irren und durch spätere Erfahrungen belehrt werden, daß es besser gewesen wäre, eine andere Gruppierung, d. h. eine andere Institution oder »Organisation« mit dieser bestimmten Aufgabe zu betrauen, das ändert aber an diesem Wahlprinzip gar nichts.

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[1] Dieselbe Auffassung fand ich auch bei Mohl, Gladstone, Eötvös und G. Jellinek.

Wir philosophieren offenbar über das Staatsproblem im letzten Grunde zu dem Zweck, um bestimmte materielle oder ideelle Verbesserungen in der jeweiligen Lage der Menschen zu erfinden und zu verwirklichen. Wir brauchen dabei gar nicht schwierige Untersuchungen über die Entstehung des Staates, über den Naturzustand und sein Verhältnis zum Staat anzustellen, alle historischen und philosophischen Untersuchungen über diese speziellen Probleme sind ja endlos: erstere schon darum, weil etwa neu aufgefundene Dokumente jedes früher gewonnene Resultat und jede darauf mühsam aufgebaute Institution über den Haufen werden würden, philosophische Theorien aber haben immer etwas Willkürliches an sich, das man immerhin mit Interesse vernehmen kann, das aber vor jedem neuen Tatbestand des wirklichen Lebens, vor jedem neu auftauchenden Bedürfnis verblassen muß.

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Greifen wir daher die Dinge aus der Mitte des Lebens heraus und fassen wir irgend einen beliebigen Staat ins Auge: Was sehen wir da?

Die einzelnen Individuen sind mit den bestehenden Institutionen bald zufrieden, bald unzufrieden, aber auch die meisten Unzufriedenen unterwerfen sich ihnen, meistens jedoch infolge des ausgeübten moralischen und physischen Zwanges, nur wenige revoltieren durch das Wort und sehr wenige durch die Tat. Der so beschaffene Zustand heißt: ein geordneter staatsrechtlicher Zustand, die sogenannten Verbrecher aller Art gehören daher nicht weniger zum Staat wie ihre Richter. Der Charakter jenes geordneten staatsrechtlichen Zustandes besteht hauptsächlich darin, daß bei ihm keine permanenten Bürgerkriege vorkommen, sondern nur in einzelnen Fragen und Fällen mehr oder weniger heftige Widersprüche gegen das eben Geltende, aber immer in relativ gemäßigten Dimensionen und maßhaltender Energie.

Wir sehen also eine immerwährende Gärung, Umbildung und Erneuerung der Zustände und der Gesetze, wobei es im ganzen und großen allerdings beim friedlichen Zustand bleibt und ein Befolgen der meisten Gesetze weiter stattfindet. Und so kann man, wenn man diesen Ausdruck gebrauchen will, diesen

dynamischen Prozeß des Staatslebens ein beständiges Vertragsbefolgen und Vertragsändern nennen, sei es zwischen verschiedenen Berufen, religiösen oder Welt-Anschauungen, zwischen den verschiedenen Individuen oder den verschiedenen Klassen, oder von Gruppen Unzufriedener gegenüber der Staatsmacht. Bald tritt diese, bald jene Art von Kämpfen mehr in den Vordergrund, je nach dem Lauf der Geschichte, und es ist daher eine langgewohnte Einseitigkeit der Soziologen, stets nur von Klassenkämpfen als Triebkräften in der gesellschaftlichen Bewegung zu sprechen. Offenbar setzt aber ein stetiges erneutes Vertragsändern ein stetiges Vertragsbrechen voraus, denn es entsteht ja fortwährend ein mehr oder weniger bedeutender, neuer staatsrechtlicher Zustand, wenn die Neuerung auch noch so klein wäre.

Es gibt also wohl keinen Gesamtvertrag, sondern viele kleine mehr oder weniger stille Verträge oder Vertragsverhältnisse zwischen Allen als Individuen, sowie gegenüber Klassen und Mächten aller Art. Selbst ein mächtiger Despot existiert nur still vertragsmäßig, nämlich so lange, als nicht ein Bruch des Verhältnisses der einzelnen Individuen zu dem Despoten, zum Beispiel in Form seiner Verjagung erfolgt. Und das Ganze besteht in ähnlicher Art weiter, wie ein Gas, dessen zahllose Teilchen untereinander an Geschwindigkeit, Bewegungsrichtung und noch manchem anderen verschieden sind und fortwährend aneinander stoßen.

Aus der von Natur gegebenen Souveränität aller Individuen entsteht in allem dem, worin ihre Tendenzen übereinstimmen, die »Volkssouveränität«.

Der Gedanke eines stillschweigenden Vertrages findet sich bereits bei dem im XVII. Jahrhundert lebenden großen Vorläufer Rousseaus, nämlich — wie ich dem Werke über »Johannes Althusius« von Otto Gierke entnehme — jenem radikalen Staatsphilosophen, der in seiner »Politik« sagte: »Gegenstand der Politik ist die Vereinigung zum gesellschaftlichen Leben, zur Vereinigung treibt das Bedürfnis und sie vollzieht sich durch stillschweigenden oder ausdrücklichen Vertrag.«

Überdies könnte man, um auch historische Analogien heranzuziehen, hier an die römisch-rechtliche Kategorie des »Quasikontrakts« erinnern, wobei nämlich »auch ohne vorausgegangenen Vertrag infolge bestimmter Tatsachen vertragsähnliche Verpflichtungen zustande kommen«[1]. Die Tatsachen sind in unserem Falle die Wechselbeziehungen der Staatsangehörigen untereinander und zu den Gesetzen.

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Wenn bei so vielen Staatsrechtslehrern, auch schon bei Althusius, die Zustimmung aller Beteiligten als die wirksame Ursache jeder Vereinigung gilt, so kann man nach meiner Auffassung des Bestandes der Vereinigung im Staate durchaus nicht von einer vollständigen Zustimmung der einzelnen und aller sprechen, sondern in der Regel nur von einer Mischung von Zustimmenden und Nichtzustimmenden, die sich in immerwährender Gärung befindet und deren Resultat doch der fortdauernde Bestand dieser Vereinigung ist, und zwar dadurch, daß die Zustimmung und ihre Machtresultante überwiegt. Daß übrigens eroberte und wider ihren Willen behaltene und mit einem schon bestehenden Staate vereinigte Provinzen der »Vereinigung« nicht zustimmen, leuchtet von selbst ein. Allerdings wird der Mensch in einen schon bestehenden Staat hineingeboren, daraus darf man aber nicht den Schluß ziehen: der Staat sei vor den Menschen, zuerst komme der Staat, dann erst das Individuum, und darf auch nicht argumentieren: daher sei jeder dem Staat, wie er ist, mit Haut und Haar als ausgeliefert anzusehen. Denn kein Mensch mit gesunden Sinnen wird die Kinder als volle Staatsbürger ansehen und betrachten, geht man doch in den wichtigsten Beziehungen des sozialen Lebens so weit, daß man die »Volljährigkeit« voraussetzt. Es sind also nur die Erwachsenen als staatlich aktive Individuen zu bezeichnen, wie das ja auch der Altersbestimmung für das allgemeine Stimmrecht zugrunde liegt. Und erst diese reifen Individuen beginnen ihr Spiel in dem allgemeinen politischen und sozialen Getriebe, sie befolgen — sei es zufrieden oder unzufrieden — stillschweigend die Gesetze oder sie äußern sich unzufrieden mit ihnen und mit den bestehenden Einrichtungen oder sie begehen eventuell Verbrechen, sie revoltieren usw. In all diesen Arten, sich politisch zu verhalten, liegen unzählbare und unaufhörliche vertragsartige Vorgänge gegenüber dem bestehenden Staat, im großen oder im kleinen,

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[1] Ich bin kein Kenner des römischen Rechtes und benützte hier bloß ein Zitat.

mit dem Unterschiede gegen das sonst übliche Vertragschließen, daß nichts aufgeschrieben, kein »Instrument« verfaßt und kein Notar oder Advokat zugezogen wird. Dies alles ist für Vertragsgedanken und -absichten ganz überflüssig; es handelt sich immer nur um das »Vertragen«.

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In wohl allen hervorragenden Staatsrechtstheorien wird, wie schon hervorgehoben wurde, das Volk als Gegensatz zum Monarchen oder allgemeiner zum »Herrscher« hingestellt und als eine Einheit aufgefaßt. Allein die Geschichte und namentlich die der neueren Zeit hat gezeigt, daß diese Auffassung eine ganz und gar unpraktische sei; nicht nur die einzelnen Individuen sind in ihren Zielen und Wünschen sehr verschieden, sondern auch die mannigfachen Klassen und gesellschaftlichen Gruppen stehen einander geradeso gegenüber, wie ein Despot gegenüber seinen Untertanen. Der Kampf »Aller gegen Alle«, den Hobbes für den Naturzustand voraussetzt, herrscht daher auch im bereits konstituierten Staat, wenn auch meistens nicht entfernt in jener wilden Art, wie die Ansicht von Hobbes und seine Darstellung erscheinen läßt.

Daß ein Staatsvertrag, ein sogenannter »Urvertrag«, eine historische Realität für den Übergang des anarchischen oder unzivilisierten Zustandes in den eben als Staat geordneten sei, glaubte fast niemand, nicht David Hume, nicht Kant, nicht einmal Rousseau selbst.

Diejenigen, welche, wie Fichte in seiner späteren Zeit, die Individuen als »bloßes Werkzeug für den die Gattung darlebenden Staat« betrachten, eine Ansicht, die seit der historischen und organischen Staatsauffassung jetzt beinahe die herrschende ist, sehen nicht, daß es wohl jedem frei steht, sich in dieser Weise einzuschätzen, daß aber auch diese Auffassung nichts objektiv Gültiges, sondern wieder nur ein Ausfluß dieses und jenes souveränen Individuums ist. Die entgegengesetzte Auffassung ist ebenfalls Ausfluß des souveränen Individuums und es folgt daraus, daß jeder Zwang, der von dem ersteren gegen das zweite ausgeübt werden will, nichts anderes als ein Bürgerkrieg ist, dessen Resultat sehr wechseln kann.

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Nach allem Bisherigen versteht es sich daher von selbst, daß es der Volkssouveränität freisteht zu bestimmen, was sie dem Staatsregime entziehen ⟨z. B. die Wehrpflicht⟩ oder was sie ihm auftragen will ⟨z. B. Sicherung der Lebenshaltung⟩ und daß die Staatsbürger im allgemeinen durchaus nicht, wie es Rousseau ausdrückt, ihre »ganze Person und ganze Kraft dem Staat zur Verfügung stellen«, wenn es ihnen nicht paßt. Man sieht das auch schon aus der Leichtigkeit, mit der man, wenn es einem nützlich scheint, seinen Staat verläßt, um sich in einem anderen niederzulassen, was ja beweist, daß nicht alle Mitglieder des Staates sich, wie Rousseau meint, als »untrennbare Teile des Ganzen« fühlen. Und wenn mitunter gesagt wird, ein »treuer« Staatsbürger wandere nicht so leicht aus, so muß man auch zugeben, daß es stets auch nichttreue Staatsbürger gibt, und daß viele gerne auswandern möchten, wenn nicht so manches dem entgegenstünde. Damit meine ich nichts anderes, als daß bei vielen die Anhänglichkeit an den Staat im Gemüte, wie sie im Altertum fast immer vorhanden war, heute — von Ausnahmsfällen, wie manchmal einem allgemeinen Kriegsrausch, abgesehen — fast nicht mehr zu finden ist, daß also die ganze Auffassung Rousseaus den Gesinnungen des größten Teiles der heutigen europäischen Menschheit im allgemeinen widerspricht, und daß, wenn eine solche Anhänglichkeit hie und da vorhanden ist, sie sich meistens auf die Nationalität und weniger auf den Staat als politisches Gebilde bezieht. Das Prinzip der Nationalität spielte aber bei Rousseau noch gar keine Rolle, das ganze Zeitalter Rousseaus hatte überhaupt noch kein Nationalitätsgefühl.

Auch ist die Gesinnung der meisten Menschen im westlichen und mittleren Europa weit entfernt davon, dem Staatsoberhaupt »unbeschränkte Macht« geben zu wollen und zuzustimmen, daß es »die Höhe des abzutretenden Teiles unserer Freiheit selbst bestimme«. Hiezu erwähnen wir von den vielen anderen nur die eine Tatsache, daß kein einzelner Staatsbürger, und umsoweniger ein ganzes Volk, dem Regenten oder einer Volksvertretung erlauben würde, zu verordnen, einen Menschen zu vivisezieren, weil ihnen das etwa irgendwie nützlich zu sein erschiene. Es gibt eben Schranken, welche die allgemeine Meinung und Sitte der Staatsgewalt entgegenstellt, und diese Grenzen

wollen wir, wenn wir von Vorurteilen und Theorien unbeeinflußt sind, nach unserem Belieben, d. h. nach unseren Wünschen und Bedürfnissen fixieren, erweitern oder verengen.

Die Deduktion Rousseaus aus dem »Urvertrag«, daß »das Leben des Individuums nicht mehr ausschließlich eine Wohltat der Natur, sondern nur ein ihm bedingungsweise bewilligtes Geschenk des Staates« sei, ist eine ganz ungerechtfertigte Übertreibung und eines der merkwürdigsten Mausfallenargumente, die jemals aufgestellt wurden.

Nach Rousseaus Ansicht findet an jedem Individuum eine Art politischer Taufe statt, es ist nun einmal, auch ohne es zu wissen oder zu wollen, durch Vererbung im Urvertrag untergetaucht und auf der Stelle und für immer dem Staate überliefert, sein Leben ist dem Staat wie zu Lehen gegeben.

Aber es ist ferne von uns, das anzunehmen!

Wenn unsere Vorfahren wirklich einen solchen törichten Urvertrag geschlossen hätten, uns kümmert das nicht, und wenn wir selbst in einem Moment der Übertöpelung einen derartigen Vertrag eingegangen wären, so kündigen wir ihn und brechen ihn auch, so gründlich als wir nur immer können. Wir — das sind alle jene, die mit mir übereinstimmen — wollen unseren Staat so einrichten, daß er uns jenen verlangten Schutz und Förderung irgend welcher Art durch Vereinigung der Einzelkräfte gewähren kann, wenn wir eben einen solchen Schutz oder solche Förderung verlangen, ohne daß wir darum den Staat als Vogelscheuche aufrichten, vor der wir uns dann, lächerlicherweise, wie vor einem Gespenst fürchten!

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So sehr die staatliche Existenz des Menschen eine wichtige ist, so bleibt sie ja doch nur eine unter vielen anderen wichtigen Existenzarten, die sein Leben ausfüllen können. Es sind ja auch immer mehrere Arten von Solidaritäten, denen jedes Individuum angehört. Empfindungen für Nationalität, für Religion, für Wissenschaft, Kunst oder für die Familie erfüllen sehr häufig weit inniger als das sogenannte Staatsgefühl. Das ist ja eine alltägliche Erfahrung und ich will hier nur die Tatsache erwähnen, daß — nach der gewiß richtigen Bemerkung des großen chinesischen Staatsmannes Li-Hung-Tschang — der

Hauptunterschied zwischen Europäern und Chinesen darin besteht, daß in China die große Masse sich um ihren Staat fast gar nicht kümmert, dafür aber in dem Familiengefühl aufgeht.

Es ist sogar eine für die jetzige Kulturepoche ganz unpraktische Ansicht, wenn man ein totales Verwachsensein des Individuums mit dem Staate wünscht und als notwendig hinstellt, wie wir das bei Rousseau und Hegel finden. Erfüllt von den Erinnerungen an die kleine Republik Genf und an die antiken Demokratien, behauptet Rousseau: »Je vollendeter die Staatsverfassung ist, desto mehr überwiegen die öffentlichen Angelegenheiten in den Augen des Staatsbürgers die privaten.« Die heutige Meinung ist die: Gerade umgekehrt! »Je vollkommener die Staatsverfassung« ist, desto mehr muß sie es dem einzelnen möglich machen und frei stellen, sich etwaigen anderen Aufgaben und Interessen zu widmen und sich auf die Berufspolitiker zu verlassen. So ist es ganz ausgesprochen bei den Chinesen der Fall, die, wenn man mit ihnen über Staats-, respektive politische Angelegenheiten diskurieren oder disputieren will — wenigstens bis auf die neueste Zeit — das mit den Worten abweisen: um solche Sachen mögen sich jene Leute kümmern, die »dafür bezahlt sind«, d. h. die Staatsbeamten.

Es ist das gewiß eine Geschmacksache. Das chinesische Volk führte aber bisher bei diesem Regime — im ganzen und großen und bevor die Europäer hinkamen — in berechtigtem Vertrauen auf seine Gesetze, die Macht der Gewohnheitsrechte und sein so sehr geordnetes Familienleben ein ruhiges und zufriedenes Dasein.

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Was hier dargelegt werden soll, ist aber nicht eine Vorschrift darüber, wie jeder es treiben soll, sondern die Forderung, daß jedem sein eigenes, von ihm gewünschtes Regime gestattet sein möge, ohne daß ihm und der so bestehenden Staatsverfassung der Vorwurf einer unedlen oder unvollkommenen Art zu leben und zu sein, gemacht werde.

Man denke an eine Existenz wie jene des Archimedes, eines Jesus von Nazareth, Mozart, eines Goethe: sollen etwa bei solchen Individuen die »öffentlichen Angelegenheiten ihre individuellen überwiegen«? Natürlich sind bei diesen

Männern unter ihren individuellen ihre idealen Bestrebungen zu verstehen. Aber auch die privaten Interessen des ganz gewöhnlichen Menschen haben ein Recht, ihn so auszufüllen, daß er — wenn es ihm so behagt — jeden Eingriff in die Staatsangelegenheiten, ja jede ernstere Beurteilung ihrer Entwicklung, von sich ferne hält und sich anderen Interessen, die ihm wichtiger oder angenehmer sind, zuwendet. Denken wir hier vor allem an die Frauen, die ja gerade so gut wie die Männer Teile des Staates — wenn auch meistens noch minderberechtigte — sind, wer wird einer Mutter es verargen, wenn sie sich ganz der Liebe zu ihren Kindern hingeben und etwa die Politik gehen lassen wollte, wie sie eben geht?

Als es sich im Jahre 1859 darum handelte, ob Deutschland dem österreichischen Staate im »Interesse des Deutschtums« zu Hilfe kommen solle, um die Lombardei gegen die Italiener und die Franzosen zu verteidigen, und unter anderem im engeren Kreise der Heidelberger Universitätsprofessoren darüber heftig disputiert wurde, schwieg der große Physiker Kirchhoff, der Erfinder der Spektralanalyse, beharrlich, und als man ihn aufforderte, doch auch zu sprechen, erwiderte er ungefähr: »Ich habe darüber gar keine bestimmte Ansicht und es ist mir ganz einerlei, ob die Lombardei zu Österreich oder zu Italien gehört.«

Wird man Kirchhoff hieraus einen Vorwurf machen wollen? Das würde doch nur ein fanatischer deutscher Nationalist tun, gewiß in ehrlicher Überzeugung seiner eigenen »idealen« Anschauung über Nation und Staat, aber dennoch ohne Berechtigung, denn in diesen Dingen läßt sich nichts beweisen und niemand hat ein Recht, seinen eigenen Standpunkt für den an sich und einzig richtigen zu halten oder gar ihn anderen mit irgendwelchen Mitteln, und sei es auch bloß durch Vorwürfe oder durch Invektiven oder gar etwa mittels der — Wehrpflicht aufdrängen zu wollen.

Wie in dieser Beziehung einem Genie wie Kirchhoff, muß auch jedem anderen ohne Ausnahme das Recht eingeräumt werden, so leben zu können, wie es ihm am angenehmsten und passendsten erscheint. Wer es anders will, treibt schlimme Tyrannei. Bedenke man doch überdies, wie es sich gerade in der neueren Zeit herausstellte, daß die stets allgemeiner werdende

Beschäftigung mit Politik den Charakter der Menschen immer unruhiger, aufgeregter und roher machte und daß diese Erfahrung so offenkundig ist, daß Millionen und Millionen Menschen schon die Geduld verlieren und vor den unaufhörlichen politischen Verhetzungen und Nörgeleien endlich einmal Ruhe haben wollen.

Und da konnte Rousseau — der allerdings nichts Höheres kannte als den Staat — schreiben: »Sobald einer von Staatsgeschäften sagt: Was liegt mir daran? — so ist sicher der Staat verloren.« Welche maßlose Übertreibung liegt in dieser Ansicht! Infolge der unaufhörlichen Reizungen der Gesellschaft durch das lebhafte Treiben der Parteien geht das gesittete Leben innerhalb der Gesellschaft und manchmal sogar die Existenz des Staates verloren. Das Gesetz Solons, wonach — wie Aristoteles in der »Verfassung von Athen« mitteilt — jeder als ein Feiger bestraft wird, der beim Ausbruch von Unruhen nicht unter die Waffen tritt und sich nicht zu einer Partei schlägt, mag von Anhängern der extremen Staatsauffassung als ein weises angesehen werden, ich jedoch glaube, man kann es, wenigstens für unsere Zeit und Kultur, nur als schädlich bezeichnen. Es stimuliert nur die Staatsbürger, die ja ohnedies auf Reizungen solcher Art leicht reagieren, und es verletzt das Grundrecht jedes Individuums, sich sein Leben nach seinem Willen zu gestalten und alles von sich abzuweisen, was dieses Leben stört — natürlich ohne ihn seiner notwendigen Pflichten gegen andere, die Familie oder die Gesamtheit, zu entheben.

Es mögen und sollen die menschenfreundlichen, ernsten Politiker rastlos an der Besserung unserer Zustände arbeiten, aber die Verbreitung der politischen Streitigkeiten auf jung und alt, wie das jetzt der Fall ist und fast zur immerwährenden Verhetzung führt, ist nur von Nachteil. Wenn jemand durch passende Institutionen in seinen fundamentalen Bedürfnissen und in den jeweils geltenden sogenannten Grundrechten gesichert ist und wenn er glaubt, daß für ihn selbst alle anderen Bedürfnisse und Anforderungen an den Staat jenen gegenüber nur von sekundärer Bedeutung sind, so ist nicht einzusehen, warum man ihm vorschreiben will oder es ihm besonders ans Herz legen soll, sich um weitere Staatsangelegenheiten zu kümmern, besonders dann, wenn ganz andere Dinge sein Interesse oder seine Tätigkeit auszufüllen vermögen. Andererseits ist es nur zu

loben, wenn sich jemand aus freiem Willen seiner Mitbürger in uneigennütziger Weise annimmt, für Recht und Gerechtigkeit eintritt und für den Fortschritt in materieller und ideeller Beziehung tapfer kämpft.

Man schreckt uns also nicht mit der Warnung: »Der Staat würde zugrunde gehen.« Im Altertum hatte das vielleicht einen Sinn, denn damals hing alles, Kultur und sogar die physische Existenz aller Staatsangehörigen von der ununterbrochenen Wachsamkeit, also der politischen Tätigkeit, zu der jeder direkt verhalten wurde, ab, eine solche Trennung des privaten Lebens von dem öffentlichen, wie sie bei uns vorhanden ist, gab es damals nicht, also dürfte zu jener Zeit auch die Bestimmung Solons zweckmäßig gewesen sein. Heute aber sind wir über die Staatssklaverei schon weit hinaus und müssen es noch weit mehr werden. Heute lebt der Mensch nicht vom Brot allein und auch nicht vom Staat allein.

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Wenn wir also, unbeeinflußt von allen willkürlichen Staatstheorien, daran festhalten, daß der Staat wie jede andere Institution die Erfüllung unserer Wünsche oder unser Wohl — wie wir es eben verstehen mögen — herbeiführen soll, insoweit wir das durch eine andere Institution nicht erreichen können, so folgt mit Notwendigkeit, daß wir für manche unserer Bedürfnisse die Einmischung, für andere die Nichteinmischung des Staates verlangen werden. Nichteinmischung gilt bereits für das Hausrecht, Briefgeheimnis, die Berufswahl, die Zeiteinteilung und soll gelten für den Kriegsdienst, die Einmischung besitzen wir seitens der Gerichte, des Polizeischutzes, gewisser Verkehrseinrichtungen und wir sollen besitzen die Sicherung der ökonomischen Existenz. Ich halte es daher für unrichtig, wenn Spencer behauptet, daß der Fortschritt zu einem höheren sozialen Typus sich durch »Aufgeben von Funktionen« auszeichne. Die Einführung der ökonomischen Garantie aller Staatsangehörigen z. B. wird ein enormer, vielleicht der größte soziale Fortschritt sein und er besteht doch in der Aufnahme einer neuen Funktion, nämlich der Sicherung der Lebenshaltung eben seitens des Staates. Nur ein Satter oder ein ökonomisch Unbesorgter, der sich um das Schicksal anderer, ökonomisch schlecht situierter Menschen nicht kümmert, kann darin einen Rückschritt sehen. Und auch Spencer,

ganz wie Treitschke und W. von Humboldt, sorgt sich am meisten um die — Bildung des Charakters, ob man zu essen hat oder sein Brot sorgenvoll gewinnen und verzehren muß, kümmert diese Staatsphilosophen nicht. »Das Ziel,« meint Spencer, »welches der Staatsmann stets vor Augen haben sollte, höher als irgend ein anderes, ist die Bildung des Charakters.«

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Nach Spinoza ist der Staatszweck geistige Freiheit, nach Chr. Wolf Vervollkommnung der Menschen, Kant sieht im Staat nur eine Rechtsinstitution, ebenso meinen Mill, W. von Humboldt, Josef Eötvös und Laboulaye, der Staat habe nicht die Aufgabe, den Einzelnen Güter zu verschaffen, sondern nur ihren Besitz zu sichern. Für Hegel ist der Staat nur die »höchste Form der objektiven Sittlichkeit«. Man muß darüber staunen, daß alle diese so hoch stehenden Männer so gar nicht an die einzelnen Individuen und die Sicherung ihrer physischen Existenz und stets nur an gewissermaßen polizeiliche und pädagogische Zwecke des Staates dachten, obgleich doch Not und Sorge zu ihrer ‹und zu allen Zeiten› vorhanden waren.

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Die Lösung des Problems, die richtige Grenze zwischen Individuum und Staat zu finden, ist im Prinzip die folgende: Prinzipiell genommen übergibt oder überläßt man ohne Einrede dem Staat — und analog irgend einer kleineren Korporation, also der Gemeinde oder Genossenschaft und dergleichen — alles dasjenige, von dem man voraussetzt, daß es auf anderem Wege gar nicht oder nicht so gut durchzuführen oder — wie z. B. ein gewisses großes Solidaritätsgefühl — nicht so gut zu erreichen wäre, und in jedem speziellen Falle muß die Bilanz gezogen werden zwischen dem Einsatz der Individuen — z. B. der Größe der Beschränkung oder Opfer — und den resultierenden Vorteilen oder Vorzügen.

Wenn aber hier gesagt wird, daß wir der Staatsinstitution nur jene Angelegenheiten übergeben sollen, die auf anderem Wege nicht ebenso gut erledigt werden könnten wie durch den Staat, so folgt doch daraus durchaus nicht, daß er durch diese Einschränkung auf ein sehr niedriges Niveau herabgesetzt und

den Charakter einer dürren und ärmlichen Institution erhalten würde. Es bleibe ja unbenommen, wenn die Bevölkerung es so will, ihrem Staat nebst so manchem anderen ‹wie z. B. Verteidigung nach außen, Rechtsgesetzgebung usw.› auch nationale, religiöse oder künstlerische Aufgaben zuzuweisen, falls man glaubt, ohne den Staat hiebei zu benützen, nicht so gut das angestrebte nationale, religiöse oder künstlerische Ziel erreichen zu können. Dieser Auffassung entsprechend wurde ja von mir — in Form einer allgemeinen Nährpflicht — vorgeschlagen, den wichtigsten Wohlfahrtszweck, nämlich die Sicherung der ökonomischen Lebenshaltung aller Staatsangehörigen, eben darum dem Staat zu übergeben, weil eine solche Sicherung auf keinem anderen Wege zu erreichen ist.

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Als Gegenstück zu dieser, wie ich glaube, natürlichen und präzisen Beantwortung dieser alten staatsrechtlichen Frage möchte ich eine andere aus neuester Zeit vorführen, aus der man ersehen kann, was für staatsphilosophische Umwege und Künsteleien bei manchen Schriftstellern beliebt sind. Ich denke hier z. B. an die Theorie, die L. Kidd in seinem Werke »Soziale Evolution« entwickelt.

Kidd sagt: »Die Tatsache von zentraler Bedeutung, die uns in unserem heutigen kulturellen Gemeinwesen begegnet, ist die, daß die Interessen des sozialen Organismus und die seiner jeweiligen Individuen sich jederzeit wie die ärgsten Feinde gegenüberstehen.« Schon diesen Satz kann man nicht zugeben, denn es gibt sehr viele Institutionen, in denen von einer solchen Feindschaft keine Rede sein kann, sondern beide Interessen parallel gehen, wie z. B. eine auch nur halbwegs gerechte Steuergesetzgebung, und andererseits alles das, was die besoldeten Staatsbeamten für den Schutz und die Rechtspflege der Staatsangehörigen leisten.

»Diesen absoluten Widerspruch,« fährt Kidd fort, »diese Tatsache, daß die Interessen des sozialen Organismus und die des Individuums einander ausschließen und einander feind bleiben«, habe die nationalistische Wissenschaft bisher ganz übersehen. Die menschliche Vernunft kann diesen Widerspruch nicht aufheben, denselben zu mildern war immer die Sache der Religion. Zu diesem Zweck nimmt die Religion immer ein übersinnliches

Element zu Hilfe, daher jede Religion eine überhalb der Vernunft liegende Normierung des sozialen Verhaltens für das Individuum gibt .... In der Gesamtheit der ethischen Gefühle, deren Ausdruck die Religion ist, liege die mächtigste Triebfeder jedes sozialen Fortschritts. Darin liege die Bedeutung des Christentums ... die treibende Kraft unserer westlichen Zivilisation liege in den altruistischen Gefühlen und diese Gefühle seien das »charakteristische und entscheidende Produkt des religiösen Systems, auf dem unsere Zivilisation ruht.«

Abgesehen davon, daß das Christentum schon nahezu 1900 Jahre besteht und bisher so wenig in der Erweckung altruistischer Gefühle geleistet hat, daß erst in neuerer Zeit, in der zugleich die religiösen Gefühle immer mehr abnahmen, durch politische Revolutionen oder durch Reformen als Konsequenzen der Schriften fast ausschließlich irreligiöser Schriftsteller altruistische Gefühle wenigstens einigermaßen in unseren Institutionen zum Ausdruck kommen, also abgesehen davon, daß die ganze historische Stelle bei Kidd nicht wahr ist, sieht man nicht ein, wie das Problem, das uns und Kidd hier beschäftigt, durch altruistische Gefühle ohne nähere vernünftige Untersuchung — mit oder ohne Religion — gelöst werden könnte. Und da die religiösen Gefühle jetzt immer mehr verschwinden, so wäre eine Versöhnung zwischen den Interessen des Individuums und des sozialen Organismus überhaupt nie möglich! Glücklicherweise hat aber, wie oben gezeigt wurde, die Lösung des Problems gar nichts mit der Religion zu tun.

In ähnlicher Weise wie Kidd spricht auch Chatterton-Hill in dem Werk »Individuum und Staat« davon, daß, um das soziale Band zu knüpfen, ein »Irrationales« nötig sei, früher sei das die Religion gewesen, jetzt sei es der Patriotismus.

In dieser meiner Schrift aber wird es wohl deutlich genug gemacht, daß von dem Begriff des Irrationalen, mit dem die Vorstellung des Unvernünftigen verknüpft ist, im staatsphilosophischen Denken ganz abgesehen werden kann.

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In Übereinstimmung mit unserer oben dargelegten Staatsbetrachtung entwerfen wir nun im Nachstehenden die Grundzüge einer Staatsverfassung.

Beim Aufbau der innerstaatlichen Institutionen leitet uns hauptsächlich der Gedanke der Unterscheidung zwischen fundamentalen und sekundären Bedürfnissen der Staatsbürger und sodann das Prinzip des gleichen, allgemeinen Stimmrechts.

Unter fundamentalen Bedürfnissen verstehe ich alle jene Forderungen und Wünsche materieller und ideeller Natur, die dem ganzen Volk oder einem überwiegenden Teil desselben als so dringend und wichtig erscheinen, daß die Entscheidung über die Annahme und Gestaltung der betreffenden Gesetzvorschläge den direkten Äußerungen eines Volkes — einem Referendum — und nicht seiner Repräsentanz, d. h. einem Parlament und noch weniger einer Person oder einigen Personen anheimgestellt werden soll. Eine strenge Abgrenzung zwischen fundamentalen und nichtfundamentalen Angelegenheiten der Gesetzgebung, das heißt eine Aufzählung derselben, soll und kann im vorhinein nicht gezogen werden, sondern es hängt eben von den gegebenen Verhältnissen ab, was in einem bestimmten Moment als fundamental angesehen wird oder nicht. Es steht aber nichts im Wege, für die normalen Zustände eine Liste jener Agenden aufzustellen, die dem Parlament zuzuweisen sind, wie das ja schon in der Schweizer Bundesverfassung der Fall ist, ohne daß jedoch die Praxis sich unter allen Umständen danach richten muß.

Als Beispiele für Gegenstände der Volksabstimmung, die wohl einmal eine Hauptrolle spielen werden, können die zwei großen Probleme: die ökonomische Sicherung aller Staatsangehörigen und die Freiwilligkeit des Kriegsdienstes gelten, und als solche, die bereits in vielen Staaten rechtliche Geltung haben, seien die sogenannten Grundrechte angeführt: Hausrecht, Briefgeheimnis, Freizügigkeit usw., die fast alle der englischen politischen Entwicklung zu verdanken sind. Diese Grundrechte, so wichtig sie sein mögen, können sich an Bedeutung dennoch mit den eben genannten zwei Zukunftsaufgaben der inneren Politik nicht entfernt vergleichen, jene könnte man daher ganz gut als »quasifundamentale« bezeichnen, aber keinesfalls dürfte man sie zu den bloß sekundären Bedürfnissen rechnen, wie zum Beispiel Steuerfragen, Verkehrsangelegenheiten, Kunstfragen oder dergleichen.

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Die Einteilung der Bedürfnisse in fundamentale und sekundäre gab ich zuerst im Jahre 1880 als staatsphilosophische Einleitung zu einer Abhandlung, mit der ich mich um einen von Isaak Pereira im Jänner 1880 in der »Liberté« ausgeschriebenen Preis »auf die besten Schriften zur Beseitigung des Pauperismus« bewarb. Im Jahre 1905 publizierte ich jene Einleitung wortgetreu zuerst in der Wiener Zeitschrift »Die Wage«, gleich darauf in der Broschüre »Fundament eines neuen Staatsrechts« ⟨Dresden, Verlag Reißner⟩ und kam auf ihren Grundgedanken beinahe in allen meinen späteren Werken zurück. Die Darstellung in dem vorliegenden Werk, und zwar in diesem Kapitel, unterscheidet sich von der im Jahre 1880 gegebenen nur dadurch, daß ich nicht nur die ökonomische Sicherung und die Freiwilligkeit des Kriegsdienstes, sondern auch die sogenannten politischen Grundrechte und überhaupt alle jene Forderungen zu den fundamentalen rechne, die der Bevölkerung von so großer Wichtigkeit erscheinen, daß über sie nicht in einer Volksvertretung, sondern vom ganzen Volk — den erwachsenen Männern und Frauen — entschieden, also jedes einzelne Individuum mitzureden berechtigt werden soll.

Diese Erweiterung wurde durch den hier gegebenen Verfassungsentwurf, in welchem das Prinzip des Referendums vertreten wird, veranlaßt und dürfte wohl an sich als berechtigt und zweckmäßig angesehen werden.

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Es leuchtet wohl von selbst ein, daß, wenn es sich um Einführung einer speziellen fundamentalen Institution oder eines solchen Gesetzvorschlages handelt, die Zahl der Abstimmenden so groß als möglich sein soll, sie muß also alle erwachsenen ⟨und zurechnungsfähigen⟩ Staatsangehörigen männlichen wie weiblichen Geschlechts umfassen. Bei sekundären Angelegenheiten ist das nicht nötig, es wäre das nur ein unverhältnismäßiger Aufwand an Wahlvorbereitungen und auch ohne rechten Sinn, schon wegen des Mangels an Verständnis für den Gegenstand bei der großen Masse, es mögen daher in solchen Fällen die Volksrepräsentanten beraten und entscheiden.

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Ich will diesem meinem Vorschlage, der die Abstimmungen qualifiziert, jenen Rousseaus in seinem »Gesellschaftsvertrag«

gegenüberstellen. Dort heißt es ‹im vierten Buch, zweites Kapitel›:

»Je wichtiger und ernster die Beschlüsse sind, eine desto größere Stimmenmehrheit verlangt die siegreich hervorgegangene Ansicht, und je größere Beschleunigung die zur Beratung gelangte Angelegenheit erheischt, desto mehr muß man bei Teilung der Stimmen die vorgeschriebene Unterscheidung beschränken, bei augenblicklich zu treffenden Entscheidungen muß schon die Mehrheit einer einzigen Stimme genügen.«

Ich glaube, daß der Vorschlag Rousseaus durchaus nicht der Aufgabe, zwischen mehr und weniger wichtigen Gesetzvorschlägen eine staatsrechtliche Unterscheidung zu treffen, so gut genügt wie der von mir gemachte. Schon das geringe Interesse und Verständnis für die allermeisten innerpolitischen Angelegenheiten, besonders mancher lokalen, die in die Volksversammlung kämen, beweisen, daß man sie überhaupt nicht mit deren Behandlung beschweren soll. Aber Rousseau wollte von einer Trennung zwischen Volksabstimmung und Parlamentsabstimmung überhaupt nichts wissen, er erklärte sich ausdrücklich gegen die Institution der Volksvertretung, weil »man sich in politischer Beziehung nicht vertreten lassen könne«. »Jedes Gesetz,« — heißt es bei ihm weiter — »welches nicht vom Volk in Person ratifiziert wurde, ist null und nichtig, es ist gar kein Gesetz.« Andererseits erlaube die Praxis eine direkte Volksberatung und -abstimmung nur für Städte oder kleine Republiken.

Dieses letztere Argument hatte seinerzeit vielen sehr eingeleuchtet, ist aber durch eine einfache Betrachtung zu widerlegen und ist bereits in der politischen Geschichte, z. B. Frankreichs und besonders der Schweiz ‹durch das Referendum›, tatsächlich widerlegt. Bei der heutigen Entwicklung der Presse, des Verkehrs und der politischen Erziehung der Staatsbürger kann nämlich die Volksberatung vor der Volksabstimmung sehr gut und, wenn nötig, relativ rasch vor sich gehen, Leitartikel, Broschüren, Bücher, Reden bearbeiten die Gesinnungen und erweitern die politischen Einsichten viel gründlicher, als das in den Versammlungen der antiken Staaten möglich war, die keine Buchdruckerkunst und keine Eisenbahnen und Telegraphen kannten.

Was aber die in unseren Tagen immer mehr gesteigerte Abneigung gegen den Parlamentarismus betrifft, die aus ganz anderen Gründen als bei Rousseau sich entwickelte, so mögen die folgenden Bemerkungen erwogen werden.

Vor allem ist die Tatsache, daß in so vielen Parlamenten mehr oder weniger Korruption, d. i. Bestechlichkeit durch Geld, Titel, Orden oder Stellungsförderung und auch Ehrgeiz statt Sachlichkeit, die Abstimmungen beeinflussen, zwar zuzugeben, sie beweist aber nichts gegen den Parlamentarismus, sondern nur, daß der menschliche Charakter so beschaffen ist, daß er in allen Verhältnissen und Institutionen sich genügend zurecht zu finden weiß, um Vorteile auf unrechtmäßige Weise zu erringen[1]. Schon in der römischen Republik gab es bei den Wahlen Bestechungen, die kaum je ihresgleichen hatten, obwohl schon damals eine Art geheimer Abstimmung sie hätte unmöglich machen sollen. Sowohl unter dem Absolutismus als auch unter ständischen Vertretungen gab und gibt es Korruption und wenn auch bei den letzteren weniger private, so doch die noch folgenreichere Klassenkorruption, den Korporationsegoismus, die systematische Korruption im großen. Wenn man mit den praktischen Ergebnissen der Institution der Volksvertretungen immer unzufriedener wird, so hat das seinen Hauptgrund darin, daß die zwei fundamentalen Bedürfnisse: ökonomische Sicherung aller und Freiwilligkeit des Kriegsdienstes, noch nicht befriedigt und auch nicht einmal einer Beratung unterzogen worden sind. Namentlich die wirtschaftliche Sicherung würde mit einem Schlage unzählige kleinere Fragen, Debatten und Abstimmungen überflüssig machen und alle die hunderte Unzufriedenheiten mit Parlamentsbeschlüssen, das heißt neuen Gesetzen und Verordnungen, die bei weitem nicht radikal genug oder geradezu als rein formalistische erscheinen, verstummen machen oder doch wesentlich abschwächen.

Überdies scheint ganz aus dem Gedächtnis verschwunden zu sein, welches elende Dasein, namentlich in ideeller Beziehung, die Völker zu führen hatten, als sie noch keine Vertretungen ‹mit Immunität der Abgeordneten› besaßen. Es wäre beinahe notwendig, in die Geschichts- und in die Lehrbücher über Bürger-

[1] Eingehend sind die Schäden des Parlamentarismus dargelegt in der Abhandlung »Die Gefahr des Parlamentarismus für das Recht« von Dr. Julius Ofner ‹im Archiv für öffentliches Recht, d. J. 1903, Nr. 107›.

kunde eigene Kapitel über die Zustände in nichtkonstitutionellen Regimen früherer und auch noch heutiger Zeit einzufügen, damit die ungerechtfertigte Mißachtung des Parlamentarismus schon in den Köpfen der Jugend ausgerottet werde.

Als positive Vorzüge der Volksrepräsentation sind aber anzuführen: die Verbreitung politischer Bildung und Einsicht durch die Debatten, und hier erscheint es sehr notwendig, darauf aufmerksam zu machen, daß man die Wichtigkeit der Beschlüsse gegenüber jener der Debatten und Reden sehr überschätzt. So manche Rede, so manches Schlagwort hat eine viel tiefere, wenn auch nicht momentane Nachwirkung in den Gesinnungen und daher auch für spätere Bestrebungen der Staatsbürger, die sich überhaupt für die Politik interessieren wollen, hinterlassen, als irgendwelche beschlossenen Gesetzvorschläge, man darf daher die praktische Bedeutung der Reden und Debatten nicht unterschätzen. Schon so manche sogenannte bloße Phrase oder theatralisch aussehende Szene in einem Volkshaus überdauert Jahrzehnte und ist mitunter einer der wirksamsten Teile seiner ganzen Tätigkeit. Man braucht hiebei nur an das allerdings größte Beispiel, an die ersten Monate der französischen Revolution, zu denken und ich hoffe, hier nicht nötig zu haben, auf Details näher einzugehen.

Ein weiterer großer Vorzug der Parlamentsinstitution ist die sonst fehlende Möglichkeit, unter dem Schutze der Immunität wichtigere oder geringere Beschwerden vorzubringen, wozu große Volksversammlungen ganz ungeeignet wären. Diese bloße Möglichkeit unterdrückt schon viele Ungerechtigkeiten und Gewalttätigkeiten und wenn man heute diesen Vorzug vergißt, so hat das seinen Grund darin, daß in der Tat eben durch ihn viel seltener Fälle von solchen Übertretungen, namentlich in entlegenen Teilen des Staates, zu verzeichnen sind, und auch darin seinen Grund, daß man sich überhaupt gegen das Gute leicht abstumpft.

Und diese Abstumpfung gegen den Segen der Volksrepräsentation überhaupt erklärt auch mit die jetzige Unzufriedenheit mit dieser Institution, sie langweilt bereits und man möchte etwas Neues oder wenigstens etwas anderes haben, und sei es auch vielleicht ein ancien régime.

Man sollte aber auch daran nicht vergessen, daß — wie Le Bon hervorhebt — die Parlamente noch das Beste darstellen, was die Völker zu ihrer Regierung und namentlich zur möglichsten

Befreiung vom Joche persönlicher Tyrannei bisher herausgefunden haben. Und nicht minder wahr ist, was Bentham als einen der Vorzüge demokratischer Regierungen bezeichnete, nämlich, daß sie von »schlechten Einflüssen« sehr viel freier wären als monarchische, er meint dabei: von solchen Einflüssen, welche die Regierung bestimmen, den Vorteil kleiner Bruchteile der Bevölkerung dem der Gesamtheit vorzuziehen. Allerdings meint Sir Henry Sumner Maine in seinem Werke über »Die volkstümliche Regierung«, dieses Los gebühre auch der Monarchie; aber bei aller Achtung vor den Ansichten dieses ausgezeichneten englischen Rechtsgelehrten und Politikers scheint es mir doch in Erinnerung an so vieles, was bei kontinentalen Monarchien vorkam, daß die demokratischen Regierungen — auch in dieser Beziehung — den Vorzug besitzen.

Nicht zu leugnen ist auch die Tatsache, daß durch das System des Parlamentarismus viele Kräfte erwachen, die sonst gebunden blieben, und die mitunter bedeutende materielle oder ideelle Fortschritte hervorrufen.

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Nun ist aber in jüngster Zeit, und zwar in Rußland, eine neue Institution aufgetaucht, das sogenannte Rätesystem, das bisher nur in den offiziellen Arbeiter-, Soldaten- und Bauernräten ausgebaut und teilweise auch in der Deutschen Republik und in Österreich eingeführt wurde.

Das höchste gesetzgebende, verfügende und kontrollausübende Organ ist die Exekutive der Zentralräte, welche Behörde genau wie ein Parlament in Wahlkreisen, aber ausschließlich von den industriellen Syndikaten gewählt wird, und wählen dürfen nur jene, die um ihren Lebensunterhalt körperlich oder geistig arbeiten. Der allrussische Sowjetkongreß aber bildet die höchste Instanz der Sowjetrepublik.

Nun behaupten die Führer dieser Bewegung, die den Parlamentarismus aus dem politischen Leben ganz ausschalten will, die Überlegenheit des Rätesystems über jenes des allgemeinen Stimmrechtes für eine Volksrepräsentanz in parlamentarischer Form, und sie begründen diese Überlegenheit folgendermaßen:

1. Weil bei ihnen keine Person Staatsbürgerrechte erlangt, die nicht ihr tägliches Brot durch eigene Arbeit verdient. Es heißt nämlich hierüber in der »Verfassung der russischen

sozialistischen föderativen Sowjetrepublik«: »Das Recht zu wählen haben alle diejenigen, die ihren Lebensunterhalt aus produktiver und gesellschaftlich nützlicher Arbeit bestreiten, ebenso Personen, die im Haushalt tätig sind, wodurch den ersteren das produktive Arbeiten ermöglicht wird, wie: Arbeiter und Angestellte aller Arten und Kategorien, die in der Industrie, im Handel, in der Landwirtschaft usw. beschäftigt sind, Bauern und ackerbautreibende Kosaken, insoferne sie sich keiner Lohnarbeiter zur Erzielung von Gewinn bedienen.«

Nun sind die Begriffe »produktiv«, »gesellschaftlich nützlich« sehr unbestimmt, und nicht einmal von körperlicher Arbeit läßt sich immer sagen, daß sie produktiv und nützlich sei — wie zum Beispiel von Munitionsarbeitern, Dirnen und Jockeys, man müßte also in jedem einzelnen Falle — bevor man das Bürgerrecht erteilt — eine Untersuchung darüber vornehmen. Ferner wird man, bei der bolschewistischen Geistesrichtung, höchstwahrscheinlich alle jene von der Wahlfähigkeit ausschließen, die überhaupt für die Annehmlichkeiten der Menschen arbeiten, und das träfe nicht nur eine große Zahl von Personen, sondern es ist auch nicht einzusehen, warum solche keine Bürgerrechte genießen sollen. Nicht nur die Künstler würden hiedurch ausgeschlossen, sondern auch die meisten Männer der Wissenschaft, falls man diesen nicht eine »nützliche« Anwendungsfähigkeit ihrer Studien nachweisen könnte.

Und noch mehr. Im § 65 der Verfassung heißt es: «Weder wählen noch gewählt werden dürfen, auch wenn sie zu einer der vorerwähnten Kategorien gehören: a) Personen, die behufs Erzielung von Gewinn Lohnarbeiter verwenden, und b) Personen, die von arbeitslosem Einkommen leben, wie: Zinsen von Kapital, Einnahmen von Unternehmen, Erträgen von Vermögen usw.«

Hienach könnte kein Rechtsanwalt, der auch nur einen Konzipienten beschäftigt, oder ein kleiner Handwerksmeister mit einem Gesellen oder ein Maler mit einem Farbenreiber als Gehilfen, kein Bürgerrecht erhalten. Und andererseits denkt man bei »Zinsen von Kapital« immer an einen reichen Rentier und Privatier, der in Hülle und Fülle lebt, nicht aber auch zum Beispiel an jene, die ihr Leben lang strenge gearbeitet und äußerst eingeschränkt gelebt haben, um in ihren alten Tagen von dem kleinen angesammelten Kapital sorglos leben zu können, warum

sollen diese, die doch Jahre lang vorher nützliche Arbeit geleistet haben, nicht wählen können? Und warum sollen Nutznießer von Unternehmen ausgeschlossen werden, die nicht selten unvergleichlich mehr produktive Arbeit leisten, als Hunderte oder Tausende von Lohnarbeitern? Zum Beispiel Emil Rathenau, der Begründer elektrischer Industrie in Deutschland, oder Ford, der die Automobilindustrie in Amerika begründete?

Dies alles gilt allerdings von der heutigen und nicht von einer sozialistischen Produktionsweise, allein die letztere ist in Rußland noch gar nicht organisiert worden. Alle oben erwähnten einschränkenden Bestimmungen haben ja nur den Zweck, alle zur Arbeit zu verpflichten, das führt heute aber zu vielen Ungerechtigkeiten und Absurditäten, und bis heute existiert überhaupt noch kein klares sozialistisches Programm, ausgenommen meines von der allgemeinen Nährpflicht, die nicht identisch ist mit der allgemeinen Arbeitspflicht, welche sich nicht nur wie jene auf die Herbeischaffung der notwendigen Lebenshaltung, sondern auf alles erstrecken soll. Überdies führt die allgemeine Nährpflicht viel sicherer und in würdigerer Form zur beschränkten Arbeitspflicht als durch jene bolschewikischen Maßregeln.

2. Der zweite Grund der Überlegenheit der Rätekongresse über den Parlamentarismus soll nach der Meinung der Sowjetleute der sein, daß nicht nur der am besten organisierte und politisch bewußte Teil der Gemeinschaft an der Gesetzgebung teilnimmt, sondern es werden auch alle ausgeschaltet, die im Dienste von Parasiten stehen. — Gewiß ist ja aber, daß nicht wenige, die heute und eventuell auch später zwar gar nicht arbeiten würden, vermöge ihrer Erziehung oder Intelligenz jedoch politisch viel bewußter sein mögen als viele Arbeiter, die gute Organisation ist nicht immer so maßgebend.

3. Ein dritter Grund der Überlegenheit soll der sein, daß man durch die Schaffung einer zentralen gesetzgebenden Körperschaft aus Delegierten der Arbeiterorganisationen die Bedürfnisse der Arbeiter kennen lernt, während beim Parlamentarismus die Vertreter aus Wahlkreisen, in denen alle möglichen Leute wohnen, nicht die Interessen aller ökonomischen Gruppen ihres Wahlkreises vertreten können. — Aber auch in den Parlamenten kann man die Bedürfnisse der Arbeiter durch ihre beruflichen Vertreter, innerhalb wie außerhalb des Parlaments, zur Kenntnis bringen,

und nicht nur die Bedürfnisse der Arbeiter, sondern auch jene der vielen anderen Berufe und Beschäftigungen, die mitunter wegen ihrer geringen Mitgliederzahl oder wegen ihrer Eigenart gar keine Organisation besitzen und die, soviel ich sehe, bei den Sowjets gar nicht zu Worte kommen.

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Mit diesen meinen Einwendungen soll jedoch über die Räteinstitution durchaus nicht abgesprochen werden. Einerseits ist sie noch zu neu und die Berichte über ihre Resultate sind zu widerspruchsvoll, um sie definitiv zu beurteilen, andererseits kann man ihr so manche Vorteile zusprechen, namentlich den, daß sie viel besser für Herbeiführung von — berechtigten oder unberechtigten — Revolutionen taugt als der Parlamentarismus. Sie erscheint mir daher im Grunde eine sozialistische Mobilmachung für eine Revolution in Form einer dauernden Institution zu sein, könnte aber auch neben dem Parlamentarismus stabilisiert werden, wenn man sie nur nicht als oberste Instanz für alles einsetzt.

Jedenfalls fehlen der Räteinstitution viele Vorzüge der parlamentarischen, namentlich jene, die ich unmittelbar vor dieser Betrachtung über die Räte angeführt habe. Es gilt ja nicht nur spezielle, fachliche Fragen zu beantworten, sondern auch solche Angelegenheiten zu behandeln, die vielen oder allen Gruppen oder Berufen gemeinsam sind. Wie will das Rätesystem Fragen der Kultur, der Ehegesetzgebung, des Gerichts-, des Schulwesens, der Volksbildung, rein politische Fragen, die der Aufhebung der Todesstrafe, der Trennung der Kirche vom Staate usw. entscheiden, ja nur beurteilen, da ihnen dazu die notwendigen Intelligenzen, Erfahrungen und Diskussionen fehlen? Ein ganzer Staat kann als solcher niemals als Summe bloß fachlicher Korporationen in die Erscheinung treten, dazu sind diese viel zu banausisch und meistens auch zu einseitig und engherzig.

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Es wurde oben als Basis der innerstaatlichen Institutionen die Unterscheidung zwischen fundamentalen und sekundären Bedürfnissen und sodann das Prinzip des allgemeinen und gleichen, direkten und geheimen Stimmrechtes hingestellt.

Was nun dieses Prinzip des allgemeinen Stimmrechtes betrifft, so irrten allerdings diejenigen, die von seiner Einführung erwarteten, daß nunmehr lauter weise Gesetze verfaßt und daß die schwierigsten politischen und sozialen Probleme mit Leichtigkeit gelöst würden. Aber die Vorteile dieser Institution sind dennoch ganz bedeutende. Denn es kommen die Wünsche der großen Massen deutlicher zum Vorschein als sonst, und wenn auch das bezweifelt würde, so steht doch die Hauptsache, die Grundbedeutung des allgemeinen und gleichen Stimmrechtes fest, nämlich: Die Tatsache der Anerkennung der Gleichheit aller in einer wichtigen politischen Funktion, nämlich bei den Wahlen in ein Parlament oder der Stimmabgabe bei einem Referendum. Nunmehr kann jeder sagen: Auch ich bin da, und durch den Stimmzettel erkennt der Staat, die ganze Gesellschaft und die Obrigkeit das an und damit die politische Existenz aller Staatsbürger, also so weit es an ihm liegt, ihre Persönlichkeit, ihre politische Menschenwürde.

Das ist nicht nur ein idealer Fortschritt, sondern auch für die künftige praktische Sozialgesetzgebung sehr weittragend und wieder eine Etappe mehr auf dem Wege zu dem größten Ziele aller politischen Bestrebungen: Zur Anerkennung jeder menschlichen Existenz als einzigartige und unersetzbare Individualität und endlich zur positiven und direkten Fürsorge für ihre Erhaltung.

Kann man doch behaupten, daß aller Fortschritt in der politischen Bewegung der Weltgeschichte nur darin besteht und bestanden hat, daß man eben immer mehr und mehr das einzelne Individuum überhaupt beachtet, in wichtigen Beziehungen jedem anderen gleich achtet und seine Menschenwürde wie auch die Bedingungen seiner physischen Existenz immer mehr in der Gesetzgebung berücksichtigt. Dieses Prinzip kann man wohl als den roten Faden ansehen, der sich durch die ganze Geschichte — mitunter sehr dünn oder auch nahezu abgerissen — hindurchzieht, und es gibt je nach dem Grade und der Art seiner Verwirklichung den Maßstab an, inwiefern eine Geschichtsperiode der einzelnen Staaten ernst genommen und geachtet werden kann. Alles andere, wovon uns die Geschichte berichtet, ist dagegen als sekundär oder als ganz nichtig anzusehen.

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Die soeben angegebenen Vorteile des allgemeinen und gleichen Stimmrechtes stehen so fest, daß sie nicht einmal durch die unbedingt vorhandene Korruption bei den Wahlvorgängen verloren gehen. Diese Wahlkorruption ist so verbreitet, so allgemein und oft so kraß, daß sie beinahe als selbstverständlich angesehen und sogar teils mit Entrüstung, oft aber mit Humor zur Kenntnis genommen wird. Die Schuld tragen vor allem die wirtschaftlichen und Stellungs-Abhängigkeiten, sodann das Bedürfnis der meisten Menschen nach mehr, nämlich nach mehr Geld oder Stellung, endlich der Umstand, daß die Wähler jener Korruption so leicht zugänglich sind, weil ihnen selten das Thema des Wahlvorganges genügend verständlich oder den Bestechungsvorteilen gegenüber nützlich und wichtig genug erscheint.

Die wirtschaftlichen Abhängigkeiten oder trostlosen Situationen würden durch die Einführung der allgemeinen Nährpflicht ‹nach meinem Programm› in der Hauptsache beseitigt werden; das Bedürfnis »nach mehr« dürfte aber kaum jemals verschwinden, die Wahlmüdigkeit, d. i. die Wahlenthaltung, als solche — so sage ich im Gegensatz zu Rousseau — wäre noch nichts Schlimmes. Da aber die Vorzüge der Institution des allgemeinen und gleichen Stimmrechtes so groß sind, so müssen wir sie trotz allem aufrecht halten, selbst wenn wir sogar jede Hoffnung aufgeben müßten, daß die angeführten Korruptionen jemals verschwinden werden.

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Zum Thema der Wahlmüdigkeit noch einige Bemerkungen:

In der Gesetzvorlage der holländischen Regierung vom Jahre 1916 über die auch auf Frauen ausgedehnte Erweiterung des Wahlrechtes wird als Begründung für sie unter anderem der Satz ausgesprochen:

»Was heute vom Wähler verlangt wird, ist nicht die Fähigkeit, über so und so viele Fragen der Staatsverwaltung zu urteilen, sondern nur ein solches Interesse an den öffentlichen Angelegenheiten, daß er sich darüber Rechenschaft gibt, mit den Prinzipien welcher politischen Partei er sich am besten vereinigen kann.«

Diesem in gewissem Maße jedenfalls richtigen, wenn auch die Sache nicht erschöpfenden Gedanken sei andererseits zur näheren Beleuchtung der Frage des allgemeinen Stimmrechtes

die Bemerkung von Hans Delbrück ‹in seinem Essay »Regierung und Volkswille«› angefügt, daß »die Erfahrung der Jahrtausende lehrt, daß die ungeheure Mehrzahl der Menschen am Staate nicht so viel Anteil nimmt, um ganz aus eigenem Antriebe sich eine Meinung über Personen- und Gesetzvorlagen zu bilden und demgemäß abzustimmen.« In dem Werke »Human nature in politics« von Graham Wallas, sagt ferner Delbrück, werde die Ansicht vertreten, daß »selbst in einem Lande so alter politischer Erziehung wie England keine Grafschaft existiere, in der die Zahl der tatsächlich in der Politik tätigen Personen auch nur zehn Prozent der Wählerschaft erreiche.« Darüber darf man sich aber nicht verwundern. Wie kann sich denn die breite Masse für die so große Anzahl sekundärer Staatsangelegenheiten interessieren und für oder gegen Partei ergreifen? Die von Wallas mitgeteilte Tatsache ist aber ganz und gar nicht geeignet, den Reaktionären als Vorwand zu dienen, um ein mehr oder weniger allgemeines Stimmrecht und Wahlrecht als überflüssig hinzustellen. Das englische Volk würde dagegen gewiß höchst energisch protestieren.

Das Referendum, d. i. die unmittelbare Volksabstimmung, wurde in der neueren Zeit zuerst in den Jahren 1791 und 1793 angewendet, um die französischen Verfassungen dieser Jahre gutzuheißen. Und heute ist es in der Schweiz sowohl im Bunde als in Kantonen und Gemeinden eingebürgert, aber auch — wie ich ebenfalls Delbrücks Essay entnehme — in einigen Staaten Amerikas und in Australien.

Sehr beachtenswert ist es aber, »wie oft das Referendum einen Zwiespalt zwischen den Ansichten der Regierenden, dem gewählten Vertretungskörper und den Ansichten der Wahlberechtigten zutage bringt. Von 41 Vorschlägen ‹von 1874 bis 1898 in der Schweiz› ist kein einziger von der Mehrheit der Wähler angenommen worden.« Man wird wohl daraus nicht den Schluß ziehen, der Satz Hegels: »Das Volk ist derjenige Teil des Staates, der nicht weiß, was er will,« sei richtig, sondern annehmen müssen, daß diejenigen, die die Vorschläge für das Referendum machten, eine sehr geringe Kenntnis des Volksgeistes und der Volksbedürfnisse besitzen oder besaßen.

Jener Ausspruch Hegels dürfte so manchen wegen seiner anscheinend zynischen Form frappieren, er ist aber aus gewissen

sachlichen Erwägungen herausgeholt, wenn auch einiger Einschränkungen bedürftig. Ein unvergleichlich wärmerer Freund des Volkes als Hegel hat beinahe dasselbe gesagt; denn im Gesellschaftsvertrag ⟨2. Buch, Kapital 6⟩ fragt Rousseau, wie eine »blinde Menge, die oft nicht weiß, was sie will, weil sie selten weiß, was für sie gut wäre«, aus sich selbst eine so große und schwierige Unternehmung ausführen könnte, wie es ein System der Gesetzgebung ist.

Und das ist ja auch richtig, ein neues System der Gesetzgebung aufzustellen, ist nicht nur für eine »Menge«, sondern auch für einen Staatsmann eine »große und schwierige Unternehmung«.

Hier muß jedoch auch die Meinung eines Staatsphilosophen angeführt werden, der Gelegenheit hatte, die Resultate von Volksabstimmungen in der vielleicht ausgelassensten Demokratie der Welt direkt oder indirekt kennen zu lernen. In den Volksabstimmungen findet nämlich Aristoteles eine Summierung der geistigen Kräfte und Einsichten, so daß, wenn auch der einzelne Mann aus dem Volke hinter dem Gebildeten an Urteilskraft zurückstehe, das Gesamturteil des Volkes doch in der Regel das Richtige treffe und dem Urteil des einzelnen Gebildeten an Treffsicherheit überlegen sei[1].

Wenn wir aber von den in der Schweiz durch Referendum abgelehnten Vorschlägen minderer Tragweite noch sprechen wollen, so ist zwar ein gewisser konservativer, ja reaktionärer Zug in der Schweizer Bevölkerung nicht abzuleugnen, andererseits aber darf eine solche Tatsache nicht dazu verleiten, zu glauben, es wäre doch besser, etwa einen aufgeklärten Absolutismus anstatt einer demokratischen Verfassung einzuführen oder ihn wenigstens zu wünschen. Denn erstens hat niemand das Recht, seine noch so zweckmäßigen Reformgedanken dem Volke aufzudrängen und nur das Volk selbst hat das Recht, zu irren und eventuell sich selbst zu schädigen, und andererseits sind unter den verworfenen Vorschlägen, soweit mir bekannt, auch solche, die nicht unbedingt notwendig sind. Auch ist es sehr wohl möglich, daß einige Vorschläge der Bevölkerung nicht genug erläutert wurden, um sie für sie zu gewinnen.

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[1] Einem Werke über Polybius entnommen.

Daß Volksabstimmungen eine für Kulturfortschritte und für freiheitliche Prinzipien, ja sogar für den Staat selbst oft sehr schädliche Institution sein können, beweist uns ja die Geschichte zur Genüge, es sei nur an die Geschichte Roms und Athens und auch daran erinnert, daß zwei Plebiszite in Frankreich die beiden napoleonischen Kaiserreiche herbeiführten. Und die Ultramontanen, die das sehr gut wissen, sind es auch, denen die Erfindung des Referendum-Paragraphen in der Luzerner Kantonsverfassung zu danken ist. Sie beabsichtigten dabei, die Stimmen der freisinnigen Katholiken durch jene der ganzen Bevölkerung zu überwältigen. ⟨Maine in seinem oben zitierten Werk.⟩ Es ist aber Sache der Kämpfer für demokratische Institutionen, durch Erziehungsmaßregeln in Schule und Haus und politische Agitation die Gesinnungen der Menschen in ihrem Sinne heranzubilden. Wenn das nicht gelingt, so muß man eben die Tatsachen hinnehmen, wie sie sind, aber keinesfalls die eigenen Prinzipien dadurch negieren, daß man die Völker zu ihrem vermeintlichen Glück zwingen wollte.

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Gegen das Prinzip des allgemeinen und gleichen Stimmrechtes kann man aber eine Einwendung, und zwar bei den meisten Staatsverfassungen mit vollem Recht, erheben, gerade dann, wenn das Gegenteil von Indolenz oder Wahlmüdigkeit der Volksmassen vorhanden ist, nämlich: wenn sie wirklich wählen.

Man kann nämlich sagen, es sei doch ohne Sinn und ohne Berechtigung, anzuordnen, daß ein Straßenkehrer, ein Kutscher und alle die anderen gänzlich ungebildeten Menschen, die für die wenigsten öffentlichen Angelegenheiten Interesse und Verständnis haben, mit demselben Gewicht in solchen Angelegenheiten — durch einfache Stimmabgabe — sollen entscheiden können, wie der tüchtigste Fachmann in Politik und Staatsrecht und öffentlichen Angelegenheiten überhaupt. Und was man auch von »Sublimation« der Wahlergebnisse sagen mag, wie zum Beispiel, daß, falls Parlamente zu entscheiden haben, die vom Volke gewählten Volksrepräsentanten doch meistens Personen von sachlichem Verständnis sein werden, so wird das gewiß doch niemanden befriedigen. Denn der Einfluß der Stimmberechtigten auf die

Auswahl der Volksvertreter ist nach allen Erfahrungen unbestreitbar und muß es ja wohl auch sein, denn wenn das nicht der Fall wäre, wozu führt man dann ein allgemeines und gleiches Stimmrecht ein?

Diese Einwendung verliert an Gewicht, wenn das hier vorgeschlagene System angewendet wird, die für fundamental angesehenen Angelegenheiten dem Referendum der Volksabstimmung zu unterwerfen und minder wichtige der gewählten Volksvertretung zuzuweisen. Denn dann besitzt allerdings jeder oder fast jeder aus dem Volke das notwendige Verständnis für den dem Referendum vorzulegenden Gesetzvorschlag, der ja stets als von besonderer Wichtigkeit vorausgesetzt wird und, was das wichtigste ist, jeder entscheidet mit. Die vom Volke gewählten Repräsentanten mögen nun entscheiden wie immer, ihre Beschlüsse betreffen doch nur immer unwesentlichere Dinge — die aber meistens detaillierte fachliche Kenntnis verlangen — sie greifen aber nicht so intensiv ins Leben des Volkes ein und man hat daher keinen Grund, über die Unvollkommenheiten dieses oder jenes Abstimmungsmodus ernstlich zu klagen. In den wichtigsten Angelegenheiten geht die Abstimmung ja doch den ganz richtigen Weg, nämlich den, daß jeder Staatsangehörige mitentscheidet. Alle die so subtilen Untersuchungen über die Abstimmungsformen, über absolute oder relative Majorität, über Proportionalwahlen, über Listenskrutinium usw. mögen zwar nach Belieben weitergeführt werden, man möge wie immer entscheiden, großes Unheil kann keinesfalls entstehen.

Wie schwer oder eigentlich unmöglich es ist, überhaupt einwandfreie Abstimmungs- und Wahlformen zu erfinden, sieht man am besten daraus, daß, während an vielen Orten die Proportionalwahlen sehnlichst als etwas Vollkommenes herbeigewünscht werden, in Belgien, wo bereits Proportionalwahlen eingeführt sind, die Minoritätsparteien sich lebhaft darüber beklagen, daß sie von der Majorität benachteiligt werden.

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Nun fragt man: Wie, das heißt, von wem wird denn bestimmt, was als fundamentale Angelegenheit zu gelten hat?

Vorbereitet wird die Antwort auf diese Frage im Schoße der Gesellschaft selbst durch eine, wie man es nennen könnte, irreguläre Initiative, das heißt durch Reden, Schriften, Zeitungsartikel, Bewegungen, sogar Revolten, was so lange dauert, bis sich eine gewisse Ansicht so herauskristallisiert, daß das Parlament von selbst diese Ansicht als Gesetzvorschlag vor das Volk bringt, um ein Referendum zu veranlassen. Oder dadurch, daß auf dem Wege der »Initiative«, also einer regulären Initiative, auf Wunsch einer gewissen Mindestzahl von Staatsbürgern die Regierung ein Referendum veranlaßt. Volksabstimmungen können zum Zwecke haben, neue Gesetze einzuführen, alte Einrichtungen abzuschaffen, Parlamentsbeschlüsse abzulehnen oder zu korrigieren. Das Referendum funktioniert also als Antragsteller oder als Veto- oder als Korrekturinstanz.

Da man im vorhinein in einer Verfassungsurkunde nicht feststellen kann, welche Angelegenheiten im Laufe der Zeit zu der Kategorie der fundamentalen oder der der sekundären vom Volke oder vom Parlament gerechnet werden, so kann es öfter geschehen, daß Fragen, die im Parlament als sekundäre behandelt wurden, entweder mitten in der Beratung oder nach ihrer Beendigung und Beschlußfassung vom Volke aufgegriffen und, wenn die genügende Anzahl der Unterschriften einer Initiative zustande kommt, als fundamentale einem Referendum unterworfen werden. Besonders hierin kann sich der hohe Grad von Freiheit der Staatsbürger und der Fähigkeit einer Verfassung, sich an die politischen Bedürfnisse oder Wünsche anzupassen, ganz besonders erweisen.

Um einigermaßen ein System und eine gewisse Ordnung in das Regierungsregime hineinzubringen, kann man wohl eine Liste jener Gegenstände aufstellen, die in den Geschäftskreis des Parlaments ⟨also der Volksrepräsentanten⟩ und nicht der Volksabstimmung fallen, wie das ja in den Verfassungen der Vereinigten Staaten Nordamerikas und der Schweiz geschah. Durch die Institution der Initiative — einer der bedeutendsten Erfindungen in dem Gebiete des Staatsrechtes — wird aber verhütet, daß dem ganzen Volke durch eine solche Liste vorkommendenfalls sein Einfluß verkürzt wird, falls es einen solchen verlangt.

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Hier sei zur weiteren Aufklärung auch folgendes historische Datum angeführt:

»Während der ersten englischen Revolution wurde ⟨im Jahre 1647⟩ von dem Armeerate Cromwells unter Führung

von John Lilburne und Ireton, den Häuptern der Levellers, eine Verfassung Englands, der Volksvertrag, das agreement of the people, ausgearbeitet, das später in veränderter Gestalt dem Parlamente vorgelegt wurde und von diesem dem gesamten englischen Volke zur Unterschrift vorgelegt werden sollte. In diesem Grundvertrag ist genau unterschieden zwischen den fundamentalen und den nichtfundamentalen Sätzen. Jene bilden das unveräußerliche Recht der Nation selbst, welches dem Parlament, das nur mit beschränkter Gewalt ausgerüstet ist, unantastbar gegenübersteht. Die Unterscheidung zwischen parlamentarischen und Volksrechten, die den amerikanischen Staatsverfassungen eigentümlich ist, tritt hier zum erstenmal hervor.« ‹Siehe »Das Recht des modernen Staates« von Georg Jellinek, S. 466.› Die hier eben angeführte Unterscheidung zwischen fundamentalen und nichtfundamentalen Sätzen ist von der in diesem Werke vorgeschlagenen wesentlich verschieden, denn in dem englischen Grundvertrag bezieht sie sich auf das Verhältnis der Rechte zwischen Nation und Parlament, und diese beiden Kategorien von Rechten sind im vorhinein, wie ich glaube annehmen zu müssen, fixiert, bei mir jedoch sind sie — wie bemerkt wurde — nicht fixiert und es handelt sich hier viel weniger um das Verhältnis zwischen Volk und Parlament als um jenes der verschiedenen Gesetzgebungsfragen in ihrer Wichtigkeit und ihrem Allgemeininteresse untereinander.

Ferner sei erwähnt, daß die mächtigsten Kantone der Schweiz: Bern, Zürich und Genf, die noch heute vorhandene Kombination der repräsentativen und der unmittelbaren Demokratie schon im XV. Jahrhundert kannten.

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Diese ganze Auseinandersetzung hilft uns auch dazu, die These, die Taine ‹im Vorwort zum »Vorrevolutionären Frankreich«› aufstellt, näher zu beleuchten.

»Ein über die Form seiner Verfassung befragtes Volk,« heißt es dort, »kann im Notfalle sagen, welche Form ihm gefällt, aber nicht, welcher Form es bedarf, das muß erst die Erfahrung lehren. Die Zeit muß erst dartun, ob das politische Haus, das man sich gebaut, bequem und stark, ob es sturmfest und den Eigenschaften, Sitten, Beschäftigungen und Charakteren der Bewohner angemessen ist.«

Das hört sich gut an, besonders wenn man sich das befragte Volk in großer momentaner Aufregung vorstellt und überdies — mit Recht — daran denkt, was für eine äußerst schwierige Aufgabe es überhaupt sei, eine neue Verfassung zu entwerfen. Aber nur in seltenen Fällen handelt es sich bei Volksabstimmungen um die Form der Verfassung, sondern um einzelne, allerdings wichtige Gesetzvorschläge. Man darf sich daher durch den allgemeinen Satz von Taine durchaus nicht abschrecken lassen, Volksabstimmungen einzuführen. Andererseits: wer ist so verläßlich an Einsichten und Unparteilichkeit, daß man ihm unbedingt die Entscheidung über eine neue Verfassungsform anvertrauen kann? Ich meine: Wie viele unter den Staatsmännern gab es, mit deren Reformen die anderen Staatmänner, die politischen Schriftsteller und das Volk selbst zufrieden gewesen wären? Wer ist nicht von Mit- oder Nachwelt getadelt worden.

Es bleibt also dabei, daß in allen fundamentalen Angelegenheiten alle Staatsbürger abstimmen und dadurch entscheiden, wie ihnen ein Vorschlag »gefällt«, er wird ja ohnedies vielfach vorher diskutiert, und überdies hat, wie schon gesagt, nur das ganze Volk das Recht, in ihm wichtig erscheinenden Angelegenheiten — eventuell — zu irren. Wenn bei der Volksabstimmung zwischen den Staatsbürgern keine Übereinstimmung herrscht, was ja im vorhinein wahrscheinlich ist, so bilden solche Unstimmigkeiten den Keim zu jenen weiteren gesellschaftlichen Bewegungen, in denen eben das politische Leben besteht.

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Sprechen wir auch noch von dem sogenannten »Recht der Minoritäten«. Das Problem des Schutzes der Minoritäten bezieht sich auf »das Recht derselben bei Entscheidungen in gesetzgebenden Kollegien und bei Volksabstimmungen« ‹Jellinek, »Das Recht der Minoritäten«›. Dann heißt es weiter:

»In allen Lehren ‹über Minoritätenschutz› ruht als Kern der Gedanke, daß Anerkennung einer staats- und gesellschaftsfreien Sphäre des Individuums, innerhalb deren es keinem Mehrheitswillen sich zu unterwerfen hat, ein soziales Interesse ersten Ranges ist.«

Nach der hier vertretenen Grundanschauung genügt es jedoch nicht, eine staats- und gesellschaftsfreie Sphäre für das

Individuum zu schaffen, sondern in mancher Beziehung ist es mitunter notwendig, gerade umgekehrt, dasselbe in die Staatssphäre einzubeziehen, der es bisher nicht angehörte. Denn wenn zum Beispiel jedes Individuum vom Staate in ökonomischer Beziehung gesichert werden soll, so ist das nur durch eine gesellschaftliche Zwangsorganisation möglich, die wir bis jetzt noch nicht besitzen. Und umgekehrt in der Frage des Kriegsdienstes: Die ‹von mir befürwortete› Freiwilligkeit setzt in der Tat die Unabhängigkeit vom Zwang durch den Staat voraus.

Die gewohnte einseitige Betonung der »Anerkennung einer staats- und gesellschaftsfreien Sphäre des Individuums« rührt davon her, daß man bisher immer den Staat als den Zwingherrn des Individuums betrachtete und in gewissen Beziehungen mit Recht das Heil in der Lockerung dieses Verhältnisses sah. Aber, wenn sich der Blick fest auf das Hauptziel aller unserer Bestrebungen, nämlich auf die Sicherung aller Forderungen des Individuums richtet, so muß man, je nach deren Realisierungsmöglichkeit, bald das staatsfreie, bald das staatsgebundene Verhältnis desselben zu Hilfe rufen.

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Hieraus ergibt sich, daß eine scharfe Trennung zwischen Individualismus und Sozialismus, auf welchen beiden Prinzipien die Soziologen und Staatsrechtler ein so großes Studium verwenden und die sie, als sich ausschließend, so schroff einander gegenüberstellen, in der Praxis nicht aufrecht zu erhalten ist. Denn jedes Individuum lebt oder will leben in Gebieten des materiellen oder geistigen Daseins, in denen es frei, unabhängig von jedem Zwang durch die Gesamtheit, existieren kann, und andererseits und gleichzeitig auch in solchen Gebieten, in denen es der Gesamtheit und ihren Anforderungen untergeordnet sein muß und mitunter auch sein will.

So z. B. ist heute beinahe in allen Staaten das religiöse und wissenschaftliche sowie das künstlerische Bekenntnis gänzlich frei von irgend einem sozialen Zwang, in der Wehrfrage und Steuerfrage jedoch herrscht zufolge seiner Verfassung der Staat, respektive seine Regierung unbedingt. Man sieht auch, daß uns die Ansicht Platos in seiner »Republik«, daß in einem gerecht geordneten Staat das Individualitätsinteresse mit dem Sozialinteresse koinzidiert, nicht annehmbar sein kann. Denn je nachdem sind beide Interessen einander indifferent oder übereinstimmend oder entgegengesetzt.

Ganz ungerechtfertigt ist es daher, aus Individualismus und Sozialismus zwei feindliche Lager zu bilden, und gar überspannt ist es, in diesen beiden Ideen zwei separate Lebensanschauungen sehen zu wollen und sich hiebei in detaillierte und weitläufige Untersuchungen zu ergehen.

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Für eine wenigstens halbwegs zivilisierte Bevölkerung dürfte, auf Grund alles bisher Gesagten, daher folgender Aufbau ihrer Verfassung anzuempfehlen sein: Ein Parlament ‹Volkshaus›, das aus Wahlen nach allgemeinem, gleichem, direktem und geheimem Stimmrecht hervorgeht, und zwar sollen die Gewählten nicht Vertreter von Wahlkreisen, sondern der ganzen Bevölkerung sein, womit die sogenannte Wahlgeometrie gänzlich vermieden wird, indem die Stimmenzählung sich auf den ganzen Staat erstreckt, für alle wichtig erscheinenden Angelegenheiten dient die direkte Volksabstimmung in Form eines Referendums, wobei entweder das Parlament oder die Volksinitiative die Vorlage wünscht. Neben dem Parlament eine Ratskammer, d. i. eine Art Senat, der keine beschließende Kraft hat und nur dazu dient, gewisse schwierigere fachliche Fragen durchzuberaten, zu welchem Zweck er auf Einberufung durch das Volkshaus sich versammelt und dann den Gang seiner Beratungen in Form von Sitzungsberichten dem Parlament zur beliebigen Berücksichtigung übermittelt. Der Zweck dieser Institution ist der, für gewisse fachliche Fragen eine genügende Anzahl von erfahrenen Sachverständigen stets zur Hand zu haben, während ein vom Volk gewähltes Parlament eine solche Garantie nie bieten kann. Ein Beschluß oder ein Resumé darf in der Ratskammer niemals gefaßt werden. Zu ihren Mitgliedern werden vor allem alle ehemaligen höchsten Beamten gewählt: Minister, Oberrichter, oberste Verwaltungsbeamte und Fachpersonen aus den verschiedensten Gebieten, die selbständig arbeiteten, also z. B. unter den Industriellen nur jene Fabriksbesitzer oder unter den Landwirten nur jene Gutsbesitzer, die selbst technische Leistungen aufzuweisen haben, überhaupt die hervorragendsten Spezialisten, sodann tüchtige Vertreter der Kunst und der Wissenschaft. Die Dauer eines Mandats soll eine möglichst lange, z. B. zehn Jahre, und ihre Zahl soll eine große

sein. Gewählt werden die Mitglieder der Ratskammer vom Parlament.

Die oberste vollziehende und leitende Behörde wird von dem Parlament gewählt und besteht aus dem Präsidenten und den Ministern; die Wahl des Präsidenten geschieht durch die sämtlichen Mitglieder der Exekutive, und zwar stets nur auf ein Jahr; zwischen einer Wahl und Wiederwahl muß immer eine Anzahl von ⟨z. B. vier⟩ Jahren liegen. Was die Behandlung der auswärtigen Angelegenheiten sowie die Entscheidungen über Krieg und Frieden betrifft, so verweise ich auf die in den früheren Kapiteln gemachten Vorschläge.

Nicht genug aber kann auf die Nützlichkeit der Institution der Initiative hingewiesen werden und nicht schnell genug können die Völker sie in ihre Verfassungen einführen. Ohne Initiative ist das Volk fast immer stumm, denn es kann nur reden, wenn man es zum Sprechen auffordert. Sobald in der Bevölkerung dringende Wünsche aufsteigen, so sollten aber Parlament und Regierung ⟨d. h. die Exekutive⟩ sie zu hören bekommen. Zeitungsartikel genügen hier nicht, sind auch nicht verläßlich genug. Als einen besonders wichtigen Fall nenne ich jenen, wenn ein Krieg geführt wird und das Volk ihn beendet sehen will; hier ist die Initiative wohl das einzige Mittel, das die Kriegsmüdigkeit der Staatsbürger in richtiger und kräftigster Weise zum Ausdruck bringt und, da eine allgemeine Volksabstimmung die Folge ist — wenn es überhaupt nach der vorhandenen Lage möglich ist — dem Kriegführen ein Ende macht. Während eines Krieges können auch die Männer im Felde sich an der Initiative beteiligen.

In jenen Staaten, die einen Staaten- oder Kantonsbund oder einen Bundesstaat bilden, käme zu dem Bisherigen noch ein »Staatenhaus« hinzu.

Wie man sieht, besitzt bereits die Schweiz die hier empfohlene Verfassung zum größten Teil mit Ausnahme der Ratskammer. Leider hat sie aber bisher nur einen sehr schwächlichen Gebrauch davon gemacht. Die Bevölkerung hat noch nicht einmal daran gedacht, eine Initiative behufs einer unbedingten ökonomischen Sicherung aller Staatsangehörigen und der Freiwilligkeit ihres Milizdienstes zu versuchen; das Wichtigste und Nützlichste fehlt also noch.

XIV.

Patriotismus.

Es ist nicht leicht, präzise zu bestimmen, was »Patriotismus« ist, und wenn man näher zusieht, so findet man, daß es nicht wenige Arten von sogenanntem Patriotismus gibt, die überdies nicht viel miteinander gemein haben. Am häufigsten wird Patriotismus, der doch schon der Wortbedeutung nach sich nur auf ein Land, nämlich das »Vaterland« bezieht, mit Nationalitätsempfindung verwechselt, und die Folge ist, daß mannigfache, in der Praxis sehr einflußreiche Verwirrungen in solchen Staaten zutage treten, in denen Volksteile verschiedener Nationalität vereinigt sind. Wenn ein Krieg ausbricht, so macht sich dieser Unterschied zwischen Vaterland und Nationalität mitunter in furchtbarer Weise geltend; und wenn es auch nicht immer zu solchen extremen Konsequenzen kommt, so muß man doch auf unangenehme Folgen der Zweideutigkeit der ganzen Situation immer gefaßt sein.

Das Wesen des Unterschiedes zwischen Staat und Nationalität, insoweit er dem praktischen Verhalten der Menschen zugrunde liegt, hat kurz und sehr gut W. Jerusalem in seinem Werke: »Der Krieg im Lichte der Gesellschaftslehre« mit den Worten präzisiert: »Der Staat ist mehr über mir, die Nationaliät mehr in mir.« Aus dieser Distinktion kann man beinahe alles erklären, was uns die Erfahrung im politischen und kulturellen Leben lehrt.

Ebenso unsicher wie irgend eine Definition des Patriotismus ist selbstverständlich dann auch die Konstatierung, ob ein als patriotisch geltendes Individuum wirklich Patriot sei. Als echt patriotisch könnte es z. B. gelten, wenn jemand, der weder einer Religion noch einer Nationalität fanatisch anhängt, in der

Schlacht sehr schmerzlich verwundet wird und sich nach seiner Heilung von neuem zum Kriegsdienst meldet oder sich früher anmeldet, als er dazu verpflichtet wäre. Aber auch dieses Kriterium kann oft irreführen, denn, so merkwürdig es scheint, nicht selten treibt die bloße Rauflust zu solcher Opferbereitschaft. Ich selbst weiß von einem Offizier, der eben von seiner Wunde geheilt war und noch vier Wochen Urlaub hatte, aber es nicht erwarten konnte, an die Front zu kommen; vergebens wollte seine Frau ihn zurückhalten, er rief immer im höchsten Affekt aus: »Ich will raufen, ich muß wieder raufen!« und er ging ihr wirklich davon.

Wie ja auch die richtige Beurteilung der soldatischen Tapferkeit keine so einfache Sache ist. Was man schon daraus ersehen kann, daß — je nach der Beschaffenheit eines Staates — oft sehr viele Rekruten, sei es schon bei Kriegsbeginn, sei es nach Abflauen der anfänglichen Begeisterung, höchst ungern in das Feld ziehen, also wie Feiglinge aussehen, aber in der Schlacht selbst als Kämpfer nichts zu wünschen übrig lassen. Kann man jenen Major einen Patrioten nennen oder nicht, der ein ganzes Jahr lang mit höchstem Wagemut seine Pflicht erfüllte und dann, als ihm eine Kugel durch die Handfläche fuhr, im selben Moment sich an seine Umgebung jubelnd mit dem Ausruf wandte: »Kinder, dieser Schuß ist Tausende wert!?« Überdies hat sich in dem jetzigen Weltkrieg gezeigt, daß die Soldaten aller Nationen tapfer gekämpft haben und es waren doch darunter nicht bloß fast alle Länder Europas, sondern auch die »Kinder« Asiens und Afrikas vertreten.

Auch habe ich in Erfahrung gebracht, daß viele Soldaten in dem jetzigen Weltkrieg durch die Strapazen so kriegsmüde wurden, daß sie sich nach einer Kugel sehnten, die ihnen den Tod brächte oder sie wenigstens so verstümmeln sollte, daß sie weggeschickt werden müßten. Sie nannten daher einen Schuß, der geeignet wäre, sie untauglich zu machen, einen »schönen Schuß«; bei einer nur leichten Verwundung sprachen sie von einem »nicht schönen« Schuß. Und alle diese Soldaten waren zu Beginn des Krieges patriotisch begeistert und tapfer in den Schlachten.

Soviel ich glaube, wird man, abgesehen von Verteidigungskriegen, bei denen es sich offensichtlich um die Existenz des

Staates und seiner Bewohner handelt, selbst in solchen Fällen, wo wir bei den Menschen das jedenfalls schöne Gefühl eines echten Patriotismus wahrzunehmen glauben, nicht selten bei einer Analyse desselben darüber erstaunen, wie kleinlich, wie philiströs, ja wie kindisch, wenn nicht gar gemein oder brutal der Kern dieses Gefühls bei jenen Menschen oft ist. Um das aber an realen drastischen Beispielen, die wohl jeder kennt, zu erläutern, führe ich an, daß es oft genügt, den Rekruten oder Soldaten die ihnen langgewohnten Landesfarben zu zeigen oder die Staatshymne vorspielen oder sie von ihnen selbst absingen oder einen volksbekannten Fürsten, Prinzen oder General schneidig vorüberreiten zu lassen, um eine Begeisterung zu erwecken, die selbst zum Opfern des Lebens hinreißen kann und unbedingt den Eindruck von Patriotismus macht.

Jenes wirkliche Staatsgefühl, welches Menschen bis zur bewußten und beharrlichen Opferbereitschaft und bis zum Tod erfüllt, findet sich, wenn es nicht offensichtlich um Leben, Haus und Hof geht, gar selten!

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»Wie ist das Allgemeingefühl der Verwundeten gleich nach der Schlacht?« fragte jemand eine Oberschwester in einem Verwundetenspital. »Wollen sie wieder zurück oder haben sie genug vom Krieg?« »Das ist ganz verschieden,« erwiderte die Schwester, »wir haben Leute, die innerlich so erschüttert sind, daß sie nur mit Grauen an ihre schweren Erlebnisse denken können. Andere hingegen reden nur vom baldigen Wiederauszug. Wir haben Leute gehabt, die selbst im Traum und trotz der schwersten Verwundungen geradezu auflebten, wenn sie von ihrer künftigen Wiederbeteiligung sprachen. Aber im ganzen werden die anderen wohl in der Mehrheit sein.« Gar nicht zu sprechen von den unzähligen Rekruten, die wochenlang vor der Musterung in Angst dahinleben, totenbleich sich in das Kommissionszimmer begeben, während sie sich entkleiden, am ganzen Körper zittern und, wenn sie tauglich befunden wurden, ganz oder halb ohnmächtig das Lokal verlassen.

Ganz gewiß, das Staatsgefühl ist weit mehr über uns als in uns!

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Hören wir, wie ein Mann von hoher Bildung und von unzweifelhafter Anhänglichkeit und Hingebung an sein Vaterland dachte, ein Mann, der im jetzigen Verteidigungskrieg Deutschlands mitfocht und am 12. Februar 1915 in der Champagne sein Leben verlor. Es war das ein Professor der klassischen Philologie, Dr. Albert Klein, aus dessen Briefen ich einige Stellen herausheben und daran die Frage knüpfen will: hatte er den richtigen Patriotismus oder nicht?

»Tapfer, sorglos um sein Leben, wer ist dies überhaupt unter uns? Wir alle wissen zu sehr, was wir wert sind und leisten können, wir stehen im besten Alter, Kraft in den Armen und Seelen, und da stirbt niemand gerne, da ist niemand ‚tapfer' im herkömmlichen Sinne des Wortes oder doch nur ganz wenige. Gerade weil Tapferkeit so selten ist, deshalb dieser Aufwand von Religion, Denken, Dichtung, der Euch, in der Schule beginnend, den Tod fürs Vaterland als das Höchste, Herrlichste preist, bis er gipfelt in all dem faux heroisme, der uns aus Zeitungen und Reden der Gegenwart umdröhnt und so billig ist, und in dem wahren Heroismus, dem schlichten Heldentum weniger, das sich einsetzt und — vielleicht — andere mit fortreißt.«

»... Wenn ich in den Zeitungen .... diese Auspuffung jedes Soldaten zum Helden lese, so wird mir ganz übel. Heroismus ist ein selten Gewächs und darauf baut man keine Volksheere auf. Zu deren Zusammenhalt braucht man, daß der Mann vor den Vorgesetzten Respekt und selbst mehr Angst hat als vorm Feinde .... Wenn man die Elogen auf uns von denen hinter uns liest, so erröten wir ..... Ach, liebe Freunde, wer das hier mitmacht, der redet nicht so selbstverständlich vom Sterben, Tod, Opfer und Sieg, wie es die tun, die hinter uns die Glocken läuten, die Reden halten, die Zeitungen schreiben. Der fügt sich in die bittere Notwendigkeit des Leidens und Sterbens, wenn sie ihn antritt ....« Und als der Schreiber dieses Briefes einen Transport französischer Gefangener und unter ihnen einen Kollegen, Altphilologen aus Vigeac, »einen so offenen, intelligenten Mann« erblickte, stellte sich ihm recht »der Widersinn des Krieges« vor Augen. »Wir gerieten bald in ein Gespräch über ein Rousseau-Buch und fingen an, als alte Philologen zu disputieren ... Daß wir darauf

angewiesen sind, Freunde zu sein und stets getrennt sein sollen!«

Es wird gewiß genug Personen geben, die den Verfasser jenes Briefes für nicht genug echten Patrioten halten werden; es fehlt ihm, werden sie sagen, das rechte Feuer, der genügend starke Haß gegen den Feind. Darf denn ein wahrer Patriot wünschen, einem Feinde Freund zu sein?

Und darf gar der echte deutsche Patriot mit dem Feinde über ein »Rousseau-Buch« sprechen?

Die Vaterlandsliebe ist ein so sonderbares Gefühl, seinem Wesen nach so mannigfach, es erscheint in so vielen Graden von Intensität, daß diese Art von »Liebe« darin vielleicht jede andere Art übertrifft. Die Skala, die der Patriotismus durchläuft, beginnt mit der moralisch indifferenten, also der amoralischen Notwehr gegen einen feindlichen Staat, geht dann durch jenes Stadium, in dem man das Vaterland wirklich liebt und verteidigt, nicht nur, weil es »Pflicht ist, sein Vaterland zu lieben«, dann durch die Region, in der diese Liebe und die Opferbereitschaft durch höhere ethische und Menschlichkeitsempfindungen abgekühlt wird, wie in dem oben erwähnten Fall des klassischen Philologen, und erreicht mitunter einen Grad von Heftigkeit, der mitunter nur von der Liebe zur eigenen Nationalität übertroffen wird.

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All dies ruft die Forderung hervor, die Wurzel der echten Vaterlandsliebe aufzudecken. Ich glaube nun, alle so verschiedenen Arten des Patriotismus lassen sich in der Hauptsache auf das Gefühl der Pietät zurückführen, die infolge der Gewohnheit, in einem bestimmten Staate mit bestimmten Eigenheiten und Traditionen zu leben, sich von selbst und je nach der Disposition der Individuen in höherem oder niederem Grade entwickelt.

Vaterlandsliebe, nationales Gefühl, religiöse und Familienanhänglichkeit sind in Beziehung auf die Innigkeit der Empfindung und auch infolgedessen in der äußeren Betätigung sehr verschieden. Der Versuch, diese Gefühle aus einer Quelle herzuleiten, gelingt darum nie vollkommen, weil fast immer mehrere in gewissem Grade miteinander verbunden sind.

Das Extrem der Heftigkeit der Vaterlandsliebe ist in Europa bei den Nationen wohl nie, bei einzelnen sehr selten, aber in

Japan immer und beim ganzen Volke zu finden. Vielleicht geben die folgenden zwei Schreiben aus der Zeit des russisch-japanischen Krieges eine gute Vorstellung vom japanischen Patriotismus:

Zwei in Charbin verhaftete japanische Spione erhielten, kurz bevor sie zur Richtstätte geführt wurden, die Erlaubnis, an ihre Verwandten zu schreiben. Ihre Briefe lauteten:

»Oki an seinen Vater!

Mein Vater! Seit ich lebe, hattest Du immer Sorge und Kummer um mich und ich fand bisher nie Gelegenheit, Dir durch Taten dafür zu danken. Endlich bot sich mir eine Gelegenheit, durch die ich zu beweisen hoffte, daß ich würdig bin, Dein Sohn zu sein. Mit einer großen Idee wandelte ich durch die Mandschurei, fiel aber in die Hände der Russen. In fünf Minuten bin ich nicht mehr. Ich fürchte den Tod nicht, da ich fürs Vaterland sterbe; ich bedauere unendlich, daß es mir nicht gelungen ist, meine Idee zur Ausführung zu bringen. Vergiß mich und reiße mich aus Deinem Herzen, lieber Vater.«

Und nun noch ein Schreiben eines Vaters an seine Söhne:

»Yokokama an seine zwei Söhne!

Meine lieben Kinder! Euer Vater begab sich auf Befehl des Mikado in die Mandschurei. Leider hatte er wenig Erfolg. Schnell wurde er von den Russen gefangen und zum Tode verurteilt. Das alles war mir bestimmt! Ihr müßt Euch freuen, daß Euer Vater eines so ehrenvollen Todes stirbt. Liebet Euere Mutter und werdet berühmte Männer. Mehr kann ich Euch nicht schreiben.«

Wenn man solche Gesinnungen vor sich hat, dann wird man sie gewiß nur in höchstem Maße achten, alles das geht eben ohne Zwang vor sich und unsere Einwendungen gegen die allgemeine Wehrpflicht sind daher hier gegenstandslos, es ginge in Japan gerade so wie jetzt, wenn auch keine allgemeine Wehrpflicht existieren würde.

Wieso aber das patriotische Gefühl in Japan einen so hohen Grad von Innigkeit bis zur extremsten Opferfreudigkeit erreichen konnte, wie niemals bei anderen Völkern — Griechen und Römer nicht ausgenommen — ist leicht zu erklären. Japan wird von einer einheitlichen Rasse mit einheitlicher Sprache bewohnt, seine Dynastie ist bereits nahe an 2500 Jahre lang stets dieselbe und wird als

göttlichen Ursprungs betrachtet, zugleich lebte diese Inselbevölkerung bis auf die neuere Zeit ganz isoliert. Nation, Staat und Dynastie sind für den Japaner ein untrennbares Ganzes, eine vollständige Solidarität, und vielleicht der wichtigste Faktor ist das japanische Erziehungssystem, in dem Gebote der allgemeinen Ethik — frei von aller und jeder Religion — mit jenen eines extremen Patriotismus auf das innigste verflochten sind. Alle diese Umstände zugleich sind ein zweitesmal nicht vorhanden und können auch mit Absicht nicht verwirklicht werden.

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Es ist ein arger Atavismus, der in der neueren Zeit viel Unheil gebracht hat, wenn Rousseau in der »Economie politique« sagt: »Wollen wir, daß die Völker tugendhaft seien, beginnen wir damit, sie das Vaterland lieben zu machen.« Die Völker oder die einzelnen Menschen mögen mannigfaltige Tugenden besitzen, sie mögen ihre Pflichten gegen ihren Staat, ganz wie man es verlangt, erfüllen, sie brauchen bei dem allen dennoch aber nicht im mindesten ihr Vaterland zu lieben. Die größten Geister des Altertums und der neueren Zeit empfanden gar keine »Liebe« zu ihrem Vaterland, sondern waren Kosmopoliten; ich erwähne nur Demokrit, Sokrates, Euripides, die Stoiker, den Kaiser Marc Aurel, Montaigne, Voltaire, Kant, Herder, Lessing, Goethe, Schiller u. a. Glücklicherweise wurde der Begriff »Vaterlandsliebe«, namentlich von manchen Sozialisten, in unseren Tagen so gründlich analysiert, daß die Rousseausche Maxime immer mehr an Kraft verliert, und mit Vergnügen zitiere ich hier einen Satz eines französischen modernen Schriftstellers, der schon an und für sich die Rousseausche Auffassung im höchsten Maße einschränkt. »Wenn wir das Vaterland lieben sollen,« schrieb nämlich Lanson, »so muß uns das Vaterland wieder lieben.«

Trotz diesem allen soll nicht geleugnet werden, daß uneigennütziger Patriotismus als ein altruistisches Gefühl, wenn es anderen nicht schadet, ein großes und edles Gefühl sei, nur ist es nicht nach jedermanns Geschmack, läßt sehr verschiedene Auslegungen und Begrenzungen zu und darf niemandem aufgedrängt werden.

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Schopenhauer spricht davon, daß die Liebe zum Vaterlande »eigentlich eine gar zweideutige Tugend ist, indem Beschränktheit, Vorurteil, Eitelkeit und wohlverstandener Eigennutz großen Anteil an ihr haben . . .« »Ein echtes Heldentum offenbare sich im Kriege nicht mehr als bei jedem anderen Unglück von derselben Größe . . .«

Diese Behauptungen sind wohl in vielen Fällen zutreffend, werfen jedoch ganz ungerechtfertigt ein viel zu ungünstiges Licht auf das patriotische Gefühl. Besonders durch seine Bezeichnung als »Beschränktheit«. Man kann sogar Kosmopolit sein und zugleich seinem Staat mehr als jedem anderen und ohne Antipathie gegen irgend einen anderen, von ganzem Herzen zugetan sein, ebenso wie man die ganze Menschheit achten oder lieben und gleichzeitig ein sehr inniges Familiengefühl besitzen kann. Alle diese Gefühle schließen einander nicht aus.

Es mag auch bemerkt werden, daß sich ein Patriotismus aus reiner Pietät für die Taten und Leiden seines Staates im Laufe der Geschichte vor dem internationalen Gefühl durch seine viel größere Innigkeit auszeichnet. Und wenn man auch große Innigkeit — wie z. B. innige Liebe zu einer Person des anderen Geschlechtes — nicht »Tugend« nennen kann, so ist sie doch ein die Menschen erwärmender, ja oft beglückender oder gar erhöhender Zustand.

Schopenhauer sagt ferner: »Wer für sein Volk Opfer zu bringen bereit ist, ist edelmütiger als derjenige, der nur an sich, seine Familie und seine persönlichen Bekannten denkt. Aber einen höheren Edelmut zeigt der, welcher an dem Wohl und Wehe aller Völker teilnimmt, und der höchste Edelmut ist das allumfassende Mitleid, das sich in gleicher Weise auf Menschheit und Tierwelt ausdehnt.« »Es zeugt schon von einem Mangel an Edelmut, heißt es irgendwo[1], von Egoismus, seinem eigenen Volke mehr Glück als den anderen Völkern zu wünschen. Während eines Krieges wünscht ein edler Mensch einen solchen Ausgang des Krieges, der der ganzen Welt am heilsamsten ist. Den Sieg seines Volkes wünscht er nur dann, falls er davon überzeugt ist, daß durch diesen das Heil der ganzen Welt gefördert würde. Wie wir das Wohl des Vaterlandes höher schätzen müssen als

[1] Ich glaube ebenfalls bei Schopenhauer.

das der Familie, so müssen wir das Wohl der Welt höher schätzen als das des eigenen Staates.«

Ich fühle mich geradezu verpflichtet, diese Ansichten einer — und zwar einer tadelnden — Kritik zu unterwerfen. Denn nach meinen vielfachen Erfahrungen sind sie sehr verbreitet und auch geeignet, Verwirrung in den Gemütern solcher Menschen hervorzubringen, die gewohnt sind, ihr Denken und Handeln nach edel erscheinenden Maximen einzurichten und die sich dann oft nicht getrauen, ihrem unmittelbaren und gesunden Empfinden nachzugeben, dabei aber nicht genug nachgedacht haben, um jene Maximen objektiv und nüchtern beurteilen zu können.

Vor allem eine Aufklärung über den eben angeführten Vorzug der größeren vor der geringeren Zahl von Individuen, denen man wohl will und vielleicht sogar Opfer bringt. Es wäre sehr sonderbar zu glauben, der Kosmopolitismus sei edler als der Patriotismus, und dieser edler als das Familiengefühl, weil die arithmetischen oder räumlichen Größen der Sympathiekreise darüber zu entscheiden haben, was »edler« sei! Sondern der größere Umfang dieser Kreise beweist nur, daß weniger egoistische Beweggründe mitwirken, wenn wir so vielen fremden Individuen wohlwollen, und ferner beweist der weitere Kreis, daß man eben weniger Menschen in seinem altruistischen Gefühle ausläßt, sie also vom Wohlwollen nicht ausschließt.

Damit ist aber die Frage noch nicht erledigt. Es kommt sehr viel auch auf die Intensität des Wohlwollens an, und da kann es vorkommen, daß ein weniger opferfreudiger Patriot oder ein kühler Kosmopolit uns — mit Recht — viel weniger edel erscheint, als ein Mensch, der sich für seine Familie, für seine Eltern aufopfert. Es ist daher angezeigt, nicht die Bezeichnung: »edel« und »unedel« zu gebrauchen, wenn es sich um den Umfang der Sympathiekreise handelt, sondern die einfache Tatsache zu konstatieren, daß der Friede in der Welt und auch im Innenleben der Menschen umsomehr gesichert ist, wenn so wenig Antagonismen als möglich empfunden werden und daher auch demgemäß gehandelt wird.

Es wurde gesagt, es sei egoistisch, seinem eigenen Volke mehr Glück als anderen Völkern zu wünschen. Das ist, meiner Überzeugung nach, eine ganz und gar ungerechtfertigte Behauptung, sie entspringt nur einer wirklichkeitsfremden Theorie, die

die alltäglichsten Tatsachen und Notwendigkeiten ignoriert. Es ist wohl selbstverständlich, daß man allen Völkern Gutes wünschen soll, ob gleich viel Glück? Das ist schon unmöglich, weil das Glück nicht gemessen werden kann, nehmen wir also an, alle Völker mögen sich, jedes nach seiner Art und seinem Geschmack, glücklich fühlen.

Aber wenn es auf Kosten unseres Volkes ginge? Dann wäre es ein seltener Zug von Großmut, wenn wir uns — von gewissen ganz besonderen Fällen abgesehen — hintansetzen wollten, die Weltgeschichte kennt noch keinen einzigen solchen Fall, und es ist auch gar kein moralischer Grund vorhanden, ein solches Opfer zu verlangen. Denn warum ist es ethisch notwendig, uns selbst weniger zu lieben als den anderen? Wäre das der Fall, so bestünde ja das ganze Leben ethischer Menschen in immerwährendem, sachlich unbegründetem gegenseitigen Sichaufopfern, woraus noch viel weniger Heil resultieren würde, als wenn sich niemand opfern würde.

Wenn es aber nicht gerade auf unsere Kosten ginge, so soll man doch nicht dem eigenen Volke mehr Glück wünschen als irgend einem anderen? Das ist undurchführbar. Denn jeder Mensch, auch der ethischeste, der noch so zurückgezogen lebende, steht gewissen besonderen Menschen oder Gruppen von Menschen in mehr oder weniger wichtigen Beziehungen näher als allen anderen. Sei es die eigene Familie, seien es Freunde, sei es die Gemeinde, Berufs-, Staats- oder Religionsgenossen.

Unter sonst gleichen Umständen ist es selbstverständlich, daß man den irgendwie Näherstehenden den Vorzug geben und nicht etwa losen wird, wen man hintansetzen soll. Der rigoroseste Gleichheitsmoralist wird mehr darauf bedacht sein, lieber seinen Kindern einen Vorteil zukommen zu lassen als fremden, falls es sich um eine Wahl zwischen beiden handeln sollte. Ebenso ist es, wenn man seinem Volke im Gemüte anhängt oder sich als mitbeteiligt an seinen Geschicken fühlt, selbstverständlich, wenn es sich um ein Entweder — Oder handelt, sein eigenes Volk einem anderen vorzuziehen.

Wenn aber die Umstände nicht gleich sind und es zum Beispiel sicher wäre, daß die Kultur oder Freiheit durch eine andere Nation mehr gefördert würde, wenn diese und nicht wir einen Vorteil erringen könnte, dann allerdings ist es schön und

edel, ihr diesen Vorteil zu wünschen — aber nur solange es sich nicht um fundamentale Lebensbedingungen handelt, denn gegen solche verschwindet jede andere Erwägung und es wäre nur ein selbstmörderischer Fanatismus, das nicht gelten zu lassen. Diese Erwägung gewinnt dann besonders größte Bedeutung, wenn ein Kriegszustand vorhanden ist. Wenn es sich um unser Leben und fürs Leben primitiv notwendigstes Eigentum handelt, sollen wir, heißt es, »nur dann den Sieg unseres Volkes wünschen, wenn wir davon überzeugt sind, daß durch diesen — das Heil der Welt gefördert würde!«

Welches Heil gibt es aber, das sich mit unserer Existenz vergleichen ließe? Und wieviel verschiedene Arten von »Heil« gibt es doch! Kein vernünftiger Mensch — der nicht lebensüberdrüssig und kein Feind seines eigenen Staates ist — wird und soll sich einen Augenblick besinnen, sich, d. h. seinem eigenen Staate den Sieg zu wünschen, wenn die Existenz des Staates oder sogar die eigene Existenz auf dem Spiele steht, ohne erst nachzurechnen, ob dadurch auch das Heil der Welt gefördert wird.

Das »Wohl der Welt« ist eine sehr unbestimmte und vieldeutige Sache, aber ganz gewiß ist unter allen Wohlen die Sicherung von Menschenleben das höchste.

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Der französische Physiologe und Unterrichtsminister unter Gambetta, Paul Bert, drückte sich in der Rede »de l'Éducation civique« folgendermaßen über »Patriotismus« aus:

»Unsere Auffassung des Vaterlandes ist eine höhere ‹als die der Griechen und Römer›. Wir wollen, daß man das Vaterland ehre, weil wir in ihm einen Ausdruck, eine der höchsten Manifestationen der menschlichen Freiheit erblicken.«

Wieso das Vaterland menschliche Freiheit manifestiert, ist nicht einzusehen, auch der Russe hat ja ein Vaterland!

»Das Vaterland wird nicht definiert durch natürliche Grenzen, nicht durch die Sprache oder durch die Rasse, es hat beinahe nichts zu tun mit der Geographie, Linguistik, Ethnographie. Das Vaterland bildet sich heraus durch die freie und gegenseitige Zustimmung der Menschen, die unter einem politischen und sozialen Regime leben wollen, welches sie frei geschaffen oder angenommen haben. Es kittet sich

fest durch das Andenken der gemeinsamen Kämpfe für diesen sozialen Zustand, durch die Gemeinsamkeit des Schlachtfeldes, des vergossenen Blutes und auch durch die gemeinschaftlichen Bestrebungen und Interessen.«

Diese Darstellung der Anlässe, ein solidarisches patriotisches Gefühl zu erwecken und zu stärken, ist wohl richtig.

Aber ganz willkürlich ist die weitere Behauptung Berts:

»Es gibt keine Einheit des Vaterlandes und der Nation, wenn nicht jedes der Mitglieder, die diese Nation zusammensetzen, bereit ist, zu sterben für die Verteidigung aller.«

Wenn es sich um eine wirkliche Verteidigung handelt, so werden wohl alle Glieder der Nation mittun, was aber wurde und wird alles und nicht am wenigsten von den Franzosen unter »Verteidigung des Vaterlandes« verstanden! Und speziell Bert denkt ja bei seinen scheinbar allgemeinen Redensarten sozusagen zähneknirschend an die Wiedergewinnung von Elsaß-Lothringen. Und überdies gibt es, wie die Erfahrung zeigt, so manche Fälle, wo ein gewisser Grad von »Einheit« des Vaterlandes vorhanden ist, aber bei manchem seiner Angehörigen von einer Bereitwilligkeit, dafür zu sterben, keine Spur ist. Es gibt eben sehr verschiedene Arten und Grade von patriotischem Gefühl und von politischen Einheiten.

Natürlich zielt der Redner hier auf die Berechtigung der Institution der allgemeinen Wehrpflicht ab. »Wir alle sind Franzosen, weil wir es sein wollen, weil wir lieben, es zu sein und« — hier kommt der Pferdefuß, nämlich Elsaß-Lothringen, zum Vorschein: »man erwirbt nicht das Eigentum eines Menschen, wie jenes eines Feldes durch langen Besitz, es gibt keine Verjährung entgegen der menschlichen Freiheit.«

Ganz schön! Diese Maxime ist zu loben und soll, wo es nur immer geht, auch angewendet werden. Haben aber die Franzosen sie jemals in Anwendung gebracht? Hat Paul Bert, haben die Kammermitglieder zu jener Zeit gegen die Eroberung von Tonking, das sich gegen die Annexion tapfer verteidigte, im Namen der Freiheit auch nur im geringsten Maße protestiert? Die Tonkinesen zeigten doch durch ihre tapfere Gegenwehr gegen das französische Protektorat, daß sie ihr Vaterland »lieben«, es half ihnen aber gar nichts, sie mußten Frankreich lieben lernen! Wir sehen also, was die schönen Gefühle des Patriotismus wert

sind. Wehe den Schwachen, die nicht vor ihnen auf der Hut sind. Und obwohl der Patriotismus ein erwärmendes und schönes Gefühl sein kann, so ist er in der politischen Praxis doch oft ein gewalttätiger, ja ein anarchistischer Faktor, ein Gefühl, dem der Menschenfreund und Ethiker durchaus nicht jene hohe Stelle einräumen kann, die ihm von so vielen Staatsphilosophen zugewiesen wird.

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Sehr sonderbar und sinnlos ist es, überhaupt zu sagen, es sei Pflicht, sein Vaterland zu lieben. Eine Verpflichtung zu lieben, ist schon an sich ein Widerspruch und sinnlos, ebenso wie eine Pflicht, zu glauben. Hat man schon jemals gehört, daß es »Pflicht« einer Mutter ist, ihr Kind zu lieben? War es — von seltensten Ausnahmen abgesehen — jemals anders, als daß die Mütter ihre Kinder lieben, ohne daß man sie dazu ermahnt?

Und in der politischen Praxis zeigt sich unaufhörlich der Widersinn dieser Forderung, sein Vaterland zu lieben. Wenn es geschieht, so ist nichts dagegen zu sagen und an sich schön anzusehen. Aber: Wie kann man z. B. verlangen, daß die Bevölkerung der französischen Schweiz, die sich sehr nach Vereinigung mit Frankreich sehnt, die Schweiz, also ihr Vaterland, liebe? Und die Bewohner des Kantons Tessin, die sich mit Italien vereinigen wollen? Ohne noch sogenannte Hochverräter zu sein und ihre Pflichten gegen den Schweizer Staat ganz erfüllend, würden sie doch dagegen sehr protestieren, wenn man von ihnen größere Liebe zum Vaterland als zu Frankreich oder respektive zu Italien verlangen würde. Und gar erst die Polen! Können jene in Posen und jene in Rußland ihre Vaterländer, d. h. Preußen, respektive Rußland, lieben?

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Das allermerkwürdigste aber ist, daß es Arten von Patriotismus gibt, die je nach Zeitalter und je nach politischen Auffassungen, ganz besonders in unserer Zeit geradezu als antipatriotische gelten. Wir haben Erfahrungen, daß der Mangel an Vaterlandsliebe, diese im heutigen und im allgemeinen Sinne genommen, mitunter gerade bei hochgesitteten Individuen zu finden ist, weil bei ihnen dem landläufigen patriotischen Gefühl ein anderes, ebenfalls patriotisches Gefühl anderer, wie viele glauben, sogar edlerer Art entgegenwirkt. Das so sehr verschiedene

Wesen dieser beiden Arten von Vaterlandsliebe liegt in demjenigen, auf das hin sie sich eben richtet. Der Patriotismus im vulgären Sinne bezieht sich mehr auf das Land, dem man angehört, jener andere auf die Menschen, ihr Wohl und ihren Fortschritt. Man könnte sagen, beide Arten verhalten sich wie die Anhänglichkeit der Katze an ihr Haus zu der Treue des Hundes gegen dessen Bewohner.

Man kann sogar Sympathien mit dem Feinde des eigenen Staates haben und diese Ansichten nur im Innern hegen oder sogar in Taten umsetzen, also direkt Hochverräter sein, und eine genauere Betrachtung kann dennoch zeigen, daß dieser Gesinnung eben nur eine wirkliche echte Vaterlandsliebe zugrunde liegt! Allerdings wird z. B. in unseren Tagen selbst die Anerkennung des edlen Motivs die Staatsregierungen nicht hindern, Patrioten dieser eigentümlichen Sorte strenge zu strafen, denn es handelt sich den Regierungen — und auch der Mehrheit der Bevölkerung — in diesen Fällen um die Verteidigung solcher Interessen, — z. B. um Erhaltung der Landesgrenzen, also der bestehenden Staatsorganisation — die ganz anderer Natur sind und ihnen viel wichtiger erscheinen als jene, die solche patriotischen Hochverräter im Auge haben, z. B. als eine größere politische Freiheit.

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Es mögen nun aber einige hervorragende Beispiele von solchem hochverräterischen Patriotismus vorgeführt werden:

Ich erinnere hier an die Tatsache, daß während des Krieges Friedrichs des Großen mit Frankreich die Pariser Philosophen für den preußischen König schwärmten, so z. B. die Gesellschaft um Helvetius, um Frau Geoffrin und andere, ja die Philosophen ließen durch die Geoffrin — eine unvergleichlich edle Frau, die von D'Alembert überaus hoch geschätzt wurde — ihre besten Wünsche für das Gedeihen der Regierung Friedrichs des Großen in einem Brief an den König ausdrücken. Nicht genug damit: Voltaire gratulierte, wie ich glaube, dem König zu seinem großen Siege über das französische Heer bei Roßbach. Und warum dies alles? Weil man eine aufgeklärte und fortschrittlich gesinnte Regierung für wichtiger hielt als die Siege des eigenen Staates, mit dessen despotischer Regierung man unzufrieden war.

Und ganz dasselbe ereignete sich nicht gar lange darnach in Deutschland in Beziehung zu Frankreich in der Zeit der großen Revolution[1]. Es sei hier nur an den genialen und edlen Georg Forster erinnert. Heute kann man es kaum begreifen, daß man den Verlust eines Gebietes seines Staates an den Feind gleichgültig ansehen kann. Aber damals betrachteten fast alle Bewohner des linken Rheinufers die Abtrennung von 1200 Quadratmeilen deutschen Gebietes und nahe an vier Millionen Menschen mit voller Kaltblütigkeit, Forster selbst sprach den Franzosen sogar das Recht zu, ihre natürliche Grenze, die Grenze des alten Gallien, zurückzuverlangen. »Was wir heute unter Nationalbewußtsein verstehen,« heißt es in einem Bericht über jene Zeiten, »das vor allem in die Behauptung vaterländischen Bodens seine Ehre setzt, suchen wir vergebens. Jenem Geschlechte war es viel wichtiger, daß die überrheinischen Gebiete frei, als daß sie deutsch waren.« Also genau dasselbe Motiv wie bei den französischen Philosophen zur Zeit Friedrichs des Großen. »Nie,« rief Forster, der selbst auf dem linken Rheinufer wohnte, aus, »werden die Deutschen des Rheinufers vergessen, daß die Franzosen ihre Ketten zerbrochen,« und »in allem Ernst, es gab deutsche Patrioten, die aus deutschem Patriotismus den Siegen der fränkischen Waffen über ihr Vaterland zujubelten. In Deutschland, hofften sie, werde einst herrlich aufgehen, was in Frankreich mit Blut und Schrecken ausgesät worden«. Der »deutsche Patriot« und feurige Republikaner Georg Kerner glühte vor Begierde, auch sein Vaterland durch die fränkischen Heere in Brand gesetzt und zur Freiheit aufgeweckt zu sehen, und er blieb auch dann noch der Sache Frankreichs treu und widmete ihm seine Dienste — als Sekretär des »Bürgers« Reinhard, des französischen Gesandten in Florenz — als es längst nach allen Seiten erobernd und plündernd ausgriff. »Deutsche Freiheit,« schrieb er im Jahre 1799, »ja es ist ein schöner und göttlicher Gedanke, der mich mitten aus meiner Ermattung reißt . . . Deutsche Freiheit — ich werde dafür gelebt, ich werde dafür gehandelt haben — ohne sie jemals zu sehen. Aber sehen werden sie und erringen die, die da kommen und besser und kraftvoller und glücklicher sein werden als die kettenduldenden Väter.«

[1] Ich benütze hier einen Aufsatz in der »Münchner Allgemeinen Zeitung«.

Hier sehen wir also einen Mann aus Patriotismus — »Vaterlandsverräter« werden, wer unter den heutigen Patrioten — auch wenn er dies aufs schärfste verurteilt — wird sich erkühnen, sich prinzipiell für ethischer zu halten als einen Forster und Kerner? So verwickelt und verschieden sind die Ansichten von Vaterlandsliebe!

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Man wird vielleicht glauben, solche Fälle von hochverräterischem Patriotismus aus idealen Gründen konnten nur in der so aufgeregten revolutionären oder napoleonischen Zeit entstehen.

Allein prinzipiell gleichartigen Ansichten, wie jenen Georg Forsters und Kerners, begegnet man nicht selten, und zwar immer dann, wenn ein Staat sich im Kriege befindet, mit dessen innerem Zustande man unzufrieden ist. Einen Unterschied gegen den Fall Kerner begründet der allerdings wesentliche Umstand, daß es meist bei der unzufriedenen Gesinnung bleibt und jede praktische Betätigung derselben ausgeschlossen ist.

Sogar im jetzigen Weltkrieg gab es Leute genug, die nicht nur Deutsche sind, sondern auch Deutschland und das Deutschtum lieben, aber von den sozialen und politischen Verhältnissen in Preußen, namentlich von dem Dominieren der Klasse der Junker, so angewidert waren, daß sie den Sieg der Ententemächte wünschten. Sie hofften nämlich, daß infolge einer Niederlage Preußen-Deutschlands unbedingt eine Besserung jenes reaktionären Zustandes eintreten müsse.

Diese Personen kann man unbedingt »Patrioten« nennen, und zwar platonisch-hochverräterische Patrioten. Sie wünschen nämlich nur, tun aber nichts dazu, den Feinden Deutschlands zu nützen und zu der Niederlage ihres eigenen Staates beizutragen. Allerdings könnte man denken, wenn es jenen Leuten mit der unbedingten Notwendigkeit einer Gesellschaftsreform in ihrem eigenen Staat wirklich voller Ernst ist, daß sie sich — so wie Kerner — auch dafür persönlich einsetzen, ihren Staat verlassen und in das feindliche Lager übertreten. Und das müßte auch z. B. für solche Personen gelten, die zwar ihrem Staate keine definitive Niederlage, aber auch keinen leichten Sieg wünschen, weil sie von einem solchen eine maßlose Steigerung des Hochmutes der herrschenden Klasse befürchten.

Die Forderung: diese besonderen Arten von Patrioten sollten die Konsequenzen ziehen und sich in der eben angedeuteten Weise für ihre politischen oder kulturellen Ideale persönlich exponieren, ist vielleicht zu weitgehend, man kann das kaum verlangen, wenn man an die daraus entstehenden Folgen denkt. Aber es erscheint mir doch wichtig genug, diese ganze Art zu denken, näher zu beleuchten, nicht nur in theoretischem Interesse, sondern auch wegen der praktischen Folgen einer eventuellen Ausbreitung solcher Ansichten in weitere Kreise.

Wie sollen wir solche Arten von »Patriotismus« beurteilen? Alle Achtung vor jeder Ansicht eines ehrlichen und selbstlosen Menschen. Aber man soll sich doch hüten, den Idealismus in Fanatismus übergehen zu lassen, und dem Ernst des Lebens nicht ins Gesicht sehen zu wollen.

Was wünschen jene sonderbaren Patrioten? Sie wünschen mehr Freiheit im inneren politischen Leben ihres Staates oder weniger Geltendmachung seiner physischen Macht, Abschwächung der Bevorzugung einzelner Bevölkerungsklassen und dergleichen. Damit kann und wird wohl jeder human und liberal Denkende einverstanden sein.

Auf der anderen Seite aber wünschen diese Patrioten, damit diese Ziele erreicht werden, — anstatt es einer innerpolitischen freiheitlichen oder kulturellen Agitation zu überlassen — den Sieg der Feinde, d. h. sie sind damit auch ganz einverstanden, daß, wie sie ja sehr gut wissen, eine siegreiche, haßerfüllte und meist schon an und für sich brutale Soldateska ins Land eindringt, Männer tötet, Frauen vergewaltigt, Eigentum raubt oder vernichtet, und daß die feindlichen Regierungen den Wohlstand des Staates auch bis zur eintretenden Not vernichten wollen. Darf man nun ernstlich jenen idealen Fortschritt gegen Tod und Not von ungezählt vielen Individuen eintauschen wollen? Darf man auch nur einen solchen Wunsch und einen solchen Gedanken hegen?

Es ist wohl begreiflich und verzeihlich, wenn jemand in seinem Unmute über ein elendes Regime in seinem eigenen Staat diesem eine Niederlage oder einen nur schwer erkämpften Sieg wünscht, damit die politischen Zustände geändert und verbessert werden. Man mag solche Wünsche selbst in vertrautem Kreise gewissermaßen ohne weitere Überlegung so hinwerfen. In allgemeinen Betrachtungen über die innerpolitische Situation

und auch in Ratschlägen für ihre Verbesserung mag man sich sogar in voller Öffentlichkeit ergehen. Denn alle die Millionen des im Kriege stehenden Landes, in Deutschland zirka 66 Millionen, zweifeln, sobald sie nur nachzudenken beginnen, keinen Augenblick, daß das von jenen »Patrioten« getadelte Regime, wenn es infolge eines Sieges über den Feind weiterbestünde, in der Regel dennoch nicht entfernt so viel Unglück über das Volk bringen würde wie der siegreiche Feind.

Wenn unser »Patriot« öffentlich sich nicht nur in Abstraktionen und politischen Ratschlägen ergeht, sondern seinen Wunsch einer Niederlage seines Staates durchblicken läßt oder gar, wie Kerner, direkt in diesem Sinne agitiert, so muß nicht nur die Regierung, sondern müssen jene Millionen den Patrioten, der ja schon durch den moralischen Einfluß auf seine Umgebung deren Energie in der Landesverteidigung schwächt, unzweifelhaft als gefährlichen Freund ansehen.

Noch mehr: Nehmen wir an, einer jener Ideal-Patrioten lebt in irgend einer Stadt mit Frau und Kindern, der Feind hätte gesiegt und soeben dringt er, nach Belagerung und Bombardement der Stadt, in die Häuser ein, mordend, vergewaltigend und plündernd. Schon kommen auch die wütenden Soldaten in die Wohnung jenes Idealisten und bedrohen sein und seiner Angehörigen Leben. Zuerst aber vergewaltigen sie die Frau und die Tochter in Gegenwart des idealistischen Hausvaters, sodann fallen sie über seinen alten Vater her und raufen ihm den Bart aus, so daß er mit einem Schrei zu Boden sinkt, — was alles im jetzigen Weltkrieg von den frommen orthodoxen Kosaken praktiziert wurde —, wird der Idealist in dieser Situation noch immer glauben, daß es so besser sei, als wenn der Feind besiegt worden wäre? Wird er noch immer überzeugt sein, daß er den richtigen Standpunkt vertrete, wenn er freiheitlicher oder kultureller Ziele wegen dem eigenen Staate eine Niederlage wünsche? Wird er nicht jetzt einsehen, daß mit dem Leben menschlicher Individuen sich gar nichts, gar kein noch so hohes Ideal — außer, wenn sie es wünschen — vergleichen lasse.

Aber an solche Wirklichkeiten, die doch unausweichlich eintreten, denkt ein solcher Idealist gewöhnlich nicht, in seiner Überhitzung mißachtet er unbewußt menschliche Existenzen.

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Noch eine andere und wohl ganz neue Art von hochverräterischem Patriotismus erlebten wir während des jetzigen Weltkrieges.

Es wird nämlich gewiß nicht geleugnet werden können, daß es ein patriotisches Beginnen ist, für den Abschluß eines Krieges, also für den Frieden, zu agitieren. Aber die meisten Regierungen, die den Krieg fortsetzen wollten, betrachten alle Friedensbestrebungen als staatsgefährlich, in manchen Ländern sogar als hochverräterisch. Und eben, da ich dieses niederschreibe, kommt die Nachricht: »Das Kriegsgericht in Rom hat die Sekretäre und Mitglieder der sozialistischen Organisationen von Rom wegen des Versuches, eine »antipatriotische« Agitation für die Wiederherstellung des Friedens zu betreiben, zu Gefängnisstrafen von fünf und sechs Jahren verurteilt.« Das Kriegsgericht betrachtet also Friedensbestrebungen als »antipatriotisch«. Die Bezeichnung »hochverräterisch« könnte man daher, wenn man die obige Auseinandersetzung über die Folgen eines Krieges nicht ignoriert, allerdings viel passender auf das Kriegsgericht als auf jene Friedensfreunde anwenden.

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Man wird wahrscheinlich aus den angeführten Beispielen den Schluß ziehen, daß hochverräterischer Patriotismus sich nur bei revolutionären, freiheitlich gesinnten Personen und Parteien vorfindet. Weit gefehlt!

Der große Coundé verband sich mit fremden Herrschern gegen den eigenen. Während der Revolution konspirierten und kämpften die adeligen Emigranten gegen das eigene Land und im Jahre 1806, nach der Schlacht bei Jena, übergaben preußische Junker viele Festungen den Franzosen ohne jeden Kampf, und zwar aus dem Grunde, weil die reaktionäre Partei lieber unter dem despotischen Regiment Napoleons leben wollte als unter einem Preußen, in welchem sich soeben die Keime von liberalen Reformen bemerkbar machten.

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Man kann fragen: Was geschieht, wenn es solcher oder analoger, also mit den Feinden sympathisierenden, »Patrioten« sehr viele gibt?

Antwort: Dann werden diese zu den Feinden überlaufen und, wenn sie stark genug sind, wird es vielleicht auch einen Bürgerkrieg geben.

Da der Patriotismus seit jeher als hohe, ja beinahe als höchste Tugend gerühmt wird, derart, daß es als genügend erscheint, dieses Gefühl und die entsprechende Opferwilligkeit zu besitzen, um als ethische Persönlichkeit zu gelten, so halte ich es für notwendig, die vulgäre Vaterlandsliebe einer besonderen Beleuchtung zu unterziehen.

Der gewöhnlich sogenannte Patriotismus involviert die Verpflichtung, für den Staat gewisse Opfer zu bringen, namentlich: Im Frieden Steuern zu zahlen und in Kriegszeiten Felddienst zu leisten, tut man das gezwungen, so ist es kein »wahrer«, kein edler Patriotismus oder eigentlich gar keiner, keine Liebe zur staatlichen Gesamtheit. Der Gemütspatriotismus jedoch, der diese Liebe besitzt, ist unbedingt eine moralische Gesinnung, verdient alles Lob und ist sehr selten zu finden.

Diese Liebe zur Gesamtheit ist aber fast immer eine sehr einseitige und darum unvollständige. Ein voller und ganzer Patriotismus müßte sich doch in mehr oder weniger opferwilligem Wohlwollen gegenüber den eigenen Staatsgenossen zeigen und in einem, gegenüber fremden Staatsangehörigen, ⟨wenigstens⟩ etwas erhöhten Wohlwollen. Die volle Vaterlandsliebe muß sich also in dem Bestreben zeigen, den Staat nicht nur als Massenerscheinung oder als Abstraktion zu unterstützen, sondern auch die einzelnen Menschen oder Klassen, aus denen er eigentlich besteht.

Merkwürdigerweise wird aber, wenn von »Patriotismus« gesprochen wird, von dieser Art von Gesinnung und Tätigkeit gänzlich abgesehen. Und nur selten werden in der Geschichtsschreibung diejenigen, die sie besitzen und ausüben, als »Patrioten« bezeichnet, nein: vielmehr jene »lieben ihr Vaterland«, die als Feldherren, Soldaten oder Staatspolitiker ⟨nach außen⟩ auftreten, mehr oder weniger Erfolg aufzuweisen haben!

»In unseren eigenen Tagen,« sagt Robertson[1], »sehen

[1] Einer der edelsten und gelehrtesten Schriftsteller der Neuzeit, den wohl nur wenige näher kennen. John M. Robertson ist Mitglied des englischen Unterhauses und Verfasser zahlreicher, auch stilistisch ausgezeichneter Werke, ich nenne: An introduction to English Politics, The Saxon and the Celt, Short History of Freethougt, A Short History of Christianity, Modern Humanists und andere. Einige Sätze, die ich hier zitiere, entnehme ich seinem von Hanselmann ins Deutsche übersetzten vortrefflichen Werke: »Patriotismus, Militarismus, Imperialismus« ⟨Pierson, 1910⟩.

wir in der Gesellschaft, in der wirtschaftlicher Wettbewerb vielleicht aufs höchste angespannt ist, wie den Aufforderungen des ‚Patriotismus' unter der Form eines Angriffskrieges gegen einen schlecht geleiteten Nachbarstaat mit Begeisterung Folge geleistet wird. Der Plutokrat, dem es sein Leben lang um nichts anderes zu tun gewesen war, als alle Rivalen unschädlich zu machen, findet auf einmal eine ganz besondere Freude an der Gelegenheit eines leidenschaftlich erregten Zusammenwirkens im Namen des Gemeinwohls. Er, dessen Lebenswerk darin bestanden hatte, drückende, ihn selbst begünstigende Schutzzölle herbeizuführen, alle seine Konkurrenten zu unterbieten und zugrunde zu richten, die Löhne seiner Arbeiter zu drücken, um sich selbst zu bereichern, erbietet sich nun, für seine eigene Rechnung ein Regiment Soldaten auszurüsten zum Ausdruck seiner neuentdeckten Wonne am Gedanken der Zusammengehörigkeit. Aber es ist dabei der alte, rohe, kriegerische Instinkt am Werke, um die Veränderung herbeizuführen und diejenigen, welche meinen, daß er, nachdem sich dieser Instinkt wieder schlafen gelegt hat, fortfahren werde, unter normalen Verhältnissen das Gemeinwohl zu fördern, sind ganz gewaltig im Irrtum.«

Wie war es im klassischen Altertum?

»Im alten Rom sehen wir den armen Ackerbauer treu ergeben in den Krieg ziehen an der Seite seines reicheren Nachbars, um ihm zu helfen, den Erbfeind zu vernichten, und zurückkehren, um in Leibeigenschaft geworfen zu werden wegen der Schuld, die er gezwungen war, auf sich zu laden nach einem vorhergegangenen Feldzug — gezwungen zufolge der Tatsache, daß sein Ackerbau der Verödung anheimfiel während seiner Abwesenheit, wogegen des reichen Mannes Gut von dessen Sklaven bestellt und von dessen Landvögten verwaltet worden war. Kein Feind hätte den armen Ackerbauer schlimmer mißhandeln können . . .«

». . . Es genüge hier, nur zu bemerken, daß diese praktische Begriffsbestimmung des Patriotismus als bloß negativer Gemeinschaft des Hasses, die nur das allernötigste Mindestmaß von weiterem Zusammenwirken oder Mitgefühl in sich einschließt, schwer auf der ganzen Weltgeschichte lastet . . . Die ‚Dreihundert' bei Thermopylä hatten . . . keine Spur von

einem normalen Zusammengehörigkeitsgefühl weder mit ihren Heloten, noch mit der ihnen untergebenen Klasse der Ackerbauern . . . Auf Heloten, die jeden Augenblick in hinterlistiger Weise von ihren rohen Gebietern verräterisch niedergemacht werden konnten unter dem Vorwande, sie seien in erschreckender Weise gesund und zahlreich, konnte man sich beinahe immer verlassen, wenn es sich darum handelte, gegen andere Gruppen von Sklaveneigentümern im Interesse ihrer eigenen Herren zu kämpfen.«

Die Zustände im mittelalterlichen Europa sind nicht »sehr viel anders gewesen, als in Sparta und Rom« und selbst in Athen erhob sich »das Wesen des Patriotismus normalerweise nicht über eine Gemeinschaft in der Beherrschung tributzahlender Verbündeter . . .«

»In England hatten zwanzig Jahre angeblicher nationaler Einheit in Feindschaft gegen ein anderes Volk[1] die Begüterten nicht fähiger, sondern im Gegenteil unfähiger gemacht zu wohltätigem Mitgefühl für ihre »Gattung«, welche den Kampf mit ihnen ausgefochten hatte. Der englische Aristokrat hatte nicht gelernt, sich mehr um seine unglücklichen Landsleute zu kümmern, als Coriolanus im republikanischen Rom . . . Der englische Durchschnittspatriot hat nicht mehr Achtung für den bewaffneten Fenianismus als für den unbewaffneten irischen Nationalismus. Der krasseste Egoismus, der unvernünftige Animalismus kommt zum Vorschein, sobald der Instinkt eines anderen in Reibung mit ihm gerät. Patriotismus bedeutet für ihn den Haß des Patriotismus anderer Leute, sobald letztere ihm damit lästig werden . . . Streicht man den Patrioten aus, so kommt der Seeräuber zum Vorschein . . . Die Leute, die am meisten über Patriotismus und Weltherrschaft schwätzen und die gewöhnlich von unserer natürlichen Feindschaft gegen Deutschland oder Rußland sprechen, sind in der Regel hervorragend in ihrer Gleichgültigkeit gegenüber dem Wohlbefinden der Massen ihrer eigenen Landsleute . . . Im allgemeinen wünschen sie in der Tat guten Geschäftsgang für das ganze Land und sie freuen sich darüber, wenn die Lage unseres Handels eine günstigere ist als die der anderen

[1] Gegen die Franzosen 1793–1815.

Länder, aber sie würden auch nicht einen Finger rühren, um die Struktur der Gesellschaft so zu ändern, daß die Arbeiterklassen an Wohlstand und Komfort gewinnen würden . . .«

Es gibt kaum ein Land, in dem ein so flammender Patriotismus zu finden wäre, wie Frankreich. Und doch gab es auch keinen Staat, in dem eine so rücksichtslose Klassenherrschaft vorhanden war, wie in Frankreich. Ohne Mitleid bedrückte der Adel des ancien régime die Bauern und in unseren Tagen gibt es nirgendwo einen so hartnäckigen Widerstand gegen sozialpolitische Verbesserungen seitens einer vermögenden Bourgeoisie wie in jenem Lande. Nicht einmal eine rechte progressive Einkommensteuer kann in Frankreich zur Einführung gelangen. Aber nirgendwo hört man bei jeder Gelegenheit so viele patriotische Phrasen von der »Größe« des eigenen Volkes.

In Preußen findet sich bei der Klasse der Junker der vulgäre Patriotismus, soweit es sich um militärische Leistungen handelt, in hohem Maße, aber schon beim Steuerzahlen hört er auf, von solcher Art von Opfer für die Allgemeinheit wollen die Junker und Konservativen nichts wissen. Als es sich vor kurzem um die Einführung einer Vermögenssteuer handelte, widersetzten sie sich sehr energisch und, sich auf die Gefühlsmenschen hinausspielend, gaben sie vor, durch eine solche Steuer werde das »Familiengefühl« geschwächt, und nichts gleicht ihrer Mißachtung der bürgerlichen Klasse und ihrem Hasse gegenüber den Arbeitern und allen Sozialreformen. Solche Menschen halten sich für »Patrioten«!

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Diese Beispiele genügen wohl, um zu zeigen, welcher ethische Wert dem landläufigen Patriotismus beizumessen ist. Und fassen wir alles zusammen, so ergibt sich:

Wenn man gezwungen der Gesamtheit der Staatsangehörigen Opfer bringt, so ist überhaupt von irgend welcher Art von Patriotismus keine Rede. Wenn man freiwillig für den Staat Opfer bringt, weil der Zustand der Notwehr gegeben ist, so ist das noch immer gar kein Patriotismus, sondern ein selbstverständliches, gerechtfertigtes, egoistisches Vorgehen. Wenn man freiwillig Lasten auf sich nimmt, und zwar aus einem Gefühl der Solidarität und Pietät gegen seinen Staat und seinen Traditionen heraus, so ist das ein ehrlicher Patriotismus im gebräuchlichen

Sinne des Wortes und es hat dieser Gemütszustand schon etwas Ethisches an sich. Wer aber seine Liebe zum Staat in werktätigem Wohlwollen gegen seine Mitbürger, und besonders gegen die ungünstiger Situierten, beweist, der ist Patriot im vollen Sinne des Wortes, er ist Menschenfreund in Form der »Vaterlandsliebe«.

Diese Art Patriotismus muß man suchen!

XV.

Das Nationalitätsgefühl.

Es scheint mir nicht richtig zu sein, wenn von einigen Staatsrechtslehrern während des jetzigen Weltkrieges behauptet wird: »Eine der folgenschwersten Tatsachen, die uns der Krieg enthüllt hat, ist der Sieg des Staatsgedankens über das Nationalitätsprinzip.« ⟨Franz v. Liszt.⟩

Oder: »Der Staatsgedanke hat in der jüngsten Zeit eine Macht erlangt, welche ihm seit vielen Jahrhunderten, seit der Zeit der Antike, nicht innewohnte. Die Staatsidee hat wieder einen unbestrittenen Sieg über alle Strömungen davongetragen, die sich ihr im Laufe der geschichtlichen Entwicklung entgegengestellt haben. Diese Opposition kommt hauptsächlich von zwei Seiten, vom Egoismus des Einzelmenschen, welcher selbstherrlich und unabhängig seine Interessen verfolgen will, aber auch vom Egoismus der gesellschaftlichen Klassen, welche das Interesse ihrer Gruppen zum Leitstern ihres Handelns erheben . . . Der bis vor kurzem so mächtige Gedanke der nationalen Gemeinschaft, der Nationalismus und die Idee des Weltbürgertums treten derzeit dem Staatsgedanken gegenüber in den Hintergrund.« ⟨Rektoratsrede des Prof. Dr. Adolf Menzel.⟩

Wenn man aber die Tatsachen, die im jetzigen Weltkriege zutage traten, berücksichtigt, so muß man, wie ich glaube, zu dem Resultate gelangen, daß in den meisten Staaten nicht die Staatsidee über alles andere gesiegt hat, sondern die nach innen gerichtete Staatsmacht und diese Staatsmacht gründet sich auf die Institution der allgemeinen Wehrpflicht.

Wo es nur immer ging, sträubten sich gewisse Nationalitäten gegen die Kriegführung ihres eigenen Staates, und selbst in

England opponierten die Iren der Einreihung in die Feldarmee. Man denke sich den Wehrzwang weg und Europa hätte ein anderes Gesicht gezeigt, es hätte sich sowohl der Egoismus der »Einzelmenschen« als jener der »nationalen Gemeinschaften« gewaltig in den Vordergrund gedrängt.

Was die Idee des Weltbürgertums betrifft, so war sie überhaupt noch sehr wenig verbreitet, eigentlich nur bei den echten Sozialisten und den intelligentesten Personen der anderen Bevölkerungsklassen vorhanden, sie hatte daher noch viel zu wenig innere und äußere Kraft, man möge aber nur abwarten, es kann sich darin vieles ändern, ich nenne es: bessern. Man darf aber nicht glauben, gerade das Bestehen der Institution der allgemeinen Wehrpflicht beweise die jetzige Präponderanz der Staatsidee, denn sonst, meint man vielleicht, »würden die Völker sie ja nicht besitzen oder nicht dulden!«

Es ist hier vielmehr so wie bei dem heute noch vorhandenen absolutistischen Regime in der Behandlung der auswärtigen Angelegenheiten. Die Wehrpflicht war überall im Moment kriegerischer Unternehmungen oder Absichten entstanden und wurde dann wegen der permanenten politischen Intrigen und daher auch Kriegsbefürchtungen sowie infolge dynastischer oder Klasseninteressen nicht mehr abgeschafft. Die Abschaffung wurde aber, infolge der niederdrückenden Ansicht vom Staate und seinen unbedingten Herrscheransprüchen an seine Staatsbürger, selbst von hochintelligenten Geistern überhaupt gar nicht verlangt, aber auch in dieser Beziehung möge man nur abwarten, es kann sich einmal vieles ändern.

Kurz: Unsere jetzt geltende Staatsidee ist eine korrupte Idee und die richtige und segensreiche trachte ich eben in dieser Schrift zu propagieren.

Wann werden wir so denken wie ein großer französischer Schriftsteller und zugleich einer der gesittetsten Menschen aller Zeiten, nämlich wie Michel Montaigne, der in seinen Essays über die gegenseitige Nörgelei der Menschen und der Völker sprach: »Ich glaube nicht, mein Himmel sei der blaueste!«

Solche ohnedies unbeweisbare Aussprüche, wie: »Mein Glaube ist der beste«, »Unsere Sprache ist die logischeste und reichste«, »Unsere Kunst ist die höchste« und dergleichen, sollten

niemals getan werden. Ganz abgesehen davon, daß es einen objektiven Maßstab für solche Abschätzungen überhaupt nicht gibt.

Hier ist eine der Hauptaufgaben unserer Erziehung ersichtlich, an die man überhaupt bis heute noch gar nicht gedacht hat. Sie besteht darin, schon die Jugend und im öffentlichen Leben auch die Erwachsenen durch Wort und Schrift daran zu gewöhnen, all die tausend Unterschiede in der Zivilisation und Kultur als etwas anzusehen, das man bemerken und hervorheben kann, aber alle Formen, alle Arten derselben — soweit sie nicht als schädlich erscheinen — als gleichberechtigt zu beurteilen, ich meine: ohne diese Verschiedenheit als Anlaß zu Mißachtungen oder gar Verfolgungen zu nehmen. Schon in den Unterweisungen in der Ethnographie und Urgeschichte der Menschheit kann man diese Tendenz zur Geltung bringen, und wenn man zum Beispiel mitteilt, irgend ein Volk kenne das nichterotische Küssen bei Begrüßungen nicht, aber man reibe zur Begrüßung die Nasen aneinander, so möge man, anstatt darüber zu lachen, durch nüchterne Analyse zeigen, wie beide Begrüßungsarten jetzt gleich wertvoll oder gleich wertlos sind. Oder wenn man darüber lacht, daß die Chinesen Reis auf die Gräber der Verwandten hinsetzen, und höhnisch fragt, ob denn die Leichen den Reis essen werden, führe man die Gegenbemerkung jenes Chinesen an: ob denn die Leichen unserer Verstorbenen an den Blumen riechen werden, die wir auf ihre Gräber legen. Und so ins Endlose! Meine Mahnung bezieht sich, von den untergeordnetsten Sitten und Gewohnheiten angefangen bis auf die feinsten Fragen der Kunst und der Kultur überhaupt.

Ist es nicht höchst lächerlich, unsinnig und traurig, wenn man gegen Kunstleistungen anderer Nationen, weil sie einem nicht gefallen, tiefste Antipathien und Verachtung oder gar Haß gegen jene Leistungen und gar gegen jene fremde Nation empfindet?

Man kann mit Recht fragen, was hat z. B. die Musik mit dem jetzigen Weltkrieg zu tun? Und doch stimmt der deutsche Verfasser eines Aufsatzes »Der Krieg und die deutsche Musik« wahre Klagelieder wegen der »ausländischen Hörigkeit« an, in der sich Deutschland betreffs neuer Kompositionen befindet! Deutsche Musiker haben, heißt es dort, durch ihren Import fremder Kompositionen (z. B. skandinavischer und slawischer

Musik) das »deutsche Ansehen aufs Spiel gesetzt« und »ihre Ausländerei hat mit auf den Ausbruch des Krieges hingetrieben!«

Aber nicht weniger kleinlich und kindisch ist es, daß, wie der Verfasser jenes Aufsatzes mitteilt, die Russen die deutsche Musik deshalb der Unfruchtbarkeit und Minderwertigkeit zeihen, weil die Deutschen ihr »Heil Dir im Siegerkranz« — nach einer englischen Melodie singen.

Es ist eine herrliche Tatsache, daß Herder und dann Goethe — über Lessing hinaus — vollkommen frei von jenen Beschränktheiten waren, die so viele, unter anderem speziell im Gebiet der Poesie aufweisen, und daß sie uns den Gedanken einer Weltliteratur brachten. Das ist aber nur ein kleiner Teil dessen, was hier verlangt wird.

Allgemein sollte die Maxime gelten: Genießen, was einen freut, ohne sich dabei stören zu lassen, von welcher Person und von welchem Volk und aus welcher Zeit es stammt, und ferner ruhig als Tatsachen hinnehmen und ohne die Nase zu rümpfen über alles das, was anders ist, als man es gewohnt ist.

Dementsprechend soll auch in den Schulen beim Unterricht in der Kulturgeschichte nicht nur besonders auf die Kulturhelden der eigenen Nation, sondern aller Nationen hingewiesen und ihr Verdienst hervorgehoben werden, ebenso wie beim Religionsunterricht das Schöne oder Tiefe aller Religionen, soweit es überhaupt vorhanden ist, aufgezeigt werden soll. Ist doch nicht einmal das Verständnis von Kultur oder Religion möglich ohne eine solche Art, sie bekannt zu machen.

Diese Auffassung sollte eine allgemeine werden, viele überflüssige Streitigkeiten und Verbitterung würden dadurch vermieden werden, und durch die Lehren und das Beispiel gesitteter Intelligenzen könnte hierin, wenn nicht alles, so doch vieles Gute erreicht werden. Wird man aber wirklich endlich wenigstens anfangen, mit solchen Unterweisungen die Menschen zu erziehen? Wird man überhaupt so bald aufhören, alles und jedes einer ganz überflüssigen Beurteilung und einem strengen Richterspruch zu unterwerfen, mit der verschwiegenen Tendenz, es zu tadeln und aus Eigenliebe daran zu nörgeln — stets in der Meinung, bloß gerecht zu kritisieren?

Wer es nicht schon längst, vor dem jetzigen Weltkrieg mit seinen Begleiterscheinungen der nationalistischen Verhetzungen, wußte, hat durch diesen Krieg lernen können, wohin sie führen.

Durch das Nationalitätsprinzip, wie es in neuerer Zeit kultiviert wird, kam ein neues Gift, geradezu ein anarchistisches Prinzip in unsere Kultur. Dies zeigt sich besonders deutlich in seinem Einfluß auf die sogenannte große Politik, namentlich insofern sie dahinstrebt, reine Nationalstaaten zu bilden[1]. Der heutige Nationalismus begnügt sich nicht mit der Liebe zu seiner Nation, er will auch in aggressiver Weise in die innere wie äußere Politik eingreifen, die geographische Begrenzung der Staaten sich unterwerfen und sie nach ethnographischen Gesichtspunkten verschieben. Da aber nur äußerst wenige Nationalitäten als kompakte und einheitliche Masse in irgend einem Staat vorkommen und ihnen zugehörige Teile in anderen Staaten versprengt existieren, so hat das Streben, alle Teile derselben Nation auch geographisch, d. h. in seinem Staat, zu vereinigen, ewige politische Aufregungen und endlich stets neue Kriege zur Folge.

Wenn unter nationaler Selbständigkeit eine geographisch-politische Abgrenzung verstanden wird, so sieht man, daß die von deutschen Sozialdemokraten am 4. August 1915 abgegebene und später auch von anderen Sozialisten und Internationalisten oft wiederholte Erklärung: »Jedes Volk hat das Recht auf nationale Selbständigkeit«, mit der der gesittete Politiker prinzipiell gewiß einverstanden wäre, doch nichts anderes ist, als eine von den Sozialisten ehrlich gemeinte, bei den Diplomaten eine scheinheilige Phrase, sie ist aus soeben angegebenem Grunde undurchführbar, jeder Versuch ihrer faktischen Befolgung muß zu einem immerwährenden politischen Trommelfeuer und zu wirklichen Kriegen führen. Und sie ist, schon auf den ersten Blick, darum undurchführbar, weil die europäischen Mächte konsequenterweise sofort alle ihre Kolonien aufgeben müßten. Denken aber die Politiker einen Augenblick an eine solche Resignation? Beabsichtigen die Franzosen, die wegen Elsaß-Lothringen dieses Prinzip der

[1] Auf diesen anarchistischen Charakter des heutigen Nationalismus wies ich im Sommer des Jahres 1903 in einem Feuilleton hin, das mit mehreren anderen unter dem Titel »Einige Gedanken über Kant, Goethe und Richard Wagner« in der »Neuen Freien Presse« erschienen war.

»freien Selbstbestimmung der Völker« so ganz besonders hoch rühmen, Marokkaner und Tonkinesen freizugeben? Oder England, Indien und Ägypten aufzugeben?

Wenn sich irgend eine Nation wirklich so sehr nach ihrer speziellen kulturellen ‹und sprachlichen› Vereinigung und Entwicklung sehnt, so steht gar nichts im Wege, daß alle Teile, die sich national zusammengehörig fühlen, dies in jeder entsprechenden Weise dokumentieren: durch die Literatur, durch Kongresse, Volksfeste und dergleichen. Aber an der Tatsache des eben vorhandenen Bestandes der Staatsgrenzen soll nicht gerührt werden, solange es nicht auf friedliche Weise geht — wenn man eben Kriege vermeiden will, d. h. wenn man Menschenleben höher schätzt als irgend eine national-politische Konstruktion.

Kulturelles, also auch nationalkulturelles Leben kann fast ganz unabhängig sein von Größe wie von Form der Landkarte, und wenn selbst die Verbindung der politischen Einigung mit der nationalen auch eine gewisse Steigerung des Kulturlebens ermöglichen sollte, so darf doch ein solcher Gewinn nicht entfernt erlauben, Menschen dem Tode zuzuführen, d. h. deshalb es auf Kriege ankommen zu lassen.

Alle jene, die Menschenleben nationalistischen oder allgemeinkulturellen Idealen zuliebe aufs Spiel setzen, also das Nationalitätsprinzip in die äußere Politik ‹oder in die innere› bis zur Entfachung des Krieges hineintragen, sind ja doch nicht anders als wie Massenmörder aus Luxusbedürfnissen anzusehen und zu behandeln, sie mögen noch so sehr als Enthusiasten, als uneigennützige Sprachforscher, als ganz ehrliche Ethnographen, als Kunstbegeisterte oder als durch die Vergangenheit ihres Volkes tief gerührte Historiker auftreten.

Daß aber trotz aller Macht nationaler Ideen ein Staat sehr mächtig sein kann, ohne daß er ein einheitlich nationaler ist, beweist am besten der römische Staat. Denn die Römer sind — wie Rümelin hervorhob — das erste Beispiel eines nicht ethnographischen, sondern politischen Volkes.

Die Anwendung des Gesagten auf die Verhältnisse in Europa liegt auf der Hand, und um nur ein Beispiel anzuführen,

spreche ich von den Deutschen. In Nordamerika leben Millionen Menschen deutscher Abkunft, die zwar gute Amerikaner sind, aber sich doch mit den Reichsdeutschen kulturell eins fühlen, sie haben Sympathien mit dem deutschen Volk als Ganzes, mit der deutschen Literatur und Kunst, mit seinen Fortschritten jeder Art, aber wem wird es einfallen zu sagen: Diese Sympathien und dieses kulturell-gemeinsame Empfinden sei ohne Wert, solange das Deutsche Reich Nordamerika nicht — erobern und annektieren kann? Und analog verhält es sich mit den zahlreichen Irländern in Amerika. Allerdings, wenn das große Wasser zwischen beiden Staaten nicht vorhanden wäre, wer weiß, ob nicht die alldeutschen Heißsporne — die immer weiter erobern möchten und die man zu den heftigsten Chauvinisten aller Länder rechnen muß — nicht auf einen Krieg mit den Vereinigten Staaten hinarbeiten würden? Obwohl sie es jeden Tag bitter empfinden, wie manche Bewohner von Elsaß-Lothringen die deutsche Landkarte aus nationalen Gründen verkleinern wollen und die preußischen Polen dasselbe wünschen und die Nordschleswiger auch nichts anderes anstreben. Und jetzt, während des Weltkrieges, forderten alldeutsche Vereine Belgien und Nordfrankreich als — »urdeutschen Kulturboden«. Und warum? Wie begründen sie das? Weil schon im IV. und V. Jahrhundert »germanische Scharen« ihn bevölkerten!

Man darf hier nicht die Einwendung erheben, daß die deutschen Staaten ebenfalls so lange nach einer Einigung trachteten, bis sie gelungen war. Das geschah jedoch, ohne einem anderen Staate etwas wegzunehmen, denn die Eroberung von Elsaß-Lothringen hat mit der Einigung direkt gar nichts zu tun, sie ist für sie ganz gleichgültig und ergab sich nur aus militärischer Sicherung vor französischen Angriffen. Eben dasselbe gilt für Nordschleswig. Immer handelte es sich, dem Einheitsziele nach, nur um die Erreichung einer gewünschten neuen Form des Zusammenlebens benachbarter deutscher Länder. Eine politische und dadurch in gewissem Grade erhöhte kulturelle Einheit der Deutschen hätte ohne alle Schwierigkeit schon längst erreicht werden können, wenn nicht undeutsche Staaten, dynastischer Egoismus und kulturelle Feinde des Deutschtums ihr Widerstand geleistet hätten.

Das Nationalitätsprinzip spielte in der neueren Zeit und teilweise auch in dem jetzigen Weltkrieg eine große Rolle, jedoch fast ausschließlich zum Unglück der Menschheit. Aber trotz aller seiner Exzesse darf man nicht blind oder ungerecht sein und diesen eigentümlichen Trieb durchaus verdammen oder wegwünschen. Das nationale Gefühl, das jetzt die Staaten mehr beeinflußt und erregt als das religiöse, und an Stärke fast mit diesem Gefühl zur Zeit seiner höchsten Macht vergleichbar ist, kann in der Tat Menschen glücklich machen und hat dabei den Vorzug vor der Religion, daß es vollständig frei von Absurditäten und Widersprüchen gegen Vernunft und Wissenschaft und sehr oft auch gegen Moral ist oder, besser gesagt, sein kann.

Das nationale Gefühl ist eine der verschiedenen Abarten des Solidaritätsgefühls und als Gefühl geradeso berechtigt wie das Staatsgefühl, das religiöse oder das Familiengefühl. Es vereinigt Millionen von Menschen in ganz eigentümlicher Weise, der so wie den anderen oben genannten Empfindungen ein gewisses, mehr oder weniger oberflächliches, mitunter auch ein ernsteres Pietätsgefühl zugrunde liegt, und dieses Gemeinsamkeitsgefühl kann sich sowohl auf die gegenwärtige wie auf längstvergangene Generationen erstrecken. Dabei kommt es auf den inneren Wert aller der vielen Anlässe zum Erwecken desselben gar nicht an und selbst der nüchternste Intellektuelle kann dies und jenes — vielleicht das meiste — dabei leer, ja kindisch finden, dennoch mag er sich damit selbst für seine eigene Person zufriedengeben, d. h. es nicht verachten, wenn er nur dabei bedenkt, daß es sich hiebei um nichts anderes als um den Ausdruck des an sich gewiß nicht unedlen, oft ganz realen Gemeinsamkeitsgefühls handelt, das ja bei den meisten Menschen ein so ausgesprochenes Gemütsbedürfnis ist.

Auch religiöse Zeremonien und Kultgebräuche schlingen um die meisten Menschen ein fast unzerreißbares Band und es kommt dabei auf den Inhalt und Sinn dieser Zeremonien und Gebräuche gar nicht an. Die Manifestation der Gemeinsamkeit ruft das Gefühl der Einheit hervor und bewegt das Gemüt. Der Zusammenhalt der religiösen Gemeinde beruht geradeso wie die nationale Gemeinschaft in hohem Grade oder wenigstens zum Teil sozusagen auf einem oft wiederholten Nichts. Weder Denken

noch Wollen spielen hier eine Rolle, es ist wie Zauberei, und oft eine Zauberei, die nicht mit sich spassen läßt!

Ja, man kann sagen, die sogenannten Nebensachen seien in den positiven Religionen Hauptsache und die Hauptstützen ihrer Dauer. Wenn Zeremonien, Kultgebräuche und andere noch geringere Attribute des kirchlichen Lebens sich allmählich verlieren und gar stückweise abbröckeln, so wird das ganze religiöse Gebäude baufällig, die Gemeinschaftsgefühle und ihre Kraft hören auf und wenn auch die Metaphysik oder die Legenden dieser Kirche noch so schön sind, so bleibt von der positiven Religion doch nichts übrig, was volles Leben anzeigt und für die Massen anziehende und gegen Außenstehende innere Kraft beweist.

Diese Auffassung, daß es nicht der Inhalt einer Volksgewohnheit ist, sondern der Ausdruck des Gefühls der Gemeinschaft, das sich in dieser oder jener religiösen Zeremonie, in der speziellen Sitte und dergleichen manifestiert, erklärt den Schmerz oder den Ärger, ja die Wut darüber, daß sich jemand gewissermaßen treulos und verräterisch ausschließt, also aus der Gemeinschaft austritt. Die Gemeinschaft verlassen erscheint einerseits als Mißachtung und andererseits als Renegatentum und das gilt zwar besonders bezüglich einer religiösen Gemeinschaft, aber auch für die nationale und soziale.

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Dieses Gefühl ist nicht zu verwechseln mit jenem Solidaritätsgefühl, das die Rechtsphilosophen und die Sozialökonomen ihren Betrachtungen zugrunde legen, um praktische Folgerungen für die rechtliche oder wirtschaftliche Gesetzgebung ziehen zu können. Ihnen ist die gegenseitige Abhängigkeit der Menschen und, wie es Leon Bourgeois ausdrückt, das »Zusammenwirken unter wechselseitiger Abhängigkeit« die Hauptsache und sie — namentlich viele französische Nationalökonomen und Philosophen — suchen dann die »Verpflichtungen des Individuums gegen die Gesellschaft und umgekehrt« zu erforschen[1].

[1] Man sehe die vortreffliche Darstellung dieses Gegenstandes in dem Aufsatz: »Die Solidaritätsphilosophie in Frankreich« von Professor Dr. Siegmund Feilbogen in der im Jahre 1915 erschienenen »Festschrift für Wilhelm Jerusalem«.

Hier aber handelt es sich um das Verständnis bloßer Gefühle, noch bevor man an ihren Nutzen oder Schaden denkt, eines Gemütszustandes, bei dem irgendwelche praktische Folgen noch nicht bedacht und höchstens matt und unbestimmt geahnt werden.

Es ist daher korrekter, um Mißverständnisse zu verhüten, diese Gefühle nicht als Solidaritäts-, sondern als Gemeinschaftsgefühle zu bezeichnen.

Und es ist das gewiß eine merkwürdige und noch nicht genügend beachtete Seite der menschlichen Psyche, um die es sich hier handelt. So wie es genügt, irgend eine Behauptung, mag sie noch so unbegründet, ja unsinnig sein, durch genügend häufiges Wiederholen den Menschen plausibel oder sogar ohne alle Plausibilität glaubhaft zu machen, so genügt es, irgend eine an sich noch so bedeutungslose Tätigkeit, Stimmung oder Gewohnheit an vielen Menschen der Umgebung öfter zu bemerken, um darin etwas Wertvolles und Nachahmenswertes zu finden und einer solchen Suggestion zu unterliegen. Diese vielen Wiederholungen wirken so betäubend ein wie das beständige Anblicken eines Knopfes bei der Hypnose.

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Das ist anwendbar auf das Staats-, das Familien-, das Nationalitäts- und auf das religiöse Gefühl. Die Vernunft mag zum Beispiel die beiden letzten Gefühle in einzelnen praktischen Gestaltungen noch so sehr geringschätzen.

Es steckt etwas Angenehmes, mitunter sogar Beglückendes in dem Gemeinsamkeitsgefühl, auch wenn man von jedem etwaigen Vorteile der Gemeinschaft absieht. Und, was jenem Gefühl zugrunde liegt und sein Anlaß ist etwas überraschend einfaches, nämlich die Tatsache, daß eben eine größere oder kleinere Anzahl von Menschen irgend etwas Gemeinsames haben, was nicht zu den elementaren Lebensbedingungen gehört.

Und es hat gewiß auch etwas ungemein Beruhigendes, von einem, wenn auch noch so wenig klaren oder vernunftsmäßig gerechtfertigten Gefühl für seinen Staat oder seine Nation oder seine Religion erfüllt zu sein. Es ist das ein Bewußtsein stiller eigentümlicher Verwandtschaft, welches solche Menschen erwärmt, eben bloß als Folge irgend eines Gemeinsamen. Im letzten Grunde ist es wahrscheinlich die Sicherheit, mit so vielen Menschen

einig und einträchtig zu sein, daher umso gewisser, mit ihnen im Friedenszustande leben, eventuell mit ihnen zusammen äußere Gegner oder ‹bloß› Fremde bekämpfen zu können.

Ein solches Gefühl kann Menschen erwärmen und viel wohler tun, als irgend eine aus gegenseitigem Nutzen oder gemeinsamen Interessen hervorgehende und gewußte Solidarität. Ein derartiges Gefühl kann es sogar dahin bringen, daß eine Mutter, die ihren Sohn im Kampfe für das Vaterland verliert, ohne jede weitere Reflexion über die Veranlassung des Krieges, anstatt diesen Verlust zu beklagen oder gar in tiefsten Schmerz zu versinken — erfreut und stolz auf den Tod ihres Kindes ist.

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So einfach die Hervorrufung eines solchen Gemeinsamkeitsgefühls auch ist, so merkwürdig ist doch das mitunter sogar fast dämonische Resultat eines solchen Gemeinsamen, namentlich, wenn es schon in früher Jugend erlebt wird. Es wäre wert, diese Seite der menschlichen Psyche einer genaueren Untersuchung zu unterziehen, denn es ist nicht zu viel gesagt, wenn behauptet wird, daß ganz bedeutungslose Zeremonien, Ähnlichkeit von Kehllauten im Sprechen, die Gewohnheit, gemeinsam zu baden und dergleichen die Menschen vielleicht inniger miteinander verkitten als irgend etwas anderes, und daß die Welt- und namentlich die Kriegsgeschichte solchen oft nur mikroskopischen Dingen ihre Buntheit und ihre Schrecklichkeit verdankt.

Und nicht minder merkwürdig als die Wirkung eines Gemeinsamen vieler Menschen auf unsere sympathischen Gefühle ist die entgegengesetzte Wirkung von Nicht-Gemeinsamem zwischen uns und anderen, beträfen solche Unterschiede selbst die an sich gleichgültigsten Dinge. Solche Antipathien arten leicht in Haß und Feindschaft aus und da dies in der menschlichen Natur zu liegen scheint, so ist eine ethische Erziehung zur Unschädlichmachung dieser Neigungen von großer Wichtigkeit[1].

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[1] Ein belehrendes, hierher gehöriges Beispiel ist folgende Tatsache: Wenn in einer Schulklasse zu viele Schüler sind, so pflegt man sie zu teilen, und zwar nach den Anfangsbuchstaben ihrer Familiennamen, z. B. von A bis M und von N bis Z. Und da zeigt mehrfache Erfahrung, daß die beiden Klassenhälften sofort einander feindlich gegenüberstehen und raufen. Dies nur darum, weil die Anfangsbuchstaben ihrer Namen in einer anderen Gruppe stehen!

Die Staaten und die Staatspolitik basieren übrigens fast immer auf mehreren Arten von Solidaritäten oder Gemeinsamkeiten und je nach subjektivem Dafürhalten oder je nach Berechnung der Nützlichkeit für einen politischen Zweck wird bald die eine, bald die andere Solidaritätskategorie von Führern der Bewegungen als die relativ wichtigere oder als die wichtigste ausgegeben: bald die nationale, bald die abstrakt staatliche, bald die religiöse, bald die rein kulturelle. Ein Fall für viele: Ein sehr konservativer Historiker und Politiker, Niebuhr — er starb an gebrochenem Herzen, weil die Julirevolution gesiegt hatte — schrieb ‹nach dem Wiener Kongreß›, um die Annexion Sachsens durch Preußen zu rechtfertigen, auf Grund des Nationalitätsprinzips: »Die Gemeinschaft der Nation — durch Stammesart, Sitte, Sprache, Literatur und Tradition — ist höher als die Staatsverhältnisse, welche die verschiedenen Völker eines Stammes vereinigen oder trennen.« Offenbar bedachte er bei Anführung dieses Arguments nicht, daß dann beinahe alle Staaten Europas sofort auseinanderfliegen und z. B. Preußen seine polnischen Provinzen herausgeben müßte.

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Allerdings wirken zur Erweckung jenes Gemeinsamkeitsgefühls sehr oft ganz äußerliche Umstände mit: Vor allem das Hineingeborensein in eine bestimmte Nationalität, sodann die bloße Gewohnheit des Zusammenlebens, die ja auch die Hauptsache beim Familiengefühl ist; ferner in der Schule und im Leben die immer wiederholte Anregung, national zu fühlen: durch Wort, Schrift, Versammlungen, Ansammlungen mit und ohne Fahnen, durch Feiern von Gedenktagen, durch Feste mit nationaler Musik, durch Vorträge nationaler Poesien aller Art, durch national gefärbte Geschichtsschreibung, durch der Nation eigentümliche Speisen oder Speisenzubereitung, sei es an Wochentagen, besonders aber an Feiertagen.

Die letzterwähnte Art von Erweckung und Aufrechterhaltung des Nationalgefühls mag der nüchternen Vernunft gewiß als kindisch und lächerlich erscheinen, sie ist jedoch, aller Erfahrung zufolge, von einer ganz ungewöhnlichen Wirksamkeit und der auf diese Weise gewonnene Nationalist braucht sich dessen nicht allzu sehr zu schämen; es geht in anderen Gebieten, die sich auf noch viel Tieferes beziehen, auch nicht anders. Bei den positiven

Religionen z. B. wirkt u. a. beim Volke als ein Argument und Anlaß für die Sympathie und feste Anhänglichkeit an den eigenen Glauben oft die Gewohnheit, spezielle Speisen — hier ebenfalls besonders an Feiertagen — und besondere Formen von ihnen mit vielen anderen Personen desselben Glaubens zu genießen; und besonders die Kinder empfangen auf diesem Wege eine für das ganze Leben festhaftende Anhänglichkeit an ihre Religion, respektive an ihre Nation.

Wer eine neue, interessant geformte und gut schmeckende Speise erfinden und sie durch entsprechende Propaganda bei einer großen Zahl von beisammen lebenden Menschen einführen kann, leistet vielleicht mehr für das nationale oder religiöse Gefühl als jener, der einen neuen Nationalhelden oder Heiligen erfindet.

Eine andere, scheinbar unwesentliche Eigentümlichkeit, die aber von sehr starker Wirkung auf ein Gleichartigkeits- und hiedurch auf das Nationalgefühl ist, bildet die Gleichheit der Tracht. Viele, die stets oder lange Zeit hindurch eine internationale ‹kosmopolitische› Kleidung trugen und dann ihre Landsleute in ihrer altererbten Gewandung sehen, werden durch die auftauchenden Stammes- und Heimatsgefühle mehr gerührt, als durch die schönsten Kunstwerke oder die wärmsten ethischen Tatsachen. Diese propagandistische Kraft der Nationaltracht würdigten z. B. die Engländer, als sie den aufständischen Schotten nach der Schlacht bei Culloden ‹1746› die nationale Tracht bei strenger Strafe verboten; und viele Beispiele des großen Einflusses der Nationaltracht aus neuerer Zeit, besonders bei kleineren Nationen ‹z. B. Magyaren, Tschechen u. a.› sind ja ebenfalls wohl bekannt.

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Aber die Wichtigkeit der nationalen Tracht und anderer analoger Eigentümlichkeiten für die Entstehung und Festigung des Staatsgefühls, und zwar für den nationalen Staat, hebt befürwortend ein Mann hervor, von dem man es kaum erwarten sollte. Während Rousseau in seinem im Jahre 1762 publizierten Contrat Social den Staat in ganz abstrakter Weise auffaßt, immer nur vom »Volk« spricht und sich für Nationalitätsgedanken gar nicht interessiert, legt er in den Considérations sur le gouvernement de Pologne et sur la réformation projétée, die im Jahre 1772 erschienen, gerade auf das spezifisch Nationale

das größte Gewicht und bezeigt gegenüber jedem Kosmopolitismus sowie jeder Vereinheitlichung der Menschheit seine volle Antipathie.

»Die Polen,« heißt es dort, »sollen sich nicht mit anderen Völkern verschmelzen. Sie sollen eine große Meinung von sich selbst und ihrem Vaterlande haben . . . . Ich betrachte es als ein Glück, daß die Polen eine besondere Kleidung haben . . . . Erhalten Sie sorgfältig diesen Vorteil, niemand soll anders gekleidet sein.«

In diesem Geiste, der genau der der heutigen Nationalisten ist, spricht sich Rousseau an vielen Stellen jener Schrift aus. Er spricht über Numa, der die Stadt »dieser Räuber« zu einem »heiligen Orte machte durch diese frivolen und abergläubisch scheinenden Riten, deren Effekt die Leute nicht ahnen . . . .« »Durch was die Herzen bewegen, Gesetze und Vaterland zu lieben? Wage ich es zu sagen? Durch Jugendspiele, durch Institutionen, die in den Augen oberflächlicher Leute müßige sind, die aber unbesiegbare Anhänglichkeit und teuere Gewohnheiten hervorbringen.« Selbst die Stiergefechte sind ihm recht, er empört sich nicht über diese furchtbare Abart sadistischer Grausamkeit, denn »sie haben nicht wenig dazu beigetragen, um die Kraft der spanischen Nation zu erhalten«.

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In allem diesen zeigt sich die Gleichgültigkeit, ja Antipathie gegen die Forderungen einer höheren Kultur, wie auch Gleichgültigkeit gegen jedes Bestreben, die Menschen nicht den dumpfen, ja verdummenden Betäubungen durch Unvernunft und irrationelle Suggestionen auszuliefern.

Als Tatsache ist ja alles, was Rousseau hier sagt, richtig und stimmt ganz mit dem überein, was ich oben, ebenfalls als Tatsachen, angeführt habe. Der Unterschied ist jedoch der, daß Rousseau mit ihnen einverstanden ist, ich aber sie, wie man wohl herauslesen kann, nur mit einer gewissen Mißachtung und wahrem Schrecken vor so manchen schlimmen Konsequenzen begleite.

Ein bedeutender Unterschied zwischen Rousseaus hier aufgezeigtem Nationalismus gegen jenen, der seit ungefähr hundert Jahren eine so große Rolle spielt, ist jedoch, und zwar darin

vorhanden, daß jener nicht aggressiv-politisch aufgefaßt wurde und frei von jedem Expansionsbestreben blieb. Man kann also mit vollem Rechte behaupten, daß das achtzehnte Jahrhundert auch in dieser Beziehung gesitteter und aufgeklärter als das neunzehnte und das bisherige zwanzigste war.

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Bei der gebildeteren Jugend und bei älteren Personen wirkt die Vorstellung, mit längst vergangenen Generationen, ja mit wirklich oder vermeintlich stammverwandten Urvölkern biologisch verwandt zu sein, sehr stark nationalisierend ein. Es ist oft rührend zu beobachten, wie hinschmelzend viele ihren »organischen« oder auch kulturellen Zusammenhang mit Ahnen empfinden oder wenigstens zu empfinden glauben, letzteres ähnlich wie der Mystiker seine Einheit oder Vereinigung mit Gott. Dabei kommt es gar nicht auf irgend einen moralischen oder sonst kulturellen Wert dieser Ahnen an. Bemerkenswert ist hiebei der wesentliche Unterschied zwischen diesen Urgefühlen und dem Ahnenkultus der Chinesen und Japaner. Denn bei diesen werden eben diese Ahnen verehrt, bei den Urgefühlen unserer Zeit aber eigentlich ihre Nachkommen, also stets die lebenden Generationen, es ist also mehr eine Sache der Eitelkeit und Einbildung. Daher kommt es auch, daß die ostasiatische Ahnenverehrung so viel Gemütswärme besitzt auch für ‹ethisch gesinnte› Europäer und sie so gut die Stelle einer Religion vertreten kann, die nationalen Urgefühle aber jedem Außenstehenden jedenfalls als kindisch, wenn harmlos als rührend, wenn sie zu Aggression verleiten, als doppelt widerwärtig erscheinen.

Ein deutscher Jüngling, der für Achilles gar kein wärmeres Interesse hat, kann in den Siegfried der Sage oder des Wagnerschen Musikdramas wie verliebt sein und er hat ernstlich die Vorstellung, mit ihm biologisch verwandt zu sein, ja er hat die Überzeugung, dieselben Eigentümlichkeiten, die er unbedingt als Vorzüge ansieht, wenn auch vielleicht in viel geringerem Grade, wie jener zu besitzen. So war es z. B. bei jenem jungen Norweger, der in einer Gesellschaft von Deutschen und Dänen mit größtem Stolz hervorhob, er, als Norweger, stamme von den Urgermanen ab!

Kann man aber gar den ‹eventuell vermeintlichen› Ahnen mit Sicherheit besondere Vorzüge und Leistungen zuschreiben,

so erreicht das Gemeinsamkeitsgefühl noch eine besondere Verstärkung durch die stolze Einbildung, Teil zu haben an diesen Vorzügen[1], wobei man merkwürdigerweise es sich aber nicht einfallen läßt, auch auf die Leistungen irgend einer anderen bestehenden Nation oder Urnation, wenigstens als Mensch, stolz zu sein, worin sich eben das ausgesprochene Nationalitätsgefühl gewissermaßen in Reinkultur zeigt.

Aber nur ein Mangel an Verstand kann zu der Meinung führen, es gäbe ein »auserwähltes Volk« oder unter den Völkern einen »auserwählten Kulturträger«. Und kommt zu diesem Mangel an Verstand auch noch ein Überfluß an Eitelkeit hinzu, so kann man glauben, gerade das eigene Volk sei jener auserwählte Kulturträger.

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Während aber hier immer über »Nation« und »Nationalitätsprinzip und -gefühl« gesprochen wird, vermißt man wahrscheinlich eine präzise Erklärung dieser Begriffe, obwohl gewiß jeder Leser eine genügend konkrete Vorstellung von dem sozialen Gebilde einer Nationalität besitzt. Man sieht hier eben wieder, wie in vielen anderen Wissensgebieten, wie relativ überflüssig eigentlich Definitionen sind und auch, wie schwierig ihre Aufstellung ist. »Nation« ist ein soziologischer Begriff, man könnte es daher noch hinnehmen, daß er schwer so zu definieren ist. Es sind ja auch in der Tat »weder die Soziologen noch die Philosophen über den Begriff der Nation einig!«

Bagehot und nach ihm Ruedorffer meinten, die Nation sei eine der vielen Erscheinungen, von denen wir wissen, was sie sind, solange wir nicht gefragt werden, die wir aber nicht kurz und bündig erklären können. Und der englische Politiker Maine sagt, ganz genau könne niemand sagen, was das Nationalitätsprinzip ist und gerade diese Unbestimmtheit mache es so gefährlich.

Sollte sich jemand über diesen Stand der Dinge verwundern und glauben, er könne ganz gut sagen und bestimmen, was eine Nation sei, so sei zu seiner Aufklärung folgende Stelle aus dem

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[1] Ich erinnere mich daran, wie einmal ein junger Arier sich nicht wenig stolz gebärdete, weil »auch« James Watt ein – Arier war, also sie beide aus gleichem Stoffe seien.

⟨ausgezeichneten⟩ Werke »Die Nationalitätenfrage und die Sozialdemokratie« von Otto Bauer zitiert:

»Ist die Nation eine Gemeinschaft von Menschen gleicher Abstammung? Aber die Italiener stammen von Etruskern, Römern, Kelten, Germanen, Griechen und Sarazenen, die heutigen Franzosen von Galliern, Römern, Briten und Germanen, die heutigen Deutschen von Germanen, Kelten und Slawen ab.

Ist es die Gemeinschaft der Sprache, die die Menschen zu einer Nation vereint? Aber Engländer und Iren, Dänen und Norweger, Serben und Kroaten sprechen dieselbe Sprache und sind darum doch nicht ein Volk. Die Juden haben keine gemeinsame Sprache und sind darum doch eine Nation.

Ist es das Bewußtsein der Zusammengehörigkeit, das die Nation zusammenschließt? Oder soll der Tiroler darum kein Deutscher sein, weil er sich der Zusammengehörigkeit mit Ostpreußen und Pommern, Thüringern und Elsäßern nie bewußt geworden?«

Wir wollen diese Fragen noch durch eine andere Stelle ⟨aus Hans Delbrücks Werk »Regierung und Volkswille«⟩ ergänzen. Man spricht ja so leichthin von »Deutschen« und »Deutschtum« im heutigen deutschen Staat, in der Meinung, hier sei – abgesehen von Posen, Elsaß und Nordschleswig – die vollkommene »nationale« Einheit vorhanden. Unterdessen

»sind die Elsaß-Lothringer der Abstammung nach zum Teil Alemannen, zum Teil Franken, zum Teil Franzosen. Sämtliche Deutsche am Rhein wie südlich des Mains sind sehr stark gemischt mit Kelten, Rhätiern und anderen romanisierten Völkern, alle Gebiete östlich der Saale und Elbe wiederum mit Slawen, Preußen und Lithauern. Nur ein geringerer Teil des deutschen Volkes: Hannover, Westfalen, Braunschweig, Oldenburg sind in der Hauptsache Germanen.«

Wenn wir diese Angaben auch nur halbwegs ernstlich überdenken, so fühlen wir uns in der Tat gezwungen, zu fragen: Hat es den geringsten Sinn, daß Menschen, die sich als zugehörig zu irgend welchen verschiedenen Nationen rechnen und eventuell auch fühlen, sich gegenseitig die Köpfe einschlagen? Was wird z. B. ein fanatischer Deutscher aus der Rheingegend sagen, wenn man ihm – etwa auf heraldischem oder einem anderen Wege – beweisen würde, seine Familie stamme von

Kelten ab? Wie stünde er beschämt vor den »echt-deutschen« Männern da? Sofort würden diese ihn aus der biologischen Nationaleinheit hinauswerfen und, wenn der arme deutsche Kelte erwidern wollte, es komme auf die »geistige Einheit« einer Nationalität an und er sei in die deutsche geistige Einheit ganz und gar versenkt und untergetaucht, so würde ihm diese Einrede gewiß nichts nützen. Geistige Einheit, wird es heißen, genüge und entscheide nicht, diese Art von Einheit kann vorgetäuscht werden, sie könne, wenn sie ernstlich vorhanden ist, erworben, durch das Milieu, durch Studien und dergleichen angeeignet werden, aber — geborenwerden stehe himmelhoch über erwerben! In die Nation hinein geboren werden, sei ein tiefer, nahezu mystischer Prozeß, ein organischer Prozeß, eine geistige Akkommodation jedoch sei nur ein oberflächlicher Vorgang. Offenbar ist diese Ansicht genau dieselbe, derzufolge der Erbadel einen so unausrottbaren Hochmut besitzt, der sich und anderen darin zeigt, daß das größte plebejische Genie einem Aristokraten selbst niederster Stufe nicht zu imponieren vermag!

Solche Enttäuschungen kommen in Wirklichkeit sehr häufig vor, und wenn man nicht gerade als Kelte demaskiert wird, doch umso häufiger mehr oder weniger als Deutsch-Slawe oder als Deutsch-Jude oder als Englisch-Deutscher.

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Unter den einseitigen Auffassungen des Nationalitätsgedankens spielt jedenfalls gerade die nach der Abstammung eine hervorragende Rolle. »Ein Volk kann nur nach der Analogie des Lebendigen, des Menschen begriffen werden . . . Anorganisch muß jedes Ganze heißen, das durch die Gesamtheit seiner Teile bestimmt ist, organisch: das Ganze, das nie aus den Teilen und dessen Teile nur aus ihm begriffen werden können . . . oder Naturzweck ⟨ist⟩: ein Ganzes, dessen Teile sich zueinander wie Mittel und Zweck verhalten, das also als Ganzes für alle Teile Zweck ist und von dem aus gesehen alle Teile als Mittel erscheinen« ⟨Ruedorffer⟩.

Mit dieser Distinktion zwischen »organisch« und »unorganisch« ist jedoch für das Verständnis der Nationalität nichts gewonnen und umsoweniger, als die eben angeführte nähere Erläuterung des Organischen wertlos ist. Denn die Bestimmung,

daß »das Ganze nie aus den Teilen und dessen Teile nur aus ihm begriffen werden können« und »von dem aus gesehen alle Teile sich zueinander wie Mittel und Zweck verhalten und alle Teile als Mittel erscheinen«, paßt, wie im XII. Kapitel bereits hervorgehoben wurde, genau z. B. auch auf ein Gewölbe oder die Kette einer Kettenbrücke, auch für diese gilt die Auffassung, daß jeder einzelne Stein ⟨Eckstein, Schlußstein, Mittelsteine⟩ oder jedes einzelne Glied ⟨der Kette⟩ als Mittel zum Zwecke des Ganzen dient.

Weniger unbestimmt lautet die von Otto Bauer aufgestellte Definition der Nation: als »die Gesamtheit der durch Schicksalsgemeinschaft zu einer Charaktergemeinschaft verknüpften Menschen«. Aber auch diese Begriffsbestimmung erscheint mir nicht befriedigend. »Charaktergemeinschaft« ist ein viel zu elastischer Begriff, der Charakter einer Nation kann zu weit oder zu eng aufgefaßt werden und es wird immer davon abhängen, welche Eigenschaften oder Eigenheiten besonders hervorgehoben werden und überdies sind es in vielen Fällen ganz andere Dinge als die Charaktergemeinschaft, auf denen das Nationalgefühl und -bewußtsein beruht.

Was aber richtig und auch wertvoll zu sein scheint, ist die Behauptung Bauers, daß das Nationale, der Nationalcharakter veränderlich sei: das folgt ja unmittelbar aus dem Wechsel des historischen Geschehens im Laufe der Zeiten.

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Die treffendste Darlegung dessen, was im Nationalgefühl im letzten Grunde steckt, ganz unabhängig von seinem Ursprunge, scheint mir jene zu sein, die der große Literaturhistoriker Gaston Paris in einem Vortrage im Dezember des Jahres 1870, also während des deutsch-französischen Krieges, vertreten hatte, und seine Ideen, unter diesen Umständen in Paris ausgesprochen, zeigten, wie sehr er verdiente, nicht nur zu den gebildetsten, sondern auch zu den gesittetsten Geistern des neueren Frankreich gezählt zu werden. Also Paris sagte im wesentlichen folgendes[1]:

»Ein rein materielles Nebeneinanderleben einer gewissen Anzahl Menschen, welches durch Gewalt bewirkt und durch

[1] Nach einem Bericht in der Beilage der »Münchener Allgem. Zeitung«.

Gewohnheit aufrecht erhalten wird, schafft noch keine Nation, gibt noch kein Vaterland im wahren Sinne des Wortes. Ebensowenig genügt dazu die Gemeinsamkeit der Interessen, denn diese ist überdies viel zu sehr der Gefahr der Auflösung ausgesetzt und vermag, da sie sich auf den Egoismus basiert, nichts zu schaffen, was sie selbst einen Augenblick überleben könnte. Bande ganz anderer, höherer und zarterer Natur sind es, welche zwischen den Menschen diese engen und geheiligten Beziehungen herstellen, die nur das vergrößerte Abbild der Familiengemeinschaft darstellen ... Das Nationalbewußtsein kann, obwohl einheitlich in seinen Offenbarungen, doch verschiedene Quellen haben, sich auf verschiedene Weise entwickeln. Bald beruht es auf der Rasse, bald auf der Kultur, bald auf der Religion, oft auch auf einer Lebensgemeinschaft, welche lange genug gedauert hat, um zur zweiten Natur zu werden. Dieser letzte Ursprung ist sogar im Grunde der, auf welchen die Analyse alle anderen Ursprungsarten zurückführt ... Was aber auch die direkte Quelle des nationalen Lebens sei, es bekundet sich ... auf gleichartige Weise, nämlich: durch die Vaterlandsliebe. Durch sie gerade unterscheidet sich der Organismus einer Nation gründlich von dem Mechanismus eines Empire. Eine Nation ist tatsächlich nur vorhanden, solange sie liebt und geliebt wird. Wahrlich, die Liebe werden Sie als Grundlage jeder wirklichen Nationalität finden. Nur diejenigen sind Brüder und Glieder eines und desselben Körpers, welche etwas gemeinschaftlich lieben. Und die einzelnen Nationen können recht verschiedenartige Dinge lieben, und es ist auch keineswegs nötig, daß ihre Liebe durchaus vernünftig und gerecht sei.«

Vielleicht sollte dieses Gemeinschaftliche der vier von mir oben angeführten Kollektivgefühle genauer durch »Anhänglichkeit« als durch »Liebe« bezeichnet werden[1]. Denn Anhänglichkeit findet bei allen vieren statt, Liebe aber eigentlich nur beim Nationalitäts- und sehr oft beim Familiengefühl. Und in der Tat kann diese Liebe zur eigenen Nationalität, geradeso wie die geschlechtliche Liebe, einen Hitzegrad erreichen, der weder bei der Pietät gegen-

[1] Dann könnte auch das Heimatsgefühl jenen vier Kollektivgefühlen angereiht werden.

über dem Vaterland oder der Familie, noch kaum der Religion gegenüber erreicht zu werden pflegt, was man allen Erfahrungen nach wohl behaupten kann, wenn man bei der Religion selbst die heftigste Bigotterie und den wütendsten Fanatismus nicht mit »Liebe« zu ihr verwechselt. Gerade in unseren Tagen, in hohem Grade in Frankreich und in höchstem Maße in Groß-Rußland — das man oberflächlicherweise als »Rußland« bezeichnet — zeigt sich die Liebe zur eigenen Nationalität so schrecklich in Art und Grad, daß man auf diese Art von Liebe die Worte Turgenjews anwenden kann: »Die Liebe ist kein Gefühl, sondern eine Krankheit des Geistes und des Körpers.«

Wenn wir bei jemandem irgend eines der oben angeführten Kollektivgefühle wahrnehmen, so darf uns das ja nicht verführen, es als Beweis und Garantie eines ethischen Gesamtcharakters anzusehen. Besonders dann nicht, wenn jenes Gefühl als ein überhitztes oder gar fanatisches zutage tritt.

Am leichtesten wird man durch die Wahrnehmung patriotischer Gefühle getäuscht, was seinen Grund darin hat, daß sie sich auf die so mächtige und umfassende Institution des Staates beziehen. Man findet in der Geschichte und im privaten Leben selten einen Menschen von fanatischem Patriotismus, der den Eindruck eines im ganzen ethischen Menschen macht und dessen patriotische Taten die Wärme einer moralischen Natur verraten. In dieser Beziehung wird unsere Jugend in hohem Grade durch die Geschichtsschreiber des Altertums und ihre Interpretation zu unrichtigen Werturteilen verleitet, und was Teilhaberschaft am gemeinschaftlichen Staatsgeschäft ist, wird als Tugendäußerung ausgegeben. Selbst als Patrioten so hoch gerühmte Männer, wie unter anderen Coriolanus und Themistokles, traten, wenn sie sich vom Volke gekränkt fühlten, ihrem Vaterlande entgegen, was doch klar beweist, daß ihre Person ihnen viel wichtiger war als ihr eigenes Volk. Als Alexander der Große Mazedonier, Griechen und Asiaten in einer großen Kultur vereinigen wollte, und als Julius Cäsar auch Gallier anstellen und allen italienischen Bundesgenossen das Bürgerrecht geben wollte, hieß es von beiden, sie seien keine wahren Patrioten. Aber derselbe Cato Censorius, den Plutarch und andere nicht genug als Patrioten und als Muster von Tugend emporheben können, sprach den Grundsatz aus und handelte darnach: daß der

Sklave, nachdem von ihm so viel Arbeit wie möglich gewonnen wurde, vertrieben werden müsse, um zu sterben.

Und es erscheint mir ganz am Platze, hier darauf aufmerksam zu machen, daß weder Liebe noch Anhänglichkeit, ja daß persönlich ganz uninteressierte Gefühle überhaupt darum auch sehr gute oder edle Gefühle sein müssen. Die Liebe eines Menschen zur Natur, Kunst oder Wissenschaft wie auch zu Personen anderen Geschlechtes verbürgen nicht im mindesten seinen ethischen Charakter; und ungleich öfter finden wir sogar echte Begeisterung für irgend welche sogenannte Ideale als ernste theoretische oder praktische Teilnahme an menschlichen Schicksalen.

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Von Wichtigkeit ist es, zu wissen, daß es bei Erweckung des nationalen Bewußtseins sowie eines nationalen Gefühls gar nicht darauf ankommt, auf welche Weise es entsteht.

Es wurden wohl schon oben einige solche Anlässe und Erregungsarten des Nationalgefühls angeführt, und darunter mehrere solcher Art, auf die der Nationalist durchaus nicht stolz zu sein braucht, die aber doch bei mangelhaften Intelligenzen und mitunter selbst bei ausgebildeteren Geistern genügen, ihnen warm oder sogar heiß zu machen. Die Zahl der Entstehungsarten jenes Gefühls ist jedoch eine viel größere als die der angeführten und es ist daher schwer, sie vollständig aufzuzählen.

So z. B. genügt es, daß in der Familienwohnung des Knaben irgend ein bei einem Trödler gekauftes Bild hängt, von dem der Vater oder der Erzieher behauptet, es sei das Porträt Karls des Großen oder Barbarossas, — von denen doch überhaupt kein Bild uns überkommen ist — ohne daß also irgend eine Ähnlichkeit zwischen dem Bilde und jenen Männern vorhanden ist. Wenn nun dem Knaben in begeisterten Worten von den Taten Karls oder des Rotbarts, als von Vorfahren ausgeübt, erzählt wird, dabei nur Gutes und Großes von ihnen gesagt, alles Schlimme aber verschwiegen und dieser Geschichtsunterricht einige Zeit fortgesetzt wird, so ist der junge Mensch gewiß für die Nationalität jener Persönlichkeiten gewonnen, und dabei ist als sicher anzunehmen, daß der bloße nur in Worten bestehende Unterricht nicht entfernt so tiefe Wurzeln im Gemüte des Knaben gefaßt hätte, wie das durch jenes wertlose Bild ohne alle Realität geschah.

Es sind hauptsächlich drei Sinne, durch die ein Nationalgefühl erweckt werden kann, ohne daß Bildung oder Vernunft oder ein ethisches Gefühl hiebei mitwirken.

Der Gesichtssinn: durch wirkliche oder angebliche Bilder von sehr verehrten oder berühmten Männern, denen man sich aus bekannten oder unbekannten Gründen als zugehörig betrachtet; durch Farben der Fahnen, der Kokarden und Medaillen; durch Trachten; durch eigentümliche Physiognomien, die man mehr oder weniger ausgeprägt auch selber besitzt und die man für sehr schön oder sehr edel anpreist, sowie durch den besonderen völkischen Haar- oder Bartwuchs.

Der Gehörsinn: durch die als national akzeptierten Hymnen und Melodien; überhaupt durch den akustischen Eindruck der Sprache.

Der Geschmackssinn: durch als national betrachtete Speisen und mitunter auch durch so deklarierte Getränke und was mit ihnen zusammenhängt; so z. B. dürfte der »Samowar« der Russen höchst wahrscheinlich ein ziemlich wichtiges Attribut des russischen Nationalgefühls und des damit zusammenhängenden Behagens und Genügens bilden.

Der Geruchssinn spielt im Nationalgefühl — so viel ich weiß — nur eine negative Rolle. Es ist mir nicht bekannt, daß ein spezifischer Geruch zu den Vorzügen der eigenen Nation oder Rasse gerechnet wird, wohl aber zu den unangenehmen Eigenschaften einer solchen, der man nicht angehört, und in solchem Falle trägt der Geruchssinn nicht wenig — auf indirekte Weise — zum festeren Zusammenschlusse der eigenen Nationsgenossen und zur heftigeren Antipathie und Bekämpfung jener anderen Nation oder Rasse bei. Ein sehr instruktives Beispiel bieten die Vereinigten Staaten Nordamerikas, wo die Weißen den Geruch der Schwarzen nicht ausstehen können oder wollen und daher in den Waggons der Eisenbahn- und elektrischen Bahnen separierte Coupés verlangen. Dann entstand in Deutschland und besonders in Preußen ⟨und wohl auch in Sachsen⟩ die Behauptung eines unangenehmen spezifischen Geruches der Juden, und im jetzigen Weltkriege die angebliche oder faktische Konstatierung eines höchst unangenehmen und durchdringenden Geruches der Preußen; ein französischer Militärarzt behauptete sogar, daß er im Vorüberfahren im Aeroplan über ein preußisches

Armeekorps diesen spezifischen Preußen-Duft ganz deutlich wahrgenommen habe. Der erste aber, der den »nationalen Geruch« als einen wichtigen charakteristischen Bestandteil der Kultur bezeichnete, war wohl Fr. v. Hellwald, der in seiner »Kulturgeschichte« den spezifischen Geruch der Juden hervorzuheben für nötig fand[1].

Der Tastsinn spielt für das nationale Bewußtsein wohl gar keine Rolle.

Daß nun die Wirkungen solcher anscheinend unbedeutenden Faktoren im Hin und Her des Völkerlebens sehr stark sein können und fast immer auch sind, kann keinem objektiven Beobachter der menschlichen Sympathie- und Antipathiegefühle entgehen.

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Und hier ist zu dem Problem der Definition der Nationalität noch die Bemerkung am Platze, daß alle vorhandenen Lösungsversuche in der Tat viel zu hochtrabend sind, und daß zum Beispiel die bestechende Lösung: »aus Schicksalsgemeinschaft erwachsende Charaktergemeinschaft« in den meisten Fällen viel zu hoch greift. Man ist fast nie imstande, wenn man eine bestimmte Nation im Auge hat, eine solche ausschließliche Charaktergemeinschaft zu finden oder unbestritten zu behaupten. Man möge nur darauf achten, wie das Nationalitätsgefühl bei den einzelnen Individuen entstanden ist und überdies untersuchen, ob die behauptete Charaktergemeinschaft bei den Adepten, die ihr völkisches Bewußtsein zur Schau tragen, überhaupt zu finden ist. Man wird da gewöhnlich tief enttäuscht sein.

Viel einfacher als die Nationalität läßt sich die Rasse definieren, denn bei dieser handelt es sich um sichtbare gemeinschaftliche biologische oder psychologische Eigenschaften. Bei der Rasse spielen Kulturfaktoren und Volkssitten keine Rolle, zur Rasse muß man »geboren sein«.

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[1] Ich möchte hier an die geniale Stelle in Konrad Ferdinand Meyers Erzählung »Gustav Adolfs Page« erinnern, wo der schwedische König in tiefer Erschütterung die Nachricht aus Stockholm bekommt, die Jesuiten hätten seinem Kinde, der nachmaligen genialen Königin Christine, einen Rosenkranz aus wohlriechendem Holz geschenkt.

Also: Ein so einflußreicher Faktor im privaten und namentlich im öffentlichen Leben das nationale Gefühl auch ist, so darf man sich doch hiedurch nicht imponieren und verwirren lassen. Auf ihre Entstehung muß man achten, dann wird klar, daß die unscheinbarsten Dinge oder Vorgänge die nationalen Gefühle hervorrufen können und daß es nur die allerintelligentesten Menschen sind, die ihr völkisches Bewußtsein und Auftreten auf ernste Betrachtungen und Studien gründen. Aber ein einziges Volksfest mit Fahnen und nationalen Reden genügt, um allen alten und besonders allen jungen Teilnehmern ein Nationalgefühl für immer einzuprägen.

Wenn eine solche — nämlich die eben dargelegte — Auffassung paradox erscheinen sollte, so denke man doch daran, was für unscheinbare Details in dem Äußern oder dem Benehmen eines Mädchens einen Mann zur Verliebtheit und oft bis zur halben Raserei bringen können. Ein für die meisten Männer unsichtbarer Zug um Augen oder Nase kann auf den oder jenen die größte Anziehungskraft ausüben. Und so ist es auch bei der Entstehung völkischer Gefühle.

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Nun mag man aber irgend ein Individuum des anderen Geschlechtes noch so sehr, ja bis zur Raserei lieben, man mag seinen Eltern oder seinen Verwandten noch so sehr anhängen, niemals entsteht hiedurch das Bedürfnis, andere Individuen jenes anderen Geschlechtes oder andere Familien zu hassen. Die Konsequenz des Hasses finden wir jedoch beim Nationalitäts- und beim religiösen Gefühl, gegenwärtig dominiert, seitdem nämlich das religiöse an Heftigkeit abgenommen hat, die Haßempfindung beim nationalen Gefühl. Das ist noch nicht lange her, denn »noch die erste Hälfte des XVIII. Jahrhunderts hat Nationalbewußtsein ‹namentlich unprovoziertes›, kaum gekannt«, und »seitdem ist der Nationalismus die größte bewegende Kraft der geschichtlichen Welt überhaupt« ‹Lamprecht›, und selbst »das Wort ‚Nationalität' scheint nicht weit über den Anfang des XIX. Jahrhunderts zurückzureichen« ‹Kirchhoff›.

Nachdem der nationale Trieb sich den politischen Zusammenschluß der Nationsgenossen zum Ziele gesetzt und oft auch erreicht hatte, entwickelte er sich in der neuesten Zeit

jedoch immer mehr in aggressiver Richtung, und gegenwärtig wird, wenn vom Nationalgefühl gesprochen wird, immer diese Seite seiner Entwicklung und fast gar nie der — eben fehlende — Fortschritt in seiner inneren Veredlung hervorgehoben. In allen Enunziationen nationaler Kategorie merkt man sogar eigentlich gar wenig von Liebe zur eigenen Nation, hingegen sehr viel von Gegnerschaft gegen andere, und selbst, wenn die Sympathie oder Begeisterung für sein Volk zum Ausdruck kommt, so merkt der erfahrene Beobachter fast immer die zwar unausgesprochene, aber den Zuhörern ⟨oder Lesern⟩ ganz gut verständliche Anspielung und sogar Drohung an die Adresse irgend einer fremden Nation.

Es wird in den Betrachtungen über Nationalismus als selbstverständlich ausgesprochen, daß er nach »Weltmacht und Vorherrschaft« strebt, und daß »der Idee nach jedes Volk wachsen, sich ausdehnen, herrschen und ohne Ende unterwerfen will«. Aber das wird nicht nur als Tatsache hingestellt, sondern meistens auch gebilligt. »Traurig die Nation,« heißt es in dem Werk »Grundzüge der Weltpolitik« von J. J. Ruedorffer, »die nicht mehr glaubt, daß an ihrem Wesen die Welt genesen werde.«

Das ist eine zutage liegende Anpreisung ewiger Kulturkriege und genau dasselbe inhumane Streben, wie seinerzeit die gewalttätigen Methoden der Ausbreitung des Christentums, um allen Menschen die Seligkeit zu verschaffen.

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Wenn man nun bedenkt, wie, durch welche minutiöse Umstände meistenteils das Nationalbewußtsein entsteht, und daß ferner die von den Höchstgebildeten hervorgehobenen und in glänzendstes Licht gestellten Eigenschaften ihrer Nation niemals einen allgemeinen und objektiven Wert repräsentieren, sondern nur Geschmackssache bleiben müssen, so findet man in dem Ausspruch Herders »Unter allen Stolzen ist der auf seine Nation Stolze der größte Dummkopf« — durchaus keine Übertreibung.

Man möge doch aufhören, das Solidaritätsgefühl oder das Gemeinsamkeitsgefühl als solches für etwas Ethisches auszugeben. Es fragt sich immer nur, was man damit macht. Schon die Uniform der Soldaten, der Beamten, der Veteranen, der Feuer-

wehrleute, der Türsteher, der Briefträger kann ganz allein, ohne alle Nebenvorstellungen, unter ihnen schon ein Gefühl der Solidarität hervorrufen, und diese Art von Gemeinsamkeits-Empfindung äußert sich schnell gegen Außenstehende, wo es nur immer angeht, mindestens durch hochmütiges oder grobes Verhalten. Und, ohne alle Uniformen, genügt ein etwas häufigeres Zusammensein, z. B. in einem Kegelklub, als Stammgäste an einem Wirtshaustisch, als Teilnehmer an Landpartien, um Solidaritätsgefühle zu entwickeln. Allerdings arten alle diese nicht entfernt so aus, wie jenes einer nationalen Solidarität.

Man lernt die menschliche Natur von einer ganz seltsamen Seite kennen, wenn man solche scheinbar unbedeutende Tatsachen sowohl an sich als nach ihren praktischen Konsequenzen ernstlich überdenkt. Hier noch einige solche Tatsachen, die ich dem Werke von Sir H. S. Maine »Die volkstümliche Regierung« entnehme:

»Von den amerikanischen Wilden heißt es, daß sie über den halben Kontinent ziehen, bloß um jenen im Kampfe beizustehen, die dasselbe Abzeichen tragen wie sie. Zwei irische Parteien, die sich im ganzen Lande die Köpfe wund schlugen, sollen aus einem Streite über die Farbe einer Kuh entstanden sein. Im Süden Indiens finden fortwährend gefährliche Aufläufe statt, weil zwei Parteien im Felde stehen, die weiter nichts voneinander wissen, als daß sie die Parteien der rechten oder der linken Hand sind. Es gibt Leute, die aus Überzeugung Torys oder Whigs sind, aber viele tausend Wähler stimmen für gelb, blau oder purpur, nur weil irgend ein Volksredner sie dazu ermuntert. Ein Prediger verlieh einer Anzahl ganz gewöhnlicher Frömmler Bedeutung, indem er sie bewog, Uniform zu tragen und sich eine Armee zu nennen. Und ein Mann begründet den Erfolg einer Enthaltsamkeitsgesellschaft, indem er die Mitglieder beredete, öffentlich und immer ein blaues Bändchen zu tragen.«

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Welchen traurigen, niederdrückenden Eindruck macht es auf einen, der Achtung vor jeder menschlichen Individualität besitzt, wenn er eine Menschenmenge wie eine unvernünftige Herde ihr nationales Lied anstimmen hört, in dem sie ihre eigene Nationalität über alle anderen hochpreist — ohne zu

wissen warum? Wird nicht jeder denkende Mensch, jeder, der etwas auf seine Würde hält, sich schämen, mitzusingen? Es ist unvorstellbar, daß ein Montaigne, ein Spinoza, Leibniz, ein Kant, ein Goethe, ein Schiller bei einem solchen Chor mittun würden, der bloße Gedanke daran erweckt die widerlichsten Empfindungen. Es ist damit so, wie wenn man einem freien gebildeten Geist zumuten würde, einen Drehtanz der Mawlawi-Derwische mitzumachen »bei den Tönen der Flöte, wobei sie leise den Namen Gottes aussprechen zum Zwecke der Weltentrückung, indem sie durch ein reihiges, gleichmäßiges Drehen das harmonische Kreisen der Sphären im All um den ewigen Pol symbolisieren« — vielleicht ist jener Gesang noch etwas Dümmeres!

Man bedenke doch: Jeder nationale ‹oder patriotische› Gesang wirkt auf die Masse wie eine Art von Argument und stärkt die Überzeugung, daß »wir« im Rechte sind, daß »unsere« Sache die edlere ist, gegenüber einer anderen Nation oder einem anderen Staat. Nun aber singt diese andere Nation oder dieser andere Staat auch und auch diese sind durch ihre Melodie ebenso überzeugt, daß ihre Sache die gerechtere und edlere sei. Dabei haben alle diese Melodien keinerlei Zusammenhang mit diesen Sachen. Denkt man sich nun die beiden Melodien vertauscht, so wirken sie noch immer geradeso überzeugend auf das Gemüt jeder Partei wie früher. Und auf diese Weise würde auch die Marseillaise die Deutschnationalen begeistern und die Melodie von »Deutschland, Deutschland über alles« die Franzosen, geradeso wie es bis heute der umgekehrte Gesang imstande war. Welche Torheit in diesem allen!

Andererseits ist so ein Massengesang, wenn er eben einen Inhalt besitzt und nicht bloßes musikalisches Vergnügen zum Zwecke hat, also eine Art politischer Programmusik repräsentiert, und wenn man diesen Gesang als Naturforscher betrachtet, ein höchst merkwürdiger Vorgang, sei es nun ein nationaler oder patriotischer oder ein kirchlicher ‹Gemeinde-› Gesang. Wir sehen hier vor uns einen Menschenhaufen sich in bestimmter — akustischer — Art einheitlich betätigen und dabei irgend einer gärenden Kraft einer gemeinsamen Empfindung sich hingeben, die bei der leisesten Veranlassung bereit ist, sich in brutaler Weise Luft zu machen. Kaum jemals — und das ist das

Merkwürdige dabei — entfaltet sich diese durch Kollektivität erhitzte Stimmung in der Richtung auf Güte oder auch nur auf Gutmütigkeit.

In solchen Augenblicken verhält sich eine singende Masse wie ein seltsames großes Tier, das einen besonderen Ton von sich gibt, ungefähr wie der Drachehafner in Wagners »Siegfried«. Oder richtiger: Da die singende Menge kein Zentralorgan besitzt, so dürfte die passende Analogie derselben die mit einem Bienenschwarm sein, der als Traube von aneinander haftenden Individuen erscheint, und die gegenseitige Haftung besteht eben in dem gemeinsamen Gesang und dessen alles andere Denken und Wollen beherrschender Ausschließlichkeit. Aber man darf dieser Menschentraube ebensowenig zu nahe kommen wie einem Bienenschwarm! Der unbedeutendste Anlaß kann genügen, um diesen Haufen bis zum Totschlagen menschlicher Individuen emporzuwirbeln. Man denke nur an eine in der Kirche versammelte, in wirklicher Andacht versunkene und singende Gemeinde oder an eine Prozession von Wallfahrern, wenn da jemand ausrufen würde: »Ein Ketzer ist unter uns« oder: »Jener Mann hat uns verhöhnt,« so ist es um diese beiden geschehen.

Vom Standpunkt dieser Auffassung aus kann man zum Beispiel die Kunst Richard Wagners nur bewundern, mit der er den Pilgerchor in »Tannhäuser« und den Marsch der Graalsritter im »Parsifal« ausstattete, denn in deutlichster Weise und ganz unverkennbar tritt aus diesen beiden Kompositionen das zugleich Verdummende und Brutalisierende der ganzen zugrunde liegenden Institution hervor, natürlich — und das ist das Geniale dabei — gleichzeitig die Schönheit der Melodie.

Und genau so ist es bei fast allen wirklichen Massengesängen, sie sind verdummend, verrohend und schön.

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Wenn man bei solchen singenden Volksversammlungen den Menschen in ihr Inneres hineinblicken könnte, so würde man mit Staunen gewahr werden, auf welchen dürftigen Gedanken- und Gefühlselementen sich die so lärmende Aufregung aufbaut.

Und doch können solche Szenen mitunter für das öffentliche Leben von nicht geringer Bedeutung werden! In solchen

Momenten ist fast jeder Anwesende, er sei noch so ungebildet, noch so unintelligent, ja von noch so ordinärer Natur — ein »Liebhaber großer Gefühle« und zugleich sprungbereiter, zumeist brutaler Energie.

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In einer weniger lärmenden Weise äußert sich das nationale Gemeinsamkeitsgefühl, wenn es sich auf die Vergangenheit des Volkes erstreckt, dann tritt das eigentümliche, Behagen erweckende und mehr erwärmende als überhitzende Gefühl der Pietät hervor und gerade diese stille Bewegung der Gemüter hat oft die weitestragenden Folgen für das politische Leben der Völker. Es ist dieser Altertümelei der Massen zu verdanken, wenn kleine Nationen mit unerschöpflicher Zähigkeit irgend einem vergangenen historischen Zustande so sehr anhängen, daß sie ungeahnte Kräfte für ihre politischen Bestrebungen gewinnen. Und große Völker verdanken dieser Kultivierung der Altertümelei auf die einfachste Weise die Fähigkeit langer Dauer nationaler oder staatlicher Existenz.

Man kann hiebei an die Römer denken. Aber das hervorragendste Beispiel bietet uns England, wie man es seit Jahrhunderten bis zum heutigen Tage beobachten konnte. Denn von England kann man wohl mit Recht sagen, daß die große Solidität in der Entwicklung seines Verfassungslebens, das Fehlen großer tumultuarischer Episoden in seiner inneren Politik in der neueren Zeit hauptsächlich seiner beharrlichen Altertümelei zu danken ist. Die noch heute geltende Gewohnheit, bei besonderen öffentlichen Situationen und Aufzügen die alten Trachten und zugehörigen Perücken zu benützen, die Festessen der Gilden, die Tracht und die Attribute des Sprechers im Unterhause, dies alles verknüpft die Gegenwart mit der Vergangenheit inniger als alles, was die größte politische Weisheit ausdenken könnte. Was immer für Fortschritte in der Gesetzgebung oder Verwaltung etabliert werden, stets erscheinen sie als Fortsetzung und nie als radikale Neuerung, und so entsteht ein Schein von Kontinuität im politischen Leben und das — sonst vielleicht renitente — Volk verschluckt das Neue mit befriedigten Gurgeltönen. Nur gerade die »Konservativen«, denen man am meisten Pietät für die altertümelnden Formen zutrauen möchte, gehen auf diese Methode nicht ein und bleiben von ihr ungerührt, wenn eine Neuerung ihnen zu schaden droht,

denn sie wissen es am besten, wie nüchtern ihre Gesinnungsgenossen in der »Vergangenheit« stets gewesen waren.

Das was hier behauptet wurde, findet man in vollkommenster Weise bestätigt, wenn man die Vorgänge während der sogenannten »glorreichen Revolution« von 1688 betrachtet, in einigen wenigen Sätzen seien sie durch Benützung von Macaulays englischer Geschichte gekennzeichnet:

»So wie unsere Revolution ein Kampf um alte Rechte war, so wurde sie auch mit der größten Rücksicht auf alte Formen gemacht. Fast in jedem Wort und jeder Handlung läßt sich die große Ehrfurcht vor der Vergangenheit erkennen. Die Stände des Reiches erwägen die Sache in den alten Sälen, nach den alten Regeln ... Die Reden bilden zu denen der Revolutionäre aller anderen Länder einen fast lächerlichen Gegensatz. Beide englische Parteien kamen überein, die alten konstitutionellen Überlieferungen des Staates mit der feierlichsten Achtung zu behandeln. Da man ihnen sagte, daß die Krone bei einer Vakanz sogleich auf den nächsten Erben übergehen müsse, antworteten sie, nach englischem Recht habe ein Lebender keinen Erben. Als man ihnen sagte, es gäbe keinen Präzedenzfall, daß der Thron für unbesetzt erklärt worden sei, brachten sie aus den Schriften im Tower eine Pergamentrolle hervor, fast dreihundert Jahre alt, auf der in sonderbaren Zeichen und barbarischem Latein geschrieben stand, wie die Stände des Reiches einen treulosen und tyrannischen Plantagenet des Thrones verlustig erklärten. Als dann endlich der Streit beigelegt war, wurden die neuen Herrscher nach alter Art und Weise ausgerufen. All der phantastische Pomp der Herolde war da, Clarencieux und Norroy, Portcullis und Rouge Dragon, die Trompeten, die Banner, die sonderbaren Röcke mit eingestickten Löwen und Lilien. Der Titel »König von Frankreich«, den der Sieger von Cressy sich beigelegt, wurde im königlichen Titel nicht ausgelassen.«

Wie man sieht: lauter Nichtse und nichts als Nichtse, und doch welche Bedeutung und welche Folgen haben solche Nichtse in der Welt!

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Es ist nicht richtig, daß, wie Rousseau es im »Gesellschaftsvertrag« ausspricht, Patriotismus und Humanität zwei

»unvereinbare« Tugenden sind, ebenso unrichtig ist es, zu behaupten, Nationalitätsgefühl und Kosmopolitismus oder besser: Internationalismus seien miteinander unvereinbar. In beiden dieser scheinbaren Gegensätze kommt es nur darauf an, das eine oder das andere Gefühl nicht unbedingt und ausschließlich zum Ausdruck zu bringen und zur einzigen Richtschnur für alle Handlungen zu nehmen. Ich kann mir sehr gut denken, daß man seine Nationalität, sein eigenes Volkstum liebt, kultiviert und rühmt, aber es selbstverständlich findet, daß Angehörige anderer Nationalitäten das mit gleichem Recht tun, und daß man überdies, wenn es nicht das eigene Volk schädigt, theoretisch und praktisch Interesse und sogar Sympathie für alle anderen Nationalitäten beweist. Allerdings ist für eine solche Gleichzeitigkeit der Empfindungen unsere Gesittung noch nicht weit genug fortgeschritten, nur Ausnahmsmenschen oder Ausnahmsepochen in der geschichtlichen Entwicklung zeigen eine solche Gleichzeitigkeit, so namentlich das Zeitalter des Anfanges der französischen Revolution. Im allgemeinen aber weisen die Menschen kosmopolitische Anschauungen weit zurück, auch sonst Hochintelligente, die aber nicht auf höchstem ethischen Niveau stehen, tun das. Dabei kommt es gar nicht auf die Größe des Genies an, so daß man gerechterweise die Größe der Begabung auch bei den national bornierten Personen mitunter so hoch stellen mag, wie bei den Kosmopoliten.

Aber es scheint mir — und es wird vielleicht auch so manchem anderen ebenso scheinen — daß der Eindruck, den prononzierte Nationalisten und andererseits Kosmopoliten auf einen gesitteten Menschen machen, ein spezifisch verschiedener ist. Ich meine, wenn wir an bekannte große Namen denken, so machen die Pannationalen den Eindruck des Edleren, Reineren, Kultivierteren gegenüber den Nationalisten.

Man vergleiche z. B. Euripides, Marc Aurel, Montaigne, Voltaire, Kant, Herder, Goethe, Schiller mit dem überaus genialen und zugleich Gründer der Bayreuther Hepp-Hepp-Kolonie Richard Wagner und dem in letzterer Beziehung verwandten, aber durch die russische Güte veredelten Dostojewski. Bei allen Talenten und auch Tugenden tritt uns — glaube ich — bei den beiden letzteren immer eine gewisse Heftigkeit und Raufbereitschaft ⟨natürlich nur in Wort und Schrift⟩ entgegen, bei den

ersteren aber: Ruhe, Vornehmheit, unbedingte Güte oder Sanftmut und Achtung »alles dessen, was Menschenantlitz trägt.«

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Die Antipathie gegenüber dem Kosmopolitismus geht manchmal ins Komische über. Mitunter hat man förmlich Furcht sogar davor, daß, wenn alle Menschen einen Staat oder eine einzige Nation bilden, sie alle — dieselbe Kleidung, etwa den Frack tragen, und so gegenüber den nationalen Trachten als eine unbunte, gleichförmige Menschenmasse erscheinen müßten! Treitschke spricht in seiner Abhandlung über die »Freiheit« von einem »kosmopolitischen Urbrei«. Da er aber nichts sehnlicher herbeiwünschte, als daß Deutschland ein einheitlicher Staat bleibt und womöglich sich auch noch vergrößert, so ist er mit einem Brei von seinerzeit fünfzig ⟨jetzt nahezu achtundsechzig⟩ Millionen Bewohnern ganz zufrieden. Ich finde jedoch keinen merkbaren Unterschied darin, ob siebzig oder ob tausend Millionen Menschen eine Gesamtheit bilden, jede größere Nation repräsentiert eben einen größeren oder kleineren — Urbrei. Abgesehen davon, daß in jeder etwa zahlreicheren Kollektivität sich stets mehrere Arten von Solidarität vorfinden, wie z. B. jene der Gemeinsamkeit in politischer, nationaler, religiöser, wissenschaftlicher, künstlerischer und anderer Beziehung, für Buntheit ist also immer genügend gesorgt.

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Aber es ist andererseits auch gar nicht wünschenswert, daß die Verschiedenheit der Nationalitäten und ihrer Kulturen aufhöre.

Auch der Kosmopolit erfreut sich an der Mannigfaltigkeit der Völker und überdies kann sehr oft eine Nation von der anderen lernen.

Goethe wollte von einer Abschließung gegen die fremden Kulturen nichts wissen, ein Nationalhaß lag ihm völlig fern.

> »Es gibt eine Stufe, wo er ganz verschwindet und wo man gewissermaßen über den Nationen steht ... Diese Kulturstufe war meiner Natur gemäß« ⟨1830 zu Eckermann⟩.

Jedoch ebensowenig dachte er an eine Aufhebung der Nationalitäten oder an ein gemeinsames Geistesleben der Völker ...

> »Jede Nation hat Eigentümlichkeiten, wodurch sie von den anderen unterschieden wird, und diese sind es auch, wodurch

die Nationen sich untereinander getrennt, sich angezogen oder abgestoßen fühlen.«

Was er — namentlich von der Weltliteratur —, verlangte, war ein gegenseitiges Kennen und Beachten, davon erwartete er auch das Verschwinden aller Vorurteile.

Es handelt sich nur um Ausmerzung der Auswüchse des Nationalbewußtseins, wie wir sie namentlich in neuerer Zeit und ganz besonders in unseren Tagen, während des Weltkrieges, erlebt haben.

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Von verschiedenen Seiten wird ⟨Ende 1915⟩ behauptet, die »geschichtliche Stunde der Nationalitätsidee ist im Ablaufen.« Heinz Potthoff schreibt:

»Die Ereignisse der Gegenwart bedeuten das Ende des Rassegedankens und des Nationalitätengedankens als staatenbildender Kraft ... Auch bei uns in Deutschland muß das »Völkische« eine Abschwächung erfahren ... Über das »Völkische« siegt das »Staatliche«. Man versucht, diese Ansichten durch die Tatsache zu unterstützen, daß »Bismarck selbst mit der nationalen Idee schlechthin sich niemals identifiziert, vielmehr im Widerspruch zu ihr sich entwickelt hat ...« »Denn höher als die von der politischen Form losgelöste und über sie hinausstrebende Idee der Nation stand Bismarck die Idee des Staates, die historisch begründete und formierte, im Kampf gewonnene Macht.«

Diese Hereinziehung der Ansichten Bismarcks erscheint mir, angesichts der Erfahrungen des Weltkrieges und einer nüchternen Beobachtung aller Verhältnisse nutzlos; ich glaube, die geschichtliche — und damit die in den meisten Fällen unheilbringende — Rolle der Nationalstaatsidee ist noch durchaus nicht ausgespielt. Als politisches Hetzmittel wird sie vielleicht noch lange nicht zu wirken aufhören. Andererseits sahen wir — und sehen wir jetzt noch — das Nationalitätsprinzip während des Weltkrieges sehr lebendig; es sei nur an die Italiener, die Polen, die Rumänen, die Slawenstämme in Österreich erinnert; und in Rußland gärte es in der Ukraine und in Finnland.

Daß Bismarck die Staatsidee über die nationale stellte, ist bei seinem Naturell sehr erklärlich; denn nur in der Kategorie des Staatsverbandes und nicht entfernt in jener des National-

verbandes konnte er — angesichts der durcheinander vermischten Nationalitäten — jene Bestimmtheit und Klarheit finden, die zur Regierung und zur Diplomatie so nützlich sind.

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Aus den verschiedenen Entstehungsweisen des nationalen Gefühls ersieht man, daß es gar keinen Keim von Haß gegen andere Nationen in sich trägt und als solches keine Veranlassung zur Zwietracht bietet, sondern nur zu Ausschreitungen mißbraucht werden kann.

Durch diese auf große Menschenmassen sich erstreckende Einheitsempfindung ist es ermöglicht, sich innerhalb ihrer sozusagen warm und behaglich zu fühlen, wie in einer geheizten Stube innerhalb einer kalten Welt. Und es ist durchaus nicht möglich zu beweisen, daß diese Empfindung von irgend einer anderen, z. B. dem Staatsgefühl im Hegel-Treitschke'schen Sinne oder dem religiösen Gefühl oder dem Familiengefühl der Chinesen an Innigkeit übertroffen wird. Das sei zugegeben und auch der günstige Einfluß eines warmen nationalen Gefühls auf eine eigentümliche Entwicklung der Kunst und Literatur anerkannt; dennoch steht es fest, daß es in neuerer Zeit viel mehr Zwist und Kriege veranlaßt, als es Gutes oder Schönes gebracht hat; und es ist bemerkenswert, daß der schädliche Einfluß des Nationalgefühls besonders hervorgetreten ist, seitdem es nicht ein naives geblieben ist, sondern unaufhörlichen Analysen, Reflexionen und afterwissenschaftlichen Untersuchungen unterworfen wurde.

Und was hier vom Nationalitätsgefühl gesagt ist, gilt in gleicher Weise von dem ihm sehr nahestehenden oder oft identischen Rassengefühl und Rassenbewußtsein, bei dem es sich nicht um sogenannte kulturelle, sondern um biologische Gemeinschaft handelt; beide Gefühle wurden in unseren Tagen aus der wissenschaftlichen und künstlerischen Sphäre in das politische Gebiet hinübergeleitet und haben seitdem sehr dazu beigetragen, unsere Gesittung zu korrumpieren.

Seinerzeit ging es ja geradeso mit der Religion, die jetzt von dem Nationalgefühl in Beziehung auf Stiftung von Unfrieden abgelöst wurde. Und es ist ja auch möglich, daß dieses ebenfalls entweder sich verlieren oder seinen bösartigen Charakter abstreifen

wird, dann würde also diese moderne Quelle von Kriegen aus der zukünftigen Kulturgeschichte ausbleiben.

Wer kann aber wissen, ob nicht ein neues Gefühl, ein neues »Ideal« an seine Stelle treten wird? Wenn man zum Beispiel an die heftigen Kämpfe denkt, die schon öfters nicht nur in den Schriften, sondern auch im privaten Leben des gebildeten Teiles der Gesellschaft wüteten, wenn neue Kunstwerke und Künstler auftauchten, die dem Hergebrachten widersprachen, so könnte man fast versucht sein, zu befürchten, es werde einmal auch wahrhafte »Kunstkriege« geben. Hat doch neulich ein deutscher Musiker, wie wir oben erwähnten, die Ansicht ausgesprochen, durch den Import fremder Kompositionen werde »das deutsche Ansehen aufs Spiel gesetzt« und diese Ausländerei habe »mit auf den Ausbruch des Krieges hingetrieben«. Es brauchte nur diese Auffassung von einer größeren Anzahl von Schriftstellern aufgenommen und auf das Konzertpublikum beharrlich eingewirkt zu werden, so würde es vielleicht nicht lange dauern und man hätte einen kleinen Bürgerkrieg vor sich, vielleicht ohne Kanonen, aber mit veritabeln Schlägereien, denn viele Menschen würden ganz überzeugt sein, daß wirklich fremde Musikstücke »Kriege zum Ausbruch bringen« und das Ansehen ihres eigenen Volkes »aufs Spiel setzen«. Wer das für undenkbar hält, der denke nur an das weise Wort von Fontenelle: Wenn ein halbes Dutzend rühriger und intelligenter Personen die Behauptung vertreten und propagieren würde, daß die Sonne am hellen Mittag nicht scheine, so sei zu wetten, daß bald die ganze Nation es glauben werde. Wenn das nun für den Sonnenschein gelingt, wie erst, wenn in Aussicht steht, der angeborenen Brutalität Luft zu machen!

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Nachdem hier von dem Nationalgefühl in aller Objektivität gesprochen wurde, will ich mir aber nicht versagen, ihm nochmals das pannationale Gefühl gegenüberzustellen, und um nicht von meinem eigentlichen Thema zu sehr abzuschweifen, nichts tun, als einen kurzen Satz von Montaigne anführen:

»Nicht weil es Sokrates gesagt hat, sondern weil es in Wahrheit meine Sinnesart ist, vielleicht nicht ganz ohne Schwärmerei, achte ich alle Menschen für meine Mitbürger, und umarme einen Polen so innig wie einen Franzosen, indem ich dieses Nationalband dem großen und allgemeinen Bande der Menschheit nachsetze. Ich halte gar nicht meinen Himmel für den blauesten.«

Auch hier ist Gefühl, auch hier ist Wärme vorhanden, welche hohe Gesittung und welche Bürgschaft für Friede und Eintracht ist aber damit verbunden!

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Besonders in unseren Tagen sprachen viele Deutsche gerne den Satz aus: »An deutschem Wesen — soll die Welt genesen.« Vor welchem Zukunftsbild — es mag nun wahr oder falsch sein — die anderen Völker schaudern! Und der Kolonialpublizist Paul Rohrbach schrieb: »Siegen wir in Kraftfülle, so sind wir es, die imstande sind, den Inhalt unseres Volksgedankens in jene wartenden Gebiete ⟨Orient, Afrika, Ostasien⟩ einströmen zu lassen.«

Andererseits behauptet aber Dostojewski, Rußland, das heißt seine »Rechtgläubigkeit«, sei bestimmt, den Orient zu erlösen.

Wie wird nun die Sache werden? Ist Dostojewski, ist Rohrbach der wahre Prophet?

Es gibt noch einen viel früheren Nationalisten, der ebenfalls in seiner Nation den Gipfel alles Guten und Schönen findet und ganz Europa gerade durch sie beglücken will. Im Jahre 1844 erschien nämlich eine Schrift von J. Kollar, des Titels »Über die literarische Wechselseitigkeit der slawischen Nation«. Da heißt es:

»Bei den anderen Völkern Europas sind der Kopf und das Herz getrennt, der Slawe denkt und fühlt zugleich; im Tempel der Slawa küßten sich diese beiden Genien der Menschheit und aus ihrer Ehe wird hoffentlich für die ganze geistige Zukunft ein neues vollkommeneres Leben geboren, in welchem sich das Ideal der Menschheit in möglichster Vollständigkeit verwirklichen wird. Die Slawen sollen die Antike und das Mittelalter versöhnen, die beiden bisher getrennten Kulturelemente in ihr nationales Leben aufnehmen und durch ihre Fortbildung für das Menschengeschlecht eine neue Epoche begründen. Die Slawen haben sich gezählt und gefunden, daß sie in Europa die zahlreichsten sind, diese Berechnung hat sie von ihrer Kraft in Kenntnis gesetzt.« Überdies »offenbaren die geistigen Anlagen der Slawen die

größte Vielseitigkeit, ihre Sprache vereinigt alle Vorzüge der alten und neueren Sprachen, die Religion der Mehrzahl derselben schwebt in der Mitte zwischen der katholischen und evangelischen, welche beide dem Volksgeiste eine einseitige Richtung geben usw.«

In derselben Zeit, in die die Publikation der Kollarschen Schrift zugunsten der Slawen fällt, sprach ähnlich für die Magyaren Franz Pulszky, ein intimer Freund Kossuths: »Ungarn ist ausersehen, die antike Freiheit auf Erden zu verewigen«.

Nun habe ich nicht die geringste Absicht, dem Selbstlob aller dieser Nationalitäten entgegenzutreten, hier handelt es sich um etwas weit wichtigeres als um die Analyse und Kritik solcher Ansichten. Diese Selbstverliebtheiten nationaler Wortführer mag man mit Lächeln und gleichmütiger Toleranz beobachten, aber: Zu welchem Unheil in der Welt führten diese Bestrebungen, die eigene Nation oder Rasse immer mehr nicht nur kulturell emporzuheben, sondern ihr deswegen eine künftige Hegemonie über die anderen zu prophezeien und auch in der praktischen Politik anzustreben!

Diese Hegemonie-Krankheit bringt uns den ewigen Krieg. Dostojewski sagt uns, die russische Rechtgläubigkeit sei allein das wahre Christentum, auch Pobedonoszew behauptet, daß weder Katholizismus noch Protestantismus sich mit dem orthodoxen Glauben vergleichen lassen, Kollar hält eine in »der Mitte zwischen Katholizismus und Protestantismus schwebende Religion der Mehrzahl der Slawen« für die allein richtige, was aber Pobedonoszew gewiß nicht zugeben konnte. Damit vergleiche man die apologetischen Schriften der Vertreter der katholischen und der protestantischen Kirchen und noch weiter die begeisterten Schilderungen der Vorzüge der eigenen Nationalitäten überhaupt. Alle wollen Propaganda machen, aber nicht nur in geistiger Beziehung und mit geistigen, sondern mit ganz derben politischen und, in letzter Beziehung, mit militärischen Mitteln.

Und da behauptet Dostojewski, ähnlich wie in unseren Tagen Ruedorffer (in seinem Werke »Grundzüge der Weltpolitik«): »Traurig die Nation, die nicht mehr glaubt, daß an ihrem Wesen die Welt genesen werde.«

Beide sprechen von dem natürlichen Expansionszwang der Nationen, d. h. der Nationalitäten, man nennt ihn sogar, wie das gerne geschieht, um ihm eine höhere Weihe zu geben, einen »organischen« Drang. Nun war das allerdings bisher der Fall, aber nichts spricht dafür, daß das immer so sein würde und müsse, man hat schon so vieles für »natürlich« gehalten, was jetzt überhaupt nicht mehr vorhanden ist! Und überdies verhielt sich die Sache auch nicht so, daß die Nationen aus sich selbst, in ihrer Masse und spontan Expansionsdrang besaßen, sondern es waren und sind immer einige, sogar nur wenige Geschichtsforscher und politisierende Ethnologen oder bloße ehrgeizige Schreier, die den Zündstoff in die Massen hineinwarfen, und die Massen glaubten schließlich, jener Drang wäre aus ihrem eigenen Wesen entstanden.

Daher erscheint mir die Ausdrucksweise Rankes nicht berechtigt, wenn er in seiner Abhandlung »Die großen Mächte« sagt: »Das Nationalbewußtsein eines großen Volkes fordert eine angemessene Stellung in Europa. Die auswärtigen Verhältnisse bilden ein Reich nicht der Konvenienz, sondern der wesentlichen Macht. Eine jede Nation wird es empfinden, wenn sie sich nicht an der gebührenden Stelle erblickt.« Aber eine »Nation«, die derlei aus sich selbst heraus wie ihrer Natur zufolge empfindet, gibt es nicht, es ist immer eine gewisse Gruppe intelligenter, verantwortungsloser Politiker, die ohne eine »angemessene Stellung in Europa« nicht glauben leben zu können und die dann größere Massen mit ihrer Agitation betäuben. Man frage doch Männer wie Kant oder Goethe, ob sie eine angemessene Stellung für Deutschland für notwendig halten, das erste Wort ihrer Antwort wäre die Frage: »Worin soll diese Angemessenheit bestehen? Wie weit soll sie reichen? Und wer soll ihre Grenzen bestimmen?«

Aus Rankes Worten klingt, wie später bei Treitschke, ganz deutlich das echt preußische Wort »Macht! Macht!« heraus!

»... In den Beziehungen der Völker zueinander«, heißt es ferner bei Ruedorffer, »liegt zu allerunterst ewige und absolute Feindschaft, das liegt nicht in einer Verderbnis der menschlichen Natur, sondern in dem Wesen der Welt und den Quellen des Lebens selbst.«

Daß das in dem »Wesen der Welt« liege, bestreite ich

unbedingt. Diese Feindschaften sind noch immer Tatsachen, aber sie müssen nicht immer vorhanden bleiben. Eine andere Erziehungs- und Unterrichtsmethode als die heutige wird ‹oder soll› es dahin bringen, daß die Menschen in dieser Beziehung gesitteter werden und daß wohl Streben nach Ausbildung eigentümlicher Vorzüge der Nationen und ein Wettbewerb mit anderen, aber keine gegenseitige Feindschaft vorhanden sein wird.

Nur Eitelkeit und Hochmut wirken dahin, daß jede der Nationen dominieren und die anderen niederhalten oder wenigstens mißachten will. Es ist nicht einzusehen, warum eine Nation nicht sollte in sich zufrieden, zugleich mit allen anderen in Frieden, in Wetteifer, aber ohne Feindschaft leben und sich entwickeln können.

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Eines der abschreckendsten Beispiele für die demoralisierende Wirkung eines heftigen Nationalitätsgefühls ist eben der russische Dichter Dostojewski.

»Die wichtigste Voraussetzung zur Lösung der Orientfrage ist die Lösung der Slawenfrage,« sagt der Großrusse, der sich nicht darum kümmert, daß die Orientfrage auch noch andere Völker und noch andere Fragen, wie etwa jene wirtschaftlicher Natur, involviert, und auch daran nicht denkt, daß in 100 Millionen von 170 Millionen der ganzen russischen Bevölkerung gegen 70 Millionen Großrussen, also eine bedeutende Majorität, ganz andere Ambitionen haben als eben bei den Großrussen. Und die Eroberung Konstantinopels durch Rußland hält Dostojewski für »notwendig«! »Nicht im Interesse der Machterweiterung des Zarenreiches, sondern im Interesse des ewigen Friedens Europas«. Man möchte aber doch gerne wissen, warum gerade — Rußland? Warum kann der ewige Friede nicht aufrecht erhalten werden, wenn es z. B. die Türkei wäre? Dostojewski ist so sehr fanatischer nationalistischer Großrusse, daß er etwas anderes sich gar nicht vorstellen kann als das, was seit Peter dem Großen und Katharina als politisches Ideal aufgestellt wurde. Das »Interesse des ewigen Friedens Europas«, der dann folgen würde, soll wahrscheinlich alle anderen Staaten und Völker trösten, die vielleicht ein russisches Konstantinopel nicht gerne sehen würden. Und dieser Gedankengang Dostojewskis erinnert gar sehr an den jenes

Mannes, der auf Raub ausging und behauptete, er wolle nur so viel zusammenrauben, damit er dann sein übriges Leben als ehrlicher Mann verbringen könnte.

Was der geniale Dichter aber am meisten vergaß oder ignorierte, und was schwerer wiegend als alles andere ist, ist das Bedenken, daß Konstantinopel, ebenso wie irgend eine andere Stadt oder ein anderes Land, nicht ohne Blutvergießen gewonnen werden könnte, und natürlich, nicht nur nichtrussischer, sondern auch russischer Leute. Die Tötung von Zehn- oder Hunderttausenden von Menschen ist für ihn kein Umstand, wegen dessen er auf »Konstantinopel« zu verzichten brauchte. Und gibt es eine intensivere Demoralisation eines sonst höchst edlen Menschen, als wenn er die Ehrfurcht vor Menschenleben, die unendliche Hochschätzung der physischen Integrität menschlicher Individuen verliert? Und sei es welchem Ideale immer zuliebe! Was sind alle genialen, tiefen Dichtungen, was sind die herrlichen Worte des Starost in den »Brüdern Karamasow«, was der edle Charakter des »Idioten«! Wie verlieren sie an Wertschätzung, wenn der Leser dabei denken muß: Dieser Dichter opfert Menschen — seinem nationalen Gefühle zuliebe oder, wenn er es nicht selbst tut, so eifert er doch andere an, die die Macht dazu haben!

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Bei Dostojewski sieht man also besonders deutlich, wie nationalistischer — und auch religiöser — Fanatismus — in aller Naivität, möchte man sagen — in die ordinäre politische Expansionslust übergeht und ausartet, das heißt in letzter Instanz: wie er beim Töten ungezählter menschlicher Individuen anlangt.

Um zur gewünschten Geltung zu kommen, schrecken eben Nationalisten auch vor Kriegen nicht einen Augenblick zurück.

Nachdem Dostojewski davon gesprochen hat, daß »bei den anderen Völkern jede nationale Persönlichkeit einzig für sich und in sich« lebt, verspricht er: »Wir ‹die Großrussen› aber werden, wenn unsere Zeit kommt, gerade damit beginnen, daß wir die Diener aller werden, um der allgemeinen Versöhnung willen . . . Das führt zur endgültigen Vereinigung der Menschheit.«

Man wird vielleicht an der Erfüllung dieses Versprechens zweifeln, wenn man an die bisherige Politik Rußlands denkt,

allein sei es drum! Aber: Auf welchem Wege soll es ins Leben gesetzt werden? Darauf antwortet Dostojewski: »Versteht sich, daß zu diesem selben Zweck Konstantinopel — früher oder später doch unser sein muß.« Schwer, sehr schwer ist ein Zusammenhang zu erkennen zwischen der Eroberung von Konstantinopel und — der »endgültigen Vereinigung der Menschheit«! Auch dürfte Katharina II., die die Eroberung Konstantinopels förmlich in fieberhafter Ungeduld erwartete, kaum dabei an die »allgemeine Versöhnung« gedacht haben und ihre Pläne stimmten doch, wie wir sehen, ganz mit Dostojewskis Plänen überein.

Man könnte sagen: Warum sollen nicht die Griechen Byzanz bekommen, mit dem sie so vielfach verknüpft sind? Darauf gibt Dostojewski, ganz wie der erste beste Minister des Auswärtigen, die Antwort: »Das ist unmöglich. Einen so wichtigen Punkt der Erde kann man ihnen nicht abtreten, das wäre denn doch etwas zu viel für sie.« Warum? Vielleicht könnten die Griechen die »Vereinigung der Menschheit« ebenso gut oder noch besser herbeiführen? Sie sind ja bekanntlich noch frömmere und bigottere Christen als selbst die Russen, wie kompetente Personen versichern, sind sie sogar die bigottesten Christen Europas.

»Die Allmenschheit ist die russische Nationalidee« — was bisher wohl kaum zu bemerken war. »Die Allvereinigung mit der vollen Achtung für die Persönlichkeit der einzelnen Nation,« fügt Dostojewski bei, und gleich darauf erfahren wir, wie das eigentlich gemeint ist: »Wißt, daß Alt-Polen niemals mehr aufleben wird. Es gibt ein neues Polen, ein vom Zaren befreites, auferstehendes . . . ein Alt-Polen wird es niemals neben Rußland mehr geben.« Man darf darauf gespannt sein, ob die Polen mit dieser Art von allgemeiner Versöhnung und Allvereinigung zufrieden sein würden. Und da nach Dostojewski Rußland Konstantinopel von Europa »nur als Führer, Beschützer und Erhalter der Rechtgläubigkeit« fordern kann, so dürften die »gut« katholischen Polen von der russisch aufgefaßten Allvereinigung schon gar nicht entzückt sein!

Im Jahre 1877, vor Ausbruch des russisch-türkischen Krieges, wird aber der Politiker in Dostojewski ganz besonders munter:

»Konstantinopel muß unser werden, ob früher oder

später bleibt sich gleich . . . Nicht nur der prachtvolle Hafen, nicht nur die Pforte zu den Meeren und Ozeanen verbinden Rußland so eng mit dieser verhängnisvollen Orientfrage und nicht einmal die Vereinigung und Auferstehung der Slaven . . . Unsere Aufgabe ist unendlich tiefer. Wir, Rußland, sind in der Tat unumgänglich notwendig für die ganze orientalische Christenheit, sowie auch für die Vereinigung der ganzen zukünftigen rechtgläubigen Menschheit . . .«

Und dazu ist der Besitz von Konstantinopel notwendig? Die Zukunft eines religiösen Glaubens, einer so eminent geistigen Lebensäußerung, soll von dem Besitz einer Stadt abhängen?

Es kommt aber immer derber politisch.

»Wir brauchen Krieg und Siege!« braust dann Dostojewski auf. »Mit Krieg und Siegen wird das neue Wort kommen und wird das lebendige Leben beginnen.« Menschenliebe? Menschliche Existenzen? — Das sind für Dostojewski nichtsbedeutende Dinge. »Unsere Klugen . . . predigen Nächstenliebe und Humanität, sie trauern um vergossenes Blut . . . Vor allem haben wir wirklich genug von ihren bourgeoisen Moralpredigten . . . Es wird Blut dabei vergossen! Menschenblut! rufen unsere Klugen entsetzt. Aber diese Rumpelkammerphrasen über vergossenes Blut sind mitunter wirklich nichts weiter als eine Häufung der allernichtigsten schönen Worte zu einem bestimmten Zweck . . .«

Nun sehen wir deutlich, wohin selbst ein edler Charakter und großes Genie wie Dostojewski gebracht wird, wenn ihn der nationalistische Taumel erfaßt. Klagen über vergossenes Menschenblut sind ihm »Rumpelkammerphrasen«!

Wollen Russen, wie Dostojewski meint, ihr Leben freiwillig opfern, um die »wahre Lehre Christi« zu verbreiten, so werden es gewiß nur wenige sein, die allermeisten Soldaten werden einfach der Wehrpflicht genügen müssen, um derlei kümmert sich aber ein richtiger Nationalist nicht.

Wie ist es aber mit den von den rechtgläubigen Russen angegriffenen und im Kampfe für die »hochherzige Idee« der Russen getöteten Nicht-Russen? Und mit allen dem Zar unterworfenen Völkerschaften: den Polen, den Finnländern, den Sektenanhängern, den turanischen Stämmen, die alle in den Krieg ziehen müssen, wenn der Zar es befiehlt?

»Rumpelkammerphrasen!« für einen begeisterten Nationalisten und Rechtgläubigen wie Dostojewski, der aber auch, wenn er im rechten Zuge der Begeisterung ist, geradeso den Pulverrausch bekommt wie der erste brutale Soldat.

»Geog-Tepe, die Festung der Achal-Teke, ist erstürmt!«, ruft er im Jahre 1881 ganz verzückt aus ... »Der Sieg Skobelews wird in ganz Asien, in seinen weltfernsten Winkeln Widerhall finden. Also hat sich wieder ein wildes und stolzes mohammedanisches Volk dem weißen Zaren unterworfen, werden jetzt die asiatischen Völker denken ... Der Name des weißen Zaren muß über den Khans und Emiren stehen, muß über dem der Kaiserin von Indien leuchten, sogar über dem des Chalifen ... Es lebe der Sieg von Geog-Tepe! Hoch Skobelew und seine Soldaten!«

So denkt nur der eingefleischteste Chauvinist, er jubelt, daß England überflügelt wurde, kümmert sich nicht um die eines Tamerlan würdigen Grausamkeiten Skobelews gegen die Turkmenen und freut sich auch über die Unterwerfung eines neuen mohammedanischen Volkes. »Mohammedanisch«! Was ist es denn mit der Rechtgläubigkeit? Will Rußland etwa diese Mohammedaner zur wahren Lehre Christi bekehren? Ist das vielleicht der Zweck Skobelews gewesen?

Das wird aus einem der größten literarischen Genies, wenn es nicht von unbegrenzter Achtung vor menschlichen Existenzen erfüllt ist. Und dahin kann es eben nationalistischer Fanatismus bringen, wie man sieht, ist der religiöse Fanatismus vollkommen ersetzt.

XVI.

Politik und Moral.

Mit der Reform der Leitung auswärtiger Politik in administrativer Beziehung — namentlich durch Einführung einer permanenten Kontrolle der Tätigkeit ihrer Vertreter, Verbot geheimer Verträge sowie Freiheit der Diskussion in den Parlamenten und Journalen als auch entscheidende Einflußnahme der Volksvertretungen auf wichtigere außenpolitische Angelegenheiten — wäre es noch lange nicht getan. Nicht bloß die Diplomaten, sondern auch die allermeisten Menschen, also auch die kontrollierenden und die eventuell entscheidenden Volksvertreter, müssen von der unheilvollen Ansicht frei werden, daß die Politik mit der Moral nichts zu tun haben sollte. So lange diese Auffassung herrscht, wird es keinen Frieden in der Welt geben.

In der Einbildung, starken praktischen Verstand zu besitzen, oder auch in dem Wahn, einen hohen geschichtsphilosophischen Standpunkt einzunehmen, behauptet man, die moralischen Maximen, die für das Privatleben gelten oder wenigstens vorgeschrieben werden, könnten für den Verkehr der Staaten untereinander nicht in Anwendung kommen, und wir sehen ja auch jeden Tag, wie sowohl die politischen Schriftsteller als auch die Praktiker sich aus voller Seele dieser Ansicht hingeben und mit welchem Behagen und mit welch gutem Gewissen sie List, Lüge, Rücksichtslosigkeit, ja die größten Verbrechen für ihre politischen Zwecke empfehlen oder in Anwendung bringen.

Was gibt ihnen allen die Beruhigung, sich über alle Ethik hinwegzusetzen?

Die unendlich übertriebene Meinung und der nahezu mystische Respekt vor der Souveränität des Staates sowie die korrupte Vorstellung, daß die Forderungen der Moral von der Zahl — und zwar im umgekehrten Verhältnisse zu dieser Zahl — der Individuen abhängen solle, auf die sie sich erstrecken. Da der Staat aus Millionen Menschen besteht, so soll jede Schurkerei, die zu ihrem Nutzen beabsichtigt wird, gerechtfertigt sein! Wenn es sich um ein, um zehn oder hundert handeln würde, solle man Recht und Moral achten, wenn um viel mehr, gelte das aber nicht mehr.

Hierauf sei mit aller Bestimmtheit und Unbedingtheit gesagt: Maximen der Moral sollen in gleicher Weise im privaten wie im öffentlichen Leben geachtet werden, falls man überhaupt Frieden und nicht ewigen Kriegszustand herbeiwünscht. Und selbst die bisherigen Gegner dieser Ansicht werden mir vielleicht zustimmen, wenn sie die folgende Deduktion ihrer Aufmerksamkeit unterziehen.

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Die ganze Verwirrung in dieser Frage rührt daher, daß die, namentlich die sehr strengen, Moralisten im Gebiete der Privatmoral stets ein »ethisches« Verhalten in einem lebensfremden, sozusagen sentimentalen, überspannten Sinne auffassen und definieren, genauer gesprochen mitunter auch solche Handlungen als unmoralisch bezeichnen, die diesen Tadel gar nicht verdienen.

Es ist ja ganz richtig, wenn man nur jenes Verhalten für ein moralisches ansieht, bei dem man anderen, besonders mit mehr oder weniger großen Opfern, wohlwill und ebenso richtig ist es, das Wohlwollen gegen sich selbst als amoralisch zu bezeichnen. Aber fehlerhaft ist es, jede Verletzung fremder Interessen, die zu unserem Nutzen geschieht, ohne Rücksicht auf die obwaltenden Umstände als unmoralisch und je nachdem sogar als verbrecherisch anzusehen und auszugeben. Selbst der edelste Mensch kann doch in Situationen kommen, wo er sich in solcher Notwehr befindet, daß er sogar Verbrechen, und dies auch mit ruhigem Gewissen, zu begehen sich entschließt. Nie wird man, wenn man das Töten eines Menschen noch so sehr verabscheut, sich lange bedenken, einen bewaffneten Straßenräuber, der uns angreift, wie auch immer, unschädlich zu machen,

sei es selbst, indem man ihn niederschießt; man muß diesen Mord für erlaubt halten. In dem harmloseren Fall, daß ein Familienvater für seine Kinder kein Brot erwerben kann und er welches aus einem Bäckerladen stiehlt, wird er wegen »unwiderstehlichen Zwanges« freigesprochen werden und niemand, selbst der strengste Moralist, wird ihn tadeln und ihn einen »unmoralischen« Menschen nennen.

Wir sehen also: Auch im privaten Leben darf man mitunter Böses oder Schädliches tun, ohne moralischen Tadel zu verdienen. Und zwar dann, wenn es gerechtfertigt ist. Eine solche Rechtfertigung ist vorhanden, wenn eine Übeltat nicht aus Bosheit oder Übermut, sondern aus sachlicher Notwendigkeit geschieht und wenn ferner eine gewisse Verhältnismäßigkeit zwischen der Schädigung des anderen und dem daraus hervorgehenden eigenen Nutzen beobachtet wird, so daß die Schädigung auf das notwendigste beschränkt wird. Und hieraus geht auch hervor, daß große, schwerwiegende Übeltaten nur unter Voraussetzung besonders gefährlicher Situationen, die mitunter Existenzialfragen tangieren, erlaubt sein können.

So gut daher z. B. im wirtschaftlichen Gebiet Konkurrenten einander zu schaden suchen und, falls sie nicht zu Betrug oder Lüge oder zu irgend extremen, sondern nur zu rein geschäftlichen Mitteln greifen, dennoch keinen Tadel verdienen, ebenso muß es dem Politiker moralisch erlaubt sein, den fremden Staat zu schädigen, besonders, wenn es sein eigener Staat nötig hat, aber nur dann, wenn in jener Schädigung Maß gehalten wird.

Gewiß wird es in vielen Fällen nicht möglich sein, über den Grad der Rechtfertigung eines üblen Vorgehens übereinstimmende Urteile zu erhalten, im ganzen und großen genügt aber doch, wie die Erfahrung des täglichen Lebens zeigt, der moralisierende Trieb der Menschen und ihr Bedürfnis nach Beurteilung der menschlichen Handlungen, — beinahe der beliebteste Gesprächsstoff in unseren geselligen Zusammenkünften — um eine gewisse mittlere Linie für Lob und Tadel in fast allen Fällen festzustellen. Und in ähnlichem Maße ist es bei den Maßnahmen der Politiker möglich zu sagen, welche moralisch gerechtfertigt und welche nicht gerechtfertigt sind.

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Es ist gar kein Grund vorhanden, Politik als jenseits von Gut und Böse stehend, hinzustellen. Schon in der inneren Politik ist diese Auffassung, wenigstens heuchlerisch, so ziemlich aufgegeben und keine Regierung und keine Klasse oder Partei behauptet heute, das, was sie Schlimmes tut, geschehe zu anderem Zweck als zum »Wohle des Ganzen«. Aber in der äußeren Politik herrscht noch immer der nackte und schamlose, rücksichtslose Egoismus und, was noch schlimmer ist, oft auch Übermut und Brutalität.

Warum aber einen Unterschied zwischen innerer und äußerer Politik machen, wenn es sich um die Forderung ihrer Moralität handelt? Man könnte ja auch durch unmoralische innerpolitische Maßregeln vielen Staatsangehörigen z. B. ganzen Klassen nützen, geradeso wie bei solchem Verhalten in der auswärtigen Politik dem ganzen Staat, und doch perhorresziert man sie ‹wenigstens den Worten nach›.

Und überdies muß man doch die Frage aufwerfen: So vielfach wird behauptet, der Staat sei ein höheres organisches Wesen, ein »großes Lebewesen«, eine überindividuelle »Persönlichkeit«, also etwas der menschlichen Persönlichkeit Analoges. Wenn man nun vom einzelnen Menschen ein moralisches Verhalten verlangt, warum nicht ebenso oder umsomehr von der Staatspersönlichkeit? Woraus folgt denn, daß die Staatspersönlichkeit, der staatliche »Organismus«, das gerade Gegenteil von dem menschlichen sein darf, ja nach der Ansicht gewisser Rechtsphilosophen und Historiker, geradezu sein soll? Was berechtigt dazu, von dem Einzelmenschen Hingebung, aber von der Staatspersönlichkeit unbeschränkten Egoismus zu verlangen? »Recht, Rechtschaffenheit selbst so preiswürdig bei dem Einzelnen, warum sollte sie es nicht bei einer ganzen Nation sein?« sagt Bentham in seinen »Prinziples of international laws«.

Nach diesem sieht man wohl, daß kein Grund vorhanden ist, zwischen Privat- und Staatsangelegenheiten wegen der an sie zu stellenden moralischen Forderung überhaupt einen Unterschied zu machen. Denn wenn jemand die große Zahl der Staatsangehörigen anführen wollte, zu deren selbst noch so geringem Nutzen Angehörige anderer Staaten verletzt oder ganze Staaten bedrängt werden dürften, so gerät er damit in die Sackgasse, behaupten zu müssen: Ein kleiner Staat, wie

die Schweiz oder Belgien, müsse sich in seiner Politik streng an die Moral halten, aber von z. B. zehn Millionen aufwärts an, die irgend einen Staat bilden, gelte das nicht mehr, und es gelte immer weniger und weniger, je mehr die Zahl von zehn Millionen überschritten wird, so daß Rußland und England in ihrer äußeren Politik machen dürfen — wie es auch in der Tat geschieht — was sie wollen, ohne daß wir sie deswegen tadeln dürften.

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Was aber den Respekt vor der Souveränität des Staates betrifft, so kann man wohl aus den früheren Kapiteln: »Eine staatsrechtliche Betrachtung« und »Der Staat« erkennen, wie unrichtig oder wenigstens wie ganz willkürlich alle jene Auffassungen des Staates sind, die ihn »jenseits von Gut und Böse« stellen, die uns einreden wollen, daß wir uns vor ihm niederwerfen und uns von ihm wie von dem großen Götzenwagen in Dschaggernaut überrädern lassen sollen. Weil der Staat die »größte Organisation ist, die die Menschheit bisher zustande gebracht hat«, so gellt der Begriff der »Macht« uns aus den Schriften der Politiker immerwährend entgegen, als ob die Macht des Staates sich über alles, über unser Leben und auch über alle Maximen der Moral erstrecken müßte. Wogegen doch so viele freie Geister und gesittete Menschen schon seit langer Zeit nicht aufhören zu protestieren! »Macht« hatte und hat auch noch die katholische Kirche und vielleicht, wenn auch ohne direkte Zuhilfenahme von Kanonen und Bajonetten, eine noch intensivere Macht als irgend ein heutiger Staat, dennoch werden alle unmoralischen Taten der Kirche seit jeher getadelt und es fällt niemandem, der nicht der vollen Bigotterie und dem Verluste jedes selbständigen Urteils anheimgefallen ist, ein, eine prinzipielle Souveränetät der Kirche anzuerkennen.

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Die vermeintliche und behauptete Unvereinbarkeit von Moral und Politik ist also nur in der irrtümlichen Meinung begründet, daß die private Moral verbiete, den eigenen Vorteil unter Umständen selbst auf Kosten anderer anzustreben und sei es für unseren Bestand noch so notwendig.

Man darf andererseits nicht glauben — auch wenn man der

⟨meiner⟩ Meinung ist, daß die Politik moralisch bleiben soll — man sei in jedem Falle verpflichtet, den Vorteil selbst einer großen Anzahl von Staatsangehörigen der Moral zuliebe hintanzusetzen und beeinträchtigen zu lassen, sondern man muß sowohl im privaten wie im öffentlichen, also auch im politischen Leben, in ganz gleichartiger Weise sich bei allen seinen Handlungen die Fragen vorlegen:

»Handelt es sich wirklich um eine so fundamentale Sache oder gar um eine Existenzfrage für mich, meine Familie oder meine Staatsgenossen, daß ich deswegen anderen — Privatpersonen oder fremden Staatsangehörigen — schaden und vielleicht gar rücksichtslos auch die schärfsten Mittel anwenden darf?«

Und bei Angelegenheiten geringerer Wichtigkeit die Frage: »Handelt es sich wirklich um etwas sehr Nützliches, das wir ohne allzugroße Schädigung des fremden Staates durchführen können?« Auch in diesem Falle brauchen wir vor einer Benachteiligung jenes Staates nicht zurückzuschrecken. Man darf also nicht glauben, daß ein sekundärer Vorteil uns ebenso wichtig und als jeder moralischen Bewertung überlegen erscheinen solle wie ein fundamentaler, falls die Anzahl der jenen Vorteil genießenden Personen sehr groß wäre. So z. B. darf ⟨soll⟩ man nicht einen Eroberungskrieg unternehmen, um irgend ein dem Luxus dienendes Naturprodukt ⟨etwa Südfrüchte⟩ aus einem fremden Staat zu beziehen und glauben, die Zahl der Personen des eigenen Staates, welche diesen Luxusartikel genießen, sei so groß, daß der sekundäre Vorteil gewissermaßen durch die Multiplikation mit jener Anzahl zum Range einer existentialen Forderung erhoben und daher bei seinem Gewinn über jedes moralische Bedenken hinausgehoben werde. Eine solche Multiplikation ist in ethischer Beziehung prinzipiell unanwendbar.

Es darf daher nur eine Notwehr, eine Existentialfrage gegenüber Menschen oder gegen eine verzweifelte Situation sein, die für gesittete Individuen alle moralischen Forderungen oder Verbote auslöschen darf, aber durchaus nicht jeder geringfügige Vorteil oder jede Verbesserung unseres Lebens und Zustandes, ohne die wir ganz gut weiterleben könnten.

Diese Distinktion zwischen fundamentalen und sekundären Wünschen oder Forderungen, deren Erfüllung, eventuell auf Kosten anderer Staatsangehöriger, wir anstreben, macht ein kosmopolitisches Verhalten überhaupt erst möglich, ungleich mehr als das Verständnis fremder Kulturen, als die Anerkennung einer Weltliteratur oder als die Bewunderung wissenschaftlicher oder anderer Leistungen fremder Völker.

Der echte Kosmopolitismus — richtiger: Inter- oder Pannationalismus — ist ja viel weniger eine Sache der Intelligenz als des Gemütes, und es kann der ungebildetste und geistloseste Mensch mehr Kosmopolit sein als der gebildetste Chauvinist, der mitunter nicht anders als ein Raub- und Mordritter höchster Potenz angesehen werden kann.

Eine schöne Abart des Kosmopolitismus des Gemütes ist die Tierfreundlichkeit, und in der Tat unterwerfen sich ohne alle subtilen Reflexionen die Tierfreunde jener oben definierten Distinktion: Wenn das Tier gefährlich ist, also ihre Existenz oder Gesundheit bedroht, kennen sie keine Rücksicht und Rücksicht können wir ja auch, wenn es sich um ein Tier handelt, »Ethik« nennen, wenn es ihnen aber nur wenig oder gar nicht gefährlich ist, schonen, pflegen und lieben sie sogar das Tier.

Jemand erzählte mir von einem absolut unwissenden und geistlosen Manne, der auf dem Lande lebte und die Gewohnheit hatte, bei Regenwetter nach Schnecken zu suchen, die gerne auf die Landstraße hinauskamen, sobald er eine Schnecke fand, so faßte er sie und trug sie in den Wald zurück, weil er besorgte, sie könnte unter die Räder der Wagen geraten, die über die Straße fuhren. Wer ist nun mehr als moralisch, als ganzer Mensch zu achten, dieser Kosmopolit eigener Art oder etwa ein Treitschke oder ein General Bernhardi, die von aggressivem »Machtgefühl« strotzen und gewissenlos das größte Unheil über die Menschen fremder Völker — aber auch ihres eigenen Staates — vorbereiten? Beide, namentlich der erstgenannte sehr begabte Mann, sind ohne allen Vorbehalt als die — potentiell, weil sie nur schreiben — gefährlichsten Menschen-Tiere zu betrachten, geradeso wie gewisse aktive Politiker, die heute noch unter uns leben und »wirken«.

Gewalttätige und niedrige Seelen sehen mit Verachtung auf den Kosmopolitismus herab, sie sind in Vergötterung des

Nationalitäts- oder des Staatsgedankens ganz verloren, sie nennen den Kosmopolitismus »geschlechtslos« gegenüber der nationalen Empfindung. Alle Achtung vor ihr — solange sie eine gesittete Empfindung bleibt, aber so wie der Nationalismus sich in neuerer Zeit entwickelt hat, kann man ihn nicht anders als »geschlechtskrank« nennen. Denn er wirft Blasen und Geschwüre auf, die, wenn sie bersten, die ganze Menschheit vergiften, das Nationalitätsgefühl, meint man, sei nur ein edles Gefühl und in gewissen Grenzen kann es ja so sein, aber es entwickelte sich in neuerer Zeit zur Wut und man kann z. B. bei Betrachtung der heutigen politischen Zustände sagen: zur Tollwut.

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Wenn es auch erlaubt ist, bei Existentialfragen »unmoralisch« zu sein, d. h. also: anderen Menschen wehe zu tun und nur auf die eigene Existenz bedacht zu sein, so folgt doch daraus nicht, daß man von dieser Erlaubnis in allen Fällen Gebrauch machen soll. Es ist oft die höchste Moralität, sich anderen zum Schutz zu opfern, so z. B. wenn Räuber mich und meinen Vater töten wollen und ich wohl fliehen könnte, der Vater aber zu schwach dazu wäre, so »soll« ich bleiben und ihn mit Lebensgefahr verteidigen, also die Erhaltung meiner Existenz nicht als das Entscheidende zu oberst stellen.

Zusammengefaßt: Im Privat- wie im öffentlichen Leben sollen wir ehrlich bleiben und anderen nicht wehe tun, nur in Fällen der Notwehr ist es uns gestattet, anderen gegnerisch gegenüberzutreten und bei Gefahr für unsere physische Existenz andere Existenzen zu bedrohen. In besonderen Fällen jedoch ist es eine hohe ethische Aufgabe, auf die eigene Notwehr und sogar auf Rettung der eigenen Existenz zu verzichten, aber vorschreiben läßt sich das ebensowenig wie Resignation überhaupt.

In diesen besonderen Fällen handelt es sich um sogenannte heroische Tugenden. Sie beziehen sich immer auf einzelne Individuen, die sie auszuüben entschlossen sind. Ganzen Menschengruppen oder Bevölkerungen eines ganzen Staates jedoch eine solche heroische Tugend zuzumuten, hat keinen Sinn, vermutlich nur darum, weil in der ganzen Geschichte kein solcher Fall vorkam, und er kam deswegen nie vor, weil eben der größte Teil

der Menschheit nicht moralisch fühlt. Über die einfache Moral des normalen Privatlebens braucht das Verhalten eines Staates, also auch seiner Führer, nicht hinauszugehen[1].

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Die hier empfohlene Methode, in der Politik moralischen Anforderungen gerecht zu werden, ohne doch unbedingten Lebensforderungen zu widersprechen, macht es meistenfalls leicht, in vorkommenden Fällen Klarheit zu verschaffen und richtige Entscheidungen zu treffen.

Daß das heute fast gar nicht der Fall ist, sieht man zum Beispiel in den jetzigen Diskussionen über die Frage, ob Annexionen moralisch zulässig sind. Auf der einen Seite will man nur ethische Politik zulassen und andererseits den »reinen« Politiker nicht vor den Kopf stoßen und so ergeben sich Unklarheiten und Widersprüche, wenn man einseitigen Entscheidungen ausweichen will.

Während im Jahre 1915 und 1916 in Deutschland die einen nach einem Siege unbedingt Annexionen verlangen, perhorreszieren andere, namentlich die ethischen Politiker, jede Angliederung nichtdeutscher Bevölkerungen. Die sozialdemokratische Partei aber, die sich im August des Jahres 1915 mit der »Frage der Kriegsziele« beschäftigte, beschloß folgende zwei sich widersprechende Leitsätze: 1. »Die Sicherung der politischen Unabhängigkeit und Unversehrtheit des Deutschen Reiches heischt die Abweisung aller gegen seinen territorialen Machtbereich gerichteten Eroberungsziele der Gegner. Das trifft auch zu für die Forderung der Wiederangliederung Elsaß-Lothringens an Frankreich, einerlei, in welcher Form sie erstrebt wird.«

Mit diesem Leitsatz hätten also die Sozialdemokraten sich sozusagen »staatstreu« erwiesen und könnten hoffen, in den deutschnationalen und Regierungskreisen wohl angesehen zu werden. Aber im Leitsatz 4 heißt es: »In Erwägung, daß Annexionen volksfremder Gebiete gegen das Selbstbestimmungsrecht der Völker verstoßen und daß überdies durch sie die innere Einheit und Kraft des deutschen Nationalstaates nur geschwächt und seine

[1] Diese Forderung deckt sich mit dem schönen Begriff der »Staatenwürde«, den Jerusalem in seinem Werke: »Der Krieg im Lichte der Gesellschaftslehre« und in seinen »Richtlinien nach dem Kriege« eingeführt und behandelt hat.

politischen Beziehungen nach außen dauernd aufs schwerste geschädigt werden, bekämpfen wir die darauf abzielenden Pläne kurzsichtiger Eroberungspolitiker.«

Hiernach hätte Deutschland, wenn nicht Elsaß-Lothringen, so doch Posen und Oberschlesien ganz gutwillig abtreten müssen!

Es ist also evident, daß solche Fragen wie die nach Annexionen oder nach wirtschaftlicher Aggression, immer nur zugleich vom ethischen und vom Nützlichkeitsstandpunkte beantwortet werden müssen: Bei Lebensfragen entscheidet der staatliche Nutzen, bei sekundären die politische Moral, die sich aber von der privaten nicht unterscheidet. In dem Geiste dieser Auffassungen liegt es daher, wenn man sich schon für den Nützlichkeitsstandpunkt entscheiden muß, daß man so viel als möglich schonend, also gewissermaßen ethisch, vorgehen soll. So z. B. wenn man militärische Sicherung unbedingt nötig hat und sich für einen Eingriff in das feindliche Land entscheidet, womöglich statt einer Einverleibung einer Provinz nur das Schleifen aller Festungen, Besitznahme aller Waffen- und Munitionsvorräte, Zerstörung aller Militäretablissements vorzunehmen oder endlich, wenn das alles noch nicht genügen sollte, Besatzungen in feste Punkte des Feindeslandes zu legen.

Wie man sah, herrscht kein Widerspruch zwischen den Vorschriften der privaten Moral und der Moral im politischen Leben und es handelt sich immer nur vor Anwendung extremer Maßregeln, namentlich vor einem kriegerischen Entschluß — und um Vorsicht im Gebiete einer Kriegspolitik handelt es sich hier hauptsächlich — eine ehrliche Distinktion anzustellen, ob bei unserem Handeln oder Unterlassen in jedem gegebenen Fall ein fundamentales Interesse oder nur ein sekundäres im Spiel sei. Diese Distinktion zu machen, wird fast immer ohne langes Nachdenken, sozusagen intuitiv, rasch genug vorgenommen werden können und nur selten wird der Fall vorkommen, daß man durch erkünstelte Konsequenzmacherei aus einem sekundären ein fundamentales heraustüfteln wird, ohne eine Gewissensmahnung zu empfinden. Allerdings, es wird stets Menschen genug geben, die ein so zartes Gewissen nicht haben oder trotz des Bewußtseins der Korruption in ihrem politischen Verhalten alle Teufel herbeirufen, um irgend ein relativ untergeordnetes Ziel als zur Existenz des Staates notwendig hinzustellen. Und endlich wird es doch

auch Fälle geben, wo selbst der gesittetste Politiker keinen sicheren Anhaltspunkt für jene geforderte Distinktion und daher mit seinen Ansichten auch manchen Widerspruch finden wird. Dies alles zeigt sich ja in den Fällen des privaten Lebens ebenfalls und wir müssen es eben als unangenehme Tatsache hinnehmen, daß wir nie absolute Gesetze, die für alle Fälle passen, aufstellen können und daß es überdies stets gewissenlose Menschen gibt, denen die Empfindung für Gleichberechtigung des Wohlbefindens aller Individuen, also auch fremder Staaten — von Notwehr abgesehen — mehr oder weniger fehlt.

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In allen diesen Fällen ist es aber in dieser Beziehung glücklicherweise um die Praxis besser bestellt als um die Theorie, falls eben das Programm der Freiwilligkeit des Kriegsdienstes durchgeführt ist. Denn nichts Schlimmeres kann bei den politischen Streitigkeiten erfolgen, als ein Krieg, und vor dem ist dann jeder, der sich nicht zum Felddienst meldet, bewahrt. Allerdings ist es noch höchst wünschenswert — wie schon oben gesagt wurde — daß auch ein relativ moralisches Völkerrecht ausgebaut und von den Kriegsheeren und von den Regierungen befolgt werde, daß dies sobald eintreten werde, muß nach den Erfahrungen im jetzigen Weltkrieg sehr bezweifelt werden. Hier kann jedoch nur darauf hingewiesen werden, was sein und angestrebt werden soll, wenn man das weiß, so kann immerhin durch Erziehung, Beispiel und namentlich durch passende Institutionen vielleicht etwas Gutes erreicht werden.

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Man wird sagen: »Wenn wir auch in der Politik moralisch bleiben wollten, so müßten wir auf vieles, an dem uns gelegen wäre, wenn es auch kein fundamentales Bedürfnis wäre, verzichten.«

Jawohl, das sollen wir, geradeso wie wir auch im privaten Leben oft resignieren müssen. Wenn wir das nicht täten, so wäre zum Beispiel kein vermögender Mann vor Beraubung durch einen weniger vermögenden Mann sicher, wenn das Strafgesetz nicht ausreicht, ihn zu schützen.

Und alles in allem genommen, vergesse man keinen Augen-

blick, daß in der Politik, namentlich der auswärtigen, jede anfangs noch geringfügige Aggression sich leicht zur gewalttätigen oder zur kriegerischen Aktion entwickelt, daß selbst bei Vorhandensein der Freiwilligkeitsinstitution sich vielleicht mitunter genug Menschen — infolge von Suggestion, Irrtum, Leichtsinn oder Bezahlung — zum Kriegsdienst melden und daß gegenüber dem Leben auch nur eines einzigen Menschen, der den Tod nicht wünscht, und umsomehr eines solchen, der infolge der heute noch geltenden Wehrpflicht gegen seinen ausgesprochenen Willen zum Lebensrisiko oder -verlust gezwungen wird, daß also demgegenüber selbst der glänzendste Fortschritt im Staatsleben oder in der Kultur, daß dies alles nur eitler Plunder ist. Wer das nicht glaubt, dem steht es ja frei, sich für solche Ziele zu opfern, zwingen werden die Menschen sich aber nicht lange mehr lassen. Und fragen, ob diese meine These richtig ist, werden wir ganz gewiß nicht die Staats- und Kulturphilosophen, die ja fast ausnahmslos eine eigene menschenfeindliche Art von höherer Ästhetik vertreten, sondern wir werden die Kombattanten, ihre Mütter, ihre Väter, ihre Gattinnen und ihre Kinder fragen. Ihre Antwort ist uns unendlich maßgebender als die schönsten Bücher über die Vorteile der Kriege und über die angeblichen »Gefahren des Stillstandes« in unserer Kultur, falls die Völker nicht miteinander mittels Bajonetten, Kanonen, Unterseebooten und Flugmaschinen für den Fortschritt kämpfen.

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Es wird wohl zweckmäßig sein, dieser allgemeinen Betrachtung über das Verhältnis der Moral zur Politik und über die hier entscheidend auftretende Notwendigkeit einer Distinktion zwischen Existential- und anderen Aufgaben der Politik nunmehr zur besseren Verdeutlichung dieses Grundgedankens einzelne Fälle seiner Anwendung vorzuführen und sie einer Kritik zu unterziehen.

Nehmen wir an, der Bevölkerung eines ganzen Staates drohe Hungersnot. Dabei sind zwei Fälle zu unterscheiden: diese Gefahr trete durch irgendwelche Ursachen, z. B. große Elementarereignisse, mit einer gewissen Plötzlichkeit ein, so daß eine Abhilfe auf normalem Wege unmöglich wäre. Wenn nun absolut nichts anderes übrig bliebe, als das fehlende Notwendige einem anderen Staat zu rauben, also ihn mit Krieg zu überziehen, so kann selbst der ethischeste Politiker trotz alles Bedauerns das Vorgehen nicht tadeln, genau so und ebensowenig wie das Stehlen von Brot, wenn die Familie am Verhungern ist. Wenn sich die Gefahr der Hungersnot zwar sicher, aber nur in sehr langsamem Tempo nähert, z. B. infolge von Übervölkerung, so ist ein Krieg niemals nötig, es genügt z. B. jene Maßregel, die ich in dem Werk »Die allgemeine Nährpflicht als Lösung[1] der sozialen Frage« gelegentlich des sogenannten Malthus-Problems vorgeschlagen habe.

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Wie ist das Bestreben zu beurteilen, ausländische Völker gleicher Kultur oder Sprache zur Vereinigung mit dem eigenen Staat zu zwingen, sei es durch eine direkt kriegerische Aktion oder durch eine andere Art politischer Pression? Das wäre eine unmoralische Handlungsweise und der gesittete Politiker wird sich niemals zu einer solchen hergeben, sollten auch die Begeisterungswogen einer fanatischen Jugend oder fanatischer Kulturchauvinisten oder -politiker noch so hoch gehen. Man mag auf jede andere als gewalttätige Weise die Gemeinsamkeit der Kultur oder Sprache zum Ausdruck bringen und in dem Bestreben, sie immer weiter zu entwickeln, noch so beharrlich bleiben, eine Änderung der bestehenden geographischen Staatsgrenzen, wenn sie mit Blut oder mit Lebensangst erkauft werden müßte, darf von einer menschenachtenden Politik nicht beabsichtigt werden. Denn man kann ganz gut weiterleben und sich auch der kulturellen Solidarität mit anderen Staaten oder Staatsteilen in hohem Maße erfreuen, ohne geographisch, d. h. politisch mit ihnen eine Einheit zu bilden.

Ebenso ist es ein Verbrechen, Krieg zu führen, um seinen Handel zu heben oder seine Kolonien oder sein Staatsterritorium zu vergrößern, falls nicht die wirtschaftliche Lage bezüglich zum Leben unentbehrlicher Gegenstände dazu direkt zwingt. Und noch verdammenswerter wird eine solche gewalttätige Politik, wenn die wirtschaftlichen Zustände des eigenen Staates ohnedies glänzende sind und dies von der Regierung selbst vor der Volksvertretung

[1] Wie ich erfuhr, die von dem bedeutenden Statistiker und Nationalökonomen W. Lexis gebilligte, und zwar als einziges Rettungsmittel empfohlene.

ausdrücklich erklärt wird. Dieses verbrecherische Vorgehen erlebten wir wieder in höchstem Maße bei dem jetzigen Weltkrieg, und zwar seitens Englands.

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Nicht streng genug kann man vom Standpunkt der politischen Ethik aus die sogenannten Kulturkriege verdammen, zu denen sich selbst intelligenteste und sonst edelste Menschen gerne bekennen, die menschliche Existenzen um der Idee eines kulturellen Fortschritts willen leichten Herzens opfern. In dieser Schrift wurde schon früher an mehreren Stellen gegen diese barbarische, menschenmordende Denkungsart polemisiert, die wir ja aus der Zeit der fanatischen Kirchenpolitik als eine modernisierte Variante überkommen haben. Ob die »wahre« Religion oder ob die »höhere« Kultur verbreitet werden soll — wer dieses Ziel durch Krieg erreichen will, betreibt Massenmord. Es sei abermals gesagt, menschliche Existenzen sind wichtiger als alle religiösen und als alle kulturellen Fortschritte, ganz abgesehen davon, ob es auch immer wirkliche Fortschritte wären.

Wie leicht aber die Idee des kulturellen Fortschritts jedes Bedenken, Menschenleben zu vernichten, in selbst hervorragenden Menschenfreunden auslöscht, soll an dem Beispiel von Marx und Engels gezeigt werden, das wohl sehr vielen nicht bekannt sein dürfte.

Im Juni 1848 übernahmen Marx und Engels die Leitung der »Neuen Rheinischen Zeitung«. Sie wollten ein »Eintreten für jedes revolutionäre Volk zum allgemeinen Krieg des revolutionären Europas gegen den großen Rückhalt der europäischen Reaktion in Rußland«. Dagegen könnte man vom ethischen Standpunkt aus nichts sagen, wenn es sich nur um freiwillige Kombattanten handeln und wenn das russische Volk ‹oder ein wichtiger Teil davon› diese auswärtige Hilfe anrufen würde. Allein so war es nicht gemeint, sondern es wurde von Marx und Engels ein anderes, sehr gefährliches Prinzip aufgestellt. »Sie betonen,« sagt Konrad Schmid im »Archiv für Sozialwissenschaft und Sozialpolitik« vom Jahre 1905 — mit einer Schärfe, die in Erstaunen setzt — »das Recht der stärkeren Nationen, wofern die stärkeren zugleich als Träger des historischen Fortschritts und damit auch der Revolution erscheinen.« Mit diesem Prinzip würde offenbar der Krieg in Permanenz erklärt,

schon darum, weil jede Nation behaupten kann, sie sei »Träger des Fortschritts«, ohne daß man imstande wäre, sie zu widerlegen. »Mit demselben Recht,« heißt es dort weiter, »mit dem die Franzosen Flandern, Lothringen und Elsaß genommen haben und Belgien früher oder später nehmen werden, mit demselben Recht nimmt Deutschland Schleswig — mit dem Recht der Zivilisation gegen die Barbarei, des Fortschritts gegen die Stabilität . . . . . Und selbst wenn die Verträge für Dänemark wären, was noch sehr zweifelhaft ist, dies Recht gilt mehr als alle Verträge, weil es das Recht der geschichtlichen Entwicklung ist.«

Wie man sieht, wird hier mit dem »Recht der Zivilisation« ein neues Recht geschaffen, und es ist nicht einzusehen, warum analog ein starker Staat nicht auch soll sagen können: »Für mich spricht das Recht des Stärkeren« — der deutsche General Bernhardi und auch der englische General Lord Roberts sagten das ganz offen — und »wenn gerade ich so hervorragend stark bin, so liegt das doch gewiß in der ‚geschichtlichen' Entwicklung und diese Entwicklung gibt mir eben ein Recht, Verträge zu brechen oder andere Staaten anzugreifen, denn wozu wäre sie sonst, so wie sie ist, vorhanden?« Wenn im Privatleben jemand behaupten würde, er brauche seinem Gläubiger nicht zu zahlen oder er dürfe einen reichen Mann berauben, weil er tugendhafter oder gelehrter sei als jener Gläubiger oder als jener reiche Mann, und seine Tugend oder Gelehrsamkeit gebe ihm also hiezu ein Recht, weil sie anderen zugute kommen könne und daher für die ganze Gesellschaft wohltätig wirke und die Zivilisation stärke — so würde man ihn auslachen. Durch die Unterscheidung zwischen Privat- und politischer Moral setzt man sich eben über alle Moral leichten Herzens hinweg. Wer Hegels schwungvolle, auf haushohen Stelzen einhermarschierenden Ansichten über Politik und Geschichte kennt, findet sofort heraus, daß die gewalttätige Auffassung von politischem Recht bei Marx und Engels direkt von Hegel abstammt, bei welchem Philosophen der Mangel an Achtung vor menschlichen Existenzen und das Extrem von Rücksichtslosigkeit gegen sie infolge einer speziellen intellektuellen Weltanschauung mehr als bei irgend einem anderen Denker anzutreffen ist.

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Die Anzahl der Beispiele unmoralischer Politik ließe sich mit größter Leichtigkeit ins Ungemessene vermehren, denn hiezu wäre ja nichts anderes notwendig, als die ganze politische Weltgeschichte vorzunehmen, als deren harmlosester Teil sich, so sonderbar es auch klingen mag, vielleicht die Zeit der Völkerwanderung erweisen würde. Wollte ich mich auf die neueste Zeit, nämlich auf die Zustände unmittelbar vor dem jetzigen Weltkrieg beziehen, so ließe sich aus dieser neuen politischen Phase besonders viel lernen, denn sie repräsentiert einen so exzessiven Tiefstand aller politischen Moral, wie er, in der weltlichen Politik wenigstens, wohl noch niemals seinesgleichen hatte. Ich unterlasse das jedoch.

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Die Unmoral, präziser gesagt: die Korruption der Politik, ist, bei der Konstanz ihres Charakters, natürlich schon seit jeher den Menschen zum Bewußtsein gekommen und doch oft genug auch direkt angeraten worden.

Man denkt hier natürlich zunächst an das Buch Macchiavellis »Vom Fürsten«. Es ist aber merkwürdig, daß er da, wo er als Republikaner schrieb, nämlich in den »Erörterungen über die erste Dekade des Livius« ⟨42. Kapitel⟩ ebenso wie im »Fürsten« schreibt: »Es ist zu bemerken, daß es nicht schimpflich ist, Versprechen nicht zu halten, zu denen du mit Gewalt gezwungen worden bist . . . und nicht allein erzwungene Versprechungen werden unter Fürsten, wenn der Zwang aufhört, nicht gehalten, sondern auch alle anderen Versprechungen werden nicht mehr beachtet, wenn die Gründe wegfallen, die zu dem Versprechen veranlaßt haben.«

Es ist ⟨mir⟩ nicht klar, ob Spinoza im »Politischen Traktat« den Satz: »Ein Bündnis dauert so lange wie der Grund, auf dem es steht, nämlich Furcht vor Schaden oder Hoffnung auf Gewinn«, als eine theoretisch-psychologische Selbstverständlichkeit oder als eine Erfahrungstatsache hingestellt hatte. Indessen sind beide Auffassungen wohl im Grunde identisch. Und sehr ähnlich, aber doch in moralischer Beziehung etwas gemildert, klingt das Wort Bismarcks, daß »unabweisliche Interessen« in »zweifellosen Wortbruch« treiben können und ein Vertrag zwischen Großmächten nur so lange haltbar sei, als die Umstände währen, unter deren Zwang er geschlossen wurde. Die Milderung gegen-

über Spinozas Ausdrucksweise besteht darin, daß hier von »unabweislichen« Interessen und von »Zwang« gesprochen wird, und nicht allgemein: »Furcht vor Schaden und Hoffnung auf Gewinn«, daß also, wie ich es hier oft ausdrücke, nur Existenzial- oder fundamentale Fragen ins Spiel kommen. Allerdings wird sich nicht immer eine scharfe Grenze zwischen Existenzial- und sekundären Fragen ziehen lassen, aber doch in den allermeisten Fällen. Kant meinte: »Noch hat kein Philosoph die Grundsätze des Staates mit der Moral in Übereinstimmung bringen und doch auch keine besseren, die sich mit der menschlichen Natur vereinigen ließen, vorschlagen können.« Oben glaube ich jedoch gezeigt zu haben, daß eine solche Übereinstimmung an sich wohl vorhanden ist und für die Praxis daher auch gefordert werden kann, ob es aber gelingen wird, sie erfüllt zu sehen, ist eine andere Frage.

Macaulay sagt: »Die Grundsätz der Politik« — er meint die in der Praxis befolgten Grundsätze — »sind so beschaffen, daß der gemeinste Räuber sich scheuen würde, sie seinen zuverlässigsten Spießgesellen auch nur anzudeuten.«

Nietzsche schrieb: »Der Staat ist die unorganisierte Unmoralität.«

Alle diese Aussprüche kontrastieren nicht wenig mit Hegels Begeisterung für das »sittliche Wesen« des Staates, was man, da doch Hegel genug von der politischen Geschichte wußte — sogar mehr als Nietzsche oder als Kant — nur damit erklären kann, daß er sich eine eigene, staatliche »Sittlichkeit« konstruierte, sie aber unter der falschen Flagge der gewöhnlich sogenannten Sittlichkeit in den Gewässern seiner Rechtsphilosophie herumplätschern ließ.

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Am eindringlichsten jedoch über Politik im Verhältnisse zur Moral sprach ein Mann, der, was seine politische Moral betrifft, unter allen Diplomaten seiner Zeit den denkbar schlechtesten Ruf hatte, nämlich Friedrich der Große, der »Philosoph von Sanssouci«, von dem Rousseau sagte: »Er denkt als Philosoph und handelt als König,« und der trotz allem, wie man sogleich sehen wird, dennoch auch während seiner Handlungen wegen seines guten Glaubens und Willens ein Philosoph war. Denn er war sich nicht nur der Unmoralität

seiner Politik bewußt und machte sich sie förmlich zum Vorwurf, sondern er hatte seine wohl erwogenen Gründe für sie, die selbst der Ethiker von heute nur dann als unzureichend durchschaut, wenn er die Unterscheidung von notwendigen und von sekundären staatlichen Bedürfnissen getroffen hat, eine Distinktion, die zu keiner Zeit, also auch nicht zur Zeit Friedrichs, in der praktischen Politik gemacht wurde und selbst heute noch nicht ins Bewußtsein getreten ist.

Aber noch mehr: Die allgemeine Forderung dieser Unterscheidung — die speziell für Kriegsunternehmungen schon Cicero und in neuerer Zeit Fichte gemacht hatte — erhebt, als vielleicht einziger, schon Friedrich selbst, allerdings als er noch kein praktischer Politiker, sondern ein schriftstellernder und philosophierender Kronprinz war. In seinem »Antimacchiavell« schrieb er, der Vertragsbruch solle nur im äußersten Fall, wenn das Heil des Volkes und eine sehr große Notwendigkeit dazu zwingt, und auch dann nur nach rechtzeitiger Anzeige an den Partner, als entschuldbar gelten. Dann als König, im Jahre 1776, schrieb er, mit bisher unerhörter Selbstironie und Satire auf den ganzen Beruf der Politiker, folgenden Satz nieder: »Ich hoffe, die Nachwelt, für die ich schreibe, wird in mir den Philosophen vom Fürsten, den Ehrenmann vom Politiker zu scheiden wissen.« Mit der satirischen Unterscheidung zwischen dem Philosophen und dem Fürsten hat daher, wie man sieht, Rousseau Friedrich nichts gesagt, was er nicht schon selbst wußte und — ernstlich bedauerte. Und was nun folgt ist von nahezu tragischem Charakter, eben als Ausdruck des Bedauerns eines unübertroffenen Menschenfreundes, darüber, daß er gerade infolge seines Pflichtbewußtseins nicht so moralisch handeln konnte, wie er es gerne getan hätte[1]. »Ich muß gestehen,« schrieb der König, »daß es dem ins Getriebe der großen europäischen Politik Hineingerissenen sehr schwer wird, seinen Charakter rein und ehrlich zu halten. Stets schwebt er in der Gefahr, von Bundesgenossen verraten, von Freunden in Stich gelassen, von Neid und Eifersucht erdrückt zu werden, und schließlich steht er vor der schreckenden Wahl, entweder sein Volk zu opfern oder

[1] Auszunehmen ist hier Friedrichs erster schlesischer Krieg, den er — als junger Mann — eingestandenermaßen hauptsächlich aus Ehrgeiz begann.

sein Wort zu brechen . . . Die Geschichte jedes Staates, jeder Monarchie oder Republik, zeigt uns Abkommen und Bündnisse, die ebenso schnell gebrochen wie geschlossen werden. Jeder Fürst ist gezwungen, sich in die Gewohnheit zu fügen, die den Betrug und den Machtmißbrauch heiligt, und ich sage offen: Die Nachbarn des Fürsten, der's nicht täte, würden nur seine Redlichkeit ausnützen und, was Tugend ist, als Schwachheit deuten. Das Wohl des Staates soll die Richtschnur des Fürsten sein. Verträge darf man brechen, wenn der Bundesgenosse seine Pflicht nicht erfüllt, wenn er den Partner hintergehen will und dieser ihm, weil kein anderer Ausweg bleibt, zuvorkommen muß, wenn der Druck höherer Gewalt den Bruch erzwingt, wenn die Mittel zur Fortsetzung des im Vertrag vorgesehenen Friedens erschöpft sind . . . Unanzweifelbar scheint mir, daß der Privatmann sein Wort, auch das unbedachtsam verpfändete, halten muß. An seinem Wort hängt nur das Schicksal eines einzelnen, an dem des Herrschers aber das Wohl oder Wehe ganzer Völker. Ist der Vertragsbruch eines Fürsten so schlimm wie der Untergang eines Volkes?«

Besser ist amoralische oder antimoralische Politik wohl noch nicht verteidigt worden als in dieser Darlegung Friedrichs. Und der letzte Satz, in welchem ein Vertragsbruch dem Untergang eines Volkes gegenübergestellt wird, macht wahrscheinlich auf den Leser einen so starken Eindruck, daß er geneigt wäre, selbst die rücksichtsloseste Politik gutzuheißen. Allein die unbeabsichtigte Täuschung liegt darin, daß in der ganzen Auseinandersetzung ausdrücklich oder unausgesprochen: »Notwendigkeit«, »Opfern seines Volkes«, »sein Untergang« und dergleichen vorausgesetzt und die — auch nach meiner Meinung in solchen Fällen vorhandene — Berechtigung der Gewalttätigkeit der Politik auf alle Fälle erstreckt wird und auf diese Weise die Unehrlichkeit des Politikers überhaupt beschönigt erscheint.

Macchiavelli sagt zwar, daß jeder Staatsmann früher oder später zugrunde geht, welcher sich vorgesetzt hat, unter allen Umständen tugendhaft und ehrlich zu sein — zwischen so vielen anderen, die dies nicht sind. Allein mit dieser, aus der bisherigen Praxis, namentlich aus jener der italienischen Renaissance, abstrahierten Bemerkung wird die Forderung einer moralisch orientierten Politik durchaus nicht als unpraktisch bewiesen. Denn

es hat in der Geschichte genug so manche wirklich tugendhafte Staatsmänner gegeben, unter den Alten einen Epaminondas, unter den neueren einen Washington, einen Lincoln, einen Déak. Und wenn man das zwar zugibt, aber einwendet, gewisse Umstände wären gar nicht ohne Listen, ohne Gewalttätigkeit — Epaminondas wie Lincoln führte ja trotz aller Tugenden Krieg — zu beherrschen, so sei nur wiederholt, daß eine ethische Politik sich nicht von einer ethischen Privatmoral unterscheiden muß, d. h. daß man in beiden Gebieten nur in der Notwehr und in Existenzialfragen gewalttätig oder mit Listen und Täuschungen vorgehen mag.

Richtig ist aber der Satz Machiavellis — der sich ja nur um tatsächliche Zustände in der politischen Welt und nicht um eine prinzipielle Verbesserung dieser Zustände und wie manche glauben, nicht einmal um die Einheit und Freiheit Italiens kümmerte, sondern nur eine Technik des Regierens geben wollte — insoferne, als es schwierig ist, in einer solchen verderblichen politischen Atmosphäre tugendhaft zu bleiben, auch wenn der Politiker sonst voll guten Willens ist. Friedrich der Große, der, wie schon gesagt, an diplomatischen Rücksichtslosigkeiten[1] und selbst Gewalttaten wohl von keinem Politiker seiner Zeit übertroffen wurde, will sein Vorgehen mit der »Verderbnis seines Zeitalters« entschuldigen. Man kann das für in hohem Grade richtig ansehen und sieht daraus, wie eine Besserung nur von innen heraus, d. h. durch erziehliches Vorgehen ermöglicht werden kann.

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Man würde aber sehr irren, wenn man der Meinung einiger Schriftsteller zustimmte, die Politik stehe darum prinzipiell außer aller Moral, weil sie »Massenmoral« sei oder wie zum Beispiel A. Christensen in dem Werke »Politik und Massenmoral« sagt, sie sei der praktische Ausdruck der Massenmoral. Bei dem Worte »Massen« ist man sehr geneigt sich vorzustellen, daß die Staatsmänner ‹für das Auswärtige› und die eventuell

[1] Hiebei und bei der ganzen Behandlung der Frage über das Verhältnis der Politik zur Moral wird als selbstverständlich vorausgesetzt, daß eine unmoralische Politik nur im Interesse der Allgemeinheit und nicht zu persönlichen Zwecken geführt wird. Eine egoistische Politik wird ja überhaupt und wohl von jedermann verdammt.

ihnen zustimmenden Volksvertretungen notgedrungen nur das tun, was die »Massen« von ihnen verlangen, in Übereinstimmung mit dem Gedanken, es sei ja die Politik die höchste Anspannung der Volkskräfte. ‹H. Scholz in »Politik und Moral«.›

Aber der Begriff der Massen, als der große Haufen der Unintelligenten aufgefaßt, ist ganz und gar nicht am Platze. Die intelligentesten und auch genialsten Staatsmänner arbeiten mit den unmoralischesten Mitteln in ihrer äußeren Politik, ohne daß irgend welche »Massen« derlei von ihnen verlangen, ja überhaupt von ihren Intrigen und Rücksichtslosigkeiten irgend eine Ahnung haben. Und was die Parlamente, namentlich die Oberhäuser, betrifft, so sind sie mit dem Gebaren der Minister für Auswärtiges, wenn er welche Schurkereien immer, jedoch im Interesse des Staates verübt, fast immer einverstanden, sie müssen nur zum Ziele führen oder es wenigstens versprechen.

Es ist merkwürdig, daß — meines Wissens — bisher mitunter wohl über die Korruption der politischen Führer, aber nie über jene der Parlamente gesprochen wurde, die zwar passiv bleiben, aber mit seltensten Ausnahmen einzelner Parlamentsmitglieder, alles, was diese Führer, d. h. die Minister ‹oder Potentaten› tun, ganz befriedigt hinnehmen. Von einer moralischen Entrüstung über völkerrechtswidrige, unmenschlich-brutale Maßregeln oder über Lügen und Foppereien im Dienste der Politik wird man kaum in einem einzigen Parlament etwas vernehmen. Nur Männer wie Burke, Sheridan und in unseren Tagen der Sozialist Snowden und wenige andere leuchten aus dem ältesten Parlament der Welt als einzelne Sterne aus dem tiefsten moralischen Dunkel der allgemein seit Jahrhunderten geübten furchtbaren auswärtigen Politik hervor. Und wenn man solche Vorgänge beobachtet: das System von Völkerrechtswidrigkeiten, Rücksichtslosigkeiten, mitunter von Unmenschlichkeit und Verlogenheit, und wenn man sieht, mit welcher Ruhe, mit welchem stillen und behaglichen Schmunzeln das alles hingenommen und dabei doch immer mit Rechtschaffenheit und Humanität paradiert wird, so mag einem wohl der Vergleich einfallen, die Parlamente und auch das Volk und seine politische Literatur hielten es mit ihren aktiven Politikern wie ein Mann, der sehr gut weiß, daß seine Frau mit ihrem Körper gute Geschäfte macht, diese Art

des Erwerbes in seinem Inneren gutheißt und nach außen trotzdem den anständigen Mann markiert.

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Für den Anhänger der sogenannten materialistischen Geschichtsauffassung ist diese ganze Frage allerdings sinnlos, denn dieser Anschauung zufolge sind es ja gar nicht einzelne Personen, sondern die Massen und die »geschichtliche Entwicklung«, die alle politischen Veränderungen hervorbringen, man könne daher von einer Schuld der Politiker und Diplomaten überhaupt nicht sprechen. Über dieses Thema habe ich in meinem Werke »Die allgemeine Nährpflicht als Lösung der sozialen Frage« gelegentlich der Kritik des Marxismus gesprochen und, indem ich auf diese Kritik verweise, will ich hier zu jener Geschichtstheorie nur einige kurze Bemerkungen machen, die vielleicht schon an sich genügen werden, von ihrer Unbrauchbarkeit zu überzeugen.

Immer hört man: »Die Völker wollen nicht den Krieg«, aber — sie führen ihn ja doch? Wie ist dieser Widerspruch nun zu verstehen, wenn wirklich nur Massenvorgänge und keine persönlichen Einflüsse politische Ereignisse hervorbringen?

Man muß ja zugeben, daß in den Massen immerwährend teils bewußte, teils unbewußte Gärungen vorhanden sind, die zwar den Untergrund von politischen Vorgängen bilden können, aber ohne Anregungen durch einzelne Persönlichkeiten und ohne planmäßiges Eingreifen solcher Personen würden sie nie oder viel später als faktisch ausgelöst werden und in die Erscheinung treten. Glaubt vielleicht jemand, daß ohne Ludwig XIV., Napoleon, Eduard VII. die Dinge ebenso gegangen wären, wie sie sich wirklich ereignet haben? Oder kann man meinen, daß trotz der Revanchelust Frankreichs der Krieg im Jahre 1870 ohne die Intrigen der Kaiserin Eugenie und der Pfaffen und daß ohne ein paar hartnäckige Revanchepolitiker und Chauvinisten, wie Delcassé und Poincaré, die die bereits abgekühlten Revanchegedanken aufpeitschten, und ohne ein Häufchen russischer Politiker und Militärs ein Krieg im Jahre 1914 ausgebrochen wäre? Das »Massengefühl« des Gloirefanatismus der Franzosen war wohl seit langem in aller Stille und im Kern vorhanden, aber ohne Anfachung desselben durch einzelne Personen wäre es nicht

in Kriegsform gebracht worden. Dies alles wird auch dadurch als richtig bewiesen, daß die Völker — mit Ausnahme der Diplomaten und Politiker — wenn auch beunruhigt, doch sehr oft gar nicht ahnen, daß es so bald zu einem Kriege kommen werde, wie das ja auch beim jetzigen Weltkriege der Fall war. Er kam, wörtlich genommen — wie im Kapitel »Diplomatie« gezeigt wurde — mit telegraphischer Geschwindigkeit zustande. Hätten die führenden Politiker sich mit ihrem Gedankenaustausch etwas mehr Zeit genommen, z. B. einen Monat oder doch eine Woche statt einiger Stunden, so wäre der Krieg vielleicht gar nicht ausgebrochen. In jedem Falle legten einzelne Personen die brennende Lunte an die schon geladene Kanone und ohne diese hätte die Kanone keinen einzigen Schuß abfeuern können.

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Und ganz heiter wirkt es, wenn die Marxisten, respektive die Vertreter der materialistischen Geschichtsauffassung, sich oft gegen solche Politiker wenden, die ihnen nicht zu Gesicht stehen. Warum denn so erbost gegen Personen, wenn nicht diese, sondern die historische »Entwicklung«, die Massenvorgänge an allem schuld sind? Was wolltet ihr von Bismarck, von Wilhelm II., von Eduard VII., wenn sie nur ein blindes Werkzeug der Entwicklung waren? Und mit welchem Recht konnte z. B. ein sozialdemokratisches Blatt ‹die österreichische »Arbeiter-Zeitung« vom 20. Juli 1915› die Frage aufwerfen: »Ob die Verständigungsverhandlungen zwischen England und Deutschland im Jahre 1912 auch gescheitert wären, wenn die Entscheidung letzten Endes nicht bloß den Diplomaten anheimgestellt gewesen wäre? Wenn also die Völker hätten mitsprechen können?« Damit ist doch zugestanden, daß die paar Diplomaten nicht nur in einer so wichtigen Angelegenheit entschieden hatten, sondern sogar entgegen dem angenommenen und wohl auch wirklichen Willen der Völker ihre Pläne durchsetzten. Wo bleibt also die historische Entwicklung? Wo die alleinige Massentätigkeit und Einflußnahme auf die politischen Ereignisse?

Und endlich vergessen die Massenhistoriker, daß ja auch die einflußreichen politischen Personen nicht in der Luft schweben, nicht aus dem Nichts entstehen, sondern geradeso wie die Massen aus der historischen Entwicklung, im weitesten naturwissenschaft-

lichen Sinne genommen, hervorgewachsen sind, meine Ansicht durchbricht daher ganz und gar nicht die Auffassung der allgemeinen Weltdetermination, obwohl wir ihr allerdings nicht auf den Grund sehen können und so sprechen müssen, als ob in den Menschen ein freier und verantwortlicher Wille stecken würde. Es ist übrigens sehr merkwürdig, wie die Marxisten, aber auch nicht minder andere Geschichtsphilosophen, von ihren Theorien so sehr geblendet werden, daß sie die offenkundigsten, ihren Prinzipien widersprechenden Tatsachen, nicht sehen oder wenigstens nicht beachten. So meint einer jener orthodoxen Marxisten — Max Adler in seiner Schrift: »Prinzip oder Romantik« — vom Weltkrieg: »Kein Staat wollte diesen Krieg, aber jeder mußte ihn führen, denn sie alle treibt das System der heutigen wirtschaftlichen Ordnung unausweichlich gegeneinander.« Da muß man doch fragen, ob die großrussische Gesellschaft und Diplomatie den Krieg — durch die Unterstützung Serbiens gegen Österreich — wirklich nur aus »wirtschaftlichen« Gründen introduziert hat? Ob Rußland zu wenig Getreide, zu wenig Mineralien, zu wenig Platz für seine Bevölkerung hat und ob nicht Ländergier, Ehrgeiz und Panslawismus die wahren Triebfedern der Kriegsunternehmung bildeten? Die Ausfuhr der russischen Landesprodukte durch die Dardanellen verlangt durchaus nicht deren Besitz und gewiß würde es nie der Türkei einfallen — und ist ihr auch in früheren Zeiten nicht eingefallen — russischen Handelsschiffen während des Friedens mit Rußland die Durchfahrt zu verwehren. Und wie ist es mit Frankreich? Hat es bei seinem Revanchedurst irgend welche wirtschaftliche Ambitionen? Nicht eine einzige Stimme behauptete bisher, Frankreich, das überhaupt nur Geld- respektive Bankiergeschäfte ‹mit Rußland› macht, kümmere sich dabei um Handelsbilanzen.

Dieselbe Einwendung gilt bezüglich der Behauptung von O. Spann ‹in seiner »Philosophie des Krieges«›, der Krieg sei kein Anachronismus in unserer fortgeschrittenen Zeit, weil er nur die Fortsetzung des Lebensprinzips unserer Gesellschaft, eben des Konkurrenzkampfes sei, der selbst wieder, wie der Kampf ums Dasein in der Natur erweist, im Grunde einer biologischen Notwendigkeit entspringt. Aber der Gloiredurst der Franzosen ist keine »biologische Notwendigkeit«, wenigstens hat er nichts mit einem »Konkurrenzkampf« zu tun, bei dem es sich ja immer

um materielle Ziele handelt, und warum findet sich dieser »biologisch« notwendige Gloiredurst nicht auch bei allen anderen Völkern?

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Es ist gewiß sehr merkwürdig, daß die Menschen, wenn sie äußere Politik treiben, immer noch viel schlechter sind als sonst und das gilt ja vielleicht ganz besonders auch von höchst zivilisierten Nationen. Man könnte wohl mit Recht zu dem Schlusse kommen, daß die Institution des Staates auf die Moral verderblich einwirke, da die Idee seiner Souveränität die Menschen geneigt macht, allen in den Nationen vorhandenen bösen Instinkten ohne alle Hemmungen freien Lauf zu lassen. Mögen das jene wohl überlegen, die, wie manche Staatsphilosophen, den Menschen im Staate ganz aufgehen lassen wollen und sogar geneigt sind, die staatliche Sittlichkeit als die einzige oder wenigstens als die höchste anzuerkennen.

Je größer die Anzahl von Menschen ist, die durch ein gemeinschaftliches Ziel oder eine gemeinsame Idee oder Empfindung verbunden sind, desto gefährlicher und brutaler werden sie, desto mächtiger zwar — in höchst seltenen Fällen — auch im Guten, aber beiweitem öfter und mehr im Bösen. Wenn kein einziges Individuum fähig wäre, einen Mord zu begehen, so wird doch Morden etwas ganz Leichtes, wenn solche sonst sehr zahme Individuen in irgend einer Beziehung sich solidarisch und dadurch mächtig fühlen. Wenn eine kirchliche Prozession von einem Vorübergehenden sich z. B. durch einen Scherz noch so leicht oder durch ein noch so harmloses Benehmen oder sogar bloßes Versehen beleidigt fühlt, so sind alle Teilnehmer doch sofort bereit, wie ein gereizter Bienenschwarm sich auf ihn zu stürzen und ihn auch zu töten. Es ist so, als ob es in der Welt nur ein einziges Gewissen gäbe und dieses sich auf die große Masse verteilen würde, so daß, je zahlreicher die Menge, desto schwächer der Gewissensanteil bei jedem einzelnen wird.

Daher sind auch die Angehörigen eines ganzen Staates so unempfindlich gegen alles Böse, das seine Diplomaten gegen andere Staaten beabsichtigen oder ausführen, es kommt beinahe gar nie vor, daß Volksvertreter in den Parlamenten solche böse Pläne und Taten — wie das ausnahmsweise Burke und Sheridan gegenüber den Verbrechen des Warren Hastings taten —

ernstlich rügen. Und da sagt Hegel: »Der Staat ist die Wirklichkeit der sittlichen Idee!« Hüten wir uns daher auch schon aus diesem Grunde der Staatsinstitution mehr einzuräumen, als eben notwendig und nützlich ist, nämlich absolut nicht mehr als dasjenige, was auf nichtstaatlichem Wege nicht entfernt so gut verwirklicht werden kann als eben durch das Staatsganze.

Und es ist sehr interessant, daß, wenn es sich um Heuchelei handelt, der Staat jede Privatperson und jede andere Institution, ausgenommen die Kirche, nicht nur erreicht, sondern vielleicht noch übertrifft. Die Staatsregierungen heucheln und die Staatsangehörigen sind damit ganz einverstanden.

In neuester Zeit, darauf sei in diesem Kapitel über Politik und Moral eigens aufmerksam gemacht, wird von den Politikern sehr gerne und oft der Ausdruck: »heilig« gebraucht. Als Griechenland jüngst Soldaten nach Albanien sandte, sprach es von seinen »heiligen Bataillonen«. Als vor einigen Jahren die ungarische Regierung das von Österreich-Ungarn annektierte Bosnien für Ungarn reklamieren wollte, hob der Ministerpräsident Wekerle hervor, Bosnien sei einmal einem ungarischen König unterstanden, habe daher zur »heiligen ungarischen Krone« gehört und müsse daher an diese heilige Krone wieder zurückfallen. Im Jahre 1915 beflissen sich namentlich die italienischen Politiker der Anwendung dieser sonderbaren, wesenlosen, der Kirchensprache entnommenen Bezeichnung: »heilig«. Da wurden die Absichten auf Eroberung österreichischer Provinzen: »geheiligte Aspirationen« und jene Provinzen: »heilige Provinzen« genannt, ja der Ministerpräsident Salandra sprach sogar von »heiligem Egoismus«. Und daß die russischen Politiker seit langem schon stets von dem »heiligen Rußland« sprechen, wenn sie aggressive Absichten haben, ist ja allgemein bekannt. Es fehlt nur noch das Wort: »heilige Niederträchtigkeit«.

So daß man behaupten kann, daß, so oft ein »Staatsmann« das Wort: »heilig« gebraucht, irgend eine Intrige, ein Kniff oder eine größere Lumperei dahintersteckt, und daß die ihm zugehörigen Staatsbürger, die das ganz gut wissen, mit behaglichem Schmunzeln das anhören und dazu schweigen.

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Man kann also nach allen Erfahrungen die massenpsychologische Regel aufstellen: je zahlreicher eine mit Macht ausgestattete Gemeinschaft ist, destomehr entsteht in deren Mitgliedern Gleichgültigkeit gegen Kollektivverbrechen und, was noch viel gefährlicher ist, desto spontaner keimt in ihnen Haß und Aggressivlust auf. Daher so viel Brutalität in der Geschichte der Staaten, der Nationalitäten wie der Kirche zu finden ist. Die Institution der Familie begreift nur wenige Personen und ist nicht mit Macht gegen andere Familien ausgestattet, daher repräsentiert eine Gesellschaft mit hoch entwickeltem Familiensinn — wie die chinesische — eine friedliche Gemeinschaft, ohne gegenseitigen Haß. Andererseits würde eine kosmopolitische Vereinigung der Menschen trotz der enormen Anzahl ihrer Mitglieder nach außen ungefährlich sein; entweder wäre sie ungefährlich, wenn sie nur eine geistige und nicht zugleich eine Machtorganisation ist, oder selbst, wenn sie dieses wäre, so wäre ja niemand da, gegen wen sie sich wenden könnte, ausgenommen: die »kosmopolitisch« genannte Vereinigung erstreckte sich bloß auf sehr viele, aber doch nicht auf alle Völker: z. B. auf alle christlichen oder auf alle von uns »zivilisiert« genannten Völker, dann aber wehe allen Nichtchristen und allen »wilden« Nationen!

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Im Zusammenhang mit der Art der Auffassung der Politik nach ihrer moralischen Seite steht die Stellungnahme gegenüber dem bekannten englischen Satz: »Right or wrong — my country.«

Jeder Mensch mit einem einigermaßen ethischen Naturell ist bei Anhörung dieser Maxime eines vollendeten staatlichen Egoismus nicht wenig empört, denn sie negiert jeden Sinn für Gerechtigkeit in beinahe zynischer Weise.

Und diese Entrüstung ist auch ganz berechtigt, wenn man unter dieser Maxime versteht: Man solle in der Politik sich unbedingt um Wahrheit und Gerechtigkeit nicht kümmern, sondern nur und immer das tun, was eben dem Staate nützt. So meinen es nicht nur in der Regel die englischen praktischen Politiker, sondern auch die Staatsmänner überhaupt und besonders jene politischen Schriftsteller Deutschlands, die das Staatsgebilde als ein so hohes, so souveränes betrachten, daß all sein Tun und Lassen über allen »moralisch« genannten Forderungen steht. Von den vielen Gewaltsschriftstellern dieser Sorte sei nur Treitschke,

und ein früherer und ungleich größerer, nämlich Hegel erwähnt. Von Hegel sei in dieser Richtung folgender, etwas schwerfälliger, aber dennoch ganz präziser Satz angeführt. In seinen — von G. Lasson herausgegebenen — »Grundlinien der Philosophie des Rechtes«, Seite 269, heißt es:

»Es ist die Forderung besprochen worden, die Politik der Moral unterzuordnen. Aber ⟨es ist⟩ zu bemerken, daß das Wohl eines Staates eine ganz andere Berechtigung hat, als das Wohl des einzelnen und die sittliche Substanz, der Staat, ihr Dasein, d. h. ihr Recht unmittelbar in einer nicht abstrakten, sondern in konkreter Existenz hat, und daß nur diese konkrete Existenz, nicht einer der vielen für moralische Gebote gehaltenen allgemeinen Gedanken, Prinzip ihres Handelns und Benehmens sein kann . . .«

Wenn man diese Argumentation noch so genau und mit noch so gutem Willen prüft, so wird man doch keine Spur von Beweiskraft in ihr finden. Die ganze Unterscheidung zwischen dem Wohl, also auch der Moral, des einzelnen und jenem eines Staates ist, wie eben die ganze Devotion Hegels vor dem Staat und der von ihm frei erfundenen »sittlichen Substanz« desselben, ganz willkürlich. Allerdings läßt sich in diesem Gebiete des Staatsrechtes wie der Moral überhaupt nichts zwingend beweisen, also Hegels Ansicht ebensowenig wie die hier vertretene entgegengesetzte. Allein die meine hat offenbar die größere zwischenstaatliche Friedenssicherheit — neben der Vereinheitlichung des Regimes unserer Tätigkeiten im privaten und im öffentlichen Leben — für sich und umsomehr ist zu hoffen, daß man sich, wenn man das weiß, nicht von solchen auf philosophischen oder metaphysischen Stelzen einhermarschierenden Darlegungen werde imponieren lassen.

Wie ich schon oben argumentierte: Ist ein Staat mit hundert Bewohnern schon eine »sittliche Substanz?« Nach Hegel ganz gewiß, wenn er überhaupt die »staatsmäßige« Einrichtung besitzt, und »staatsmäßig« ist, eben nach Hegel, »eine Menschenmenge . . . wenn sie zur gemeinschaftlichen Verteidigung der Gesamtheit ihres Eigentums verbunden ist . . . durch wirkliches Wehren sich verteidigt« . . . »Die Einheit der Staatsmacht,« sagt Hegel ferner, »zum allgemeinen Zweck der Verteidigung ist das Wesentliche eines Staates.« Also jene hundert Bewohner sind, ebenso wie

irgend eine Räuberbande, ein wirklicher Staat, wenn sie nur durch eine »wirkliche Wehre« sich verteidigen. Nun kann man fragen: Warum sollen moralische Maximen für alle privaten Verhältnisse gelten, aber nicht für jene hundert Personen ⟨mit einer »wirklichen Wehre«⟩? Die ganze doch so ungerechtfertigte Prosternierung vor dem Staatsbegriff dürfte doch nur im Respekt vor dem Polizeibüttel aus der absolutistischen Zeit ihren Ursprung haben und wenn man das weiß und sieht, wie selbst so große Geister wie Hegel — seine philosophische Ehrlichkeit vorausgesetzt — darin nicht freier sind als tausend andere, so empfindet man erst deutlich, welche Befreiung die Auffassung des Staates als einer Vertragsinstitution in die Welt gebracht hat, besonders die Auffassung Rousseaus, der nicht wie Hobbes annahm, die Abtretung der individuellen Rechte geschehe an einen Souverän, sondern an die ganze Gesellschaft.

Also mit der Immunität des Staates vor ethischen Anforderungen ist es nichts!

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H. Gomperz meint — in seinem Werke »Philosophie des Krieges in Umrissen« — »der einzelne wird mit dem Bewußtsein zufrieden sein müssen, daß er für eine gute und gerechte Sache kämpft, wenn er das Interesse seines Volkes verteidigt«. Ganz so sprach Cecil Rhodes über seine völkerrechtswidrigen und oft überaus brutalen Unternehmungen: »Meine Unternehmung ist gewiß gut, denn sie ist für mein Vaterland nützlich.« Wenn man solche Ansichten hat und verbreitet, dann ist die sichere Aussicht auf höchste politische Sittenverderbnis vorhanden und ein kontinentaler Philosoph sollte sich zehnmal bedenken, diese Maxime zu propagieren, die wohl der ganzen äußeren Politik Englands seit Jahrhunderten entspricht, aber von jedem gesitteten Menschen verabscheut wird. »Interesse« des Volkes, »Nutzen« für das Vaterland, genügen nicht, um Kriege und gar um Völkerrechtsverletzungen zu rechtfertigen; es müßten nur Existenzfragen ins Spiel kommen, und auch dann darf man nicht von einer »guten und gerechten Sache« sprechen, für die man kämpft, sondern von nackter Notwehr, die ja nichts mit Güte und Gerechtigkeit zu tun hat.

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Es ist aber, um ungerechten Tadel des Verhaltens in Kriegszeiten zu verhüten, notwendig, den an sich moralisch so häßlichen Satz: »Right or wrong — my country!« einer weiteren Analyse zu unterziehen. Der Ethiker hat das Recht, ihn zu verwerfen, solange er sich auf das rein politische Verhalten der Staatsmänner, Volksvertreter und politischen Schriftsteller bis unmittelbar vor dem eventuellen Ausbruch eines Krieges bezieht. Bis dahin wird also eine moralisch gerichtete Politik — von Existenzfragen abgesehen — nicht aggressiv sein, nicht lügen und betrügen, kurz, nichts von alledem an sich haben, was die Diplomatie so berüchtigt macht. Wenn aber trotz allem und allem ein Krieg beginnt, so mag sich jeder Staatsbürger — wenn er sonst nichts dagegen hat — in die Reihe der Verteidiger seines Staates stellen, ohne daß man ihm Untreue gegen seine sonstigen moralischen Maximen vorwerfen kann, selbst wenn er noch immer überzeugt wäre, daß der feindliche Staat im Recht ist. Aber es darf sich eben nur um die wirkliche Verteidigung seines Landes und nicht um ein Erobern irgendwelcher Art handeln! Denn nunmehr, nach Beginn der Feindseligkeiten heißt es, sich, seine Angehörigen und noch vieles andere verteidigen, und kein Moralist kann verlangen, daß man Leben und Eigentum hingeben solle, weil die Politik des eigenen Staates eine unmoralische war. Wir wissen überdies, daß im Krieg das Völkerrecht von den Kombattanten sehr selten geachtet wird — man denke z. B. an das furchtbare Vorgehen der Russen in Ostpreußen und Galizien sowie an die militärischen Rücksichtslosigkeiten der Deutschen in Belgien und Nordfrankreich während des Weltkrieges — und wenn feindliche Heerhaufen in meinem Wohnort oder Soldaten in mein Haus eindringen, so würde es mir gar nichts nützen, dem Feinde zuzurufen: »Euer Staat ist im Recht, ich habe es immer gesagt und sogar unter Lebensgefahr in Zeitungsartikeln öffentlich behauptet, ich verdiene Schonung für mich, meine Familie und mein Eigentum!« Es wäre der Gipfel der Lächerlichkeit.

Man mag also, da es sich dann um eine Existenzfrage handelt, sich um gar nichts anderes als um die Verteidigung kümmern und es verdient durchaus keinen Tadel, wenn z. B. ein Politiker, der immer ein Gegner des Krieges mit jenem feindlichen Staat war, beim Ausbruch und während des Krieges sich für die

energische Führung desselben einsetzt, ebenso darf man nicht darin einen Widerspruch sehen, wenn ein Pazifist in die Armee seines Staates eintritt und sonst alles mögliche zur Herbeiführung des Sieges unternimmt. Auch den Sozialisten, insofern sie Internationalisten waren und sind, wurde mit Unrecht vorgeworfen, daß sie ihre Prinzipien verleugneten, wenn sie an der Verteidigung ihrer eigenen Staaten teilnehmen. Abgesehen davon, daß nur ein geringer Teil der Sozialisten wirklich und radikal international fühlt, d. h. den Internationalismus dem Nationalismus oder dem Staatsgefühl vorzieht, hätte es ja auch keinen Sinn, sich anders zu verhalten, denn solange die Internationalisten nicht stärker als die bestehenden Regierungen und als die anderen Parteien sind, können sie Kriege nicht verhindern. Und sie würden, wenn sie die Kriegführung nicht unterstützen oder vielleicht ihr gegenarbeiten wollten, sich den größten Verfolgungen im Innern aussetzen und nichts anderes herbeiführen, als vielleicht die Schwächung und Niederlage ihrer eigenen Armee und das notwendigerweise daraus entstehende Unheil für den ganzen Staat und also auch für sich selbst. Es handelt sich eben um eine Existenzfrage, hinter der in der Regel alle anderen Fragen zurücktreten. Auch hier gilt es, daß das Bekenntnis der Internationalität dem eindringenden Feind gegenüber nichts nützen würde, höchstens würde er uns mit einem Spottwort das Bajonett hineinstoßen.

Wer aber noch immer behaupten wollte, man müsse aus moralischen, idealen Gründen dem Feind den Sieg wünschen, weil er im Recht und der eigene Staat im Unrecht sei oder weil jener Sieg kulturellen Fortschritt oder das »Heil der Welt« sicherer verbürge als der eigene, so stelle ich an diesen Mann, der theoretisch das, was edler ist, nicht zu unterscheiden weiß von dem, was dringender ist, die Frage: Wenn der siegreiche Feind in die Stadt eindringt und die wütende Soldateska mordet, Frauen vergewaltigt und plündert — wird jener Idealist sich und seine Angehörigen mit aller Ruhe den Gewalttaten preisgeben? Wird er mit diesem allen zufrieden sein, weil der »Fortschritt« jetzt gesichert ist, da ja der Feind gesiegt hat? Wird er nicht wünschen, daß doch noch im letzten Moment die feindliche Armee von der eigenen geschlagen und zum Rückzug gezwungen werde? . . . Es heißt darüber nachdenken! Aber auch,

wenn wir im Bereich des Gedankens und der Theorie bleiben, ist den Sozialdemokraten kein Vorwurf zu machen. Denn man kann der ehrlichste und prinzipientreueste Kosmopolit ‹Internationalist›, dabei aber auch ein inniger Anhänger seiner Familie oder seiner Nation oder seines Staates sein. Und da ist es doch nur natürlich, daß hier, wie so oft im Leben, Situationen entstehen können, aus denen sich moralische Konflikte ergeben und wo man eine oft bittere Wahl treffen und sich für dasjenige entscheiden muß, was das geringste Übel nach sich zieht. Nach dem Krieg können dann dieselben Sozialisten, die für ihren Staat kämpften, mit voller Energie wieder sich für den Internationalismus einsetzen, ohne im geringsten eine Inkonsequenz zu begehen.

Ohne Zweifel ist es sehr bedauerlich und tragisch, daß unser politischer und unser völkerrechtlicher Zustand so barbarisch ist, besonders daß die Zivilbevölkerung seit diesem Weltkrieg völkerrechtlich nicht mehr geschützt wird und noch mehr, daß die Institution der allgemeinen Wehrpflicht existiert, die jede politisch gespannte Situation so leicht und unausweichlich in die denkbar tragischeste überführt.

In dem eben Gesagten setzte ich als fast selbstverständlich voraus, daß jeder die Verteidigung von Leben, Gesundheit und eventuell auch des Eigentums über die unentwegte Befolgung irgendwelcher politischer Prinzipien stellen wolle, ohne ihnen deswegen untreu zu werden, daß man also nur der aufs äußerste gespannten furchtbaren momentanen Situation gerecht werden wolle.

Indessen wurden in der neuesten Zeit Stimmen laut, die ein solches Vorgehen tadeln, ja mitunter auf das schärfste verurteilen.

Nun, es steht ja jedem die Art seines Vorgehens frei. Aber es ist ganz ungerecht, jene Sozialisten, die um eines Prinzips oder einer Tendenz ‹z. B. der Internationale› willen doch durchaus nicht das Schlimmste erdulden und daher gegen einen äußeren Feind verteidigen wollen, verächtlich »Sozialpatrioten« zu nennen. Denn fürs erste ist gar kein Grund und keine Berechtigung vorhanden, jemanden zu tadeln und zu mißachten, weil er dem Gefühl des Patriotismus zugänglich ist, wenn er auch zugleich

zum Beispiel Sozialist ist. Es sind ja sehr verschiedene politische Ansichten insofern gleichberechtigt, als man von keiner einzigen beweisen kann, daß sie an sich falsch ist; man kann sie bekämpfen, aber nicht wissenschaftlich exakt widerlegen.

Andererseits ist jener, der sich überhaupt gegen den Feind zur Wehr setzt, darum allein noch immer kein »Vaterlandsverteidiger«, wenigstens der Absicht nach nicht. Denn er kann ganz gut starker Gegner seines Staates, seiner Institutionen oder seines gegenwärtigen Zustandes sein und doch, wenn der Feind anrückt, sich und seine Angehörigen — an die er zunächst denkt — zu schützen suchen, indem er in der heimischen Armee mitkämpft. Er braucht also dabei gar nicht an sein »Vaterland« zu denken, er kämpft nicht für ein Vaterland, sondern für »Haus und Hof«.

Hieraus ersieht man klar, wie ungerechtfertigt die Ansichten sind, die Lenin in seiner ‹im August 1916 mit Sinowjew publizierten› Schrift: »Die Grundsätze des Sozialismus und der Krieg vom Jahre 1914« äußert.

Er spricht da immer in wegwerfendem Tone vom »Sozialpatriotismus«, einem Begriff, der, wie wir eben sahen, eine ganz unberechtigte Kombination von zwei Bezeichnungen darstellt, die gar nichts miteinander zu tun haben. Es heißt dort: »Der Sozialpatriotismus ist die Vaterlandsverteidigung der Sozialisten in diesem Krieg . . . . . Die Sozialpatrioten führen eine antiproletarische, bürgerliche Politik, denn sie verteidigen in Wirklichkeit nicht das Vaterland gegen die Unterjochung durch die fremden Völker, sondern das Recht der Großmacht auf die Plünderung der Kolonien und die Unterdrückung der fremden Völker. Der Sozialpatriotismus unterstützt die Bourgeoisie in ihrem Betrug des Volkes, dem einzureden versucht wird, daß der Krieg für die Verteidigung der Existenz und der Freiheiten der Nationen geführt werde. Die Sozialpatrioten stellen sich so auf die Seite der Bourgeoisie.«

Allein es ist gar keine Rede von Bourgeoisie oder Proletariat oder dergleichen. Der Weltkrieg war einmal da, ohne daß das Volk den geringsten Einfluß auf seinen Ausbruch hatte, wie ein furchtbares Naturereignis, und dazu kam noch, daß die deutsche Regierung die Sachlage so darstellte ‹wie viele meinen: fälschlich›, als ob sie provoziert worden wäre, so daß das deutsche

Volk, also auch das Proletariat und die meisten führenden Sozialisten, von dem Vorhandensein eines Verteidigungskrieges fest überzeugt waren — was hätten da die armen Staatsbürger machen sollen? Hätten sie die Russen in Ostpreußen unbehelligt einmarschieren lassen sollen? Hätten sie durch allerlei Störungen des Aufmarsches die eigene Kriegführung erschweren oder gar, wie das manche Revolutionäre wünschten, unmöglich machen und sich so nur ein Dankschreiben des Großfürsten Nicolai Nicolajewitsch verdienen sollen, dem dadurch der Einzug in Berlin so sehr erleichtert worden wäre?

Etwas anderes wäre es gewesen, wenn die Sozialisten sowohl in Deutschland als gleichzeitig auch in Rußland den Aufmarsch hätten stören, also den Krieg hätten verhindern können. Daran war aber, ganz besonders im zaristischen Rußland, nicht entfernt zu denken, und es zeigt nur abermals, welchen Mangel an Urteilskraft — bei allem guten Willen — fanatische Revolutionäre zeigten, die, wie Liebknecht und die Luxemburg, in Berlin zu Revolten anfeuerten, und nicht minder denselben Mangel an Verständnis bei allen jenen, die dieses Vorgehen als ein zweckmäßiges hinstellten.

Und es ist auch sinnlos zu sagen, die Sozialpatrioten stellten sich so auf die Seite der Bourgeoisie! Die deutschen Sozialdemokraten ‹die Mehrheitssozialisten› stellten sich einfach in die Reihe der Verteidiger von Haus und Hof und damit weder auf die Seite der Bourgeoisie noch auf die der Junker oder irgendwelcher anderer Parteien oder Klassen, die ja alle mitkämpften, geradeso wie man nicht sagen kann, die Artillerie »stellte sich an die Seite der Infanterie«, denn sie stellte sich einfach an die Seite aller Mitkämpfenden, also auch an die Seite der Infanterie, militärisch mit ihr einig, sonst aber mindestens ganz indifferent.

Und vollends widersinnig ist Lenins Behauptung, die Sozialpatrioten »verteidigten die Unterdrückung der fremden Völker«, gewiß hat nicht ein einziger Sozialist an so etwas auch nur entfernt gedacht!

Lenin bedauert so sehr »den Verzicht auf den Klassenkampf« während des Weltkrieges. Allein wenn es heißt: »Die Russen kommen!« so muß der Klassenkampf warten, und wenn man an die Grausamkeiten einer eindringenden russischen

Soldateska denkt, so hat man keine Lust und auch keine Zeit, an den Klassenkampf auch nur zu denken.

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Eine Frage der politischen Moral ist auch die nach der Zulässigkeit der Annexion fremder Landesteile oder einer Gebietsübertragung gegen die Interessen oder Wünsche der Bevölkerung.

Bei den unparteiischen Gegnern von solchen Annexionen oder Gebietsübertragungen herrscht hiebei als Grundgefühl die Forderung der freien Selbstbestimmung der Völker, die der möglichst freien Selbstbestimmung der Individuen analog gedacht wird.

Diese sozialethische Forderung dürfte ihren Ursprung in dem Aufklärungszeitalter und in der Entrüstung haben, die sich der edleren Geister bemächtigte, als sie die Kriege und Friedensschlüsse in der Zeit der absoluten Fürstengewalt ihrer Kritik unterzogen. Damals waren Annexionen noch viel widerwärtiger als später in der Zeit konstitutioneller Regierungen, denn da ein ganzer Staat als privates Eigentum des Monarchen betrachtet und behandelt wurde, so spielte die Bevölkerung eines annektierten Territoriums nahezu die Rolle von neugewonnenen Leibeigenen der siegreichen Fürsten. Genau genommen verhielt es sich nicht anders in jenen Fällen, wenn Provinzen durch Erbschaft oder Heirat irgend einer regierenden Familie zufielen. Von einer Äußerung des Willens der Bevölkerungen — zum Beispiel durch Abstimmung — in allen genannten Fällen auch nur zu sprechen, konnte in der Zeit des Absolutismus natürlich niemandem einfallen, und Plebiszite zu verlangen, ist erst eine Forderung der neuesten Zeit, diese Forderung tauchte wohl zum erstenmal gelegentlich der Annexion von Savoyen und Nizza durch Napoleon III. auf und zugleich damit schon die Kritik an solchen Abstimmungen, über deren Ehrlichkeit. So viel ich weiß, ist dieses Thema der Annexionsabstimmungen wie auch der Annexionen überhaupt jedoch bis auf den heutigen Tag noch lange nicht eingehend genug studiert worden.

Prinzipiell muß unbedingt jeder ethisch gesinnte Politiker jene Achtung vor Menschen als auch vor der Bevölkerung ganzer Territorien verlangen, die es verbietet, sie ohne und gar gegen ihren Willen von einem Staatsgebiet in ein anderes,

gewissermaßen wie einen Baumwollballen, hinzuwerfen. Man soll also die Bevölkerung fragen, ob sie mit der Annexion einverstanden ist. Dabei können sich allerdings Schwierigkeiten oder wenigstens Komplikationen ergeben, wenn die Bevölkerung in nahezu gleiche Hälften oder in nicht allzu ungleiche Teile betreffs ihrer Wünsche geteilt wäre. Wenn aber eine sehr respektable Majorität für oder gegen die Zustimmung, annektiert zu werden, vorhanden ist, so bleibt nur die Sorge um ehrliche Abstimmungen, d. h. um vollkommen freie, unkäufliche und unbeeinflußte Stimmabgabe übrig. Diese kaum lösbare Aufgabe hat aber die Annexionsabstimmung mit jeder anderen, zum Beispiel dem allgemeinen Stimmrecht, gemein, sie bedarf daher hier keiner speziellen Behandlung.

Bisher waren die sogenannten zivilisierten Staaten, also jene Europas und Amerikas, noch nicht sehr für die freie Selbstbestimmung annektierter Bevölkerungen eingenommen. Frankreich annektierte Tunis, Tonking, Marokko, und England Indien, Ägypten, Länder in Afrika und allerlei Inseln im Großen Ozean und im Mittelländischen Meer, die Vereinigten Staaten Kuba und die Philippinen, ohne jeden Versuch, eine Abstimmung einzuleiten, dagegen sprechen die Staaten umso mehr von »Menschenrechten«[1].

Ein weniger moralischer als praktischer, d. h. Nützlichkeitsgrund ist bei der Forderung nach Abstimmung der zu annektierenden Bevölkerung die gewiß richtige Erwägung, daß man bei Nichtabstimmung eine renitente Volksmasse und einen rachsüchtigen besiegten Staat zu erwarten hätte.

Trotzdem ist in der Praxis selbst für den ethischen Politiker die Entscheidung, ob man annektieren solle oder nicht, durchaus nicht so leicht zu treffen, wie man nach obigen Betrachtungen vielleicht meinen könnte, denn es sind noch viele andere Umstände zu berücksichtigen, die selbst dem strengsten Moralisten einen Entschluß nicht leicht machen.

Auf der einen Seite spricht das Selbstbestimmungsrecht gegen die Annexion einer widerstrebenden Bevölkerung. Andererseits aber kann eine Annexion für die Sicherung gegen einen benachbarten und erfahrungsgemäß angriffslustigen Staat notwendig

[1] Dieses ist vor Beendigung des Weltkrieges geschrieben.

erscheinen und man könnte unter Umständen vielleicht annehmen, daß diese verstärkte Sicherung durch Hinausrückung der eigenen Grenzen und Annäherung an die eventuell feindliche Hauptstadt die Gefahren durch das Vorhandensein einer renitenten Bevölkerung, die sich nach Befreiung sehnt, weitaus überwiegt. Ein weiterer Vorteil einer Annexion bestünde in einer Vergrößerung, also auch in quantitativer militärischer — allerdings unverläßlicher — Verstärkung des eigenen Staates, und ein großer Nutzen wäre, besonders unter Umständen, auch die größere wirtschaftliche Unabhängigkeit in lebensnotwendigen Dingen von anderen Ländern, wenn gewisse fehlende Naturprodukte oder besondere Verkehrsverbesserungen, sehr wichtige Häfen und dergleichen gewonnen würden. Alle diese Vorteile haben aber für den ethischen Politiker gegenüber der Selbstbestimmung der Völker als sekundär und als nicht entscheidend zu gelten. Aber zu diesem allen sei folgendes bemerkt:

Eroberungskriege sollen im allgemeinen nicht geführt werden, selbst dann nicht, wenn der freiwillige Kriegsdienst eingeführt wäre, denn Krieg führen heißt: Menschen töten und verwunden und auch noch viel anderes Unheil bringen. Es folgt daher von selbst, daß solche Annexionen nicht vorkommen sollen. Man darf aber, auch vom moralischen Standpunkte aus, Eroberungskriege führen, also auch annektieren, wenn es sich wirklich um Existenzziele, d. h. solche Ziele handelt, die zur physischen Existenz der Bevölkerung unbedingt notwendig sind, z. B. zum Gewinne von fehlenden notwendigen Nahrungsmitteln, vorausgesetzt, daß es keinen milderen Weg zur Erreichung solcher Ziele gibt — dabei ist immer Freiwilligkeit des Kriegsdienstes angenommen.

Wenn man aber nach einem siegreichen Verteidigungskriege in der Lage ist, Annexionen zu machen, so handelt es sich darum, den Anforderungen der Moral und auch den praktischen Notwendigkeiten gerecht zu werden, es wird demnach immer eine Art Kalkül gemacht werden müssen und, wenn man sich nicht von gewaltliebenden Parteien oder Personen überrumpeln läßt, ein ehrlicher Kalkül, bei dem immer nur bei äußersten Gefahren der praktische Standpunkt dem moralischen vorgezogen werden soll. Man soll daher, um z. B. sich militärisch besser zu sichern, trachten, wenn es nur immer geht, durch andere Mittel

als durch Annexion fremden Gebietes zum Ziele zu kommen, und das dürfte wohl in den meisten Fällen gelingen.

Sehr zu wünschen wäre es, wenn überhaupt gar keine Annexionen mehr gemacht würden, also ein Stillstand in den Veränderungen der Staatsgrenzen durch Kriegsunternehmungen einträte; dies wäre eine, wenn auch noch keine absolute, so doch eine Hauptsicherung des Friedens unter den Staaten, und es ist daher nicht ohne Sinn und sehr gerechtfertigt, wenn man den pazifistischen Vorschlag einer allgemeinen gegenseitigen Garantie der eben bestehenden Staatsgrenzen gegenüber Veränderungen ‹auf kriegerischem Wege› durchführen könnte.

Eine Stabilisierung der politischen Grenzen für immer kann nicht verlangt werden und soll je nach Umständen auch nicht gewünscht werden; nur sollten Veränderungen in den Staatsgebieten ausschließlich auf dem Wege der Vereinbarungen vorgenommen werden. Ein Wunsch, der allerdings den jetzigen Anschauungen so widerspricht, daß er für eine Utopie äußersten Grades angesehen werden kann.

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Überhaupt möge man bedenken, daß die allermeisten Staaten nicht ausschließlich nach einem einzigen Prinzip konstituiert sind. Wir finden das Prinzip der Nationalität, das Recht der Eroberung, die Anhänglichkeit an eine Dynastie, die Gleichheit der Religion, historische Erinnerungen und vielleicht noch andere Prinzipien oft in den Bevölkerungsgruppen eines und desselben Staates als konstituierenden Faktor seines Bestandes vertreten. Und in Streitfällen wird je nach den politischen Interessen bald der Vorzug des einen, bald der Vorzug eines anderen Prinzips hervorgehoben und als entscheidend hingestellt.

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Zu dem Problem des Verhältnisses der Politik zur Moral gehört auch die allerdings bisher noch nicht behandelte Frage:

Darf ein wahrhaft ethischer Mensch, der doch die physische Integrität eines jeden menschlichen Individuums auf das höchste schätzt und daher ohne Notwehr nicht angreift, darf ein solcher Mensch Revolution machen oder an ihr teilnehmen, auch wenn sie voraussichtlich Menschenleben kostet?

Daß es erlaubt ist, in der Notwehr äußere Feinde im Kriege zu töten, ist an sich evident, wobei es aber jedem frei steht, dem »Übel nicht zu widerstreben«. Ganz dasselbe gilt, wenn man im privaten oder öffentlichen Leben von eigenen Staatsgenossen am Leben oder an der Gesundheit bedroht wird.

Schon penibler wird die Situation und größer die Schwierigkeit einer Entscheidung, wenn es sich darum handelt, absolut notwendige fehlende Lebensmittel durch gewaltsames Eingreifen in fremde Gebiete zu verschaffen, falls kein anderer milderer Ausweg übrig wäre. In einem solchen Falle ist die Verletzung menschlicher Individuen eine traurige Notwendigkeit und daher erlaubt, wenn man sich selbst nicht opfern, also nicht verhungern will.

Nun aber geht die Frage nach der ethischen Zulässigkeit von Revolutionen mit voraussichtlich blutigem Ausgang.

Auf der einen Seite — nehmen wir an — sei jemand erfüllt von dem heftigsten Verlangen nach ‹z. B. sehr radikaler› Verbesserung politischer oder sozialer Zustände, von einem Verlangen, das so heftig sein mag, daß man sogar bereit ist, gern sein Leben daran zu setzen, aber auch andere Leben nicht zu schonen.

Auf der anderen Seite steht vor einem das Gebot, kein menschliches Leben ‹ohne Notwehr› zu vernichten! Entsprechend jenem Motto, das ich meinem Werke »Das Individuum und die Bewertung menschlicher Existenzen« vorangesetzt habe, auf welchem ich auch heute beharre und das ich hier wiederholen will:

»Wenn irgend ein selbst noch so unbedeutendes Individuum, das keines anderen Leben mit Absicht gefährdet, ohne oder gar wider seinen Willen aus der Welt verschwindet, so ist das ein ungleich wichtigeres Ereignis als alle politischen, religiösen oder nationalen Ereignisse und als sämtliche wissenschaftliche, künstlerische und technische Fortschritte aller Jahrhunderte und aller Völker zusammengenommen.

Wer das für Übertreibung hält, der möge nur denken, er selbst oder eine von ihm sehr geliebte Person wäre jenes Individuum — und sofort wird er es verstehen und glauben.«

Wie nun? Soll der enthusiastischeste Reformer und Revolutionär jede Aktion unterlassen? Dann müßte man ja selbst

auf die nach seiner Meinung heilsamsten Verbesserungen der öffentlichen Zustände verzichten?

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Hier ein Versuch, dieses große Dilemma zu lösen:

Wenn einer gegnerischen Person ‹Monarchen oder Politiker überhaupt› oder einer Partei oder Klasse durch vorhergehende öffentliche Bewegungen, durch Reden, Schriften oder Demonstrationen Revolution angekündigt wird und jene Person oder Partei gibt nicht nach, so ist damit auch beim Ausbruch der Revolution kein tadelnswerter Angriff gegeben; denn wenn prinzipiell und unbedingt Schutz vor Angriffen und Erhaltung der physischen Integrität gewünscht worden wäre, so hätte man nachgegeben. So aber hat man sich zum Widerstand, also zum Kämpfen entschlossen und seine Sicherheit aufs Spiel gesetzt und es ist nicht anders als ein Krieg zwischen zwei Staaten, wobei allerdings, ebenso wie bei solchen Kriegen immer, jedoch stets nur ganz subjektiv, zwischen mehr oder weniger gerechtfertigten Kriegen unterschieden werden kann. Beide Parteien haben also freiwillig ihre Sicherheit und auch ihr Leben eingesetzt.

Man kann nun als Ethiker sagen: Da man doch voraussehen konnte, daß man durch eine Revolution Menschenleben, sei es freiwillig im eigenen, sei es herausgefordert im gegnerischen Lager, durch Aggression vernichten würde, so habe man Schuld am Untergang menschlicher Individuen, man sollte daher die Revolution unterlassen, denn selbst ihre günstigsten Resultate seien »doch nicht ein einziges Menschenleben wert«.

Da hilft nur ein einziger Ausweg: Man darf in Revolutionen nur dann Menschenleben aufs Spiel setzen, wenn die zu behebenden Übelstände derart sind, daß durch sie ebenfalls physische menschliche Existenzen vernichtet werden, wenn also durch eine Revolution deren weitere Vernichtung verhindert wird.

Hiernach allein sind solche Revolutionen zu beurteilen. So z. B. der Zug Garibaldis mit seinen tausend Freiwilligen nach Neapel im Jahre 1860. Da die bourbonische Regierung das Volk mit Hinrichtungen und Kerkerstrafen heimsuchte, so konnte Garibaldis Gewaltschritt ethisch vollkommen gerechtfertigt erscheinen. So auch das Vorgehen der ersten und auch der

zweiten ‹»glorreichen«› englischen Revolution. Vor der großen französischen Revolution waren Verhaftungen und Verfolgungen genug vorgekommen, dennoch war sie anfänglich ganz unblutig, aber nach der Zusammenziehung von Truppen, der Herbeirufung fremder Armeen und den Konspirationen der Emigranten war die bewaffnete Revolution vollkommen berechtigt. Daß jedoch die Schreckensherrschaft aufs äußerste zu verdammen ist, versteht sich von selbst.

Die Revolutionen des Jahres 1848 waren anfangs unblutig, die Tötung von Menschen wurde vom Militär begonnen.

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Wie ist es, wenn zwar keine physischen Verfolgungen stattfinden, aber ein solcher geistiger Druck oder eine solche Korruption und Ungerechtigkeit stattfindet, daß man es sozusagen nicht länger aushält und revolutionär losbrechen will? Und es sei gewiß, daß Menschenleben ‹in beiden Lagern› hiebei vernichtet würden?

Darf der Ethiker trotzdem losschlagen? Ich glaube: Nein! Es wird sich aber ohne Zweifel die Sache so entwickeln, daß anfangs unblutige Revolten ausbrechen, daß gegen diese Waffengewalt verwendet, daher dann die blutige Revolution als Notwehr hervorgerufen wird, denn wenn man am Leben angegriffen wird, so hat man das Recht, sich bis zur Vernichtung der Angreifer zu wehren.

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In unseren Tagen gibt es kein größeres Revolutionsthema als die Überführung der kapitalistischen Gesellschaftsordnung in eine mehr oder weniger sozialistische. Wenn nun ein sozialistisches Programm für das richtige angesehen wird, dürfen seine ethischen Anhänger für seine Realisierung eine blutige Revolution machen?

Wenden wir die obige Maxime an: Die Übelstände des Kapitalismus sind ohne Zweifel solche, daß ihm menschliche Existenzen zum Opfer fallen. Man müßte also vor allem dessen ganz sicher sein, daß das einzuführende System unbedingt den Ruin menschlicher Existenzen gänzlich oder fast gänzlich verhindert. Über die Verluste während der Durchführung der Revolution würde man sich wahrscheinlich trösten, wenn man sich von ihrer Geringfügigkeit für überzeugt hält, jedoch ist das schon ein bedenklicher Punkt. Ferner müßte man auch dessen sicher sein,

daß die radikalen Übelstände in der heutigen Gesellschaft durch ‹unblutige› Reformen nicht behoben werden können, also zum Beispiel durch spezielle Unterstützungsmaßnahmen, Arbeiterschutzgesetze usw. Auf der anderen Seite können die Stürmer sagen, ohne Revolution dauere jedenfalls die Vervollkommnung der Gesellschaftsordnung viel zu lange.

Ich beantworte diese Frage folgendermaßen: So viel ich weiß, gibt es heute kein einziges soziales Programm, das mit Sicherheit den Erfolg der absoluten Sicherstellung aller ökonomischen Existenzen verbürgt, ausgenommen mein Programm der allgemeinen Nährpflicht. Ich befürworte nun, jede Gewalttätigkeit für die Realisierung dieses Programms zu vermeiden, aber mit äußerster Energie auf solche Verbesserungen als vorübergehende Aushilfe bedacht zu sein, die die Verluste an menschlichen Existenzen so sehr als möglich verhindern, und zugleich eine so lebhafte Propaganda für jenes Programm zu entwickeln, daß in kürzester Zeit eine überwiegende Majorität der Bevölkerung dafür gewonnen wird. Dann genügt diese Tatsache, um als Drohung die Gegner so einzuschüchtern, daß eine gewalttätige Revolution überflüssig wird.

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Bei jeder anfangs noch so zahmen und gesitteten Revolution ist jedoch der verrohende Einfluß zu besorgen, den die Massenbewegungen auf den Verlauf der Revolution ausüben, welche Massenbewegungen teils von Agitatoren arrangiert werden, teils von selbst entstehen. Sobald Menschen in größeren Mengen und namentlich auf freien Plätzen beisammen sind, hört jede Ethik auf. Kein noch so radikaler Bösewicht kehrt sich so wenig an moralische Gebote oder Maximen wie eine Menschenmasse, unter »Masse« durchaus nicht bloß eine Anhäufung von an sich rohen und unintelligenten Individuen verstanden, sondern es können auch sonst gute und rücksichtsvolle und hochintelligente Personen dabei mittun, junge und alte, Männer wie Frauen, jedoch namentlich Frauen.

Noch mehr, man kann sagen, durch das Beisammensein vieler Personen in einigermaßen bewegten Zeitläufen werden die anwesenden Männer feminisiert. Das heißt, der momentane Charakter aller Versammelten wird sofort ein ausgesprochen

weiblicher, und das zeigt sich darin, daß sie mit größter Leichtfertigkeit und Schnelligkeit Verdächtigungen aussprechen und mit größter Bereitwilligkeit hieraus brutale Konsequenzen ziehen, ohne diese Brutalitäten zu begrenzen und ohne darauf bedacht zu sein, sie in einigermaßen entsprechendes Verhältnis zu den als Tatsachen vorausgesetzten Verdächtigungen zu bringen.

Die Erklärung dieser merkwürdigen Umbildung der menschlichen Psyche durch Massenversammlungen beruht auf dem aus der Elektrizitätslehre bekannten Dynamoprinzip, das sich bei den Menschen als gegenseitige Aufpeitschung definieren läßt. So wie der Elektromagnet und der elektrische Strom in der Dynamomaschine gegenseitig in die Höhe treiben, so tun das die Menschen in der Masse durch gegenseitiges Gespräch, ja durch die bloße äußere Haltung, wenn die Individuen darin einig sind, irgend jemanden oder irgend etwas zu tadeln und auch niederzuschlagen.

Man beobachte doch nur zwei Frauen, die über eine dritte Person erbost oder nur in dem Tadel ihres Benehmens einig sind, wie da im Wechselgespräch stets die eine und die andere Frau heftiger und heftiger wird, bis ihre Entrüstung einen Gipfelpunkt erreicht. Was hier unter zwei Personen vorgeht, das gegenseitige Aufpeitschen, das geschieht in ungleich verstärktem Maße in den Massenversammlungen. Und da sind nicht einmal Gespräche nötig. Der Anblick der aufgeregten Physiognomien, der unscheinbarsten Körperbewegung reicht hin, die Gemeinschaftlichkeit der Stimmung genügt, um die heftigsten Explosionen hervorzurufen. Und es ist traurig sagen zu müssen, daß ein gegenseitiges In-die-Höhe-treiben zur Güte oder zu edlen Empfindungsausbrüchen bei den Massen kaum jemals vorkommt. Und wenn man mitunter davon berichtet, daß große Volksmengen »fraternisieren«, so zeigt eine nüchterne Betrachtung, daß die ganze Brüderlichkeit in der Gemeinsamkeit einer latenten Feindschaft gegen irgend wen und irgend etwas besteht, die nur auf den Moment wartet, um loszubrechen.

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Wenn nun dem so ist und wenn man nicht genug ängstlich sein kann, Menschenleben zu schonen, so muß der Ethiker, bevor er Revolution macht, darauf bedacht sein und seine Reformidee darauf hin prüfen:

1. Ob sie so klar und anschaulich vor ihm und wahrscheinlich auch vor anderen steht, daß sie keine Unbestimmtheit zuläßt, sowohl bezüglich ihrer Ausführung als auch betreffs ihres Zweckes und nicht minder ihrer unmittelbaren Folgen.

2. Daß die Gesinnungen so vorbereitet sind, daß die große Majorität der Bevölkerung zustimmt und womöglich auch mitgeht.

3. Daß niemand, der nicht angreift, von der Revolution angegriffen und in seiner physischen Integrität verletzt wird.

Und nicht genug kann davor gewarnt werden, die Geduld gar zu bald zu verlieren und in der Sehnsucht nach Reformen gar zu rasch nach Revolution zu rufen. Die Menschheit wird nie zur Gesittung gelangen, solange sie nicht das oben angeführte Motto zur Richtschnur ihres Handelns macht.

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Der eben beendete Weltkrieg — und nicht minder die ihm folgenden Friedensverträge mit ihren Begründungen — würden eine reichliche, nur allzu reichliche Gelegenheit geben, über Politik und Moral zu philosophieren.

Hier in diesem Werke wurde nur soviel über den Weltkrieg gesprochen als nötig war, um an ihm einige allgemeine Themen zu erläutern, die den Hauptgegenstand dieses Buches bilden. Aber ich habe zwei spezielle Betrachtungen über den Weltkrieg in den Jahren 1917 und 1918 publiziert, und zwar unter dem Titel: »Einige Gesichtspunkte für die Beurteilung der Urheberschaft am Weltkriege« und »Friedensvorschläge, Schiedsgerichte, Völkerbund«[1], wo besonders die Frage der Schuld am Weltkriege erörtert wurde. Zu meiner Genugtuung kann ich konstatieren, daß meine dort geäußerten Ansichten trotz und infolge aller seitherigen so zahlreichen Veröffentlichungen und Enthüllungen unerschüttert geblieben sind.

Auf diese beiden Publikationen will ich hier nur hinweisen, jedoch eine Bemerkung anknüpfen, die mir von einiger Wichtigkeit zu sein scheint.

Man kann über politische Vorgänge von dreierlei Standpunkten aus schreiben: 1. Vom egoistischen, d. i. patriotischen oder chauvinistischen Standpunkt; 2. von dem der allseitigen Gerechtigkeit, 3. vom rein ethischen Standpunkt aus.

[1] Anzengruber-Verlag, Brüder Suschitzky, Wien-Leipzig.

Der erste ist keiner näheren Betrachtung würdig.

Der zweite ist eben jener, von dem aus meine beiden Broschüren verfaßt wurden, obwohl auch der dritte Standpunkt darin gelegentlich vertreten wurde.

Der dritte wird in dem vorliegenden Werke vertreten. — Was ist unter »Gerechtigkeit« im politischen Urteil zu verstehen? — Das Prinzip, alle Parteien, die überhaupt beurteilt werden, nach den gleichen, allgemein geltenden politischen Maximen zu kritisieren und nicht der einen Partei gewisse Handlungsweisen zuzubilligen, die man der anderen untersagen möchte.

In diesem Weltkriege wurde nun von Seite der Politiker, der aktiven sowohl wie der bloß schreibenden und sprechenden, gegen dieses Prinzip der Gerechtigkeit aufs äußerste gesündigt, ganz abgesehen davon, daß man direkt und sozusagen brutalerweise ungerecht wurde, indem man entscheidende Tatsachen absichtlich oder unabsichtlich ignorierte.

In meinen beiden Aufsätzen wird eben das Hauptgewicht darauf gelegt, jeden zu seinem Rechte auf Subsumtion unter die allgemein geltenden politischen Maximen kommen zu lassen.

Hier einige Beispiele, denen ich vorausschicke, daß hier nur von der Schuld am Weltkriege durch politische Ungehörigkeiten, nicht aber an der Verlängerung des Krieges und auch nicht von den Brutalitäten und Völkerrechtsverletzungen während des Krieges die Rede sein soll. Und ferner vorausschicke, daß ich damals wie heute und wie immer als echter Pannationaler spreche und keiner Partei angehöre.

Also: Man macht Österreich-Ungarn einen großen Vorwurf daraus, daß es den Vermittlungsvorschlag Greys, seinen Streit mit Serbien einer Konferenz zu unterwerfen, zurückwies. Ich bemerkte aber ⟨in der erstgenannten Schrift⟩ dazu, daß ohne Zweifel Österreich-Ungarn auf einer Konferenz einer im vorhinein gegnerischen Majorität ausgesetzt gewesen wäre, und wenn es auf sein Prestige gegenüber Serbien pochte, so meine ich, daß man ihm — aber nur als altgewohnter ordinärer Politiker — auch das zugute halten müsse. Denn, so argumentierte ich, wenn zum Beispiel der russische Großfürst-Thronfolger durch Angehörige Rumäniens, das etwa auf Beßarabien spekulierte und so wie Serbien Österreich, Rußland gereizt hätte, ermordet worden wäre, wie das mit dem österreichischen Thronfolger geschah, so

hätte gewiß niemand etwas dagegen eingewendet, wenn Rußland sich selbst Genugtuung verschafft und seinen kleinen Nachbar »gezüchtigt« hätte, ohne auch nur einen Augenblick daran zu denken, eine europäische Vermittlung anzurufen. Weder die verschiedenen Regierungen noch die Zeitungen hätten etwas gegen dieses Vorgehen eingewendet, sie hätten es dem »Prestige« Rußlands für entsprechend und selbstverständlich gehalten und kein aktiver Politiker hätte es gewagt, der russischen Regierung einen Vorwurf zu machen, denn er hätte gewußt, daß er als ein höchst »unfreundlicher Akt« aufgenommen worden wäre.

Ebensogut begründet war die Weigerung Wilhelm II., dem Prestige Österreichs nahezutreten und ihm in seine Entscheidung bezüglich des englischen Vermittlungsvorschlages dreinzusprechen.

Allerdings ist diese meine Rechtfertigung der Mittelmächte nur eine Anwendung der politischen Unparteilichkeit. Ein ethisches Vorgehen war es nicht, Serbien wegen des Prestiges mit Krieg zu überziehen, denn ein Ethiker wird keinem Prestige zuliebe auch nur einziges menschliches Individuum opfern und daraus sieht man aber, wie weit entfernt ein bloß unparteiisches, ethisches politisches Urteil bleibt.

Auch der Vorwurf ist unbegründet, daß Deutschland auf den Vorschlag Rußlands, das Haager Schiedsgericht anzurufen, nicht eingegangen ist, denn auch in diesem Falle war eine gegnerische Majorisierung gewiß.

Ganz besonders wurde der unbeschränkte U-Bootkrieg Deutschlands getadelt, man schwieg aber davon, daß zuvor England die Nordsee ganz völkerrechtswidrig als Kriegsgebiet erklärt hatte! Und, was noch wichtiger ist, dieser U-Bootkrieg sollte eine Gegenmaßregel gegen die ungleich größere Barbarei der Aushungerungsblockade Deutschlands durch England sein.

Am schlimmsten kam die deutsche Regierung wegen des völkerrechtswidrigen Einmarsches in Belgien weg. Gewiß mit Recht! Aber davon schwieg man in den Polemiken, namentlich in den englischen, daß England im Jahre 1807 in Kopenhagen und vor kurzem erst mit den Raid des Dr. Jameson ins Burenland ganz genau dieselbe Völkerrechtswidrigkeit beging, wegen der die englischen Regierungsmänner Deutschland aus der Reihe der zivilisierten Völker streichen wollten. Und eine ebenso große

Ungerechtigkeit in der politischen Beurteilung dieses deutschen Gewaltaktes war darin gelegen, daß man immer von der belgischen Neutralität sprach, die durch die Deutschen verletzt worden sei. Nun hatte aber Belgien unbedingt seine Neutralität dadurch verletzt, daß es sich lange vor dem Kriege mit dem englischen Generalstabe ins innigste Einvernehmen setzte mit Rücksicht auf den Fall, daß Deutschland Belgien angreifen würde, es aber unterließ, auch mit Deutschland sich militärisch zu verständigen für den Fall, als England Truppen in Belgien landen würde.

Ebenso muß man es tadeln, daß man auf Seite der Entente die belgischen Gesandtschaftsberichte vollständig sekretierte, aus denen mit Evidenz der Plan Englands, respektive Eduard VII., hervorging, Deutschland zu isolieren.

Es war und ist mir ganz unbegreiflich, wieso es sogar intelligente politische Schriftsteller der Mittelmächte vermochten, so blind zu sein oder sich so blind zu stellen, daß sie die Entente als die Unschuldigen und die Mittelmächte als die allein Schuldigen hinstellten. Diese Schriftsteller gingen und gehen immer davon aus, daß Österreich und mit ihm Deutschland durch das Ultimatum an Serbien den Weltkrieg provozierte, kümmern sich aber nicht im geringsten um alles, was während der letzten Jahrzehnte und namentlich der letzten fünfundzwanzig Jahre vorausgegangen war.

Es genügt eben bei weitem nicht, die Vorgänge unmittelbar vor Kriegsausbruch herauszuheben und z. B. die Provokation Serbiens durch die österreichische Diplomatie aufs äußerste zu beklagen. Vom ethischen und vom pazifistischen Standpunkte aus war diese Provokation gewiß ein unerhörtes Verbrechen, auf dem Standpunkte der Ethik und des Pazifizismus stand aber damals weder Österreich-Ungarn, noch irgend ein anderer Staat, noch stehen die Politiker heute dort — wie die Friedensverträge zeigen — nach dem so schrecklichen Weltkriege.

*

Wie sah denn Europa in der neueren Zeit überhaupt in politisch-militärischer Beziehung aus?

Daß sei nun für alle Zeiten hier festgestellt, weil es konsequent beiseite gelassen wird, obwohl es eigentlich jedem wohlbekannt ist, aber nur aus verschiedenen Gründen nicht nach Gebühr beachtet wird.

Europa — seit ungefähr 1871 — muß man sich vorstellen wie einen gewaltigen Zirkus, in welchem eine Anzahl von Bestien darauf lauert, loszugehen und Beute zu machen, und nur darauf wartet, sich zu gruppieren, um dann mit vereinter Kraft auszubrechen. Wenn hier gesagt wird, »Europa« lauerte, so sind natürlich darunter die entscheidenden Faktoren der Einzelstaaten zu verstehen, das sind bald größere, bald kleinere Gruppen von sogenannten Staatsmännern — und Staatsfrauen —, während die Volksmassen selbst im Dunklen dahinschleichen und auf die politischen Brosamen warten müssen, die ihnen zugeworfen werden, um sie in Bewegung zu setzen.

Worauf lauerten also die Bestien?

Da ist vor allem »Frankreich«, dieses wartete auf die Revanche für 1870. Sodann »Rußland«, das auf Konstantinopel wartete und schon seit Jahren den Weg dahin zuerst über Wien, dann über Berlin suchte. Ferner »Italien«, das auf Südtirol, Istrien mit Triest und Dalmatien lauerte. »Österreich« auf die Beherrschung des Balkans, »Serbien« auf die Verkleinerung Österreich-Ungarns. »Deutschland«, durch die preußischen Junker repräsentiert, auf das Losschlagen überhaupt. Und endlich »England« — das mit England, d. h. mit seinem ganzen Volk identisch war und ist — auf die Zertrümmerung des deutschen Handels und der deutschen Seemacht.

Wie man sieht, ist nur eine einzige dieser Bestien »kapitalistisch« orientiert, nämlich England, alle anderen haben »Ideale«, die mit Kapitalismus gar nichts zu tun haben — man könnte höchstens den Konflikt der ungarischen Großgrundbesitzer mit den serbischen Schweinebesitzern ausnehmen. Man kann also nicht weiter von einem wirtschaftlichen, kapitalistischen Ursprung des Weltkrieges sprechen, wie das die Marxisten mit einer Beharrlichkeit à la Kiselack behaupten und andere unüberlegt es ihnen nachsprechen. Und doch wird gewiß niemand auch im geringsten Maße leugnen können, daß das, was soeben über die erlauerten Ziele der Einzelmächte angeführt wurde, etwas anderes als die nackten Tatsachen darstellt.

Ob nun die Bestien losgehen würden, hing vor allem davon ab, daß sich ihre Gruppierung vollzog, und der Zeitpunkt der Rauferei selbst hing nur von irgend einem sozusagen episodischen, fast zufälligen Umstande ab. Die lange erwartete

Gruppierung vollzog sich in der Tat im Jahre 1891 durch eine französisch-russische Allianz und im Jahre 1892 infolge der russisch-französischen Militärkonvention vom 17. August desselben Jahres, in der im Falle der Mobilmachung auch nur einer einzigen Macht des Dreibundes ⟨Deutschland, Österreich-Ungarn und Italien⟩ unverzügliche und gleichzeitige Mobilmachung der gesamten französischen und russischen Streitkräfte und deren schleuniger Einsatz zu entscheidendem Kampfe vereinbart wurde, hiezu kam das Milliardenanlehen Rußlands bei Frankreich zu rein strategischen Zwecken und die Erweiterung des im Jahre 1892 geschlossenen Kriegsbündnisses durch die Marinekonvention vom 16. Juli 1912. Und auf diese Weise — wie schon oben dargelegt wurde — war die Hauptgruppierung der Mächte seit 1892 fixiert und der Ausbruch eines Weltkrieges für früher oder später außer Zweifel gesetzt.

Aber auch das wurde außer Zweifel gesetzt, daß es in der Hauptsache gegen Deutschland ging. Denn schon am 8./21. September 1911 berichtete der serbische Geschäftsträger Gruitsch aus London von einer Unterredung mit dem französischen Botschafter Paul Cambon, in welcher dieser ganz offen von den französischen Rüstungen für einen in allernächster Zeit ausbrechenden Krieg sprach. Da die Rüstungen nicht vor 1914 vollendet sein würden, so sei man gezwungen, den Krieg bis zu diesem Termin aufzuschieben. Und von der Bereitwilligkeit Englands, in diesem geplanten Kriege mit Frankreich zusammenzugehen, berichtete Gruitsch am 9./22. November desselben Jahres, dazu bedenke man noch die Einkreisungstätigkeit Eduard VII. und sein schroffes Verhalten gegen Deutschland, wovon die belgischen Gesandtschaftsberichte so viel zu erzählen wissen. Den feststehenden Entschluß Rußlands aber, Krieg zu führen, ersieht man in positivster Weise daraus, daß es den serbischen Politikern und Generalen immerwährend zur Geduld riet, bis Rußland gerüstet sein werde. Schon am 19. Februar/13. März 1909 berichtete Kosutitsch, der serbische Gesandte in Petersburg: »Gutschkow erklärt mir: Ist unsere Rüstung einmal vollkommen durchgeführt, dann werden wir uns mit Österreich-Ungarn auseinandersetzen, beginnt jetzt keinen Krieg, denn das wäre Euer Selbstmord, verschweigt Eure Absichten und bereitet Euch vor, es werden die Tage Eurer

Freude kommen.« Und der definitive Beweis für die russischen Kriegsabsichten war doch die Anordnung der allgemeinen Mobilisierung während der Vermittlungsversuche des Deutschen Kaisers und die Enthüllungen gelegentlich des Suchomlinow-Prozesses.

Hingegen Deutschland seit 44 Jahren Frieden hielt und sogar unter sehr drängenden Umständen Frieden zu erhalten strebte. Alle Anzeichen wiesen darauf hin — wir haben das ja soeben in kurzem darzulegen versucht — daß es auf eine Niederwerfung Deutschlands abgesehen sei und daß es einen großen Krieg, aber einen Verteidigungskrieg werde führen müssen. Hievon war nicht nur Wilhelm II. aufs innigste überzeugt, sondern auch der größte Teil des deutschen Volkes, das ja sonst nicht eineinhalb Millionen Freiwillige ins Feld gestellt hätte. Der deutsche Kaiser hielt sich geradezu für verraten von den englischen wie von den russischen Politikern und noch mehr, man wurde geradezu überrascht, aus den Marginalnoten Wilhelm II. zu den politischen Aktenstücken und aus seiner Korrespondenz mit dem Zaren zu ersehen, mit welcher Beharrlichkeit er an Aufrechthaltung des Friedens ‹und sogar allgemein auf Hintanhaltung jedes Krieges› arbeitete. Nach den neuesten Veröffentlichungen entstand betreffs seiner speziell kriegspolitischen Gesinnungen ein dem bisherigen ganz entgegengesetztes Bild dieses Mannes. Im Bewußtsein, über eine außerordentlich starke Macht zu verfügen, mit der er seinen Widersachern trotzen konnte, machte er allerdings große Worte, die wie Übermut klangen, an einen Aggressivkrieg dachte er jedoch nie, und niemand wird bei ihm einen solchen Gedanken objektiv nachweisen können. Selbst wenn er in der Annahme, nur einen Verteidigungskrieg zu führen, geirrt hätte und wenn ebenso das deutsche Volk sich hierin geirrt hätte, so kann man beide doch unmöglich schuldig sprechen, den Weltkrieg veranlaßt zu haben, und daß sie wirklich diese Überzeugung hatten, scheint mir doch durch alles so viel wie bewiesen zu sein[1].

Dagegen wissen wir aus einem Situationsbericht des russischen Gesandten Bencken dorf in London vom 12./25. Februar 1913: »Wenn ich Cambons Unterredungen mit mir, die gewechselten Worte kurz wiederhole und die Haltung Poincarés

[1] Ein Verhängnis für Wilhelm II. wie das deutsche Volk war jedoch das an Wahnwitz grenzende Bewußtsein seines Gottesgnadentums.

hinzunehme, so kommt mir der Gedanke, der einer Überzeugung gleichkommt, daß von allen Mächten Frankreich die einzige ist, die, um nicht zu sagen, den Krieg wünscht, so doch ihn ohne großes Bedauern sehen würde. Jedenfalls hat mir nichts gezeigt, daß Frankreich aktiv dazu beiträgt, in dem Sinne eines Kompromisses zu arbeiten. Nun, der Kompromiß — ist der Frieden, jenseits des Kompromisses liegt der Krieg.« Es ist ja allgemein bemerkt worden, daß selbst im Juli 1914 Frankreich gar nichts getan hat, um auf die russischen Politiker im friedlichen Sinne einzuwirken.

Und ebenso wissen wir aus einem Bericht des Ministers Sasonow an den Zaren aus dem Jahre 1912, wie »Englands« Neutralität und Friedensgesinnung in Wirklichkeit beschaffen war: »Aus diesem Anlaß« — schrieb Sasonow — »bestätigte mir Grey aus eigenem Antrieb das, was ich bereits von Poincaré wußte, und zwar: das Vorhandensein eines Abkommens zwischen Frankreich und Großbritannien, nach dem England im Falle, eines Krieges mit Deutschland sich verpflichtete, Frankreich nicht nur zur See, sondern auch auf dem Kontinent durch Landung von Truppen zu Hilfe zu kommen.«

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Resumieren wir: Alle Großmächte waren seit langem auf der Lauer nach Beute, seit 1891 stand der Ausbruch eines Weltkrieges fest und dabei war Deutschland in die Defensive gedrängt. Dies sei nochmals durch folgende Tatsachen bewiesen: Im Jahre 1891 gab es eine französisch-russische Allianz, 1892 eine französisch-russische Militärkonvention, 1902 ein englisch-japanisches Bündnis, 1903 die ‹direkt› antideutsche europäische Agitationsreise Eduard VII., 1904 die französisch-englische Entente, 1906 den Beginn französisch-englisch-belgischer Vereinbarungen betreffs Eingreifens englischer Truppen in Belgien gegen Deutschland, 1907 und 1908 die englisch-russische Entente; 1912 war England laut den Brüsseler Gesandtschaftsberichten schon entschlossen, im Falle eines Krieges in Belgien Truppen zu landen, auch ehe ein Einmarsch der Deutschen daselbst erfolgt wäre, und im selben Jahre fanden militärische Konferenzen zwischen englischen und französischen Fachleuten statt und wurde bereits ein Bündnis zwischen diesen Staaten — in brieflicher, aber genügend fester Form — geschlossen.

Und man bedenke immer, daß Österreich-Ungarns Provokation Serbiens im Grunde auf Rußlands Drang nach Konstantinopel, und daß Deutschlands Ermunterung zu dieser Provokation in letzter Instanz nur auf Frankreichs Revanchegelüste zurückzuführen ist.

Obwohl nun Verteidigungskriege auch ethisch zulässig sind, so ist doch die Provokation Serbiens und die Ermunterung derselben durch den Deutschen Kaiser als unethisch auf das äußerste zu verurteilen. Man darf bei Achtung vor menschlichen Existenzen selbst einen Verteidigungskrieg nicht beginnen, so sehr auch die politische und militärische Voraussicht dafür sprechen mögen.

*

Es scheint mir hier angemessen, bei Vergleichung zwischen Politik und Moral zweier großer Persönlichkeiten zu gedenken, über die sehr viel gesprochen wird und die meiner Meinung nach in unrichtiger Weise in ihrem kulturellen Werte abgeschätzt werden. Ich meine hier die beiden russischen Dichter: Dostojewski und Tolstoi.

Es ist für mich beinahe rätselhaft, wieso das kriegerische Element bei Dostojewski so stark sein konnte, daß es ihm nicht nur prinzipiell im Gemüte saß, sondern auch durch seinen Intellekt gerechtfertigt und sogar verherrlicht wird. Mit größter Energie trat er ein für einen russisch-türkischen Krieg im Jahre 1876, betrachtete einen Krieg für die Rechtgläubigkeit als hohes Ideal, verlangt die Eroberung Konstantinopels sowie die Bekämpfung der Turkmenen und wollte von den Meerengen den Griechen, obwohl auch sie rechtgläubig sind, nicht den kleinsten Teil überlassen, »weil es für sie zu viel wäre«. Eine Erwägung der Todesqual der in den Krieg hinein gezwungenen Soldaten kam ihm keinen Augenblick in den Sinn. Dostojewski steht also bei dem wichtigsten Standpunkte der Humanität, nämlich der Achtung menschlicher Existenzen, mit so vielen anderen viel weniger begabten Dichtern auf einer sehr niedrigen Stufe.

Tolstoi, obwohl hochadelig von Geburt und Soldat, war von dieser menschenmörderischen Marotte Dostojewskis vollständig frei und wir müssen ihn, wenn er auch bezüglich der Notwehr zu nachsichtsvoll war, unter die allergrößten Menschen aller Zeiten rechnen, was ist dagegen sein kolossales Dichtertalent, das man meinetwegen über oder unter Dostojewskis Talent stellen mag!

XVII.

Schlußwort.

Der hauptsächlichste Zweck dieses Werkes ist der: die Überzeugung hervorzurufen, daß es bis jetzt keine Institution gibt, die jedes menschliche Individuum vor den Hauptübelständen durch Kriege mit mehr Sicherheit bewahren kann, als der Ersatz der Wehrpflicht durch den freiwilligen Kriegsdienst.

Die Argumentationen und Ausführungen zu diesem Programm mögen mit Aufmerksamkeit gelesen und erwogen werden, und es wäre sehr viel für die Verbesserung unserer politischen Zustände gewonnen, wenn eine große Majorität der Bevölkerung Europas recht bald meinen Vorschlag akzeptieren würde. Dann wäre dieses Buch nicht nutzlos geschrieben worden, selbst wenn alles andere, wenn alle sonstigen darin enthaltenen Vorschläge, Betrachtungen und kritischen Bemerkungen gar keine Zustimmung fänden.

Mein Hauptprogramm behielte auch dann seinen Wert, wenn man den verschiedenen Vorschlägen pazifistischer Natur alles Vertrauen entgegenbrächte. Und es kann auf keinen Fall schaden, sondern nur das Zutrauen in pazifistisch geordnete Zustände erhöhen, wenn mein Hauptvorschlag bereits realisiert worden wäre.

Das Programm der Freiwilligkeit setzt natürlich voraus, daß es noch Kriege gäbe und daß noch Kriegsabsichten und Kriegsbefürchtungen bestehen. Mit positiven Maßregeln zu ihrer Verhinderung hat es nichts zu tun, obwohl es indirekt auch in dieser Beziehung nützlich sein wird.

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Dieses Werk hat durchaus nicht die Tendenz, jede Art von Krieg prinzipiell zu verdammen, denn es wäre doch sehr

unangebracht, Befreiungskriege oder Kriege in Notwehr gegen unerträgliche Situationen irgend welcher Art tadeln zu wollen. Solche Kriege betrachte ich, bei aller Hochschätzung einer jeden menschlichen Existenz und physischen Integrität, als eine sehr traurige, aber oft unabwendbare Tatsache, und ich bin daher ein umso stärkerer Gegner aller anderen Arten von Kriegen.

*

Da ich die Zuversicht hege, daß die Beherzigung und Realisierung dessen, was ich in diesem Buche gesagt habe, von großem Nutzen für die Menschheit sein würde, so will ich zur größeren Deutlichkeit und Anschaulichkeit die in den einzelnen Kapiteln zerstreuten Vorschläge und Anregungen hier ganz kurz und übersichtlich zusammenstellen.

*

Der wichtigste und dringendste meiner Vorschläge ist, wie gesagt, das Programm der Freiwilligkeit des Kriegsdienstes und der im VIII. Kapitel gegebenen zugehörigen Detailbestimmungen, sowie die Vorschläge über das einzuhaltende Regime im Gebiete der Seestreitkräfte. Dieses Programm ist nebst jenem der allgemeinen Nährpflicht, das in meinem Werke dieses Titels eingehend dargelegt wurde, die Hauptreform, der unser soziales Regime unterzogen werden muß.

Auf diese zwei Säulen wird sich, wie ich glaube, eine relativ gesittete, segensreiche und friedliche Einrichtung des künftigen Staates stützen können.

*

Die anderen Vorschläge, Anregungen und praktisch zu verwertenden Auffassungen und Ratschläge, die in diesem Werke mehr oder weniger eingehend behandelt und begründet wurden, sind die folgenden:

Vor allem, was den Staat betrifft:

Möge man dem Staat, also der Regierung, nur das in seine Machtvollkommenheit übergeben, was auf andere Weise, das heißt durch einzelne oder durch Korporationen oder kleinere Gesellschaftsgruppen, nicht ebenso gut oder nicht besser durchgeführt werden könnte.

Sodann: Möge eine durch Volksabstimmung oder durch ein Parlament von Fall zu Fall sanktionierte Unterscheidung zwischen fundamentalen, d. h. sehr wichtigen und sekundären Forderungen und Wünschen der Staatsangehörigen gemacht werden. Die Fragen der fundamentalen Forderungen — wie zum Beispiel die Sicherung der Lebenshaltung durch Verteilung eines Minimums oder die Freiwilligkeit des Kriegsdienstes — sind von jeder Einflußnahme der Regierung oder einer Volksvertretung freizuhalten und einer Volksabstimmung zu unterwerfen. Jene Angelegenheiten, die von sekundärer Bedeutung sind, mögen der Volksvertretung überlassen werden, die nach direktem, allgemeinem, gleichem und geheimem Stimmrecht aus der ganzen Bevölkerung zu wählen ist.

Es soll in Reden, Zeitschriften und in den Büchern dahin gewirkt werden, daß sekundäre Angelegenheiten, die also keine Lebensnotwendigkeiten betreffen, nicht für so wichtig genommen werden, um — wie jetzt — heftige Streitigkeiten und Kämpfe wegen unsympathischer Entscheidungen durch die Volksrepräsentanten zu entfachen. Denn sind einmal fundamentale Forderungen befriedigt, so sollen untergeordnete doch nicht mehr den Frieden stören können, besonders im Hinblick darauf, daß in diesen Gebieten sich nicht wie in den exakten Wissenschaften objektive oder zwingende Beweise für Richtigkeit oder Unrichtigkeit geben lassen.

Ferner: Soll die äußere Politik — wie auch die innere — womöglich nach ethischen Grundsätzen geführt werden.

Die wichtigeren Beziehungen und Verhandlungen zwischen dem eigenen und den fremden Staaten sollen unbedingt und regelmäßig den Staatsbürgern bekanntgegeben werden. Das ist mindestens ebenso wichtig wie Wetterberichte.

Verträge sind nur dann rechtskräftig, wenn die Volksvertretung oder, in wichtigeren Fällen, wenn ein Referendum ihnen zustimmt.

*

Was Erziehung und Unterricht betrifft:

Vor allem soll im Geschichtsunterricht alle Bewunderung unmoralischer, wenn auch noch so glänzender politischer Unternehmungen sowie dementsprechend die Verehrung brutaler Heldentaten vermieden und in den Gemütern der Jugend erstickt werden.

Sodann sollte man den Menschen schon von frühester Kindheit an die höchste Achtung vor der physischen Integrität eines jeden menschlichen Individuums einprägen.

Beim Unterricht in der politischen und Kultur-Geschichte sollen nationale Eigentümlichkeiten, die uns nicht direkt unethisch erscheinen, nie verlacht oder gar getadelt werden. Aber selbst die unmoralisch erscheinenden sollen auf ihren Ursprung, ihre Bedeutung und die bei jeder fremden Nation vorhandene gedankliche Rechtfertigung hin genau untersucht werden, um ungerechten Tadel zu verhüten oder zu mildern. Alles Fremde und etwa Auffallende oder Abstoßende soll als mit unseren Sitten gleichberechtigt, wenn auch nicht immer als für uns passend hingestellt werden.

Der Erziehung der Jugend zur Pietät im weitesten Sinne des Wortes soll eine ganz besondere Aufmerksamkeit zugewendet werden. Heute fehlt sie uns beinahe gänzlich.

*

Es gibt gewiß noch vieles andere zu wünschen und es werden solche Wünsche nach Verbesserungen unserer Zustände auch reichlich genug ausgesprochen. Aber unter den zahlreichen Forderungen, die erhoben werden, sind die meisten jener, die hier angeführt werden, gar nicht vertreten. Und doch glaube ich, daß, wenn man meinen Vorschlägen Gehör gibt, es den Menschen endlich möglich sein würde, ihr Leben relativ glücklich zu verbringen: Mit fremden Staaten fast immer im Frieden, im eigenen nicht minder, und frei und ungestört in Tätigkeit oder Untätigkeit und namentlich mit sich selbst in innerem Frieden — ohne Langeweile.

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LEONHARD WINKLER

DEUTSCHES RECHT

IM SPIEGEL DEUTSCHER SPRICHWÖRTER

LEONHARD WINKLER

Deutsches Recht im Spiegel deutscher Sprichwörter

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„Das Recht ist ein gemeines Gut,
Es lebt in jedem Erdensohn,
Es quillt in uns wie Herzensblut."

Deutsches Recht im Spiegel deutscher Sprichwörter

Ein Lese- und Lernbuch für das deutsche Volk

Von

LEONHARD WINKLER

Oberlandesgerichtsrat in Karlsruhe

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Vorwort

„Das Recht im Spiegel deutscher Sprichwörter. Ein Lese- und Lernbuch für das deutsche Volk" — ist das nicht ein totgeborenes Kind? Will denn das deutsche Volk ein solches Buch? Will es etwas ernstlich vom Rechte wissen? Genügt es nicht seinen Bedürfnissen, sich gelegentlich über das Recht und über alle, die mit dem Rechte etwas zu tun haben, Richter, Anwälte und Regierungen einmal ordentlich auszuschimpfen? Diese und ähnliche Fragen erscheinen dem Kenner nicht überflüssig. Wer z. B. weiß, wie bei Beratungen über Gesetzentwürfe die Abgeordneten der Volksvertretung aus dem Sitzungssaal flüchten und wie leer die Bänke der Zuhörer zu sein pflegen, kann der daran glauben, daß ein vom Recht handelndes Buch im Volke Anklang finde? Ist das Recht und was damit zusammenhängt, für das Volk nicht ein Buch mit sieben Siegeln? Und verzichtet man nicht deshalb darauf, sie zu lösen, weil man gar nicht wissen will, was in dem Buche steht?

Auch ich habe mir diese Fragen gestellt. Gleichwohl habe ich den Versuch gemacht, um die Seele des Volkes zu ringen. Wird es mir gelingen, seine Augen und Ohren zu öffnen, ja vielleicht sogar ein bißchen Liebe zu gewinnen für ein Lebensgebiet, das als trocken und langweilig verschrien ist und das uns doch wie die Luft jeden Tag unseres Lebens umgibt und begleitet? Weder die Fachleute noch das Volk sollten doch vergessen, daß das Recht ein Ast vom Baume der großen menschlichen Kultur ist und nicht ein in Gesetzesparagraphen eingeschnürtes Gebiet des Lebens, das die freie Luft nicht verträgt! Freilich hat sich auch das Recht geradeso wie die anderen Zweige der menschlichen Erkenntnis in einer ungeahnten Weise entwickelt. Es kann daher nicht mehr wie in alter Zeit jeder Volksgenosse ohne besondere berufliche Schulung darin Meister sein oder werden. Vielmehr hat sich auch hier wie sonst eine besondere Fachausbildung und ein eigener Berufsstand als nötig erwiesen. Immerhin sollten aber die Grundzüge des Rechts wie die der Gesundheitslehre Gemeingut des ganzen Volkes sein.

Wer jedoch an die Seele des Volkes herankommen will, muß sich fernhalten von der üblichen wissenschaftlichen Schreibweise. Er darf

nicht verzichten auf Anschaulichkeit und muß sich hüten vor den vielen Anmerkungen, die den Fluß der Darstellung unterbrechen und ihren Genuß stören. Ich habe daher die meist fremdsprachigen Fachausdrücke vermieden und im allgemeinen das wissenschaftliche Rüstzeug weggelassen; jedoch habe ich im Gebiete des bürgerlichen Rechts für den oder jenen Leser, der sich von der Richtigkeit des Vorgetragenen überzeugen oder vielleicht auch sein Wissen erweitern will, auf die einschlägigen Gesetzesbestimmungen hingewiesen. Und zwar sind außer dem deutschen bürgerlichen Gesetzbuche von 1896, das im Jahre 1900 in Kraft getreten ist, auch die Bestimmungen der entsprechenden schweizerischen und österreichischen Gesetzbücher von 1907 und 1811 angeführt. Denn mein Buch wendet sich nicht bloß an die Teile des deutschen Volkes, die in den jetzigen Grenzen des vom Feindbund mißhandelten Deutschen Reiches wohnen, sondern es möchte hindringen, soweit die deutsche Zunge klingt.

Noch etwas anderes macht es so schwierig, ein volkstümliches Buch über diese Frucht des menschlichen Geistes zu schreiben. Wer das erstrebt, darf nämlich nicht vergessen, daß das Recht, wie es dem Deutschen der neueren Zeit dargeboten wird, vielfach nicht auf deutschem Boden gewachsen, sondern aus Rom eingeführt worden ist. Der Deutsche aber hat seit alters ein dumpfes Gefühl dafür, daß aus Welschland wenig Gutes für ihn komme. Immerhin wird jetzt auch das bürgerliche Recht nicht mehr aus einem in lateinischer Sprache geschriebenen Buche geschöpft, nämlich aus den unter dem oströmischen Kaiser Justinian zusammengestellten Pandekten, sondern aus Gesetzbüchern, die in der Muttersprache geschrieben sind und in denen auch deutscher Geist lebt.

Bei der Abfassung des Buches habe ich natürlich aus mancherlei Quellen geschöpft, habe sie aber nicht im einzelnen angegeben, da das entbehrlich ist bei Büchern, die nicht als wissenschaftliche Arbeiten gelten wollen. Jedoch bemerke ich für den, der sich nicht mit der hier gegebenen Auslese von Sprichwörtern begnügen, sondern sie vollständig kennen lernen möchte: am meisten habe ich der 1869 in zweiter Auflage erschienenen Sammlung deutscher Rechtssprichwörter von Eduard Graf und Matthias Dietherr, der sogenannten Münchner Sammlung, entnommen. Ja, ich habe sogar ganze Sätze daraus übernommen, und zwar ist das regelmäßig der Fall, wo eine Stelle in Anführungszeichen abgedruckt ist, ohne daß dafür

eine andere Quelle angegeben wird. Weiter habe ich, um die Worte Luthers aus seinem Sendebriefe vom Dolmetschen zu gebrauchen: „deutsch, nicht lateinisch noch griechisch reden wollen. Man muß aber nicht die Buchstaben in der lateinischen Sprache fragen, wie man deutsch reden soll, sondern man muß die Mutter im Hause, das Kind auf der Gasse, den gemeinen Mann auf dem Markte darum fragen und ihnen aufs Maul sehen, wie sie reden und danach dolmetschen; so verstehen sie es dann und merken, daß man deutsch mit ihnen redet."

Das Buch bringt Sprichwörter, die vor Jahrhunderten entstanden sind und heute ohne Erläuterung manchmal kaum verstanden werden. Deshalb muß es da und dort in die Geschichte unseres Volkes hinaufschreiten. Insofern ist es ein geschichtliches Buch. In der Hauptsache jedoch soll sich in den Sprichwörtern das heutige Recht spiegeln. Aber weiter! Die im Machtspruch von Versailles ausgeklügelten Bedrückungen greifen vielfach auf längst überwundene Stufen der Rechtsentwicklung zurück. Sie hemmen und erschweren allenthalben das deutsche Staats- und Wirtschaftsleben der nächsten Zukunft. Da drängen sich ungesucht und ungewollt in den Abschnitten vom öffentlichen Recht kritische Bemerkungen auf und es tritt selbst ein gewisser politischer Einschlag zutage. Das eben ist der Fluch der bösen Tat, die verübt worden ist unter dem Deckmantel der Freiheit, der Gerechtigkeit und des Selbstbestimmungsrechts.

Was in der Münchner Sammlung oder sonstwo als Rechtssprichwörter aufgeführt und von mir übernommen worden ist, habe ich anhangsweise in einem nach der Buchstabenfolge geordneten Verzeichnis zusammengestellt. Wer genau prüft, wird freilich finden, daß nicht alles, was hier gebracht wird, die Bezeichnung „Sprichwort" verdient. Manches ist nicht ein kurzer kerniger, in sich abgeschlossener Satz und ist darum höchstens eine sprichwörtliche Redensart. Manches Sätzchen riecht auch stark nach der Lampe des Gelehrten und ist nicht im Munde des Volkes entstanden. Doch war das kein hinreichender Grund, solche Worte hier wegzulassen. Ausgeschieden wurden vor allem nur die Rechtssprichwörter über Verhältnisse, die heute nur noch geschichtliche Bedeutung haben, wie über Wergeld, oder was in das Gebiet der einzelnen Stände und Berufe führt, wie etwa „Bodmerei ist kein Gegenstand der Havarei" und dergleichen. Bei der Einreihung mancher Sprichwörter unter

die Buchstaben des Abc ist eine gewisse Willkür nicht zu vermeiden. In dem Spruche: „Das vordere Gut gibt dem hinteren Weg und Steg", liegt z. B. der Hauptton auf vordere und man könnte ihn daher unter V bringen; jedoch handelt der Satz vom Wegrecht und ich habe ihn daher unter W gestellt. Wer jeden Anstoß vermeiden wollte, hätte manches Sprichwort unter zwei oder drei Buchstaben bringen müssen. Da mein Buch aber nicht nach den Grundsätzen der Bibliothekwissenschaft eingerichtet ist, habe ich Wiederholungen vermieden. Wer ein Sprichwort beim Nachschlagen nicht unter dem Anfangsbuchstaben des Wortes findet, das er für das wichtigste hält, mag eben unter einem anderen Buchstaben darnach suchen.

Nun mag das Buch seinen Weg gehen. Im Vorwort seines Landpredigers von Wakefield meint Oliver Goldsmith: „Ein Buch kann trotz vieler Irrtümer sehr unterhaltend und wiederum ohne eine einzige Abgeschmacktheit sehr schal sein." Mein Buch bringt freilich keine Erzählung, sondern behandelt ein Wissensgebiet. Gleichwohl war ich bestrebt, es unterhaltend zu machen. Ist mir das gelungen, dann verschlägt es nichts, wenn es auch eine Reihe von Mängeln aufweist.

Karlsruhe, im Juni 1926 L. Winkler

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Abkürzungen

BGB. = Deutsches Bürgerliches Gesetzbuch von 1896, in Kraft getreten am 1. Januar 1900. Oft auch einfach bezeichnet § (§ ist das Zeichen für das aus dem Griechischen stammende Wort Paragraph = Beiwort, das früher an den Rand gesetzt wurde und in Kürze den Inhalt eines Absatzes angab).

Schw.ZGB. = Schweizerisches Zivilgesetzbuch von 1907, in Kraft getreten 1912. Oft auch einfach mit Art. bezeichnet.

Schw.OR. = Schweizerisches Obligationenrecht (Obligation = Schuldverhältnis).

Ö. BGB. = Österreichisches Bürgerliches Gesetzbuch von 1811.

HGB. = Handelsgesetzbuch.

Str.GB. = Strafgesetzbuch.

Str.PO. = Strafprozeßordnung

ZPO. = Zivilprozeßordnung.

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Einleitung

Wer darstellen will, wie sich das Recht in Sprichwörtern spiegelt, muß wohl auch die Frage streifen, wo und in welcher Weise Sprichwörter entstehen. Die allgemeine Antwort wird lauten: Da, wo das Volk in einer gewissen geistigen Anregung oder Entspannung zusammenkommt, um sich zu begrüßen, Gedanken auszutauschen, Bekanntschaften zu begründen oder zu erneuern. Solche Gelegenheiten sind namentlich Messen und Märkte, aber auch gemeinsame Arbeit, der Heeresdienst. Allenfalls können sie ihren Ursprung auch im Kopf eines Dichters haben, der die Fühlung mit dem Volksleben bewahrt hat. Wo das Volk selbst der Vater des Sprichworts gewesen ist, kann man sich die Entstehung etwa folgendermaßen denken. Zu irgendeinem Gegenstande macht einer eine treffende, durch Anschaulichkeit und Bildhaftigkeit ausgezeichnete Bemerkung. Ein anderer fängt sie auf, gibt ihr eine besondere Färbung oder eine glückliche kurze Fassung. Sie gefällt, wird von anderen übernommen und wie ein Edelstein weiter geschliffen, bis sie eine Form hat, in der das Volk Geist von seinem Geist anerkennt und bei jeder passenden Gelegenheit als Bestätigung des besonderen Erlebnisses an den Mann bringt. Schließlich sind es im Volksmunde laufende Sprüche von lehrhaftem Charakter und einer über die gewöhnliche Rede gehobenen Form. Sind sie bloß lehrhaft wie das Sprüchlein „Aller Anfang ist schwer", dann sind sie vielfach schon aus vorgermanischer Zeit übernommen. Das gilt namentlich von römischen Sprichwörtern; denn die Römer waren (im Gegensatz zu Griechen und Juden) der dichterischen Begabung bar und schufen solche allgemeinen Sätze wie errare humanum est, Irren ist menschlich. Der deutsche Volksmund aber machte sich solche ihm wesensfremde Sprüche oft erst recht zu eigen, indem er einen scherzhaften Zusatz beifügte, der die allgemeine Lehre auf einen einzelnen Fall anwandte, wie: „Aller Anfang ist schwer, sagte der Dieb und stahl einen Amboß" oder „Irren ist menschlich, sagte der Hahn und trat eine Ente". Soweit die bloß lehrhaften Sprüche nicht aus fremdem Sprachgut übernommen sind, stammen sie meist von Halbgelehrten; auch diese wollten ihren Geist leuchten lassen, ohne daß sie doch noch über die Bildkraft verfügten, wie sie dem deut-

schen Volke eigen ist. Das Volk aber läßt seiner Freude an Bildern die Zügel schießen und fragt nicht erst lange, ob seine Vergleiche dem Leben abgelauscht sind. Als man das Wort schuf: „Wer selbst in einem Glashaus sitzt, soll nicht nach anderen mit Steinen werfen" machte man sich keine Gedanken darüber, daß die Menschen nicht in Glashäusern zu sitzen und von dort aus andere anzugreifen pflegen.

Wie die allgemeinen Sprichwörter großenteils im Volksmunde entstanden sind, so auch die Rechtssprichwörter. Sie konnten in früherer Zeit leichter als heute im Volke entstehen, weil das Volk damals nicht nur im Strafverfahren als Urteilsfinder mitwirkte, sondern auch in bürgerlichen Streitigkeiten, wie sie aus Kauf, Teilungsverträgen usw. hervorgehen können. Die Gelegenheit zu solcher geistigen Betätigung des Volks hörte gegen das Ende des Mittelalters freilich auf, als das heimische Recht mehr und mehr dem gelehrten römischen Rechte wich. Mit diesem wurde das Volk schon deshalb nicht vertraut, weil es in einer fremden, unverständlichen Sprache geschrieben war; das in der Zeit der sogenannten Renaissance dem deutschen Volke auferlegte römische Recht konnte nur von Gelehrten verstanden und bearbeitet werden. Damit ist eine Entfremdung zwischen Volk und Recht eingetreten, die heute noch nicht überwunden ist. Wir müssen sie um so mehr beklagen, als die Begabung für das Recht und seine Anwendung gerade so wie für die Musik keineswegs an die berufsmäßige Beschäftigung mit diesen Schöpfungen des Menschengeistes verknüpft ist.

Die Sprichwörter entnehmen aus den Erfahrungen des Lebens vielfach nur das, was klar zutage liegt, und verallgemeinern es. Dabei dringen sie nicht immer in die Tiefe und verkünden daher oft nur halbe Wahrheiten. Wie schon Friedrich Seiler vom deutschen Sprichwort im allgemeinen bemerkt, machen andere Menschen entgegengesetzte Erfahrungen. Auch diese finden ihren Niederschlag in Sprichwörtern und treten daher oft zu älteren in Widerspruch. Schließlich sucht man nach einer Vermittlung und nach einem Ausgleich. So empfiehlt man einerseits frisches Wagen ohne langes Überlegen: „Frisch gewagt ist halb gewonnen". Stoßen sich bei diesem Verfahren viele die Hörner ab, so scheint ihnen Überlegung vor der Tat am Platze: „Erst wäg's, dann wag's". Macht man aber die Erfahrung, daß grüblerische Naturen vor lauter Abwägen überhaupt nicht mehr zur Tat kommen, so faßt man schließlich die Vorzüge und Nachteile

des kecken Wagens in dem ausgleichenden Sprichworte zusammen: „Wagen gewinnt, Wagen verliert". Genau so ist es beim Rechtssprichwort. So wurde bei verschiedenen Stämmen und zu verschiedenen Zeiten die Frage ganz verschieden beantwortet, wie es mit Kindern stehe, die aus einer Ehe von Freien und Unfreien hervorgegangen waren. Daher finden sich so widerspruchsvolle Sprichwörter wie: „Der Sohn behält seines Vaters Schild", „Das Kalb folgt der Kuh" und „Das Kind folgt der ärgeren Hand". Wir werden später darüber noch Genaueres hören. Einstweilen wollen wir uns an der Bildhaftigkeit jedes der drei Sprichwörter freuen. Wir wollen uns auch im stillen gestehen, daß uns diese Sprichwörter noch einige Rätsel zu raten geben, und zwar desto mehr, je weiter sich der Hörer oder Leser von der Redeweise des Volkes entfernt hat. Daher wollen wir auch schon auf folgendes aufmerksam machen. Wer bildhaft und anschaulich reden will, muß sich immer einen bestimmten Fall vor Augen stellen und nur von ihm sprechen. Wenn der Sohn nach dem ersten der drei Sprichwörter seines Vaters Schild behält, so ist damit nur etwas über seine Wehrhaftigkeit ausgesprochen. Daß er auch in den übrigen Familienstand und beim Tode des Vaters in seinen Nachlaß eintritt, ist nicht gesagt, aber offenbar gemeint; das soll und muß aus dem Satz geschlossen werden. Der Satz läßt daher die allgemeine Fassung vermissen, die man bei Gesetzen wünscht und auf die man bei der Prägung ihres Wortlauts in steigendem Maße Wert legt. Daher kann ein neuzeitiger Gesetzgeber die Sprichwörter nicht gut in ihrer Fassung brauchen. Auch wenn er sie schätzt und denselben Gedanken zum Gesetz machen will, so gibt er ihnen doch eine allgemeinere Form. Er sagt bei der Regelung des bäuerlichen Nachbarrechts z. B. nicht mehr: „Was den Pflug irrt, das soll er brechen", sondern: „Der Eigentümer eines Grundstückes kann Wurzeln eines Baumes oder eines Strauches, die von einem Nachbargrundstück eingedrungen sind, abschneiden und behalten", wie sich § 910 des deutschen BGB. ausdrückt. Denn die Wurzeln des nachbarlichen Baumes belästigen und schädigen ein Grundstück nicht nur, wenn es mit dem Pfluge bestellt wird, sondern auch, wenn die Hacke oder das Grabscheit dazu verwendet wird. Die Wurzeln aber darf man nicht bloß beseitigen, wenn sie zufällig vom Pfluge erfaßt werden, sondern man darf eigens darnach graben. Wir werden zugeben müssen, daß das jetzige Gesetz eine klarere, umfassendere Bestimmung

gibt als das alte Sprichwort. Die Stufen von der Regelung des einzelnen Falles zu immer weiterschreitender Verallgemeinerung kann man auch in den Gesetzgebungswerken selbst genau verfolgen. Der unter Napoleon I. geschaffene französische code civil nimmt eine Mittelstellung ein: er hat z. B. beim Kauf in den Art. 1594—97 einen besonderen Abschnitt darüber, wer verkaufen und kaufen könne. Das Gesetzbuch trifft also ohne einen inneren Grund für dieses Einzelgeschäft besondere Regeln. Das deutsche BGB. ist weit darüber hinausgeschritten. Es faßt in den einheitlichen Begriff der Geschäftsfähigkeit zusammen nicht nur die Fähigkeit zur Schließung aller Verträge, sondern auch die zur Vornahme sonstiger Handlungen, wie z. B. zur Errichtung eines letzten Willens, zur Kündigung usw. Und es regelt diesen Begriff in seinem allgemeinen Teil in § 104 ff.

Freilich kann das Bestreben nach einer möglichst allgemeinen Fassung so weit gehen, daß der Mann aus dem Volke nicht mehr folgen kann. Er ist an die Anschaulichkeit des einzelnen Falles gewöhnt und bedarf ihrer zum Verständnis. Scheidet man aber alles aus, was an den Einzelfall erinnert und zu einer zu engen Auslegung des Gesetzes verführen könnte, so kann sich der einfache Mann beim Gesetzeswort nichts mehr denken, vollends wenn diesem noch eine besondere fachliche Bedeutung innewohnt. Diese Gefahr liegt z. B. nahe bei der Vorschrift des § 137 BGB.: „Die Befugnis zur Verfügung über ein veräußerliches Recht kann nicht durch Rechtsgeschäft ausgeschlossen oder beschränkt werden. Die Wirksamkeit einer Verpflichtung, über ein solches Recht nicht zu verfügen, wird durch diese Vorschrift nicht berührt". Gerade in der Neigung zu einer allzu weitgehenden Verallgemeinerung seiner Vorschriften unterscheidet sich unser Deutsches Bürgerliches Gesetzbuch nicht zu seinem Vorteil vom Schweizerischen Zivilgesetzbuche. Die Verfasser des deutschen BGB. waren gewiß klug und wollten das Beste, aber sie hatten sich in ihrer Gelehrsamkeit zu weit von der Denk- und Sprechweise des Volks entfernt. Sie vermochten nicht mehr die Sprache zu sprechen, der das Volk gerne lauscht und die in sein Herz dringt. Dem deutschen BGB. ist daher zu seinem und zu unserem Schaden die Fähigkeit, volkstümlich zu werden, dauernd versagt. Anders das schweizerische ZGB. Dort war der Verfasser in der Hauptsache ein einzelner Mann, Eugen Huber, und ihm war, obwohl auch er ein Gelehrter von Gottes Gnaden gewesen ist, die große Gunst des

Schicksals verliehen, eine Sprache zu sprechen, die auch das Volk als seine eigene empfindet. In den Worten, die dann Gesetz geworden sind, findet es sein eigenes Rechtsbewußtsein widergespiegelt. Ja es sind einzelne Rechtssprichwörter wörtlich ins Gesetz aufgenommen worden, so der Satz: „Heirat macht mündig". Möge auch uns Deutschen, wenn die Zeit zu einer umfassenderen Änderung des BGB. gekommen ist, ein Mann beschert sein, der den Inhalt des Gesetzes nicht bloß als ein rückwärts gerichteter Prophet aus dem schon vorhandenen Rechte ausliest, wie die Verfasser unseres ersten Entwurfs. Möge sein Blick vielmehr nach vorwärts gerichtet sein auf die Rechtsgedanken, die im Volke keimen und nach Gestaltung ringen. Möge er auch die Sprache finden, die es besinnlichen Deutschen zu einem Bedürfnis macht, selbst das Gesetzbuch in die Hand zu nehmen, um das geltende Recht daraus zu erforschen. Dann brauchte der friedfertige Bürger vor dem streitsüchtigen und rechthaberischen nicht manchmal schon deshalb zurückzuweichen, weil er ohne Beratung nicht herausbringen kann, was Rechtens ist, und weil er lieber nachgibt, als daß er Gerichte oder Anwälte angeht.

Erstes Buch

Recht und Gesetz

1. Begriff und Aufgabe des Rechts

In den Anfängen der Menschheit, als man noch kein Sondereigentum am Grund und Boden anerkannte, als noch keine Einehe galt und als die von einem Verstorbenen benutzten Waffen und Geräte noch nicht vererbt, sondern dem Toten mit ins Grab gelegt oder auf dem Scheiterhaufen mitverbrannt wurden, dämmerte doch schon der Begriff des Eigentums. Der Mensch nahm die Felle der Tiere, die er erlegt hatte, an sich und kleidete sich damit. Ebenso nahm er die Waffen, die er sich zum Kampf gegen wilde Tiere und menschliche Feinde selbst geschaffen hatte, auch für sich allein in Anspruch. Und ebenso war es gewiß selbstverständlich, daß, wer einem anderen in der Not oder aus Gefälligkeit eine Waffe oder ein Reittier geliehen hatte, das Hingegebene zurückerhalten mußte, wenn es der Empfänger ausgebraucht hatte; darin liegen aber die Anfänge des Schuldrechts. Ob das in jenen Zeiten als bloße Sitte oder als Rechtspflicht gegolten habe, brauchen wir nicht zu untersuchen; denn beides fiel damals ununterscheidbar zusammen. Aber allmählich schieden sich Sitte und Recht. Von der Sitte und von der Sittlichkeit, die sich an den inneren Menschen wendet und ihn durch Vorbild oder durch Hoffnung auf Belohnung im jenseitigen Leben zum Guten anspornt und durch Verachtung oder Furcht vor ewigen Strafen vom Bösen abhält, sonderte sich das Recht, das gebietend auftritt und sich gegen den Widerstrebenden mit Gewalt durchsetzt. Solche Gewalt brauchte keineswegs bloß von einem Unbeteiligten, einem Richter, angewandt zu werden, vielmehr konnte sich auch der Berechtigte selbst zum Vollstrecker seines Rechtes machen. So heißt es am Schlusse des Gleichnisses von den bösen Weingärtnern mit jener Mischung von bürgerlichem und Strafrecht, die den Urzeiten eigentümlich ist: Der Herr des Weinberges wird die Bösewichter übel umbringen und seinen Weinberg anderen Weingärtnern austun, die ihm Früchte zu rechter Zeit geben, Evang. Math. 21, 41.

So entwickelte sich im Laufe der Menschheitsgeschichte die Rechtsordnung. Das Recht stellt sich aber dar als die Gesamtheit der erzwingbaren Regeln, nach denen sich das äußere Leben und Treiben der Menschen gestalten soll. Woher kommt es? Dem noch wenig ge-

schulten Geist junger Völker fällt es nicht leicht, durch Denken eine Antwort auf diese Frage zu finden. Der Glaube aber gibt sie, er führt alle Dinge auf Gott zurück und somit auch das Recht: „Recht kommt von Gott". Man konnte aber doch auch nicht übersehen, daß es sich unter den Händen der Menschen ändere, also mindestens in seiner Fortbildung Menschenwerk sei. Daher schränkte man jenen Satz ein und wies Gott nur die Urschöpfung zu: „Gott ist ein Anfang alles Rechtes". Bei fortschreitender Erkenntnis ahnte man ferner, daß das Recht wie die Sprache ursprünglich nicht bewußt geschaffen, sondern mit der Menschheit gewachsen und dem Menschen erst allmählich zum Bewußtsein gekommen sei. Von diesem natürlichen Erzeugnis, das auf einen von Gott in uns gelegten Keim zurückzuführen ist, konnte man sagen: „Natürliches Recht heißt Gottes Recht". Indem es bestimmte, was der einzelne tun und lassen sollte, schützte es vor allem den Schwachen gegen die Willkür des Starken: „Recht ist Steuer und Grundfeste alles Guten" und schuf die Grundlage, Händel zwischen Angehörigen zu schlichten: „Recht ist Friedensstifter unter Brüdern". Einzelne Eigenschaften dieses Rechts werden dann durch Sprichwörter besonders herausgehoben: „Recht ist wahr", „Recht ist gerade", „Recht ist Wahrheit", „Wahrheit ist Recht", „Was nütze und ehrlich ist, muß man halten". Das Recht soll auch keine Unterschiede zwischen hoch und niedrig, reich und arm machen, sondern jeden mit dem gleichen Maße messen: „Was einem recht ist, ist allen recht" und „Was einem recht ist, ist dem anderen billig".

Neben das unbewußt gewachsene Recht tritt mit der steigenden Entwicklung des menschlichen Geistes mehr und mehr das bewußt geschaffene, das gesetzte Recht oder die Satzung. Sie sollte das natürliche Recht nicht ändern, sondern nur ergänzen. „Satzung kann kein natürliches Recht verdrängen". Über den Geist aber, der solches Recht schaffen soll, sagen die Sprichwörter: „Einfalt ist eine Freundin des Rechts", dagegen „Krumme Wege beschädigen das Recht".

Aufgabe des Rechtes ist, Ordnung im Zusammenleben der Menschen zu schaffen und zu erhalten: „Das Recht lehrt Zucht", „Ordnung erhält die Welt" oder mit dem humorvollen bildlichen Zusatz, der der deutschen Volksseele und Volkssprache eigen ist und sie so liebenswert macht: „Ordnung regiert die Welt und der Knüppel den Hund". Die Aufgabe des Rechts, jedem das Seine zuzuteilen und Übergriffen zu steuern, bringt das Wort zum Ausdruck: „Wär' kein

Recht im Lande, so hätte jeder, was er erwischt"; freilich nur jeder Rücksichtslose und Draufgänger, die Bescheidenen und Friedfertigen dagegen hätten nichts. Daher betonen die Worte: „Das Recht hilft dem, der sich nicht selbst helfen kann" und „Das Recht beschirmt die Unschuld" die Eigenschaft des Rechtes, die Schwachen gegen die Starken zu schützen. Sein Kampf gilt vor allem der Gewalt: „Alle Gewalt ist Unrecht". Die Wahrheit des Wortes: „Wo Gewalt herrscht, schweigen die Rechte", hat der Deutsche ja in trauriger Weise im besetzten Gebiete, vollends bei der Vergewaltigung des Ruhrbeckens erfahren und an dem Abschluß eines Krieges, den ein heuchlerischer Feind für Freiheit und Gerechtigkeit zu führen vorgegeben hat. Auch für die Worte: „Wo Gewalt Richter ist, da ist bös richten", „Läßt Gewalt sich blicken, — geht das Recht auf Krücken" und „Wo Gewalt Recht ist, da hat das Recht keine Gewalt" bietet die neueste Zeit treffende Beispiele: der machttrunkene Franzose fiel der deutschen Rechtspflege in den Arm, als sie einschreiten wollte gegen das verbrecherische Treiben derer, die die Pfalz vom Reiche losreißen und an Frankreich ausliefern wollten, der sogenannten Separatisten.

Allerdings ist Gewalt nicht der einzige Feind der Gerechtigkeit; vielmehr drohen ihr ähnliche Gefahren, wenn sich die Richter vor dem Reichtum beugen oder wenn im Staate Günstlingswirtschaft herrscht: „Gewalt, Geld und Gunst — schwächt Recht, Ehr' und Kunst".

Während die Gesetze heute oft das Einzelne und Kleinste regeln und einen unübersehbaren Umfang einnehmen, waren sie in alten Zeiten oft gar kurz und dürftig und warfen, namentlich im Strafrecht, kleines und großes in einen Topf. Dann konnte es bei einem, der im kleinen gefehlt hatte, wohl heißen: „Strenges Recht verlangt viel Milde" oder „Strenges Recht ist oft das größte Unrecht". Das leuchtet heute auch dem Einfältigsten ein, daß man nicht jede Tötung gleichmäßig bestrafen kann. Den Raubmörder muß man natürlich anders anfassen als den Gerüstbauer, dessen Gerüst bei einem starken Wind zusammenstürzt und einige Arbeiter erschlägt: „Gerechtigkeit macht Unterschiede". Aber nicht immer verstanden das in unentwickelten Zeiten die noch ungewandten Richter: „Das Recht ist wohl ein guter Mann, aber nicht immer der Richter". Manchmal freilich läßt das zwingende Gesetz keine feineren Unterscheidungen zu und in solchen Fällen macht man dann für das mangelhafte Gesetz den Richter verantwortlich. So war es, solange der Diebstahl von gering-

wertigen Gebrauchsgegenständen nicht gegenüber dem gewöhnlichen Diebstahl gesetzlich begünstigt war, ein beliebter Vorwurf gegen die deutschen Richter, daß sie, in kapitalistischen Anschauungen aufgewachsen, eine arme Frau, die Kohlen stahl, um ihren Kindern eine warme Stube bieten zu können, zu drei Monaten Gefängnis verurteilten; und doch war dies beim Diebstahl im Rückfall die nach dem Gesetze geringste zulässige Strafe, bevor in § 248a RStrGB. der Diebstahl an Verbrauchsgegenständen von den Rückfallsvorschriften ausgenommen war. Manche Volksteile bringen aber kein Verständnis dafür auf, daß der Richter auch dann dem Gesetze untertan sei, wo er es nicht billigt. Ein solcher Zwiespalt zwischen dem Gesetz und dem Rechtsgefühl kommt gar nicht so selten vor. Denn auch die Gesetze sind wie alles Menschenwerk unvollkommen; manches regeln sie mangelhaft, manches gar nicht. Bringt doch das Leben manchmal Erscheinungen, an die noch kein Mensch gedacht hat! So waren vor dem Weltkriege die Kämpfe noch nie in der Luft und unter dem Wasser geführt worden. Das Völkerrecht kannte daher wohl Notlandungen von Kriegsschiffen, aber nicht von Luftschiffen und Flugzeugen. Wenn die neutralen Staaten dazu gleichwohl Stellung nehmen mußten, so konnten sie es tun nach dem Satz: „Man deutet ein Recht nach dem andern".

2. Gewohnheit

In unserer Zeit sprudeln die Gesetze wie die Quellen nach einem Landregen, und die Lebensverhältnisse ändern sich fast so rasch wie die Moden. Wir haben daher kaum noch ein Verständnis dafür, daß sich Recht bilden könne, ohne daß der Gesetzgeber spricht, sondern lediglich dadurch, daß jedermann im Verkehr nach einer bestimmten Weise verfährt in dem Glauben, so und nicht anders müsse es sein. In alter Zeit aber war das gesetzte Recht nicht der Hauptteil der Rechtsordnung. In der uns von Jugend auf bekannten Bibel wird als erste richtige Gesetzgebung die vom Berge Sinai im 19. und 20. Kapitel des zweiten Buchs Mose dargestellt. Jedoch handelt sie mehr von religiösen und sittlichen Geboten; das bürgerliche Recht wird darin kaum gestreift. Gleichwohl lebten die Menschen schon Jahrhunderte vorher nach einer rechtlichen Ordnung, und zwar nicht

nur mit Volksgenossen, sondern auch mit anderen Völkern. So verkauften die Söhne Jakobs nach 1. Moses 37, 28 ihren Bruder Josef um 20 Silberlinge an Midianitische Kaufleute, die ihn nach Ägypten brachten. Und noch viel früher wird von dem Bunde erzählt, den Gott mit Noah und seinen Söhnen schloß, 1. Moses 9, 9, also von einem Vertragsverhältnis. Diese Begriffe hatten sich eben nicht erst durch eine gesetzliche Vorschrift gebildet, sondern durch das dem Menschen angeborene und durch das Zusammenleben geweckte Bedürfnis nach Vereinbarungen, auf deren Einhaltung man unter gewissen Umständen vertrauen konnte. Sind doch solche Vereinbarungen, soweit man sie nicht angeborene Triebe nennen will, auch schon in der höheren Tierwelt zu finden in der Art, wie Zugvögel fliegen oder wie gesellige Tiere, wie Wölfe, Elefanten usw. zu jagen oder zu weiden und zu tränken pflegen. Denn hier sind einige besonders erfahrene Tiere zunächst Wächter und Beschützer; ihren Hunger und Durst stillen sie selbst erst, wenn die anderen gesättigt sind und die Wache übernommen haben.

So spielte das Herkommen und die Gewohnheit auch bei unseren Vorfahren eine große Rolle, und so konnte Eike von Repgaw, der Verfasser unseres wichtigsten mittelalterlichen Rechtsbuches, des im Anfang des 13. Jahrhunderts niedergeschriebenen Sachsenspiegels, in seiner berühmten gereimten Vorrede sagen:

„Diese Rechte habe ich nicht selbst erdacht,
Sie haben von alters auf uns gebracht
Unsere guten Vorfahren."

Es ist daher nicht verwunderlich, daß sich die deutschen Sprichwörter mit einer gewissen Vorliebe gerade mit dem Gewohnheitsrecht befassen: „Das Recht ist alt und hergekommen manchen Tag", „So ist es an uns gekommen, so weisen wir's wieder von uns", „Recht sagt ein Mann dem andern", „Aus Gewohnheit wird zuletzt Recht" und „Wo Gewohnheit ist, da ist Recht". Der beharrende Zug, der auch heute noch besonders im englischen Rechtsleben herrscht, gibt sich kund in Worten wie: „Alte Schuhe verwirft man leicht, alte Sitten schwerlich", „Das Alte — behalte"; „Alte Marksteine soll man nicht verrücken" und „Gewohnheit ist ein eisern' Pfaid (Jacke oder Wams) —, wer sie abzieht, tut sich leid".

Nicht immer freilich ist es klar, ob eine Gewohnheit vorliege, die

im Volke als rechtsverbindlich angesehen wird. Daher wird warnend darauf hingewiesen, daß es der Richter mit der Berufung auf eine Gewohnheit nicht so leicht nehmen und erst prüfen solle: „Einmal ist keine Gewohnheit" und „Einmal ist nicht immer". Freilich, eine wirkliche „Gewohnheit wächst mit den Jahren" und ist in der Lage, ein davon abweichendes Gesetzesrecht außer Übung und damit außer Kraft zu setzen: „Gewohnheit verdrängt ein Recht" und „Sitte und Brauch — hebt manches Recht auf".

Mit der Zeit schreitet jedes Volk zur Aufzeichnung des Rechtes. Das hatte z. B. im alten Rom das niedere Volk verlangt, um gegen die willkürliche und allzu harte Anwendung des bisher nur mündlich in den herrschenden Kasten überlieferten Rechtes geschützt zu sein, und so entstand die berühmte 12 Tafelgesetzgebung der Römer. — Damit verliert aber die Gewohnheit noch nicht ihre Bedeutung. Denn das Gesetz enthält nur einzelne Sätze, mit denen man in der Rechtsprechung allein nicht durchkommt. Hält doch der Gesetzgeber sogar manches, was im Volke gärt und Anlaß zu Streitigkeiten gibt, noch nicht reif dafür, in feste Formen gegossen zu werden. Wenn nun der Richter auf eine Lücke stößt, so forscht er zunächst, ob und wie die jetzt streitige Frage etwa früher entschieden worden ist und richtet sich darnach: „Gewohnheit ist die beste Deuterin des Rechts", „Wo das Recht zweifelhaft ist, soll man nach der Gewohnheit richten". Die Gewohnheiten sind freilich oft nach Landstrichen verschieden. Das gilt selbst heute noch; z. B. hat in einer Gegend der Mieter den Küchenherd zu stellen und der Vermieter die Zimmeröfen, in anderen umgekehrt. Das besagen die Worte: „Ländlich sittlich", „Aller Länder Sitten sind nicht gleich". Aber nicht bloß örtlich sind die Sitten verschieden, sondern erst recht zeitlich. Bei noch jungen Völkern wird z. B., was auch Dahn in seinem Roman „Ein Kampf um Rom" bei der Vermählung der ostgotischen Königin Amalaswinta mit Witigis verwertet hat, das erste Beilager öffentlich gefeiert. Ein ähnliches Tun kann sogar staatsrechtliche Bedeutung haben, nämlich, daß der Thronfolger die Herrschergewalt an sich reißen wolle, wie aus 2. Sam. 16, 21 und 22 hervorgeht. Heute folgt auch kein Herrscher mehr dem Beispiele des „Sonnenkönigs" Ludwig XIV., der auf dem Nachtstuhl thronend Audienzen erteilte. In den Ländern der abendländischen Kultur gibt es ferner nicht mehr die in früherer Zeit und bei Naturvölkern nicht seltenen Eheschließungen unmündiger Kinder, vielmehr

müssen die Brautleute die geschlechtliche Reife, das Alter der sogenannten Ehemündigkeit erreicht haben: „Andere Zeiten, andere Sitten".

Nicht alle Gewohnheiten sind gut. Hat sich z. B. ein Stand die Macht im Staate angemaßt, so wird das von den anderen eine Zeitlang ertragen, solange sie sich ihrer eigenen Kraft noch nicht bewußt sind oder die Herrschaft mit Maß ausgeübt wird. Steigt aber den Herrschenden ihre Macht zu Kopf und suchen sie das Emporkommen der anderen durch strenge Gesetze oder wirtschaftliche Ausbeutung der von der Regierung Ausgeschlossenen niederzuhalten, dann gilt: „Böse Gewohnheiten machen kein Ding gut", „Mißbrauch ist alles guten Brauches Rost". Dann stellen entweder die eigene Einsicht der Herrschenden oder die sich aufbäumende Leidenschaft der Unterdrückten die schlechten Gewohnheiten ab: „Natur überwindet die Gewohnheit". Neuen Übergriffen aber sucht man durch genaue Festlegung der den einzelnen Ämtern und Klassen zustehenden Rechte vorzubeugen: „Der Brauch muß dem Rechte weichen". Hier kündigt sich zugleich die zeitweise herrschende Anschauung an, die dem Brauche und dem Gewohnheitsrecht feindlich gesinnt war und sie möglichst durch Gesetzesrecht verdrängen wollte.

3. Gesetz

In Zeiten, in denen die Fülle der Staatsgewalt beim Herrscher allein ruht, hat das Volk bei der Gesetzgebung nicht mitzureden. Dann gilt, was der verblendete Kaiser Wilhelm II. in jugendlichem Unbedacht ins goldene Buch von München eintrug: Lex suprema regis voluntas, zu deutsch: des Königs Wille ist das oberste Gesetz. Das war nie Rechtens in Deutschland, solange die römisch-byzantinischen Gedankengänge noch nicht eingedrungen waren. Wie wenig die Willkür des Herrschers allein Gesetz und Recht schaffen konnte, zeigt das Wort: „Der deutsche König hat kein Recht für den, der an sich keines hat". Bisweilen betont man immerhin die über den Gemeinfreien herausragende Stellung des Königs, der ein Künder des Gesetzes ist. Darauf ist wohl der Satz zurückzuführen: „Der Kaiser ist der Vater des Gesetzes".

Kommt ein neuer Herr, so teilt er nicht immer die Anschauungen

seines Vorgängers; man denke nur an die gegensätzlichen Anschauungen zweier preußischer Könige, des überaus sparsamen Friedrich Wilhelm I. und seines prunksüchtigen Vaters Friedrich I. Dann ändert sich auch vieles in der Gesetzgebung: „Neuer König, neu Gesetz". Unkluge Herrscher vollziehen solche Änderungen dazu manchmal noch in der schroffsten Form. So gab nach 1. Kön. 12, 14 nach dem Tode Salomons sein Sohn Rehabeam dem um größere Milde bittenden Volke die törichte Antwort: „Mein Vater hat euch mit Peitschen gezüchtigt, ich aber will euch mit Skorpionen züchtigen."

Was bedeutet aber der merkwürdige Satz: „Von schlimmen Sitten kommen gute Gesetze?" Gesetze macht man regelmäßig, um Mißstände zu beseitigen, die sich im Leben gezeigt haben. Als nach Überwindung des in Urzeiten herrschenden Mutterrechts die Männer allein die Gewalt in den menschlichen Gemeinschaften an sich gerissen hatten, führten sie u. a. auch die Vielweiberei ein. So hatte nach 1. Kön. 11, 3 der jüdische König Salomo Hunderte von Frauen. Mit der fortschreitenden Gesittung aber erkannte man, daß die Vielehe ein Fluch für die gesamte Entwicklung des Menschengeschlechts sei. Man verbot daher bei den meisten Völkern Männern und Frauen die Vielehe und bedrohte die Übertretung des Verbots mit Strafe. Indem man hierbei auch keinen Unterschied zwischen reich und arm, hoch und niedrig machte, war wirklich eine schlimme Sitte zum Vater eines guten Gesetzes geworden. Im übrigen wird man freilich nicht immer sagen können, daß die Folgen schlechter Sitten gerade gute Gesetze gewesen seien. Einen dem eben besprochenen Sprichwort ähnlichen Gedanken drückt ferner der Satz aus: „Neue Gesetze setzt man um neuer Sachen willen". Die Erfahrung aber, daß die Mächtigen, die im Staate über Recht und Gesetz wachen sollen, oft erst durch die Schliche des niederen Volkes darüber aufgeklärt werden, wie man durch die Maschen der Gesetze schlüpfen kann, ohne darin hängen zu bleiben, drückt schalkhaft das Wort aus: „Pöbel macht die Herren weise".

Zwischen der Rechtsordnung und denen, die aus ihrer Übertretung Vorteil ziehen, ist ein ewiger Kampf. Hat man Mißbräuche durch ein Gesetz abzustellen gesucht, so strengt sich alsbald der Scharfsinn vieler an, Mittel und Wege zu finden, wie man die Verbote des Gesetzes umgehen könne, ohne unter seine Strafbestimmungen zu fallen; das gilt vor allem von Steuergesetzen. Diese Erfahrung ist

uralt und vom Volksmund in entsprechende Worte gebracht worden: „Es ist kein Gesetz: es hat ein Loch, wer's finden kann", „Neuen Gesetzen folgt auf der Ferse neuer Betrug" und „Sobald Gesetz ersonnen — wird Betrug begonnen".

Einfache Zeiten kommen mit wenigen Gesetzen aus, und das Zusammenleben wird oft durch die Macht der Sitte und durch die Furcht vor der Verachtung der Stammesgenossen gegen den Übermut der Schlechten geschützt. Diese Kräfte büßen bei älter gewordenen Völkern einen großen Teil ihres Einflusses ein und werden daher vielfach durch Gesetze ersetzt. Die auf der Naturordnung beruhende Pflicht, daß die Eltern den Kindern Unterhalt zu leisten haben, wird in England auch heute noch lediglich durch das Sittengesetz gewährleistet, in Deutschland dagegen sichern staatliche Gesetze des bürgerlichen und des Strafrechts ihre Durchführung. Schon im Rom der Kaiserzeit wie auch sonst hat sich daher der Erfahrungssatz gebildet: „Wo viele Gesetze sind, da sind viele Laster", „Je mehr Gesetze, desto mehr Untugend" und „Je mehr Gesetz, je weniger Recht". Wer aus neuester Zeit ein Beispiel wünscht, sei daran erinnert, daß die im Reichsgesetzblatt enthaltene Sammlung der jährlich geschaffenen Gesetze und Verordnungen nie so umfangreich war, wie in den ersten Jahren nach Beendigung des Weltkriegs; andererseits war der Sinn des deutschen Volkes für Recht und Gerechtigkeit noch nie so getrübt wie damals.

In aller Welt ist von jeher nicht immer mit dem gleichen Suchen nach wahrer Gerechtigkeit gerichtet worden, je nachdem es sich um eine Tat gehandelt hat, die den im Staate Herrschenden gepaßt hat oder ihnen zuwider war: Als der sozialistische Abgeordnete Jaurès am 31. Juli 1914 in Paris ermordet wurde, weil er ein Gegner des Kriegs war, wurde die Verhandlung gegen den Täter bis nach Beendigung des Kriegs, also mehr als 4 Jahre hinausgeschoben und der Mörder alsdann freigesprochen. Solche Beispiele lassen sich aus allen Zeiten und bei allen Völkern finden. Wer über solches Treiben und seine Folgen nachdachte, der konnte wohl das Wort prägen: „Wenn man die Gerechtigkeit biegt, dann bricht sie".

In Goethes Faust spottet zwar einmal Mephistopheles darüber, daß man Gesetze selbst dann nicht ändere, wenn sich die durch sie geregelten Lebensverhältnisse völlig verändert haben, und daß sich daher Gesetz und Rechte wie eine ewige Krankheit forterben. In der

neuesten Zeit aber haben wir das Gegenstück erlebt: fortgesetzt wurden neue Gesetze gemacht und manche wieder abgeändert, bevor sie überhaupt in Kraft treten. Da gilt der Satz: „Die Jungen verjagen die Alten“ und „Wo ein Recht über das andere gegeben wird, muß das alte weichen“.

Im neuzeitigen Staate haben wir gleiches Recht für das ganze Reich und für alle Stände. Nicht so im Mittelalter. Dort hieß es: „Jedes Weichbild (= Gemarkung) hat sein sonderlich Gesetz“, „Pfaffen und Laien sind verschiedenen Gesetzes“; was den einen angeht, berührt den anderen möglicherweise gar nicht. Den Kampf zwischen dem staatlichen und dem kirchlichen Recht und die verschiedenen Anschauungen je nach der Zeitströmung offenbaren Sprichwörter wie: „Der Papst kann kein Recht setzen, womit er unser Land ärgert“ und „Das weltliche Recht muß dem geistlichen dienen“.

Eine uralte und auch heute noch nicht zur allgemeinen Zufriedenheit gelöste Frage ist es, wie weit man sich auf seine Unkenntnis vom Recht berufen könne. Kann sich der Lehrer, der einen ungezogenen Schüler mit dem Stocke züchtigt und nun wegen Körperverletzung im Amte angeklagt wird, damit entschuldigen, er habe geglaubt, ungewöhnlicher Frechheit mit ungewöhnlichem Züchtigungsmittel begegnen zu dürfen? Auf diese Frage geben zwei Sätze ganz verschiedene Antworten: „Unwissenheit hilft nicht; denn jeder muß sein Recht kennen“ und „Unwissenheit entschuldigt“. Die zweite Meinung wird im allgemeinen abgelehnt.

4. Widerstreit der Rechte

Die den deutschen Stämmen innewohnende Neigung zur Sonderung hatte bewirkt, daß neben dem für das ganze Reich geltenden sogenannten gemeinen Recht auch noch anderes galt, das bloß für einzelne Länder oder Städte oder Stände bestimmt war. Solche Gesetze enthielten öfters Anordnungen, die nicht miteinander in Einklang zu bringen waren. Es erhob sich daher die Frage, nach welchem Gesetz man sich beim Widerstreit mehrerer zu richten habe. Während die Weimarer Reichsverfassung von 1921 in Art. 13 bestimmt: „Reichsrecht bricht Landrecht“, hieß es früher in zahlreichen Abwandlungen: „Willkür bricht Stadtrecht, Stadtrecht bricht Landrecht,

Landrecht bricht gemeines Recht“. Das Sätzchen „Willkür bricht alle Rechte“, bedarf für den Nichtrechtskundigen einer Erläuterung. Manche Gesetze legen sich zwingende Kraft bei, derart, daß jede Abweichung davon der Rechtswirksamkeit entbehrt. Ein Staatsbürger kann z. B. mit niemandem rechtswirksam vereinbaren, daß er von der Entrichtung öffentlicher Abgaben frei sein wolle; denn diese zu zahlen, ist jeder ohne Ausnahme verpflichtet und kann von dieser Pflicht nicht durch Vertrag losgesprochen werden. Das bürgerliche Recht ist dagegen in weitem Umfange nachgiebig, d. h. es läßt zu, daß die Beteiligten etwas anderes ausmachen, als es für den Regelfall bestimmt. Während z. B. die Mietzinsen nach dem Ablauf der für seine Berechnung maßgebenden Zeitabschnitte zu zahlen sind (BGB § 551), bleibt es den Beteiligten unbenommen, Vorauszahlung zu vereinbaren. Ist das geschehen, dann kann sich der unpünktliche Mieter nicht darauf berufen, sein Mietzins sei nach der gesetzlichen Vorschrift überhaupt noch nicht fällig. Denn die „Willkür geht vor“ und „Geding bricht Landrecht und Stadtrecht“.

Je nach der Naturanlage der Völker wird die Frage verschieden beantwortet, ob ein Fremder nach seinem heimischen Rechte gerichtet wird oder nach dem Rechte des Landes, dessen Gerichte mit seinen Angelegenheiten befaßt sind. Den ersten Weg werden die Völker einschlagen, die auch im Fremden den Träger eines Menschenantlitzes und einen Bruder sehen, den zweiten Weg diejenigen, die sich für die Krone der Schöpfung und die anderen für Barbaren halten. (Es sind dies die Fragen vom räumlichen Herrschaftsbereich der Gesetze oder vom staatlichen Zwischenrechte, die man früher meist Internationales Privatrecht nannte.) Das deutsche Recht stand grundsätzlich auf dem Standpunkt: „Unsere Nachbarn bringen ihr Recht mit sich“, und „Ein Fremder bringt sein Recht mit sich“. Heute gibt es keine einfachen Regeln mehr, vielmehr wird unterschieden, ob die zu entscheidende Frage dem Verkehrsrecht angehört oder dem Familien- und Sachenrecht. Ob z. B. ein zu seiner Ausbildung in Deutschland weilender Japaner eine Ehe eingehen könne, oder nach welchem Rechte er im Todesfall beerbt wird, entscheidet sich nach den Gesetzen seiner Heimat (Art. 13 und 25 des Einführungsgesetzes zum BGB). Wird aber ein Recht an einem inländischen Grundstück geltend gemacht, will z. B. ein Holländer, der ein inländisches Grundstück erworben hat, ein Grundpfandrecht darauf eintragen lassen, so kommt

es auf die Staatsangehörigkeit des Eigentümers in keiner Weise an, vielmehr ist allein das „Recht der belegenen Sache“ maßgebend, also das Recht des Staates, zu dem das Grundstück gehört.

Über die Frage, wie es gehalten werden soll, wenn mehrere das gleiche Recht ausüben wollen, sprechen sich die Sprichwörter aus: „Der erste in der Zeit, der erste im Rechte“, „Welcher Wagen zuerst zur Brücke kommt, der fährt zuerst hinüber“, „Wer zuerst zur Mühle kommt, soll zuerst mahlen“. Diese Sätze finden namentlich Anwendung, wenn ein schlecht stehender Schuldner von mehreren Gläubigern betrieben wird. Wer zuerst bei ihm pfänden läßt, dem haften die Pfandsachen nach dem deutschen Rechte vorzugsweise. Kommt es zu einer Versteigerung, so erhält der erste Pfandgläubiger den Erlös in der Höhe seiner Forderung, („Wer die erste Verpfändung hat, ist der erste in der Zahlung“), ein späterer Gläubiger aber nur den Überrest und hat unter Umständen das Nachsehen. Das ist dann nicht schlimm, wenn der Schuldner noch anderes zugreifbares Vermögen hat, an das sich ein zunächst nicht befriedigter Gläubiger halten kann. Hat der Schuldner aber sonst nichts mehr, so ist es höchst unbefriedigend, daß einer alles und der andere gar nichts bekommen solle. Es müssen darum andere Grundsätze herangezogen werden. Und zwar wird auf Antrag über das Vermögen des zahlungsunfähigen Schuldners das Gant- oder Konkursverfahren eröffnet und es werden dann alle Gläubiger, denen nicht vom Gesetz ein besonderer Vorrang eingeräumt wird oder die nicht schon vor dem Zusammenbruch des Schuldners ein Pfandrecht hatten, zu gleichen Teilen ihrer Forderungen befriedigt: „Pfennig ist gleich Pfennig“ und der im Seerecht bei der Haverei wiederkehrende Spruch: „Mein Pfennig ist deines Pfennigs Bruder und Leidensgenosse“.

Zweites Buch

Das bürgerliche Recht

Einleitung

Wer sich auf einer Hochschule dem Studium der Rechtswissenschaft gewidmet hat und dort die Abschlußprüfung macht, wird doctor utriusque iuris, er ist „ein Gelehrter der beiden Rechte". Nicht jedermann weiß aber, welche beiden Rechte damit gemeint sind. Wer sich die Haupteinteilung des gesamten Rechts in neuerer Zeit vor Augen hält, wird die beiden Rechte für das bürgerliche und das öffentliche halten. Sie sind jedoch nicht damit gemeint. Denn der doctor utriusque iuris stammt schon aus einer Zeit, als das deutsche Recht den Unterschied vom bürgerlichen und öffentlichen Recht noch kaum kannte. Vielmehr ist dabei an das Kirchen- und an das weltliche Recht gedacht, ein Gegensatz, der das Mittelalter beherrschte. Heute ist er in der Hauptsache verblaßt und an seine Stelle ist die erwähnte Spaltung in öffentliches und bürgerliches Recht getreten. Wohl ist auch in Staaten der Neuzeit nach Ort und Zeit verschieden, was zum einen und was zum anderen zählt; aber die Unterscheidung in öffentliches und bürgerliches Recht ist heute auch aus dem deutschen Rechte nicht mehr weg zu denken. Worin besteht nun der Unterschied? Beispiele mögen es veranschaulichen. Dem öffentlichen Rechte gehören an die Bestimmungen darüber, welche amtlichen Befugnisse der Reichskanzler oder ein Stadtoberhaupt haben soll, wer in den Reichstag, in den Landtag oder in den Gemeinderat gewählt werden kann. Das bürgerliche Recht aber regelt, welche Rechte und Pflichten die einzelnen Familienglieder gegeneinander haben, und welches die Rechtslage des Schneidermeisters und seines Kunden ist, der sich einen Anzug bei ihm hat anmessen lassen. Das erste Gebiet greift in die Verhältnisse von Staat und Gemeinde ein, berührt also öffentliche Angelegenheiten, das bürgerliche Recht aber regelt Fragen, die den Menschen in seinem Alltagsleben, in Beruf und Familie angehen.

Das bürgerliche Recht begleitet jeden Menschen von seinem Eintritt ins Leben bis zum Grabe; es gibt ihm mit der Geburt Unterhaltsrechte gegen die Eltern und regelt, wie sein Nachlaß verteilt werden soll. Es ist gewissermaßen das Hemd, das dem Menschen näher ist als der Rock (des öffentlichen Rechts).

Daher wollen wir zuerst vom bürgerlichen Rechte sprechen und hier wieder zunächst von dem Teil, dessen gute oder verfehlte Regelung den Menschen schon in der Wiege, ja schon im Mutterleibe trifft: nämlich vom Familienrecht.

I. Hauptstück: Familienrecht

1. Verlöbnis und rechtlich nicht geregelte Lebensverhältnisse

Die beste Erklärung und Rechtfertigung des Verlöbnisses gibt Schiller in den bekannten Versen seines Liedes von der Glocke:

„Drum prüfe, wer sich ewig bindet,
Ob sich das Herz zum Herzen findet,
Der Wahn ist kurz, die Reu' ist lang."

Denn nicht alle Menschen, die einander im Augenblicke anziehen, vermögen sich dauernd zu beglücken oder auch nur miteinander zu leben, ohne daß der eine von ihnen verkümmert. Der Prüfstein, ob zwei junge Leute zueinander passen, soll der Brautstand sein. Wenn zwei junge Leute miteinander gehen, ist jedoch noch lange nicht gesagt, daß sie sich heiraten wollen; und es ist daher oft sehr fraglich, ob es sich um eine bloße Liebschaft oder um ein Verlöbnis handele oder ob die Liebschaft in ein Verlöbnis übergegangen ist. Damit auch dritte Personen, Eltern, Bekannte usw. wissen, woran sie sind, hat man jederzeit Wert darauf gelegt, daß ein Verlöbnis an äußeren Zeichen erkennbar sei. Heutzutage veröffentlicht man seine Verlobung in der Zeitung oder schickt Karten an seine Bekannten, daneben ist schon lange der Ringwechsel im Gebrauche. Daß mit der Verlobung für die Braut (übrigens nicht bloß für sie) gewisse Pflichten verbunden seien, drückt des Wort aus: „Ist der Finger beringet —, so ist die Jungfrau bedinget". Im Worte „Dingen" kommt aber zum Ausdruck, daß man gegen jemanden eine gewisse Verpflichtung eingegangen habe; so wie sich ein Knecht oder eine Magd verdingt. Die Bindung, die ein Brautpaar eingeht, ist das Versprechen, später miteinander die Ehe zu schließen.

Nicht immer führt eine gegenseitige Neigung zum Verlöbnis;

oft geben Wünsche der Eltern, Vermögensrücksichten usw. den Ausschlag. Das war früher, wo der Wille des Vaters das Schicksal der Tochter bestimmte, noch viel häufiger als heute. Man denke an die Lustspiele des großen französischen Dichters Molière aus der Zeit Ludwigs XIV., worin geizige oder verblendete Väter und Vormünder überhaupt nicht nach dem Willen ihrer Töchter oder Mündel fragten, oder an die Art, wie Napoleon I. seine Geschwister und sonstige Verwandte verheiratete und wie selbst Friedrich der Große mit einer ungeliebten Frau verbunden worden ist. Da stellte sich bei einem Verlobten häufig ein Gemütszustand ein, der seinen Niederschlag in den Worten gefunden hat: „Zur Brautliebe kann man niemand zwingen". Kommen die Brautleute zu der Einsicht, daß sie nicht zueinander passen, so werden sie meist auch den Mut finden, wieder voneinander zu gehen. Denn „Anwerbung macht noch keine Verbindung". Wenn aber der Mann etwa die Mitgift der Braut oder diese die in der Ehe in Aussicht stehende Versorgung nicht fahren lassen möchte, so können sie ihr Ziel rechtlich doch nicht erzwingen; denn: „Aus einem Verlöbnis kann nicht auf Eingehung der Ehe geklagt werden" § 1297 BGB., Art. 91 schw. ZGB., § 41 ö. BGB., vielmehr kann jeder Teil vom Verlöbnis zurücktreten. Das gilt selbst dann, wenn die Brautleute schon geschlechtlich miteinander verkehrt haben und die Braut schwanger geworden ist. In einem solchen Falle hatte die Praxis des evangelischen Kirchenrechts freilich die Zwangstrauung zugelassen. Darüber berichtet E. Huber in seinem schweizerischen Privatrecht Bd. 4, 324 f: „Man stand nicht an, auch zwangsweise die Vollendung der Ehe durch kirchliche Trauung anzuordnen. Der Zwang wurde meist mittelbar ausgeübt durch Verhängung von Gefängnisstrafen, Androhung der Landesverweisung, oft aber treffen wir solchen Zwang auch geradezu angewandt, wo es sich um Fälle handelt, daß die Verlobte bereits schwanger war. Das Jawort wurde durch den Stadtknecht ausgesprochen". Aber man verkannte auch schon damals nicht, daß eine solche Ehe nur selten etwas taugt und sprach es aus in den Worten: „Gezwungene Ehe bringt nur Wehe". Daher sieht man heute von jedem persönlichen Zwang ab und gibt nur bei unbegründetem Rücktritt dem unschuldigen Teil gewisse Schadenersatzansprüche, wenn seine Erwerbs- und Vermögensverhältnisse einen Nachteil erlitten haben (§ 1298), und der unbescholtenen Braut auch für die Schädigung von Ruf und Ansehen (§ 1300 und Art. 93).

Wesentlich am Verlöbnisse ist, daß jeder Teil willens ist, die Ehe mit dem anderen künftig einzugehen. Fehlt auch nur einem der beiden diese Absicht, so liegt höchstens ein „Verhältnis“ vor, wie es nicht selten von jungen Männern angeknüpft wird, die bei ihren Vermögens- und Einkommensverhältnissen noch keine Familie ernähren können, aber doch den Kampf mit dem Geschlechtstrieb nicht aufnehmen wollen.

Tritt zur Bett- noch die Tischgemeinschaft, dann herrscht die „wilde Ehe“, früher vielfach ein Unterschlupf für die Paare, deren Verehelichung polizeiliche Hindernisse entgegenstanden, und noch jetzt nicht selten in Großstädten, wo der Einfluß von Kirche und Sittenlehre nicht zu ihrer Fernhaltung ausreicht. Auch wenn ein solches Paar bis zum Tode des einen Teils zusammen gelebt haben sollte, behandelt die Rechtsordnung die daraus hervorgegangenen Kinder als unehelich; sie erhalten den Familiennamen der Mutter und werden nicht Erben des Vaters. Immerhin haben sie, wie wir noch genauer hören werden, von Gesetzes wegen Unterhaltsansprüche gegen ihren Vater. Die Frau dagegen ist ganz auf den guten Willen und das Pflichtgefühl des Mannes angewiesen. Wird er seiner Geliebten überdrüssig und läßt sie und die Kinder im Stiche, dann kann die Frau keine Unterhaltsansprüche gegen den Treulosen geltend machen und es muß meist die öffentliche Armenpflege eingreifen. Da die wilde Ehe leicht begründet und gelöst werden kann und da sie der Neigung mancher Menschen zur Abwechslung entgegenkommt, ist sie eine gewisse Gefahr für die wirkliche Ehe. Um dem zu begegnen, ist sie mancherorts durch polizeiliche Vorschriften verboten, so namentlich in den Vereinigten Staaten von Amerika.

2. Die Ehe

Wohl vom 1. Moses, Kap. 2, Vers 24 beeinflußt ist der Spruch: „Mann und Weib ist ein Leib“. Neben der natürlichen Gemeinschaft kommt die geistige Seite der Ehe etwas mehr zum Ausdruck in dem Verschen: „Ein Mann, ein Weib, — zwei Seelen und ein Leib“. In anderen Worten wird das sittliche Verhältnis schärfer betont. Und hier hat das Volk im Sprichwort teils *mit* der Kirche gearbeitet, teils *gegen* sie. Die Kirche des Mittelalters hatte den geist-

lichen und Ordensstand hoch über jeden weltlichen gestellt. Diese Anschauung wurde vom deutschen Volke, das schon nach der Erzählung des römischen Schriftstellers Tacitus in seiner Germania Kap. 18 und 19 die Ehe und das eheliche Leben besonders ernst nahm, nicht uneingeschränkt hingenommen. Das Sprichwort folgte der Kirche darin, daß es die Ehe mit Orden und Gnadenmitteln (Sakramenten) verglich. Es hob sich aber von der Kirche ab, indem es sich nicht darein ergab, daß der Ordensstand schlechtweg über den weltlichen gestellt wurde. Vielmehr verherrlichte es das eheliche Leben durch folgende feinen Sprüche: „Der Ehestand ist der heiligste Orden“, „Die Ehe ist der 7 Heiligkeiten eine der höchsten“, ein Satz, der zugleich eine schöne Verdeutschung des kirchlichen Wortes Sakrament enthält. Und wie man selbst dem Ordensgelübde der Keuschheit die Spitze bot, zeigt der Satz: „Die Ehe ist kein Verlust der Jungfrauschaft.“ Dabei übersah man aber auch nicht, daß keineswegs alle Ehen vorbildlich verlaufen. Jedoch sah man das für innere Angelegenheiten der Ehegatten an, in die sich die Obrigkeit nicht einzumischen habe: „Eheleute verbrechen nichts, wenn sie sich schlagen“ und „Schlägt der Mann Frau und Kinder mit Stock und Rute, so bricht er damit keinen Frieden“. Bei dem naiven Mannesstandpunkt des Mittelalters galt das freilich nur, wenn der Mann Frau und Kinder schlug; prügelte aber die Frau den Mann, so verstieß das so gegen die öffentliche Ordnung, daß beide eine Ehrenstrafe erhielten. Die Frau mußte nämlich den Lästerstein auf öffentlichen Wegen tragen; der Richter stellte für sie zur Erheiterung der Straßenjugend einen Pfeifer, der Ehemann aber einen Pauker. Wir messen heute mit gerechterem Maße und haben auch die Scheu vor öffentlichem Einschreiten überwunden. Wir strafen mit Recht auch einen Gatten und Vater wegen Mißhandlung von Frau und Kindern wie jeden anderen, bei grausamer und boshafter Mißhandlung der Kinder aber noch schärfer als einen Fremden (§ 223a Abs. 2 StrGB).

Sobald die Menschheit zu einer dauernden Geschlechtsverbindung, also zur Ehe gelangt war, erhob sich alsbald die Frage, ob jeder Mann mit jeder Frau eine solche Verbindung eingehen dürfe oder ob bestimmte Schranken aufzurichten seien, sogenannte Ehehindernisse. Die Geschichte hat diese Frage zu verschiedenen Zeiten verschieden beantwortet. Ägypten, die alten Inkas in Peru und die alten Juden lassen es noch zu, daß sich Geschwister heiraten: war doch Sarah nach

1. Moses 20, 12 Abrahams Schwester und Frau! Aber mit der Zeit mußte man die Erfahrung machen, daß die Verbindung naher Verwandten neben sittlichen Bedenken Gefahren für die körperlichen und geistigen Eigenschaften der Nachkommenschaft bringen. Ein Niederschlag dieser Erfahrungen ist der Satz: „Heirat ins Blut tut selten gut“ (Nachteile der sogenannten Inzucht) und deshalb wurden die Ehen unter gewissen nahen Verwandten verboten. Diese Ehehindernisse hat namentlich das von der katholischen Kirche im Mittelalter geschaffene Recht, das sogenannte kanonische, sehr ausgebildet und vor allem zu der natürlichen die sogenannte geistliche Verwandtschaft zugefügt, die z. B. bestehen soll zwischen dem Täufling, dem Taufpaten und den Kindern beider. Als der neuzeitige Staat die Ehegesetzgebung selbst in die Hand nahm, fielen vor allem die Ehehindernisse aus geistlicher Verwandtschaft, weil ihnen vom Standpunkt der körperlichen und geistigen Vervollkommnung des Menschengeschlechts keine Bedeutung innewohnt. Auch die übrigen Hindernisse wurden auf das Allernotwendigste beschränkt; vgl. §§ 1309—1316 BGB und Art. 100—104 schw. ZGB.; die §§ 60—68 des ö. BGB. sind freilich noch stark vom kanonischen Rechte beeinflußt und kennen z. B. noch das Verbot der Ehe zwischen Getauften und Ungetauften sowie das Ehehindernis der Priesterweihe und des Ordensgelübdes § 63.

In der Geschichte der menschlichen Gesittung läuft die Entwicklung darauf hinaus, das Eheband gegen willkürliche Lösung zu schützen. In Zeiten des ausgesprochenen Männerrechts konnte sich der Mann von einer ihm nicht mehr genehmen Frau leicht frei machen: bei den alten Juden gab er ihr nach 5. Moses 24, 1 einen Scheidebrief in die Hand, und nicht viel anders war es bei den alten Griechen und Römern. Hiergegen schritt die Kirche ein, die im Laufe des Mittelalters den Anspruch erhob und durchsetzte, das Eherecht allein zu regeln und den weltlichen Gesetzgeber davon auszuschließen. In der Tat hat sie das große Verdienst, die Stellung der Frau gegen willkürliche Verstoßung durch den Mann geschützt zu haben. Im übrigen aber kümmerte sie sich nicht um die geschichtliche Entwicklung, die überall eine Lösung des Ehebandes zuließ, sondern erklärte noch über Matth. 5, 32 hinaus die Ehe für grundsätzlich unlösbar. Das ist wie jede starre Durchführung eines Grundsatzes herb und groß, nimmt aber auf das irdische Glück und Wohlergehen des Einzelnen keine Rücksicht. Bereiten sich Mann und Frau hienieden die Hölle, so finden sie freilich

„keinen Frieden auf Erden“ und helfen einander nicht, das Höchstmaß irdischer Vollkommenheit zu erringen. Sie können sich aber mit der Meinung des Apostels Paulus trösten, daß dieser Zeit Leiden nicht wert seien der Herrlichkeit, die an uns soll offenbar werden. Ob die Regelung den Bedürfnissen dieser Welt genüge, konnten die kirchlichen Gesetzgeber nicht am eigenen Leib erproben, da sie ja selbst eine Ehe nicht eingehen durften. Den Grundsatz der Unauflösbarkeit aber drückt das Sprichwort aus: „Hast du mich genommen, so mußt du mich behalten“. Eine Lockerung dieses Grundsatzes trat, nachdem Luther die Ehe wieder als ein weltliches Geschäft bezeichnet hatte, im evangelischen Kirchenrecht insofern ein, als Ehebruch und Nachstellung nach dem Leben des anderen als Scheidungsgrund anerkannt wurden. „Ehebruch reißt das Eheband.“ Aber auch das war nur ein Notbehelf. Denn nicht jeder Ehegatte, der zu spät erkannt hat, daß sich das Herz nicht zum Herzen finde, zieht gleich mit so grobem Geschütz auf. Ein Lebensgefährte kann dem andern auch sonst das Leben vergällen. Wenn ein König wie Leontes in Shakespeares Wintermärchen 2. Aufzug seiner sittenreinen Frau vor versammeltem Hofe Ehebruch vorwirft und die schwangere in den Kerker werfen läßt, so kann die Gekränkte im Bewußtsein ihrer Unschuld mit Jesus sagen: Herr vergib ihm, denn er weiß nicht, was er tut. Aber man kann diesen hohen, entsagenden Standpunkt niemandem zumuten, der nicht durch Anlage und Selbstzucht dazu gereift ist. Der Weg, auf dem der Dichter die schweren Verfehlungen des Mannes sühnen läßt, weicht von denen des Alltagslebens zu sehr ab, als daß ihn der Gesetzgeber wählen könnte. Die rechte Lösung fand man in der Zeit der Aufklärung, indem man den Glaubenssatz von der Unauflösbarkeit des ehelichen Bandes preis gab, da der Staat sein Recht für alle seine Angehörigen gibt, nicht bloß für die Bekenner eines bestimmten Glaubens.

Seit den großen Gesetzgebungen zu Ausgang des 18. und zu Anfang des 19. Jahrhunderts wurde das Eherecht vom Staate wieder als ein Zweig des bürgerlichen Rechts selbständig geordnet ohne Rücksicht auf die Ansprüche der Kirchen. Der Staat aber regelt grundsätzlich nur die Verhältnisse dieser Welt und steht daher auch dem irdischen Glück und Unglück seiner Angehörigen nicht so gleichmütig gegenüber wie die vor allem auf das Jenseits gerichteten Kirchen. Er sah daher wie in vorchristlicher Zeit die Scheidung der

Ehe aus gewissen gesetzlich genauer bestimmten Gründen vor. Das ist der Standpunkt des deutschen BGB. (§§ 1564—69) und des schw. ZGB. Art. 137—142. Österreich dagegen, die treueste Tochter Roms, kennt nur eine Trennung von Tisch und Bett und teilt noch den Standpunkt der Kirche, daß das Band einer gültigen Ehe zwischen Gatten, von denen auch nur einer dem katholischen Bekenntnisse angehört, bloß durch den Tod eines Ehegatten gelöst werden könne (§§ 93 ff., 103 ff.). Auch die Versuche im Freistaate Deutsch-Österreich, das Eherecht den Anschauungen der Neuzeit anzupassen, blieben erfolglos.

Aber die wichtige Frage, wie es nach einer Scheidung mit der Unterhaltspflicht der bisherigen Ehegatten gehalten und welchem von ihnen die Kinder anvertraut werden sollen (§§ 1578, 1636), schweigen die Sprichwörter; denn sie sind größtenteils in einer Zeit entstanden, als es eine Trennung der Ehe dem Bande nach noch nicht gab.

3. Die Schlüsselgewalt der Frau

Auch wenn ein junges Paar aus Liebe und nicht um des Geldes wegen geheiratet hat, machen sich die Vermögensfragen bald von selbst bemerklich. Wenn die Frau etwas auf den Tisch stellen will, muß sie, wenigstens in der Stadt, zuvor Fleisch, Gemüse usw. kaufen. Hat sie Geld, so wird sie es bar bezahlen, sonst wird sie, was sie an Nahrungsmitteln kauft, beim Bäcker, Metzger, Krämer „aufschreiben lassen". Wer aber hat den Kaufpreis der geborgten Lebensmittel zu zahlen, die Frau, die bloß den Haushalt führt, oder der Mann, der wirken und streben, pflanzen und schaffen muß? Auf diese Frage konnte man noch keine befriedigende Antwort geben in Zeiten, in denen die Begriffe „Stellvertretung" und „Vollmacht" nur mangelhaft ausgebildet waren und wo die Frau im Rechtsleben fast überall zurückgesetzt wurde. Da dachte man nicht daran, den Mann als das Haupt der Familie, die er gegenüber der Außenwelt vertritt, allein haften zu lassen. Aber auch auf das Frauenvermögen konnte der Gläubiger nicht ohne weiteres greifen; denn „Eine Frau mag ihr Gut nicht hingeben ohne ihres Mannes Willen". So kam man zu dem merkwürdigen, das gegenseitige Vertrauen in Handel und Wandel nicht gerade fördernden Ergebnis: „Wer mit Frauen kauft, verliert sein Kaufgeld". Das geht heute nicht mehr. Wenn die Frau einen Dienstboten einstellt, wenn sie den Arzt zum erkrankten Mann oder Kind ruft, aber auch wenn sie im Kaufhaus für sich und die Kinder Kleider oder Hüte kauft und mit der Rechnung in die Wohnung schicken läßt, wird nicht *sie* Schuldnerin der zu leistenden Vergütung, sondern der *Mann*. Denn er hat der Frau und den Kindern Unterhalt zu gewähren (§§ 1360, 1602 Abs. 2, 1606 Abs. 2, Schw. Art. 160, Ö. §§ 91, 115). Solche Versorgungen aber sind Sache der Frau geworden. Der Mann geht ja seinem Berufe heutzutage als Kaufmann, Fabrikant, Beamter, Angestellter oder Arbeiter vielfach fern von der Wohnung nach, er ist als Reisender, Schiffer oder während eines Kriegs lange Zeit von Hause abwesend und überläßt der Frau die Führung des Haushalts. Diesen aber kann die Frau nur dann richtig besorgen, wenn sie im Hauswesen eine ähnliche Stellung hat wie ein Handlungsbevollmächtigter im kaufmännischen Gewerbe. Darum gaben die neueren Gesetze der Frau die weitgehenden Vollmachten der sogenannten Schlüsselgewalt. Danach darf die Frau den Mann bei allen Rechtsgeschäften vertreten, die die Führung eines Haushaltes regelmäßig mit sich bringt (§ 1357, Schw. Art. 163; das ältere ö. BGB. hat darüber noch keine besondere Bestimmung). Diese Vollmacht ist der Frau vom *Gesetze* eingeräumt; sie braucht also vom Mann nicht besonders erteilt zu werden, wie es bei sonstigen Bevollmächtigungen notwendig ist.

Nun gibt es aber nicht bloß sparsame und fleißige Frauen, sondern auch putzsüchtige und verschwenderische. Von diesen kann dann gelten: „Was der Mann mit dem Heuwagen ins Haus führt, trägt die Frau mit der Schürze hinaus", oder wie ein Volksreim sagt:

„Was der Mann ins Haus bringt mit dem Scheffel,
Schafft die Frau hinaus mit dem Löffel."

Die Folgen eines solchen Treibens faßt ein anderes Verschen in die Worte: „Ist die Frau liederlich, so geht alles hinter sich". Natürlich muß das Gesetz auch gegen die damit verbundenen Gefahren einen Schutz geben. Er besteht darin, daß der Mann die Schlüsselgewalt der Frau beschränken oder entziehen kann (§ 1357 Abs. 2, Schw. Art. 164). Hat das der Mann getan, dann haftet für die von der Frau gemachten Schulden nicht mehr der Mann und sein Vermögen ohne weiteres, sondern nur soweit als sein Vermögen dadurch be-

reichert ist. Da eine solche Maßregel für die Frau kränkend ist, kann sie dagegen die Entscheidung des Vormundschaftsgerichts anrufen.

Die Vorschriften über die Schlüsselgewalt gelten in jeder Ehe, gleichgültig in welchem Güterstande die Ehegatten leben.

4. Eheliches Güterrecht

Die Ehe ist der Hauptberuf der Frau und wird es bleiben, was auch die Frau im Kampf um die Verbesserung ihrer Rechtsstellung schon erreicht hat und noch erreichen mag. Dagegen ist die Ehe kein Beruf des Mannes; er muß etwas anderes sein als Ehemann. Man denke nur an die eigenartige Rolle, die ein Prinzgemahl spielt in Königreichen mit salischem Erbrecht, wo Frauen auf den Thron kommen können.

Hat der Mann ein Geschäft oder will er ein solches anfangen, so braucht er Geld, und oft genug gibt bei der Wahl einer Frau der Vermögensstand ihres Vaters mehr den Ausschlag als ihre eigene Schönheit und Tugend. Man drückt diese Tatsache etwas verschämt mit dem Worte aus: „Von der Liebe kann man nicht leben". Dabei handelt es sich übrigens nicht bloß um die Frage, ob die Frau Vermögen in die Ehe bringe, sondern um die weitere, ob und wie der Mann das Frauenvermögen für sich und für die Zwecke der Familie an sich ziehen und benutzen dürfe. Versagt man ihm ein solches Recht, so benimmt man ihm vielleicht die Möglichkeit, rasch vorwärts zu kommen und der Frau und den Kindern eine angesehene Stellung und reichen Unterhalt zu verschaffen. Denn wer mit Kapitalvermögen selbst arbeitet, wird daraus regelmäßig größere Erträge erzielen, als wer dieses Vermögen einem anderen überläßt und dafür bloß Zinsen erhält. Erlaubt man dem Mann dagegen, das Frauenvermögen für sich zu verwenden, so läuft die Frau unter Umständen Gefahr, daß der Mann das von ihren Vätern in steter Arbeit ersparte Vermögen in gewagten Geschäften rasch verliert oder gar verpraßt, während Frau und Kinder darben müssen. Das sind die schwierigen Fragen, denen sich der Gesetzgeber bei der Regelung des ehelichen Güterrechts gegenüber gestellt sieht. Sie werden ganz verschieden beantwortet, je nachdem das Recht mehr darauf bedacht ist, dem Mann Betriebsmittel für seine Arbeit zu verschaffen oder die Frau gegen die Gefahren zu schützen, die aus mißbräuchlicher Verwendung oder aus geschäftlichem Unglück des Mannes drohen. Auch wenn der Gesetzgeber die rechte Mitte einzuhalten bestrebt ist, wird er eine verschiedene Regelung treffen, je nachdem er mehr den Tatendrang des Mannes begünstigt oder den Rentnerstandpunkt, der mit dem Kapital nicht selbst arbeiten, sondern es an andere ausleihen will. Wie aber der einzelne Ehemann sein und seiner Frau Vermögen nutzbringend verwenden wird, hängt größtenteils von seinem Berufe ab. Der Beamte wird sich z. B. regelmäßig damit begnügen können, die bloßen Erträgnisse des Frauenvermögens zur Deckung der Kosten des Haushalts ganz oder zum Teil zu verwenden, der Kaufmann und Handwerker aber hat weitergehende Wünsche. Und wie soll es gehalten werden mit dem Geld, das sich die Frau durch eigene Arbeit als Künstlerin, Putzmacherin oder Fabrikarbeiterin verdient? Soll der Mann auch daran irgendeinen Anteil haben? Das sind zum Teil Fragen, auf die unsere Sprichwörter die Antwort schuldig bleiben, weil zur Zeit ihrer Entstehung viel einfachere Lebensverhältnisse bestanden und solche Zweifel noch gar nicht aufgetaucht waren. Aber auch der neuzeitige Gesetzgeber kann sie bei den ganz verschiedenen Verhältnissen der einzelnen Berufskreise nicht in einer einheitlichen Güterordnung befriedigend lösen. Daher hat man in Deutschland eine Anzahl von Güterständen, wie sie vor 1900 in Geltung waren, im Gesetze genauer geregelt. Unter diesen können sich die Ehegatten nun den aussuchen, welchen sie in ihrer Ehe einführen wollen. Einer davon ist der sogenannte gesetzliche Güterstand, der in jeder Ehe gilt, wenn die Eheleute nicht ausdrücklich einen anderen wählen. Das aber können sie nur in einer vor Gericht oder Notar aufgenommenen Urkunde, dem sogenannten Ehevertrag. Unter dem Worte „Ehevertrag" versteht daher das deutsche und das schweizerische BGB. einen Vertrag, durch den die Braut- oder Eheleute festsetzen, welches Güterrecht in ihrer Ehe gelten soll. Österreich dagegen gebraucht dieses Wort in § 44 für die Eingehung der Ehe selbst.

Die möglichen Güterstände kann man in drei Hauptgruppen teilen: entweder bleibt jeder Ehegatte *Eigentümer* seines Vermögens, aber der Mann *verwaltet* außer seinem eigenen auch das Vermögen der Frau und erhält dessen Nutzungen als Gegenleistung dafür, daß er den gesamten ehelichen Aufwand zu tragen hat. Diese Art nannte das schw. ZGB. Güterverbindung, weil die Güter der

Ehegatten wenigstens zum Zwecke ihrer gemeinsamen Verwaltung verbunden sind. Oder die Frau behält nicht bloß das Eigentum, sondern auch die Verwaltung und Nutznießung ihres Vermögens und hat dem Mann nur einen gewissen Betrag zu den Lasten der Ehe zu leisten: das ist der Kern der Gütertrennung. Hier ist natürlich die Frau am besten geschützt gegen Eingriffe in ihr Vermögen, mögen sie vom Manne selbst oder von dessen Gläubigern herrühren. Oder endlich es tritt, wie es den jugendlich begeisterten Anschauungen von vollkommener Lebensgemeinschaft und dem überlieferten Rechte vieler deutschen Stämme am meisten entspricht, zu der Gemeinschaft des sonstigen Lebens auch eine Gemeinschaft des Vermögens ein. Und zwar kann entweder das gesamte Vermögen beider Ehegatten gemeinsam werden (allgemeine Gütergemeinschaft) oder es kann der ererbte Grundbesitz davon ausgeschlossen und die Gemeinschaft auf die Fahrhabe (über diesen Begriff vgl. S. 61) und das in der Ehe Erworbene beschränkt werden (sogenannte Fahrnisgemeinschaft) oder es kann alles Vermögen, das die Ehegatten in die Ehe einbringen oder das einem von ihnen durch Erbschaft oder Schenkung zufällt, ihm wie bei der bloßen Güterverbindung verbleiben und die Gemeinschaft sich auf das beschränken, was in der Ehe durch die Arbeit der Gatten erworben wird und was als Zinsen, Früchte usw. anfällt, die sogenannte Errungenschaftsgemeinschaft.

Im allgemeinen kann man sagen, daß die Gütergemeinschaft mehr in Oberdeutschland, die ehemännliche Verwaltung und Nutznießung aber mehr in Niederdeutschland heimisch war. Diese „Güterverbindung" ist nun aber sowohl in Deutschland, wie in der Schweiz und in Österreich zum gesetzlichen Güterstand geworden (§ 1363 ff., ZGB. Art. 194 f. ö. a. BGB. 1237 ff.). Da das Güterrecht alle Stände des Volks in gleicher Weise angeht, ist kein Wunder, daß hier der Strom des Sprichworts besonders reich fließt:

a) Hat der Mann die Verwaltung und Nutznießung des Frauenguts, so kann sich der Mann als Herr der Schöpfung fühlen und von sich sagen: „Alle Dinge sollen sein in des Mannes Hand". Freilich darf er dabei mit dem Grundstock des weiblichen Vermögens nicht willkürlich verfahren; denn „Weibergut kann weder wachsen noch schwinden". Es wächst nicht, weil seine Erträgnisse während der Ehe dem Mann zufallen, es soll aber auch nicht schwinden, weil der Mann den Grundstock nicht angreifen und nicht ohne Zustimmung der Frau darüber verfügen darf (§ 1375, Schw. Art. 202). Bei Auflösung des Güterstandes hat der Mann das Frauenvermögen im Stück oder mindestens seinen Wert zurückzugeben (§ 1421), aber gleichwohl ist das Sprichwort nicht immer wahr. Denn wenn auch der Mann ein Grundstück der Frau oder ihre Wertpapiere nicht ohne ihre Zustimmung veräußern oder verpfänden darf, so kann er es doch mit ihrer Zustimmung tun und wo hätte, wenn Not an Mann geht, ein liebendes Weib die Zustimmung versagt? Man denke an Porzia in Shakespeares Kaufmann von Venedig, 3. Aufzug, 2. Szene: als sie erfährt, daß der edle Freund ihres Verlobten Bassanio am Verfalltage die 3000 Dukaten nicht zurückzahlen könne, die er für Bassanio bei dem blutgierigen Geldverleiher Shylock aufgenommen hatte, ruft sie aus:

„Zahlt ihm 6000 aus und tilgt den Schein,
Doppelt 6000, dann verdreifacht das,
Eh' einem Freunde dieser Art ein Haar
Gekränkt soll werden durch Bassanios Schuld."

Nicht jedes Opfer, das eine Frau so bringt, hat aber den gewünschten Erfolg und manchmal ist ihr Vermögen unwiederbringlich dahin und der Mann außerstande, den Wert zurückzugeben!

Im übrigen ist es selbstverständlich, daß die Frau nach Beendigung des Güterstandes ihr Vermögen wieder erhält. Daß sich die Herausgabepflicht des Mannes darauf beschränkt, kann auch hingenommen werden, wenn die Frau in der Ehe keine Erwerbstätigkeit ausgeübt hat, wie es in den wohlhabenden Volkskreisen und in der Beamtenschaft üblich ist. Hatte aber die Frau während der Ehe regelmäßig im Geschäfte des Mannes mitgearbeitet und ihm vielleicht die Einstellung einer bezahlten Arbeitskraft erspart, wie in der Bauernschaft und im Kleinhandel, dann ist es ein schnödes Unrecht, daß die Frau keinen Anteil an dem erhält, was in der Ehe erworben wird. Man stelle sich vor, eine Frau habe im Geschäfte des Mannes 20 Jahre lang den Laden besorgt, der Mann habe vom Glücke begünstigt mit ihrem Vermögen Reichtum erworben und sei dann in die Netze einer Buhlerin geraten; auf die Klage der Frau werde die Ehe aus alleinigem Verschulden des Mannes geschieden. Alsdann muß der Mann das Vermögen der Frau herausgeben, aber beim gesetzlichen Güterstande auch nur das und nichts von dem, was in der Ehe durch die

gemeinsame Tätigkeit errungen worden ist. Allerdings können diese unerfreulichen Folgen durch einen entsprechenden Ehevertrag vermieden werden. Ja, in der Erwartung, daß die Eheleute selbst schon den ihren Verhältnissen gemäßen Güterstand finden und wählen werden, haben die Verfasser des deutschen BGB. kein Bedenken getragen, den Güterstand der ehemännlichen Verwaltung und Nutznießung wegen seiner Einfachheit zum gesetzlichen zu machen. Der lebenskluge Schöpfer des schw. ZGB. ging zwar grundsätzlich denselben Weg, verhütete aber das darin gegen die Frau liegende Unrecht dadurch, daß er der Frau von einem in der Ehe gemachten „Vorschlag" ein Drittel zukommen läßt (Art. 214). Mit diesen verschieden großen Anteilen trug er immerhin der Tatsache Rechnung, daß des Mannes Arbeit im allgemeinen mehr erwerbender, die der Frau mehr erhaltender Art ist.

Wenn das Gesetz dem Mann die Verwaltung und Nutznießung des Frauenvermögens einräumt, muß es auch einen Schutz davor schaffen, daß ihm die Frau ihr Vermögen nicht durch Veräußerung aus den Fingern ziehe. Daher gilt auch heute noch der Satz: „Eine Frau mag ihr Gut nicht hingeben ohne ihres Mannes Willen" oder wie sich § 1395 ausdrückt: „Die Frau bedarf zur Verfügung über eingebrachtes Gut der Einwilligung des Mannes". Das gilt auch in der Schweiz, wiewohl es ihr manchmal zu knappes Gesetzbuch nicht ausdrücklich ausgesprochen hat. Ist die Güterverbindung durch Tod oder auf andere Weise beendet, so hat der Mann das eingebrachte Gut herauszugeben. Diese Rechtspflicht besteht auch dann, wenn in der Ehe schlecht gewirtschaftet und das Frauengut verloren ist. Was nicht im Stück zurückgegeben werden kann, dafür ist Ersatz in Geld zu leisten. Das kann den Mann unter Umständen schwer treffen; aber dafür war er in der Ehe Verwalter des Frauenguts und er lernt die Bedeutung des Wortes: „Teuer in den Sack, teuer wieder heraus".

b) Über die Güterverbindung, die in neuerer Zeit von Frauenseite als unsachgemäß und mit der Gleichstellung der Geschlechter unvereinbar bekämpft wird, gibt es nicht so viele Sprichwörter als über die Gütergemeinschaftsarten, die nur kraft besonderen Vertrags (§ 1434, Schw. Art. 181, Ö. § 1233) in einer Ehe gelten. Früher dagegen waren sie auch vielfach gesetzlicher Güterstand, der entweder schon von Vollziehung der Ehe oder mit der Geburt des

ersten Kindes eintrat. Daß die allgemeine Gütergemeinschaft von ersterem Zeitpunkt an gelten solle, besagt der Satz: „Ist die Decke über den Kopf gezogen, so sind die Eheleute gleich reich." Damit ist das Wesen dieser Gemeinschaftsart scharf gezeichnet. Hat z. B. ein armer Mann eine reiche Frau geheiratet und gehört beiden nach dem Rechte der allgemeinen Gütergemeinschaft das in die Ehe gebrachte Vermögen gemeinschaftlich, so hat die Frau die Hälfte ihres Vermögens an den Mann verloren. Von diesem Güterstande gilt daher ganz besonders der Spruch: „Wem ich meinen Leib gönne, dem gönn' ich auch mein Gut". Und vom Standpunkt beider Ehegatten aus kann man sagen: „Mann und Weib — haben kein gezweites Gut bei ihrem Leib". Freilich wird nicht bloß das Vermögen gemeinschaftlich, sondern auch die Schulden, und es können nunmehr des Mannes Gläubiger auf das von der Frau eingebrachte und gemeinschaftlich gewordene Vermögen greifen. Das besagt das Wort: „Die dem Manne traut, die trauet auch den Schulden". Das ist jetzt im einzelnen näher ausgeführt in § 1459 und Schw. Art. 219/20. Daraus ergibt sich denn, daß der Mann das gleiche Vertrauen der Frau entgegenbringt und die gleiche Gefahr läuft. Denn nicht nur ein Leutnant kann Darlehens- und Spielschulden in die Ehe bringen, es kann auch eine gefeierte Sängerin oder Schauspielerin beim Schmuckwarenhändler oder im Modehaus schwer verschuldet sein. Alsdann können auch ihre Gläubiger Befriedigung suchen in dem gesamten Vermögen, das vom Mann herrührt. Sind die Brautleute nicht aufrichtig gegeneinander und kennen sie ihre Verhältnisse nicht gegenseitig, wie es oft genug der Fall ist, so kann eines von ihnen nach der Eheschließung unangenehm überrascht werden. Es gilt auch hier der Satz, den wir in der Lehre vom Kaufe finden werden: „Die Augen auf oder den Beutel auf". Ist freilich ein Ehegatte geradezu getäuscht worden, hat z. B. der Mann auf die Frage des Schwiegervaters nach dem Stande seiner Schulden eine Null zu wenig angegeben, so kann der hintergangene Teil den Ehevertrag wie jeden anderen nach § 123, 143 BGB anfechten und so sein Vermögen dem Zugriff der Gläubiger des anderen Teils entziehen. Er muß sich dabei übrigens auf die Anfechtung des Ehevertrags, als der güterrechtlichen Regelung beschränken, da die Ehe selbst nach § 1332 Abs. 2 nicht wegen einer Täuschung über Vermögensverhältnisse angefochten werden kann; vgl. auch Schw. Art. 126. Mit der allgemeinen Gütergemeinschaft

sind also, so sehr sie dem Gedanken einer völligen Lebensgemeinschaft entspricht, doch für jeden Teil gewisse Gefahren verbunden, und zwar nicht bloß bei schuldhaftem Verhalten eines Teiles, sondern auch schon dann, wenn der Mann kraft seines Berufes wetten und wagen muß wie der Kaufmann. Denn mit seinem Vermögen verliert er dann immer auch das von der Frau beigebrachte. Natürlich hat die Frau aber auch teil an allem Gewinn, den der Mann macht, und so gilt besonders von der allgemeinen Gütergemeinschaft der Spruch: „Weibergut gewinnt halben Nutzen und verliert halben Schaden". Dieser nicht ungefährliche Güterstand eignet sich danach nur für Ehegatten, die sich und ihre Vermögensverhältnisse genau kennen, und für Berufsstände, bei denen für den Regelfall nicht das ganze Vermögen einzusetzen ist, also namentlich für Bauern und Festbesoldete.

c) Frei von dieser Gefahr ist die bloße Errungenschaftsgemeinschaft. Da hier das von der Frau eingebrachte Vermögen nicht in die Gemeinschaft fällt, haftet es auch nicht für Schulden des Mannes oder der Gemeinschaft. Andererseits sichert die Errungenschaftsgemeinschaft der Frau einen Anteil an dem, was in der Ehe hinzu erworben wird. Das ist aber ein Gebot der Gerechtigkeit auf dem Lande und im sogenannten Mittelstand, wo die Frau regelmäßig im Berufe des Mannes mitarbeitet. Daher sollte die Errungenschaft namentlich in diesen Volkskreisen durch Eheverträge eingeführt werden. Nicht so notwendig ist dies dann, wenn die Frau nicht im Gewerbe des Mannes mithilft, sondern selbst verdient als Sängerin, Wäscherin, Fabrikarbeiterin; denn an dem durch selbständigen Erwerb erzielten Verdienst der Frau hat auch beim gesetzlichen Güterstande der Mann keinerlei Rechte, vielmehr wird er Vorbehaltsgut der Frau, § 1367, Schw. Art. 191.

d) Die eheliche Gütergemeinschaft endigt natürlicherweise mit der Auflösung der Ehe. Jedoch hielt man es vielfach für unbillig, daß dadurch der überlebende Ehegatte aus den gewohnten Verhältnissen herausgerissen werde und bei unbekindeter Ehe etwa mit Seitenverwandten des Vorverstorbenen teilen müsse. Deshalb hat man im deutschen Rechte manchmal die in der Ehe zusammengebrachten Güter auch über die Dauer des ehelichen Lebens hinaus beisammen gelassen. Dies konnte dadurch geschehen, daß der Anteil des zuerst Verstorbenen dem Überlebenden anwächst und dieser dadurch Alleineigentümer wird. Das besagen die Worte: „Leib an Leib, Gut an Gut", „Der

Letzte macht die Türe zu", „Hut bei Schleier, Schleier bei Hut". Das mit „Hut" versinnbildlichte ursprüngliche Mannesgut bleibt also bei dem ursprünglichen Frauengut, dem Schleier. Bei dieser Regelung fallen also die Blutsverwandten des zuerst Verstorbenen ganz aus, ein Ergebnis, das unseren heutigen Anschauungen im allgemeinen nicht entspricht; es tritt daher nicht mehr kraft Gesetzes ein. Wohl aber wird dieser Erfolg manchmal freiwillig erzielt, wenn sich die Ehegatten gegenseitig zu Alleinerben einsetzen. Kraft Gesetzes aber kann bei bekindeter Ehe der überlebende Teil die allgemeine Gütergemeinschaft auch heute noch mit den gemeinschaftlichen Kindern bis zu seinem Tode fortsetzen (§1483 ff.). Er benutzt und verwaltet dabei das ganz vorhandene Vermögen weiter. Die Kinder erhalten alsdann elterliches Vermögen nicht wie sonst schon nach dem Tode des einen Elternteils, sondern erst nach dem Tode des Längstlebenden.

5. Eltern und Kinder

Von jeher gab es auch Ehegatten, die nicht sittlich gefestigt sind und die eheliche Treue brechen. Wenn darum eine Ehefrau ein Kind gebiert, so steht zwar die Mutter fest, aber nicht ausnahmslos der Vater. Der Gesetzgeber darf aber mit Recht davon ausgehen, daß die Frau die eheliche Treue gewahrt hat und der Ehemann der Frau auch der Vater des Kindes ist. Für Volk und Recht gilt daher der Satz: „Ehe beweist Kinder" oder wie das schw. ZGB. Art. 252 sagt: „Ist ein Kind während der Ehe oder innerhalb einer Frist von 300 Tagen nach Auflösung der Ehe geboren, so gilt es für ehelich"; ähnlich § 1591 und Ö. § 138. Die hier hereinspielende Frage hat der große englische Dichter Shakespeare, der Alleskünder, im ersten Auftritt des ersten Aufzugs seines Schauspiels „König Johann" behandelt. Dem Könige legt er, als Robert Faulconbridge die Ehelichkeit seines jüngeren Bruders Philipp anzweifelte, folgende Worte in den Mund:

„Euer Bruder ist ein echtes Kind.
Des Vaters Weib gebar ihn in der Ehe,
Und wenn sie ihn betrog, ist's ihre Schuld,
Worauf es alle Männer wagen müssen,
Die Weiber nehmen. Sagt mir, wenn mein Bruder,
Der, wie ihr sprecht, sich diesen Sohn geschafft,
Von euerm Vater ihn gefordert hätte:

Traun, guter Freund, sein Kalb von seiner Kuh,
Konnt' er behaupten gegen alle Welt;
Das konnt' er, traun! war er von meinem Bruder,
So konnt' ihn der nicht fordern, euer Vater
Ihn nicht verleugnen, war er auch nicht sein."

Das letzte Sätzchen freilich trifft für unser Recht nicht mehr zu, vielmehr kann sich der Mann solcher Kinder erwehren, die offensichtlich nicht von ihm abstammen können. Ist ein Ehemann etwa bei Beginn des Weltkriegs von den Russen gefangen und nach Sibirien verbracht worden, kehrt er dann nach sechsjähriger Gefangenschaft nach Hause zurück und findet dort ein einjähriges Kind vor, so kann er, aber auch nur er, die Ehelichkeit des Kindes durch Klage anfechten, § 1593, Schw. Art. 253, Ö. § 158. Das besagt auch schon das Sprichwort: „Es ist niemand schuldig, die Kuh mit dem Kalb zu behalten". Die „Kuh" mußte der Mann freilich nach kanonischem Rechte, das keine Scheidung dem Bande nach zuließ, regelmäßig behalten, sofern ihm nicht die Anfechtung der Ehe zu Hilfe kam; vgl. S. 180.

Das Kind tritt mit der Geburt unter die elterliche Gewalt des Vaters. Diese gibt sich zunächst kund in dem *Rechte*, dem Kinde den Vornamen zu erteilen, hauptsächlich aber in der gewissenhaften Erfüllung von *Pflichten*, wie Ernährung und Erziehung. Denn „Der Vater muß die Kinder ziehen, bis sie sich selbst erkennen". Auch bei gröberen Ausschreitungen der Kinder mischt sich die öffentliche Strafgewalt nicht ein: „Bis zum Aufgang der Bescheidenheit soll die Rute der Kinder Missetaten zwingen". Bescheidenheit bedeutet aber hier (ähnlich wie in der mittelalterlichen Spruchsammlung „Freidanks Bescheidenheit") die Fähigkeit zu unterscheiden, Bescheid zu wissen.

Die elterliche Gewalt wird während der Ehe hauptsächlich vom Vater, nach dessen Tode von der Mutter ausgeübt. Sie endigt stets mit der Volljährigkeit des Kindes, die Gewalt der Mutter aber nach dem Worte: „Solange die Frau ihren Witwenstuhl nicht ändert, ist sie ihrer Kinder Vormund" schon mit ihrer Wiederverheiratung, § 1697. Denn „Wenn die Henne zum Hahn kommt, so vergißt sie ihre Jungen" und „Ein Stiefvater, eine Stiefmutter". Daß das gleiche auch beim Vater — und dazu oft noch in viel höherem Maße — eintreten könne, weiß das Sprichwort wohl: „Wer eine Stiefmutter hat, hat auch einen Stiefvater". Aber das vom Männerrecht überschattete

deutsche BGB. hat daraus keine Folgerung gezogen, während der vorurteilsfreie schweizerische Gesetzgeber die beiden Geschlechter gleich behandelt. Er, der seine Regeln mehr nach den Erfahrungen des Lebens als nach überkommenen und manchmal überalterten Rechtsgrundsätzen trifft, läßt die elterliche Gewalt mit der Wiederverheiratung eines Elternteils überhaupt nicht ausnahmslos erlöschen; vielmehr gebietet er nur, „wenn die Verhältnisse es erfordern, den Kindern, die sich unter der Gewalt des Wiederverheirateten befinden, einen Vormund zu stellen. Als Vormund kann einer der Ehegatten bezeichnet werden". Art. 286. Damit ist erreicht, daß wiederverheiratete Eltern unter einer größeren Aufsicht der Vormundschaftsbehörde stehen. Das österreichische Recht, das hier auf einer älteren Stufe der Rechtsentwicklung steht, kennt nur die *väterliche* Gewalt, § 147, an der die Mutter keinen Teil hat. Das Leben fragt freilich nicht immer nach den Gesetzen, namentlich wenn sie veraltet sind und den allgemeinen Rechtsanschauungen nicht mehr entsprechen. Auch in Österreich wird es viele Ehen geben, in denen in Wahrheit nicht der Mann, sondern die Frau herrscht und wo der Mann und Vater die erforderlichen Rechtshandlungen vornimmt, weil es die Frau so haben will.

Für jedes bürgerliche Recht ist es eine schwierige Frage, wie es sich zu den *unehelichen* Kindern stellen soll. Eine vieltausendjährige Erfahrung hat gezeigt, daß auch die härteste Behandlung von Mutter und Kind den außerehelichen Geschlechtsverkehr und seine Folgen nicht verhüten können. Mit Schärfe auch gegen den mitschuldigen Mann vorzugehen, hat freilich noch kein Gesetzgeber, der ja in der Vergangenheit immer männlichen Geschlechts gewesen ist, ernstlich versucht. Daß auch das aussichtslos sein würde, hat der große Dichter Shakespeare in seinem Schauspiel „Maß für Maß" veranschaulicht. Dort hat ein übereifriger Statthalter ein altes Gesetz, das jeden außerehelichen Verkehr mit dem Tode bestraft, wieder in Kraft gesetzt und — erliegt doch der gleichen Versuchung, als die Schwester eines dem Tod geweihten Sünders um Begnadigung bittet. Im übrigen hat bei der Behandlung dieser Fragen der Kampf der Kirche gegen Fleischeslust ein seltsames Bündnis mit den eigennützigen Anschauungen der Männer eingegangen und die Rechtsstellung des unehelichen Kindes in einer Weise heruntergedrückt, die wenig paßt zu dem Gedanken, daß Gott seine Sonne scheinen läßt

über Gute und Böse und regnen läßt über Gerechte und Ungerechte. Auch die vom BGB. getroffene Regelung ist keineswegs vorbildlich. Es gibt dem unehelichen Kinde zwar Unterhaltsansprüche gegen seinen Vater, läßt aber gegen die Klage die Einrede der Untreue zu, also die Einwendung, die Mutter habe während der Empfängniszeit auch noch mit andern Männern verkehrt, § 1717. Wird das bewiesen, so ist die Klage des Kindes abzuweisen. Von dieser Einrede wird reichlich Gebrauch gemacht. Daher sorgt das Gesetzbuch weniger dafür, daß ein neugeborenes Kind, das doch auf die Hilfe beider Eltern angewiesen ist, stets auch gegen den Vater einen Unterhaltsanspruch habe; es ist vor allem darauf bedacht, daß kein Mann zur Unterhaltspflicht herangezogen wird, wenn er nicht auch ganz bestimmt der Erzeuger ist. Von den über die unehelichen Kinder entstandenen Sprichwörtern haben manche auch heute noch ihre Bedeutung. So sind die Worte: „Kein Kind ist seiner Mutter Kebskind", „Keine Mutter trägt einen Bastard" die volkstümliche Umschreibung des § 1705: „Das uneheliche Kind hat im Verhältnis zu der Mutter und zu den Verwandten der Mutter die rechtliche Stellung eines ehelichen Kindes"; ähnlich Schw. Art. 302, 324. Das ist wohl auch der Sinn von Ö. § 165, während ein solches Kind im angelsächsischen Rechte nicht einmal als verwandt mit seiner Mutter gilt. Das deutsche BGB. beschränkt die Verleugnung der Natur wenigstens auf den Satz: „Ein uneheliches Kind und dessen Vater gelten nicht als verwandt" (§ 1589, Abs. 2) und gibt durch den Gebrauch des Wortes „gelten" zu, daß seine Bestimmung eigentlich der Natur und dem vernünftigen Denken widerspricht. Diese kommen erst wieder zum Durchbruch im Ehehindernis der Verwandtschaft (§ 1310), da im Sinne dieser Vorschrift zwischen dem unehelichen Kind und seinem Vater eine Verwandtschaft besteht, sowie bei der sogenannten Legitimation § 1719; danach wird das mit seinem Vater zunächst nicht verwandte uneheliche Kind durch die Eheschließung des Vaters mit der Mutter zum ehelichen und damit zu einem Verwandten der ersten Ordnung. Das Merkwürdige daran ist nur, daß die Verwandtschaft hier also nicht durch den natürlichen Vorgang der Zeugung entsteht, sondern durch einen von der Rechtsordnung geregelten Schritt, nämlich die Eheschließung.

Für den Engländer und den englischen Gesetzgeber ist das weite und wichtige Gebiet der unehelichen Verwandtschaft shocking, anstößig. Es wird aber nicht dadurch aus der Welt geschafft, daß man davon nicht gern spricht. Und wie die Natur ihre Gaben nicht danach abstuft, ob ein Kind in der Ehe oder außer der Ehe geboren ist, so sollte auch die Rechtsordnung für alle sorgen, die Menschenantlitz tragen und der Fürsorge bedürfen.

6. Unterhaltspflicht

Daß die Mutter ihren Kindern Unterhalt gewähren müsse, brauchte die Rechtsordnung nicht erst zu bestimmen. Das hat die Natur allen ihren Geschöpfen eingepflanzt und das können schon die Kinder an der Sorge der Henne für ihre Küchlein und der Katze für ihre Jungen sehen. Anders ist es schon mit der Unterhaltspflicht des Erzeugers. Vollends die Sorge für die alten und gebrechlichen Eltern hat sich erst beim Menschengeschlecht entwickelt und war in den Urzeiten noch keineswegs allgemein verbreitet. Es ist schon eine hohe Stufe sittlicher Entwicklung erklommen in dem Gebot Mosis: „Du sollst deinen Vater und deine Mutter ehren" oder in der Erzählung, wie beim Brand Trojas der fliehende Aeneas seinen Vater Anchises auf den Schultern aus den rauchenden Trümmern aufs rettende Schiff brachte. Ebenso hat gewiß die Rechtsordnung kaum schon in ihren Uranfängen vorgeschrieben, daß nicht bloß die Ehegatten einander und die Eltern den Kindern Unterhalt schulden, sondern auch die Kinder den Eltern und nach manchen Gesetzgebungen auch die Geschwister einander. Sicherlich aber gehört zu den ältesten Rechtssätzen auf diesem Gebiete das Wort: „Seine Kinder muß jeder wohlfahrten". Fraglich ist freilich, ob damit auch der uneheliche Vater gemeint sei. Das altfranzösische Recht hat dies wohl bejaht, wie aus dem Sprichwort geschlossen werden kann: qui fait l'enfant, le doit nourrir; wer ein Kind erzeugt, muß es auch ernähren. Später aber drang der galante Geist durch, den der große französische Dichter Molière seinem Don Juan in den Mund legt: Wenn wir einer Schönen unsere Gunst zuwenden, verlieren die anderen dadurch nicht das Anrecht darauf, ebenfalls unserer Liebe teilhaftig zu werden. Danach müßten es die Frauen schon als eine Ehre ansehen, vom Herrn der Schöpfung nicht übergangen zu werden. Um Kinder aber, die aus einer solchen vorübergehenden Verbindung entstehen, braucht

sich der galante Mann so wenig wie ein Hahn um die Küchlein zu kümmern. Das ist denn auch festgelegt worden in dem berühmten und berüchtigten Art. 340 des unter Napoleon I. geschaffenen code civil: la recherche de la paternité est interdite: man darf nicht nachforschen, wer der Vater eines unehelichen Kindes ist, und darf ihn nicht zum Unterhalt anhalten. Diesen sittlich tiefen Standpunkt, der nur auf die verantwortungslose Befriedigung männlicher Sinneslust bedacht ist und alle Lasten und Beschwerden der Frau aufbürdet, teilen, Gott sei Dank, nicht die germanischen Rechte. Natürlich gilt auch hier der Satz: „Die Mutter ist schuldig, ihre Kinder zu versorgen"; bringt doch die Natur selbst die erste Nahrung für das Kind im Leib der Mutter hervor! Aber auch der außereheliche Vater wird zum Unterhalte des Kindes herangezogen; vgl. § 1708, Schw. Art. 319, Ö. § 167. Aber die im Leben so wichtige Frage, wie weit der verklagte Vater der Unterhaltungsforderung des Kindes die Einrede entgegensetzen könne, er sei gar nicht der Vater, weil die Mutter während der Empfängniszeit noch mit anderen Männern verkehrt habe, scheinen sich freilich keine Sprichwörter gebildet zu haben. Wohl aber ist das der Fall bei der weiteren Frage, wie es mit dem Kostgeld gehalten werden soll, wenn der Vater noch andere Schulden hat. Da heißt es: „Kostgeld schreit vor aller Welt" und „Kostgeld geht vor allen Schulden". Dies ist auch heute noch insofern anerkannt, als die Unterhaltsansprüche ehelicher und unehelicher Kinder gewisse Vorrechte genießen, wenn gegen den in der Zahlung säumigen Vater auf Grund eines gerichtlichen Urteils durch Pfändung seines Lohns vorgegangen werden soll. Für sonstige Forderungen sind nämlich die noch nicht fälligen Lohnansprüche eines Arbeiters oder Angestellten bis zu einem gesetzlich bestimmten Mindestbetrage jeder Pfändung entzogen. Daß der uneheliche Vater seinem Kinde Unterhalt leiste, dafür hat der deutsche Gesetzgeber gesorgt; dieses Recht erlischt sogar nach § 1712 BGB. nicht mit dem Tode des Vaters. Dagegen hat der eigentümliche Satz, ein uneheliches Kind gelte nicht als verwandt mit seinem Vater (§ 1589 Abs. 2) für das Erbrecht volle Geltung; am väterlichen Nachlaß hat das uneheliche Kind keine erbrechtlichen Ansprüche. Hier bleibt es vielmehr bei den altdeutschen Sätzen: „Kein unehelicher Sohn geht zur Losung" und „Uneheliche Kinder haben keine Erbschaft".

7. Die „Besserung"

Es kommt nicht selten vor, daß ein Kind unehelich geboren wird, weil die unsicheren Erwerbsverhältnisse des Vaters oder der Widerstand von Verwandten einer Eheschließung der Eltern im Wege standen; nach der Beseitigung der Hindernisse aber gehen die Eltern die schon lange beabsichtigte Ehe ein. Wie steht es mit solchen Kindern? Bleibt ihnen der Makel der Unehelichkeit, der sie besonders auf dem Dorfe oder in der Kleinstadt oft schwer trifft, ihr Leben lang anhaften? Das deutsche Recht enthielt hierüber keine begünstigenden Vorschriften und das englische sieht sie heute noch nicht als eheliche an. Auch haben wir bis zur Stunde noch kein allgemein anerkanntes deutsches Wort dafür, daß solche Kinder nach dem Vorgang des kanonischen Rechts durch die Eheschließung der Eltern die Stellung eines ehelichen Kindes erlangen. Unser BGB. begnügt sich mit dem vieldeutigen Fremdwort Legitimation (Titelüberschrift vor § 1719), das bad. Landrecht spricht von Ehelichmachung, das schweizerische und österreichische von Ehelichkeitserklärung (Art. 258 und § 162), beides etwas hölzerne Ausdrücke, die sich an Bildhaftigkeit nicht messen können mit den im Mittelalter üblichen. Hier heißt es nämlich: „Wer die Mutter bessert, bessert auch das Kind" und „Die Besserung nimmt die Frau mit dem Kind und das Kind mit der Frau." Über die ganze Einrichtung aber heißt es in der Münchener Sammlung: „Der unecht Geborene erwarb sich seinen Stand, wenn er in nachfolgender Ehe unter seinen Erzeugern rechtlich wiedergeboren wurde. Zur Versinnbildlichung nahm früher die Mutter bei der Trauung das voreheliche Kind unter ihren Bauch, später vom Kern auf die Schale gehend unter den Mantel. (Man nannte solche Kinder daher Mantelkinder.) Undeutsch ist die Rechtfertigung durch den Kaiser: Der deutsche König hat kein Recht für den, der an sich keins hat."

Dieser letzte Satz zeugt von einer gewissen Unbeholfenheit und Ratlosigkeit gegenüber Fällen, wo etwa die Mutter bei der Geburt verstorben ist und das Kind daher nicht durch eine Eheschließung gebessert werden kann. Hier war es daher am Platze, ein Anlehen aus fremdem Rechte zu machen und die in Rom ausgebildete Ehelichkeitserklärung durch Verfügung der Staatsgewalt zu übernehmen. Auch liegt wohl keine Veranlassung vor, deren Wirkungen auf das Ver-

hältnis zwischen Vater und Kind zu beschränken und die Verwandten des Vaters davon auszuschließen, wie es § 1737 und Ö. § 162 tun. Ein von der Staatsbehörde für ehelich erklärtes Kind gilt als nicht verwandt mit den Eltern seines Vaters und hat gegen diese keine Unterhalts- und Erbansprüche. Der schweiz. Art. 263 atmet auch hier einen freieren Geist und vermeidet das, was der Rechtskundige Kasuistik nennt, nämlich die Sucht, ohne ausreichenden Grund jeden Fall besonders zu regeln, statt sich mit der Aufstellung leitender Rechtssätze zu begnügen.

Wenn man einmal daran geht, unser BGB zu kürzen und zu verbessern, dann kann man den besprochenen sachlichen Mangel beseitigen und den noch unverbrauchten Worten „Besserung" oder „Rechtfertigung", oder dem niederdeutschen „Echtigung" eine fachliche Bedeutung beilegen, wie es längst geschehen ist bei den Worten Klage und Beschwerde. Denn sie bedeuten im Streitverfahren etwas ganz anderes als z. B. im Schillerschen Gedichte „Des Mädchens Klage" oder in den Redensarten „Atem- und Schwangerschaftsbeschwerden". Daß man das vieldeutige Wort Legitimation aus dem BGB. beseitige, ist schon deshalb am Platze, damit die rechtlichen Vorschriften, die die Rechtsstellung vorehelicher Kinder bessern, einen anderen Namen führen als der Ausweis eines Handlungsreisenden, der nach § 44 a Gewerbeordnung Legitimationskarte genannt wird.

In den Zeiten, als die Rechtssprichwörter entstanden sind, war das deutsche Volk noch von unerschöpflicher Fruchtbarkeit, wie ihm der römische Schriftsteller Tacitus nachrühmt, und es gab wohl nur selten kinderlose Ehen. Wo sie etwa vorkamen, half man sich vielleicht, indem man Pflegekinder aufzog. Jedenfalls hat weder das deutsche Recht, noch die deutsche Sprache aus eigener Kraft geschaffen, was die Römer adoptio nannten und was das deutsche und ö. BGB. etwas schwerfällig umschreibend als Annahme an Kindesstatt, die Schweiz in Art. 264 als Kindesannahme bezeichnen. Da die Sprache nicht einmal ein kurzes volkstümliches Wort — man spricht auch von Wahlkindschaft oder Ankindung — für dieses Rechtsgebilde besitzt, ist es kein Wunder, daß das Sprichwort ganz davon schweigt.

8. Vormundschaft

Mund bedeutet im alten deutschen Recht ein Schutz- und Vertretungsverhältnis. Ein solches war und ist nötig bei allen Menschen, die noch nicht „zu ihren Jahren gekommen" sind. Wird ein Knabe auf dem Schulwege von einem scheu gewordenen Pferd geschlagen und dauernd in seiner Gesundheit geschädigt, so kann er sich natürlich nicht selbst helfen, vielmehr muß sein gesetzlicher Vertreter (Vater, Mutter oder Vormund) prüfen, ob er die Ersatzansprüche des Kindes durch einen Vergleich mit dem Tierhalter aus der Welt schaffen oder klagweise bei Gericht geltend machen will.

Früher stand weiter aber auch die Frau Zeit ihres Lebens in der „Mund", zuerst in der des Vaters, dann in der des Mannes („Der Mann ist des Weibes Vogt und Meister") oder gar des Sohnes. Das war im griechischen Altertum nicht anders. Man denke an die Worte, die der große Dichter Homer in seiner Odyssee I 357—360 dem jungen Telemach in den Mund legt, dem „verständigen Sohn" des Odysseus, der nach dem Fall Trojas 10 Jahre in der Welt umhergeschlagen wurde. Telemach richtet an seine Mutter Penelope, als sie den Männersaal aufsuchte und den Sänger bat, ihr Herz nicht noch mehr mit seinen Gesängen über die Ruhmestaten der Griechenhelden zu zerreißen, die nicht sehr freundlichen Worte:

„Auf, zum Gemach hingehend, besorge du deine Geschäfte,
Spindel und Webstuhl, und gebeut' den dienenden Weibern,
Fleißig am Werke zu sein. Für das Wort liegt Männern die Sorg' ob,
Allen, und mir ja zumeist; denn mein ist die Macht in der
Wohnung!"

Da die Frau in alten Zeiten nie frei von der Mundschaft wurde, galt der altdeutsche Satz: „Heirat macht mündig" nur fürs männliche Geschlecht.

Das ist jetzt alles anders geworden. Die Frau wird im gleichen Lebensalter mündig wie der Mann („Eine Jungfrau steht für einen Mann") und erlangt dieselbe Rechtsstellung. Der Satz „Heirat macht mündig" aber gilt in Deutschland überhaupt nicht mehr. Nach § 1303 darf nämlich nur ein volljähriger Mann die Ehe eingehen. Allerdings kann er nach § 3—5 gerade zu dem Zwecke für volljährig erklärt werden, um heiraten zu können; so namentlich, wenn er die Folgen

vorehelichen Geschlechtsverkehrs wieder gut machen will. Ähnlich ist die Ehefähigkeit im Art. 96 des schw. ZGB. geregelt. Wenn dieses in Art. 14 weiter den alten Satz „Heirat macht mündig“ wörtlich übernommen hat, so ist er vermutlich als Rechtswohltat vor allem für Mädchen gedacht, die zwischen dem 18. und 20. Lebensjahre heiraten. Jedes Ding hat aber seine zwei Seiten, und es ist nicht leicht zu sagen, ob die früher eintretende Mündigkeit in der Schweiz für die dadurch Begünstigten immer zum Segen ausschlägt. Denn auch nach deutschen Rechte kann jede Ehefrau die Geschäfte abschließen, die das Hauswesen erfordert; die minderjährige Frau hat nämlich die Schlüsselgewalt in gleichem Umfang wie eine volljährige (§ 1357, 165; vgl. S. 30). Daß sie aber sich und ihr eigenes Vermögen nicht ohne Mitwirkung ihres gesetzlichen Vertreters verpflichten kann, solange sie noch minderjährig ist, dafür darf sie dem Gesetzgeber manchmal dankbar sein. Hat ein unerfahrenes Mädchen einen sicher und gewandt auftretenden Mann geheiratet, der alsbald ihr Vermögen veräußern oder sie zur Übernahme von Bürgschaften für sich veranlassen möchte, dann ist es nur gut, daß das deutsche Gesetz ihrer Unerfahrenheit und Vertrauensseligkeit zu Hilfe kommt, indem es die Zustimmung des gesetzlichen Vertreters zu Veräußerungen und Verpflichtungen verlangt (§ 107). Will die Frau aber ein selbständiges Gewerbe, etwa ein Putzgeschäft oder eine Kostgeberei betreiben, so kann sie für volljährig erklärt werden; alsdann kann sie sich allein durch Verträge verpflichten.

Gesetzlicher Vertreter ehelicher Kinder ist kraft Gesetzes der Vater und nach seinem Tod die Mutter als Inhaber der elterlichen Gewalt. Dagegen muß von der Obrigkeit, nämlich dem Vormundschaftsgerichte, ein gesetzlicher Vertreter bestellt werden für Vollwaisen und für uneheliche Kinder, soweit diese nicht in die gesetzliche Vormundschaft des Jugendamts treten. Keineswegs gilt mehr der alte Satz: „Der nächste Freund (= Verwandte) ist der nächste Vormund“ und dem Sätzchen: „Der gemachte Vormund geht vor der geborenen Mundschaft“, kommt nur noch ein beschränkter Geltungsbereich zu. Nach dem Jugendwohlfahrtsgesetz von 1922 steht nämlich den Jugendämtern kraft Gesetzes das Amt des Vormunds über gewisse Fürsorgebedürftige zu. Soweit aber das Fürsorgerecht der Jugendämter nicht eintritt, haben immerhin gewisse Verwandte ein Anrecht darauf, vor fremden Leuten zu Vormündern bestellt zu werden, so

der väterliche und der mütterliche Großvater (§ 1776 Ziffer 3 und 4, und noch weitergehend Schw. Art. 380 und Ö. § 1980).

In früherer Zeit hatte der Vormund ähnlich wie der Vater nicht bloß für den Unterhalt und die Erziehung des Mündels zu sorgen, sondern er hatte auch das Recht auf den Ertrag des Mündelvermögens. Das bedeutete der Satz: „Unmündiger Gut gewinnt nichts“ und „Elternloses Gut mag weder wachsen noch schwinden“. Auch verwaltete der Vormund das Vermögen und die sonstigen Rechte des Mündels ganz zu seinem eigenen Nutzen und war, selbst wenn der Mündel großjährig geworden war, nicht immer bereit, diesem das ihm Gebührende auszuantworten. Solches eigennütziges Verhalten des Kaisers Albrecht von Österreich war ja auch der Hauptgrund, warum er von seinem Neffen und Mündel Johann im Jahr 1308 ermordet wurde; diesem hat dann die nicht immer gerecht messende Geschichte deshalb den Beinamen Parricida, verruchter Mörder, beigelegt.

Die Rechtsstellung des Vormunds ist heute ganz anders geworden. Er braucht zwar von seinem Vermögen nichts zur Ernährung und Erziehung des Mündels zu opfern, vielmehr muß für den armen Mündel unter Umständen die öffentliche Fürsorge einspringen. Ebensowenig aber erhält er etwas aus den Erträgnissen des Mündelsvermögens. Es muß nämlich über sie wie über die Ausgaben, die er für den Mündel macht, dem Vormundschaftsgericht Rechnung stellen. Immerhin erspart man sich bei kleineren Vermögen die lästige Buchführung und Rechnungslegung über jeden Einnahme- und Ausgabeposten dadurch, daß dem Vormund durch einen besonderen Pflegevertrag die Erträgnisse des Mündelvermögens überlassen werden gegen die Verpflichtung, die Kosten der Erziehung des Mündels zu bestreiten. Jedenfalls ist heute das tiefe Mißtrauen nicht mehr am Platz, das in alter Zeit gegen die Vormünder allgemein bestand und das seinen Ausdruck fand in dem beißendem Worte: „Selbst der Teufel würde um die Hölle kommen, wenn er einen Vormund hätte“. Aber auch in der Beschränkung auf den bestellten Vormund darf man heute nicht mehr sagen: „Es ward nie ein guter Vormund gekoren“. Sofern dieses Wort nicht seinen Ursprung im Neid der übergangenen Verwandten hat und daher auch früher nur bedingt zutraf, kann man vielmehr aus der Art, wie die Vormünder mit seltenen Ausnahmen ihr Amt treu und gewissenhaft führen, geradezu den Schluß ziehen,

daß die sittliche Entwicklung des deutschen Volks trotz mancher gegenteiliger Anzeichen vorwärtsgeschritten ist.

Es entsprang wohl dem Mißtrauen in die Verwaltung eines Mannes, daß man früher gern mehrere Vormünder bestellte, damit der eine den andern überwache. Darunter hatten aber meist die Mündel zu leiden, weil sich dann nicht bloß ein Vormund zu bereichern suchte. Gegebenenfalls aber schob der eine dem andern die Verantwortung für Benachteiligung des Mündels zu: „Bei vielen Hirten wird übel gehütet". Um die Gefahr der Mehrherrschaft zu mindern bestimmt schon Ö. § 210: „Immer muß auch das Gericht veranstalten, daß die Person des Minderjährigen und die Hauptführung der Geschäfte von einem besorgt wird." Die neuen Gesetze aber sehen selbst für mehrere Geschwister regelmäßig bloß einen Vormund vor und ordnen ihm nur bei einer größeren Vermögensverwaltung einen Gegenvormund bei. Dessen Mitwirkung ersetzt dann vielfach die Genehmigung des Vormundschaftsgerichts, deren der Vormund sonst regelmäßig beim Abschluß wichtiger Geschäfte bedarf.

Das Amt des Vormunds beruht auf dem Vertrauen, das das Vormundschaftsgericht seiner Person entgegenbringt. Das Amt ist daher nicht vererblich, „Vormundschaft erbt (altertümlich für das heutige: vererbt) kein Mann auf seinen Erben", sie endigt vielmehr mit dem Tode des Vormunds.

2. Hauptstück: Sachenrecht

1. Sachen, Bestandteile, Zubehör, Früchte

Das deutsche Recht machte von jeher bei den Sachen einen Unterschied zwischen Liegenschaften, vom deutschen bürgerlichen Gesetzbuch „Grundstücke" genannt, und Fahrnissen, die das deutsche BGB. regelmäßig als „bewegliche Sachen", eine bloße Übersetzung des lateinischen Wortes mobilia, bezeichnet. Es kennt den alten deutschen Ausdruck nur noch in der Benennung des Güterstandes „Fahrnisgemeinschaft" (§ 1549), das schweiz. ZGB. verwendet ihn auch sonst; vgl. Art. 713, 884 u. a. Die Liegenschaften waren in alter Zeit Familiengut: am Grundbesitz hat nach deutschem Recht die ganze Familie Anteil, das Familienhaupt konnte darüber nicht ohne Mitwirkung der Familienglieder verfügen. Bei der Vererbung des Grundbesitzes ging der Mannesstamm der weiblichen Linie vor, für die Veräußerung und Verpfändung von Liegenschaften galten stets andere Vorschriften als bei Fahrnissen usw. Es wurde daher von Bedeutung, im einzelnen festzustellen, was zu den Liegenschaften gehörte und was zur Fahrhabe. Die allgemeine Antwort gibt der Satz: „Was man treiben und fahren mag, ist fahrende Habe" („mögen" bedeutete früher soviel wie vermögen; übersetzt doch auch noch Luther: „Fürchtet euch nicht vor denen, die den Leib töten und die Seele nicht mögen töten"). Eine andere Eigenschaft der Fahrhabe, die sie vom Grund und Boden unterscheidet, führt der Spruch an: „Was die Fackel verzehrt, ist Fahrnis". Darunter fallen auch Meßbuden und Hütten, die in der Tat auch heute noch zur Fahrnis zählen. Die mit dem Grund und Boden fest verbundenen und zum Teil aus Stein gebauten Häuser dagegen bilden, obwohl auch sie durch die Fackel verzehrt werden können und daher Gegenstand besonderer Gebäude-Brandversicherung sind, heute „wesentliche Bestandteile eines Grundstücks", § 94. An ihnen kann kein anderes Recht bestehen als am Grundstück selbst (§ 93, Schw. Art. 671, Ö. § 293 und 297). Ein Haus gehört daher dem Eigentümer des Grund und Bodens, auf dem es steht. Davon gibt es nur eine Ausnahme: das Recht, auf einem fremden Grund und Boden ein Bauwerk zu haben, kann in der Rechtsform des Erbbaurechts verselbständigt werden; Verordnung vom 15. Januar 1919 und Schw. Art. 675. Das Haus, das ein Erbbauberechtigter kraft seines Rechts baut, gehört ihm, nicht dem Grundeigentümer.

Alles, was auf einem Grundstück wächst, ist zunächst ein Bestandteil des Bodens und gehört daher dessen Eigentümer, selbst wenn das Grundstück verpachtet ist. Es ist daher eine wichtige Frage, wie lange das Eigentum an Bodenerzeugnissen dem Eigentümer des Grundstücks zusteht. Denn die Gewächse sind dazu bestimmt, abgeerntet und verbraucht oder verkauft zu werden, mag sich das für den Menschen Wertvolle unter der Erde befinden, wie bei der Kartoffel, oder im Luftraum, wie beim Getreide. Dauergewächse wie Obstbäume und Weinstöcke teilen dauernd das rechtliche Schicksal des Grundstücks. Aber ihre Früchte bleiben meist nicht beim Eigentümer des Bodens, sondern gehen in viele Hände. Den Zeitpunkt, in dem die Erzeugnisse des Erdbodens aufhören, ein Bestandteil des

Grundstücks zu sein, vielmehr selbständige Sachen werden, geben die Sprüchlein an: „Kommt das Korn an die Wied (Seil aus Weidenruten) und das Heu ans Seil, so ist es fahrende Habe“ und „Wenn der Wein in den Zuber kommt und das Heu ans Seil, so ist es fahrende Habe.“ Hier ist also auf eine besondere menschliche Tätigkeit zur Aneignung der Früchte abgehoben. Der nüchterne Römer und mit ihm die neuen Gesetze, lassen aber richtiger den Zeitpunkt entscheiden, in dem die Früchte von der Muttersache getrennt werden, (§ 101, Ziffer 1, 953 f., Schw. Art. 643), mag dies durch Abernten oder durch ein Naturereignis geschehen. Das bisherige Eigentum des Verpächters an den noch hängenden Baumfrüchten erlischt und statt seiner erwirbt der Pächter das Eigentum an den Früchten nicht bloß, wenn er sie bricht, sondern auch wenn sie durch einen Sturm getrennt werden. Die soeben besprochenen Sprichwörter geben Antwort auf die Frage, wann ein bisheriger Bestandteil eines Grundstücks zur selbständigen Fahrnis wird. Ebenso wichtig ist die umgekehrte Frage, wann und wodurch eine bisher selbständige Sache Bestandteil eines Grundstücks werde und dadurch die bisher an ihr bestehenden Rechte erlöschen. Unser BGB. sagt darüber in § 94: „Samen wird mit dem Aussäen, eine Pflanze wird mit dem Einpflanzen wesentlicher Bestandteil des Grundstücks.“ Läßt der Erbauer eines Landhauses den Ziergarten durch einen Handelsgärtner anlegen, so geht jeder Strauch und jedes Bäumchen, das der Gärtner aus seinen Beständen mitbringt und das bisher ihm gehörte, durch das Einpflanzen ins Eigentum desjenigen über, dem der Garten gehört. Sollte selbst ein Bauer Saatgetreide gestohlen haben, so geht es mit dem Aussäen in sein Eigentum über. Das besagt auch das alte Wort: „Die Saat ist dessen, des der Acker ist.“ Sofern der Grundeigentümer dadurch auf Kosten eines andern Eigentum erwirbt, hat er dem bisherigen Eigentümer nach den Vorschriften über unerlaubte Handlungen oder über ungerechtfertigte Bereicherung Ersatz zu leisten.

Besondere Sprichwörter gibt es dann darüber, auf welche Gegenstände sich das Eigentum am Haus erstreckt. Etwas dunkel ist der Sinn des Satzes: „Wer ein Haus kauft, hat manchen Balken und Nagel umsonst.“ Klarer ist die Bedeutung der bekannten Worte: „Zum Haus gehört, was Niet und Nagel begreift“ sowie „Was genietet und genagelt ist, folgt dem Hause.“ (Gegenüber dem gewöhnlichen Nagel ist die Niete ein stumpfer Nagel oder Stift, der durch die zu verbindenden Teile hindurchgebracht und dann an einem oder beiden Enden umgeschlagen wird, so daß er nicht zurück kann.) Was so mit dem Hause befestigt worden ist, bildet eben einen Bestandteil und wird (wie der Nagel selbst) keines besonderen Eigentums mehr fähig; mit dem Einbauen geht das Eigentum der Steine, der Stiegen, der Tapeten vom Bauhandwerker auf den Grundstückseigentümer über, auch wenn dieser von den Vorgängen im einzelnen nichts weiß. Bestandteile eines Hauses sind übrigens auch Türen und Fenster, obwohl sie nicht angenagelt sind, sondern in Angeln ruhen; immerhin aber haben sie durch die Einfügung ihre ursprüngliche Selbständigkeit eingebüßt.

Neben den Bestandteilen eines Grundstücks, die ihre natürliche Selbständigkeit durch Einpflanzen, Einbauen usw. verloren haben, gibt es dann noch Fahrnisse, die zwar nach wie vor fahr- und tragbar bleiben, die aber wirtschaftlich einer anderen Sache, namentlich einem Grundstück zu dienen bestimmt sind und die daher sein rechtliches Schicksal teilen, das sogenannte Zubehör, § 97, Schw. Art. 644 Abs. 2, Ö. § 294—96. Wer ein Haus kauft, hat Anspruch darauf, daß ihm mit dem Hause auch die Haus- und Zimmerschlüssel übergeben werden (§ 314, 926, Schw. Art. 644 Abs. 1, Ö. § 294—96), wenn auch die Schlüssel kein Teil des Hauses sind und in der Tasche seiner Bewohner getragen zu werden pflegen. Hierher würde das schon erwähnte Wort passen: „Wer ein Haus kauft, hat manchen Balken und Nagel umsonst“. Auf den Speichern alter Häuser liegen meist Bretter und Dielen herum, die bei einem Hausverkauf nicht besonders aufgeführt werden, aber ohne weiteres als mitverkauft gelten. Übrigens gibt es auch Zubehör von Fahrnissen, wie aus dem hübschen Verschen hervorgeht:

„Schenkt man einem die Kuh,
Schenkt man ihm auch den Strick dazu.“

Strick und Halfter, an denen man Rindvieh und Pferde hält und zieht, können Zubehör des veräußerten Tieres sein, brauchen es aber nicht zu sein.

Wer seine Sachen selbst besitzt und betreut, erntet auch die Früchte, die sein Grund und Boden oder seine Haustiere abwerfen: „Ist die Henne mein, so gehören mir auch die Eier“. Die Eigentümer großer

Güter geben sich aber nicht immer selbst damit ab, ihre Güter zu bauen, vielmehr war in früherer Zeit oft infolge eines Leiheverhältnisses (vgl. S. 222) ein anderer als der Eigentümer berechtigt, die Früchte solcher Güter zu ziehen; heute gründen sich solche Berechtigungen auf Pacht oder die Bestellung eines Nießbrauchs (vgl. S. 101). Stirbt zum Beispiel die alte Magd, der letztwillig ein Gärtchen zur Nutznießung vermacht worden war, zwischen Saat und Ernte, so erhebt sich die Frage, ob die Früchte ihren Erben zufallen oder dem Eigentümer des Gartens. Darauf antwortete das ältere Recht durch die Sprichwörter: „Des Mannes Saat ist verdient, sobald die Egge darüberfährt", „Der Garten ist verdient, so er gesäet und geharkt ist" und „Wer säet, der mähet". Heute hört mit dem Ablauf des Nutzungsrechts auch die Befugnis auf, die Früchte abzuernten; für den Verlust der Ernte aber gibt man Ersatzansprüche. So bestimmt Schw. Art. 756 Abs. 2: „Wer das Feld bestellt, hat für seine Verwendung gegen den, der die reifen Früchte erhält, einen Anspruch auf angemessene Entschädigung, die jedoch den Wert der reifen Früchte nicht übersteigen soll"; eine ähnliche Regelung enthält das deutsche BGB. in § 101, Ziffer 1 und 102.

2. Nachbarrecht

Der Vers aus Wilhelm Tell: „Es kann der Frömmste nicht im Frieden bleiben, wenn es dem bösen Nachbarn nicht gefällt", enthält eine Lebenserfahrung aus dem Zusammenwohnen verschieden gearteter Menschen. Das Recht hat daher die Verhältnisse regeln müssen, die das Nebeneinanderliegen von Häusern und Feldern mit sich bringt. In früherer Zeit kannte man noch keine Kultur- und Vermessungsämter, welche die in vielen Erbauseinandersetzungen zu Zwergstücken zerteilten Äcker klug zusammenlegten und durch Anlegung neuer Zufahrtswege jedem Grundstück einen besonderen Zugang beschafften. Damals kam es oft vor, daß ein Grundstück nicht mehr an einem Fahrwege lag und daß es nur durch Begehen oder Befahren des davor liegenden Grundstücks erreicht werden konnte. Aus dieser Zeit stammt das Wort: „Das vordere Gut gibt dem hinteren Weg und Steg." Der gleiche Gedanke liegt den heutigen Bestimmungen über Notwegrecht zugrunde, das Fürsorge für den

Fall trifft, daß einem Grundstücke die zur ordnungsmäßigen Benutzung notwendige Verbindung mit einem öffentlichen Wege fehlt (§ 917, Schw. Art. 694). Das Recht sieht aber vor, daß der Nachbar, der den Zugang zum abgeschlossenen Grundstück dulden muß, voll zu entschädigen ist. Das ist notwendig, weil heute nicht mehr wie in der Zeit der Dreifelderwirtschaft ganze Gewanne nur mit einer Frucht bestellt werden; der Hinterlieger kann daher heute mit der Aberntung nicht mehr warten, bis das vordere Feld geräumt ist.

Schon im Alten Testament heißt es: „Verflucht sei, wer seines Nachbarn Grenzen engert". Wie gewissenlose Nachbarn bei solchem Engern verfahren, das hat uns Gottfried Keller in seiner Novelle „Romeo und Julia auf dem Lande" anschaulich dargestellt. Die Grenzen kann der Pflügende freilich nur dann richtig einhalten, wenn sie gut gekennzeichnet sind. Heute geschieht dies meist durch Steine, die von Steinsetzern oder Markscheidern so tief in den Boden gesetzt werden, daß sie sich beim gewöhnlichen Pflügen nicht verrücken. Das war aber nicht immer so, vielmehr hieß es früher, namentlich in Gegenden, wo man keine geeigneten Steine hatte, wie in der norddeutschen Tiefebene: „Wahrzeichen muß man nehmen, wie man sie hat". Sie wurden Lachen genannt, und es dienten als solche Bäume, Hecken, Raine, Gräben usw.

Bäume und Steine können zwar gute Grenzzeichen sein, sie halten aber das weidende Vieh und das Geflügel nicht von des Nachbarn Feld ab und noch weniger geben sie Schutz gegen menschliche Eingriffe. Es hat sich daher schon frühzeitig das Bedürfnis eingestellt, das Eigentum auch zu umzäunen und so vor Einbruch von Mensch und Tier zu sichern, es zu umfrieden. Insofern dadurch die Händel seltener wurden, die aus dem Eindringen des Viehs nur zu oft zwischen Nachbarn entstehen, konnte man sagen: „Zaun ist Friedensstifter unter den Nachbarn" oder noch bildreicher, indem man den Acker mit einem Haus verglich: „Zaun ist des Ackers Mauer und der Himmel ist sein Dach". Wenn man will, kann man aus der zweiten Satzhälfte noch herauslesen, daß sich das Recht des Eigentümers auch grundsätzlich auf den Luftraum über dem Acker bis zum Himmel erstreckt (§ 905, Schw. Art. 667, Ö. § 297). Kraft dieses Rechts könnte ein Eigentümer vielleicht sogar einem Luftschiff oder Flugzeug verwehren, über sein Grundstück zu fliegen, wenn ihm nicht in § 1 des Luftverkehrsgesetzes vom 1. August 1922 die Unter-

lassungsklage gegen störende Einwirkungen des Luftverkehrs entzogen wäre. Auf alle Fälle aber könnte er verbieten, daß Drähte zur Vermittlung des Fernverkehrs den Luftraum seines Grundstücks überzögen. Aber auch diesen Ausfluß des Eigentumsrechts hat man um des gemeinen Nutzens willen beschränkt. Es ist nämlich das Reich durch Sondergesetze, wie § 12 des deutschen Gesetzes über die Telegraphenwege vom 18. Dezember 1899 ausdrücklich ermächtigt worden, den Luftraum zu benutzen.

In unruhigen Zeiten ist ein Nachbar regelmäßig ein gewisser Schutz und Gefährte in der Gefahr. Daher muß man auch mancherlei Belästigungen, die das Zusammenwohnen notwendig mit sich bringt, auf sich nehmen: „Von Nachbars wegen soll man etwas leiden". Immerhin tat das Recht gut daran, über gewisse häufig vorkommende Verhältnisse, die Anlaß zu Streit geben können, besondere Vorschriften zu erlassen. Eine Gefahr für den nachbarlichen Frieden bilden z. B. Bäume, die zu nahe an der Grenze stehen und die ihre Zweige und Wurzeln in den Luftraum und das Erdreich des Nachbarn hineinragen lassen. Daher besann man sich, wie man dem Nachbar die Last versüßen oder sonst erleichtern könne. Die von überragenden Zweigen herkommenden Nachteile mindert das Überfallsrecht: „Was über den Zaun fällt, ist des Nachbarn" (§ 911, Schw. 687 Abs. 2, Ö. 422). Dasselbe besagt der Spruch: „Wer den bösen Tropfen hat, genießt auch den guten". Wer den Nachteil hat, daß die Äste des Nachbarbaums sein Grundstück beschatten und den natürlichen Regenfall hemmen, der soll dafür wenigstens den Vorteil haben, daß er das auf sein Grundstück *fallende* Obst erhält (deutsch), oder sogar ein Recht auf alles Obst erwirbt, das in seinem Luftraum *wächst* (Schw. u. Ö.). Schärfer geht das Recht gegen die überwachsenden Wurzeln vor, weil sie den Eigentümer auch beim Pflügen stören und den Boden aussaugen. Hier heißt es: „Was den Pflug irrt, das soll er brechen" (§ 910, Schw. 687 Abs. 1, Ö. 422).

3. Besitz und Eigentum

Kann sich auch der *Pächter* eines preußischen Ritterguts einen Rittergutsbesitzer nennen? Wer eine Sache gepachtet hat, erlangt dadurch wohl das Recht, sie in Besitz zu nehmen und zu behalten, so-

lange die Pachtzeit dauert. Aber gleichwohl versagt ihm der Sprachgebrauch die klangvolle Bezeichnung „Rittergutsbesitzer" und behält sie dem vor, dem das Gut *gehört*. Der Sprachgebrauch ist hier wie öfters nicht genau und unterscheidet nicht zwischen *Besitz* und vollem *Eigentum*. Besitzer im Rechtssinn ist aber jeder, der eine Sache in seiner tatsächlichen Gewalt hat; das kann der Eigentümer sein, es kann aber auch ein Mieter oder ein Entleiher, ja selbst ein Dieb sein. Unter den Besitzern, die nicht Eigentümer sind, kann man wieder unterscheiden zwischen solchen, die z. B. eine gemietete oder geliehene Sache als eine fremde besitzen und anerkennen (Fremdbesitz) und solchen, die sie so besitzen, wie wenn sie ihnen gehörte (Eigenbesitz), so z. B. der Dieb. Er hat ja durch die rechtswidrige Wegnahme natürlich kein Eigentum erlangt, geht aber mit der Diebesbeute ganz so um wie ein Eigentümer. Im übrigen gibt es nicht bloß *unredliche* Eigenbesitzer, vielmehr kommen in jeder Rechtsordnung Fälle vor, wo sich jemand für den Eigentümer hält, ohne es tatsächlich geworden zu sein. Wem etwa ein Geisteskranker, dessen Zustand nicht leicht erkennbar ist, eine Sache käuflich oder schenkweise übergeben hat, der wird an sein Eigentum glauben. Die Rechtsordnung aber erkennt es nicht an, weil ein Geisteskranker geschäftsunfähig ist (§ 104 Z. 2) und daher über sein Vermögen nicht verfügen kann. Wenn der Geisteskranke die verkaufte Sache übergibt, erlangt der Käufer damit noch kein Eigentum daran. Besitz und Eigentum fallen daher nicht immer zusammen und unterliegen verschiedenen Rechtsregeln.

In einem Staatswesen, das verbietet, sein vermeintliches Recht mit der eigenen Faust durchzusetzen, ist natürlich immer besser daran, wer etwas schon hat als wer es erst erlangen will. Wer etwas von einem anderen herausverlangt, muß dem Gerichte beweisen, daß er ein Recht auf die Sache des anderen habe; der Besitzer aber behält sie, selbst wenn er nicht angeben kann, wie er zu ihrem Besitz kam. (Wer das biblische Alter erreicht hat, kann sich nicht mehr an jede Kleinigkeit seines Lebens erinnern. Er wird daher oft genug nicht mehr angeben können, wann und auf welche Weise er in den Besitz irgendeines Teils seiner Habe gekommen ist.) Daher sagt man: „Wer etwas hat, behält es billig". Wer aber gar etwas als Eigentum besitzt, hat die volle Herrschaft darüber: „Wem die Kuh gehört, der fasse sie bei den Hörnern". Er kann damit nach Belieben schalten

und walten. „Jeder mag das Seine frei brauchen und besitzen". Er darf es sogar zerstören, ohne daß ihn jemand zur Verantwortung ziehen könnte: „Wer die Häfen macht, kann sie auch zerbrechen". Ein Weistum drückt diesen Gedanken in urkräftiger Sprache also aus: der Eigentümer „kann das Gut, wenn er will, dem Hund an den Schwanz binden". Hier findet man also auch im deutschen Recht nichts von dem christlichen Gedanken, daß wir uns lediglich als Haushalter Gottes ansehen und auch über das, was uns rechtlich unbestreitbar gehört, nicht gegen den gemeinen Nutzen verfügen sollen. Da ist in der Tat ein Widerstreit zwischen Recht und sittlichem Gebot, der namentlich seit dem Weltkriege zu mancherlei Beschränkungen der Eigentumsbefugnisse geführt und auch in der Gegenwart noch keine befriedigende Lösung gefunden hat. Eine Richtschnur stellt die Deutsche Reichsverfassung in Art. 153 Abs. 3 auf: „Eigentum verpflichtet. Sein Gebrauch soll zugleich Dienst sein für das gemeine Beste". Hier ist ein Sittengebot in eine Rechtsurkunde aufgenommen. Es ist das eine erfreuliche Erscheinung, die freilich im Alltagsleben nicht so leicht durchzuführen ist, solange der einzelne Eigentümer die von der Verfassung vorgezeichnete sittliche Stufe noch nicht erreicht hat.

Der Besitz einer Sache kommt dem Menschen oft *ohne seinen Willen* abhanden: durch Diebstahl, Raub, selbst durch das gewöhnliche Verlieren. Darin unterscheidet sich der *Verlust* des Besitzes scharf von der *Erlangung*; denn den Besitz erlangt man regelmäßig nur *mit Willen*: man muß die angebotene Sache annehmen, das Fundstück aufheben und an sich nehmen. Das will das Wort sagen: „Wider Willen kann man einem wohl etwas nehmen, aber nicht geben." Im übrigen unterscheidet man scharf zwischen rechtmäßigem und unrechtmäßigem Besitz: Der Dieb und Räuber mag seine Beute wohl besitzen, verzehren, verkaufen oder verschenken; aber rechtmäßig wird darum sein Besitz und seine Verfügung niemals: „100 Jahre Unrecht war keine Stunde Recht" und „Alt ist darum nicht Recht". Daher kann der Dieb das Eigentum am gestohlenen Gut auch nicht durch Ersitzung erlangen. Allerdings verjährt die Klage des wahren Eigentümers auf Herausgabe der gestohlenen Sache nach § 195 BGB. in 30 Jahren; nach Ablauf dieser Frist wird daher auch der Besitz eines Diebes unanfechtbar. Von solchem unrechtmäßigen Erwerb abgesehen, erwirbt jeder durch bloßen langjährigen Besitz das Eigentum an Fahrnissen, und zwar wird in Deutschland ein zehnjähriger, in der Schweiz ein fünfjähriger Eigenbesitz verlangt (§ 937; Schw. Art. 728); Österreich begnügt sich in § 1466 mit dreijährigem Besitz, fordert aber in § 1461 einen „Titel, der zur Übernahme des Eigentums hinlänglich wäre, wenn dieses dem Übergeber gebührte", wie Vermächtnis, Kauf usw. Die Ersitzung verschafft daher dem im früheren Beispiel erwähnten Käufer, der von einem Geisteskranken erworben hat, mit dem Ablauf der gesetzlichen Frist an der ihm übergebenen Sache Eigentum. Mit gestohlenen und von einem Dritten gutgläubig erworbenen Sachen steht es ähnlich: habe ich z. B. bei einem Althändler eine alte Geige gekauft, die ihrem Eigentümer gestohlen worden war, so wird sie nach allen Rechten, die über den Erwerb gestohlener, verlorener oder sonst abhanden gekommenen Sachen erlassen sind, nicht sofort mit der Übergabe mein Eigentum, auch wenn ich von dem ihm anhaftenden Rechtsmangel nichts wußte (§ 935, Schw. 714 und 934). Wohl aber werde ich Eigentümer, wenn ich die Geige die ganze Ersitzungszeit besessen habe, ohne von dem Mangel etwas zu erfahren. In diesem Falle heißt es von dem bisherigen Eigentümer: „Schweigendem Mund ist nicht zu helfen". Hat aber der Eigentümer in der Ersitzungszeit geredet und sein Recht zur Kenntnis des neuen Besitzers gebracht, so wird dadurch dessen guter Glaube zerstört und es heißt: „Dem Zweifler gebührt nichts" sowie „Arglist hilft nicht". Er muß die Sache dem Eigentümer herausgeben und kann sich wegen des bezahlten Preises nach deutschem Recht nur an den halten, von dem er seinerzeit gekauft hat (vgl. § 935, 985; anders nach Schw. Art. 934).

Über die Art und Weise, wie regelmäßig das Eigentum an Fahrnis und Liegenschaften erworben wird, seien hier wenigstens kurz einige Worte beigefügt, wenn auch die Sprichwörter über dieses wichtige Rechtsgebiet schweigen. An einem Buch, an einer Wurst, kurz an einer Fahrnis erlangt man regelmäßig dadurch das Eigentum, daß sie einem der bisherige Eigentümer übergibt, sofern dabei Geber und Nehmer das Eigentum übertragen und empfangen wollten. Im übrigen ist es ganz gleichgültig, ob der Geber schenken oder seine Pflicht als Verkäufer erfüllen oder Geldschulden zurückzahlen will. Der Empfänger nimmt das Fahrnisstück an sich, bringt es in räumliche Beziehung zu seinem sonstigen Vermögen und so sieht man der Fahrhabe regelmäßig an, wem sie gehört. Das ist im allgemeinen anders bei einem Hause oder gar bei einem Acker. Wohl kann man

an einem Hause einer Großstadt viele Namen und Schilder lesen, aber keines braucht den Eigentümer anzugeben, und einem Acker in einem Dorfe mit Gemengelage sieht man ebensowenig an, wem er gehört. Deshalb läßt das deutsche Recht die schlichte Übergabe des Grundstücks nicht genügen zur Übertragung des Eigentums, sondern verlangt dazu zweierlei: erstens feierliche Einigung beider Teile vor einer Behörde darüber, daß der bisherige Eigentümer sein Recht an einen anderen weggebe, es ihm überlasse oder „auflasse", wie der jetzige aus niederdeutschem Sprachgut stammende Ausdruck heißt; und weiter, daß die Auflassungserklärung in ein zu jedermanns Einsicht offenes Buch, das vom Grundbuchamt geführte Grundbuch, eingetragen werde. Erst wenn auch dies geschehen ist, hat der Erwerber volles Eigentum erlangt.

4. Erbgut und Näherrecht

In früherer Zeit unterschied man beim Grundbesitz zwischen Ererbtem, dem Erbe, und dem zu Lebzeiten Erworbenen. Während man über den Erwerb im allgemeinen frei verfügen konnte, war das Ererbte durch das Anwartschaftsrecht der Verwandten verfangen. Sie konnten eine etwaige Veräußerung kraft ihres „Näherrechts" dadurch zunichte machen, daß sie selbst an Stelle des fremden Erwerbers das Gut zu den vereinbarten Gedingen übernahmen. Das besagt der Spruch: „Was von der Erben Hand gekommen, muß man den Erben zuerst bieten", „Der nächste Freund hat den nächsten Kauf" und „Will jemand sein Gut verkaufen oder versetzen, so soll ihm der rechte Erbe der nächste sein". Die neuere Zeit, die den Menschen auf diesem Rechtsgebiet grundsätzlich nicht mehr als Glied einer Familie und einer Gemeinde bewertete, sondern ganz auf sich allein stellte, hat mit diesen Näherrechten aufgeräumt. Sie kommen nur noch in seltenen Fällen als gesetzliche Vorkaufsrechte vor. So bestimmt § 2034 BGB.: Verkauft ein Miterbe seinen Anteil am Nachlaß an einen Dritten, so sind die übrigen Miterben zum Vorkaufe berechtigt. Die neueste Zeit aber kämpft gegen die Auswüchse, die mit der alleinigen Berücksichtigung des einzelnen Menschen und mit der Verkümmerung des Gemeinschaftsgedankens verknüpft sind, und sucht der Gesamtheit ihre Rechte zurückzuerobern. „Eigentum verpflichtet.

Sein Gebrauch soll zugleich Dienst sein für das gemeine Beste", sagt der schon erwähnte Art. 153 der Weimarer Verfassung. Um diesem sittlichen Gebote Nachdruck zu verleihen, wird bei neuerer Gestaltung des Bodenrechts gewissen öffentlichen Körperschaften ein Vorkaufsrecht eingeräumt. Dieses Recht soll erst einen Schutz geben gegen die Gefahren, die mit der freien Veräußerlichkeit von Siedlungsgütern verknüpft sein könnten. Sonst könnte nämlich der Eigentümer ein Siedlungsgut, das er mit öffentlicher Unterstützung zu dauernder Ansiedelung erworben hatte, alsbald mit Gewinn weiterveräußern und es könnte das Siedlungsland zum Gegenstand gewinnbringender Unternehmungen, zur Spekulationsware statt zu einer dauernden Heimstätte werden. Die Schweiz gibt weitergehend sogar jedem Miteigentümer ein Vorkaufsrecht gegenüber jedem Fremden, der einen Anteil erwerben will. Haben etwa Geschwister zusammen ein Haus gekauft und will eines davon nach einem Streite seinen Anteil an einen Fremden verkaufen, um die anderen zu ärgern, so haben diese das Recht in den mit dem Fremden geschlossenen Vertrag an dessen Stelle einzutreten. Will ein Näherberechtigter sein Vorrecht in einem Falle ausüben, wo mit dem Fremden Barzahlung vereinbart war, so muß er, um sein Recht verwirklichen zu können, „mit der einen Hand ziehen, mit der anderen Hand zahlen".

5. Fahrhabe

Deutschland war im Mittelalter ein Bauernstaat. Das Hauptvermögen des Bauernstandes besteht aber in Liegenschaften, und der Grundbesitz galt daher allein als rechtes Eigentum. Das äußerte sich nicht bloß darin, daß man bei Lebzeiten über das Grundeigentum nur in beschränkter Weise verfügen konnte, sondern das liegende Gut erfreute sich bei Gericht auch eines durchgreifenderen Rechtsschutzes. „Fahrhabe achte nicht für Eigen", sagte bezeichnend das Sprichwort. Darin zeigte sich namentlich der Gegensatz zum römischen Recht, das in dem weitgehenden Schutz des Eigentums keinen Unterschied zwischen Grundstücken und Fahrhabe machte. Dagegen kann auch nach heutigem Rechte der Eigentümer die Herausgabe von Fahrnisstücken, die in den Besitz eines anderen gelangt sind, nur ausnahmsweise mit der Eigentumsklage betreiben, weil nach § 1006, Schw. Art. 930

zugunsten des Besitzers einer beweglichen Sache vermutet wird, daß er Eigentümer sei. Ein Beispiel möge die Bedeutung dieser wichtigen und schwierigen Verhältnisse veranschaulichen: Leiht ein Bauer seinem Nachbarn ein Pferd zum Pflügen, und will es der Nachbar nicht eher zurückgeben, als bis er für eine alte bestrittene Forderung befriedigt worden sei, so kann der Bauer das Verlangen auf Rückgabe seines Pferdes vor Gericht auf zwei Rechtsgründe stützen: zunächst auf den Leihvertrag. Der Entleiher hat die Sache nach dem vereinbarten Gebrauche zurückgegeben, § 604, schw. OR., Art. 309, Ö. § 973. Mit dieser Vertragsklage wird der Bauer in der Tat durchdringen. Er könnte aber seinen Herausgabeanspruch an sich auch auf sein Eigentumsrecht am Pferde gründen; denn „der Eigentümer kann von jedem Besitzer die Herausgabe der Sache verlangen" (§ 985, Schw. Art. 641 Abs. 2, Ö. § 324). Der reinen Eigentumsklage kann der Nachbar jedoch die Einwendung entgegenhalten, vom Besitzer einer beweglichen Sache werde vermutet, daß er ihr Eigentümer sei. Wenn aber der Kläger auch nachwiese, daß und wann er selbst das Eigentum am Pferd erworben habe, könnte der Nachbar darauf erwidern: „Das ist alles schön und gut. Aber jetzt habe ich das Pferd und es wird daher vermutet, daß ich sein Eigentümer sei". Um diese gesetzliche Vermutung zu entkräften, muß der wahre Eigentümer doch näher darlegen, wie der Beklagte in den Besitz gekommen ist; er muß also doch behaupten und beweisen, daß er seinem Nachbarn das Pferd bloß geliehen habe. Damit allein widerlegt er die gesetzliche Vermutung des § 1006. Wenn er aber auf alle Fälle das Vertragsverhältnis klar stellen muß, hat es keinen Zweck, auch noch sein Eigentum zu beweisen. Mit der Vertragsklage dringt er überdies auch dann durch, wenn er selbst gar nicht Eigentümer ist, wenn er vielmehr seinerseits das Pferd nur für eine gewisse Zeit gemietet hatte.

Mit dem eben Ausgeführten sind im Grunde auch schon die berühmten Sprichwörter erklärt: „Hand muß Hand wahren" und „Wo einer seinen Glauben gelassen hat, da muß er ihn wieder suchen". Denn sie versagen in Erinnerung an das Wort: „Fahrhabe achte nicht für eigen" im Fahrnisverkehr regelmäßig die Eigentumsklage und verweisen den Eigentümer im allgemeinen auf die Vertragsklage, die ihm gegen den Mieter, Entleiher usw. zusteht.

Wenn der Entleiher unter mißbräuchlicher Ausnutzung seiner Besitzerstellung das entliehene Pferd auf dem nächsten Pferdemarkt an

einen Dritten verkauft und übergibt, so erwirbt dieser, wenn er den Verkäufer für den Eigentümer gehalten hat, nach den für den Fahrnisverkehr geltenden deutsch-rechtlichen Grundsätzen (s. S. 59) das Eigentum am Pferd. Der bisherige Eigentümer aber hat gegen ihn keinerlei Ansprüche. Er kann sich nur an den halten, dem er sein Pferd anvertraut hatte. Es gilt daher für den, der einem anderen eine Sache überlassen soll, das Wort: „Trau, schau, wem". Wäre allerdings das Pferd dem Entleiher nächtlicherweile gestohlen und vom Dieb weiter veräußert worden, so hätte der Erwerber nach § 935 kein Eigentum erlangt. Aber auch gegen ihn hätte der bisherige Eigentümer natürlich keine Vertragsklage, weil er keinen Vertrag mit ihm geschlossen hat. Dagegen kann er hier die Eigentumsklage mit Erfolg geltend machen; denn die für den derzeitigen Besitzer aufgestellte Eigentumsvermutung des § 1006 gilt nicht dem früheren Besitzer gegenüber, dem die Sache gestohlen worden, verloren gegangen oder sonst abhanden gekommen ist. Hier gilt also auch im deutschen Recht ausnahmsweise der Satz: „Dritte Hand soll antworten". Unter der dritten Hand aber ist jeder zu verstehen, dem der Eigentümer nicht selbst seine Sache überlassen hat.

Diese Regelung wird auf den ersten Blick recht befremdlich erscheinen und mancher, der sonst über das römische Recht immer nur abfällig urteilt, wird seinem Grundgedanken, den Eigentümer auf alle Fälle zu schützen, den Vorzug geben vor der deutsch-rechtlichen Regelung. Das deutsche Recht will eben in erster Linie den *redlichen Verkehr* schützen. Man sieht den Waren eines Kaufmanns und auch dem sonstigen Fahrnisbesitz nicht an, woher sie stammen. Waren sind auch zum Unterschied von Liegenschaften nicht dazu da, dauernd im Besitz zu bleiben, sondern sie wechseln den Herrn und werden verbraucht. Wer etwas kaufen will, kann nicht immer den Verkäufer lange darnach fragen, woher er die Ware habe und ob sie sein Eigentum sei, er darf nach deutscher Rechtsanschauung den *Besitzer* zugleich als *Eigentümer* ansehen, wenigstens solange sich ihm keine Verdachtsgründe gegen ihren ehrlichen Erwerb aufdrängen; allerdings „ungebundenes Getreide, genäßtes Zeug und blutiges Kleid soll niemand kaufen". Und so stellt, wie mit Recht betont worden ist, auf diesem Gebiete das römische Recht ein Eigentümerrecht, das deutsche aber ein Händlerrecht dar. Immerhin gewährt auch das deutsche Recht in krassen Fällen den notwendigen

Schutz. Zunächst läßt es die Eigentumsklage zu, wo die Sache dem Eigentümer gestohlen worden oder sonst abhanden gekommen ist, insbesondere auch wenn er sie verloren hat. Hier kann der Eigentümer nach § 935 von jedermann die Herausgabe verlangen, auch wenn der derzeitige Besitzer die Sache gutgläubig erworben, zum Beispiel auf dem Markt gekauft hat (Schw. Art. 934 Absatz 2 legt dagegen in diesem Falle dem Eigentümer die Pflicht auf, dem Erwerber den von ihm bezahlten Preis zu vergüten). Man kann den Eigentümer hier in der Tat nicht dahin verweisen, wo er seinen Glauben gelassen habe; denn dem Dieb hat er ja nichts anvertraut. Und da weiter nur der redliche Verkehr geschützt werden soll, kann der Eigentümer auch gegen den Besitzer klagen, der beim Erwerb nicht in gutem Glauben war. Hat ein gewandter Aufkäufer einem Bauersmann ein wertvolles Kästchen durch die mit Kennermiene vorgetragene Behauptung abgelistet, es sei nicht mehr wert als altes Brennholz, und erzählt er seine Heldentat bei der Weiterveräußerung an einen Althändler, so kann der ursprüngliche Eigentümer seine auf Wiederherstellung des früheren Zustandes gerichtete Schadenersatzklage nach §§ 823 Absatz 2, 826 BGB. wohl auch gegen den Althändler richten, da sein Erwerb nicht redlich war. Die Eigentumsklage selbst ist nicht gegeben, da der frühere Eigentümer das Schränkchen mit seinem Willen aus der Hand gegeben hat; die Anfechtung des Kaufs wegen Täuschung nach § 123 aber nützt ihm nicht unmittelbar, da sie nur Rechtswirkung gegenüber dem Vertragsgegner, also dem Aufkäufer hat, nicht aber gegen einen weiteren Erwerber.

6. Pfandrecht

Hat jemand Schulden, so haftet dem Gläubiger das ganze Vermögen, in alten Zeiten sogar auch die Person des Schuldners; bei nicht rechtzeitiger Zahlung konnte dieser in den Schuldturm geworfen oder noch früher in Sklaverei verkauft werden. Aus jenen Zeiten stammt das Wort: „Hat man kein Pfand, so muß man selbst Pfand sein".

Wenn so dem Gläubiger das ganze Vermögen des Schuldners verhaftet ist, könnte man meinen, daß er sich damit zufrieden geben

sollte und keine besondere Sicherheit gerade für seine Forderung zu verlangen brauchte. Das wäre freilich eine falsche Meinung. Denn wenn jemand einem anderen etwas borgt, weiß er regelmäßig nicht, wieviel Schulden der andere schon hat, und noch weniger weiß er, wieviel Schulden jener noch eingehen wird. Kann der Schuldner zur Zeit der Fälligkeit nicht zahlen und will der Gläubiger auf dessen Vermögen greifen, so muß er gewärtig sein, daß ein anderer Gläubiger noch flinker ist und ihm mit der Pfändung der Habe des Schuldners zuvorkommt. So läuft der Gläubiger Gefahr, nur einen kleinen Betrag oder gar keine Befriedigung für seine Forderung zu erhalten. Daher sagte man von einem allzu vertrauensseligen Gläubiger: „Wer borgt ohne Bürgen und Pfand, — dem sitzt ein Wurm im Verstand." Der Gefahr, sein Geld zu verlieren, will sich aber ein vorsichtiger Gläubiger nicht aussetzen. Sofern er einem anderen überhaupt borgt, läßt er sich häufig eine besondere Sicherheit geben durch Verpfändung von Liegenschaften oder der Fahrhabe des Schuldners. „Pfand — ist sicherer als Hand." Das, was der Schuldner dabei tut, nennt man auch im Volksmunde „versetzen", und das schw. ZGB. kennt noch heute ein besonderes Versatzpfand, Art. 907 bis 913. Das hat freilich dort die Besonderheit, daß für das gewährte Darlehen nur das Pfand haftet, nicht auch der Verpfänder persönlich mit seinem sonstigen Vermögen, ähnlich wie im Seerecht durch den Bodmereivertrag für das Schiffsdarlehen nur Schiff, Fracht und Ladung verpfändet und keine persönliche Haftung des Darlehensnehmers begründet wird.

Die Verpfändung von Liegenschaften war von jeher an besondere Förmlichkeiten gebunden: „So das Unterpfand ein Haus wäre, so soll der Dorf- oder Stadtknecht daraus einen Span schneiden, wenn Acker, so haue er daraus eine Scholle und gebe sie dem Gläubiger, wodurch dieser den Angriff bekommt". Heute ist vor allem nötig, daß das Unterpfandsrecht ins Grundbuch eingetragen wird (§ 873, Schw. Art. 958, Ö. § 451). Unser BGB. hat befremdlicherweise beim Grundpfand das Wort Pfandrecht vermieden und spricht von Hypothek; dieses Wort stammt aus dem Griechischen, ὑποθήκη = Unterlage, Unterpfand.

Das Pfandrecht gibt nicht nur ein besonderes Zugriffsrecht, sondern auch Schutz gegen Verjährung. Jedes Recht muß nämlich ausgeübt werden und dadurch zeigen, daß es am Leben ist. Fordert der

Gläubiger nichts und leistet der Schuldner nichts, so wird dieser Zustand der Ruhe im Laufe der Zeit zum Rechtszustand. Der Anspruch verjährt so durch Nichtgebrauch. Der Schuldner hat manchmal lange Jahre nichts, namentlich auch keine Zinsen zu leisten brauchen. Vielleicht wußte er vom Bestehen der Schuld gar nichts; das kann im Leben wohl vorkommen, namentlich wenn jemand anders durch Erbgang in ein Schuldverhältnis eingetreten ist. Er soll nun auch von Rechts wegen einer verspäteten Anforderung die Einrede entgegensetzen können, daß er nicht mehr schuldig sei, etwas zur Befriedigung des Gläubigers zu tun. Wenn er aber auch selbst nichts mehr zu leisten braucht und sein Vermögen im allgemeinen nicht angegriffen werden kann, so darf er doch nicht hindern, daß der Gläubiger aus der für seinen Anspruch besonders haftenden Pfandsache seine Befriedigung sucht: „Versatz verjähret nicht"; so auch § 223, Schw. Art. 790 und 807, Ö. § 1483.

Pfandrechte entstehen regelmäßig durch einen zwischen Gläubiger und Schuldner abgeschlossenen Pfandvertrag. Doch gibt es auch eine Anzahl Pfandrechte, die kraft gesetzlicher Vorschrift eintreten, ohne daß es einer Vereinbarung zwischen Gläubiger und Schuldner bedürfte; das ist vor allem so im Handelsrechte, aber auch im bürgerlichen. Die bekanntesten sind die Pfandrechte des Vermieters und des Verpächters an den vom Mieter oder Pächter eingebrachten Sachen. Von ihnen gilt: „Das Recht gibt das Pfand ohne des Herren Willen"; „Herr" bedeutet hier Eigentümer und Schuldner. Auch ohne daß der Mieter oder Pächter dies weiß oder will, haftet sein Einbringen für die Miet- und Pachtforderung und der Vermieter darf mit eigener Hand verhindern, daß der Mieter die dem Pfandrecht unterliegenden Sachen aus der Wohnung entferne („Rücken" nennt man in der Stadt das heimliche Verlassen einer Mietwohnung) und darf sie in seinen Besitz nehmen (§ 561, schw. OR. Art. 272—74, Ö. § 1101). Aber dieses Recht äußert sich das Sprichwort: „Wem der Hauszins nicht wird bezahlt, der mag pfänden auf der Were".

Manchmal bestehen mehrere Pfandrechte nebeneinander. Das kommt weniger häufig bei Fahrhabe vor, weil diese dem Gläubiger zur Begründung des Pfandrechts regelmäßig überlassen werden muß (§ 1205, Schw. 884, Ö. 451) und im allgemeinen nur einer Besitz haben kann. Anders aber ist es bei Grundstücken; denn sie brauchen zur Begründung des Pfandrechts nicht dem Gläubiger ausgehändigt

zu werden. Hier wird das Recht vielmehr dadurch begründet, daß der Eigentümer im Einverständnis mit dem Gläubiger ein Pfandrecht bewilligt und daß es dieser Bewilligung entsprechend ins Grundbuch eingetragen wird, § 873, 1113, Schw. Art. 799, Ö. 451. Da in den Städten die Häuser meist mit fremdem Gelde gebaut und den Geldgebern Pfandrechte bestellt werden müssen, ruhen auf den städtischen Grundstücken regelmäßig mehrere Pfandrechte, die zu verschiedenen Zeiten eingetragen wurden. Wenn der Eigentümer die Darlehenszinsen nicht aufbringt oder die Hauptschuld nach Fälligkeit nicht bezahlt, wird das Haus im Zwangswege veräußert. Wie wird es nun gehalten, wenn der Erlös nicht ausreicht, um alle Pfandgläubiger zu befriedigen? Erhalten dann alle eingetragenen Gläubiger gleichmäßigen Anteil am Erlöse oder werden einzelne bevorzugt? Darauf antworten die Sprichwörter: „Das Alter geht vor", „Die ältesten Briefe gehen vor". So sagt auch Schw. Art. 893 Abs. 2: „Der Rang der Pfandrechte wird durch die Zeit ihrer Errichtung bestimmt", ähnlich beim Fahrnispfand § 1209. Es liegt wohl auch keine grundsätzliche Verschiedenheit im deutschen Grundpfandrecht vor, wenn § 879 bestimmt, daß sich mehrere in derselben Abteilung des Grundbuchs eingetragenen Lasten nach der Reihenfolge der Eintragung, also nach einem räumlichen Merkmal richten; denn nach § 17 ff. der deutschen Grundbuchordnung sind Eintragungsanträge in der Reihenfolge zu erledigen, wie sie beim Grundbuchamte eingelaufen sind; daher entspricht die räumliche Reihenfolge im allgemeinen der zeitlichen. Überdies haben Rechte, die unter Angabe desselben Tags eingetragen sind, gleichen Rang, also wie in dem Sprüchlein: „Gleiches Alter, gleicher Rang."

Bieten bei einer Zwangsversteigerung fremde Liebhaber nicht soviel, daß der betreibende Pfandgläubiger für seine Forderung befriedigt würde, so wird er öfter selbst mitbieten. Dann kann der Fall eintreten, daß er das höchste Gebot abgibt, den Zuschlag erhält und ihm so vielleicht gegen seinen Willen die Pfandsache statt des geschuldeten Geldes zuteil wird. Die Notwendigkeit beim Bieten selbst einzuspringen, trat schon in alter Zeit so häufig ein, daß sich der Spruch bildete: „Pfand gibt oft Land". Ja, das ist nicht nur im bürgerlichen Rechte so, sondern auch im öffentlichen: Wismar wurde 1803 von Schweden auf 100 Jahre an Mecklenburg verpfändet und blieb diesem nach Ablauf der Zeit.

Einige köstliche Sprichwörter erinnern dann noch an das in den früheren Bauernzeiten bedeutsame Recht, auch ohne Mitwirkung der Obrigkeit zu pfänden. Namentlich das Schaden verursachende Vieh des Nachbarn war diesem sogenannten Privatpfandrecht ausgesetzt. Es wird noch ausdrücklich erwähnt im schw. OR. Art. 57 und ö. § 1321 und gilt auch in Deutschland noch landesrechtlich; vergleiche Artikel 89 des Einführungsgesetzes zum BGB. Nur die männlichen Zuchttiere, die eben nicht bloß kamen, um des Nachbarn Gras und Kräuter zu fressen, unterlagen dem Pfandrechte nicht: „Der Hengst ist frei wie der Farre". Sonst aber hieß es: „Jeder mag pfänden auf seinem Gut". Ein leichtsinniger Nachbar, dessen Kuh gerade nicht viel Milch gab, hätte nun in futterarmer Zeit denken können, es solle der Pfändende das Tier einmal eine Zeitlang füttern. Um ihm diesen Gedanken aus dem Kopf zu schlagen und ihn zur baldigen Auslösung zu bestimmen, erhielt gepfändetes Vieh als Futter nur „eine Gelte (Bütte) mit Steinen und eine Zaine (Korb) mit Wasser". Davon wurde das fremde Vieh gewiß nicht fett. Noch gröber verfuhr man mit den Enten und Gänsen: „Die Ente hat ihr Recht auf dem Buckel." Man pfändet sie nicht, sondern jagt sie mit Schlägen aus seinem Land, und was Gänse, die ohne einen Hirten weiden, zu erwarten haben, deutet verblümt das Wort an: „Gänse haben keinen Frieden" und ohne Bild: „Gänse bezahlen mit dem Kopf". Das ist sogar heute noch Rechtens in der Schweiz; denn hier sagt Art. 57 des OR.: „Der Besitzer eines Grundstücks darf Dritten angehörige Tiere, die auf dem Grundstück Schaden anrichten, zur Sicherung seiner Ersatzforderung einfangen und wo es die Umstände rechtfertigen, sogar töten". Mag nun einer von diesen Rechten Gebrauch machen oder nicht, jedenfalls hat das Kleinvieh, das unbewacht weidet und den Gartenbau oft empfindlich schädigt, schon viele Nachbarn zu Feinden gemacht.

7. Grund- oder Reallasten

Bei den Pfandlasten dient das Grundstück regelmäßig als Sicherheit dafür, daß der Eigentümer eine übernommene Geldverpflichtung erfüllt. Tut er es nicht, so kann die geschuldete Leistung nicht aus dem Grundstück selbst herausgeholt werden — der Grund und

Boden bringt nun einmal keine Geldstücke und Papierscheine unmittelbar hervor — vielmehr muß es veräußert und die Schuld aus dem Erlöse befriedigt werden. Es haftet also in Wahrheit der Wert, genauer der Geldwert der Liegenschaft.

Der Grund und Boden wurde aber, namentlich im Mittelalter, auch noch mit Leistungen belastet, die auf dem Grundstück selbst erzeugt wurden und im Notfall aus ihm beigetrieben werden konnten, ohne daß man es hätte veräußern müssen. Es sind dies die Grundlasten, wie sie Schw. Art. 782 f. benennt, oder Reallasten, wie sie in § 1105 bezeichnet werden; der Wortteil real kommt vom lateinischen res, die Sache. Solche Lasten waren namentlich der Zehnte, an den heute noch da und dort eine Zehntscheuer und der Familienname Zehnter, d. i. Erheber des Zehnten erinnert. Aus der Fülle der Sprichwörter, die von ihm handeln, sollen hier wenigstens einige angeführt werden: „Was der Pflug begeht, davon hat der Zehntherr die 10. Garbe". Zehntherren waren aber nicht nur weltliche, sondern auch geistliche Fürsten: „Wo der Pfaffe ein Weihwasser hinwirft, dafür muß ihm der Herr geben". Der Zehnte wurde übrigens nicht nur von Feld-, sondern auch von den Baumfrüchten geschuldet: „Was Obst der Mann hat, das soll er verzehnten", ja auch vom Vieh: „Von jedem Vieh gibt man den Zehnten sonder (außer) von Hühnern". Die Hühner waren aber nicht etwa ganz frei, sondern dort war von jeder Brut ein Stück zu geben: „Hat die Henne drei, so gibt sie eins, hat sie zwanzig, so gibt sie auch eins".

Mit dem Zehnten waren die dem Bauernstand aufgebürdeten Lasten aber keineswegs erledigt, es kamen noch die Hand- und Spanndienste dazu. Die Schlösser, deren Trümmer auf deutschen Bergen unser Auge allenthalben entzücken, sind durchweg im Frondienste erbaut. Daher ist das Sprichwort wohl verständlich: „Der Bauer fürchtet nichts so sehr als die Gerechtigkeit", das ist die Belastung seines Gutes mit neuen Grund-, Zins- und Zehntrechten. Denn „Viele Säcke sind endlich doch des Esels Tod". Es ist daher auch kein Wunder, daß sich der Bauer dagegen in unruhigen Zeiten wie im Bauernkriege auflehnte und daß die französische Revolution im Ausgang des 18. Jahrhunderts mit allen diesen Lasten reinen Tisch gemacht hat. Diesen Fortschritt in der Rechtsstellung des Landvolkes tastete der Erbe der Revolution nicht an. Das unter Napoleon I. erlassene französische bürgerliche Gesetzbuch, der code civil,

ließ demgemäß keine Grundlasten zu. So war es daher bis zum Jahre 1900 auch im westlichen Deutschland, wo französisches Landrecht gegolten hatte. Eine Beschränkung dieses freiheitlichen Grundsatzes ist freilich in der Ordnung: der alte Bauer, der übungsgemäß einem seiner Kinder seinen Hof übergibt, soll darin Wohnung und Lebensunterhalt für seine alten Tage haben. Er soll diese Rechte auch durch Begründung einer im Grundbuch einzutragenden Leibzucht in einer Weise sichern können, daß nicht bloß der übernehmende Sohn dafür persönlich haftet, sondern der jeweilige Eigentümer. Für den persönlichen Lebensbedarf des alten Bauern soll also auch ein Rechtsnachfolger des Sohnes aufkommen müssen, falls es diesem einfallen sollte, den Hof alsbald zu versilbern. Diese Last ist um so erträglicher, als sie nicht wie die mittelalterlichen dauernd auf dem Grundstück liegt, sondern mit dem Tod des Bauern und seiner Frau erlischt.

8. Rechte der Herrschaft (Regalien)

Das Wort Regal bedeutet in der Rechtssprache ursprünglich das Vorrecht des Königs; es ist abgeleitet vom lateinischen rex, regis, der König. Freilich wußte sich im Laufe der Geschichte nicht bloß der König solche Vorrechte (auch Privilegien, d. i. Befreiung von dem für alle verbindlichen Gesetz nennt sie der fremdwortfrohe Deutsche) gegenüber dem gemeinen Manne zu verschaffen, sondern auch sonstige Herrschaften, wie der Adel und die hohe Geistlichkeit. An die Stelle der Herrschaft trat schon vor der Umwälzung von 1918 da und dort der Staat. Wo das noch nicht geschehen ist, sind nach Art. 155 der Weimarer Verfassung private Regale im Wege der Gesetzgebung auf den Staat überzuführen. Bisweilen sind übrigens die Vorrechte einzelner Stände oder des Staates längst weggefallen, und es ist an ihre Stelle das allgemeine Recht getreten.

Das ist zum Beispiel der Fall beim Schatzrecht. Schatz im Rechtssinn ist ein Wertgegenstand, der im Erdboden (oder auch im Geheimfach eines alten Schrankes) gefunden wird und dessen ursprünglicher Eigentümer nicht mehr zu ermitteln ist. Von einem solchen hieß es: „All Schatz, tiefer denn ein Pflug geht, gehört in das Reich.“ Eine Erinnerung daran enthält noch heute Ö. § 399: „Von

einem Schatz wird der dritte Teil zum Staate eingezogen. Von den zwei übrigen Dritteilen erhält eines der Finder, das andere der Eigentümer des Grundes.“ Dagegen enthielt noch das berühmteste der niederdeutschen Rechtsbücher, der um 1230 von Eike von Repkow verfaßte Sachsenspiegel, die alte Vorschrift, daß der Schatz dem König gehöre. Sie rechnete aber nicht genügend mit dem natürlichen Eigennutz des Finders und Sacheigentümers, die ihren Fund lieber verschweigen als abliefern werden. Sie widersprach auch der natürlichen Billigkeit und deshalb weist zum Beispiel der mehr in Oberdeutschland geltende Schwabenspiegel den Schatz dem Eigentümer der Sache zu, die ihn in sich barg, räumt aber dem Finder einen gewissen Anspruch daran ein. Denn nicht immer findet der Eigentümer selbst den Schatz. Wie oft werden Wertsachen, die in Kriegszeiten vergraben worden sind, später durch Arbeiter beim Fällen oder beim Pflanzen eines Baumes oder beim Ausheben einer Baugrube gefunden! Für diese Regelung gilt dann der Spruch: „Wes das Erdreich ist, des ist auch der Schatz.“ Diesen Standpunkt nimmt auch Schw. Art. 723 ein. Der Schatz fällt an den Eigentümer der ihn bergenden Sache, der Finder aber hat einen Anspruch auf eine gewisse Vergütung, die jedoch die Hälfte des Wertes des Schatzes nicht übersteigen darf. § 984 des deutschen BGB. aber überweist den Schatz dem Finder und dem Sacheigentümer zu hälftigem Miteigentum. Der Finder hat also nicht bloß ein Forderungsrecht an den Grundeigentümer in einer Höhe, die unter Umständen erst durch Sachverständige zu ermitteln ist, sondern er hat Anteil an den einzelnen gefundenen Münzen oder Schmuckstücken, wie wenn beide bei gemeinsamer Arbeit den Schatz aus dem herrenlosen Meeresgrunde gehoben hätten.

Unendlich wichtiger als das Schatzrecht ist das Bergrecht. Beruht doch auf dem Reichtum an Kohlen und Erzen die überragende Bedeutung des rheinisch-westfälischen Industriegebietes und Oberschlesiens. Das Recht auf solche Bodenbestandteile stand im Mittelalter vorübergehend nur dem König zu. Doch hatte das keine besondere Bedeutung, weil sich der Mineralreichtum dem Menschen nicht ohne viel Arbeit erschließt und schon die Vorbereitung zur Gewinnung einen großen Aufwand von Kosten verursacht. Wenn man daher die Bodenschätze überhaupt den Menschen zugänglich machen wollte, mußte man dazu anlocken, indem man dem Sucher und

Finder die Erträgnisse seiner Arbeit zusicherte. Zunächst freilich bedangen sich die Herren des Regals noch gewisse Anteile an der Ausbeute aus, später aber wandelte man das Bergregal um in die Bergfreiheit. Jeder durfte nach unterirdischen Bodenschätzen suchen. „Es hat jedermann freies Schürfen." Wer sich von der Bergbehörde einen Schürfschein beschaffte, durfte auch an Stellen, die ihm nicht gehörten, graben, wenn er nur den Grundeigentümer entschädigte. Jedoch galt zuweilen zum Schutz des urbar gemachten Landes die Einschränkung: „Wo Pflug, Egge und Sense hingeht, da darf man nicht nach Gold graben." Durch diese Regelung würde freilich in einem der Landwirtschaft erschlossenen Gebiete das Suchen manchmal über Gebühr erschwert werden. Daher ist meist das Schürfen nur an einzelnen bestimmten Stellen untersagt, nämlich „unter dem Bett, dem Feuer und dem Tisch". Wer nun Erz oder Kohle beim Schürfen findet, dem wird auf sein Begehren („Muten", noch jetzt in den Worten zumuten und anmutig der allgemeinen Sprache bekannt) das Recht gewährt, daß er in dem zugewiesenen Gevierte, dem „Feld", ausschließlich nach den ihm zur Ausbeutung verliehenen Metallen oder Mineralien graben darf. Das ist der Sinn des sogenannten Bergwerkseigentums. Es verschafft kein Eigentum an einem bestimmten Abschnitt der Erdoberfläche, wohl aber das Recht, sich in der Tiefe, unterirdisch die verliehenen Mineralien anzueignen. Ist nun das Recht zur Gewinnung verliehen, so steht es an Dauer und Stärke hinter keinem andern zurück, und es hat sich darüber das Wort gebildet: „Bergrecht ist stark und weder König, noch Herzog noch Graf kann dagegen."

Staatlicher Zwang galt auch im Deichrechte. Deiche sind Dämme, die in der Tiefebene am Ufer der Ströme und des Meeres entlang gezogen werden, um das fruchtbare Land vor Überschwemmung zu schützen. Zur Errichtung und Unterhaltung der Dämme war jeder Eigentümer einer Liegenschaft verpflichtet, die durch die Überschwemmung gefährdet war, also keineswegs bloß die unmittelbaren Anlieger. Daher: „Deich und Land gehört zusammen," „Kein Land ohne Deich (d. h. ohne die Last des Deichbaues) und „Kein Deich ohne Land." Man lebte damals noch nicht in einer Zeit der Geldwirtschaft, sondern jeder mußte seiner Deichpflicht persönlich (oder durch seine Knechte) nachkommen. Wer dies nicht tat, wurde seines Landes entsetzt: „Wer nicht kann deichen, muß weichen." Die Deichlast besteht auch heute noch; Bismarck, dessen väterliches Gut an der unteren Elbe lag, war ja bekanntlich Deichhauptmann. Die Grundeigentümer brauchen aber heute nicht mehr persönlich zu deichen, vielmehr werden die Kosten auf die Beteiligten umgelegt. Bau- und Unterhaltungsarbeiten werden ja doch besser und billiger erstellt von Berufsarbeitern und Maschinen, wie Baggern usw. Über die Höhe der Umlagen entscheiden heute im Streitfall nicht die Gerichte, sondern die Verwaltungsbehörden; denn das Deichwesen ist zu einem Zweige des öffentlichen Rechts geworden.

Einträglicher und unterhaltender für die hohen Herren als das Deichregal war das Jagdregal oder der Wildbann, das ist das ausschließliche Recht, die Jagd in dem ihnen untertänigen Gebiete auszuüben. Gerade dieses Vorrecht stand jedoch völlig im Gegensatz zu deutscher Rechtsüberzeugung. Die Jagd galt als die tägliche Kriegsschule aller freien Männer. Deshalb wollte das deutsche Volk das Waidwerk jedem freien Mann in unbeschränkter Weise gewahrt wissen, und dieser Anschauung entsprach der Satz: „Wer die Vögel fängt, des sind sie und wer hinten nachkommt, hat nichts davon." Gleichwohl haben die hohen Herren den Wildbann durchgedrückt, namentlich das Recht, auch auf dem Grund und Boden ihrer Untertanen das Jagdrecht an jagdbarem Wild allein auszuüben. Für jagdbar aber wurden mit der Zeit fast alle Tiere erklärt, deren Fleisch genießbar oder deren Pelz wertvoll ist. Dazu gehören selbst offenbare Schädlinge: „Auch ein Marder gehört in den rechten Wildbann." Später hieß es sogar: „Allen Tieren ist Frieden gesetzt außer Wölfen und Bären." Daher galt bald auch nicht mehr der Satz: „An einem Fuchs bricht man keinen Wildbann", vielmehr wurden auch die Füchse jagdbares Wild, d. h. solches, das nur unter Beachtung der Jagdgesetze von dem zur Jagdausübung Berechtigten erlegt werden darf. Selbst heute noch darf der Bauer den in seinen Hühnerhof eingedrungenen Marder zwar totschlagen, muß aber den Balg dem Jagdpächter abliefern, ohne von diesem Ersatz für den vom Marder angerichteten Schaden verlangen zu können. Das ist eine für die herrschenden Stände geschaffene Regelung, die gewiß den jetzigen Anschauungen von Gerechtigkeit nicht mehr entspricht. Der Wildbann hat sich mit der Zeit immer weiter ausgedehnt. Während er sich ursprünglich auf die Vierfüßler beschränkte und es hieß: „Die Taube ist gemein", gehörte auch bald „Vogelfang zum Wildbann".

Und wie sehr der Vogelfang auch vom Adel geschätzt und gepflegt wurde, zeigt der Beinamen des ersten Sachsenkönigs „Heinrich der Vogler".

Wie schwer das Recht, auf fremdem Grund und Boden jagen zu dürfen, auf dem Bauernstande lastete, hat u. a. Bürger in seiner Ballade „Der wilde Jäger" geschildert. Die französische Revolution hat daher auch mit diesem Rechte aufgeräumt und heute hat jedermann grundsätzlich das Jagdrecht auf seinen Liegenschaften. Jedoch darf es der Eigentümer von Kleinbesitz nicht selbst ausüben, weil es mit Gefahr verbunden wäre für den Nachbarn und für den Bestand des Wildes. Das Wild erfreut aber nicht bloß das Auge des Wanderers, sondern stellt auch einen, wenn auch bescheidenen, Teil des Volksvermögens dar. Daher werden die Gemarkungen der Gemeinden (mit Ausschluß des zusammenhängenden Großgrundbesitzes) zu Jagdbezirken zusammengeschlossen, und diese Bezirke werden an Jagdliebhaber verpachtet. Der Pachtzins aber fließt in die Gemeindekasse und kommt den Grundeigentümern insofern zugute, als sich dadurch die von ihren Grundstücken zu zahlenden Gemeindeumlagen mindern.

Um für die Dauer einen angemessenen Wildstand zu erhalten, sind Schonzeiten eingeführt, innerhalb deren kein weibliches Wild geschossen werden darf: „Man muß der Kalbzeit ihr Recht lassen". Läßt sich aber das Geschlecht der Tiere aus der Ferne nicht unterscheiden, wie beim Hasen, so erstreckt sich die Schonzeit auf die ganze Wildgattung. Wer eine so große zusammenhängende Bodenfläche hat, daß er selbst die Jagd ausüben darf (vielfach 72 ha), der kann seinen Wildpark auch einhegen, um den Austritt des Wildes in fremdes Jagdgebiet zu verhüten und um die Angrenzer vor Wildschaden zu wahren: „Wer darf jagen, der darf hagen". Dazu hat der Jagdherr oft Anlaß. Denn nicht bloß die Wildsauen brechen in die Kartoffeläcker der Bauern und zerwühlen sie, sondern auch die Hasen suchen die Kohlgärten auf usw. Es ist daher, wenn man die menschliche Natur recht kennt, nicht so verwunderlich, daß die Entscheidung darüber, ob das deutsche BGB. vom Reichstage angenommen werde oder nicht, zeitweise abgehangen hat von der Art, wie in § 835 die Pflicht des Jagdberechtigten zum Ersatz des Schadens geregelt werden sollte, den Wild aus seinem Jagdbezirke an Grundstücken anrichtete. Besonders heftig wehrte sich ein Teil der Abgeordneten gegen

die Verpflichtung, den von Hasen angerichteten Schaden zu ersetzen. Diese Art des Wildschadens hat man daher, um das Gesetzgebungswerk nicht zu gefährden, aus dem BGB. weggelassen und die Regelung der Landesgesetzgebung überlassen.

Das Umhegen eines Jagdbezirks hat noch eine andere rechtliche Bedeutung. Das Wild in Wald und Feld ist zunächst herrenlos. Wem sollte auch der Zug- oder Strichvogel gehören, der seinen Standort häufig wechselt? Solche Tiere treten ins Eigentum des Menschen regelmäßig erst, wenn sie der Jäger getötet und an sich genommen hat. Und da ist die Rechtsfrage, ob das Eigentum daran jeder erwirbt, der sie erbeutet und an sich nimmt. Das lehnen die Gesetze ab; denn wenn jeder Wilderer Eigentümer des geschossenen oder in der Schlinge gefangenen Wildes würde, dann gäbe es keine geordnete Jagd- und Wildpflege. Vielmehr erwirbt das Eigentum am getöteten oder gefangenen Wild nur, wer zur Ausübung der Jagd berechtigt ist, also namentlich der Jagdpächter; er hat das ausschließliche Recht zur Aneignung, § 958 Abs. 2, HGB. § 383. „Wildtiere in Tiergärten und Fische in Teichen oder anderen geschlossenen Privatgewässern aber sind nicht herrenlos" (§ 960) oder wie das Wort sagt: „Solange das Wild im Bann, gehört's dem Herrn noch an". Wahrscheinlich aber will dieses Wort nichts darüber sagen, ob das Wild in der Freiheit irgend jemand gehöre, sondern will nur ausdrücken, daß kein Jagdberechtigter fliehendes Wild über die Grenzen seines Jagdbezirkes hinaus verfolgen darf. Die „Jagdfolge" ist verboten, auch wenn das Tier schon verwundet ist und voraussichtlich bald eingehen wird. Denn wenn man solchem Wild in ein fremdes Jagdgebiet folgen dürfte, so wäre die Versuchung zu groß, auch anderes dort angetroffenes zu jagen.

3. Hauptstück: Schuldverhältnisse (Gedinge)

1. Allgemeines

Mit dem Worte Schuld verbindet man im Recht verschiedene Begriffe. Zunächst bedeutet Schuld den Gegensatz zur bloßen Verursachung und ist ein Hauptunterscheidungsmerkmal zwischen erlaubten und unerlaubten Handlungen. Wenn man im Rechtsleben von Ursache spricht, will man lediglich feststellen, wodurch ein Erfolg herbei-

geführt worden ist, ohne zu fragen, ob dabei ein Mensch anders gehandelt hat, als er nach Recht und Sitte hätte handeln sollen. Wird ein Waldbaum vom Blitz getroffen und zerspellt, so ist der Blitz die Ursache der Zerstörung und des dem Eigentümer dadurch erwachsenden Schadens; von einer Schuld kann nicht geredet werden und der geschädigte Eigentümer hat gegen niemand einen Ersatzanspruch. Wird aber der Baum von Holzdieben gefällt und weggefahren, so ist das Fällen nicht bloß die Ursache des Schadens, sondern zugleich eine schuldhafte Handlung der Täter. Sie haben nämlich „vorsätzlich und rechtswirdrig das Eigentum eines anderen verletzt“ (§ 823, schw. OR. Art. 41, Ö. § 1294) und haben dafür nach bürgerlichem Recht Schadensersatz zu leisten. Daneben können sie vom Strafrichter wegen Holzfrevels gestraft werden. Dieser Begriff der Schuld kehrt auf verschiedenen Rechtsgebieten wieder. So im Vertragsrecht (die Büglerin versengt durch ein zu heißes Eisen die Brust eines Hemdes, so daß es nicht mehr als Taghemd getragen werden kann), aber auch im Familienrecht: so sollen nach § 1574 BGB. Scheidungsurteile eine Angabe darüber enthalten, welcher von den Ehegatten die Schuld an der Scheidung trage.

Ein anderer Begriff von Schuld hat dem zweiten Buch des deutschen BGB. den Namen gegeben: Recht der Schuldverhältnisse, Schuldrecht. Die Schweiz dagegen hat für dieses Rechtsgebiet die von Rom stammende Bezeichnung Obligationsrecht. Diese hatte sie schon ihrem Bundesgesetz von 1881 beigelegt und sie dann im Jahre 1911 beibehalten, als sie das ältere Gesetz dem neugeschaffenen Zivilgesetzbuch anpaßte. Österreich spricht in der zweiten Abteilung des zweiten Teils von persönlichen Sachenrechten, eine Bezeichnung, die sonst nicht mehr üblich ist. Auch die zweite Art des Schuldbegriffs ist dem Alltagsleben nicht fremd, so wenn etwa ein Vater seinen verschwenderischen Sohn fragt: Wie viel Schulden hast du eigentlich? Dabei denkt man freilich meist an Geldschulden. Das sind ja wohl auch die Schulden, die vielen Menschen die meiste Sorge machen. Im Rechtssinn sind es aber nicht die einzigen, es gehören dahin auch die Verpflichtungen zur Leistung anderer Sachen und von Diensten. Hat eine Eisenbahnverwaltung z. B. bei einer Fabrik 25 Güterwagen bestellt, so schuldet nicht bloß sie den Kaufpreis, sondern nach rechtlichem Sprachgebrauch ist auch die Fabrik schuldig, die bestellten Güterwagen vertragsmäßig herzustellen und abzuliefern.

Im Gegensatz zum Eigentum hat das Schuldverhältnis das Bestreben, wieder gelöst zu werden und nicht ungemessene Zeit zu bestehen. Den Hof, den der Bauer von seinen Eltern ererbt, will er seinen Kindern hinterlassen, und die Güter der Adeligen verbleiben oft jahrhundertelang in der gleichen Familie. Das Eigentumsrecht ist sonach für die Dauer bestimmt, außer beim Handelsverkehr, wo die Güter als Waren bestimmungsgemäß ihren Herrn bald zu wechseln pflegen und wo man die Waren Ladenhüter nennt, die keinen Absatz finden. Schuldverhältnisse sind grundsätzlich von vorübergehendem Bestand; sie werden eingegangen, um früher oder später gelöst zu werden. Das kann so rasch geschehen, daß Bindung und Lösung zusammenfallen. So ist es bei den meisten Käufen des Markt- und Ladenverkehrs und bei den sogenannten Handgeschenken, wo sich Verpflichtung und Erfüllung in der Regel nicht voneinander scheiden lassen. Klarer hebt sich das Binden und das Lösen eines Schuldverhältnisses ab, wenn jemand beim Schneider einen Anzug bestellt und den Stoff aussucht. Dann ist der Schneider schuldig, den ausgesuchten Stoff zu verarbeiten und den Anzug passend herzustellen, der Besteller aber hat ein- oder mehrmals zur Probe zu kommen und nach Fertigstellung und Ablieferung des Anzugs den Preis zu bezahlen. Immerhin wickeln sich auch derartige Schuldverhältnisse im Verlaufe von Wochen oder Monaten ab. Schleppt sich aber die Abtragung von Geldschulden über viele Jahre hin, so ist (abgesehen von den durch Grundpfand gesicherten Darlehn des Hausbesitzes) meist etwas nicht in Ordnung; so namentlich bei den in früherer Zeit nicht seltenen Fällen, wo ein Bauer in der Jugend sein Gut mit Schulden übernommen hatte und sie bis zum Abend seines Lebens nicht hatte abtragen können, sondern vielleicht bei seinem Viehhändler immer tiefer in Verschuldung geriet.

2. Entstehung und Schuldgrund

Die Schuldverbindlichkeiten entstehen meistens dadurch, daß mehrere Menschen eine Vereinbarung treffen, wobei der eine oder beide Teile Verpflichtungen übernehmen. Legt z. B. jemand einen Teil seines Lohnes bei der Sparkasse an, so übernimmt nur die Kasse eine Verpflichtung, nämlich dem Einleger später eine gleich hohe

Geldsumme zurückzuzahlen und das eingelegte Geld in der Zwischenzeit zu verzinsen. Bestellt aber eine Hausfrau im Herbst beim Kohlenhändler den Wintervorrat an Holz und Kohlen, so werden beide Teile zugleich Schuldner und Gläubiger: der Händler schuldet die bestellten Waren und hat den vereinbarten Kaufpreis zu fordern; die Hausfrau (richtiger der von ihr vertretene Ehemann) schuldet den Kaufpreis und ist Gläubiger der Brennstoffe. Diese Beispiele veranschaulichen den Begriff der einseitigen und der gegenseitigen Verträge.

In Verbindlichkeiten zu seinen Nebenmenschen tritt man aber nicht bloß durch freundschaftliche Vereinbarungen, sondern auch dadurch, daß man gegen sie eine unerlaubte Handlung begeht. Der im vorigen Abschnitt erwähnte Holzfrevler schuldet dem Waldeigentümer Ersatz für den Schaden, den er ihm durch das unbefugte Fällen eines Stammes zugefügt hat. Dieser Schaden braucht übrigens nicht bloß im Werte des entwendeten Holzes zu bestehen; denn der Stamm kann beim Fällen noch andere Bäume verletzt und beim Herausschleifen auf den Weg eine junge Waldanlage beschädigt haben.

In früheren Zeiten wurden die Verträge häufig auf Messen und Märkten geschlossen. Hier stellte der eine seine Ware aus, der andere besah sie. Gefiel sie ihm, so fragte er wohl nach dem Preise. Indem der Kaufmann diesen benannte, erklärte er seinen Willen, sie dem Fragenden zu verkaufen. Er machte ein Angebot oder einen Antrag zum Verkaufe (eine Offerte, wie heute noch weite Volkskreise mit einem überflüssigen Welschworte sagen), und der andere hatte es nun in der Hand, den Antrag anzunehmen oder abzulehnen. Auch wenn er anzunehmen willens war, pflegte er nicht sofort ja zu sagen, sondern fing seinerseits an, einen niedrigeren Preis zu benennen; denn auf einfachen Wirtschaftsstufen will man durchaus „handeln“. Bis zum endlichen Abschluß oder Auseinandergehen wurde meist viel hin- und hergeredet. Diese Erscheinungen des Lebens liegen wohl dem Worte zugrunde: „Fordern und Bieten macht den Kauf“. Vorausgesetzt ist dabei allerdings, daß sich Fordern und Bieten schließlich decken. Wenn aber über vielerlei geredet wird und wenn dabei alle möglichen Vorschläge aufgeworfen und verworfen worden sind, ist es oft schwer zu sagen, ob beide Teile eigentlich einig geworden seien und worüber. Daher bildete sich von altersher die Sitte, die Tatsache der Einigung durch eine besondere Form zum Ausdruck zu bringen, zum Beispiel den Abschluß des Kaufs durch Handschlag

zu bekräftigen, wie es heute noch im Viehandel üblich ist — hier muß es „patschen“. Berühmt ist der Handschlag als Vertragszeichen in Goethes Faust, wo Faust in seinem Studierzimmer und Mephistopheles in Wechselreden sagen:

„Die Wette biet' ich!“
„Topp!“
„Und Schlag auf Schlag!“

Auf diese Zeichen des Vertragsschlusses beziehen sich die Worte: „Hand muß Hand fassen“ und „Was man mit dem Munde gelobt hat, muß man mit der Hand beweisen“. An anderen Orten „beweinte“ man den Kauf, d. h. man feierte seinen Abschluß beim Wein (sog. Weinkauf). Diese Formen bringen zwar zum Ausdruck, daß man einig geworden ist, versagen aber, wenn später Zweifel darüber entstehen, ob sich die Einigung auf den oder jenen Punkt erstreckt habe. Um auch diesen Erfolg sicher zu stellen, errichtete man in einer Zeit, als die Kunst des Schreibens allgemeiner geworden war, über das Abkommen eine Urkunde und nahm in dieser alles auf, worüber man einig geworden war. Daher ist die Urkunde die Rechtsform, die in vorgeschrittenen Zeiten den Sieg über die anderen davongetragen hat.

Konnte ein solches äußeres Zeichen des Abschlusses nicht dargetan werden, so war ein Vertrag nicht rechtswirksam zustande gekommen. Heute bedarf die Willenseinigung regelmäßig keiner besonderen Form und es gilt: „Ein Wort muß so gut sein, wie Brief und Siegel“, „Ein Mann, ein Wort“, „Wenn das Wort von der Zunge ist, ist der Mann gebunden“ oder mit den beliebten spaßigen Zusätzen: „Den Ochsen hält man bei den Hörnern, den Mann beim Worte, die Frau beim Rock“ usw. Verpflichtet aber schon das bloße Wort, dann besteht die Gefahr, daß sich der Ungestüme ohne besonderes Zutun, andere aber durch Beschwatzen, durch das Zuführen berauschender Getränke usw. zu Verpflichtungen bestimmen lassen, die über ihr Vermögen gehen. Denn „Versprechen ist eins und Halten ein anderes“. Kommt der Voreilige zur Besinnung und will die Sache auf einen vernünftigen Boden stellen, so antwortet wohl der andere: „Geredet ist geredet“. Darum sagt ein weiterer Spruch warnend: „Verheißen geht nicht ohne Schaden ab“. Hat freilich ein Teil etwas Unmögliches versprochen — man denke an die mittelalter-

lichen Verträge, in denen mehr oder weniger gutgläubige Zauberkünstler geldhungrigen Fürsten Gold zu machen versprachen —, so gibt den auch heute im allgemeinen noch zutreffenden Ausweg (§ 306, schw. OR. Art. 20, Ö. § 878) das Sprichwort: „Vor der Unmöglichkeit weicht die Schuldigkeit" oder wie § 306 des BGB. sagt: „Ein auf eine unmögliche Leistung gerichteter Vertrag ist nichtig". So ist es, wenn die Leistung von vornherein unmöglich war. Wird sie aber erst nach dem Vertragsschluß unmöglich, verbrennt z. B. die vom Bauer verkaufte Frucht in seiner Scheuer bei einer Feuersbrunst, so wird er von seiner Lieferungspflicht nur frei, wenn der Brand ohne sein Verschulden ausgebrochen ist (§ 272, schw. OR. Art. 119, Ö. § 880); sonst verwandelt sie sich in die Pflicht zum Schadensersatze, § 280.

Jede Schuldverbindlichkeit hat einen bestimmten Grund, der oft schon in der Benennung des Geschäfts zum Ausdruck kommt. Der Kaufmann will seine Waren *verkaufen*, die Hausfrau Küchenvorräte *einkaufen*, der Hauseigentümer will die Räume, die er nicht für seine Familie und sein Geschäft braucht, an andere *vermieten*, zu Weihnacht will man seinen Angehörigen etwas *schenken*. Wo sich dieser Kern des Geschäfts nicht schon aus der Benennung ergibt, ist es geboten, ihn sonst zum Ausdruck zu bringen, damit klargestellt wird, daß eine Rechtsverbindlichkeit eingegangen werden soll und wirklich entsteht. Denn sonst gibt es leicht Mißverständnisse, man ist sich hie und da über das von einem Teil beabsichtigte Rechtsgeschäft in Wahrheit nicht einig geworden. Alsdann ist auch kein Vertrag zustande gekommen, etwaige Vermögensverschiebungen entbehren des rechtlichen Grundes und sind nach den Vorschriften über ungerechtfertigte Bereicherung (§ 812, schw. OR. Art. 62, Ö. § 1431) auszugleichen. Schickt einem zum Beispiel ein Papiergeschäft einen Wandkalender zu Neujahr ins Haus, so nimmt man leicht an, es solle ein Neujahrsgeschenk und Werbemittel sein, und schlägt ihn zum Gebrauche an die Wand. Wenn dann aber das Geschäft jemand zum Einziehen des Kaufpreises herumschickt mit der Behauptung, der Kalender sei zur Ansicht und zu etwaigem Einkauf an alle Stadtbewohner gesendet worden, so kann der Empfänger sagen: „Dann sind wir nicht handelseinig. Ich habe genug Kalender und kaufe euern nicht. Ich habe ihn nur als Geschenk angenommen. Wenn ihr ihn aber nicht habt schenken wollen, so gebe ich ihn so zu-

rück, wie er jetzt ist mit den Löchern, die von Nägeln stammen, und mit den Bemerkungen, die inzwischen darauf geschrieben worden sind".

Hier besteht also wohl eine *Rechtsverbindlichkeit*, nämlich die zur Herausgabe der Bereicherung, aber keine *Vertragsverbindlichkeit*, weil beide nicht über den Grund der Schuld einig geworden sind. Eine solche Einigkeit kann dagegen äußerlich vorliegen und doch kann das Wort: „Zusagen macht schuldig", abzulehnen sein, nämlich dann, wenn man keine Rechtsverbindlichkeit hat begründen wollen, es sich vielmehr um bloßen Scherz oder um Spiel handelte. Im letzten Auftritt von Lessings Lustspiel Minna von Barnhelm fragt z. B. die Zofe Franziska: Herr Wachtmeister, braucht er keine Frau Wachtmeisterin?" Und dieser antwortet: „Geb' Sie mir Ihre Hand, Frauenzimmerchen! Topp!" Nach der Vorstellung kann natürlich keiner der Darsteller gegen den anderen Rechtsansprüche aus Verlöbnis machen; denn man hat nur gespielt und keine Willenserklärung abgegeben; vgl. auch § 118.

Auch zwei anderen Arten von Verbindlichkeiten steht das Gesetz von jeher nicht freundlich gegenüber. Sie entstammen zwei Lastern, zu denen wir Deutsche schon nach dem ältesten genaueren Bericht über unsere Vorfahren, nach des römischen Geschichtsschreibers Tacitus Germania (Kap. 22—24) neigten: Spiel- und Trinkschulden. Wurden sie sofort erfüllt, so war es gut; andernfalls hatte der Gläubiger das Nachsehen, wenigstens konnte er sie nicht vor Gericht einklagen. „Um Spielgelder hilft man keines Rechts", „Wirte und Huren zahlt man vor dem Zapfen". Bei der Wirtszeche war gewiß nur an berauschende Getränke gedacht. Daß man den hier offensichtlichen Mißbräuchen steuern wollte, ist begreiflich bei einem Volke, das die schlimmen Wirkungen des Trunkes in einigen köstlichen Sprichwörtern seinen gefährdeten Volksgenossen vors Auge gestellt hat: „Der Hals ist eine enge Straße, und führt Haus und Hof durch" sowie „Im Becher ertrinken mehr als im Meere". Es wird auch heute wieder der gleiche Grundsatz in den Vereinigten Staaten von Amerika gelten, wo keine geistigen Getränke in Wirtschaften ausgeschenkt werden dürfen. Natürlich können auch dort die Forderungen für Speise und Zimmermiete eingeklagt werden. Bei uns ist ferner auch den Forderungen für geistige Getränke die Klagbarkeit nicht entzogen. Wenn aber ein Wirt einem offensichtlich betrunkenen Gaste

weiter Getränke verabreicht, so kann nicht nur wegen Beförderung der Völlerei nach den Vorschriften der Gewerbepolizei (§ 33 Gew.O.) gegen ihn eingeschritten werden, sondern es ist auch keine klagbare Schuld entstanden, weil ein Betrunkener infolge Alkoholvergiftung in seiner geistigen Tätigkeit vorübergehend krankhaft gestört ist und daher keinen Vertrag über den Kauf von Getränken schließen kann (§ 104 Ziffer 2, Schw. Art. 16, Ö. § 21). Daß man beim Trinken, auch wenn man nicht betrunken ist, doch vielfach nicht die für einen Geschäftsabschluß nötige Klarheit und Übersicht habe, berücksichtigt das heutige Recht im allgemeinen nicht. Nur ist da und dort in Verwaltungsvorschriften bestimmt, daß öffentliche Versteigerungen nicht in Wirtshäusern abgehalten werden dürfen; dadurch soll der Gefahr vorgebeugt werden, daß die Versteigerer durch Spenden von Bier und Schnaps den Kaufliebhabern Mut machen zu törichten Geboten. Zeigte das ältere Recht vielleicht bessere Menschenkenntnis, wenn es über die bürgerliche Rechtswirksamkeit solcher Geschäfte bestimmte: „Was hinter dem Wein geredet wird, gilt nicht"?

3. Willensmängel

Schiller meint zwar: „Der Mensch ist frei geschaffen, ist frei"; aber im Leben des Einzelnen und ganzer Völker ist es beim Abschluß von Verträgen mit dem freien unbeirrten Willen nicht immer gut bestellt. Wie ein entwaffnetes und halb verhungertes Volk einen Machtspruch annehmen und unterschreiben mußte, den der in Waffen starrende Feind durch das Druckmittel der Hungerschraube aufnötigte, so kann der einzelne durch Gewalt oder durch Drohung mit Gewalt gezwungen werden einen Vertrag einzugehen. Man denke etwa an die merkwürdigen Tauschgeschäfte, die nach Chamissos Gedicht „Böser Markt" der vom Königsmahle kommende Gast im Park mit dem bewaffneten Banditen schloß! „Gewalt macht schnellen Vertrag". Aber der Vergewaltigte wird sich selten dabei beruhigen und wird fragen, ob er rettungslos an den erzwungenen Vertrag gebunden sei. Darauf wird uns die Antwort zuteil: „Genötetes besteht nicht". Freilich wird ein solches Geschäft nicht ohne weiteres als ungültig behandelt, sondern es ist bloß anfechtbar. Ficht aber der gezwungene oder der betrogene Vertragsteil das durch Drohung oder Täuschung zustande gekommene Geschäft an, so ist es von Anfang an

nichtig (§ 142, schw. OR. Art. 31, Ö. § 870, 871). Natürlich wird der Vertragsgegner den Anfechtungsgrund regelmäßig in Abrede stellen; alsdann muß ihn der Anfechtende vor Gericht beweisen. Wird der Vertrag nicht angefochten, so ist er rechtswirksam. Der Betrogene oder Gezwungene schämt sich vielleicht, seine Schwäche zu gestehen, oder er kommt nachträglich zur Ansicht, daß der Vertrag auch ihm gewisse Vorteile bringe.

Wer einen Vertrag schließt und dabei falsche Anschauungen über den Marktpreis, über Beschaffenheit der Ware usw. hat, ist übrigens nicht immer vom Vertragsgegner in diesen Zustand versetzt. Der Mensch kann sich auch ohne schuldhaftes Zutun eines anderen irren. Die hier auftauchenden Fragen sind allerdings zu fein, als daß sich das Sprichwort damit befaßt hätte. Immerhin mag die Sache durch ein Beispiel klar gemacht werden: Ein Kaufmann gibt seinem Schreibfräulein den Auftrag, der Bank zu schreiben, sie solle 20 Bergwerksaktien für ihn kaufen. Dieses, nur mit halbem Ohre zuhörend, schreibt: „Verkaufen Sie für uns 20 ... Bergwerksaktien." Der Kaufmann übersieht beim Unterschreiben des Briefs den Fehler und wird ihn erst am andern Tag zufällig gewahr. Da er eine solche Erklärung, wie die niedergeschriebene überhaupt nicht abgeben wollte, kann er sie wegen Irrtums anfechten. Freilich darf darunter der schuldlose Vertragsgegner nicht leiden; dieser kann ja dem Briefe nicht ansehen, daß er einen Schreibfehler enthalte. Der Anfechtende muß dem Gegner daher den Schaden ersetzen, den der andere dadurch erleidet, daß er auf die Gültigkeit der Erklärung vertraut hat, oder wie sich Art. 26 des schw. OR. ausdrückt: Der Irrende hat den aus dem Dahinfallen des Vertrags erwachsenden Schaden zu ersetzen. Dieser Schade kann bestehen in den Postgebühren, die die Bank für den Auftrag an der Börse und für dessen Widerruf hat aufwenden müssen u. dgl. Die Vergütung dagegen, die der Bank für die Ausführung des Auftrags zu entrichten gewesen wäre, kann bei diesem Vertrauensschaden regelmäßig nicht berechnet werden.

4. Aufhebung

Ein Schuldner wird von seiner Verbindlichkeit in erster Linie dadurch frei, daß er genau das leistet, was nach dem Vertrage den

Gegenstand seiner Schuld bildet. In dem Spruche, „Zahlen macht ledig", ist wohl zunächst an Geldschulden gedacht. Geld im Rechtssinne ist aber das vom Staate eingeführte und mit seinem Hoheitszeichen versehene Zahlungsmittel, das jeder Gläubiger annehmen muß. Im Laufe der Zeit sind zur Herstellung von Geld verschiedene Stoffe wie Porzellan, Metall und Papier verwendet worden. Die Eigenschaft, daß es jeder Geldschuldner geben kann und jeder Geldgläubiger annehmen muß, kann man in dem Spruche ausgedrückt finden: „Mit der Münze, womit du zahlest, zahlt der andere auch." Vielleicht hat man darin aber mehr den Gedanken der Vergeltung zu finden, wie in dem bekannten Worte der Schrift: Mit welchem Maße ihr messet, mit dem wird euch gemessen werden."

In dem Satze: „Was gelobt ist, muß bezahlt werden" ist beim Worte „zahlen" nicht bloß an Geldschulden gedacht, sondern auch an die Verbindlichkeit zur Übergabe von Waren. Die Tilgung solcher Schulden nennt man meist „Erfüllung". Indem der Schuldner seinem Gläubiger gerade das zu leisten hat, was vereinbart worden ist, hat er nicht das Recht, diesem ohne dessen Zustimmung einen anderen Gegenstand an *Erfüllungsstatt* aufzunötigen. Ein Bauer kann zum Beispiel nicht zu seinem Darlehnsgläubiger sagen: „Geld habe ich bei den heutigen schlechten Absatzverhältnissen keins; ich werde daher die Zinsen mit Kartoffeln oder Äpfeln bezahlen." Das schließt natürlich nicht aus, daß der andere sagt: „Meinetwegen, bringen Sie mir ordentliche Ware und ich berechne Ihnen dafür den Marktpreis". Alsdann wird der Bauer durch eine solche *Hingabe an Erfüllungsstatt* von seiner Schuld bis zu dem Geldbetrage frei, den die gelieferten Waren nach dem Marktpreis wert sind (§ 364, Ö. § 1414). Seit dem Weltkriege wissen wir übrigens aus Erfahrung, daß ein Gläubiger manchmal sehr gern etwas anderes, als ihm geschuldet wird, an Erfüllungsstatt annimmt.

Im Rechtsleben spielt oft der *Ort* eine Rolle, an dem zu leisten ist. Darüber entscheidet vielfach die Natur der Sache. Wer zu einem Neubau Arbeiten übernimmt, hat sie selbstverständlich am Bauplatz zu erfüllen. Der Bauschreiner hat die Fenster und Türen nicht bloß herzustellen, sondern hat sie in den Neubau einzufügen; bevor das geschehen ist, hat er seine Vertragspflicht gegenüber dem Bauherrn noch nicht erfüllt. Im übrigen unterscheidet man zwischen Hol- und

Bringschulden. Holschulden sind solche, die der Gläubiger beim Schuldner abzuholen hat (§ 269, schw. OR. 74 Ziffer 3, Ö. § 905), Bringschulden dagegen solche, die der Schuldner dem Gläubiger zu bringen hat. Geldschulden sind regelmäßig Bringschulden (§ 270, schw. OR. Art. 74 Ziffer 1). Die meisten andern sind Holschulden. Hat z. B. ein argentinischer Getreidehändler eine Schiffsladung an ein Hamburger Einfuhrgeschäft verkauft, so hat der Verkäufer seine Verbindlichkeit erfüllt, wenn er die Ware in seinem Heimathafen dem Schiffer zur Verladung übergeben hat (§ 447). Der Käufer muß die Ware bezahlen, auch wenn das Schiff mit samt der Ladung untergehen sollte; er kann sich gegen diese Gefahr versichern. Der Käufer hat dagegen seine Verbindlichkeit nicht schon erfüllt, wenn er den Kaufpreis bei der Hamburger Post in einem Briefe aufgibt oder sonst dartut, daß er das Seine zur Bewirkung der Zahlung getan habe (§ 270). Er trägt vielmehr die Gefahr, wenn die Geldsendung nicht oder nicht rechtzeitig ans Ziel kommt. Geht daher das Schiff unter, das den Kaufpreis nach Argentinien befördern sollte, so hat der Käufer noch nicht erfüllt und bleibt weiterhin Schuldner; er hat also auch hier allen Anlaß, die Wertsendung zu versichern, um die Gefahr der Versendung nicht allein zu tragen. Übrigens sind nicht alle Geldschulden Bringschulden. Beim Wechsel heißt es vielmehr: „Der Wechsel kommt zu mir, ich brauche ihm nicht nachzugehen." Das hängt mit der besonderen Natur des Wechsels zusammen, und zwar des im Verkehr allein üblichen, den der Gläubiger auf seinen Schuldner *zieht* mit der Aufforderung: „Gegen diesen Wechsel zahlen Sie an den X. 1000 Mark." Versieht der Schuldner die Wechselurkunde mit seinem Annahmevermerk und übergibt sie dem Gläubiger, so bleibt sie erfahrungsgemäß nicht in dessen Hand. Der Wechselgläubiger benutzt sie vielmehr ähnlich wie wirkliches Papiergeld dazu, in Höhe der Wechselsumme einen seiner Gläubiger vorläufig zu *befriedigen*. Oder er gibt den Wechsel seiner Bank, die ihm den Wechselbetrag in ihren Büchern gutschreibt, allerdings nicht in der vollen Höhe; sie zieht nämlich den Zwischenzins ab, der vom Tage der Einreichung bis zur Fälligkeit des Wechsels läuft, den sogenannten Diskont, und schreibt ihren Kunden bei einem Wechsel von 1000 Mark, der noch eine mehrwöchige Laufzeit hat, nur etwa 990 Mark gut. Der mit einem Wechsel vorläufig bezahlte Gläubiger gibt ihn wie ein anderes für den allgemeinen Zahlungs-

verkehr bestimmtes Wertpapier wieder weiter, und so wandert er von einer Hand zur anderen, bis der Verfalltag herankommt. Der Schuldner weiß daher wohl, wann er die Wechselsumme zahlen muß, dagegen bis zur Vorzeigung des Wechsels meist nicht, wer der empfangsberechtigte Gläubiger ist; der Gläubiger muß zu ihm kommen. Löst der Bezogene, dies ist der im Wechsel links unten als zahlungspflichtig Benannte, den Wechsel nicht ein, so fallen alle mit dem Wechsel in seiner Laufzeit gemachten Zahlungen in sich zusammen. Denn der Wechsel ist ja nach seinem Wortlaute nur eine besondere Art der Zahlungsanweisung. Aber eine „Anweisung ist noch keine Bezahlung".

Das Wort: „Was ein Geselle borgt, muß der andere bezahlen" besagt, daß bei einem Gesellschaftsverhältnis für die von einem Gesellschafter für die Gesellschaft eingegangenen Schulden die anderen gerade so haften wie der Handelnde selbst. Das gilt bei der offenen Handelsgesellschaft nach der gesetzlichen Regel, bei der Gesellschaft des bürgerlichen Rechts, wie sie etwa zwischen den Musikanten einer Dorfkapelle besteht, nur kraft besonderer Vereinbarung. (HGB. § 128, BGB. § 714, schw. OR. 543 Abs. 3, Ö. § 1204 letzter Halbsatz). Wer mit einem anderen einen Gesellschaftsvertrag eingeht, für den heißt es daher: „Trau, schau, wem". Denn auch von ihm gilt, wenigstens für die Dauer der Gesellschaft, ein Wort, das wir im Eherecht gehört haben und das für unseren Fall lauten würde: Wer einen Gesellschafter nimmt, nimmt auch seine Gesellschaftsschulden.

Im übrigen ist die Erfüllung die wichtigste, aber nicht die einzige Art, wie Schuldverbindlichkeiten untergehen. Sie können auch durch eine neue Vereinbarung wieder aufgehoben werden: „Wie man schuldig wird, wird man los," „Die Hand wird gelöst, wie sie gebunden wurde." Der Grundsatz, daß ein Recht nur in denselben Formen wieder aufgehoben werde, wie es begründet wurde, gilt auch heute noch im Liegenschaftsrecht. Wer das Eigentum durch den sogenannten Auflassungsvertrag und durch seine Eintragung als Eigentümer im Grundbuch erlangt hat, kann es auf den Veräußerer nur unter Beobachtung derselben Förmlichkeiten wieder übertragen. Im Rechte der Schuldverhältnisse dagegen gilt, was das schw. OR. Art. 115 also ausdrückt: Eine Forderung kann durch Übereinkunft ganz oder zum Teil auch dann formlos aufgehoben werden, wenn zur Eingehung der Verbindlichkeit eine Form erforderlich

oder von den Vertragschließenden gewählt war. Auch in dem Sprichwort: „Auf seinen Vorteil kann jeder verzichten" hat man sich hinzuzudenken: ohne besondere Form.

Im Geschäftsleben kommt es häufig vor, daß der eine Teil nicht bloß Schuldner, der andere Teil nicht bloß Gläubiger ist, daß vielmehr beide Teile aus verschiedenen Rechtsgründen einander Geld schuldig sind. So sind im Handwerksleben Schreiner und Glaser, Schmied und Wagner aufeinander angewiesen. Jeder arbeitet für den anderen und erwirbt daraus Forderungen; jeder ist daher zugleich Gläubiger und Schuldner des anderen. Es wäre dann aber töricht, wenn der Teil, der die kleinere Forderung hat, dafür vom andern bare Zahlung verlangen könnte, obwohl er alsbald den ganzen Betrag und noch mehr zurückzuzahlen hätte. Um solche zwecklose Zahlungen zu vermeiden, kann jeder Teil, soweit sich die Beträge von Schuld und Forderung decken, seine Schuld abtragen durch die Erklärung, daß er sie gegen seine Forderung aufrechne. Das ist von altersher üblich gewesen und hat seinen Niederschlag gefunden in dem Worte: „Abgerechnet ist gut bezahlt" und „Gleich gegen gleich ist die beste Zahlung". Das deutsche BGB. nennt dieses Verfahren Aufrechnung (§ 387), die Schweiz Verrechnung (OR. 120 f.), das badische Landrecht sprach von Wettschlagung, Österreich hat noch den lateinischen Ausdruck „Kompensation" § 1438 f. Etwas Ähnliches findet sich auch in dem neuzeitlichen Verrechnungs- oder Giroverkehr der Banken.

Welche Bedeutung kommt aber heute dem Satz zu: „Schlechte Bezahlung bricht keinen Kauf?" Er will in erster Linie besagen, daß der Verkäufer seine Ware nicht ohne weiteres zurückverlangen kann, wenn der Käufer nicht ordnungsmäßig bezahlt. Das Nächstliegende ist vielmehr, den säumigen Käufer auf Bezahlung zu verklagen. Jedoch verschließt man dem gefährdeten Verkäufer heute nicht mehr ganz den Weg, vom Kauf wieder loszukommen und seine Ware zurückzuverlangen. Stellt sich z. B. heraus, daß der großspurig aufgetretene Käufer eines Kraftwagens mittellos ist, so mutet man dem unvorsichtig gewesenen Verkäufer nicht mehr zu, auch noch die Kosten einer Klage und Vollstreckung auf sich zu nehmen. Er kann vielmehr dem trotz Mahnung nicht zahlenden Käufer eine Frist zur Zahlung seiner Schuld mit der Erklärung setzen, daß er die Annahme des Kaufpreises nach fruchtlosem Ablauf der Frist ablehne. Zahlt der

Käufer darauf nicht innerhalb der Frist, so kann der Verkäufer erklären, daß er vom Vertrage zurücktrete (§ 326). Alsdann muß der Käufer den Kraftwagen zurückgeben, und der Verkäufer ist von dem ihm lästigen Vertrage losgekommen, ohne daß er die Hilfe des Gerichts hätte anrufen müssen. Ähnlich ist die Sache in schw. OR. Art. 214 und Ö. § 1062 geregelt.

5. Bestärkungsmittel, Bürgschaft

Verträge sind manchmal für den Schuldner nachteilig. Wenn er nicht gewissenhaft ist, sucht er sich dann auf irgendeine Weise ihrer Erfüllung zu entziehen. Er bringt daher z. B. den Einwand, es sei in Wahrheit gar keine völlige Einigung erzielt, sondern nur hin- und hergeredet worden. Dem suchte man von alters her dadurch zu begegnen, daß man für die Geschäfte gewisse jederzeit zu beweisende und den Inhalt klarstellende Förmlichkeiten vorschrieb, wie Mitwirkung von Zeugen, Errichtung einer Urkunde, Handschlag usw. Von ihnen ist noch an andrer Stelle die Rede; vgl. S. 79 und 189.

Dem vorsichtigen Gläubiger ist aber nicht schon damit gedient, daß der rechtliche Bestand der Verbindlichkeit nicht angefochten werden könne, er will vor allem wirtschaftlich gesichert sein gegen den Zustand, über den das Sprichwort mehr scherzhaft als richtig sagt: „Wo nichts ist, hat der Kaiser sein Recht verloren.“ Zwar haftet dem Gläubiger, wie im Abschnitt Pfandrecht gesagt worden ist, für die rechtmäßige Erfüllung das ganze Vermögen, in alten Zeiten sogar die Person des Schuldners. Aber dieser kann sein Vermögen verlieren, und davon, daß die altrömischen Gläubiger den Schuldner in Stücke hauen durften, wurde ihre Geldforderung auch nicht getilgt. Warf man den Säumigen in den Schuldturm, so hieß es: „Der Kerker quält, aber er zahlt nicht.“ Die Gläubiger verlangten daher von jeher häufig eine Sicherung durch andere vermögliche Personen, die für die Schuld einzustehen bereit sind, falls sie der Hauptschuldner nicht erfüllt. „Man nimmt Bürgen, weil man dem Hauptmann nicht trauen will.“ Insbesondere wer etwas kaufen will und nicht bar bezahlen kann, wird häufig als Käufer nur angenommen, wenn andere mit hinreichendem Vermögen für ihn gut-

stehen: „Wer kein Geld hat, muß Bürgen stellen.“ Bürge sein ist immer gefährlich; denn wenn der Hauptschuldner seine Verbindlichkeit nicht erfüllt, hält sich der Gläubiger an den Bürgen. So trifft das Wort zu: „Wer Bürge bleibt, gibt den Schlüssel zu seinem Gute“ und „Kein Bürge ist geborgen.“ Einem der sieben griechischen Weisen wird das Wort in den Mund gelegt: Bürgschaft bringet dir Leid. In alten Zeiten verbürgte man sich übrigens nicht bloß für Vermögensschulden, sondern auch der einer Straftat Beschuldigte stellte Bürgschaft dafür, daß er sich dem Arme der Gerechtigkeit nicht entziehen werde. Der Satz in Schillers Bürgschaft: „Ich lasse den Freund dir als Bürgen; ihn magst du, entrinn' ich, erwürgen“, entspricht daher geschichtlicher Wahrheit und klingt wohl bewußt an das Wort an: „Bürgen soll man würgen.“

Immerhin hatte der Bürge noch eine namhafte Aussicht nicht gewürgt zu werden, solange das Sprichwort galt: „Stirbt der Verbürgte, so wird der Bürge frei.“ Dieser Satz konnte sich natürlich auf die Dauer nicht halten. Denn was nützte den Gläubiger eine Bürgschaft, die erlischt, wenn der Hauptschuldner stirbt? Wird sie doch dann für ihn erst recht bedeutsam, weil mit dem Tode des Hauptschuldners die Aussicht auf Befriedigung aus seinem Vermögen häufig ungünstiger wird. Die Bestimmung, daß die Bürgschaft mit dem Tod des Hauptschuldners erlösche, gehört daher völlig der Vergangenheit an. Da überdies nicht bloß der Hauptschuldner, sondern auch der Bürge in Vermögenszerfall geraten kann, verlangt der Gläubiger bisweilen, daß mehrere die Bürgschaft übernehmen. Öffentliche Anstalten, die Geld verleihen, wie Sparkassen, und die großen öffentlichen Wald- und Wiesenbesitzer, die das geschlagene Holz und das Wiesenerträgnis an Ort und Stelle versteigern und den Steigerungspreis herkömmlicherweise nicht sofort einziehen, sind meist durch Dienstvorschriften gehalten, vom Steigerer mehrere Bürgen zu verlangen. Von diesen aber gilt: „Was an einem Bürgen gebricht, das müssen die anderen erfüllen“ (§ 769, schw. OR. Art. 497, Ö. § 1359). Hat ein solcher Bürge den Gläubiger ganz befriedigt, so bleibt ihm unbenommen, vom Hauptschuldner den ganzen Betrag seiner Zahlung beizutreiben. Da aber von diesem oft nichts zu holen ist, darf der Zahlende auch auf jeden Mitbürgen zu einem Kopfteil seinen Rückgriff nehmen (§ 774 Absatz 2, schw. OR. 497, Ö. § 1359). Hat also von drei Bürgen einer die ganze Schuld bezahlt

und kann ihm der Hauptschuldner wegen Vermögenslosigkeit nichts ersetzen, so haben ihm die beiden anderen Bürgen je ein Drittel der gezahlten Summe zu vergüten, während er das letzte Drittel auf sich behalten muß.

6. Kauf

Über den Kauf haben sich besonders viele Sprichwörter gebildet und erhalten. Natürlich! Er ist ja eines der wichtigsten Rechtsgeschäfte und zugleich eines der ältesten, wenigstens dann, wenn man den Tausch, aus dem er hervorgegangen ist, mit darunter faßt. Beide unterscheiden sich auch nur darin, daß beim Tausch von beiden Teilen Waren hingegeben werden, beim Kaufe aber Ware gegen Geld. Am Kaufe wurde auch den Völkern schon frühzeitig klar, daß ein Vertrag durch Antrag und Annahme zustande kommt. Schickt einem Gelehrten sein Buchhändler die neuerschienenen Fachwerke mit der Rechnung zur Ansicht, so macht er einen Antrag zum Kaufe, den der andere Teil ohne weiteres annehmen kann. Er kann die Annahme dem Buchhändler gelegentlich erklären und die Rechnung vielleicht gleich bezahlen, er kann die Annahme aber auch ohne besondere Erklärung dadurch zum Ausdruck bringen, daß er ein Buch aufschneidet oder seinen Namen hinein schreibt. Für den Nichtrechtskundigen ist es freilich manchmal zweifelhaft, ob in einem Vorkommnis des täglichen Lebens ein Kaufantrag zu finden sei. Das ist nicht der Fall beim Ausstellen einer Ware im Schaufenster, selbst wenn dabei der Preis angegeben ist, noch weniger in der Zusendung eines gedruckten Preisverzeichnisses. Damit soll nur weiteren Kreisen kundgegeben werden, was man in einem Geschäfte erwarten darf.

Ebenso ist natürlich rechtlich bedeutungslos das Betreten eines Kaufladens, und es ist daher ganz überflüssig, daß manche Kaufleute an ihre Ladentüre schreiben: kein Kaufzwang. Daß man durch bloße Anfrage und durch Vorzeigen der Ware noch nicht zum Kaufe verpflichtet wird, spricht das Wort aus: „Das Besehen hat man umsonst.“ Davon machen auch manche Frauen reichlich Gebrauch. Im übrigen hat man das Besehen nicht immer umsonst: Zu Ausstellungen zum Beispiel müssen auch Kaufliebhaber regelmäßig Eintrittskarten lösen. Ja, der Mensch versteht sogar noch aus ganz anderem als dem bloßen Besehen von Waren und Kunstgegenständen eine Einnahmequelle zu machen. So erzählt der Franzose Rabelais in seinem abenteuerlichen Roman Gargantua und Pantagruel von einem merkwürdigen Rechtsfall aus Paris: Ein Dienstmann aß zu Mittag sein trockenes Brot neben der Küche eines Garkochs und sog den aus der Küche strömenden Dunst ein, um sein kärgliches Mahl zu würzen. Der geschäftstüchtige Koch bemerkte es und verlangte dafür, daß der andere den Dunst seiner Küche einatmete, einen Sou. Der Dienstmann weigerte sich zu zahlen und es sammelte sich eine Menschenmenge um die Streitenden. Da kam zufällig eine stadtbekannte Persönlichkeit, Hans der Narr, daher und wurde aufgefordert, den Streit zu schlichten. Dieser neue Salomo ließ sich vom Dienstmann einen Sou geben, betrachtete und betastete die Münze genau, warf sie mehrmals auf den Tisch der Bude des Kochs, daß sie klimperte, und gab sie dann dem Dienstmann mit den Worten zurück: „Unsere Weisheit entscheidet hiermit, daß der Mann hier, der dem Koch da den Dunst des Bratens gegessen hat, ihn mit dem Klang seines Geldes vollauf bezahlt hat.“

Wer eine Ware braucht, sucht in der Regel den auf, der sie vorrätig zum Kaufe hat. Manchmal ist es aber auch umgekehrt, wie beim Hausierer. Wenn er seine Ware Leuten anbietet, die keinen Bedarf haben, wird er öfters die Erfahrung machen, die zu den Sprichwörtern geführt hat: „Angebotene Ware hat lahme Füße“ oder „Angebotene Ware stinkt.“ Aber auch wer eine Ware gern erwerben möchte, setzt an ihr oft dies und das aus, um durch Hervorheben wirklicher oder angeblicher Mängel einen billigeren Kaufpreis zu erzielen: „Wer die Ware schilt, hat Lust dazu.“ Keine neue Erscheinung ist, daß Käufer wie Verkäufer einseitig auf ihren Vorteil ausgehen. Dem Worte der Schrift: „Einer trage des anderen Last“ stehen lieblose Sätze gegenüber wie: „Kaufmannschaft leidet keine Freundschaft“, „Geschäft ist Geschäft“ und „Wo das Geld anfängt, hört die Gemütlichkeit auf.“

In früheren Zeiten gab es namentlich an kleineren Orten noch keine ständigen Läden wie heute, und man machte seine Einkäufe gleich für lange Zeiträume auf Messen und Märkten, wo viele Kaufleute und Kunden zusammenkamen. Da mag es wohl auch ab und zu schweigsame Kaufleute gegeben haben, die nach dem Satze verfuhren: „Gute Ware lobt sich selbst.“ Viel häufiger aber fand sich Anlaß zum

Sprichwort: „Jeder Kaufmann lobt seine Ware“ oder „jeder Kaufmann lobt seinen Kram“ sowie auch „Loben und Bieten gehört zum Kauf.“ Das macht in alter Weise noch jetzt der Marktschreier auf der Messe und hat dabei Erfolg bei einfachen Leuten und bei Kindern. Das macht in feinerer, der Neuzeit angepaßter Weise aber auch der geschäftsgewandte Ladner und bewahrheitet unter Umständen das Sprichwort: „Mit schönen Worten verkauft man schlechte Ware.“ Der Käufer soll sich daher weniger auf die leichtzutäuschenden Ohren als auf seine Augen verlassen. Er darf die Katze nicht im Sacke kaufen, sondern muß die Ware auf dem Markte oder im Laden ansehen und den Preis, den er bietet, danach einrichten. Denn man will nicht bloß Waren erster Güte. Wer mit einem Tierpark umherzieht, kauft zum Beispiel nicht bloß Fleisch für seine Familie und sein Gesinde, sondern auch für seine Raubtiere und ist dabei nicht wählerisch. Hat ein Käufer die geringe Güte der Ware erkannt, so kann er nicht nachher deshalb Anstände machen: „Dem Käufer schadet sein Wissen.“ Gerade so geht's ihm freilich, wenn er den Mangel zunächst nicht bemerkt, bei einiger Aufmerksamkeit aber hätte bemerken können; denn: „Auge auf, Kauf ist Kauf.“ Jedermann sehe, wofür er sein Geld gibt: „Wer nicht zusehen will, muß den Beutel auftun“, „Mach die Augen auf oder den Beutel“ und mit der dem Deutschen eigenen Gemütsderbheit und der Liebe zum Gegensatz: „Wer närrisch kauft, muß weislich bezahlen.“ Anders ist es aber dann, wenn der Fehler ohne grobe Nachbilligkeit übersehen oder wenn er gar durch besondere Kunstgriffe verdeckt und deshalb nicht wahrgenommen worden ist. So hatte einst ein Zugochse in der Wut sein eines Horn abgestoßen und wurde dadurch zum Anspannen unbrauchbar. Der Eigentümer setzte es fein säuberlich auf den Stumpf, führte den Ochsen zum Markte und verkaufte ihn als Zugochsen. Der Käufer hielt es begreiflicherweise nicht für geboten, auch die Hörner auf ihre Standhaftigkeit zu prüfen und merkte den Fehler erst, als er den Ochsen einspannen wollte und das eine Horn in seiner Hand behielt. Er konnte natürlich den Kauf anfechten, denn „Niemand darf Trug und List verkaufen“ (§ 466 schw. OR. 200, Ö. § 928).

Die Gesetze bestimmen durchweg, daß die Ware frei von Mängeln sein müsse, die den Wert oder die Tauglichkeit zum gewöhnlichen oder zu dem nach dem Vertrage vorausgesetzten Gebrauche aufheben oder

mindern (§ 459). „Faule Eier sind keine Kaufmannswährung“ und „Verlegene Waren gelten kein Geld“. Für den Viehhandel gilt nach deutschem Rechte die Eigentümlichkeit, daß der Verkäufer ohne besondere Vereinbarung nicht für alle Mängel zu haften hat, sondern bloß für bestimmte, die im Gesetz einzeln aufgeführt sind. Es handelt sich dabei regelmäßig um Krankheiten, die bei einer kurzen Besichtigung oft kaum von einem Fachmann erkannt werden und die meist eine geringe Aussicht auf Heilung haben: „Wider Rotz und Spat ist kein Rat.“ Dies sind zwei Pferdekrankheiten, von denen übrigens nur noch die erste nach heutigem deutschen Rechte als Hauptmangel anerkannt ist. Natürlich darf auch im Viehhandel der Verkäufer Mängel seines Tieres nicht arglistig verdecken.

Viele Waren werden heute in der Fabrikverpackung verkauft und können auf ihre Beschaffenheit erst geprüft werden, wenn die Verpackung entfernt ist, wie Zichorie, Tabak usw. Was kann nun aber die Hausfrau tun, wenn sie die im Laden gekaufte Kunstbutter zu Hause aus der Papierhülle nimmt und ranzig findet? Ihr sicheres Gefühl gibt ihr die richtige Antwort, auch ohne daß sie Rechtsstudien getrieben hat. Sie kann verlangen, daß der Verkäufer die Ware zurücknehme und den Kaufpreis zurückgebe (Wandlung); das wird sie namentlich dann tun, wenn der Kaufmann lauter solche Ware hat. Hat er aber auch frische, dann kann sie die mangelhafte Ware zurückgeben und gute dafür verlangen. Sie kann aber auch stets die mangelhafte Ware behalten und nur eine entsprechende Minderung des Preises fordern; diese Möglichkeit wird sie vielleicht dann wählen, wenn sie schon einen Teil der mangelhaften Ware verbraucht hat (§ 462 und 480, schw. OR. 205 und 206, Ö. § 932). Diese Rechte stehen dem Käufer auch dann zu, wenn der Verkäufer die Mängel selbst nicht kannte. Darüber hinaus hat der Verkäufer Schadenersatz zu leisten, wenn er den Mangel arglistig verschwiegen oder doch die Fehlerfreiheit ausdrücklich zugesichert hat.

Aus dem Preise läßt sich manchmal ein Schluß darauf ziehen, was man für Ware erwarten kann. Bleibt er offensichtlich hinter dem allgemeinen Marktpreise zurück, so wird auch die Ware nicht viel taugen: „Danach Geld, danach Ware.“ Freilich wird einem guten Zahler regelmäßig ein billigerer Preis berechnet, als einem, bei dem man lange auf die Zahlung warten muß: „Bar Geld kauft wohl-

feil.“ Bekommt der Verkäufer sein Geld nicht pünktlich, so kann er damit nicht in seinem Geschäfte arbeiten und muß sich durch eine höhere Kaufpreisforderung schadlos halten.

7. Schenkung

In den Menschen stecken oft entgegengesetzte Triebe und Neigungen. Der Geizige will nichts von dem, was er einmal erhalten hat, aus seinem Vermögen weggeben, der Freigebige dagegen hat eine besondere Freude daran, andere an seinem Vermögen teilhaben zu lassen. Die verschiedenen Sittenlehren und namentlich die Religionen, die im Streben nach irdischem Besitz einen Mammondienst erblicken und die Aufmerksamkeit ihrer Anhänger mehr aufs Jenseits als aufs Diesseits richten wollen, begünstigen die Freigebigkeit „Geben ist seliger als Nehmen“, ohne deshalb dem Nehmen einen sittlichen Makel beizulegen. Denn das Sprichwort: „Beschert ist unverwehrt“ steht in keinem Widerspruch zur christlichen Sittenlehre. Die staatlichen Gesetze dagegen, die ein arbeitsames wohlhabendes Volk höher schätzen als ein Volk von Bettlern, stehen den Schenkungen nicht so freundlich gegenüber. Ihnen entgeht nicht die Erfahrung, daß das Geben auch ein Ausfluß des Leichtsinns und unbeherrschter Laune sein kann. Der Empfänger aber ist manchmal ein minderwertiges Glied der menschlichen Gesellschaft, einer, der nicht arbeiten will, der sich durch Schmeicheln, Schmarotzen oder Ausnutzung der Sinnlichkeit des Wohlhabenden ein bequemes Leben verschafft und den Geber und seine Familie selbst an den Bettelstab bringen kann. Das bekannteste Beispiel aus der Dichtung ist der gleichnamige Held in Shakespeares Schauspiel Timon von Athen, der zuerst die ganze Welt beglücken wollte; als er aber sein Vermögen verschenkt hatte und ihn seine bisherigen Freunde verließen, wurde er zu einem Menschenverächter, der seine Verbitterung in maß- und zwecklosen Schmähungen über die Schlechtigkeit seiner Mitmenschen austobte.

Wegen der Gefahren, die das unbesonnene Schenken mit sich bringt, machen die Gesetze einen Unterschied zwischen den sogenannten Handgeschenken und den Schenkversprechen. Handgeschenke sind solche, die sofort durch Übergabe des Geschenks vollzogen werden. Hier

wird der Schenker sofort die Minderung seines Vermögens gewahr und das mag ihn von einem Übermaß der Schenkerfreude abhalten. Ist aber das Geschenk hingegeben, so ist die Schenkung wirksam. Der Schenker kann sie regelmäßig nicht widerrufen, wenn ihn seine Geberlaune später reuen sollte: „Niemand kann seine Gaben widerrufen.“ Anders ist es beim Schenkungsversprechen, wo das Geschenk nicht sofort übergeben werden soll und der Vermögensverlust oder die sonstigen Gefahren dem Schenker nicht so zum Bewußtsein kommt. Man denke an den König Herodes, der nach dem Evangelium Matth. 14, 7—9 der Tochter der Herodias mit einem Eide verhieß, ihr zu geben, was sie fordern würde. Als sie das Haupt Johannes des Täufers forderte, ward er wohl traurig, hielt aber doch sein Versprechen um des Eides willen und derer, die mit ihm zu Tische saßen. Was Wunder, daß die Gesetze gegen voreilige Schenkungsversprechen Schutz gewähren! Deshalb schreiben sie besondere Formen vor. Werden diese nicht beachtet, so ist das formlose Schenkungs*versprechen* rechtlich bedeutungslos und der Satz: „Ein Mann, ein Wort“ gilt hier nicht. Vielmehr heißt es: „Geben und doch behalten gilt nicht.“ „*Geben*“ ist hier nicht so viel wie *übergeben*, sondern wie *versprechen*; also wer bloß mit dem Munde verspricht, der ist zu nichts verpflichtet. Zur Wirksamkeit eines bloßen Schenkungsversprechens (im Gegensatz zu einer sofort vollzogenen Schenkung) wird vielmehr verlangt, daß es vor Gericht oder Notar abgegeben und beurkundet wird; denn dann weiß man, daß es nicht in den Tag hinein und unter Ausnutzung einer augenblicklichen Stimmung erteilt wird (§ 518). Das schw. OR. Art. 243 läßt allerdings beim Versprechen von Fahrnis die einfache Schriftform genügen und nach Ö. § 943 ist stets eine schriftliche Urkunde ausreichend.

Durch die Vorschriften über Gewährleistung (§ 459), schw. OR. Art. 197, Ö. § 922) ist ein *Käufer* dagegen geschützt, daß man ihm für sein gutes Geld schlechte Ware gibt. Etwas anders muß das Recht den *Beschenkten* behandeln; er erhält ja einen Gegenstand, ohne etwas dafür hinzugeben. Daher sagt man: „Es ist alles gut genug, was man umsonst gibt.“ In der Tat kann der Bettler, der um ein Paar Stiefel bittet, nicht erwarten, daß man ihm ein Paar „von mittlerer Art und Güte“ gebe (§ 243). Den Gegensatz zur Regelung beim Kauf drückt besonders gut das bekannte Sprichwort aus: „Einem geschenkten Gaul sieht man nicht ins Maul.“ Wer einen

Gaul kaufen will, wird ihm allerdings ins Maul sehen, weil er aus der Beschaffenheit der Schneidezähne das Alter des Tieres erkennen und danach den Preis bemessen kann, den er dafür vernünftigerweise anlegen darf. Der Beschenkte aber kann ruhig davon absehen, ohne einen Rechtsnachteil zu erleiden. Und wenn er das geschenkte Tier doch mit Kenneraugen prüft, so hat er davon keinen rechtlichen Vorteil. Hat z. B. der Kommerzienrat und Sonntagsreiter X. seiner Angebeteten, einer Kunstreiterin, zugesagt, einen sechsjährigen Wallachen aus seinem Rennstall nach ihrer Wahl zu verehren und findet sie, die Pferdekennerin, bei der Besichtigung, daß das in Frage kommende Tier wohl das doppelte Alter habe, so kann diese Feststellung zwar auf ihre Zuneigung abkühlend wirken. Sie hat aber keinen Rechtsanspruch gegen den Schenker, der sich vielleicht selbst im Alter des Tieres getäuscht hat. Ein zwölfjähriges Pferd ist zwar weniger wert als ein sechsjähriges. Das bloße höhere Alter ist aber noch kein „Fehler" der versprochenen Sache; für einen solchen hat nämlich auch der Schenker nach § 524, schw. OR. Art. 248 Abs. 2 unter Umständen zu haften.

8. Dienstvertrag

Zu der Zeit, als die deutschen Rechtssprichwörter entstanden, war der Gegensatz von Herrschen und Dienen scharf ausgeprägt. Es gab nicht bloß herrschende Stände, wie Adel und Geistlichkeit, sondern auch in der Bürger- und Bauernschaft beruhte das Verhältnis zwischen der Herrschaft und dem Gesinde auf Gehorsam und Unterordnung. Die häuslichen Dienstboten und die Gesellen teilten den Tisch mit der Herrschaft, wohnten in ihrem Hause, und so umschlang beide Teile ein gewisses Familienband. Der Mann war das Haupt der Familie und alle sonstigen Hausgenossen Glieder. Das bewirkte einen Zusammenhalt und ein Zusammengehörigkeitsgefühl, die wohl in der Rechtsordnung ihre Grundlage hatten, darüber hinaus aber beiderseits als eine sittliche Gebundenheit empfunden wurden. Das verhütete groben Mißbrauch der Herrschaft und hinterhältiges Benehmen der Hausgenossen: „Wes Brot ich ess', des Lied ich sing'." Ein solches Zusammengehörigkeitsgefühl ist — wenigstens in der Stadt und im gewerblichen Leben — der heutigen Zeit fast unbekannt. Es herrschte freilich auch früher nicht immer, und das

bohrende Gefühl der Dienenden, von den Herrschenden ausgebeutet zu werden, hat schon in alter Zeit zu dem bitteren Spruche geführt: „Arbeiter leben vom Herrenbrot, Herren aber von Arbeiter Not." Durch den Zusammenschluß der Arbeiter in den Großbetrieben der Neuzeit hat sich dann das Standesbewußtsein der Arbeiterschaft so gehoben, daß sie das Wort „dienen" nicht mehr hören mag. Man will gleich-, nicht mehr untergeordnet sein. In diesem Kampf wird daher schon der Gebrauch des Wortes „dienen" als störend und nachteilig empfunden. Selbst in der Staatsverwaltung hat man dieses Wort ausgemerzt und spricht nicht mehr von Staatsdienern, obwohl sich doch hier der Einzelne dem Ganzen bei jeder Staatsform unterordnen muß. Den in den bisherigen Gesetzen üblichen Ausdruck „Dienstvertrag" endlich will man durch „Arbeitsvertrag" ersetzen. Nach diesen Wandlungen verknüpft den Arbeitgeber und den Arbeitnehmer natürlich auch kein sittliches Band mehr, sondern nur noch ein schuldrechtliches Verhältnis: der eine verspricht für eine gewisse Zeit des Tages dem anderen seine Arbeitskraft zur Verfügung zu stellen, der andere schuldet den durch Tarifverträge festgelegten Lohn. Auch hier gilt: was vergangen ist, kehrt nicht wieder.

Obwohl sich das alte Dienstverhältnis und der neue Arbeitsvertrag sehr voneinander unterscheiden, haben doch manche überlieferten Sprichwörter auch heute noch ihren Wert behalten. Auch der auf seinen Stand und dessen Bedeutung stolze Arbeiter wird dem Worte zustimmen: „Wer dient, ist so gut wie wer lohnt." Er wird gerne hören, daß das Wort: „Wer nicht arbeitet, soll auch nicht essen" nicht erst in den Kampfzeiten des 19. Jahrhunderts geschaffen worden ist. Ja sogar das Wort: „Arbeit ist bei Gott beliebter als das Verdienst der Väter" wird trotz seines religiösen Einschlags ihm nicht mißfallen. Völlig dem heutigen stolzen Standesbewußtsein entspricht der Satz: „Eine Schwiele an der Hand hat mehr Ehre denn ein goldener Ring am Finger." Er wird auch dem Worte zustimmen: „Wer um Lohn gewonnen ist, dem soll man nicht unrecht tun," namentlich wenn damit eine unangemessene Vergütung gebrandmarkt wird. Wer gerecht denkt, wird auch heute noch die Lehre anerkennen: „Wie gedient, so gelohnt." Der Fleißige, Begabte und Gewissenhafte soll auch heute noch nicht nur im freien Berufsleben, sondern auch im Arbeitsverhältnis besser daran sein als der Faule, Unfähige und Leichtsinnige. Denn wenn im Wirtschaftsleben jede Arbeit gleich entlohnt

wird, so spannt sich der weit überwiegende Teil der Menschheit nicht mehr an, das Ganze versumpft und der Fortschritt stockt. Wem aber ein besonderer Preis winkt, der leistet auch Außerordentliches: „Guter Lohn macht hurtige Hand." Selbstverständlich gilt heute mehr als je: „Um Dank dient niemand;" denn von Dankesworten kann niemand leben und seine Familie unterhalten. Die Meinung: „Wer ungeheißen zur Arbeit geht, geht ungelohnt davon" teilt man heute im allgemeinen nicht mehr. Denn: „Jeder Arbeiter ist seines Lohnes wert," und „Die Arbeit trägt den Lohn auf dem Rücken". Daher bestimmt § 612 BGB.: „Eine Vergütung gilt als stillschweigend vereinbart, wenn die Dienstleistung den „Umständen nach nur gegen eine Vergütung zu erwarten ist" (ähnlich schw. OR. Art. 320 Absatz 2). Das ist auch natürlich bei der heutigen weiten Ausdehnung des Begriffs Dienstvertrag, der auch die Tätigkeit von Ärzten, Rechtsanwälten usw. umfaßt. Wenn zum Beispiel ein Bergsteiger abstürzt, bewußtlos ins Krankenhaus verbracht und von einem Arzt behandelt wird, kann er die Rechnung des Krankenhauses und des Arztes nicht mit der Begründung zurückweisen, Arzt und Krankenhaus seien ungeheißen zur Arbeit gegangen. Dabei ist gleichgültig, ob hier ein Vertrag oder eine (in den Rechtssprichwörtern nicht vorkommende) Geschäftsführung ohne Auftrag anzunehmen ist (§ 677 f., schw. OR. Art. 419 f., Ö. § 1035/6). So hat auch Anspruch auf Lohn, wer ein Schiff in Seenot rettet oder die über Bord geworfene Ladung auffischt, selbst wenn er das ungerufen und unaufgefordert getan hat. Denn: „Niemand ist der Narr umsonst."

Im wesentlichen nur noch für landwirtschaftliche Dienstboten von Bedeutung sind die Sprichwörter: „Wer Jahrgeld einnimmt, muß Jahresarbeit tun." Außer auf dem Lande kommt es kaum mehr vor, daß sich jemand auf ein Jahr verdingt. Nur für weibliche Dienstboten gilt der den Standpunkt der Herrschaft vertretende Satz: „Wer freien will, muß ausdienen," während das andere Wort: „Freien geht vor Miete" den Dienstboten geneigter ist. Heute hängt die Entscheidung der Frage davon ab, ob die Heirat als ein wichtiger Kündigungsgrund im Sinne des § 626 BGB. oder Art. 352 des schw. OR. anzusehen sei. Das wird zu verneinen sein bei einer Künstlerin, da Schauspielerinnen und Sängerinnen ihre Stellung bei der Eingehung einer Ehe nicht aufzugeben pflegen. Das gleiche wird gelten bei einem landwirtschaftlichen Dienstboten, der ohne erkennbaren

Grund mitten in der Erntezeit heiraten und den Dienstherrn in der Arbeit stecken lassen will. Im übrigen wird man das Freien als wichtigen Kündigungsgrund gelten lassen, namentlich wenn die Magd etwa für einen gleichwertigen Ersatz sorgt.

Die häusliche Gemeinschaft mit der Herrschaft, die Kenntnis aller Verhältnisse kann den Dienstboten in Versuchung führen, Dinge im Hause zu finden, die nicht verloren worden sind, oder umgekehrt Sachen der Herrschaft außerhalb zu verlieren, wo sie von seinen Angehörigen leicht gefunden werden können. Vor der daraus drohenden sittlichen und rechtlichen Gefahr warnt das Sprichwort: „Gesinde soll weder finden noch verlieren."

Regelmäßig steht es dem Menschen frei, ob er einem anderen seine Dienste zur Verfügung stellen will. Manche aber haben keine freie Wahl, namentlich wenn unter der willkürlichen Versagung des Dienstes das gemeine Beste Not litte. So hat das Gesetz den öffentlichen Verkehrsanstalten die Pflicht auferlegt, Beförderungsverträge über Personen und Güter mit jedem einzugehen, der sich den allgemeinen Bedingungen unterwirft. Im Mittelalter kannte man zwar noch keine Eisenbahnen und Kraftwagenlinien, aber die Verpflichtung, unter Umständen jedermann zu Diensten zu sein, war schon damals anerkannt und liegt dem Sprichwort zugrunde: „Fährleute sind aller Leute Knecht."

9. Leihe, Miete, Darlehen

Wer eine Sache verkauft, verpflichtet sich, das Eigentum daran auf den Käufer zu übertragen, und gibt sie damit endgültig aus seinem Vermögen weg. Nicht jedem ist aber seine Habe feil, auch wenn er sie selbst nicht ganz bewirtschaften kann oder will. Es haben sich deshalb schon bald Verträge ausgebildet, nach denen man einem anderen Sachen nur zu dem Zwecke überläßt, damit er diese benutzen oder Früchte daraus ziehen könne. Eine solche Überlassung kann unentgeltlich geschehen; dann liegt das vor, was in der heutigen Rechtssprache Leihe heißt. Man leiht einander Bücher zum Lesen, ein Freund leiht dem andern sein Fahrrad zu einer Besorgung usw. Hier erhält der Empfänger immer nur den vorübergehenden Besitz, während der Geber Eigen-

tümer der Sache bleibt und sie nach gemachtem Gebrauche zurückerhält. Das Volk braucht das Wort Leihe freilich in weiterem Sinn und spricht von Leihe immer, wenn Geld oder andere bewegliche Sachen zur Benutzung überlassen werden, auch wenn der Empfänger dafür ein Entgelt zu zahlen hat. Man spricht zum Beispiel von Leihbibliotheken, obwohl für deren Benutzung eine Gebühr entrichtet werden muß. Sowie aber der Gebrauch einer Sache nicht unentgeltlich überlassen wird, liegt im Rechtssinne keine Leihe, sondern eine Miete vor; um Miete von Fahrnissen handelt es sich also bei den Bootsverleihungen, bei den Reitschulen usw.

Ferner führen Sparkassen manchmal die Bezeichnung: Spar- und Leihkasse. Damit soll zum Ausdruck gebracht werden, daß sie nicht bloß Geld zum Sparen entgegennehmen, sondern auch die angesammelten Spargroschen den Geldbedürftigen „ausleihen". Dieses Verleihen unterscheidet sich aber wesentlich von den bisher besprochenen Fällen; denn das Geld, das Sparkassen oder Banken so hingeben, bleibt nicht ihr Eigentum, sondern geht ins Eigentum des Empfängers über. Er darf es, wenn er Geld zum Bauen aufgenommen hat, an die Bauhandwerker ausgeben und seine Schulden damit bezahlen: er darf es nicht bloß gebrauchen, sondern auch verbrauchen. Er muß es nur verzinsen und muß nach Fälligkeit seiner Schuld Geld im gleichen Betrage zurückzahlen. Ähnlich ist es, wenn etwa ein Bauer im Frühjahr einem anderen Saatgetreide oder -kartoffeln „leiht". In allen Fällen, wo die hingegebenen Sachen ins Eigentum des Empfängers übergehen und nur Sachen der nämlichen Art in gleicher Güte und Menge rückerstattet werden müssen, liegt im Rechtssinne ein Darlehen vor (§ 607, schw. OR. Art. 312, Ö. § 983). So nimmt der Kaufmann Darlehen auf, wenn er glaubt, mit dem erhaltenen Geld ein gutes Geschäft machen zu können: „Wer gewinnen will, muß beisetzen." Wer aber niemand findet, der ihm Geld borgt, der mag sich mit dem Wort trösten: „Wer nicht empfängt, braucht nicht wieder zu geben."

Der Sprachgebrauch bezeichnet nicht bloß die Gegenleistung für die Überlassung von Geld als „Zins", sondern auch für die Überlassung eines Grundstücks oder eines Grundstücksteils, wie einer Wohnung. Daher heißt es: „Es ist kein Bestand ohne Zins." Bestand ist aber der oberdeutsche Ausdruck für Miete oder Pacht. Miete und Pacht selbst unterscheiden sich in folgendem: Bei der Miete wird die Sache, z. B.

eine Wohnung bloß zur Benutzung überlassen, der Pächter aber darf eine fruchttragende Sache oder eine Berechtigung, wie Jagd- oder Fischereirecht, auch zur Fruchtziehung benutzen. So können die Pächter von Landgütern einen eigenen Berufsstand bilden. Ist für eine bestimmte Zeit der Hausnutzung oder der Fruchtziehung ein Miet- oder Pachtzins vereinbart, und wird das Verhältnis alsdann stillschweigend fortgesetzt, so läuft auch die Zinspflicht ohne weiteres fort: „Hauszins schläft nicht," „Zins und Miete schlafen nicht." Entsprechend heißt es vom Kapitalzins: „Die Renten laufen schlafend um." Sie reifen Tag und Nacht heran, ohne daß der Berechtigte etwas dazu zu tun braucht; das gilt selbst dann, wenn der Verpflichtete mit dem empfangenen Geld nicht gewinnbringend arbeitet.

Der Pächter muß den Pachtzins aus dem überlassenen Gute herauswirtschaften können. Er braucht ihn daher erst nach Eintritt der Ernte, also im Herbst zu zahlen. Die Ernte dauert aber eine Reihe von Monaten; der Wein z. B. wird viel später geerntet als das Getreide. Wann wird nun der Pachtzins fällig? Früher richtete man sich gern nach den Tagen gewisser Kalenderheiligen. Daher das Sprichwort: „Michaelis mahnt und Martini zahlt." Heute verlegt man solche Zahltage regelmäßig auf Vierteljahresschluß, und so ist der Pachtzins nach § 581 nach Ablauf je eines Pachtjahres am ersten Werktage des folgenden Jahres zu entrichten; ähnlich schw. OR. Art. 286, während nach Ö. § 1100 der Miet- und Pachtzins halbjährlich zu zahlen ist, wenn keine besondere Verabredung getroffen worden ist.

Wird ein großes Landgut verpachtet, so gehört dazu meist auch das sogenannte lebende und tote Inventar, also die landwirtschaftlichen Geräte, die Maschinen und das Vieh, die Zug- und Milchtiere, deren Dung für den Betrieb so wichtig ist. Dieses Vieh ist aber stetem Wechsel ausgesetzt. Es werden Kälber geworfen, es werden die alten männlichen und weiblichen Tiere ausgeschieden und entbehrliche geschlachtet oder verkauft, ganz abgesehen von den schlimmen Folgen einer Seuche, die das Rindvieh, die Schafe oder Schweine befallen kann. Deshalb wird regelmäßig von vornherein vereinbart, wie es mit dem Vieh gehalten werden solle. Es geht nicht an, daß der Pächter den Verpächter immer erst fragen muß, ob er ein ihm ungeeignet scheinendes Tier abschaffen dürfe. Daher treffen die Beteiligten meist das Abkommen, daß der Pächter bei Beginn der Pacht alles

Vieh zum Eigentum übernimmt, dafür aber am Ende der Pacht ebensoviel und eben so gutes Vieh zurück geben muß. Das übernommene Vieh gehört zum sogenannten eisernen Bestand des Gutes und wird daher mit der dem Deutschen eigenen Freude am Bild „eisernes" Vieh genannt. Weil aber der Pächter am Ende der Pacht genau solches Vieh zurückgeben muß wie er erhalten hat, so legt man diesem Vieh noch Unsterblichkeit bei und sagt: „Eisern Vieh, das stirbt nie." Da für jede hingegebene Kuh eine andere zurückgegeben werden muß, sagte man auch: „Kuh muß an Kuh kommen." Ist aber die Schafherde durch Räude beim Ablauf der Pacht kleiner geworden, so muß der Wert dessen, was nicht im Stück zurückgegeben werden kann, ersetzt werden: „Was der Hirt in seiner Hut verliert, das muß er bezahlen" und er muß die Herde gegen menschliche und tierische Räuber gut schützen: „Wer die Geis anbindet, muß sie hüten."

In der Art, wie ein Mensch fremdes Gut benützt, offenbart sich sein inneres Wesen. Auf gewissenhafte und sorgliche Menschen ist das Wort zurückzuführen: „Mit eines anderen Sachen muß man behutsamer umgehen als mit eigenen." Oberflächliche Naturen haben dagegen den Satz geprägt: „Niemand kann eines anderen Gut mehr in Obacht nehmen als sein eigenes." Das Recht würde seine erzieherischen Aufgaben verkennen, wenn es dem Leichtsinn und der Sorglosigkeit so entgegen käme. Es könnte keine Volkswirtschaft zur Blüte kommen und gedeihen, wenn sich jeder bei der Beschädigung fremden Gutes damit herausreden wollte, er gehe auch mit seinen eigenen Sachen nicht sorgfältiger um. Vielmehr muß ein Schuldner regelmäßig die im Verkehr erforderliche Sorgfalt beachten (§ 276, schw. OR. Art. 261, Ö. § 1297). Nur bei einigen Rechtsverhältnissen, wo sich der Verpflichtete und der Berechtigte persönlich nahe stehen, glaubte man vom Schuldner keine größere Sorgfalt verlangen zu sollen, als er in eigenen Angelegenheiten aufwendet; so wenn der Mann das Vermögen der Frau, der Vater das des Kindes verwaltet oder wenn jemand die Sache eines anderen unentgeltlich in Verwahrung nimmt. Hier gilt dann der Satz: „Eines anderen Gut muß jedermann bewahren wie sein eigenes."

Auf den Hüter und Bewahrer fremden Gutes bezieht sich vor allem der Satz: „Getreue Hand muß allzeit offen stehen." Er besagt dasselbe, was § 695 in folgender Weise ausdrückt: „Der Hinterleger kann die hinterlegte Sache jederzeit zurückfordern, auch wenn für die Aufbewahrung eine Zeit bestimmt ist" (schw. OR. Art. 475, Ö. § 962). Wer seine Pelzwaren den Sommer über einem Kürschner zur Verwahrung gibt, kann sie auch mitten im Sommer zurückverlangen, wenn er z. B. an einer Luftfahrt nach dem Nordpol teilnehmen will. Daß man im Geschäftsleben einem anderen *fruchttragende Sachen unentgeltlich* zum Gebrauche überlassen solle, hat auch die mittelalterliche Kirche nicht erwartet und nicht verlangt. Sie hat sich nur mit aller Macht dagegen gewendet, daß sich ein Christ für die Überlassung von Geld eine besondere Vergütung in Geld versprechen lasse. Denn „Die Erde gebiert Wucher, nicht aber ein Pfennig den andern". Wucher nannte man aber in alter Zeit nicht nur den Ertrag des Bodens, sondern auch jeglichen Kapitalzins, gleichgültig, in welcher Höhe er vereinbart war. Nach dem Verbot im zweiten Buch Mose 22, 24 und 5. Mose 23, 20 und 21 sollte der Christ keine Vergütung für das Ausleihen von Geld verlangen: „Man soll leihen, aber nichts hoffen," „Wucher ist von unserem Herrgott verboten." Da aber dieses Verbot die Juden nicht traf und da der Eigennutz nicht an ein Glaubensbekenntnis oder eine Menschenrasse geknüpft ist, kann man sich denken, daß die Kirche mit diesem Verbote keine Gegenliebe gefunden hat. Man bekämpfte es mit witzigen Worten und umging es, so gut man konnte. Mit dem Verbote trieben die Armen ihr Spiel, indem sie sagten: „Wucher ist mir verboten, es fehlt mir an der Hauptsumme" und „Ich wollte gerne viel gewinnen, es fehlt nur an der Hauptsumme." Die Reichen aber zogen gröberes Geschütz auf und vertraten die Meinung: „Wer sagt, daß Wucher Sünde sei, der hat kein Geld, das glaube frei" und „Wer nicht hat Gut und Geld, — dem Wuchern nicht gefällt". In der Tat kann man nicht erwarten, daß jemand sein Geld einem anderen überläßt und sich selbst der Möglichkeit begibt, damit gewinnbringende Geschäfte zu machen. Dazu läuft der Geldgeber noch Gefahr, das Hingegebene nicht wieder zu erhalten, wenn der andere unehrlich ist oder damit nicht wirtschaften kann. Die Folge würde sein, daß ein vermögensloser Unternehmer überhaupt kein Geld als Darlehen erhielte. Diese Wirkung aber wäre volkswirtschaftlich schlimmer als das Übel, das durch das Verbot bekämpft werden sollte. Daher haben die Gesetze der Neuzeit die Vereinbarung von Zinsen zugelassen und verboten im allgemeinen nur, daß aus noch nicht gezahl-

ten Zinsen wieder Zinsen fällig werden sollen: „Zins kann nicht Zins tragen“ (§ 289, schw. OR. Art. 314 Abs. 3, Ö. § 998). Das Wort Wucher aber änderte im Laufe der Zeit seine Bedeutung. Jetzt ist ein Wucherer, wer sich für seine eigene Leistung von einem anderen unter Ausbeutung des Leichtsinns, der Unerfahrenheit oder der Notlage des anderen übermäßige Vorteile versprechen läßt (§ 138 Absatz 2). Das schw. OR. Art .21 gebraucht dafür das Wort Übervorteilung, Österreich verweist in § 1000 auf das besonders bestehende Wuchergesetz.

10. Verhältnis mehrerer Gedinge

Im Leben treten oft mehrere Rechtsverhältnisse nebeneinander, die nicht zusammen bestehen oder vollständig durchgeführt werden können. So tobte vor der Einführung des BGB. der Kampf darum, ob Kauf stärker sein solle als Miete, ein Kampf, der Jahrhunderte alt ist, und zu entgegengesetzten Rechtssprichwörtern geführt hat; einerseits „Kauf tut Miete ab“ und „Der Käufer jagt den Mieter“, andererseits „Kauf bricht Miete nicht“. Im Leben tritt der Widerstreit von Käufer und Mieter meist in folgender Weise auf: jemand hat eine Wohnung auf längere Zeit, etwa auf drei Jahre gemietet. Nach einem Jahre verkauft der bisherige Eigentümer das Haus. Kann nun der Erwerber dem Mieter mit der üblichen vierteljährlichen Frist kündigen? Gegen eine solche Regelung spricht, daß der Mieter nach dem Vertrag, den er mit dem bisherigen Eigentümer geschlossen hatte, noch zwei Jahre sollte wohnen dürfen. Oder ist der neue Eigentümer an den Mietvertrag seines Rechtsvorgängers gebunden, obwohl er selbst dem Mieter gegenüber keine Verpflichtung eingegangen hatte und im allgemeinen mit dem von ihm erworbenen Eigentum nach eigenem Belieben verfahren darf? Der Römer, der das Recht des Eigentümers in den Vordergrund stellte, gab dem neuen Eigentümer das Kündigungsrecht und verwies den Mieter wegen des ihm dadurch vielleicht entstehenden Schadens an seinen Vermieter. Mit diesem allein hatte der Mieter einen Vertrag geschlossen, und der Vermieter mußte die Folgen tragen, wenn er beim Kaufvertrag dem Käufer nicht die Verpflichtung auferlegt hatte, den Mieter bis zum Ablauf der Vertragszeit wohnen zu lassen. Das deutsche Recht ließ sich durch die scheinbare Folgerichtigkeit des römischen Denkens nicht

verblüffen. Es wog das, was für den Eigentümer und was für den auf Miete angewiesenen Stadtbewohner spricht, gewissenhaft ab und entschied sich für den Mieter. Es paßte diese Lösung den heutigen Lebensverhältnissen dadurch an, daß es den neuen Eigentümer kraft Gesetzes in die bestehenden Mietverträge so eintreten ließ, als ob sie von ihm selbst geschlossen wären (§ 571; anders noch schw. OR. Art. 259 Absatz 2). Nach Ö. § 1095 kann ein Bestandsvertrag in ein öffentliches Buch eingetragen werden und dadurch die Wirkung eines dinglichen Rechtes erlangen. Ein dingliches Recht aber ist ein solches, das nicht bloß gegenüber seinem Begründer, sondern auch gegenüber jedem künftigen Eigentümer wirksam ist. In Deutschland gilt daher, sofern eine bestimmte Vertragszeit vereinbart ist, jetzt das Wort: „Miete ist fester als Kauf,“ „Miete geht vor Kauf.“ Noch viel weiter als im bürgerlichen Gesetzbuch sind die Rechte des Eigentümers durch Vorschriften der Nachkriegszeit beschränkt worden.

Wie schon auf Seite 20 ausgeführt worden ist, wird auf Antrag über das Vermögen solcher Schuldner, die ihre Gläubiger nicht mehr befriedigen können, das Gantverfahren eröffnet, das die möglichst gleichmäßige Befriedigung der Gläubiger sichern soll. Freilich werden auch in diesem Verfahren einige Arten von Forderungen vorzugsweise befriedigt. Dazu gehören, wie billig, die aus dem letzten Jahre herrührenden Lohnansprüche der häuslichen und gewerblichen Angestellten, der Ärzte und Hebammen usw. Es fallen darunter aber auch einige Forderungen des öffentlichen Rechts. Von letzteren gilt das Wort: „Herren und Heilige gehen vor.“ Als „Heilige“ sind heute die Kirchen anzusehen und als „Herren“ Reich, Länder und Gemeinden für öffentliche Abgaben aus dem letzten Jahre vor der Eröffnung des Konkursverfahrens. Diese Bevorzugung öffentlicher Kassen vor den andern Gläubigern entspricht übrigens nicht mehr den heutigen Anschauungen von Gerechtigkeit und gehört hoffentlich bald der Vergangenheit an.

11. Unerlaubte Handlungen

Schuldverbindlichkeiten entstehen zwischen den Menschen, wie wir schon früher gehört haben, nicht bloß aus Verträgen, sondern auch aus anderen Gründen. Der auf der Naturordnung beruhende und vom Recht anerkannte Anspruch eines Kindes auf Unterhalt und Er-

ziehung rührt her aus der Tatsache der Zeugung und Geburt. Der Vermächtnisnehmer, dem eine Jahresrente ausgesetzt worden ist, stützt sein Recht gegen den Erben auf die letztwillige Verfügung des Erblassers. Der Beraubte und Mißhandelte aber leitet seinen Anspruch auf Rückgabe seines Eigentums und Ersatz der Heilungskosten aus der unerlaubten Handlung des Täters her. Wer nämlich eine strafbare Handlung begeht, den zieht nicht bloß der Staat wegen Verletzung des öffentlichen Friedens vor den Strafrichter, es kann ihn vielmehr auch der in seinem Vermögen oder an seiner Gesundheit Beschädigte vor dem bürgerlichen Richter auf Ersatz des ihm zugefügten Schadens verklagen. In früherer Zeit stand überhaupt die Sühnung des Verletzten im Vordergrund, und regelmäßig wurde der Täter im gleichen Verfahren zur Strafe und zur Leistung einer Entschädigung verurteilt. Einen Überrest davon haben wir noch heute in der sogenannten Buße, die der an seiner Gesundheit Verletzte vom Täter verlangen kann und die zur Vermeidung zweier selbständiger gerichtlicher Verfahren im Strafurteil ausgesprochen wird. Im allgemeinen aber gehen heute das Straf- und das bürgerliche Verfahren ihren eigenen Gang. Ein Verhalten, wie z. B. die fahrlässige Sachbeschädigung, kann daher eine unerlaubte Handlung im Sinne des bürgerlichen Rechts sein, ohne daß es eine strafbare Handlung zu sein braucht.

Bei den überlieferten Sprichwörtern klingt im allgemeinen die strafrechtliche Seite vor, jedoch lassen sie auch genügende Schlüsse auf die bürgerlichen Rechtswirkungen eines Vergehens zu. Wenn es z. B. heißt: „Wer die Wunden geschlagen, muß sie büßen", so ist damit die Folge einer einzelnen unerlaubten Handlung ganz ähnlich geregelt, wie das in allgemeiner Form § 823 des deutschen BGB. tut: „Wer vorsätzlich oder fahrlässig das Leben, den Körper, die Gesundheit, die Freiheit, das Eigentum oder ein sonstiges Recht eines anderen widerrechtlich verletzt, ist dem anderen zum Ersatz des daraus entstandenen Schadens verpflichtet." Freilich zählt dieser Satz eine Anzahl einzelner Rechtsgüter auf, die er schützen will, während das schw. OR. Art. 41 noch allgemeiner und vollkommener sagt: „Wer einem anderen widerrechtlich Schaden zufügt, sei es mit Absicht, sei es aus Fahrlässigkeit, wird ihm zum Ersatz verpflichtet." Noch kürzer drückt die Rechtsfolgen unerlaubter Handlungen das Sprichwort aus: „Wer den Frevel getan, soll den Schaden haben."

Allerdings kann einen Menschen ein Schaden an Leib oder Gut durch ein Naturereignis treffen, gegen das wir Menschen ohnmächtig sind; man denke an Blitzschlag oder Erdbeben. Alsdann muß jeder seinen Schaden selbst tragen, sofern er ihm nicht durch Werke der Nächstenliebe oder durch Staatshilfe ersetzt oder doch erleichtert wird. Vielfach erleiden Arbeiter Schaden an ihrer Gesundheit in gefährlichen Betrieben, so bei Eisenbahnen, Bergwerken, chemischen Fabriken usw. Wenn eine ganze Fabrik in die Luft fliegt wie vor einigen Jahren in Oppau bei Ludwigshafen, kann hinterher oft auch nicht festgestellt werden, ob einen Menschen und wen ein Verschulden trifft. Hier haben in neuerer Zeit besondere Gesetze des öffentlichen und bürgerlichen Rechts Vorsorge getroffen und zwar sorgt für die im Betriebe Beschäftigten die gewerbliche Unfallversicherung, die anderen aber schützt das Reichshaftpflichtgesetz von 1871. Dieses gibt einem Verletzten gegen gewisse mit Gefahren fürs Menschenleben verknüpfte Unternehmen einen Anspruch auf Schadenersatz, auch wenn der Verletzte nicht nachweisen kann, daß der Unternehmer oder einer seiner Angestellten das schädigende Ereignis schuldhaft herbeigeführt habe. Hier gilt also das Wort: „Wer Schaden tut, muß Schaden büßen" in weitestem Umfang. War freilich der Schaden auch bei Aufwendung aller menschenmöglichen Vorsicht nicht zu vermeiden, liegt also „höhere Gewalt" vor, so haftet auch der Unternehmer eines solchen Gewerbes nicht: „Gottes Allmacht ist allzeit ausgenommen."

Im allgemeinen dagegen braucht man für ein schadenstiftendes Ereignis allein noch keinen Ersatz zu leisten. Wer auf seinem Grundstück unter Beobachtung der Bauvorschriften ein Haus erstellt, braucht dem Nachbarn, dessen Garten dadurch beschattet wird, noch keinen Schadenersatz zu leisten; denn: „Jeder ist sich selbst der Nächste." Damit eine Ersatzpflicht entstehe, muß vielmehr dazukommen, daß das Schaden bringende Ereignis schuldhaft, also widerrechtlich und vorsätzlich oder unter Außerachtlassung der im Verkehr erforderlichen Sorgfalt herbeigeführt worden ist.

Daß jeder Täter, und regelmäßig nur er, für das einzustehen habe, was er Unrechtes begangen hat, besagen die Worte: „Jeder ist schuldig, seine eigene Tat zu büßen und zu bessern." In dem Satz aber: „Jeder stiehlt und raubt, borgt und fischt auf seinen eigenen Hals und seine eigene Habe", ist der Haftung aus unerlaubter Handlung

die Haftung aus einem Darlehnsvertrag (borgen) gleichwertig an die Seite gestellt. Ursprünglich freilich hatte für eine Tat nicht bloß der einzelne Mensch einzustehen, sondern die ganze Familie, die Sippe. Eine alte Nachwirkung dieser Familienhaftung findet sich vielleicht noch in der heutigen Vorschrift, daß Vater und Mutter für ein unerlaubtes Handeln ihrer der Erziehung bedürftigen Kinder dann einzutreten haben, wenn sie es an der nötigen Erziehung oder Aufsicht haben fehlen lassen (§ 832, Schw. Art. 333, Ö. § 1309). Auch der Geschäftsherr hat in weitem Umfang aufzukommen für die Schäden, die ein Angestellter im Bereiche seiner Dienstverrichtung dritten Personen zufügt. Und zwar ist zu unterscheiden: jemand hat einem Gewerbetreibenden eine Verrichtung übertragen und dieser läßt sie durch einen Angestellten ausführen. Für den Schaden, den der Angestellte dem Auftraggeber dabei schuldhaft zufügt, hat der Geschäftsherr auf alle Fälle zu haften (§ 278). Der Satz: „Der Schmied steht für das Vernageln" gilt also nicht bloß, wenn er selbst das zu beschlagende Pferd vernagelt hat, sondern auch wenn sein Geselle den Fehler macht. So ist es auch, wenn bei einer Behörde ein Fehler gemacht wird; nach außen hin ist nicht irgendein Gehilfe oder Schreiber verantwortlich, sondern der Dienstvorstand: „Des Amtes Schaden geht auf des Amtes Vorstand." Dem Beschädigten haftet freilich im neueren Recht auch nicht der Dienstvorstand, sondern die Körperschaft, die die Behörde eingerichtet hat, also Staat oder Gemeinde. Verschieden aber ist der Fall geregelt, wenn der Angestellte nicht dem Vertragsgegner seines Herrn Schaden zufügt, sondern einem ganz Unbeteiligten. Überfährt z. B. der Führer eines Lastkraftwagens ein Kind oder einen Hund, so haftet natürlich zunächst er selbst für den Schaden und in der Regel auch der Eigentümer des Wagens (§ 831, schw. OR. Art. 55, Ö. § 1315). Besteht aber kein Zusammenhang zwischen der Berufstätigkeit und der unerlaubten Handlung, so berührt sie den Geschäftsherrn nicht; es gilt daher heute nicht mehr das Wort: „Stiehlt der Knecht, so zahlt der Bauer."

Die Urstufe des Rechts, die keinen Unterschied machte zwischen einem Erfolg, den jemand absichtlich oder wider seinen Willen durch einen Zufall herbeigeführt hatte (vgl. S. 131), ist schon überwunden in der Zeit, als das Sprichwort entstand: „Für Zufall büßt man des Königs Recht nicht."

Viele menschliche Verfehlungen haben ihren Ursprung nicht im Kopf und in der Hand *eines* Menschen, sondern entstehen durch das Zusammenwirken mehrerer. Es war daher eine nicht immer leicht zu lösende Aufgabe der Rechtsordnung, sowohl die Straf- wie die bürgerlich-rechtliche Verantwortlichkeit dafür festzustellen. Wenn mehrere etwas gemeinsam tun, z. B. den starken Gegner zusammen überfallen und schwer mißhandeln, so müssen sie den entstandenen Schaden gemeinsam ersetzen: „Wer mit hat helfen einbrocken, muß auch mit helfen ausessen." Die gleiche Mithaftung hat auch für den zu gelten, der sich vorsichtigerweise von der Tat fernhielt und nur andere dazu anstiftet: „Wer ein Ding heißt, ist so schuldig, wie wer es selbst tut" oder „Wer Schaden stiftet und Schaden tut, sind beide gleich gut" (§ 830, schw. OR. Art. 50).

Schaden wird aber nicht bloß von Menschen verursacht, sondern auch von Haustieren. Und es war von jeher eine besonders schwere Frage für den Gesetzgeber, wie er die Haftung für den solchergestalt angerichteten Schaden regeln solle. Sollen nur das Tier oder sein Herr oder beide dafür einstehen? Auch vom Standpunkt der Kulturgeschichte hoch bedeutsam ist die Regelung, die das altjüdische Recht, in gewohnter Weise nicht genauer zwischen Straf- und bürgerlichem Rechte unterscheidend, nach 2. Mose 21, 28—30 getroffen hat: „Wenn ein Ochse einen Mann oder ein Weib stößt, daß er stirbt, so soll man den Ochsen steinigen und sein Fleisch nicht essen; so ist der Herr des Ochsen unschuldig. Ist aber der Ochse vorhin stößig, und seinem Herrn ist es angesagt und hat ihn nicht verwahrt, und er tötet darüber einen Mann oder Weib, so soll man den Ochsen steinigen und sein Herr soll sterben. Wird man aber ein Lösegeld auf ihn legen, so soll er geben, sein Leben zu lösen, was man ihm aufgibt." Hier unterschied man also schon, ob den Tierhalter ein Verschulden treffe oder nicht. Eine andere Regelung dagegen bestimmt allgemein: „Das Tier geht auf Schaden des Herrn." Das hatte auch § 833 BGB. in seiner ursprünglichen Fassung angenommen, während man später die Haftung durch einen Zusatz einschränkte, der einen Unterschied macht zwischen Tieren, die dem Beruf ihres Herrn dienen, wie der Schäfer- oder der Metzgerhund und solchen, die dem Vergnügen dienen, wie der Windhund und Schoßhund. So sieht es auch schw. OR. Art. 56 und Ö. § 1320 vor. Einige besondere Anwendungsfälle für Haustiere, die vielfach nicht nur dem Erwerb,

sondern bloß dem Vergnügen dienen, enthalten dann noch die Sätze: „Will jemand seinen Hund beschirmen, so muß er sich der Buße unterziehen.“ Wollte er sich der Buße nicht unterziehen, so konnte er nach alter Regel, die wir aber glücklicherweise abgestreift haben, das schädigende Tier als Ersatz hingeben. In dem Worte „den Schaden büßt der Reiter, nicht das Pferd“ findet sich vielleicht noch ein Anklang an die uns jetzt befremdlich vorkommende Erscheinung, daß man in uralten Zeiten nicht bloß Menschen, sondern auch Tieren den Prozeß gemacht hat.

Das Recht hat dann noch einige Sätze über den Ersatz des Schadens ausgebildet, der bei der Seefahrt entsteht; die Fälle der sogenannten Haverei. In Seegefahr müssen manchmal Güter über Bord geworfen werden, um ein gestrandetes Schiff zu erleichtern und so wieder freizumachen. Da ein solches Verfahren zur Rettung von Mannschaft, Schiff und Ladung notwendig sein kann, so ist das Auswerfen keine unerlaubte Handlung des Schiffers, für die er Ersatz leisten müßte. Ebenso unerträglich aber wäre es, wenn die Eigentümer der ausgeworfenen Güter allein den Schaden auf sich behalten müßten und die anderen, deren Eigentum durch das Auswerfen gerettet worden ist, keinen Teil daran zu tragen hätten. Daher wird der durch Seewurf entstandene Schaden gleichmäßig auf Schiff und Ladung verteilt: „Was ohne des Schiffers Versäumnis geschieht, geht über Schiff und Gut“ und „Mein Pfennig ist deines Pfennigs Bruder und Leidensgenosse“.

4. Hauptstück: Erbrecht

1. Allgemeines. Erben

In den Anfangsstufen der menschlichen Gesittung gab es noch kein Eigentum des Einzelnen, sondern alles gehörte der Familie oder der Horde. Erst allmählich schieden sich aus dem Gesamteigentum Gegenstände aus, die der Einzelne für sich haben und behalten durfte. Und zwar waren das wohl zuerst Waffen und Werkzeuge, jedenfalls Fahrhabe, kein liegendes Gut. Dieses Sonderrecht überdauerte aber noch nicht das Leben, sondern erlosch mit dem Tode oder

richtiger: der Sonderbesitz wurde dem Toten mit ins Grab gegeben. Erst nach und nach gingen diese Dinge, aber immer noch nur die Fahrnisse, auf gewisse Menschen über, die dem Verstorbenen im Leben besonders nahe gestanden hatten, die Erben. Bei den hinterlassenen Fahrnisgegenständen wurde wieder unterschieden, ob sie mit dem Kriege und dem sonstigen Mannesberuf zusammenhängen; solche Sachen wurden nur an Männer vererbt. An anderen Sachen dagegen konnten auch Frauen teilhaben. Wer aber rückte in die Vermögensrechte eines Verstorbenen ein? Das bestimmte nach deutscher Anschauung ursprünglich lediglich das Herkommen oder das Gesetz, und es kam nicht an auf den Willen des Verstorbenen, dessen Hinterlassenschaft vererbt werden sollte, des sogenannten Erblassers. „Der Erbe wird geboren, nicht gekoren“ (gekoren ist das Mittelwort der Vergangenheit von küren; vergleiche Willkür, Kurfürst, das sind die Fürsten, die im mittelalterlichen Deutschen Reich den Kaiser küren d. h. wählen durften).

Was den Hinterbliebenen vererbt werden konnte, und wer als Erbe in Frage kam, ist zu verschiedenen Zeiten ganz verschieden gewesen. Solange der Grundbesitz noch im Gesamteigentum der Familie oder Sippe stand, war er nicht eigentlich vererblich; er blieb nach wie vor der Gesamtfamilie und der Verstorbene hatte nur keinen Anteil mehr daran. Auch in späterer Zeit zieht sich der Gegensatz von Liegenschaften und Fahrhabe durch das ganze germanische Erbrecht. So wird heute noch in England, das ja das germanische Recht viel treuer bewahrt hat als das unter das Joch des römischen Rechts geratene Deutschland, der Grundbesitz anders vererbt als die Fahrhabe. Entweder ging der Grundbesitz nur auf einen männlichen Erben über, eine Anschauung, die sich im Grundadel bis vor kurzem und im bäuerlichen Anerbenrecht bis in die neueste Zeit erhalten hat. Wo aber der Grundbesitz nicht ungeteilt auf einen überging, da erbten doch nur die männlichen Verwandten. „Das Schwert geht vor“, „Die Schwertseite ist näher“, „Erbgut erbt bei der Schwertseite“, „Der Mann geht zum Erbe, das Weib davon“ und „Speerhand verfängt Spindelhand“. Die Zurücksetzung der Frau erklärt sich namentlich daraus, daß die Töchter mit der Verheiratung in eine andere Familie übertreten; das ihnen Zugewandte fällt daher aus dem Vermögen der bisherigen Familie heraus, ein Ergebnis, das man möglichst vermeiden wollte. Nur wo keine männ-

lichen Verwandten vorhanden sind, erben die weiblichen. „Die Erbschaft geht vom Spieß auf die Spindel", „Wo kein Schwert vorhanden, da erbt die Spindel" und mit dem aus der Tierwelt genommenen Bild: „Wo kein Hahn ist, da kräht die Henne." Im Laufe der Zeit erwachte dann doch ein Gefühl dafür, daß dem weiblichen Geschlecht ein Unrecht zugefügt werde, wenn man es von der Erbschaft ausschloß. Man räumte ihm daher ein Erbrecht neben dem Manne ein, aber ein geringeres: „Zwei Schwestern gegen einen Bruder." „Der Bruder nimmt mit zwei Händen, die Schwester mit einer", „Bruder nimmt zwei Teile, Schwester den dritten" und schließlich fällt (zuerst in der Stadt) die Bevorzugung des Mannesstammes vollständig: „Schwert und Spindel erben gleich." „Wer mein Blut hat, ist mein Erbe." Die Sprichwörter: „Die Kinder haben gleiches Recht zu ihrem Erbteil", „Sohn und Tochter sind gleich nahe, Erbe zu nehmen" kehren sogar fast wörtlich nur in gedrängter Fassung in § 1924, Abs. 4 wieder: „Kinder erben zu gleichen Teilen" (ebenso Schw. Art. 457 und Ö. § 732).

2. Erbfolgeordnung

Unser Leben währt nicht immer 70 Jahre und oft genug müssen Eltern ihren Kindern ins Grab schauen. Das ist schon im Frieden so, und wie häufig erst im Kriege! Sind nun beim Tode eines Mannes außer seinen Kindern auch noch seine Eltern am Leben, so sind diese Hinterbliebenen mit dem Erblasser gleich nah verwandt. Der Grad der Verwandtschaft bestimmt sich nämlich nach der Zahl der sie vermittelnden Geburten (§ 1589, Schw. Art. 20, Ö. § 41 und 42). Die Verwandtschaft eines Menschen mit seinem Vater ist aber gerade wie die mit seinem Kinde nur durch eine Geburt vermittelt. Vater und Kinder des Erblassers sind daher Verwandte des ersten Grades. Es fragt sich deshalb, ob beide auch im Erbgang einander gleichstehen oder ob eine Gruppe den Vorrang erhalten solle. Darauf antworten viele Sprichwörter: „Es stirbt kein Gut zurück, sondern vorwärts", „Erbgut erbt sich niederwärts und nicht aufwärts", „Wer will zum Erbe stehen, — muß in den Linien sein, die niederwärts gehen", „Was Vater und Mutter lassen, das soll die Geburt besitzen" und „Die Kinder sind das erste Blut". Dem entspricht der

erste Satz des § 1924: Gesetzliche Erben der ersten Ordnung sind die Abkömmlinge des Erblassers, ähnlich Schw. Art. 457, Ö. § 751.

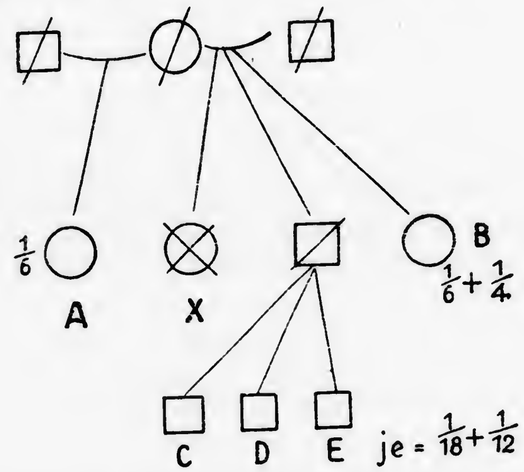
Oft ist beim Tode der Eltern eines oder das andere der Kinder bereits gestorben und hat seinerseits Kinder hinterlassen. Hier findet sich eine Besonderheit insofern, als die Verwandtschaft mit den Enkeln durch zwei Geburten vermittelt wird. Die Enkel sind daher mit den Großeltern in zweiten Grad verwandt, also nicht so nahe wie Eltern und Kinder. Sollen sie um des willen kein Erbrecht haben? So war es in der Tat in alten Zeiten. Dies war einigermaßen erträglich, solange sie in der damals noch bestehenden Gesamtfamilie nach dem Tode des Vaters einfach als Kinder seiner überlebenden Brüder galten, von ihnen erzogen wurden und so auch ihren Anteil am großelterlichen Vermögen erhielten. Das wurde aber anders, als sich die Gesamtfamilie in Sonderfamilien zerlegte, wie wir sie heute und schon lange haben. Da erst trat das Bedürfnis auf, die von vorverstorbenen Kindern stammenden Enkel nicht schlechter zu stellen als wenn sie nicht das Unglück gehabt hätten, Vater oder Mutter frühzeitig zu verlieren. Es dauerte aber lange genug, bis der oft unbeholfene menschliche Geist dahin gelangte, solchen Enkeln die Rechtsstellung ihrer Erzeuger einzuräumen. Die Streitfrage dieses sogenannten Vertretungsrechts wurde erst unter Kaiser Otto I. durch Gottesurteil zugunsten der Enkel entschieden. Offenbar war diese Entscheidung schon gefallen, als sich die Sprichwörter bildeten: „Es ist nichts lieber als Kindes-Kind" und „Kindes-Kind soll stehen an seiner Eltern Stelle". Wie lange und heftig aber um diese neuere Anschauung gekämpft werden mußte, zeigt noch das Wort: „Kindes-Kind ist halbes Kind". Natürlich erhalten die Enkel zusammen keinen größeren Erbteil als ihr Erzeuger erhalten hätte, wenn er noch am Leben wäre. Sind beim Tode eines Großvaters ein Sohn und zwei Kinder einer schon verstorbenen Tochter vorhanden, so erhält der Sohn die eine Hälfte des Nachlasses und die beiden Enkel zusammen die andere. Wollte man hier nach Köpfen teilen, so bekäme der Sohn einen kleineren Erbteil, als wenn seine Schwester am Leben geblieben wäre. Der vorzeitige Tod von Geschwistern kann aber doch nicht gut die Größe ihres Erbteils mindern; dagegen kann ein solcher Todesfall die Erbteile vergrößern, wenn einige der Geschwister ohne Hinterlassung von Abkömmlingen gestorben sind.

Nicht jeder Mensch hinterläßt Kinder. Das Gesetz muß daher noch

weitere Erbordnungen aufstellen. Als Erben der zweiten Ordnung sehen die deutschen Rechte die Eltern des Erblassers und deren Abkömmlinge an (§ 1925, Schw. Art. 458, Ö. § 731). Der Absatz 2 des § 1925: „Leben zur Zeit des Erbfalls die Eltern, so erben sie allein zu gleichen Teilen", gibt den Inhalt mehrerer Sprichwörter wieder: „Das Erbe fällt den Eltern in den Busen", „Vater und Mutter erben vor Schwester und Bruder." Und da nach § 1589 Abs. 2 ein uneheliches Kind nicht als verwandt mit seinem Vater gilt, so hat für diese Kinder der Satz: „Das Kind fällt in der Mutter Schoß" auch heute noch Bedeutung. Die uneheliche Mutter ist, wie die folgenden Ausführungen näher erläutern, auch dann alleinige Erbin ihres ohne Nachkommen verstorbenen Kindes, wenn dieses noch weitere uneheliche Geschwister hatte.

Im übrigen wird bei der zweiten Erbordnung der Nachlaß immer in zwei Hälften zerlegt, von denen die eine der väterlichen, die andere der mütterlichen Seite zufällt. Sind beim Tode eines Menschen weder Kinder noch Eltern am Leben, wohl aber zwei Brüder und von einer schon verstorbenen Schwester zwei Nichten, so zerfällt der Nachlaß zunächst in eine väterliche und mütterliche Hälfte. Von diesen Hälften erhält jeder Bruder ein Drittel, die zwei Nichten zusammen das dritte Drittel oder jedes ein Sechstel. Da aber die Brüder von jeder Hälfte ein Drittel und die Nichten ein Sechstel bekommen, so erhalten jene ein Drittel, diese ein Sechstel der ganzen Erbschaft. Die anfängliche Zerlegung in eine väterliche und mütterliche Hälfte tritt hier im Endergebnis nicht mehr in die Erscheinung. Anders ist es aber in folgendem Fall: Es stirbt jemand kinderlos mit Hinterlassung eines Stiefbruders, der mit ihm nur den Vater gemeinsam hatte, eines Vollbruders und dreier Nichten, die von einer vollbürtigen Schwester abstammen. Alsdann ergibt sich eine Beerbung, die man zur besseren Veranschaulichung im Bild darstellen kann. Und zwar ist üblich, die Männer mit Kreisen, die Frauen mit Vierecken zu bezeichnen, Ehegatten auf die gleiche Linie zu stellen und durch ein Böglein zu verbinden, Kinder darunter zu setzen, Verstorbene durchzustreichen, den Erblasser aber zu durchkreuzen. Im nebenstehenden Beispiel ist also X. der Erblasser, seine Eltern und seine Schwester sind verstorben, der Vater war zweimal verheiratet und aus der ersten Ehe stammte lediglich der Halb- oder Stiefbruder A. Dieser erbt bloß auf der väterlichen Seite mit und

erhält von der auf diese Seite fallenden Hälfte des Nachlasses ein Drittel, also vom ganzen Nachlaß ein Sechstel. Der vollbürtige Bruder B. erbt auf der Vater- und auf der Mutterseite mit und zwar erhält er von der Vaterhälfte ein Drittel und von der mütterlichen Hälfte, wo der Halbbruder A. nicht beteiligt ist, die Hälfte, also vom ganzen Nachlaß ein Sechstel und ein Viertel: also $^5/_{12}$. Die drei Nichten, Töchter der verstorbenen Schwester, zusammen erhalten endlich wie ihr Onkel B. $^5/_{12}$, oder jedes allein $^5/_{36}$ des Nachlasses. Bringt man alle Erbteile auf diesen Hauptnenner, so erhält der Stiefbruder A. $^6/_{36}$, der vollbürtige Bruder B. $^{15}/_{36}$ und die 3 Nichten zusammen ebenfalls $^{15}/_{36}$, macht zusammen ein Ganzes. Man sieht daraus, wie sich im Leben eine Regelung umständlich und verwickelt gestalten kann, die im Sprichwort so einfach klingt, wie „Halbbruder nimmt halbes Erbe" oder „Der Halbbruder nimmt mit einer Hand und der Vollbruder mit zweien."



Nach manchen Rechten haben nicht bloß Blutsverwandte ein Erbrecht. So erhält nach deutschem Rechte auch der überlebende Ehegatte von Gesetzeswegen einen Erbteil. In welchem Umfange, war nach Zeit und Ort sehr verschieden geregelt. Einen beliebten Maßstab gibt das Wort an: „Mann und Weib sollen Kindsteil nehmen." Heute gibt man dem Ehegatten regelmäßig keinen nach der Zahl der Kinder veränderlichen Erbteil, sondern einen bestimmten Bruchteil, der bei bekindeter Ehe ein Viertel und bei kinderloser Ehe mehr be-

trägt (§ 1931, Schw. Art. 462, Ö. § 757), und zwar nach dem deutschen Rechte mindestens die Hälfte, während sich Schweiz und Österreich teilweise begnügen, am weiteren Nachlaß Nutznießungsrechte zu gewähren.

3. Letztwillige Verfügung

Wer Erbe wird, regelt nicht ausschließlich Gesetz und Herkommen, vielmehr darf darüber der erwachsene Mensch auch selbst Bestimmungen treffen. Hier ist sogar ein Feld, die Seele eines ganzen Volks prüfend zu beobachten. Bei den Römern herrschte die Gewohnheit, um nicht zu sagen die Sucht, im Leben öfters letztwillige Verfügungen zu treffen, sie zu ändern und aufzuheben. Beim Tod eines Menschen war dann meist eine ganze Menge solcher Verfügungen vorhanden. Es war dann oft nicht leicht festzustellen, was eigentlich noch gelte und was widerrufen oder mit einer späteren Anordnung unvereinbar sei. Ganz im Gegensatz dazu stand der germanische Brauch, den folgende Sprichwörter in sinniger Einfalt aussprechen: „Wer will wohl und selig sterben —, der lass' sein Gut den rechten Erben", „Gott, nicht der Mensch macht den Erben", „Wenn das Kind geboren ist, so ist das Testament schon gemacht." Und wenn etwa die Eheleute beim Eingehen der Ehe ihre künftigen Vermögensrechte geordnet haben mochten, so wurden doch durch die Geburt eines Kindes alle Gedinge hinfällig: „Kindertaufe bricht Ehestiftung."

Das änderte sich aber teilweise mit dem Eindringen des römischen Rechts. Auch begünstigte die Geistlichkeit, „die goldreiche Angel des heiligen Petrus", daß der kranke Sünder Vermächtnisse zum Heile seiner armen Seele mache. Unter diesem Einfluß bildeten sich Sprichwörter, die in scharfem Gegensatz zu den vorigen traten; so: „Der ist ein stummer Mensch, der kein Testament macht" und „Große Gunst hat der letzte Wille". Der Grundzug der deutschen Volksseele aber hat sich nicht geändert und auch heute noch sind bei bekindeter Ehe die Testamente Ausnahmen. Wohl aus diesem Grunde sind in Deutschland auch letztwillige Verfügungen nicht so häufig, in denen die Laune eitler oder selbstsüchtiger Menschen manchmal Bestimmungen trifft, die einem die Frage aufdrängen, ob die Willkür sittlich unreifer Menschen auch über ihren Tod hinaus Beachtung verdiene.

Dem letzten Willen ist wesentlich, daß er sich bis zuletzt ändern kann und durch eine frühere Verfügung nicht gebunden sein soll. Daher heißt es: „Das letzte Geschäft tötet das erste", „Der letzte Wille soll der kräftigste sein" und „Das Geschäft wird durch den Tod allererst bestätigt"; vorher kann man es immer widerrufen oder abändern.

Daß man seinen letzten Willen immer ändern kann, wie sich das Wetter ändert, hat neben Vorzügen auch seine Nachteile. Der wankelmütige und Schmeicheleien zugängliche Mensch unterliegt dann leicht der Gefahr, daß er sich nach der Errichtung einer solchen Urkunde durch die Künste von Erbschleichern zu unklugen Abänderungen verleiten läßt. Diese Gefahr ist doppelt groß, wenn man wie heute ein Testament ohne fremde Mitwirkung errichten kann (§ 2231 [2], Schw. § 505, Ö. § 578). Daher hat der Gesetzgeber einen gewissen Schutz gegen Wankelmütigkeit und gegen unlautere Beeinflussung geschaffen. Das geschieht durch Erb*verträge*. Hierbei trifft der Erblasser nicht einseitig und jederzeit widerruflich die Bestimmung, wie es mit seinem Vermögen nach seinem Tode gehalten werden solle, sondern hier regeln mehrere Personen gemeinsam diese Verhältnisse in einer Weise, daß auch nur gemeinsam Abänderungen getroffen werden können. Das geschieht heute wie früher namentlich von Ehegatten und Brautleuten im Anschluß an die güterrechtliche Regelung. Dabei wird häufig bedungen, daß bei unbekindeter Ehe der überlebende Gatte der alleinige Erbe des Erstversterbenden sein soll. Gehen aber aus der Ehe Kinder hervor, so will man sie regelmäßig in ihren gesetzlichen Erbteilen nicht verkürzen. Anderseits will man aber auch vermeiden, daß der überlebende Ehegatte vorzeitig das bis dahin bewohnte Haus verlassen und sich von einem Teile des Hausrats trennen müsse. Zu diesem Zweck wird ihm öfter das Recht eingeräumt, den Nachlaß des anderen um einen mäßigen Anschlag zu übernehmen. Hier gilt dann heute nicht mehr das Wort: „Das Kind bricht alle Gedinge", „Kindertaufe bricht Ehestiftung."

4. Pflichtteilsrecht. Erbunwürdigkeit

Eltern beurteilen ihre Kinder nicht immer richtig und begegnen ihnen nicht stets mit gleicher Liebe. König Lear hat nach Shakespeares

gleichnamigem Trauerspiel gerade seine beste Tochter vom Erbe ausgeschlossen. Muß sich nun ein Kind ohne Widerrede darein ergeben, wenn es der Vater vermögensrechtlich benachteiligt und vielleicht durch die beigefügte Begründung sittlich brandmarkt? Darauf antwortet schon das Sprichwort: „Kein Recht gestattet Enterbung ohne Schuld." Auch wer Frau und Kinder hinterläßt, muß freilich nicht notwendig diese zu Erben seines Nachlasses einsetzen, sondern kann ihn auch Fremden zuwenden. Er kann dies aus sittlich achtbaren Gründen tun, so wenn er durch sein Vermögen ein Kulturwerk fördern will; es kann aber auch aus sittlich verwerflichen geschehen, wenn ein Mann etwa unter Übergehung von Frau und Kindern eine Geliebte zum Erben einsetzt. Allerdings erreicht er dadurch nicht, daß die nächsten Angehörigen gar nichts aus dem Nachlaß erhalten. Denn sie sind pflichtteilsberechtigt (§ 2303, Schw. Art. 470); auch wenn sie im Testament übergangen oder ausdrücklich enterbt worden sind, haben sie nach deutschem Rechte doch die Hälfte dessen anzusprechen, was sie als Erben bekommen würden. Will der Erblasser seinen nächsten Angehörigen gar nichts zukommen lassen, so kann er das nicht willkürlich, sondern nur, wenn sich diese gewisser im Gesetz genau aufgeführten Verfehlungen gegen ihn schuldig gemacht haben (§§ 2333 und 2334, Schw. Art. 477, Ö. §§ 768 und 769). Auch muß, wer einem pflichtteilsberechtigten Verwandten oder wer seinem Ehegatten den Pflichtteil entziehen will, den Grund in der letztwilligen Verfügung angeben. Dieser Grund muß zur Zeit der Errichtung auch wirklich bestehen und muß im Streitfall von dem bewiesen werden, der aus der Pflichtteilsentziehung Vorteile für sich herleitet (§ 2336, Schw. Art. 479, Ö. § 771). Pflichtteilsberechtigt sind aber nach deutschem Rechte die Kinder, der Ehegatte und bei unbekindeter Ehe die Eltern; nach schweizerischem Rechte auch die Geschwister (Art. 471 und 472).

Die Entziehung des Pflichtteils kann ein Erblasser natürlich nur dann anordnen, wenn er von den Verfehlungen rechtzeitig Kenntnis erhält und die entsprechenden Folgerungen daraus zieht. Ein verbrecherisch veranlagter Mensch kann aber einer solchen Schutzmaßregel zuvorkommen. Es ist in der Geschichte vorgekommen, daß ein Ehegatte den anderen oder ein Kind seine Eltern beiseite geschafft hat, sei es um früher in den Besitz der Erbschaft zu kommen, sei es um einen anderen heiraten zu können oder aus verbrecherischem

Ehrgeiz. Alle diese Gründe schändlicher Verbrechen finden sich wohl zusammen im alten fränkischen Herrschergeschlecht der Merowinger. Und wie der Ehrgeiz für einen zur Untätigkeit gezwungenen Kronprinzen eine Versuchung sein könne, spricht König Heinrich IV. in Shakespeares Schauspiel aus, als der junge Heinrich die Krone schon vor dem Ableben seines Vaters an sich nahm:

„Ich zögere dir zu lange, ermüde dich.
So hungerst du nach einem ledigen Stuhl,
Daß du dich mußt in meine Ehre kleiden,
Eh' noch die Stunde ruft?"

Einer solchen Versuchung erlag nach der römischen Königsgeschichte die entartete Tochter des Servius Tullius, die ihren königlichen Vater ermorden ließ, um selbst mit ihrem Gatten auf den Thron zu kommen.

Wer heutzutage ein derartiges Verbrechen gegen nahe Angehörige begeht, wird natürlich in erster Linie strafrechtlich verfolgt. Soll aber dem Verbrecher der Vermögensvorteil verbleiben und soll er darin einen Lohn für seine Tat finden können? Auch dem muß das Gesetz vorbeugen. Daher hieß es schon in alter Zeit: „Blutige Hand nimmt kein Erbe." Nach heutigem Recht aber ist, wer sich so schwer gegen den Erblasser verfehlt hat, erbunwürdig. Allerdings ist die Erbunwürdigkeit nicht von Amts wegen zu berücksichtigen, sondern durch Klage zu betreiben; man glaubte, ihre gerichtliche Geltendmachung dem berechtigten Eigennutz des Nächstberufenen überlassen zu können. Werden die Verfehlungen auf die Klage eines Mitbeteiligten festgestellt, so wird der Nachlaß so geteilt, wie wenn der Täter vor dem Erblasser verstorben wäre (§§ 2939—44, Schw. Art. 504/1, Ö. 540). Seine Missetat wird übrigens nicht heimgesucht an seinen Kindern und Kindes-Kindern, diese treten vielmehr an die Stelle des Erbunwürdigen (etwas abweichend Ö. § 541).

Der Spruch: „Unehelich Kind hat keine Erbschaft" gilt auch heute noch im Verhältnis zum Vater, da Vater und Kind nach § 1589 Abs. 2 nicht als verwandt gelten (ebenso Ö. § 754, anders Schw. Art. 461 Abs. 2 und 3). Dagegen hat das Sprichwort keinerlei Bedeutung mehr für das Verhältnis zwischen Mutter und Kind; hier gilt vielmehr das schon erwähnte Wort: „Das Kind fällt in der Mutter Schoß."

5. Erbteilung

Über die Erbteile und die Nachlaßteilung gibt es viele Sprichwörter. Erbteilungen haben offenbar von jeher des Menschen Seele lebhaft (und nicht immer in sittlich erhebender Weise) bewegt. Es kreuzen sich hier zwei grundsätzlich verschiedene Lebensanschauungen. Die eine sieht mehr auf das Wohl und das Fortkommen des Einzelnen; man nennt sie heute gern mit dem Fremdwort individualistisch. Aus der Regelung, die sich die Fürsorge für den einzelnen zum Ziel setzt, stammen Sprichwörter wie: „Soviel Mund, so viel Pfund", „Gleiche Brüder, gleiche Kappen", „Man soll Erbe teilen in allen Knieknoten", „Die gleich geboren sind, sollen gleich teilen" und „Kinder gehen zur gleichen Teilung". Daß man die Schattenseiten des gleichheitlichen Teilens dabei nicht übersah, ergeben Worte wie: „Viele Brüder, schmale Güter", „Breite Eigen werden schmal, — so man sie teilet mit der Zahl" und „Geteiltes Feuer währt nicht lang".

Die andere Geistesrichtung denkt mehr ans Gedeihen des Stammes als an das des Einzelnen. Sie ist bestrebt, Namen und Glanz der Familie zu erhalten und das Gut ungeschmälert über die verschiedenen Geschlechter hinzubringen. Dieses Streben findet sich vor allem beim Adel, dessen Besitz auf Verleihung beruhte (vgl. S. 222): „Lehen soll nicht gespalten werden." Aber auch im Bauernstande suchte man den Gefahren der Zersplitterung zu steuern, und hier wirkte neben Volksanschauungen auch die Beschaffenheit des Landes mit. Wenn z. B. in abgelegenen Gebirgsgegenden ein Hof, der gerade den Unterhalt einer Familie sichert, unter mehrere Brüder geteilt worden wäre, dann bestand die Gefahr, daß alle mit der Zeit zu Bettlern werden. Denn keiner konnte vom Ertrag des verkleinerten Gutes leben, und Nebenverdienst durch gewerbliche Betätigung war wenigstens in früheren Jahrhunderten oft nicht möglich. Dem mußte man durch eine andere Art als die gleichheitliche Teilung des Nachlasses begegnen. So bildete sich wie beim Adel der Brauch aus, daß ein Sohn das ganze Gut übernahm. Die anderen aber erhielten meist nur ein Wohnungsrecht, solange sie ledig blieben, und eine geringe Geldabfindung. Die Rechtsfolge, daß das Gut nur auf einen Abkömmling übergehe, drückt das Sprichwort aus: „Der Bauer hat nur ein Kind." Weil aber beim Tode des Bauern meist größere

Abgaben an den Gutsherrn, die Kirche usw. zu zahlen waren, wollte man den Fall, daß der Bauer starb, möglichst selten machen. Außerdem wollte man verhüten, daß der älter gewordene Bauer allzufrüh zur Gutsabgabe gedrängt wurde. Man ließ daher den jüngsten Sohn nachfolgen; wie er später geboren war als die übrigen, so mochte er auch länger leben. Daher heißt es: „Das Gut stirbt vom Jüngsten zum Jüngeren", „Wo Brüder sind, da besitzt der Jüngste den Herd."

Die Gefahren einer Gutszersplitterung haben in neuer Zeit, nachdem auch für den Bauernstand das gleiche Erbrecht aller Kinder eingeführt worden war, zum sogenannten Anerbenrecht geführt. Es ist eine Wiederbelebung des früheren Gedankens, daß ein einziges Kind den ganzen Bauernhof unter besonderen Begünstigungen übernehmen darf.

Eine Erbteilung ist noch heute der Prüfstein der Geschwisterliebe und einer gewissen sittlichen Reife. Denn häufig will jeder gerade das selbst haben, was der andere auch gern möchte. Eine vielfach befriedigende Lösung ergibt sich von jeher dann, wenn man die erforderliche Anzahl Teile macht und diese auslost; dann kann der eine dem andern nicht unmittelbar eine Bosheit unterschieben. Daher: „Was das Los einem gibt, das soll er nehmen" und „Das Los stillt den Hader". Wer fertigt aber die Lose? Darauf antwortet das Sprichwort: „Der Ältere soll teilen, der Jüngere kiesen." Hierbei wird dem gereifteren Verstande die Aufgabe gestellt, die Teile zu bestimmen, und dem Jüngeren die Möglichkeit verschafft, etwaige Ungleichheiten der Teile durch die Wahl des größeren heimzuzahlen. In der Tat ist das im allgemeinen ein glückliches Mittel, um eine gleiche und gerechte Teilung zu sichern. Im Einzelfall hat freilich menschlicher Eigennutz auch hier schon versucht, den Rahm für sich abzuschöpfen. Im Jahre 1535 wollten zwei Brüder aus dem Geschlechte der Zähringer, denen der namhafte Landbesitz eines Verwandten zugefallen war, diesen unter sich verteilen. Damals wurden ja noch ganze Länder nicht anders verteilt als die Äcker eines Bauern, weil das germanische Recht die Scheidung zwischen öffentlichem und bürgerlichem Rechte noch nicht kannte. Der ältere Bruder machte nun zwei ganz ungleiche Teile, tat aber in den kleineren Teil die an die oberländischen Besitzungen des jüngeren anstoßenden Gebiete. Er rechnete darauf, daß der Jüngere den kleineren Teil wählen

würde, damit sein altes und sein neues Land ein zusammenhängendes Gebiet wäre. Diese Hoffnung war aber trügerisch, und der ungerechte Teiler war höchst unwillig darüber, daß der jüngere Bruder nicht den Dummen machen wollte.

6. Haftung der Erben

Nicht alle Menschen sind gute Wirtschafter, und wenn's zum Sterben kommt, zeigt sich manchmal, daß mehr Schulden da sind als Vermögen. Dann ergibt sich die Frage: Wer kommt für ihre Schulden auf? An wen können sich die Gläubiger halten? Mancher, der zu den gesetzlichen Erben gehört, mag sich bei der drohenden Überschuldung mit der Sache überhaupt nicht befassen. Er will in einem solchen Falle lieber nichts erben, als sich mit den Gläubigern herumschlagen. Das kann er dadurch erreichen, daß er die ihm angefallene Erbschaft in der gesetzlichen Frist und Form ausschlägt (§ 1944 f., Schw. Art. 566 f., Ö. § 538). Denn „Wer Erbe nicht nimmt, braucht die Schulden nicht zu entgelten". Umgekehrt aber heißt es: „Wer das Erbe nimmt, der schuldet" oder „der soll die Schulden entgelten". In diesem Falle aber taucht die weitere Frage auf, ob der Erbe bloß mit dem geerbten Vermögen haften soll oder auch mit dem, was er schon zuvor hatte. Das deutsche Recht neigt zur ersteren Ansicht: „Niemand zahlt Schulden nach seinem Tode weiter als sein Gut (der Nachlaß) reicht", „Ist kein Gut da, so sind die Erben ledig", „Kein Kind soll des Vaters Schuld entgelten" und „Mit Eigen darf der Erbe keine Schuld entgelten". Für die Gläubiger aber, die aus der Erbmasse nicht befriedigt werden können, gilt in besonderer Weise der Spruch: „Wo nichts ist, hat der Kaiser sein Recht verloren." Auch das im Mittelalter von uns aufgenommene römische Recht machte zwar, sobald ein Erbe die Erbschaft angenommen hatte, keinen Unterschied mehr zwischen seinem bisherigen und dem ererbten Vermögen, aber es gestattete dem Erben die Erbschaft mit der Rechtswohltat des Erbverzeichnisses anzutreten. Unser BGB. hat diesen Gedanken in der Weise aufgenommen, daß durch vorschriftsmäßige Errichtung eines Nachlaßverzeichnisses die Haftung auf den Bestand des Nachlasses beschränkt werden kann. Wird aber dieses Verzeichnis nicht in der gesetzlichen Frist eingereicht, dann können sich die Nachlaßgläubiger an alles halten, was dem Erben gehört. Dann kann

wahr werden: „Erben ist kein Gewinn" und „Wer einen Heller erbt, muß einen Taler bezahlen". Dabei muß der Erbe für alle Arten von Schulden einstehen, und dem alten Worte: „Bürgschaft erbt niemand" tritt das neue gegenüber: „Bürgschaft müssen die Erben bezahlen."

Bevor ein Erbe oder ein Vermächtnisnehmer etwas aus der Erbschaft erhält, sind die Nachlaßverbindlichkeiten zu befriedigen. Denn man kann doch nicht auf Kosten der Nachlaßgläubiger jemand einen Vorteil zuwenden. Diesen Rechtsgedanken hat man bildlich also ausgedrückt: „Schulden sind der nächste Erbe." Wie steht es aber mit Schulden, die der Erblasser in der Form von Vermächtnissen dem Erben auferlegt? Im Mittelalter dachte man dabei vor allem an Verpflichtungen, die der Verstorbene um seines Seelenheils willen angeordnet hatte (das sogenannte Seelgeräte). Heute treten mehr die Vermächtnisse für nähere Bekannte oder für Zwecke von Kunst und Wissenschaft hervor. Auf alle diese Fälle trifft gleicherweise das Wort zu: „Allererst die Schulden, dann das Almosen." Wenn also der Nachlaß schon durch die Bezahlung der zu Lebzeiten des Erblassers begründeten Schulden aufgezehrt wird, bekommen die Vermächtnisnehmer nichts. Wie ist es aber, wenn etwa der reine Nachlaß 1200 Mark beträgt und der Erblasser Vermächtnisse in gleicher Höhe angeordnet hat? Dann kommt es darauf an, ob der Erbe, der in die gesamte Vermögensstellung des Erblassers eintritt, zugleich pflichtteilsberechtigt ist (vgl. S. 118) oder nicht. Steht ihm kein Pflichtteilsrecht zur Seite, so muß er die Vermächtnisse auch dann entrichten, wenn ihm als Erben nichts mehr bleibt. Er ist dann in wirtschaftlichem Sinne nichts anderes als ein Testamentsvollstrecker. Kinder, Eltern und Ehegatten dagegen genießen den Vorteil des Pflichtteilsrechts; ihnen muß aus der Erbschaft nach deutschem Recht wenigstens soviel zufallen, als dem halben Werte ihres gesetzlichen Erbteils gleichkommt. Weitergehende Anordnungen des Erblassers dürfen entsprechend gekürzt werden (§ 2306). Würde also ein Erblasser, dessen reiner Nachlaß von 1200 Mark nach dem vorigen Beispiel ganz mit Vermächtnissen belastet ist, von seinen Kindern beerbt, so könnten diese den halben Nachlaß von 600 Mark als Pflichtteil verlangen; die angeordneten Vermächtnisse aber würden demgemäß auf die Hälfte ermäßigt. Ähnlich ist die Regelung im schweizerischen und österreichischen Recht.

Drittes Buch

Das öffentliche Recht

I. Hauptstück: Strafrecht

Allgemeine Lehren

1. Recht und Unrecht

Schiller sagt einmal:

„Einstweilen bis den Bau der Welt Philosophie zusammenhält,
Erhält sie das Getriebe durch Hunger und durch Liebe."

Die Triebe zur Selbsterhaltung und zur Fortpflanzung sind natürlich nicht die einzigen, die in den Menschen gelegt sind, aber sie sind die ursprünglichsten; sie teilt überdies der Mensch mit der gesamten belebten Natur. Indem der Mensch aber im Laufe seiner Entwicklung die Fähigkeit erlernt hat, seine Triebe zu beherrschen, ist es ihm zur sittlichen und rechtlichen Pflicht geworden, die Herrschaft darüber zu gewinnen. Und schon dadurch allein, daß er ihnen hemmungslos nachgibt, kann ein Mensch die Kreise des anderen stören. Das läßt sich leichter vermeiden und ertragen in dünn besiedelten Ländern: dort kann man dem ewigen Zank um die Futterkrippe mit dem Vorschlag Abrahams entgehen: „Willst du zur Linken, so will ich zur Rechten." 1. Mose 13, 9. In dicht bevölkerten Ländern aber stoßen sich die Dinge hart im Raum und es kommt nur zu leicht vor, daß einer des andern Recht verletzt. Wie sich nun ein Tier des andern erwehrt, das ihm sein Futter streitig machen will, so greift auch der Mensch ursprünglich zur Selbsthilfe. Dabei geht diese häufig viel weiter als es zur bloßen Abwehr nötig wäre — waren doch oft genug auch sogar die von den Mächtigen im Staate gemachten Gesetze maßlos und drohten für unbedeutende Vergehen die grausamsten Strafen an! Auch können sich der Selbsthilfe im allgemeinen nur die Starken bedienen, während die Schwachen geduldig oder zähneknirschend Übergriffe des Stärkeren über sich ergehen lassen müssen. Daher hat es schließlich die Allgemeinheit in die Hand genommen, das Unrecht zu bekämpfen und zu verfolgen. Da erhob sich aber bald die Frage: soll die Volksgemeinde, die ja in den ältesten Zeiten selbst das Richteramt ausübte, in jedem

einzelnen Falle nach eigenem Ermessen darüber entscheiden, ob ein Tun, z. B. der Ungehorsam gegen die Befehle eines Oberen, ein strafbares Unrecht enthalte? Oder muß das schon vorher durch Gesetz und Herkommen festgelegt sein? Traf das Gericht eine solche Entscheidung jedesmal nach seinem freien Ermessen, dann wußte niemand im voraus mit Sicherheit, was er tun oder lassen dürfe. Durfte dagegen bloß das bestraft werden, was zuvor als strafbar bezeichnet worden war, so lief man allerdings nicht die Gefahr, unvorhergesehen und willkürlich verurteilt zu werden. Freilich konnte der Täter dann auch, ohne in die Maschen des Gesetzes zu fallen, mancherlei tun, was als Unrecht erscheint, was man aber nicht bedacht oder nicht recht zum Ausdruck hatte bringen können, als man den Wortlaut des Gesetzes festlegte. Doch überwogen die Vorteile der zweiten Art offensichtlich. So hatte auch das Volk von Athen etwa 600 vor Christus die Aufzeichnung des Rechts gewünscht, um einen Schutz gegen die Härte und die willkürliche Rechtsprechung der adeligen Richter zu erhalten. Freilich verschärfte der mit der Arbeit beauftragte Archont Drakon bei der Sammlung und Niederschrift der Gesetze die Strafdrohungen so, daß fast auf jedes Vergehen, das bei den Armen besonders nahe lag, wie etwa Getreidediebstahl, die Todesstrafe stand. Er ist so ohne seinen Willen der Schöpfer des Wortes „drakonisch" im Sinne von maßloser Strenge geworden. Sein Verfahren aber verstieß gegen natürliches Gebot: „Wie die Sünde, so die Strafe", „Wo große Missetat, da ist auch große Pein", und „Auf einen groben Klotz gehört ein grober Keil." Immerhin verbürgt die Aufzeichnung des Gesetzes, daß nicht die gleiche Tat das eine Mal als strafbar angesehen werden kann, das andere Mal aber als straflos. So gelangte man im Laufe der Geschichte zu der Lehre: „Wo kein Gesetz, da ist auch keine Übertretung" (§ 2, Abs. 1 StrGB.) und „Ist es nicht verboten, so ist es auch nicht unrecht." Ob ein solches Tun mit der Sittenlehre vereinbar sei, ist damit natürlich noch nicht gesagt. Wie sich der Priester und der Levit dem unter die Räuber Gefallenen gegenüber nach Jesu Gleichnis im Evangelium Lukas 10, 30 ff. benommen haben, war gewiß kein Unrecht, war aber mit den geläuterten Geboten der Nächstenliebe und der allgemeinen Menschlichkeit nicht vereinbar.

In dem Worte: „Die Gesetze strafen und nicht der Richter" kehrt der Gedanke wieder, eine Strafe könne erst ausgesprochen werden,

wenn sie in einem Gesetze angedroht sei. Dagegen kommt darin nicht scharf zum Ausdruck, daß die Gesetze bloß allgemein für ein ungehöriges Tun eine Strafe androhen, und zwar ursprünglich meist eine festbestimmte, ohne jeden Spielraum je nach den besonderen Umständen des Falls. Der Richter aber hat zu entscheiden, ob der Beschuldigte die ihm zur Last gelegte Tat begangen habe, und spricht danach die Strafe aus.

Auch wenn eine Handlung an sich mit Strafe bedroht ist, kann sie zu einer erlaubten werden, wenn der, dessen Schutz das Gesetz bezweckt, mit ihr einverstanden ist. Der römische Schriftsteller Cornelius Nepos erzählt einmal, der freigebige Athener Cimon habe seine Gärten nicht bewachen lassen. Daraus kann man zunächst entnehmen, daß die Früchte ohne besondere Bewachung auch im alten Athen Gefahr liefen, gestohlen zu werden; weiter aber, daß Cimon die Bestrafung eines Bedürftigen nicht wünschte, der sich in seinem Garten gütlich tat. Das drücken die Worte aus, die gewiß nicht im Volksmund entstanden sind, sondern nach der Lampe des Gelehrten riechen: „Wer mit Erlaubnis gegen mein Gebot handelt, der bleibt ohne Strafe" und „Wer gern will, dem geschieht kein Unrecht." Heute unterscheidet man zwischen Rechtsgütern, die das Gesetz als verzichtbar ansieht, wie die vermögensrechtlichen, und solchen, auf die um des öffentlichen Wohls willen nicht verzichtet werden darf, wie Leib und Leben. Wer einen auf ausdrückliches Verlangen tötet, etwa um ihm die körperlichen und seelischen Leiden eines unheilbaren Siechtums zu ersparen, wird nach § 216 StrGB. bestraft, wenn auch viel milder als bei einer anderen Tötung.

Die Gesetze sind in uralten Zeiten von der Volksgemeinde selbst gemacht worden und haben dann auch jeden aus dem Volke verpflichtet. „Wer ein Gesetz gibt, ist selbst daran gebunden." Als aber später die ursprünglich vom Volke gewählten Könige die unbeschränkte Herrschaft im Staate erlangten und ihr Machtspruch unter dem Einfluß des römisch-byzantinischen Rechts allein galt — man denke an das hochfahrende Wort des Franzosenkönigs Ludwigs XIV: L'état c'est moi, „Der Staat bin ich" — warf sich die Frage auf, ob ein solcher Herrscher selbst an die Gesetze gebunden sei, die er für den Staat gegeben hatte. Diese Frage war in der römischen Kaiserzeit verneint worden. Das deutsche Sprichwort aber steht auf einem anderen Standpunkt. Wer ein Gesetz

gibt, muß es auch selbst beobachten, und wer selbst ein schlechtes Beispiel gibt, darf sich nicht wundern, wenn es die anderen nicht besser machen. „Wenn der Abt die Würfel auflegt, dann dürfen die Brüder spielen.“ Dieses Wort ist deshalb so köstlich, weil gerade die Kirche in verdienstlicher Weise die Spielwut der Deutschen bekämpft hat. Unter dem Einfluß des römischen Rechts hat sich später freilich auch in Deutschland der unumschränkte Herrscher über die Gesetze des Landes erhoben. Selbst der verfassungsmäßig beschränkte Herrscher war nach den im 19. Jahrhundert gegebenen Verfassungen für sein Tun strafrechtlich nicht verantwortlich. In bürgerlich-rechtlichen Angelegenheiten hatte er dagegen vor den Gerichten des Landes Recht zu nehmen. So kamen in mehreren Herrscherhäusern Scheidungsklagen vor, über die von den ordentlichen Gerichten entschieden worden ist.

Wir haben früher gehört, daß die Gesetze gegeben werden, um Mißständen im Volksleben zu steuern. Es ist aber nicht damit getan, ein Gesetz zu machen. Denn der Eigenwille und der Eigennutz des Menschen kümmert sich weder um staatliches noch um kirchliches Gebot, wenn man nicht dafür sorgt, daß es befolgt wird: „Wer ein Gesetz gibt, muß auch darüber wachen.“ Einen Einzelfall behandelt das Wort: „Wenn der Wächter nicht wacht, dann wacht der Dieb.“ Es hat einen schönen Doppelsinn: zunächst hat der nächtliche Dieb leichtere Arbeit, wenn der Wächter schläft, aber auch ganz allgemein: Wo die Obrigkeit lässig und saumselig ist, da wagen sich alle bösen Leidenschaften des Menschen, nicht bloß der Hang zum Stehlen ans Tageslicht. Wie die Menschen einmal sind, tun sie das Gute meist nicht bloß aus innerem Drang deshalb, weil es gut ist, und sie lassen das Schlechte oft nicht bloß deshalb, weil es schlecht und des sittlichen Menschen unwürdig ist. Nach den Lehren mancher Religionen geschieht der Ausgleich und die Vergeltung im Jenseits. Der staatliche Gesetzgeber aber will schon in dieser Welt vergelten und gibt seinen Anordnungen Nachdruck, indem er auf deren Übertretung Strafe androht: „Gesetz ohne Strafe, — eine Glocke ohne Klöppel.“ Wie man mit einer solchen Glocke nicht läuten kann, so taugt ein Gesetz nichts, das ein Tun bloß verbietet, ohne eine Strafe auf die Zuwiderhandlung zu setzen. In der Wissenschaft spricht man hier von einem unvollständigen Gesetz. Wie das Volk über solche dachte, die sich auch durch Strafandrohung nicht vom Unrechttun abhalten

lassen, darüber äußert sich in nicht mißzuverstehender Weise das Wort: „Wer sich nicht bessern will, den soll der Henker in die Schule nehmen.“ Hierin liegt zugleich manches verborgen, was man sich über den Zweck der Strafe gedacht hat. Vergelten, Bessern, Abschrecken; aber auch die Mitmenschen vor einem Unverbesserlichen sichern, wie man sich vor einem Raubtier sichert.

Nach einer Überlieferung soll der heilige Crispin den Reichen Leder gestohlen und den Armen Schuhe daraus gemacht haben. Derartige wohlgemeinten Übeltaten haben wohl Anlaß zu dem viel genannten Worte gegeben: der Zweck heiligt die Mittel. Wie sich aber die Sittenlehre dagegen verwahrt, eine solche Ansicht zu billigen, so lehnt sie auch das Recht ab nach dem Spruche: „Man soll nicht das Leder stehlen und die Schuh um Gottes willen (d. i. als Almosen) hingeben.“ Selbstverständlich aber ist für die Bemessung der Strafe von großer Bedeutung, ob sich einer aus Eigennutz gegen ein Gesetz vergangen hat oder aus Nächstenliebe.

2. Wille und Tat

Aus dem Morgenlande wird erzählt, ein Schieferdecker sei einst während der Arbeit vom Schwindel erfaßt worden und sei vom Dache gefallen, habe durch die Wucht seines Falles einen gerade Vorübergehenden getötet, sei aber selbst durch den Fall auf den weichen menschlichen Körper mit dem Leben davongekommen. Der Sohn des Getöteten habe ihn darauf wegen Mordes verklagt. Der weise Richter habe den Sohn wohl darauf hingewiesen, es liege doch kein böser Wille vor, habe aber dann auf Drängen des Unbelehrbaren nach dem Satze: „Auge um Auge, Zahn um Zahn“ den Handwerksmann zum Tode verurteilen müssen. Diese Geschichte hätte sich in ähnlicher Weise im älteren Deutschland oder in der Kindheitsstufe jedes anderen Volks zutragen können. Denn während es von Gott heißt, er sehe das Herz an, sieht der Mensch auf unentwickelter Rechtsstufe nur auf die äußere Tat und ihren rechtskränkenden Erfolg: „Wer unwissend verbricht, büßt wissentlich.“

Aber wie der einzelne, so nehmen auch die Völker zu an Alter und Weisheit und es kommt die Zeit, wo man erkennt: „Unwissend sündigt man nicht“ und „Für Zufall büßt man des Königs Recht nicht.“ Wie man dem Menschen Leib und Seele zuschreibt, so

unterscheidet man bei seinen Handlungen zwischen dem in der Außenwelt sichtbaren Erfolg (dem Schlag der Faust, dem kränkenden Wort) und dem inneren Willen, aus dem das Tun hervorging. Aber „Der Wille ist des Werkes Seele". Ja, Jesus geht als Sittenlehrer so weit zu sagen: „Wer ein Weib ansiehet, ihrer zu begehren, der hat schon die Ehe mit ihr gebrochen in seinem Herzen," Matthäus 5, 28. Das Recht weiß freilich, daß seine Diener nicht in des Menschen Herzen hineinsehen können, und befaßt sich daher nur mit der nach außen hervorgetretenen Tat: „Die Tat tötet den Mann," „Man läßt einen bei dem, nach dem er gehandelt hat." Dagegen: „Die Gedanken sind zollfrei," ein Wörtlein, dem man, um den Menschen an seine sittliche Verantwortlichkeit zu erinnern, als Warnung bisweilen noch hinzufügt: „jedoch nicht höllenfrei". Einen ähnlichen Sinn haben die Worte: „Fürs Denken kann man niemand henken" und „Man kann falschen Mut nicht ansehen, die Tat wäre denn dabei".

Beim Worte Tat schwebte den Deutschen etwas Handgreifliches vor, dessen Spuren in der Außenwelt für jedermann erkennbar sind. Mit den Worten, die der Wind verweht, nahm er es in alter Zeit nicht so genau; er ward deshalb auch in der ganzen Welt als grob verschrien. Wie der Missetäter straflos das Urteil schelten konnte, wenigstens solange der Gerichtshof noch beisammen war oder die nächsten drei Tage, heißt es auch sonst: „Worte schlagen einem kein Loch in den Kopf," und „Ein Wort ist kein Pfeil." Seine Nervenstärke und Unbekümmertheit aber tun die Worte kund: „Vom Knallen stirbt man nicht" und „Bedrohter Mann lebt (noch) 30 Jahre." Freilich änderte sich die Anschauung darüber mit zunehmender Gesittung. Wer fein empfindet, kann mit einem Worte härter getroffen werden als ein Hartgesottener mit einem Schlag. Das Gefühl dafür spricht aus dem Satze: „Wörter — sind auch Schwerter." Ferner konnte man schließlich doch nicht darüber wegsehen, daß ein mit Totschlag bedrohter Mann in seinem Rechtsfrieden und seinem Gefühl der Sicherheit gestört wird; muß er doch damit rechnen, daß es nicht bei der bloßen Drohung bleiben werde! Man strafte daher auch die bloße Drohung, natürlich aber geringer als die Ausführung: „Mit einem Wort geht es an die Pfennige, mit Werken aber an die Hand."

Die alltägliche Erfahrung lehrt, daß eine Tat oft einen viel größeren und schlimmeren Erfolg hat, als der Täter beabsichtigt. Ein

Knabe wirft im Spiel nach einem anderen mit einem Steine und bringt dessen Auge zum Auslaufen. In derlei Fällen nahm der Volksglaube gern die Einwirkung böser Mächte an. „Ist der Wurf aus der Hand, so ist er des Teufels." Wie weit die voraussehbare, aber nicht beabsichtigte Folge einer Tat dem Täter strafrechtlich zuzumessen sei, ist eine Frage, auf die das Sprichwort keine Antwort gibt. Regelmäßig wird Fahrlässigkeit, unter Umständen sogar bedingter Vorsatz anzunehmen sein.

3. Schuldausschließungsgründe

Nicht für jedes Tun, das unter ein Strafgesetz gebracht werden könnte, muß der Mensch einstehen. Strafrechtlich nicht verantwortlich sind nach heutigem Recht vor allem die Kinder und Geisteskranken. Bei geistigen Erkrankungen tritt durch eine Veränderung des Gehirns ein länger währender Zustand ein, in dem die freie Willensbestimmung eines Menschen ausgeschlossen ist. Daneben gibt es auch verantwortungslose Zustände vorübergehender Art, wie bei hohem Fieber und bei Betäubung durch Gifte; kann doch sogar das im Alkohol wirksame Gift einen schnellen Tod herbeiführen! Im übrigen kann der Genuß betäubender oder berauschender Mittel je nach der Menge des Genossenen, der Dauer des Mißbrauchs und der Widerstandsfähigkeit des Körpers bewirken, daß der ihm Verfallene alle Stufen von Gesundheit bis zu völliger geistiger Krankheit durchläuft. Dem Mißbrauch geistiger Getränke, dem verbreiteten deutschen Erbübel, der Trunksucht, die schon der römische Schriftsteller Tacitus in seiner Germania geißelte, trat man von jeher mit zwiespältiger Seele entgegen. Einerseits sagte man: „Trunkenheit macht viel Bosheit" und „Von Trunkenheit kommt viel Übel." Auch faßte man den Missetäter, der etwa seine Trunkenheit als Entschuldigung ins Feld führte, schärfer an als vielfach in der neueren Rechtsprechung, wenigstens wenn man den Sprichwörtern trauen darf: „Trunkene Freude, nüchternes Leid," „Trunken gesündigt, nüchtern gebüßt," „Wer trunken mordet, muß nüchtern hängen," „Trunken gestohlen, nüchtern gehenkt." Diese Schärfe vertritt auch das deutsche Militärstrafgesetzbuch, das bei Verstößen gegen die Pflichten militärischer Unterordnung sowie bei allen in Ausübung des Dienstes begangenen Straftaten der

selbstverschuldeten Trunkenheit ausdrücklich die Wirkung eines Strafmilderungsgrundes versagt. Demgegenüber spricht eine gewisse Nachsicht mit dem Trunke aus folgenden Worten: „Dem trunkenen Mann soll ein Fuder Heu ausweichen“ und „Dem trunkenen Mann soll ein geladener Wagen ausweichen“. Natürlich sind diese Mahnungen nicht ganz wörtlich zu nehmen, so wenig wie eine andere Weisung über das Verhalten gegenüber Gatten, die sich nicht in der Zucht haben: „Wenn ein Mann mit seiner Frau über Feld geht und ihn ein gemählich Gemuten ankommt, so soll ihnen ein Fuder Heu so weit ausweichen, als man ein weißes Roß sehen mag.“ Das sind vielmehr Ausflüsse von Humor, wie er sich im alten deutschen Recht manchmal so erquickend findet. Der Sinn dafür ist dem neueren Rechte entschwunden, und die Anschauungen darüber, wie weit die Geschlechter ihren Verkehr miteinander dem Auge eines Dritten zu entziehen haben, sind ganz anders geworden. Auch ein Ehepaar, das seinem „gemählich Gemuten“ auf dem Wege übers Feld nachgibt, kann „durch eine unzüchtige Handlung öffentlich ein Ärgernis geben“ und sich strafbar machen.

Aber nicht nur das Kind und der Geistesgestörte, sondern auch der Erwachsene und geistig Gesunde kann sich in Verhältnissen befinden, die ein Verschulden im strafrechtlichen Sinn ausschließen. Dahin gehört vor allem der Fall, daß ein Mensch von einem anderen angegriffen wird. Wer auf einsamer Straße oder im Wald von Strolchen überfallen wird, kann sich nicht auf den staatlichen Schutz verlassen. Er muß sich selbst helfen und braucht in seiner Abwehr auch das Leben des Angreifers nicht zu schonen; er kann vielmehr, wenn er im Besitz einer Schußwaffe ist, sie in der wirksamsten Weise verwenden. Es ist die bekannte Lehre von der Notwehr, die das geltende deutsche Strafgesetzbuch in § 53 geregelt hat. Der Mensch gerät aber manchmal auch ohne Verschulden eines anderen in eine Gefahr für Leib und Leben, die er nur durch Verletzung eines fremden Rechtsguts beseitigen kann („Notstand“). Wohl mag es vorkommen, daß der sittlich Hochstehende oder der mit dem Leben abgeschlossen hat, lieber sein eigenes Leben opfert, als sich an einem fremden Rechtsgut vergreift. Für den Durchschnittsmenschen aber, bei dem der Selbsterhaltungstrieb ungebrochen ist, gilt der alte Spruch: „Jeder ist sich selbst der nächste.“ Und das muß ohne weiteres anerkannt werden, wenn auf der einen Seite Leib und Leben, auf der anderen aber bloß Vermögenswerte auf dem Spiele stehen. Wem bei einer Alpenwanderung auf schwindeligem Pfade ein Ochse den Weg versperrt, darf sich, vollends wenn er wegen drohenden Schneesturms nicht umkehren kann, den Weg durch Erschießen des Ochsens freimachen, ohne strafbar zu werden. Ob er etwa dem Eigentümer den entstandenen Schaden zu ersetzen habe, ist eine Frage des bürgerlichen Rechts und nach § 904 ff. zu bejahen. Aber nicht bloß die Tötung eines fremden Tieres ist unter Umständen rechtlich zulässig, selbst der Angriff auf ein Menschenleben kann entschuldbar sein, wie ein altes Beispiel ausführt: „Erhaschen zwei schiffbrüchige Männer in höchster Lebensnot miteinander ein Brett, das nur einem Manne Rettung bringen kann, so verschuldet derjenige kein Verbrechen, der seinen Genossen in die Wellen zurückstößt; denn er hat ja, um sein eigenes Leben zu retten, also gehandelt.“ Wer in solcher Lage ist, wird dann meist auch keine Erwägungen darüber anstellen, welches Leben für die Gesamtheit wertvoller ist. Wo nicht persönliche Beziehungen wie zwischen Mutter und Kind oder zwischen Freunden mit hereinspielen, gibt der nackte Ichsinn den Ausschlag. Für solche Fälle unverschuldeten Notstandes gibt es zahlreiche Sprichwörter: „Not kennt kein Gebot“, „Not und Tod haben kein Gebot“, „Not bricht Eisen“, „Leibesnot bricht das Recht“, „Die Not dient dem Menschen und bricht das Gesetz“, „Ein besser Recht ist Leibesnot als Herrengebot“, „Natur zieht stärker als 7 Pferde“, „Not sucht Brot, wo sich's findet“ sowie „In der Not sind alle Güter gemein“.

4. Persönliche Haftung

In den Anfängen der Gesittung stand der Mensch nicht für sich allein, sondern nur als Glied einer Horde oder eines Stammes. Was der Einzelne verbrach, dafür hatte nicht bloß er einzutreten, sondern der ganze Stamm, wenn sich die Tat gegen einen anderen Stamm richtete, oder doch die engere Familie, soweit einer des gleichen Stammes davon betroffen war. In China hält man sich noch heute wegen der Übeltat eines Unmündigen an den Vater oder den älteren Bruder. Die Mitverantwortung für das Tun eines anderen erstreckt sich überdies meist nicht bloß auf die Blutsverwandten, sondern auch auf die übrigen Hausgenossen: „Was das Gesinde einbrockt, muß

der Hausvater ausessen." Dabei entsprach es dem Rachetrieb des Naturmenschen, seine Wut an anderen auszulassen, auch wenn Unschuldige darunter zu leiden hatten. Dazu pflegte man nicht einfach Gleiches mit Gleichem zu vergelten, sondern der Mächtige überstürzte alles: verlor er bei einem Handel einen Finger, so nahm er dem Gegner die ganze Hand.

Dagegen lehnte sich schon frühzeitig das Rechtsgefühl auf: „Man muß um eines Baumes willen nicht den ganzen Wald ausroden", ein Wort, das an die wunderbare Erzählung erinnert, wie Abraham Fürbitte einlegte für die Gerechten, die etwa in Sodom leben und mit den Ungerechten untergehen sollten, 1. Mose 18, 20 ff. Aber auch nachdem man die Unschuldigen nicht mehr ohne weiteres für die Schuldigen leiden ließ, lebte doch der Gedanke fort, daß ein Stellvertreter freiwillig die Strafe auf sich nehme. Ich will hier nicht an religiöse Anschauungen erinnern, wohl aber an Schillers Bürgschaft: „Ich lasse den Freund dir als Bürgen, ihn magst du, entrinn' ich, erwürgen", sagt Möros zum Tyrannen Dionys, und dieser machte Ernst mit dem Angebot. Er hatte den Bürgen nach Ablauf der dreitägigen Frist schon mit dem Seile an dem aufgerichteten Kreuz emporziehen lassen; da stellte sich Möros wieder, der durch ein Unwetter zurückgehalten worden war. Diese Stufe des Strafrechts war in Deutschland schon überwunden, als sich das Wort bildete: „Dem Bürgen darf man nicht an den Hals sprechen." Nur langsam faßte übrigens der neue Gedanke, daß der Täter allein für seine Tat einstehen müsse, in der allgemeinen Volksanschauung Wurzel, und er mußte immer wieder neu eingeprägt werden. Das ergeben die zahlreichen Sprichwörter, die sich hierüber gebildet haben: „Wer den Brei gekocht hat, muß ihn ausessen", „Wer den Karren in den Dreck geschoben hat, muß ihn wieder herausziehen", „Selbst eingebrockt, selbst ausgegessen", „Wer die Wunden geschlagen hat, muß sie büßen", „Jeder stiehlt auf seinen Hals". Neben diesen bildhaften Worten kommen dann auch noch mehrere lehrhafte vor, wie: „Es antwortet niemand als Räuber, als wer selbst geraubt hat", „Die Schuldigen sollen es entgelten, nicht die Unschuldigen" und „Allein getan, allein gebüßt".

Während nach den zehn Geboten noch die Sünden der Väter heimgesucht werden sollen bis ins dritte und vierte Glied, — als Sinnbild der Vererbungslehre leider nur zu richtig — lernt im Laufe der fortschreitenden Gesittung der irdische Gesetzgeber menschlicher füh-

len: „Man soll den Sohn um des Vaters Schuld nicht schlagen" und „Der Sohn antwortet für den Vater nicht" oder in der dem deutschen Volke so ans Herz gewachsenen bildlichen Form: „Stiehlt mein Bruder, so hängt ein Dieb". In dem Worte: „Der Mutter Missetat schadet nicht dem unschuldigen Kinde" aber ist der allen neuzeitigen Rechten gemeinsame Grundsatz enthalten, daß an Schwangeren die Todesstrafe nicht vollzogen werden darf.

In der Rechtspflege der christlichen Völker ist die sittliche Forderung durchgedrungen, daß wegen einer Missetat nur der Schuldige, nicht auch der Unschuldige leiden solle. Aber auch hier besteht noch die Gefahr, daß der Schuldige verborgen bleibt und ein Unschuldiger für den Täter gehalten und bestraft wird. Da wir Menschen nicht allwissend sind, kann dieser bedauerliche Erfolg immer wieder vorkommen. Wie sehr aber diese Möglichkeit den Geist des Volks beschäftigt hat, und wie er seinem Rechtsgefühl widerstrebt, zeigt der Spruch: „Besser der Schuldige bleibt am Leben, als daß man einen Unschuldigen verderbe".

5. Teilnahme

Schiller legt seinem Tell die Worte in den Mund: „Der Starke ist am mächtigsten allein." Der Mensch kann in der Tat sehr viel allein vollbringen. Jedoch gibt es auch heute noch Dinge, die nur durch das Zusammenwirken mehrerer getan werden können. Ein Einzelner überfährt noch kein Weltmeer und besteigt noch nicht das Himalajagebirge. Es gibt aber für das Einzeldasein wie für das Staatsleben das Wort: „Bündnis macht den Schwachen stark." Aber auch was ein Mensch allein ausführen könnte, tut er manchmal nur, weil andere ihn beraten oder unterstützen: „Viele tun wohl, was einer allein unterließe." Das zeigt sich im Guten wie im Schlimmen, vor allem in politisch erregten Zeiten. Da entflammt einer den anderen zu Heldentaten, reißt ihn aber auch bei Zusammenrottungen zu jeglichem Verbrechen hin. Es gibt mancherlei Mittel, einen Menschen zu bestimmen oder umzustimmen. Bei dem einen bedarf es keiner großen Einwirkung. Man denke an die Worte Adams im Paradiese nach dem 1. Buch Mose 3, 12: „Das Weib, das du mir zugesellet hast, gab mir von dem Baume und ich aß." Manchmal aber wird alle Kraft zusammengenommen, um

einen Unschlüssigen oder selbst Widerstrebenden zu einer Tat zu bestimmen. In Schillers Taucher verwertet der frevelnde König selbst die abmahnende Bitte seiner Tochter dazu, den unbesonnenen Jüngling nochmals zum Sprunge in die Meerestiefen zu verlocken:

„Und schaffst du den Becher mir wieder zur Stell',
So sollst du der trefflichste Ritter mir sein,
Und sollst sie als Ehgemahl heut noch umarmen."

Daß der Anstifter einer Missetat ebenfalls strafbar sei, darüber war man sich schon in uralter Zeit einig; man schwankte nur, ob er in der gleichen Weise oder leichter bestraft werden solle als der Täter. Dieser Zweifel wurde im Sinne gleicher Behandlung entschieden. Das war schon zu der Zeit geschehen, als sich die Sprichwörter bildeten: „Wer ein Ding heißt, ist so schuldig, wie wer es tut" und „Wer Schaden stiftet und Schaden tut —, sind beide gleich gut" (d. h. böse). Ganz in Übereinstimmung mit § 48 Absatz 2 des deutschen StrGB. sagt ein weiteres Sprichwort: „Rater und Täter haben gleiche Pein."

Eine zweite Form der Teilnahme ist die Mittäterschaft. Die beiden bis jetzt besprochenen Arten der Teilnahme kommen vor in Schillers Ballade: „Der Gang nach dem Eisenhammer." Der Graf von Zabern ist Anstifter des an dem arglistigen Jäger Robert versehentlich verübten Mordes, die zwei den Schmelzofen bedienenden Knechte aber sind Mittäter. (Man darf sich auch nicht zu der Meinung verleiten lassen, es liege wohl überhaupt keine vorsätzliche Tat vor, weil der Anschlag nicht dem Leben Roberts, sondern Fridolins gegolten hatte; Robert sei also nur versehentlich getötet worden. Es lägen daher eigentlich zwei verschiedene Taten hervor: zunächst ein Mordversuch gegen Fridolin, der durch das Dazwischentreten des zweiten Ereignisses nicht zur Ausführung kam. Und ferner die Tötung des Jägers Robert, die aber nur infolge einer Verwechslung geschah und daher nicht als vorsätzlich angesehen werden könne. Diese Zergliederung ist zwar richtig gedacht, wird aber von der Rechtsordnung abgelehnt, weil vor dem Gesetz ein Menschenleben so hoch bewertet wird, wie das andere. Auch der Jäger Robert ist vorsätzlich in den Feuerofen geworfen und so getötet worden. Fahrlässige Tötungen pflegen anders zu verlaufen; ein Hauptfall ist der, wenn man ein Gewehr, das man für ungeladen hält, auf einen anderen anlegt und abdrückt.

Das deutsche Volk nimmt seine Sprichwörter über Mittäterschaft mit Vorliebe vom Diebstahl her: „Wer die Leiter hält, ist so schuldig wie der Dieb", „Der den Sack aufhebt, ist so schuldig, wie der hineinschüttet", „Mitgegangen, mitgefangen, mitgehangen". In der neueren Wissenschaft hat sich aus der Mittäterschaft eine leichtere Art der Teilnahme herausgeschält: die Beihilfe. Der Gehilfe leistet „dem Täter zur Begehung eines Verbrechens oder Vergehens durch Rat oder Tat wissentlich Hilfe" (§ 49 StrGB). Leiht jemand einem ortsbekannten Wilderer, dessen Flinte gerade beim Büchsenmacher ist, sein eigenes Gewehr, bis das andere wieder instand gesetzt ist, so ist er kein Mittäter, weil er nicht mit auf die Jagd geht, von den einzelnen Gängen und ihrem Erfolg vielleicht überhaupt nichts weiß; wohl aber ist er ein Gehilfe des Wilderers, weil er diesem sein Gewehr zum Wildern zur Verfügung gestellt hat. So feine Unterscheidungen wie die zwischen Mittäter und Gehilfen konnte man jedoch in früherer Zeit noch nicht machen. Und ebensowenig wußte man etwas von der sogenannten subjektiven und objektiven Lehre der Teilnahme. Nach der vom deutschen Reichsgericht vertretenen subjektiven ist Mittäter, wer die Straftat als eigene will und irgendeine Tätigkeit bei der Begehung entfaltet, gleichgültig welche. Planen mehrere einen Einbruchsdiebstahl und hat einer „Schmiere zu stehen", also zu wachen, damit die anderen bei der Ausführung von niemand überrascht werden, so wird er nach der auf den inneren Willen sehenden Lehre als Mittäter behandelt. Die andere Lehre verlangt eine Ausführungshandlung, d. h. eine Handlung, die wenigstens ein Tatbestandsmerkmal des vom Gesetz gegebenen Rechtsbegriffs der strafbaren Handlung erfüllt. Sie sieht daher den Wachestehenden immer bloß als Gehilfen an, da nach dem Gesetz der Diebstahl darin besteht, daß man einem anderen eine fremde bewegliche Sache in der Absicht wegnimmt, sie sich rechtswidrig zuzueignen (§ 242 StrGB.). Wachestehen ist aber kein Tatbestandsmerkmal des gesetzlichen Begriffs vom Diebstahl. Sprichwörter kümmern sich natürlich nicht um Schulmeinungen. Immerhin könnte man aus ihnen die Lehre des Reichsgerichts herauslesen, daß das bloße Mitgehen und das bloße Sackaufheben dem Diebstahl gleichgestellt wird.

Soviel Streit sonst heute in der Lehre über Teilnahme herrscht, so besteht doch darin Einigkeit, daß von einer Teilnahme nur gesprochen werden kann, wenn mitgewirkt wird zu der strafbaren Handlung.

Alles Tun aber, das erst *nachher* einsetzt, um den Täter der Bestrafung zu entziehen, oder um ihm die Vorteile der Tat zu sichern, zählt nicht mehr als Teilnahme, sondern wird Begünstigung genannt (§ 256 StrGB.) und als ein Vergehen für sich angesehen. Sucht der Begünstigte dabei seinen eigenen Vorteil, kauft er insbesondere dem Dieb die gestohlenen Sachen ab oder beteiligt er sich etwa als Althändler auf andere Weise an deren Absatz, dann wird er zum Hehler. Mit diesem befaßt sich das Sprichwort eingehend. Die Hehlerei muß von jeher eine große Rolle in der Verbrecherwelt gespielt haben: „Ohne Hehler kein Stehler", „Der Hehler macht den Stehler", „Der Hehler ist schlimmer als der Stehler". Wie sich die Rechtspflege zu beiden stellen soll, wird schließlich zusammengefaßt in dem Worte: „Hehler und Stehler gehören an *einen* Galgen."

6. Strafe im allgemeinen. Buße

Bevor die öffentliche Gewalt so erstarkt war, daß sie in der Volksgemeinde für sich allein das Recht und die Pflicht zur Bestrafung des Schuldigen in Anspruch nahm, rächte sich der Verletzte und seine Sippe selbst an dem Täter. Und zwar verfuhr die ganze Menschheit nach den Grundsätzen der alten Juden: „Auge um Auge, Zahn um Zahn, Hand um Hand, Fuß um Fuß, Brand um Brand, Wunde um Wunde, Beule um Beule" 2. Mose 21, 24 und 25. Der deutsche Spruch: „Blut schreit nach Blut" gab vielleicht Anlaß zum Ausdruck „Blutrache". Diese wird noch heute nicht nur bei den wilden Völkern fremder Erdteile geübt, sondern auch in Corsika und in den Schwarzen Bergen. Kaum etwas anderes war das namentlich bei den Rittern beliebte Fehderecht des Mittelalters, wenn es auch in gewisse rechtliche Formen gegossen war. Diesem Zustande hafteten vor allem zwei Mängel an:

1. Der Verletzte und seine Sippe warfen sich selbst zum Richter auf und ließen sich dabei mehr von ihrer Leidenschaft und Machtstellung als von der Liebe zur Gerechtigkeit leiten. Das Übermaß der Rache rief dann wieder die Verwandten des Ermordeten auf den Plan, denn: „*Ein* Eisen macht das andere scharf." Für den Frieden des Volks und das allgemeine Volkswohl war es daher schon ein ungeheuerer Fortschritt, daß man nach und nach dahin gelangte, die

Blut- und andere Rache durch eine dem Verletzten zu zahlende Buße abzuwenden. Als Buße wurden die Gegenstände hingegeben, die je nach der Stufe der Verkehrsentwicklung als Geld dienten, also Vieh, Münzen usw. Während nun die Blutrache die Leidenschaften aller Beteiligten fort und fort aufpeitschte und das Blut der Tapfersten bis zur Vernichtung ganzer Geschlechter ohne Nutzen für das Volksganze dahinfloß, söhnten sich die Erben des Ermordeten nach erlegter Buße mit dem Täter aus[1].

Auf diese Weise ward der Zustand, daß sich der Verletzte selbst das Richteramt anmaßte, innerhalb des Staatsverbands schon auf frühen Entwicklungsstufen überwunden. Im Verhältnis der Staaten untereinander dagegen wirft sich heute noch gerne ein Volk zum Richter des anderen auf. So hat nach Abschluß des Weltkrieges der Feindbund in dem Wahne, nicht bloß Geschichte machen, sondern auch schreiben zu können, im Machtspruch von Versailles vorzugehen versucht. Er hat das in seiner Qual verstummte Deutschland gezwungen, in dem berüchtigten Art. 231 das Schuldbekenntnis abzulegen, den Krieg begonnen zu haben und für sein Unheil verantwortlich zu sein. Weiter verlangte der Feindbund, Deutschland solle ihm seine Heerführer ausliefern, um sie vor seine Kriegsgerichte zu stellen. Das sollte natürlich nicht mit den eigenen Heerführern

[1] Die überlieferte Aussöhnungsformel ist von solchem dichterischen Schwung und sprachlicher Schönheit, daß sie hier einen Platz finden mag: die bisherigen Feinde „sollen teilen miteinander Messer und Braten und alle Dinge wie Freund und nicht wie Feind; wer das bricht, soll landflüchtig und vertrieben sein, soweit Menschen landflüchtig sein können, soweit Christenleute in die Kirche gehen und Heidenleute in ihrem Tempel opfern, Feuer brennt, Erde grünt, Kind nach der Mutter schreit und Mutter Kind gebiert, Holz Feuer nährt, Schiff schreitet, Schild blinkt, Sonne den Schnee schmilzt, Feder fliegt, Föhre wächst, Habicht fliegt den langen Frühlingstag und der Wind steht unter seinen beiden Flügeln, Himmel sich wölbt, Welt bebaut ist, Winde brausen, Wasser zur See strömt und die Männer Korn säen; ihm sollen versagt sein Kirchen und Gotteshäuser, guter Leute Gemeinschaft und jederlei Wohnung, die Hölle ausgenommen; aber die Sühne soll bestehen für den Gefriedeten und seine Erben, Geborene und Ungeborene, Erzeugte und Unerzeugte, Genannte und Ungenannte, solange die Erde ist und Menschen leben; und wo beide Teile sich treffen zu Wasser und zu Land, zu Schiff oder auf der Klippe, zu Meer oder auf Pferdesrücken, sollen sie teilen miteinander Ruder und Schöpfe, Grund oder Diele, wo es nottut, und freundlich untereinander sein wie Vater gegen Sohn und Sohn gegen Vater in allen Gelegenheiten".

geschehen. Die Führer der Staaten, die schließlich Sieger bleiben, haben ja von jeher keine Verstöße gegen die Sitten und Gebräuche des Kriegs begangen!

2. Der andere Fehler der Blutrache aber war, daß der Schwache dem Starken gegenüber nicht zu seinem Rechte kommen konnte. Das galt selbst dann manchmal noch, als der Staat die Strafgewalt grundsätzlich für sich in Anspruch nahm; denn auch er konnte und kann nicht immer gegen mächtige Verbrecher durchdringen. In dem bitteren Worte: „Die kleinen Diebe hängt man, die großen läßt man laufen“, oder wie der schwäbische Volksmund noch treffender sagt: „vor den großen zieht man den Hut ab“ steckt viel Wahrheit. Ein solcher viel gescholtener und viel bewunderter Dieb ist z. B. Napoleon I. Denn er hat nicht bloß, was das Streben vieler großer Männer gewesen ist, zahlreiche Länder seinem Heimatstaate einverleibt, sondern hat auch nicht vor dem Privateigentum Halt gemacht. Die Kunstwerke und Schätze aller Welt ließ er wegnehmen und nach Paris schaffen. Dagegen konnten natürlich die Strafbehörden keines besiegten Landes ankämpfen.

Aber nicht nur die Staatshäupter entziehen sich so der Strafgewalt, sie heben ihre schützende Hand auch über ihre Handlanger und Schergen. Das hat Deutschland in der Nachkriegszeit erleben müssen. Wer von einem Zaune auch nur eine Latte abreißt, wird wegen Sachbeschädigung gestraft. Wer aber nach der Besetzung des linken Rheinufers im Machtbereich der Franzosen dieses Gebiet mit Gewalt vom Deutschen Reiche loszureißen versuchte, gegen den waren die deutschen Strafbehörden machtlos. Ihn schützte das französische Schwert, das keine Bestrafung wegen Landesverrats zuließ.

So kann ein deutscher Richter wohl darüber knirschen, daß es Sprichwörter von den großen und kleinen Dieben gibt; aber es braucht ihm deshalb noch nicht die Schamröte ins Gesicht zu steigen. Denn keineswegs kann darob ein sittlicher Vorwurf gegen die Richter erhoben werden.

Das Wort von den kleinen und großen Dieben hat freilich in der Rechtspflege, auch wo sie nicht machtlos ist gegenüber solchen Hemmnissen wie den eben erwähnten, noch einen anderen üblen Beigeschmack, den man in neuerer Zeit oft Klassenjustiz nennt. Die Sache ist viel älter als das Wort, und sie war schon da, lange ehe man vom 3. und vom 4. Stand gesprochen hat. Als man zuerst den Kampf

gegen die eigene Rache aufnahm, konnte man auf einen Erfolg nur rechnen, wenn man dem Verletzten für die Befriedigung des Rachedurstes dadurch einen Ersatz bot, daß ihm der Täter eine Vermögensentschädigung zahlte, die sogenannte Buße. Fiel sie reichlich aus, so gab sich der Verletzte nicht bloß dann zufrieden, wenn ihm ein Schaden am Vermögen zugefügt war, sondern auch bei einem Angriff auf Leib und Leben. Als sich diese neue Sitte etwas eingebürgert hatte, hieß es wohl: „Bezahlt man den Mann, so sind die Wunden quitt“, „Man mag niemand den Hals verfangen, so lange er bezahlen kann“ und gar: „Man henkt keinen Dieb, der sich vom Galgen kaufen kann.“ Der Vermögliche mußte daher einen Diebstahl nicht mehr mit dem Leben büßen. Aber die Armen! Ja man kann mit Gretchen sagen: „Ach, wir Armen!“ Für sie hieß es in jener Zeit, wo man noch nicht die höhnischen Begriffe Bourgeois und Mastbürger kannte: „Wer nichts hat, muß mit der Haut bezahlen“, „Kann einer nicht bessern mit Geld, so soll er bessern mit dem Hals“, oder schön in Reime gebracht: „Ein kleiner Dieb an den Galgen muß, — vom großen nimmt man Pfennigbuß’.“ —

Von alters her herrscht lebhafter Streit über Grund und Zweck der Strafe, namentlich ob sie vornehmlich *Vergeltung* für eine begangene Tat sein oder ob sie den Täter und andere, die ebenfalls zur Begehung einer Straftat neigen, davon abschrecken solle. Über den Vergeltungsgedanken, der auch dem aus dem Alltagsleben entnommenen Sprichwort: „Wie du grüßt, so dankt man dir“ zugrunde liegt, wird im nächsten Abschnitt ausführlicher gehandelt. Die Lehre von der *Abschreckung* wirkte wohl mit bei der Schöpfung des Wortes: „Gelindigkeit der Strafe gibt oft Ursache zur Tat.“ Umgekehrt weiß man, daß eine verdiente empfindliche Strafe, die an *einem* vollzogen wird, auf manchen Schwachen und Schwankenden einen heilsamen Einfluß ausübt. Dieser Erfahrung gibt der Satz Ausdruck: „Wer *einen* straft, straft hundert“ sowie „Wo keine Furcht, da ist keine Zucht“. Der erst der neueren Zeit angehörige Gedanke, daß die Strafe den Täter bessern solle, scheint dem deutschen Sprichwort fremd zu sein, sofern man ihn nicht finden will in den Worten: „Bekannt ist halb gebüßt“ und „Abbitte ist die beste Buße.“

Der Unterschied zwischen der bilderreichen deutschen Rechtssprache und der armselig nüchternen der Römer zeigt sich unter anderem in dem Worte: „Man soll niemand mit doppelter Rute züchtigen“

gegenüber dem auch heute noch in der Gelehrtensprache üblichen: „Ne bis in idem" das ist „nicht zweimal wegen desselben". Was diese Worte bedeuten sollen, wird am besten an einem Beispiel klar. Wer einem Brautpaare zuruft: „Ihr Lumpenpack" beschimpft mit dem einen Ausdrucke beide Verlobte, und jeder von ihnen kann nach seinem Belieben Beleidigungsklage erheben. Hat dies etwa der Bräutigam getan, so kann sich die Braut noch der Klage anschließen; sie wird dadurch zum Mitkläger. Ist aber der Täter auf die Klage des einen verurteilt, so kann nicht der andere nachträglich auch noch kommen und eine zweite Verurteilung erwirken. Denn „niemand soll zwei Strafen zahlen von einer Sache" oder noch bildhafter: „Man henkt keinen zweimal."

7. Vergeltung

Die Rache ist unbändig und blind. Sie kennt wenigstens in den ersten Stufen der Entwicklung kein Maß und kein Verhältnis und führt nur selten zum Frieden. Daher findet vom römischen Rechte her der Gedanke Eingang, daß die Gegenwirkung gegen eine Tat nicht weiter gehen dürfe, als die Wirkungen der Tat selbst: „Wie du mir, so ich dir", „Bahre gegen Bahre", „Aug um Aug", „Zahn um Zahn", „Haupt um Haupt, Aug um Aug, gleiches Glied für gleiches Glied", „Mord muß man mit Mord bessern (oder kühlen)", „Wer des Menschen Blut vergießt, des Blut soll wieder vergossen werden", „Das Haupt für den Toten, die Hand für den Verwundeten" und in lehrhafte Form gekleidet: „Wie ein Mann den andern lähmt, so soll man ihm hinwieder tun".

Dabei sieht man in den Kindheitsstufen des Rechts lediglich auf den äußeren Erfolg, und die Vergeltung soll möglichst genau in derselben Weise geschehen. Das kann unter Umständen für den unschuldigen Täter zum Heil ausschlagen, wie die Fortsetzung der Geschichte des vom Bau herabgefallenen Dachdeckers (vergleiche S. 131) ergibt. Der Richter mußte den Handwerksmann, der selbst auf wunderbare Weise vom Tode errettet worden war, zum Tode verurteilen, wußte aber als weiser und wohlwollender Mann den Sieg über ein unvollkommenes Gesetz und über die Rachsucht der Angehörigen davon zu tragen. Er erklärte nämlich, die Todesstrafe müsse am Dachdecker genau so vollzogen werden, wie er den Vater des Anklägers getötet habe. An einem von ihm bestimmten Tage solle daher der Dachdecker unten an dem Unglückshause vorbeigehen, der Sohn aber sollte sich als Rächer des Vaters vom Dache herunterfallen lassen und den Dachdecker in der gleichen Weise töten, wie sein Vater ums Leben gekommen war. Die Gefahr dieser Aufgabe wirkte auf den Rächer aber doch stärker als sein Verlangen nach Bestrafung des Täters war, und er blieb an dem zur Vollziehung der Todesstrafe festgesetzten Tage aus.

Die buchstäbliche Wiedervergeltung war eigentlich nur möglich bei Verletzungen von Leben und Gesundheit. Man war aber bestrebt, auch in anderen Fällen den Grundgedanken durch eine unverkennbare Beziehung der Strafe auf die Art des Verbrechens zur Geltung zu bringen. „Wodurch man sündigt, dadurch wird man gebüßt." An dem Glied, das gesündigt hatte, wird auch die Strafe vollzogen: Die meineidige Hand wird abgehauen (obwohl ja das Emporhalten der Hand beim Schwure im Grunde nur etwas Nebensächliches ist), die verräterische Zunge abgerissen, das lügenhafte Maul geschlagen; dem Mordbrenner der Feuertod zuerkannt. Ebenso wer eine Frau vergewaltigt, verwirkt das Schamglied und „wo irgendein Mann bei eines anderen Ehemanns Weib betroffen wird, der soll (zur Strafe für beide) von dem Weib bis zum Pranger beim Schamglied gezogen werden".

Das Bestreben, jede böse Tat mit entsprechenden schlimmen Folgen zu ahnden, ist dann der Angelpunkt der Strafrechtspflege geworden. Ja, man versuchte anscheinend den Grundsatz sogar auf Betrügereien anzuwenden, wie man aus dem Worte schließen kann: „Wer den anderen betrügt, der soll wieder betrogen sein." Auf den Kaufmann aber, der falsches Maß oder Gewicht verwendet, ist wohl das sich offensichtlich an die Schrift anlehnende Wort gemünzt: „Mit dem Maße, so man ausmißt, wird einem wieder eingemessen."

Der Vergeltungsgedanke findet sich verzerrt selbst in den Scheinbußen, die man den Recht- und Ehrlosen zubilligte. Spielleute und allen denen, die Gut für Ehre nehmen und sich zu eigen gegeben haben, gibt man eines Mannes Schatten in der Sonne, d. h. „Wer ihnen Leides tut, das man bessern soll, der soll zu einer Wand stehen, daß die Sonne auf ihn scheint; und dann soll der Spielmann oder der, so sich zu eigen gegeben, hinzutreten und soll dem Schatten

an der Wand an den Hals schlagen und mit dieser Rache soll ihm gebessert sein". Aber diese Scheinbuße ist die neuere Zeit hinweggeschritten. Der Beruf des Schauspielers hat schon lange nichts Entehrendes mehr. Aber auch die Frauen, die „Gut für Ehre nehmen", genießen grundsätzlich den gleichen Strafschutz wie ihre Mitmenschen.

8. Strafen an Leib und Leben

Bei jüngeren Völkern legt man auf das Leben des Einzelnen wenig Wert. Wie der Krieg und die Seuche viele Menschen verschlingen, so ist man auch mit der Todesstrafe schnell bei der Hand. Und vielseitig ist auch ihr Vollzug. Während im heutigen Europa die Todesstrafe meist durch Enthaupten, bei den Soldaten aber durch Erschießen vollzogen wird, machte man in früheren Zeiten einen Unterschied zwischen den Geschlechtern: „Weiber darf man nicht hängen"; „Der Mann kommt an den Galgen, die Frau unter den Stein", d. h. sie wurde gesteinigt, oder „Die Männer an den Galgen, die Weiber in die Grube"; darunter verstand man das Lebendigbegraben. Um die Strafe zu verschärfen, wurden wohl auch Wölfe oder Hunde neben den Missetätern aufgehängt. Daß aber auch auf andere Art und Weise Todesstrafen vollzogen wurden, zeigt die eiserne Jungfrau auf dem Nürnberger Schlosse. In ihrem Innern waren Messer- und Dolchspitzen angebracht; in sie wurde der dem Tode Geweihte gestoßen und beim Zuschlagen zerfleischt. Diese Art der Hinrichtung scheint nicht selten gewesen zu sein. Dafür spricht wenigstens das Wort: „Es ist nicht allweg gut, die Jungfrau zu küssen."

Auf vielen Vergehen stand die Todesstrafe angedroht, wo man sich heute mit Gefängnis oder Zuchthaus begnügt: „Den Dieb soll man henken und die Hur ertränken." Mit der echt mittelalterlichen Strafe des Ertränkens strafte man aber nicht den bloßen außerehelichen Geschlechtsverkehr, oder auch nur den gewerbsmäßigen, sondern den Kindsmord. Das Stehlen war auch in der guten alten Zeit offenbar recht an der Tagesordnung; darüber bestehen viele Sprichwörter: „Die Fische sind nirgends besser als im Wasser, der Dieb als am Galgen und der Mönch als im Kloster", „Es gefällt dem Dieb kein Baum, daran der hängen soll", „Ist der Dieb gefangen, so soll man ihn hangen".

Echter deutscher Humor liegt endlich in den Sprichwörtern: „Wenn der Fuchs zeitig ist, so trägt er seinen Balg selbst zum Kürschner" und „Man henket keinen, man hat ihn denn". Übrigens weist wohl das letzte Sprichwort auf die Unzweckmäßigkeit des da und dort üblichen Verfahrens hin, die Strafe des flüchtig gegangenen Verbrechers an seinem Bild dadurch zu vollziehen, daß man es am Galgen aufhängt. Nicht ins Sprichwort übernommen ist die Strafe des Verbrennens, die an Zauberern, Giftmischern und Ketzern vollzogen wurde. Diese Strafe soll man bei Ketzern gewählt haben, um nicht gegen das Wort zu verstoßen: „Die Kirche dürstet nicht nach Blut." Auf dem Scheiterhaufen sieht man in der Tat kein Blut fließen.

9. Begnadigung

Was in der Welt geschehen ist, kann nicht ungeschehen gemacht werden: „Geschehenes hat keine Umkehr"; „Niemand kann seine vollbrachte Tat vernichten". Wohl aber können die Rechtsfolgen eines Verbrechens beseitigt werden dadurch, daß der Staat auf seinen Strafanspruch verzichtet. Das kann geschehen schon vor der Aburteilung und wird dann Niederschlagung genannt. So sollen nach aufgeregten Zeiten zum Zweck allgemeiner Beruhigung manchmal ganze Gruppen von Vergehen nicht verfolgt werden. Wird diese Nachsicht zu häufig und zu weitgehend angewendet, so kann es eine bedenkliche Maßregel sein, die zu neuen Verbrechen ermuntert und das Rechtsgefühl der Verletzten wie der Verletzer schwer zu erschüttern vermag. Denn „Wenn Gnade Mörder schont, verübt sie Mord", Romeo und Julie 3. Aufzug, 1. Szene. Der Staat kann natürlich nur auf die Ausübung der ihm zustehenden Strafbefugnis verzichten. Soweit durch Raub, Plünderung, Brandstiftung oder eine andere Straftat das Vermögen oder die Erwerbsfähigkeit einzelner Bürger beeinträchtigt worden ist, können diese ihre bürgerlich-rechtlichen Ansprüche aus unerlaubter Handlung gegen die Täter geltend machen.

Von Begnadigung im engeren Sinne spricht man, wenn jemand wegen einer Straftat rechtskräftig verurteilt worden ist und die Strafe ganz oder teilweise erlassen werden soll. Die Gründe dafür können darin liegen, daß gegenüber den starren Verallgemeinerungen des

Rechts die Billigkeit zur Geltung gebracht werden soll. So ist nach dem deutschen Strafgesetzbuch von 1871 auf die Kindstötung eine Mindeststrafe von 2 Jahren Gefängnis angedroht. Diese Strafe ist daher auch auszusprechen gegen eine uneheliche Mutter, die im besetzten Gebiete von einem farbigen Franzosen vergewaltigt und geschwängert worden war, falls sie ihr Kind in oder gleich nach der Geburt getötet hat. Eine solche Strafe unter solchen Umständen ist jedoch für das allgemeine Rechtsgefühl unerträglich und muß durch Gnadenerweisung berichtigt werden. Daher heißt es seit alters: „Gnade steht beim Rechte“ und „Gnade geht vor dem Rechte“. Das Begnadigungsrecht ist aber mit Vorsicht und Zurückhaltung auszuüben. Sonst begeht wohl mancher ein Verbrechen in der Erwartung, nicht entdeckt oder doch seinerzeit begnadigt zu werden. Hier Gnade zu üben, ist vom Standpunkt der Volkserziehung und Volkssittlichkeit verfehlt. Der Volksseele entspricht viel besser der Satz: „Wer auf Gnade sündigt, wird mit Zorn gelohnt“ und „Wer auf Gnade sündigt, wird mit Ungnade abgedankt“.

Das Begnadigungsrecht steht dem Staatshaupt zu, daher hieß es in alter Zeit: „Der Kaiser hat Macht, Friede und Gnade zu tun.“

Das Schönste, was je über Gnade gesagt worden ist, sind die Worte aus dem Kaufmann von Venedig, 4. Akt, 1. Auftritt:

„Die Art der Gnade weiß von keinem Zwang,
Sie träufelt wie des Himmels milder Regen
Zur Erde unter ihr, zwiefach gesegnet:
Sie segnet den, der gibt, und den, der nimmt;
Sie thronet in dem Herzen der Monarchen,
Ist Ehrenschmuck der Gottheit selbst,
Und irdische Macht kommt göttlicher am nächsten,
Wenn Gnade bei dem Rechte steht.“

II. Einzelne Verbrechen und Vergehen

1. Tötung und Körperverletzung. Vergehen gegen die Sittlichkeit

In der Gegenwart unterscheidet man zwei Arten von vorsätzlicher Tötung, den Mord und den Totschlag, und findet das Unterscheidungsmerkmal darin, ob eine Tat mit voller Überlegung begangen worden ist oder in einer heftigen Gemütserregung, z. B. im Jähzorn.

Das alte Recht kannte ganz andere Unterscheidungsmerkmale. Wo mit dem blanken Schwerte in der Hand oder in offenem Kampfe einer sein Leben ließ, da war von keinem Mord die Rede: „Unter Feinden wird kein Mord begangen.“ Auch hier schon zeigt sich eine beim Diebstahl wiederkehrende Charaktereigenschaft des Germanen: was er offen tut und wofür er eintritt, wird von Sitte und Recht nicht so verworfen wie die heimliche und abgeleugnete Tat. Wer nicht etwa den Leichnam des Erschlagenen zu verheimlichen suchte und wer sich selbst sofort beim Gerichte stellte, um das Geschehene zu verkünden, hat keinen Mord begangen. Die heimliche Tat dagegen und die Benutzung des leicht zu verbergenden Dolchs macht die Tötung zum Morde: „Ein Messer ist ein dieblich Mord“. Als heimlich und heimtückisch galt auch das Werfen mit Steinen. „Ein Steinwurf wiegt einen Totschlag“ schon dann, wenn der Täter die Tötungsabsicht hatte. Ob der Erfolg eintrat oder ausblieb, stand ja nicht mehr in seiner Macht: „Wenn der Wurf aus der Hand, so ist er in des Teufels Gewalt.“

Durch das Gesetz war ursprünglich gegen Tötung nicht alles geschützt, was Menschenantlitz trägt. So waren vom Schutz die Sklaven ausgenommen. Aber auch die neugeborenen Kinder durfte der Vater straflos aussetzen, wie es jetzt noch bei manchen Naturvölkern ist. Dagegen kämpfte die Kirche an, entsprechend der Stellung Jesu zu den Kindern und zu den Geringsten seiner Brüder. Aber der Erfolg trat nicht so rasch ein, und es bedeutete schon eine vorgeschrittene Stufe der Entwicklung, als sich das Wort bilden konnte: „Ein Mensch ist so gut wie der andere.“ Die Kirche nahm ferner den Kampf mit der Raufluft der alten Deutschen auf und bändigte im Laufe der Jahrhunderte die Freude der Germanen am Waffenhandwerk. Die Früchte dieses Kampfes sind Sprichwörter wie: „Wer das Schwert zieht, soll durch das Schwert fallen“, eine Anlehnung an die Worte Jesu im Garten Gethsemane (Ev. Math. 26, 52) und „Wer die Hand in Blut wäscht, muß sie in Tränen baden.“ Ja selbst gegen den Angriff sollte man sich nicht wehren. Wohl heißt es: „Schlagen ist kein Recht.“ Dennoch aber lehrte die Kirche: „Besser ehrlich fliehen denn schändlich fechten.“ Es mag den Deutschen, die die Feigheit besonders tief verachteten, schwer angekommen sein, nach diesem Worte zu handeln. Ein solches dem natürlichen Menschen widerstrebendes Verhalten mutet man heute niemand mehr zu; viel-

mehr darf, wie früher ausgeführt wurde, jedermann Notwehr üben (vgl. S. 134). Denn „Das Recht braucht dem Unrecht nicht zu weichen".

Angriffe gegen Frauen erfolgten seit alters weniger, um sie zu töten oder zu verletzen als vielmehr unter dem Drang des Geschlechtstriebs. Wer eine Frau mit Gewalt geschlechtlich gebrauchte, verfiel wegen „Notnunft" der Strafe des Schwertes; heute ist die Notzucht mit schwerer Zuchthausstrafe bedroht. Aber auch wenn keine Gewalt angewendet wurde, schien es ein schweres Unrecht, die jungfräuliche oder Frauenehre ehrbarer Frauen zu kränken: „Eine Jungfrau schwächen — ist wie eine Kirche erbrechen" und „Wer eine Jungfrau schändet, stirbt keines guten Todes".

Die Entführung eines Mädchens wurde von seinen Angehörigen wohl stets als eine besonders freche Tat angesehen. Jedoch wußte man nicht immer, ob sie mit oder gegen den Willen der Entführten geschehen war. Um den Mann zu überführen, wurden daher die Verwandten der Vergewaltigten auf die eine Seite des Gerichtsplatzes, der Angeklagte auf die andere, die Frau selbst in die Mitte gestellt. In ihrer Hand lag nun die Entscheidung über Leben und Tod des Entführers. Ging sie zu ihren Verwandten, so war er schuldig, ging sie zu ihm, dann war er ledig und frei. Denn nicht nur „der Mann wird Vater und Mutter verlassen und dem Weibe anhangen". Die Art, wie beim Gericht festgestellt werden sollte, ob ein Mann ein Mädchen mit oder gegen ihren Willen entführt habe, hat wohl auch Kleist im ersten Akte seines Kätchens von Heilbronn vorgeschwebt, wo im zweiten Auftritt Kätchen mit verbundenen Augen vor das Femgericht vorgeführt wird und sich nach Abnahme der Binde sofort neben den Angeklagten Grafen vom Strahl stellt. Die Ansichten darüber, wie weit Frauen gegen Zudringlichkeiten der Männer zu schützen seien, haben im Laufe der Jahrhunderte vielfach gewechselt. Aber auch in Zeiten größerer Strenge ließ man es wenigstens dabei: „Einen Kuß in Ehren kann niemand wehren."

2. Vergehen gegen die Ehre

Im deutschen Mittelalter sah man sehr auf seinen guten Ruf: „Ein guter Name ist besser als Gold und Silber." Den unheilvollen Einfluß der Ohrenbläserei kennzeichnet das Wort: „Nachsprach' und

Hinterrede hat schon großen Schaden gemacht." Freilich die Folgerung: „Böse Zungen soll man mit dem Tode stillen" konnte nur von einem sehr Mächtigen gezogen werden. Öfter wird es auch hier gegangen sein, wie es Schiller im Siegesfest von dem Schandmaul Thersites sagt: „Patroklus liegt begraben und Thersites kommt zurück."

Allerdings sind die Menschen je nach ihrer Naturanlage mehr oder weniger empfindlich gegen Beleidigungen. Geringschätzung spricht aus dem Sätzchen: „Wörter schlagen einem kein Loch in den Kopf" oder gar: „Ein Wort ist ein Wind", während es bei anderen heißt: „Wörter — sind auch Schwerter." So machte dem reizbaren französischen Dichter Racine nach seinem eigenen Geständnis die geringste Kritik mehr Kummer, als ihm aller Beifall Freude bereitet hatte.

Die Vorwürfe, die der Mannesehre vor allem zu nahe treten, faßte das Wort zusammen: „Unduldbar sind dem Manne 4 Worte: Mörder, Dieb, Räuber und Mordbrenner." Die schlimmsten Vorwürfe aber, die gegen eine Frau erhoben werden können, betreffen ihre sittliche Reinheit: „Heißt das Weib Hure, das ist ein unduldbares Wort." Freilich war auch bei der sogenannten üblen Nachrede wie sonst in den neueren Rechten der Nachweis der Wahrheit zulässig: „Wer einen schilt, der es verdient hat, bleibt ungestraft." Einer Ehefrau aber durfte niemand einen solchen Vorwurf machen, solange nicht der eigene Mann diese Schmach von seinem Weibe gelten ließ: „Kein Eheweib heißt Hure, außer ihr Mann beschuldigt sie." Das war eine Folge der weiblichen Unselbständigkeit, die heute überwunden ist. Die vom Rechte als frei anerkannte Frau muß sich einen berechtigten sittlichen Vorwurf gefallen lassen, auch wenn ihr Mann ihre Verfehlungen billigt, und sie kann sich dagegen wehren, auch wenn ihr Mann selbst sie schilt.

Hat jemand einem anderen Übles nachgeredet, so kann sich der Beleidiger nicht dadurch herausreden, er habe nur gesagt, was er von dem und jenem gehört habe. Denn es wird gar vieles geschwätzt und „das Böse glaubt und denkt man gern". Aber „Es ist besser, zehn bei Ehren zu halten, als einen zum Schelmen zu machen" und „Vom Hörensagen — wird mancher aufs Maul geschlagen". Wer daher über einen anderen Übles redet, das nicht der Wahrheit entspricht, wird nicht dadurch straffrei, daß er seinen Gewährsmann

nennt: „Währmann haben hilft nicht.“ Man muß vielmehr selbst prüfen, ob etwas wahr ist, bevor man es weitersagt. Ist es aber wahr, dann darf es auch regelmäßig gesagt werden: „Keiner hat Klage gegen wahre Rüge“ und „Was einer tun darf, dürfen andere sagen.“

Beleidigungen können durch Wort und Schrift zugefügt werden, aber auch durch Tätlichkeiten; auf solche setzen die neueren Strafgesetze eine erhöhte Strafe und von ihnen sagt das Sprichwort: „Es tut einem ehrlichen Mann eine Wunde nicht so weh, wie eine Ohrfeige.“ Ja, ein anderes Wort zeigt noch schärfer, wie empfindlich man gegen eine derartige Kränkung sein kann: „Auf eine Maulschelle gehört ein Dolch.“

3. Vergehen gegen das Eigentum

Unter den Eigentumsvergehen stehen voran Diebstahl und Raub. Nach unseren heutigen Anschauungen und nach den Strafen, die die neueren Gesetze auf diese Vergehen androhen, ist Raub schwerer als Diebstahl. Anders nach altem deutschen Rechte. Offene Gewalt stand nach den Anschauungen eines tapferen Naturvolks einem Mann besser an als Heimlichkeit. Daher hieß es: „Stehlen ist viel gemeiner und größer denn Raub“, „Reiten und Rauben ist keine Schande, das tun die Besten im Lande“ und ferner: „Des Nachts ist es Diebstahl, des Tags ist es Raub.“ Während jetzt die Wegnahme einer fremden Sache dadurch als besonders erschwert gilt und zum Raube wird, daß dabei Gewalt gegen einen Nebenmenschen angewendet wurde, schien gewaltsames Tun früher kein Straferschwerungsgrund und weniger schlimm als die Heimlichkeit der Ausführung. Dem Räuber gönnte man das ehrliche Schwert, den Dieb tat man mit dem verachteten Strick ab. „Dem Dieb teilt man den Galgen zu“, „Wer sich des Stehlens getröstet, getröstet sich auch des Galgens“ und „Wer des Nachts Korn stiehlt, verschuldet den Galgen.“ Wer aber bei Tag in den Wald fährt, einen Baum fällt und heimführt, begeht keinen Diebstahl, sondern höchstens einen Forstfrevel, auf den niemals der Strang angedroht war: „Mit der Axt stiehlt man nicht“, „Mit der Axt ruft man“, „Die Axt ist ein Melder und kein Dieb“, „So jemand hauet, so ruft er, so er ladet, so wartet er und bringt er's weg, so hat er's“, „Schlegel und Wagen sollen den Förster wecken“. Den Axtschlag und das Knarren des beladenen Wagens kann der Förster hören. Hört er's nicht, so erwirbt der Holzhauer seiner Arbeit Früchte; damit ist stillschweigend der hohe Wert der Arbeit anerkannt. Auch heute noch wird das Fällen und Holen von Holz (im Unterschied von der Wegnahme bereits aufgeschichteten Holzes) nach den Forststrafgesetzen nicht als entehrender Diebstahl behandelt. Die Strafbarkeit hört freilich nicht schon auf, wenn der Täter das Holz ungesehen nach Hause bringt.

Der Dieb ist ein gemeiner Schädling, weil er dem anderen mit der Frucht seiner Arbeit und Sparsamkeit oft auch die Freude an der Arbeit oder am Sparen nimmt. Die Häufigkeit und die Gefährlichkeit des Diebstahls ist wohl die Ursache, daß sich noch weitere zahlreiche Sprichwörter mit ihm befassen. Zum Dieb wird leicht ein Mensch, der nach seiner Naturanlage fremder Arbeit und ihrem Ertrag kein Verständnis entgegenbringt. Kämpft er nicht mit Macht gegen seine Neigung, so heißt es bald von ihm: „Ein Dieb läßt so wenig vom Stehlen wie ein Hund vom Bellen.“ Weiter wird ein Mensch früher und stärker in Versuchung geführt als ein anderer. Man denke an die schweren Versuchungen, die in Kaufhäusern die offen daliegenden Waren den sittlich noch nicht gereiften Besuchern bereiten. Die Worte: „Gelegenheit macht Diebe“ sowie „Zeit und Ort machen den Dieb“ geben daher eine alte ernste Erfahrung wieder.

Der Wunsch, den Dieb unschädlich zu machen, klingt aus dem Satz: „Wer findet, ehe verloren wird, wird sterben, ehe er krank wird“, wobei übrigens das Wort ‚stehlen‘ in gelungener Weise umschrieben ist. Auf die schwere Bestrafung des Diebstahls weist auch das Wort hin: „Gestohlenes Gut liegt hart im Magen“ und vor der oft trügerischen Hoffnung, der Diebstahl bleibe unentdeckt, warnen die Worte: „Es ist nichts so fein gesponnen, es kommt doch endlich an die Sonnen“ und „Zeit verrät und höhnt den Dieb.“ Unsere heutigen Sprichwörter: „Unrecht Gut gedeiht nicht“, „Wie gewonnen, so zerronnen“ und „Ehrlich währt am längsten“ weisen auf den Glauben hin an eine sittliche Weltordnung, die ohne Zutun einer menschlichen Obrigkeit für gute und böse Taten einen Ausgleich schafft. Dieser Glaube findet sich auch in verschiedenen alten Worten: „Ein Dieb stiehlt sich selten reich“, „Wer da eilet nach fremdem Gut, — auf den wartet die Armut“, „Unrecht Gut hat Adlers Flü-

gel", „Ungerechter Heller frißt einen Taler", „Am übel gewonnenen Gut — hat der dritte Erbe weder Freude noch Mut" und „Was der Teufel mit Pauken zusammenführt, geht mit Trompeten wieder auseinander." Diese Denkmäler einer schönen sittlichen Volksüberzeugung sind zugleich Mahnungen und Warnungen, um die Schwankenden gegen die Versuchung zu stärken.

In früherer Zeit unterschied man noch nicht genau zwischen Diebstahl und Unterschlagung. Der Dieb nimmt einem anderen etwas weg, der Unterschlagende (bis zum Wort „Unterschlager" hat sich die Neubildung noch nicht entwickelt) behält das, was auf erlaubte Weise in seinen Besitz gekommen ist. Man spricht daher auch heute noch im Volke von Funddiebstahl, während der Rechtskundige dafür Fundunterschlagung sagt. Denn eine Sache, etwa ein Armband, das auf der Straße verloren wurde und von Fuhrwerken zerfahren zu werden droht, darf man aufheben; ja nach der Sittenlehre soll man dies sogar tun, um es dem Verlierer wieder zuzuführen und ihn so vor Schaden zu bewahren. Das Unrecht besteht hier also nicht darin, daß man die Sache in Besitz genommen hat, sondern darin, daß man sie behält, ja daß man vielleicht sogar auf Nachfrage den Besitz verheimlicht und in Abrede stellt. Das verstieß gegen das offene Wesen des Deutschen und daher: „Ein Fund verhohlen — ist so gut wie gestohlen." Und weiter: „Ein Dieb findet so leicht wie der Glöckner den Kelch." Damit ist der beliebten Ausrede des Diebes entgegengetreten, er habe die bei ihm angetroffene Sache gefunden oder einem Unbekannten abgekauft.

Seit alters haben Diebe und Mörder die Spuren ihrer Taten manchmal dadurch zu vernichten gesucht, daß sie das ausgeraubte Haus in Brand setzten. Daher erklären sich die Sprichwörter: „Das Feuer ist ein Dieb" und „Kein Mann mag des andern Haus anzünden, ohne daß er Mordbrenner hieße." Im Zusammenhang mit Stehlen und Brennen wird auch der Satz genannt: „Mit seinem eigenen Gute kann jeder Unrecht tun." Es mutet uns zunächst wie ein Rätsel an. Denn im allgemeinen kann man mit seinen Sachen machen was man will. Polykrates, der Herrscher von Samos tat kein Unrecht, als er seinen kostbaren Ring ins Meer warf. Die Sachlage wird aber anders, wenn jemand in einer dichten Siedelung sein Haus anzündet. Denn dann droht nicht bloß seiner Habe und dem Eigentum seiner Hausgenossen der Untergang, sondern je nach dem

Winde und der Feuergefährlichkeit der Umgebung kann auch die Nachbarschaft oder ein ganzer Ort ergriffen werden. Daher wird heute wie früher als Brandstifter bestraft, wer ein Gebäude anzündet, auch wenn es das eigene wäre. Heute wird sein Tun auch um deswillen noch gefährlicher, weil mancher seine Habe über ihren Wert gegen Feuersgefahr versichert und sie dann selbst in Brand steckt. Das geschieht nicht selten, um an Stelle der vielleicht schwer verkäuflichen Sache die für ihn wertvollere Versicherungssumme in Geld zu erhalten. So trifft das Sprüchlein: „Jeder kann mit seinem Gute Unrecht tun", das gemeingefährliche Verbrechen der Brandstiftung. Vom sittlichen Standpunkt aus hat es übrigens noch eine andere Bedeutung: es gilt auch für den Reichen, der etwa sein Vermögen nicht nutzbringend oder gemeinnützig verwertet, sondern verpraßt.

4. Untreue in Wort und Tat

Die wörtliche Untreue zeigt sich im täglichen Leben als Lug und Trug. Sie trifft der Kindervers: „Wer einmal lügt, dem glaubt man nicht, und wenn er auch die Wahrheit spricht" und das gleiche meint das Sprichwort: „Untreue schlägt ihren eigenen Mann." Ist das Vertrauen zwischen Ehegatten, zwischen Vorgesetzten und Untergebenen zerstört, so gibt es kein gedeihliches Zusammenleben und Zusammenarbeiten mehr.

Die Untreue ist aber besonders schlimm, wenn sie gegen eine feierlich, insbesondere eidlich übernommene Pflicht verstößt. Heute noch bedient man sich des Eides in der Rechtspflege, wie auch in der allgemeinen Staatsverwaltung. Bei der ersten Anstellung hat jeder Beamte eidlich zu versichern, daß er die Pflichten seines Amtes getreulich und nach bestem Wissen und Gewissen erfüllen werde. Ähnlich hat der Soldat den Fahneneid zu leisten. In der Rechtspflege aber hat der Zeuge und der Sachverständige die Wahrheit seines Zeugnisses und die Unparteilichkeit seines Gutachtens zu beschwören. Auch darf einer der Streitenden selbst, wenn andere Beweismittel versagen, die Richtigkeit seiner Behauptung, auf die es im Rechtsstreit schließlich ankommt, durch den sogenannten Parteieid bekräftigen. In früherer Zeit kannte man den Eid noch zur Verstärkung von Bündnissen, man gelobte eidlich Taten, die man als heilige Pflicht übernehmen wollte, wie etwa die Beteiligung an einem Kreuzzug usw. (Gelübde).

Kein Wunder, daß bei so reichlicher, ja überreichlicher Verwendung Eid und Eidesverletzung einen häufig wiederkehrenden Gegenstand des Sprichworts bildet. Da bei der Eidesleistung Gott als Zeuge der Wahrheit angerufen wurde, so sah man den Eid gewissermaßen als ein Gebet an und sagte: „Wer recht schwört, betet recht.“ Wer schwören soll, muß mit sich wohl zu Rate gehen und darf es nicht leicht nehmen: „Ein jeder soll schwören nach seinem Gewissen“, „Es ist kein Scherz und Kinderspiel ums Schwören“ und „Eide schwören ist nicht Rübengraben“. Nicht alles, worüber man als Zeuge gefragt wird, weiß man bestimmt. Alsdann darf man auch seine Aussage nicht als sicher hinstellen, sondern muß die möglichen Zweifel angeben, damit der Richter selbst abmessen kann, wieviel Gewicht der Aussage zukomme. Beim Parteieide ist es freilich anders. Wenn der Käufer, der nicht im Besitze einer Quittung ist, beschwören soll, daß er den Kaufpreis an einem bestimmten Tage an den und den bezahlt habe, so kann er nur dies und nichts anderes beschwören. Weiß er es nicht mehr bestimmt und meint er nur, daß es so gewesen sei, so darf er es jedenfalls nicht als sichere Wahrheit, sondern höchstens, wenn zulässig, als seine Überzeugung beschwören: „Wer im Zweifel schwört, ist meineidig“ und „An Meinen und Glauben bindet niemand einen Gaul fest“ sowie „Der Meiner und der Lügner sind zwei Brüder“. Wer freilich gewissenlos ist, der fürchtet sich auch nicht vor der Verletzung der Eidespflicht; ihm ist es nicht viel mehr als Rübengraben: „Wer bereits des Teufels ist, der hat gut schwören“. Wen man aber des Meineids überführt, der soll gebrandmarkt werden: „Den Meineidigen henkt man über alle Diebe.“

Die Behörden der Strafrechtspflege können das ihnen anvertraute Amt nur dann erfolgreich ausüben, wenn die Anzeigen von Vergehen wahrheitsgemäß sind und von allen, die eine Wahrnehmung davon gemacht haben, zuverlässige Aussagen gemacht werden. Das ist nicht immer der Fall. Die Schlechten halten zusammen. In einem Fall schweigt der eine oder macht falsche Aussagen, um in einem anderen Fall einer ähnlichen Unterstützung der anderen sicher zu sein. Manche Menschen aber halten mit Angaben zurück, weil sie fürchten, daß die Täter und ihr Anhang Rache an ihnen nehmen, wenn ihre Aussagen zur Überführung des Schuldigen gedient haben. Es hat von jeher Mut erfordert, die Wahrheit zu sagen, und nicht jeder ist mutig. Daher die Aufforderung: „Die Guten sollen die Bösen

melden.“ Im Leben kommt jedoch nicht bloß Schweigen am verkehrten Orte vor, sondern auch bewußte falsche Anzeige, teils um einen Verdacht von sich selbst auf einen Unschuldigen abzulenken, teils aus Bosheit, um einem anderen Unannehmlichkeiten zu bereiten und ihn in den Mund der Leute zu bringen. So beschuldigte das Weib des Potiphar den jüdischen Sklaven Joseph bewußt falsch einer Handlung, zu der sie selbst ihn hatte verleiten wollen. Solche Anzeigen werden heute als falsche Anschuldigung mit Gefängnis bestraft. Von ihnen handelt das Sprichwort: „Wer einen zu Unrecht meldet, der soll in seine Fußtapfen treten.“ Die wissentlich falsche Anschuldigung sollte also mit jener Strafe geahndet werden, mit der die angedichtete Handlung bedroht war, also mit der Strafe des Mordes, des Diebstahls usw. Das sind gut gemeinte, aber unbeholfene Satzungen einer Zeit, die das Gemeine und Gefährliche der falschen Anschuldigung bekämpfen wollen, den rechten Weg und die Mittel dazu aber noch nicht gefunden haben.

5. Hausfriedensbruch

Bei einem Volke, das so sehr Kämpfe und Händel liebte wie das deutsche, mußte als Gegengewicht auch ein tiefes Bedürfnis und ein rechter Sinn für den Frieden entstehen. Daß dem so war, offenbart sich schön in der Friedensformel des isländischen Rechtsbuchs Graugans: Es trage die Erde den Frieden, und der Himmel sei darüber gebreitet und ihn umschließe das dunkle Meer, das alles Land umgibt, soweit wir davon Kunde haben.

Diesen Frieden gab nicht Feld und Wald, nicht die Straße, wohl aber das Dach, unter dem der Mensch wohnte, mochte es eine Hütte oder ein Palast sein. „Alles ist gleich, das Steinhaus und das Holzhaus“, „Hausfriede muß man halten, dem Reichen wie dem Armen“. Für Jedermann gilt: „Mein Haus ist meine Burg.“ Aber auch nur die Wohnstätte des Menschen genießt diesen Frieden, nicht sein sonstiger Grundbesitz: „Ist kein Haus auf dem Grund, dann ist kein Hausfriede gebrochen.“ Wer eines anderen Acker widerrechtlich und gegen den Willen des Eigentümers betritt, begeht keinen Hausfriedensbruch. Ähnlich war es früher mit dem Wirtshause. „Im Wirtshaus verbricht niemand mehr als auf einem Feld“, „Der

Trinkleute Krieg in Leuthäusern ist keine Heimsuchung“ (Leuthäuser nannte man im Mittelalter die Wirtshäuser, Heimsuchung aber ist ein veralteter Ausdruck für Hausfriedensbruch). So ist es, wenn die Gäste untereinander händeln; wenden sie sich aber gegen den Wirt, so verletzen sie dessen Hausfrieden: „Die Heimsuchung ist niemandes als des Wirts, des das Haus ist.“

Seinen Hausfrieden aber darf der Mann auf alle Weise schützen: „Wer seine vier Pfähle wahret, tut Notwehr, wie der, der seinen Leib rettet.“ Doch mußte der Eindringling den Hausfrieden wirklich haben stören wollen und nicht etwa einen nächtlichen Besuch geplant haben; „Zwischen Totschlag (dem der Hausfriedensbruch gleich-geachtet wurde) und eine Maid beschweren ist ein großer Unterschied“. Im übrigen mußte die Rechtsordnung den Frieden der Nacht, wo der Mensch in seinem Hause keines Angriffs gewärtig ist und der Ruhe pflegt, noch stärker schützen als den Frieden des Tages: „Die Nacht hat besseren Frieden als der Tag“, wie ja auch der nächtliche Diebstahl noch nach heutigem Strafrecht (§ 243 Ziffer 7 StrGB.) mit schwererer Strafe bedroht ist. Anderseits konnte die Tatsache nicht übersehen werden, daß in der Nacht nicht bloß Raubtiere ihrer Beute, sondern auch viele Menschen einem lichtscheuen Gewerbe nachgehen. Daher wird der Mensch gewarnt, sich den Gefahren der Nacht ohne Not auszusetzen: „Jeder hüte sich vor der Nacht“ und „Jeder Pfaffe muß des Nachts Gemach haben“, das heißt, er soll zu Hause bleiben. Wer aber einen nächtlichen Gang zu machen hat, wie der Arzt oder der Geistliche, die zu einem Kranken gerufen werden, der sollte ein Licht bei sich führen, um darzutun, daß er keinen heimlichen Gang gehe.

2. Hauptstück: Gericht

1. Einleitung

In den Schriften des alten und des neuen Testaments steht geschrieben: „Die Rache ist mein, ich will vergelten, spricht der Herr“ (5. Mose 32, 35 und Römer 12, 19). Ähnlich sahen auch die Deutschen den Dienst des Richters als einen göttlichen Beruf an: „Gericht ist Gottes Werk“, „Gericht stärkt Gottes Lob“, „Das Urteil ist Gottes“ und „Der Richter sitzt an Gottes Statt“. Später sah man

im Staatshaupte den Richter über alle: „Den König wählt man zum Richter“, „Vor dem König muß jeder antworten“, „Wo der König ist, ist sonst kein Richter“ und „Der Kaiser ist Richter über alle Richter“. Jeder sonstige Richter aber ist sein Vertreter: „Jeder Richter sitzt an Kaisers Statt“. Was das bedeuten kann, zeigt die Erklärung des Lord Oberrichters zu Heinrich V. von England, den er als Kronprinzen wegen Achtungsverletzung hatte verhaften lassen, im König Heinrich V., zweiter Teil, 5. Aufzug, zweite Szene:

„Da übt' ich die Person von euerem Vater;
Ich trug an mir das Abbild seiner Macht.“

In Deutschland ging dann seit dem Ausgang des Mittelalters mit dem Zerfall der kaiserlichen Macht die Richtergewalt auf die Landesfürsten über. Daß diese grundsätzlich deren Träger seien, gab sich bis zum Jahre 1918 in den meisten Bundesstaaten schon äußerlich kund durch die Eingangsformel der Urteile: „Im Namen des Königs“ usw.

Echt deutsch war es, die Tagung des Gerichts vor der versammelten Gemeinde der Volksgenossen unter freiem Himmel zu halten: „Binnen geschlossenen Wänden und unter Dach soll niemand Urteil finden.“ Die Sonne aber, die ja das Heimliche an den Tag bringt, soll bei Beginn der Tagung im aufsteigenden Teil ihrer Bahn sein: „Streit muß man grüßen bei Sonnenaufgang“ und „Urteilsprechen und Eide schwören darf man nicht länger, als bis die Sonne untergeht“. Natürlich! Selbst in geschlossenen Räumen haperte es im Mittelalter mit der abendlichen Beleuchtung. Die Plätze vollends, an denen das Gericht tagte, waren nicht für künstliche Beleuchtung eingerichtet. Damals dauerten die Gerichtssitzungen nicht, wie manchmal heutzutage, bis tief in die Nacht hinein. Die Gerichtsstätte (Dingstätte, wie noch heute in dingfest-rechtlich festgesetzt, verhaftet) wurde durch Schranken oder durch eine bloße Schnur abgegrenzt, um ihren Frieden zu sichern: „Wo man Gericht hegt, gebeut man Frieden.“ Um der Verhandlung recht folgen und das richtige Recht finden zu können, mußte man nüchtern sein. Es war nötig, das den trinkfrohen Deutschen besonders einzuschärfen: „Das Gericht muß allzeit mit nüchterner Zunge geleitet werden“ und „Man muß fastend zu Gericht gehen“.

Das Gesetz und so auch jeder einzelne Rechtssatz wie etwa: „Kein Recht gestattet Enterbung ohne Schuld“ gibt nur eine allgemeine

Regel. Es läßt aber darüber im unklaren, ob diese Regel im einzelnen Streitfall zutreffe oder nicht. Ist es z. B. eine zur Enterbung ausreichende Schuld, wenn sich die erwachsene Tochter ohne die Zustimmung des Vaters verheiratet hat? Das zu bestimmen und die Rechtsregel zur Durchführung zu bringen, ist die Aufgabe des Richters: „Das Recht kann niemand zwingen ohne den Richter." Ursprünglich beriet bei der Gerichtssitzung das ganze Volk unter Leitung eines Richters, der aber nur „Frager des Rechts" war. Daher wurde außer in den kirchlichen Festzeiten auch über die Erntezeit kein Gericht gehalten. „Binnen gebundenen Tagen soll man nicht richten." Davon sind heute noch die vom 15. Juli bis 15. September reichenden Gerichtsferien geblieben, während deren die richterliche Tätigkeit ruht, die nicht besonderer Beschleunigung bedarf. Es ist das übrigens nicht gerade ein Beispiel für das, was man in der Naturwissenschaft das Gesetz der Trägheit nennt. Allerdings beobachtet man dieses Gesetz auch im Rechtsleben. In der Rechtswissenschaft spricht man in solchen Fällen davon, daß ein Gesetz nicht schon dann seine Wirksamkeit verliert, wenn der Grund wegfällt, aus dem es seinerzeit geschaffen worden ist. So blieb z. B. die Vorschrift des § 482 der deutschen ZPO., daß die Landesherren und die Mitglieder ihrer Familie den Eid durch Unterschreiben der Eidesformel leisten, auch nach der Staatsumwälzung vom November 1918 noch einige Jahre bestehen, bis sie bei einer Gesetzesänderung im Jahre 1924 gestrichen wurde. Auch das Weiterbestehen der Gerichtsferien wird als unzeitgemäß bekämpft. Jedoch kann man sagen: Zwar wirkt das Landvolk, das in der Erntezeit von seiner wichtigen Arbeit durch nichts abgehalten werden sollte, in Deutschland bei der bürgerlichen Rechtspflege nicht mehr mit, aber die Sommermonate sind doch die Zeit, in der große Volksteile eine Erholung von ihrer Tagesarbeit suchen und auch mit Gerichtssachen nichts zu tun haben wollen. Da kann denn auch in der Bearbeitung nicht eiliger Streitsachen eine Pause eintreten.

2. Eigenschaften des Richters

Nach der Überlieferung hat der römische Landpfleger Pilatus, als Jesus zur Aburteilung vor ihn gebracht war, zu dem seinen Tod verlangenden Volkshaufen gesagt: „Ich finde keine Ursache des Todes an ihm. Darum will ich ihn züchtigen und loslassen". Da aber das Volk und die Hohepriester verlangten, daß Jesus gekreuzigt würde, übergab er ihn ihrem Willen (Evang. Lucas 23, 22—25).

Hier richtete also ein Mann, der von der Unschuld des Angeklagten überzeugt war und der ihn doch aus Angst vor dem großen Haufen verurteilte: Pilatus ist das traurige Bild eines Richters, der sich nach oben und nach unten verneigt, dazu freilich eines Richters, wie ihn der große Haufe und die Gewaltherren alter und neuer Zeit wünschen! Ein guter Richter muß allerdings aus anderem Holz geschnitzt sein. Er soll nicht bloß das Gesetz und das Leben kennen, sondern charakterfest und furchtlos sein; denn „Furcht blendet den Richter" und erstickt den Willen zur Gerechtigkeit. Die Geschichte weiß aber auch von Richtern zu erzählen, die keinen Finger breit von dem abwichen, was sie für recht hielten. So büßte der große Römer Papinian seine Gerechtigkeitsliebe mit dem Leben, als er die Anschläge des Thronfolgers Caracalla auf das Leben seines Bruders Geta vereiteln und dessen Ermordung nicht rechtfertigen wollte. Der schon erwähnte Lord Oberrichter in Shakespeares Heinrich V. aber konnte von sich sagen:

„In Ehren tat ich alles, werte Prinzen,
Gelenkt von unparteiischem Gemüt.
Und niemals sollt ihr sehen, daß ich bettle
Um schnöd' scheelblickende Begnadigung.
Hilft Redlichkeit mir nicht und offne Unschuld,
So will ich meinem Herrn, dem König nach
Und will ihm melden, wer mich nachgesandt."

Der Richter darf ferner nicht dem einen Streitenden mehr zuneigen als dem anderen: „Richter sollen zwei gleiche Ohren haben" und nicht etwa auf den reichen und mächtigen Kläger mehr hören als auf den armen Beklagten. Er darf sich nicht von Zu- oder Abneigung leiten lassen. Diesem Gedanken geben in eigentümlicher Fassung die Worte Ausdruck: „Ein Richter darf niemand kennen", „Gott und Gericht haben keinen Freund". Der Richter, dessen Freund vor den Schranken des Gerichts erscheint und über dessen Sache er urteilen sollte, muß sich daher in diesem Falle der richterlichen Tätigkeit enthalten und einen anderen unbefangenen Richter an seine Stelle treten lassen (vgl. § 42 ff. ZPO.). Nur wenn so auch der äußere Schein der Parteilichkeit vermieden wird, kann das Volk an die

Wahrheit des Wortes glauben: „Der Richter muß allen Leuten ein gleicher Richter sein.“ In neuerer Zeit ist der Richter durch gesetzliche Vorschrift von jeder richterlichen Tätigkeit ausgeschlossen, wenn am Streite er selbst, seine Frau oder nahe Verwandte oder Verschwägerte beteiligt sind; denn man kann kein gerechtes Urteil erwarten, wenn man „den Teufel bei seiner Großmutter“ verklagt.

Bei noch unentwickelten Völkern und bei Gewaltherrschern war es dagegen üblich, daß der Verletzte selbst das Gericht über seinen Gegner hielt. So verkündet in Schillers Bürgschaft der Tyrann Dionys dem des Mordanschlags geständigen Möros sofort selbst das Urteil: „Das sollst du am Kreuze bereuen.“ Ähnlich sprach nach 1. Sam. 22, 16 der König Saul zum Priester Ahimelech: „Du mußt des Todes sterben“, weil dieser dem vom Volke geliebten und daher von Saul verfolgten David die Schaubrote gegeben und ihn so vor dem Hungertode gerettet hatte. Dem Hang, sich selbst Recht zu schaffen, mußte daher immer und immer wieder entgegengetreten werden: „Aller Orten ist es Recht, daß der Richter richtet mit Urteil.“ Der Verletzte aber darf sich nicht selbst zum Richter aufwerfen: „Das Recht gehört ins Gericht“ und „Niemand kann seinen Dieb hängen“. Auch hat schon mancher, der sich selbst zum Richter aufgeworfen hat, dabei nur den Richter gespielt, um seine eigene Untat zu verdecken. So ermordete Macbeth, nachdem er auf Anstiften seiner Gattin den königlichen Gast Duncan erschlagen hatte, des Königs Wächter, stellte sie als die Mörder ihres Herrn hin und suchte seine Tat mit seiner Wut zu rechtfertigen:

„Wer konnte sich da zügeln, der ein Herz
Voll Liebe hatt' und in dem Herzen Mut,
Die Liebe zu beweisen?“
(Shakespeare Macbeth, 2. Aufzug, 2. Szene.)

Wer gedenkt bei diesem Verhalten Macbeths übrigens nicht der Art und Weise, wie der Feindbund sich selbst zum Richter aufwarf und die Schuld am Weltkriege in Art. 231 des Machtspruchs von Versailles dem wehrlosen und von der Teilnahme an den Verhandlungen ausgeschlossenen Deutschland zuschob?

Man kann ganz allgemein sagen: Wer selbst schon Untaten begangen hat oder noch begeht, über die er bei anderen urteilen soll, der wird kein gerechter Richter sein: entweder drückt er im Bewußtsein der eigenen Schuld ein Auge zu oder noch schlimmer, er heuchelt sittliche Entrüstung und fährt besonders scharf drein; daher: „Wer eines anderen Missetat richtet, muß selbst ohne Missetat sein.“ „Es wäre ein großes Unrecht, wenn ein Dieb den anderen aburteilte“, „Der Mann verurteilt nicht billig einen Dieb, der selbst ein Dieb ist“. In dieser unvollkommenen Welt läßt sich freilich nicht immer vermeiden, daß auch der Richter nicht frei von den Gebrechen ist, über die er zu Gericht sitzt. Und so konnte Shakespeare in seinem Schauspiel „Maß für Maß“ im ersten Auftritt des zweiten Aufzugs zu einer Zeit seines Lebens, als er an der Welt und ihrem Treiben irre geworden war, sagen:

„Leugnen will ich nicht,
In dem Gerichte, das auf Tod erkannt
Sei unter 12 Geschworenen oft ein Dieb,
Wohl 2, noch schuld'ger als der Angeklagte.
Der offenbar dem Rechte ward,
Den straft das Recht. Was kümmert's das Gesetz,
Ob Dieb den Dieb verurteilt?“

Wo solche Zustände herrschen und offenkundig werden, wird freilich der Glaube an die irdische Gerechtigkeit schweren Schaden leiden. Aber auch, wo sie verborgen bleiben, wird ein Richter, wenn er nicht ganz verhärtet und verstockt ist, mit dem Dorfrichter Adam in Kleists Lustspiel: „Der zerbrochene Krug“ zu sich sagen können: „Die werden mich doch nicht bei mir verklagen?“

Von jeher durchdrang das Volk ein unstillbares Sehnen danach, daß der Richter ohne Ansehen der Person seines Amtes walte: „Wie ich dich finde, so richte ich über dich.“ Auch soll der Richter frei von unangebrachtem Mitleid sein: „Wer vor dem Richter weint, verliert seine Zähren.“ Allerdings haben im Altertum schöne Sünderinnen nicht bloß mit dem Mitleid ihrer Richter, sondern mit noch ganz anderen Schwächen gerechnet und ihr Verhalten danach eingerichtet. So wird von der Athenischen Buhlerin Phryne erzählt, daß sie als letztes und wirksamstes Verteidigungsmittel ihr einziges leichtes Gewand vor den Richtern habe fallen lassen.

Daß der Richter im Zweifel freisprechen müsse, ist eine alte Wahrheit. Hat er aber in der Verhandlung die volle Überzeugung von der Schuld des Angeklagten gewonnen, so darf er sich durch keinerlei Nebenrücksichten von der Verurteilung abhalten lassen. Freizu-

sprechen ist zwar manchmal bequemer und legt scheinbar eine geringere Verantwortung auf als zu verurteilen. Davor warnen aber Worte wie: „Läßt ein Richter Diebe freigehen, so ist er selbst ein Dieb"; „Nichts ist böser als der ungerechte Richter", „Unrecht Urteil trifft den Richter". Das Sprichwort: „Der Richter ist nicht barmherzig, der einen Bösewicht frei läßt" weist endlich auch auf die Gefahren des unangebrachten Mitleids hin. Solche Gefahren bestehen für den Täter, der dann nicht in sich geht, sondern auf der bösen Bahn weiter wandert, für andere sittlich Schwache, die darauf rechnen, daß es ihnen gegebenenfalls auch nicht schlechter gehen werde, und für die übrigen Menschen, die an der staatlichen Rechtspflege irre werden.

Für das Amt des Richters genügt nicht immer der gesunde Menschenverstand; ein Richter muß auch das Gesetz kennen. „Kein Richter kann gerecht richten, er wisse denn, was Recht ist", „Niemand richtet nach seinem Wahne", „Mit Dünken verletzt man das Recht." Der Richter darf sich im allgemeinen auch nicht einfach danach richten, wie früher in ähnlichen Sachen geurteilt worden ist: „Beispiele gelten nicht, sondern Gesetze." Weil die Schulbildung früher auf dem Lande vielfach dürftig war, glaubte man: „Es kann kein Bauer Richter sein." Freilich ist es mit der Rechtskenntnis allein nicht getan, wenn es an der rechten Gemütseinstellung gegenüber dem zu Richtenden fehlt: „Es ist schwer zu streiten vor einem ungewogenen Richter." Um sich ihn gewogen zu machen, glaubte man, wie wir aus Molières „Menschenfeind" wissen, dem Richter mindestens einen Besuch machen zu sollen. Nach einem alten Worte saß der Richter in der Verhandlung da wie ein griesblickender Löwe. Finsteres Dreinblicken und harte Worte gegen die Rechtssuchenden haben wohl Anlaß gegeben zu dem Satze: „Oft fürchtet man den Richter mehr als den Kläger." Das mag namentlich dann vorkommen, wenn der Richter seine Leidenschaften nicht beherrschen kann und gleich in Zorn gerät, sobald die Verhandlung nicht den von ihm erwarteten Lauf nimmt: „Zorn tötet den Unschuldigen wie den Schuldigen." Man denke nur an die Sprüche der französischen und belgischen Kriegsgerichte im besetzten Gebiete.

Als ein äußerliches Zeichen, daß der Richter gesammelt und frei von Leidenschaften sei, galt, daß er nicht stehe oder umherlaufe: „Der Richter muß sitzen", „Sitzend muß man Urteil finden." Wessen Wohl oder Wehe vom Richterspruch abhängt, darf erwarten, daß der Richter auch äußerlich die angemessene Haltung wahrt. Damit er stets an diese Aufgabe erinnert wird, trägt der Richter in der öffentlichen Verhandlung eine besondere Amtstracht.

Vor allem aber muß der Richter unbestechlich sein: „Das Recht ist so heilig, daß man es mit Käufen nicht verunehren soll", „Kein Richter darf seine Gerechtigkeit verkaufen." Aber auch die Richter sind von dem Verdachte und dem Vorwurf der Bestechlichkeit nicht frei geblieben. Hierüber gibt es zahlreiche Sprichwörter, die ihre Bilder aus allen Gebieten des Lebens nehmen: „Gaben verblenden weiser Leute Augen", „Wo Gold redet, da gelten alle Reden nicht", „Gabe, die blind ist, macht krumm, was recht ist", „Wo man mit goldenen Büchsen schießt, da hat das Recht sein Schloß verloren", „Geld kann nicht Unrecht tun", „Goldner Hammer bricht eisernes Tor", „Armer Leute Sache gilt nicht", „Schmieren macht linde Leute", „Wer gut schmiert, der gut fährt", „Schmieren und Salben — hilft allenthalben", und „Wär' eine Sache noch so krumm, man biegt mit Gold sie um und um." Jedoch darf aus solchen Worten kein bestimmter Schluß gezogen werden, daß die Richter „ihre Gerechtigkeit verkauft" hätten. Denn diese Sprichwörter handeln nicht bloß von der Rechtspflege, sondern von allen Zweigen der behördlichen Tätigkeit und des Erwerbslebens. Noch heute wird z. B. das Schmiergeldwesen im gewerblichen Leben durch Bestimmungen des Gesetzes über den unlauteren Wettbewerb bekämpft. Dann befaßten sich diese Worte mit dem weiteren Gebiet der Verwaltung: Polizei und Zollbeamte werden von Übeltätern — manchmal mit Erfolg — in Versuchung geführt, damit diese in ihrem lichtscheuen Treiben nicht gestört werden sollen. Ferner offenbart sich in den angeführten Sätzen die im Sprichwort auch sonst zu bemerkende Erscheinung, daß man von seinem Nächsten eher das Schlechte denkt und sagt; ich erinnere an die verletzenden Urteile über Vormünder (S. 49) und daran, daß die Frau im Sprichwort im allgemeinen recht schlecht wegkommt. Dazu hatten früher die Streitenden an den Richter persönlich die Kosten (vgl. Seite 176) zu entrichten, und später erhielt er wenigstens einen Anteil an den vom Staate erhobenen Gebühren. Hier konnten sich schwächere Charaktere einigermaßen zu der zahlungsfähigen Partei hingezogen fühlen, mindestens konnte der Schein entstehen, daß armer Leute Sache nichts gelte. Diesem Verdachte ist jetzt ein Riegel durch § 7 des Gerichtsverfassungsgesetzes vorgeschoben,

der gesetzlich festlegt, daß der Richter einen festen Gehalt, aber keine Gebühren bezieht. Endlich darf man auch nicht vergessen: beim Richter muß notwendig ein Teil unterliegen. Der Unterlegene aber gibt seiner Unzufriedenheit auch heute noch in einer mehr oder weniger leidenschaftlichen Weise Ausdruck. Nicht umsonst sagt ein Sprichwort: „Wer zwischen zwei Freunden Richter ist, verliert den einen". Wer beim Richter unterliegt, sucht den Grund des Mißerfolges regelmäßig nicht in der Schwäche seiner Sache, sondern hält den Richter entweder für beschränkt („weltfremd", wie man gerne sagt), oder für bestechlich. Tatsächlich werden die meisten deutschen Richter heute und in der Vergangenheit von ähnlichen Gedanken beseelt gewesen sein, die nach 2. Chron. 19, 16 der jüdische König Josaphat den von ihm eingesetzten Richtern ans Herz gelegt hat: „Sehet zu, was ihr tut; denn ihr haltet das Gericht nicht den Menschen, sondern dem Herrn; und er ist mit euch im Gericht." Sind es doch dieselben Gedankenkreise, die die alten Verse am Tangermünder Rathause den deutschen Richtern ins Gedächtnis rufen:

„Hast du Gewalt, so richte recht.
Gott ist der Herr und du sein Knecht.
Verlaß dich nicht auf dein' Gewalt,
Dein Leben ist hier bald gezahlt.
Wie du zuvor hast richtet mich,
Also wird Gott auch richten dich.
Hier hast du gerichtet nur kleine Zeit,
Dort wirst du gerichtet in Ewigkeit."

3. Urteiler

Bei den alten Deutschen wie in Rom hat der rechtskundige Richter nicht den ganzen Streit entschieden, sondern nur die Verhandlung geleitet und die sachdienlichen Fragen gestellt. Erkennendes Gericht war entweder die ganze Volksgemeinde oder eine bestimmte Anzahl kundiger Männer als Ratgeber des Richters, die Schöffen. Denn „Ein Mann kann nicht alles in Gedanken haben", vielmehr „In vieler Leute Haupt wird vernommen und verbessert mancher Sinn", „Viele wissen viel, keiner alles". Doch war man auch nicht blind gegen die Gefahren, die mit der Zuziehung einer Menge ohne Auslese verbunden waren. „Wo die Menge, da ist Irrtum." Auch aus diesem Grunde beschränkte man mit der Zeit die Urteiler auf eine

bestimmte Zahl. Bald waren es drei, („An 3 Schöffen nimmt der König die Wahrheit"), bald 7, bald 12. Vor ihnen wurde verhandelt, an sie stellte der Richter wie bei den neuzeitigen Geschworenengerichten die erforderlichen Fragen. Ihren Spruch verkündete und vollzog der Richter, ohne daran etwas ändern zu können. Das ist der Sinn der Sprichwörter: „Wer das Urteil fragt, ist der Richter", „Wer das Urteil findet, ist des Richters Ratgeber", „In den Schöffen liegt Gewinn und Verlust des Rechts", „Was die Schöffen urteilen, soll der Richter richten", „Was der Schöffe findet, wird Recht", „Der Richter muß richten, wie ihm erteilt wird" und „Wie man fragt, so muß man berichten." Da mochte es nun auch bisweilen vorkommen, daß die Schöffen einer Meinung waren: „Das ist gut, wenn alle Männer einig sind." Häufiger aber werden die Meinungen auseinander gegangen sein. Es mußte daher eine Bestimmung getroffen werden, wie es dann zu halten sei. Darauf antworten die Sprichwörter: „Das Mehr gilt", „Die meisten Stimmen gelten", „Wer die meiste Folge hat, behält das Urteil", „Was die mehrere Hand macht, muß die mindere halten" und „Es ist recht, daß das Kleinere dem Großen folge." Das ist unvermeidlich und erträglich, wenn alle Urteiler fachkundig oder doch klug sind. Ist das aber nicht der Fall, dann wird man häufig der Worte aus Schillers Demetrius gedenken müssen:

„Was ist die Mehrheit? Mehrheit ist der Unsinn!
Verstand ist stets bei Wenigen nur gewesen...
Man soll die Stimmen wägen und nicht zählen."

Wie man es freilich zu machen habe, daß die Stimmen richtig gewogen und nicht bloß gezählt werden, das ist eine Frage, deren Lösung noch nicht gefunden ist und wohl auch nicht gefunden wird.

4. Hilfspersonen

a) Der Gerichtsschreiber

Der 1509 von Ulrich Tengler in Augsburg herausgegebene Laienspiegel sagt über den Gerichtsschreiber: „Damit, was vor Gericht geschieht, durch langwährende Zeit nicht vergessen, sondern damit menschlicher Wille durch schriftliche Dienstbarkeit um so sicherer in ewigem Gedächtnis erhalten wird, hat weise Erfahrung der Menschen

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schlüpferigem Gedächtnis zu Hilfe das Gerichtsschreiberamt mit sinnlicher Vernunft erfunden." In der Tat kann nach einer längeren lebhaften Verhandlung regelmäßig keiner der Beteiligten genau wiedergeben, wie alles im einzelnen verlaufen ist. Daher mußte der Richter bis in die neueste Zeit hinein zu jeder Verhandlung mit Rechtsuchenden einen Gerichtsschreiber hinzuziehen. Dieser hatte gewissermaßen als unbefangener Zuhörer zu beglaubigen, was vor seinen Augen und Ohren geschah. Denn „Dem Richter allein steht nicht alles zu glauben." Darum bestimmte auch Art. 1 der Hals- und peinlichen Gerichtsordnung Karls V. von 1533, daß alle peinlichen Gerichte mit Richtern, Urteilern und Gerichtschreibern versehen und besetzt werden sollten. Die Niederschrift über den Gang der Verhandlung hat der Gerichtsschreiber nicht nach der Weisung des Richters zu fertigen, sondern so, wie sie sich ihm dargestellt hat. In neuester Zeit braucht allerdings nicht immer ein Gerichtsschreiber zugezogen zu werden. Als Deutschland durch den Weltkrieg völlig verarmte und auch im Gerichtswesen sparen mußte, hat man es zugelassen, daß ein Richter namentlich bei kleineren Sachen ohne Gerichtsschreiber mit den Parteien verhandelt.

Neuerdings ist dem Worte Gerichtsschreiber der Fehdehandschuh hingeworfen worden, weil es eine irreführende und entwürdigende Bezeichnung für die Tätigkeit des Beamten sei, den unsere Gesetze über Gerichtsverfassung und -verfahren einen Gerichtsschreiber nennen. Im Laufe der Zeit hat sich in der Tat das Gerichtsverfahren immer weiter entfaltet. Der Gerichtsschreiber hat nunmehr nicht bloß zu beurkunden, was andere in seiner Gegenwart verhandeln, sondern er übt selbständig Verrichtungen aus, die sich aus der ursprünglich alles zusammenfassenden Hauptverhandlung abgesplittert haben. So nimmt er z. B. Klagen und Antworten Rechtsunkundiger auf, über die dann vor dem Richter verhandelt wird. Das sind aber zum Teil Verrichtungen, die bei den Gerichtshöfen Aufgabe der Rechtsanwälte sind.

Wer die im ersten Artikel der peinlichen Gerichtsordnung vorgesehene Besetzung der Strafgerichte mit der heutigen vergleicht, dem wird auffallen, daß die Staatsanwaltschaft in der Geschäftsordnung Karls V. nicht genannt ist. Das ist kein Versehen. Denn damals kannte man in Deutschland noch keine Behörde, die den Beruf gehabt hätte, als Vertreter des Staates die öffentliche Anklage zu erheben. Vielmehr wurde der Übeltäter von der Obrigkeit teils von Amtswegen, teils auf Begehren des Verletzten angenommen. Die Staatsanwaltschaft als Behörde ist erst in späterer Zeit von Frankreich her übernommen worden. Es ist daher nicht verwunderlich, daß sich über dieses Amt keine Sprichwörter gebildet haben.

b) Der Gerichtsbüttel

Über ihn sind die Worte überliefert: „Wo ein Gericht ist, soll ein Büttel sein" und „Der Richter gibt den Tag und der Büttel ladet vor". Daraus ergibt sich, daß damit nicht der Gerichtsdiener gemeint ist, der die Zimmer in Ordnung hält — früher wurde ja im Freien verhandelt — oder der bei einer Strafverhandlung den Sitzungsdienst hat. Vielmehr ist darunter der heutige Gerichtsvollzieher zu verstehen, also der Beamte, der die Streitteile vor das Gericht ladet, nachdem der Richter den Tag der mündlichen Verhandlung festgesetzt hat, und der das Urteil durch Pfändung oder Wegnahme der zugesprochenen Sache vollstreckt. In der Schweiz führt er noch den altdeutschen Namen Weibel.

5. Prozeßvertreter

Grundsätzlich hatte jeder Kläger und Antworter persönlich vor Gericht zu erscheinen: „Selbst soll jeder seine Sache suchen." Frauen, Kinder und Fremde hatten freilich der Dingstätte fern zu bleiben; sie wurden vertreten durch den, der die Munt, die Herrschaftsgewalt über sie hatte (vgl. S. 47). Frauen konnten sich auch um deswillen nicht gut selbst vertreten, weil bei dem unvollkommenen Rechtsverfahren früherer Zeit und bei der mangelhaften Unterscheidungsgabe der oft ungewandten Richter die Sache schließlich meist auf einen Zweikampf als Gottesurteil hinaus kam, der nicht von einer Frau ausgefochten werden konnte. Diese Verhältnisse sind u. a. in der merkwürdigen Kleistschen Novelle „Der Zweikampf" dargestellt. Mit der Zeit konnte sich jeder durch nahe Angehörige vor Gericht vertreten lassen: „Ein Freund kann für den anderen antworten." Mit der Verfeinerung des Rechts entwickelte sich allmählich das Amt der berufsmäßigen Vertreter: Fürsprech hießen sie wie heute noch in der Schweiz. Die neuere Bezeichnung „Rechtsanwalt" verwendete Kleist zum erstenmal in seiner Novelle Michael Kohlhaas, die ja das Schick-

sal eines in seinem Rechtsgefühl Gekränkten darstellt. Dem Fürsprech ist das Recht ein Handwerksgerät wie dem Krieger sein Schwert; daher: „Der Fürsprech ist Ritter des Rechts." Aber die Rechte und Pflichten dieses einflußreichen Berufsstandes haben sich begreiflicherweise manche Sprichwörter gebildet. Eine allgemeine Erfahrung aus Zeiten mit verwickelteren Rechtsverhältnissen geben die Sätze wieder: „Gut Recht bedarf guter Hilfe" und „Recht hat manchmal Hilfe nötig."

Da der Fürsprech das Wohl seines Vollmachtgebers zu wahren hat, so kann er leicht in einen gewissen inneren Kampf darüber kommen, wie weit er für ihn das tun darf, was ein ehrenhafter Mann unterläßt, ob er zum Beispiel bewußt eine Unwahrheit vortragen oder etwas Wahres bestreiten darf, um jenem zu helfen. Die heutigen gereiften Standessitten lassen das nicht zu; früher dachte man darüber anscheinend anders, wenn sich das Wort hat bilden können: „Das Amt erlaubt manches, was sonst im Recht verboten ist." Allerdings kann sich dieses Wort auch darauf beziehen lassen, daß die Vollstreckungsbeamten manches sonst Verbotene von Amts wegen zu tun haben, z. B. jemand festnehmen, und ihm in der Zeit der Leibesstrafen als „Empfang" und als „Abschied" eine Tracht Prügel zu verabfolgen usw. Als Beispiel eines nicht ganz lauteren Verhaltens wird in den Rechtsbüchern aufgeführt, daß mißliebige Zeugen künstlich in Widersprüche verwickelt oder vieldeutige Sätze an die Stelle einfacher, aber ungünstiger gesetzt werden. Nie waren offenbare Beleidigungen des Gerichts oder des Gegners zulässig: „Mit Scheltworten soll man nicht fürsprechen." Darüber, ob schließlich das Recht siege, konnte man früher wie auch heute (namentlich im Rechtsverkehr der Staaten untereinander) verschiedener Meinung sein. Dem hoffnungsvollen Worte: „Wer Recht hat, wird doch endlich siegen", steht das verzagende gegenüber: „Mit der Leute Gericht kann man der Leute Recht betrügen." Und seit dem 17. Jahrhundert steht auf dem Titelblatt des Stadt- und Amtsbuchs für Zug von 1566: „Das Stadt- und Amtsbuch hat eine wächserne Nase"; sie kann also nach rechts und nach links gedreht werden. Mit diesem Worte lehnte sich das Volk übrigens nicht bloß gegen ein allzu einseitiges Vorgehen der Fürspreche auf, sondern auch gegen die neuen und unvolkstümlichen Gesetze.

Eine selbstverständliche Standespflicht ist, daß ein Fürsprech sein Amt nicht dem Kläger und dem Beklagten zugleich zur Verfügung

stellen kann. „Wer dem einen hilft, kann dem anderen nicht helfen um dieselbe Klage." Das Wohl des einen Teils an den anderen zu verraten, ist heute ein Verbrechen, das mit Zuchthausstrafe bedroht wird (§ 356 StrGB.). Wer einen Sachwalter beizieht, muß ihn in alles einweihen, was zur Sache gehört. Namentlich muß sich der Angeklagte dem Verteidiger gegenüber offen aussprechen können. Er darf dabei nicht Gefahr laufen, daß dieser nachträglich etwa als Zeuge eidlich vernommen und so gezwungen werde, das Anvertraute zur Kenntnis des Gerichts und der Strafverfolgungsbehörde zu bringen. Daher ist den Rechtsanwälten ähnlich wie den Seelsorgern seit alters das Recht eingeräumt, das Zeugnis über Dinge zu verweigern, die ihnen bei Ausübung ihrer Berufspflicht anvertraut worden sind: „Den Fürsprechern ist wie den Beichtigern."

Das Wort „Jeder Arbeiter ist seines Lohnes wert" gilt auch für den Anwalt. Wenn sich über die Dienste des Fürsprechs die Meinung gebildet hat: „Was man umsonst hat, soll man umsonst geben", so ist dabei übersehen worden, daß Rechtskenntnisse dem Menschen nicht ohne sein Zutun anfliegen, sondern erworben werden müssen. Selbst die angeborene Rednergabe muß ausgebildet werden. Soll doch selbst der große athenische Redner Demosthenes seine unvollkommenen Stimmittel am Meeresstrande geübt und gelernt haben, das Getöse der Wellen zu übertönen. Das Wort von der unentgeltlichen Arbeit galt daher schließlich nur noch für Armensachen; denn „Armut ist auslagenfrei". In der Tat hat der deutsche Anwaltsstand die Last des Armenrechts bis nach dem Weltkriege getragen. Erst die eigene Standesnot hat bewirkt, daß die Kosten, die durch die Tätigkeit des Armenanwalts entstehen, bis zu einer gewissen Höhe vom Staate übernommen werden.

6. Der Rechtsweg

Wer gegen einen anderen einen Anspruch zu haben glaubt, rufe das Gericht nicht aufs Geratewohl an. Denn er sieht wohl den Anfang, aber nicht das Ende. Er weiß oft nicht, was der andere gegen seinen Anspruch vorbringen wird, und er weiß nicht, wie und wann die Sache ausgeht. „Rechten ist kriegen; von beiden weiß Gott das Ende." Wer mit einem anderen einen Vertrag schließt, überlege daher seinen Inhalt im voraus und fasse ihn so, daß er nicht eine Quelle

des Streits wird: „Vorreden sind besser als Nachreden", „Sieh zuvor, so darfst du nicht nachmals klagen" (dürfen bedeutet hier soviel wie brauchen) und „Besser klein Unrecht gelitten als vor Gericht gestritten". Einen Weg, der den trinkfrohen Deutschen vom Gang zum Gericht mit Erfolg abzuhalten versprach, schlägt das Wort vor: „Wenn man einen Streit mit Wein begießt, richtet man mehr aus als durch einen Prozeß." Vor gerichtlichem Streit warnt auch der Satz: „An Rechten und Kriegen gewinnt niemand viel". Ob dieser Spruch durch die Verteilung der Beute des Weltkriegs widerlegt worden sei, kann erst die Zukunft entscheiden.

Aber wie nicht jeder Krieg vermeidbar ist, so auch nicht jeder Streit vor Gericht: „Kann man's nicht in Freundschaft, so muß man's tun mit Recht." Übrigens ist auch dann noch nicht die Möglichkeit einer gütlichen Regelung genommen: „Werden die Kriegsleute versöhnt, das soll dem Kaiser lieb sein." Die Vorteile des Vergleichs wurden den streitbaren Deutschen durch viele Sprichwörter mundgerecht gemacht: „Recht scheidet, der Vergleich sühnet"; gemeint ist dabei das Urteil, das den ganzen Anspruch zuerkennt oder abweist, obwohl auch etwas für die Ansicht des unterliegenden Beklagten oder die des abgewiesenen Klägers spricht. Wer gleichwohl ganz unterliegt oder abgewiesen wird, wird leicht verbittert und es leiden darunter die nachbarlichen oder geschäftlichen Beziehungen. „Rechten und Borgen macht Kummer und Sorgen", „Vergleichen und Vertragen ist besser als Zanken und Klagen". Dasselbe meint das noch heute beliebte Wort: „Besser ein magerer Vergleich als ein fetter Prozeß." Zwei besondere Anwendungsfälle davon sind: „Wer da hadert um ein Schwein —, nehm' eine Wurst und laß es sein" und „Wer einen Prozeß um eine Henne hat, nehme lieber ein Ei dafür".

Wie schon S. 162 erwähnt, darf der Kläger nicht zugleich Richter sein: „In einer Sache kann man nicht zwei Ämter führen." Dasselbe besagt das alte Sprichwort: „Niemand kann sich selber richten." Hier ist „sich selber" wohl der dritte Fall (Wemfall): ich bin mir selber ein Richter, bin also zugleich Kläger und Richter, nicht „ich richte mich selbst". Allerdings kommt es auch vor, daß jemand zugleich Angeklagter und Richter ist, ohne daß dies aber der Rechtsordnung entspräche: so wird von manchen Polizeirichtern scherzhaft erzählt, daß sie, wenn sie in lustiger Gesellschaft über die Polizeistunde hinaus im Wirtshause gewesen seien, sich selbst wie ihren Zechgenossen

einen Strafzettel wegen Übersitzens geschrieben und die Strafe bezahlt hätten. Von einem Menschen aber, der etwa wie Brutus in Shakespeares Julius Cäsar nach dem Verluste der Entscheidungsschlacht seinen Diener bittet: „Halt denn mein Schwert und wende dich hinweg — indes ich drein mich stürze", sagt der Volksmund in übertragenem Sinne, er habe sich selbst gerichtet. Wer so verfährt, will auf diese Weise häufig einem wirklichen gerichtlichen Verfahren entgehen.

Ob man sein Recht suchen oder ob man lieber Unrecht erdulden solle („Nachgeben stillt viele Kriege"), steht im Bereiche des bürgerlichen Rechts, also namentlich bei Vermögensfragen, im Belieben des einzelnen. „Jedermann mag wohl seinen Schaden verschweigen, so lang er will", „Der Richter kann niemand zur Klage zwingen", „Wo niemand klagt, darf niemand richten", „Genügt dir, so genügt auch mir" (eine Redewendung, die in den Mund des Richters gelegt ist, wenn er von einem Rechtsbruche hört und nun im Gespräche mit dem Verletzten erfährt, daß dieser sich beruhigen und keine Klage erheben will), „Was man dem Richter nicht klagt, das darf er nicht richten" und „Wo kein Kläger ist, soll kein Richter sein". Grundsätzlich gilt das gleiche auch im Strafverfahren. Hier gebraucht man übrigens nicht das Grundwort „klagen" allein, sondern die Zusammensetzung „anklagen": „Erst anklagen, dann richten" und „Ohne Anklagen kann niemand verurteilen". Nur hat man es im Laufe der Zeit in wichtigeren Fällen nicht mehr dem Verletzten überlassen, die Anklage selbst zu erheben. Denn das Staatswohl verlangt, daß Straftaten nicht ungesühnt bleiben, auch wenn es der Verletzte unterlassen sollte, selbst zu klagen. Er kann untätig bleiben aus Gleichgültigkeit oder weil ihn der wohlhabende Täter mit Geld abgefunden hat oder gar aus Furcht vor dem mächtigen Missetäter („Mit großen Herren ist nicht gut Kirschen essen"). Daher hat man in der Staatsanwaltschaft die öffentliche Anklagebehörde eingerichtet, die immer dann die Anklage erheben soll, wenn es das Gemeinwohl erfordert. Bei kleineren Sachen dagegen hat man es in das Ermessen der Staatsanwaltschaft gestellt, ob sie die öffentliche Klage erheben wolle oder nicht, und hat dafür dem Verletzten selbst das Recht gegeben, die Tat durch Erhebung einer Strafklage zu verfolgen. Eine solche Klage nennt die jetzige deutsche StrPO. eine Privatklage, für den Nichtfachmann ein sonderbares Wort. Die deutsche Sprache hat allerdings kein rechtes deutsches Wort ausgebildet, das den Gegen-

satz zu „öffentlich“ ausdrückt. Diese Lücke auszufüllen scheint mir aber eine Aufgabe aller, die ihre Muttersprache lieben. Auch ich will einen Versuch machen: In dem uns wieder geraubten Elsaß habe ich in der Nähe von Wörth den Anschlag gelesen: „Eigenweg“. Im übrigen Deutschland hätte es wohl „Privatweg“ geheißen. Sollte diese treffende Benennung in dem urdeutschen Elsaß nicht einen Fingerzeig geben, die vom Verletzten selbst erhobene Klage als „Eigenklage“ im Gegensatz zur öffentlichen Klage des Staatsanwalts zu bezeichnen?

Von dem Grundsatz: „Wo kein Kläger, da kein Richter“ gab es übrigens zu Beginn der neuen Zeit eine Ausnahme: im sogenannten Inquisitionsprozeß, der von den Ketzer- und Hexenverfolgungen her keinen guten Namen hat, schritt nämlich das Gericht auch ohne Anklage ein. An ihn erinnern die Sprüche: „Was der Kaiser Unrechtes weiß, soll er richten ohne Klage“ und „Wo der Kaiser die Wahrheit weiß, mag er richten ohne Klage“.

Wer vor Gericht geladen ist, hat Folge zu leisten. Im bürgerlichen Rechtsverfahren kann er sich zwar regelmäßig durch einen Anwalt vertreten lassen, im Strafverfahren muß er persönlich kommen, sonst wird gegen ihn ein Vorführungs- oder Haftbefehl erlassen. Einen bloßen Vorführungsbefehl wählt man, wenn der Ausgebliebene einen festen Wohnsitz hat und dort an dem Tage anzutreffen ist, an dem er vor Gericht vorgeführt werden soll. Handelt es sich aber um einen Obdachlosen oder einen Flüchtigen, dann muß man ihn festnehmen, wo und wann man ihn findet, damit er zu der festgesetzten Zeit vor Gericht gebracht werden kann. Von derlei Dingen aus früheren Zeiten handeln die Sprichwörter: „Kommst du nicht, so hol' ich dich“ und „Wer sich vor dem Gericht verbirgt, der läßt sich finden“. Aber nur wer vor Gericht erschienen ist und sich über die Anschuldigungen hat äußern können, wird verurteilt: „Find' ich dich, so richt' ich dich“. Über Abwesende dagegen wird namentlich bei schwereren Anschuldigungen nicht abgeurteilt. Das deutsche Volk hat aus den schmählichen Urteilen der französischen und belgischen Kriegsgerichte erfahren, daß diese beiden Staaten jenes Gebot wahrer Gerechtigkeit in ihrem Strafverfahren noch nicht kennen, vielmehr auch gegen Angeschuldigte Zuchthaus-, ja Todesstrafen aussprechen, die vor Gericht nicht erschienen sind, die vielleicht von einem Strafverfahren überhaupt nichts gewußt haben. Frankreich, das ja in allem „an der

Spitze der Zivilisation marschiert“, könnte wohl auch hier aus einem Buche lernen, das vor bald 2000 Jahren geschrieben worden ist: „Es ist der Römer Weise nicht, daß ein Mensch übergeben wird umzubringen, ehe denn der Verklagte habe seine Kläger gegenwärtig und Raum empfange, sich der Anklage zu verantworten.“ Apostelgesch. 25, 16.

Wenn ein bürgerlicher oder ein Strafanspruch bei einem Gericht anhängig gemacht wird, so hängt es nicht von dessen Belieben ab, ob es tätig werden will. Es darf nicht etwa sagen: das Gesetz läßt mich im Stich; ich weiß selbst nicht, was Rechtens ist. Vielmehr heißt es: „Wo ein Kläger ist, muß auch ein Richter sein“, „Der Richter kann niemand von seiner Klage weisen“, „Jedermann ist seiner Verantwortung wert“, „Wer herkommt und Urteil begehrt, dem soll Recht bescheinen“, „Wer seine Notdurft redet, den soll der Kaiser hören“. Und wenn sich der nächstberufene Richter der Sache entziehen will, so kann man den höheren beschwerdeführend anrufen: „Läßt der König etwas ungerichtet, so habe ich zum Kaiser Mut.“ Vor allem sollen ohne Aufschub Streitigkeiten von Leuten erledigt werden, die nicht lange warten können: „Witwen und Waisen, Wallfahrern und Wehrlosen hat der Richter zu helfen; denn sie sind des Königs Mündel.“ Ihre Sachen sind meist auch nicht so verwickelt und machen keine besonderen umständlichen Prüfungen erforderlich: „Kurze Kriege und arme Leute soll man schnell abfertigen.“ Freilich darf dies auch nicht zu einer geringschätzigen Eile ausarten, damit nicht der Vorwurf erhoben werden kann: „Armer Leute Sache gilt nichts.“

Eine alte Klage über das gerichtliche Verfahren ist die lange Dauer der Prozesse; eines besonderen Rufs erfreute sich in dieser Richtung das Reichskammergericht, das seinen Sitz in Speyer und nach dessen Zerstörung in Wetzlar hatte und an dem noch der junge Goethe tätig gewesen ist. Es ist begreiflich, daß diese Klage auch im Sprichwort ihren Widerhall fand: „Hemmnis ist die Wurzel alles Übels“, „Langes Zögern sucht manche Ränke“ und „Mit langem Verzug werden die Bösen erlöst“. Die Bedeutung dieses Wortes konnte einem besonders in der Nachkriegszeit klar werden, wo zu häufig Strafverfahren im Gnadenwege niedergeschlagen wurden. Wußte sich ein Schuldiger eine Zeitlang zu verbergen oder durch weit ausholende Beweisanträge das Vorverfahren hinauszuziehen, so konnte er leicht der Verurteilung entgehen, weil seine Straftat unter einen neuen

Gnadenerlaß fiel, der noch vor Abhaltung der Hauptverhandlung der Weiterverfolgung Einhalt gebot.

Das gerichtliche Verfahren kostet Geld. Um die dem Deutschen angeborene Neigung zum Prozessieren etwas zu dämpfen, hat man von alters her dem Kläger im bürgerlichen Streitverfahren die Auflage gemacht, für die erwachsenden Kosten einen Vorschuß zu leisten. Das ist der Sinn des Sprichworts: „Geld vor, Recht nach." Erst wenn die Kosten vorgeschossen sind, wird mit dem gerichtlichen Verfahren begonnen. Freilich kann nicht jeder Kosten zahlen; daher mußte man davon die Armen freilassen, wenn man sie nicht rechtlos machen wollte: „Armut ist auslagefrei." Heute unterscheidet man zwischen Gebühren, die für die Tätigkeit des Gerichts berechnet werden, und Auslagen, die durch Barzahlung an Zeugen und Sachverständige oder durch Reisen des Gerichts zur Besichtigung einer Unfallstelle und dergleichen entstehen. Davon handelt das Sprichwort: „Wer der Zeugen bedarf, muß ihnen die Kosten bezahlen." Die „Kosten" bestanden dabei ursprünglich hauptsächlich aus der „Kost": das sagt das Sprichwort: „Wer die Hauptsache verliert, gibt Atzung und Zehrung"; so ist es noch heute bei dem „hochwohlweisen stets unfehlbaren Biergericht," das in Studentenverbindungen über Bierstreitigkeiten urteilt und dessen Kosten in Getränken und Tabakwaren bestehen. Aus früheren Zeiten aber berichtet Grimms Weistümersammlung: „Überall nimmt der Unterrichter nur die kleineren Gerichtsbußen ein, die größeren fallen dem Oberrichter zu; aber die Grenze zwischen kleineren und größeren ist nach Ort und Zeit verschieden; erstere bestanden sehr häufig in Bier und Wein, letztere immer in Geld; den Herren die Bußen und den Gerichten den Wein". In Deutschland ist (anders als in England) immer mehr der Gedanke durchgedrungen, daß der Unterliegende sämtliche Kosten des Streits tragen müsse: „Wer an der Sache fällt, zahlt die Kosten", „Wen das Urteil fällt, der soll den Schaden entgelten", „Wer in Unrecht fällt, bezahlt die Kosten" und „Wer gewinnt, genieße — wer verliert, der büße."

7. Parteirechte

Will das gerichtliche Verfahren gegen alle Volksgenossen gerecht sein, so darf es keine Unterschiede machen und nicht nach Rang, Stand und Vermögen schauen: „Ein Mann hat soviel Recht wie

der andere", „Klägers und Antworters Recht sollen gleich sein", „Keine Partei ist der anderen vor", „Freie Sprache, freie Antwort". Allerdings muß der Kläger seine Klage beweisen, der Verklagte kann sich auf das Bestreiten beschränken. Vermag der Kläger z. B. für seine Behauptung, des Nachbars Hund sei nachts in seine Hürde eingebrochen und habe ihm 3 Schafe zerfleischt, den Beweis nicht zu erbringen, so wird er mit seiner Klage abgewiesen und hat zu seinem Schaden noch die dem Nachbarn erwachsenen Kosten zu ersetzen. Insofern kann man sagen: „Das Recht ist dem Antworter viel günstiger als dem Kläger", „Entgehen ist näher als Anbringen", „Die Rechte sind geneigter zu entlassen, als zu verdammen", „Ewig ist Widersprechen stärker als Ansprechen", „Sprich lieber des Antworters Wort als des Klägers", „Das beweisende Wort hat, wer sich wehrt" oder richtiger ausgedrückt: wer sich bloß wehrt, braucht nicht zu beweisen.

Ein Grundgebot der Gerechtigkeit ist, daß jeder Teil zu Worte kommt. Denn der Kläger mag seine Klage mit noch so beweglichen Worten vortragen, immer wird er nur das vorbringen, was für ihn spricht, und er wird weglassen, was zu seinem Nachteile ist. Er wird z. B. nur erwähnen, daß ihn ein Hund gebissen und seine Kleider zerrissen hat, nicht aber, daß dies geschehen ist, nachdem er den Hund durch Steinwürfe gereizt hatte. Daher „Eines Mannes Rede ist keines Mannes Rede — man soll sie billig hören beede", „Eines Mannes Rede habe ich nun gehört, hören wir auch des anderen Wort", „Mit dem Urteil nicht eile, — höre zuvor beide Teile." „Alle Urteile kommen von Klag' und Antwort." Das sollte auch im öffentlichen Leben gelten, wird aber hier heute so wenig wie früher beachtet. Nach Abschluß des Weltkrieges hat z. B. der Feindbund einseitig den sogenannten Friedensvertrag aufgestellt, darin zu dem sachlichen Unrecht auch die Behauptung von der Alleinschuld Deutschlands am Kriege aufgestellt. Darüber ließ man auch keine Verhandlungen oder Einwendungen zu, sondern verfuhr mit dem entwaffneten Deutschland wie einst der Gallierkönig Brennus mit dem überwundenen Rom nach dem berüchtigten Wort: „Wehe den Besiegten!"

Wenn einem Teile das „rechtliche Gehör" nicht gewährt wird, kann kein gerechtes Urteil zutage kommen. Aber auch bei gutem Willen wird nicht immer der richtige Sachverhalt festgestellt oder die

zutreffende gesetzliche Bestimmung darauf angewandt. Gar manchmal ist die Klage berechtigt: „Gericht wird oft verkehrt." Daher muß es die Möglichkeit geben, den Fehler zu verbessern: „Es ist nirgends eine Seuche, es ist eine Arznei dafür." Die hier vorgesehene Arznei ist die Möglichkeit, den höheren Richter anzurufen: „Jedermann kann Urteil strafen." Das konnte er aber nicht beliebig lange, sondern nur solange er noch vor seinem Richter stand: „Stehend soll man Urteil schelten." Tat man das nicht, so galt es als Einverständnis. Und „Was einer einmal genehmigt, das kann er nicht widerrufen." Heute liebt man solche Übereilung nicht mehr. Daher hat im Strafverfahren der Angeklagte wie der Ankläger, der meist die Staatsanwaltschaft ist, eine Woche Frist zur Einlegung eines Rechtsmittels. In bürgerlichen Sachen aber, deren endgültige Regelung im allgemeinen weniger eilt, beträgt die Rechtsmittelfrist einen Monat. Solange sie nicht abgelaufen ist, ist das Urteil noch nicht „rechtskräftig" und seine Wirkungen treten noch nicht endgültig ein. Hat z. B. ein Landgericht eine Ehe geschieden, so gelten die Streitteile rechtlich noch als Eheleute, bis das Urteil durch unbenutzten Ablauf der Rechtsmittelfrist oder durch endgültige Abweisung der dagegen eingelegten Rechtsmittel unabänderlich geworden ist. Das kann noch Jahr und Tag dauern und ist in mancher Hinsicht von großer Tragweite. In der Zwischenzeit hat nämlich der Mann regelmäßig noch der Frau Unterhalt zu gewähren, und ein von der Frau vor Eintritt der Rechtskraft, ja sogar ein bis zum 302. Tage nach diesem Zeitpunkt geborenes Kind gilt als ehelich (BGB. § 1591, Schw. Art. 252).

8. Gerichtsbarkeit und Zuständigkeit

In neueren Verfassungen findet sich manchmal der Satz: „Niemand darf seinem gesetzlichen Richter entzogen werden (vgl. § 16 des Gerichtsverfassungsgesetzes und Art. 105 der Weimarer Verfassung). Wer ist aber der gesetzliche Richter? Das ist heute leichter zu beantworten als zu einer Zeit, wo jeder nur vor seinen Standesgenossen Recht zu nehmen brauchte, der Adelige also nur vor seinem adeligen Gericht, der Soldat vor einem Militärgericht und der Geistliche nur vor einem kirchlichen. Die „Standesgerichtsbarkeit" war für die damalige Zeit so selbstverständlich, daß sich eine Reihe von

Sprichwörtern darüber gebildet haben: „Ein Edelmann darf vor des anderen Gericht nicht stehen", „Wer geweiht ist, gehört an seinen Obersten", „Affen und Pfaffen lassen sich nicht strafen" (zu ergänzen: von einem weltlichen Richter; das Wort „Affen" ist natürlich nur wegen des Binnenreimes beigefügt) oder „Affen und Pfaffen machen viel zu schaffen" (weil sie auch bei einem Verstoß gegen weltliche Gesetze die Zuständigkeit eines weltlichen Richters bekämpften), „Ein Schüler muß vor seinem Schulmeister antworten". Diese Standesgerichte erfreuten sich im Volke keines besonderen Vertrauens; man glaubte nämlich, daß sie nach dem Grundsatz verfahren würden: „Eine Krähe hackt der anderen die Augen nicht aus." Und wie im besetzten Gebiet die französischen Kriegsgerichte mit dem dehnbaren Begriff „Sicherheit der Besatzungstruppen" alles an sich zu ziehen versuchten, so auch jene Standesgerichte. Gegen die Art und Weise, wie z. B. kirchliche Gerichte überall eine Beziehung zur Religion und zur Kirche zu entdecken wußten und damit ihre Zuständigkeit zu erweitern erstrebten, hat sich das Wort gebildet: „Ein Roß ist kein geistlich Ding." Man denke etwa an das Roß des Bischofs, das in der großen Gerichtsszene der „heiligen Johanna" von Bernhard Shaw der eine Ankläger mit heißem Bemühen, aber ohne Erfolg unter die Gegenstände der Anklage bringen möchte. Die Standesgerichte paßten nicht mehr in eine Zeit, deren Kampfruf ist: gleiches Recht für alle. Es sind auch fast sämtliche Standesgerichte gefallen; nur die katholische Kirche, die große Macht des Beharrens, hat ihre kirchlichen Gerichte erhalten und nicht bloß als Dienstgerichte für ihre Geistlichen, wie auch der Staat neben den allgemeinen Gerichten noch besondere Dienstgerichte für Standesvergehen der Beamten unterhält. Sie nimmt auch Ehegerichtsbarkeit für sich in Anspruch. Dieses Verlangen kann der neuzeitige Staat, der das Eherecht als einen Teil des bürgerlichen Rechts selbst regelt und die Ehestreitigkeiten den staatlichen Gerichten zuweist, in der Hauptsache nicht anerkennen. Jedoch duldet er auf Grund von Vereinbarungen, die vielfach mit dem heiligen Stuhl getroffen worden sind, den sogenannten Konkordaten, daß die katholische Kirche an den Bischofssitzen geistliche Gerichte unterhält, die von gläubigen Katholiken in Ehesachen ebenfalls angerufen werden. Nach kirchlichem Rechte darf ja ein Katholik, auch wenn seine Ehe vom weltlichen Richter geschieden ist, bei Lebzeiten des ersten Ehegatten keine neue Ehe ein-

gehen. Dieser Erfolg kann aber unter Umständen auf einem anderen rechtlichen Wege erreicht werden. Die Kirche erkennt zwar keine Scheidung an, läßt aber bei den zahlreichen Ehehindernissen des kanonischen Rechts die Anfechtung der Ehe in ziemlich weiten Umfange zu. So ist z. B. die Ehe Napoleons I. mit Eugenie Beauharnais für nichtig erklärt worden, und er ist eine neue Ehe mit der Prinzessin Marie Luise von Österreich eingegangen. Im Ehewesen stehen sich auf diese Weise staatliche und kirchliche Gerichte unvermittelt gegenüber. Im übrigen gibt es nur noch eine staatliche Gerichtsbarkeit.

Wenn in einem Streitfall auch feststeht, daß ein bürgerliches oder Strafgericht des inländischen Staates zur amtlichen Verrichtung berufen ist, so kann immer noch Zweifel oder Streit darüber herrschen, welches. Hier stehen sich die Wünsche vom Kläger und Beklagten schroff gegenüber. Ein Berliner Versandhaus z. B., das seine Kunden im ganzen Reiche hat und gegen säumige Zahler gerichtlich vorgehen will, möchte die Sache durch einen Gang zu seinem Rechtsanwalt erledigen, dem es die ausstehenden Rechnungen bringt und der vor einem Berliner Gericht gegen alle Kunden die nötigen Schritte tun soll. Der Käufer in Ostpreußen oder Oberbayern dagegen will natürlich in einem Streitfall nicht in Berlin verklagt werden, wo er niemand kennt und wegen der kleinsten Sache einen Anwalt zuziehen muß, sondern vor seinem heimischen Gerichte; da kann er allenfalls auch persönlich auftreten und seine Rechte wahrnehmen. Daraus erklären sich die vielen Streitigkeiten über die „Zuständigkeit der Gerichte", also über die Vorfrage, ob das eine Gericht über eine Sache abzuurteilen berufen sei oder ein anderes. Hier gelten nun bei straf- und bürgerlichen Gerichten im wesentlichen die gleichen Grundsätze. Einer der wichtigsten ist der: „Wo ein Mann seine Wohnung hat, da muß er antworten" und „Der Kläger sucht des Beklagten Herrschaft." Man hat seinen allgemeinen Gerichtsstand da, wo man wohnt. Den Begriff des Wohnens aber veranschaulicht das Sprichwort: „Jedermann ist schuldig zu antworten, wo sein Topf wallt, seine Gabel fällt und sein Haus raucht." Am Gerichte des Wohnsitzes des Verklagten können mit wenigen Ausnahmen alle Klagen angebracht werden. Wenn man freilich jemand nur an seinem Wohnsitz verklagen könnte, so wäre das oft recht lästig, falls der Schuldner im Ausland wohnt. Hat z. B. ein

Ausländer auf einer Vergnügungsreise mit seinem Kraftwagen ein Kind in München überfahren und zum Krüppel gemacht, und könnte er nur in seiner Heimat verklagt werden, so wäre es dem Verletzten sehr erschwert, zu seinem Rechte zu kommen, und man hätte es unter Umständen mit einem Gericht zu tun, das die deutsche Sprache nicht verstehen darf und von dem ein Deutscher auch sonst befürchten kann, daß es nicht mit gleichem Maße messe. Die Gesetze haben daher neben dem allgemeinen noch eine Reihe von besonderen Gerichtsständen vorgesehen. Einer davon, mit dem sich das Sprichwort am meisten beschäftigt, ist der des Orts, an dem die unerlaubte Handlung begangen ist. Er gilt für das Strafverfahren wie für die Schadenersatzklage des bürgerlichen Streits. Von ihm heißt es: „Die Tat wird gericht, wo sie geschicht", „Man soll den Dieb richten, wo er stahl", „Der Täter reinigt die Stätte", (wo der Frevel begangen wurde, da muß er gesühnt und so die Stätte gereinigt werden), „Wo man den Totschlag tut, muß man ihn bezahlen", „Wo sich der Esel wälzt, muß er Haare lassen." In dem Worte: „Wo der Baum fällt, muß man ihn wieder aufrichten" ist wohl hauptsächlich an den Gerichtsstand im bürgerlichen Verfahren gedacht.

Man kannte aber seit alters auch noch andere derartige Gerichtsstände. So kommt es z. B. nicht auf den Wohnsitz der Beteiligten an bei Streitigkeiten über Liegenschaften oder über Rechte oder Lasten, die daran bestehen sollen. Hatte z. B. ein Straßburger vor dem Weltkriege ein Haus im Schwarzwalde gekauft und war für den nicht bar bezahlten Kaufpreis eine Hypothek im Grundbuch eingetragen worden, so kann der Gläubiger nach § 25 ZPO. die Klage aus der Hypothek beim „Gericht der belegenen Sache" erheben und braucht nicht das nunmehr französische Straßburger Gericht anzugehen. Das ist für den Gläubiger deshalb von großem Wert, weil aus ausländischen Urteilen nicht ohne weiteres vollstreckt werden kann. Den Gerichtsstand der belegenen Sache behandelt das Sprichwort: „Wo das Eigen liegt, soll man darüber richten."

Soll eine durch Vertrag entstandene Verbindlichkeit, also z. B. die Erfüllung eines Kaufs oder Werkvertrags eingeklagt werden, so ist auch das Gericht des Orts zuständig, wo die streitige Verpflichtung zu erfüllen ist. Auch das kannte man schon früher; nur hob man auf den Ort ab, wo der Vertrag geschlossen wurde: „Wo die Sache begonnen wurde, da soll man sie beenden." Nicht selten treffen die

Vertragsteile eine Vereinbarung über die Zuständigkeit eines Gerichts, namentlich pflegen jetzt die großen Geschäfte (zum Nachteil der wirtschaftlich Schwachen) die Zuständigkeit des Gerichts ihrer Niederlassung durch einen Aufdruck auf ihren Geschäftspapieren herbeizuführen. Ist der andere Teil ausdrücklich oder stillschweigend damit einverstanden, so muß er es später hinnehmen, daß er vor ein fremdes Gericht geladen wird: „Wer sich vor ein Gericht verbindet, bleibt verbunden."

Das Sprichwort „Wo der Mann Recht fordert, soll er Recht nehmen" behandelt den Gerichtsstand der Widerklage. Damit hat es folgende Bewandtnis: hat ein Pferdehändler in Breslau einem Gutsbesitzer im Lüneburgischen ein Reitpferd verkauft und klagt in Celle den Restkaufpreis ein, so kann der Käufer kraft des Gerichtsstandes der Widerklage dort auch den Kauf anfechten, wenn er etwa behauptet, er sei über das Alter und die Abkunft des Tieres arglistig getäuscht worden.

Sowohl nach den inneren staatlichen Gesetzen wie nach den Grundsätzen des Völkerrechts erstreckt sich die Gerichtsbarkeit eines Staats in der Regel nur auf Ereignisse, die eine Beziehung zu seinem Staatsgebiete haben oder von einem Staatsangehörigen begangen worden sind. Wird ein Deutscher in Paris von einem dort wohnenden Franzosen ermordet, so kann gegen den Franzosen nur in Frankreich, nicht in Deutschland ein Strafverfahren durchgeführt werden: „Außer Landes darf niemand richten", „Soweit der Stab zu gebieten hat, ist es ein rechtes Gericht" (der Stab ist das Zeichen der Herrschergewalt) und „Man darf niemand vor die Tore rufen", also nicht außer Landes. Die Franzosen freilich halten sogar Kriegsgerichte über deutsche Heeresangehörige, die sich in einem auf deutschem Gebiete gelegenen Gefangenenlager angeblich gegen französische Kriegsgefangene verfehlt haben. Sie „richten also außer Landes" gegen jedes Herkommen. Wie man aber schon im Altertum darauf gehalten hat, von *seinem* Richter und im *gesetzlichen* Gerichtsstand abgeurteilt zu werden, zeigt die Antwort des Apostels Paulus auf die Frage des Landpflegers Festus, ob er sich in Jerusalem wolle richten lassen: „Ich stehe vor des Kaisers Gericht, da ich mich richten lassen soll... Ich berufe mich auf den Kaiser." Und Festus sprach darauf die berühmten Worte: „Auf den Kaiser hast du dich berufen, zum Kaiser sollst du ziehen" Apostelgesch. 25, 9–12.

9. Das Verfahren

Da im bürgerlichen Rechtsstreit über Mein und Dein, vom Strafgericht sogar über Leib und Leben von Menschen entschieden wird, muß ein bestimmtes Verfahren eingehalten werden, damit jeder Beteiligte zu Wort kommt. „Die Ladung ist der Sache Beginn" und „Die Ladung zieht den Menschen vor Gericht". Im allgemeinen ladet der Kläger (und so auch die Staatsanwaltschaft als Anklägerin in Strafsachen) den Beklagten vor das Gericht, während Zeugen und Sachverständige im bürgerlichen Verfahren vom Gericht unmittelbar geladen werden; in neuerer Zeit überträgt man die Ladung in noch weiterem Umfang auf die Gerichte. Dabei wird eine ganz bestimmte Stunde angegeben. Denn der Richter ist nicht jederzeit für jedermann zu sprechen, vielmehr gilt: „Man kann keinen Tag haben ohne den Richter." Vor Gericht hat der Kläger das erste, der Verklagte das letzte Wort. „Wer zuerst spricht, ist der Kläger," „Dem Beklagten gebührt allzeit das letzte Wort". Wer auf die Lieferung einer Ware verklagt oder eines Vergehens beschuldigt ist, wird regelmäßig vor Gericht sagen, was er dagegen vorzubringen hat. Weil man gewöhnlich so verfährt, hat es ein Sprichwort als eine Rechtspflicht hingestellt: „Wen man beschuldigt, der muß antworten." Freilich wäre es irrig anzunehmen, der Verklagte oder der Angeklagte habe die rechtliche Pflicht, Rede und Antwort zu stehen. Er kann vielmehr schweigen, wie es Jesus nach dem Evangelium Matth. 27, 12–14 auf die Anklage der Hohepriester und Ältesten getan hat. Allerdings ist der Richter nicht gehindert, aus dem Schweigen seine Schlüsse zu ziehen. Ja im bürgerlichen Streitverfahren schreibt sogar das Gesetz vor, daß Schweigen auf die Klagbehauptungen so angesehen werden soll, wie wenn sie als richtig zugegeben würden: „Wer schweigt, bejaht." Damit ist freilich noch nicht gesagt, daß der Richter nun auch dem Klagantrag immer entsprechen müsse. Trägt z. B. eine verlassene Braut vor, sie habe die Wankelmütigkeit ihres Verlobten gekannt und habe sich, um ihm den Ernst der Sache klar zu machen, eine Entschädigung von 5000 RM. für den Fall versprechen lassen, daß die Eingehung der Ehe unterbleibe, so hätte der Richter zwar diese Behauptungen beim Ausbleiben des Beklagten als richtig anzunehmen. Gleichwohl darf er den säumigen Beklagten nicht nach dem Antrag auf Zahlung der 5000 RM. verurteilen, weil das Ver-

sprechen einer Strafe für einen solchen Fall nach § 1297 Abs. 2 BGB. nichtig ist.

Im Strafprozeß gilt das Schweigen nicht kraft gesetzlicher Vorschrift als Geständnis. Da indes nicht geständige Angeklagte im allgemeinen eher lügen als schweigen, hat der Richter meist guten Grund, einem schweigenden Angeklagten gegenüber vorsichtig zu sein; hinter dem Schweigen steckt oft etwas, was der Angeklagte nicht ans Tageslicht kommen lassen will. Es ist z. B. ganz gut möglich, daß jemand als nächtlicher Dieb angeklagt wird, weil man ihn aus dem Hause hat weggehen sehen, in dem gestohlen worden ist. Er schweigt aber über die Beschuldigung, weil er durch Bekenntnis des wahren Sachverhalts eine Frau bloßstellen müßte, die er nächtlicher Weile besucht hat. Daher muß im Strafverfahren der Nachweis der Schuld, sei es durch Zeugen, sei es durch Fingerabdrücke oder durch sonstige Anzeichen geführt werden. Der Satz: „Du kommst oder nicht, das Recht geht seinen Gang" gilt heutzutage nur für das Vorverfahren. Denn eine Hauptverhandlung kann nach deutschem Rechte, wie wir schon gehört haben, in Abwesenheit des Angeklagten regelmäßig nicht abgehalten werden.

10. Beweis im allgemeinen. Zeugen und Urkunden

Die Menschen gehen nicht immer mit der Wahrheit um, weder im Alltagsleben noch bei Gericht. Auch beim Verhör Jesu vor dem Hohepriester wird von falschen Zeugen berichtet, Ev. Matth. 26, 60 f. Zu allen Zeiten sind Menschen unschuldig verurteilt worden, weil andere bewußt oder aus Nachlässigkeit oder vielleicht auch in schuldlosem guten Glauben unwahre Aussagen gemacht haben. Daher darf der Richter das, was ihm die Streitenden und auch die Zeugen sagen, nicht ohne weiteres für wahr halten: „Ungewisse Geschichte glaubt man nicht", „Behaupten ist nicht beweisen", „Im Kriege wird viel gelogen". Ist es doch den Streitenden und erst recht den Angeklagten vielfach gar nicht darum zu tun, daß der wahre Sachverhalt richtig aufgeklärt wird. Sie wollen vielmehr den Richter manchmal geradezu verwirren, weil sie wissen, daß sich ein gewissenhafter Richter zu einer Verurteilung nur entschließt, wenn er sich eine klare Vorstellung von dem Vorgang hat bilden können. Gelingt ihm

das nicht, so kann er den Angeklagten nicht für überführt ansehen und muß ihn freisprechen. Diese Klarheit zu schaffen ist der Zweck des Beweisrechts für das bürgerliche und für das Strafverfahren.

Womit aber kann man eine Behauptung beweisen? Darauf antwortet das Sprichwort also: „Nach Zeugen und Urkunden wird jeder Streit gerichtet", „Augenschein ist der beste aller Zeugen" und „Der Eid ist der Zeuge der Wahrheit". Das sind auch noch heute die hauptsächlichsten Beweismittel.

Im allgemeinen ist es Sache des Klägers, eine Behauptung aufzustellen und zu beweisen; der Beklagte aber kann sich unter Umständen darauf beschränken, jene Behauptungen zu bestreiten. Daher die Worte: „Dem Kläger gebührt der Beweis" und „Wer etwas sagt, muß es beweisen". Treibt jemand ein verräterisches Spiel oder führt er einen leichtsinnigen Lebenswandel, so fällt das mit der Zeit in Einzelheiten auf, ohne daß man zunächst noch etwas Bestimmtes nachweisen kann. Er kommt ins Gerede, an dem oft etwas Wahres ist: „Gemein Laut macht einen Flecken", „Gemein Geplärr — ist nie ganz leer", „Es ist nicht gar ohne, was Herr Jedermann sagt", „Wo Rauch aufgeht, muß Feuer sein", „Es heißt keine Kuh Bleßlein, sie habe denn ein Sternchen", „Gemein Gerücht ist selten ganz erlogen".

„Gerücht ist eine Pfeife,
Die Argwohn, Eifersucht, Vermutung bläst,
Und von so leichtem Griffe, daß sogar
Das Ungeheuer mit zahllosen Köpfen,
Die immer streit'ge wandelbare Menge,
Drauf spielen kann."
(Shakespeare, Prolog zu König Heinrich V., 2. Teil.)

Auch dem deutschen Sprichwort ist nicht entgangen, daß das Gerücht gern übertreibt: „Das Gerücht ist immer größer als die Wahrheit." Daher reicht das bloße Gerücht nicht zum Beweise aus, mindestens muß noch eine bestimmte Aussage dazu kommen: „Ein Zeuge ist genug mit einem bösen Gerücht."

Im übrigen genügte dem noch unentwickelten Rechte ein Zeuge allein nicht. Wir sagen ja auch: „Vier Augen sehen mehr als zwei." Einer allein erhält vielleicht nicht den richtigen Eindruck vom wirklichen Vorgang der Sache. Vielleicht kann er ihn auch nicht behalten, wenn er ein schlechtes Gedächtnis hat, oder nicht richtig

wiedergeben, wenn er ungeschult und ungewandt ist. Dazu war die Seelenkunde der aus dem Volke stammenden und nicht beruflich vorgebildeten Richter noch nicht so entwickelt, um bei den einzelnen Zeugen unterscheiden zu können, ob sie Glauben verdienen oder nicht. Das Gericht sollte sich daher nach allgemeinen Regeln richten, nicht nach dem Eindruck, den der einzelne Zeuge machte. Die Zeit war noch nicht reif für den Grundsatz der „freien Beweiswürdigung", der unser jetziges Gerichtsverfahren, sowohl das bürgerliche wie das Strafverfahren, beherrscht. Daher hieß es: „Ein Zeuge — ist kein Zeuge", „Ein Zeuge — ist einäuge", „Eines Mannes Zeugnis taugt nicht, und wär' es ein Bischof", „Eine Stimme ist soviel wie keine, und wär es ein geschworener Richter". Dagegen glaubte man in Anlehnung an 5. Mose 19, 15 und Matth. 18, 16: „Durch zweier Zeugen Mund — wird allerwärts die Wahrheit kund", und „Wenn einer Zeugnis gibt, der ist wie keiner, zwei wie zehn". Als man sich des Widerspruchs bewußt ward, einem gar nicht zu glauben, zweien aber wie zehn, sagte man: „Ein Zeuge macht einigen Beweis", aber keinen vollständigen, vielmehr: „In zweier oder dreier Zeugnis liegt alle Wahrheit". Heute zählt der gute Richter die Stimmen nicht mehr, sondern er wägt sie. Er kann sich von einem Zeugen allein, den er für wahrheitsliebend und fähig zu einer guten Beobachtung hält, überzeugen lassen und kann das Zeugnis von zehn verwerfen, die er für unglaubwürdig hält. Und er hat zu solchem Mißtrauen nicht selten Anlaß. Denn oft wird der Versuch gemacht, die Aussage von Zeugen in der einen oder anderen Richtung zu beeinflussen. Nicht alle Zeugen sind aber stark genug, unlauteren Einwirkungen den gebotenen Widerstand entgegen zu setzen.

Das Recht mußte sich allmählich auch klar werden, wer überhaupt Zeuge sein könne, und traf auf Grund allgemeiner Lebenserfahrung Bestimmungen darüber, wie hoch oder wie gering der Wert des Zeugnisses eingeschätzt werden solle. Hatte man schon früher erkannt, daß jemand nicht zugleich Kläger und Richter sein könne, so sah man mit der Zeit ein, daß man auch nicht zugleich Kläger und Zeuge sein könne, weil der Kläger die Sache durch seine Brille ansieht und von dem Wunsch geleitet wird, ein ihm günstiges Urteil zu erlangen, der Zeuge aber die reine Wahrheit sagen soll, keinem zuliebe und keinem zuleid. Daher heißt es: „Selbst kann der Kläger kein Zeuge sein", „Niemand kann von sich selbst zeugen". Das ist für den Verletzten freilich schlimm, wenn er von einem anderen unter vier Augen beschimpft oder geschlagen worden ist. Eine gewisse Hilfe dagegen ist der Grundsatz der freien Beweiswürdigung. Denn es kann sich der Richter aus dem Vortrag des Klägers und der Antwort des Beklagten oft, auch ohne daß Zeugen den Vorfall beobachtet und darüber ausgesagt haben, ein Bild davon machen, wer Recht oder Unrecht hat; namentlich dann, wenn er ein Menschenkenner ist und wenn beide Teile persönlich vor ihm erscheinen. Aber in früheren Zeiten mit ihren starren Beweisregeln konnten solche Verhältnisse dem Verletzten sehr nachteilig sein, und sie haben auch zu manchem Scherz Veranlassung gegeben. Bekannt ist folgendes Geschichtchen: Ein Fahrgast bekommt mit dem Fährmann wegen seiner Langsamkeit oder Ungeschicklichkeit Händel und gibt ihm eine Ohrfeige. Dieser bleibt ruhig und erwidert nur: „Das werden Sie büßen" und zu den anderen Fahrgästen gewandt: „Meine Herren, Sie sind Zeugen". Darauf gibt der schlagfertige Gast auch allen anderen eine Ohrfeige mit den Worten: „Es tut mir leid, Ihnen zu nahe treten zu müssen; es geschieht nur, damit Sie nicht Zeugen sein können."

Hier konnte allerdings fraglich sein, ob die anderen Fahrgäste Mitverletzte seien wie etwa bei einer gemeinsamen Schlägerei, oder lauter selbständig Verletzte. Wirklich Mitverletzte können auch heute, wenn sie selbst als Kläger auftreten, nicht zugleich Zeugen sein. Bei schweren Straftaten erhebt aber regelmäßig die Staatsanwaltschaft die öffentliche Klage, und dann sind die Verletzten bloß Zeugen und werden vereidigt. Sie haben dann aber auch nicht die Rechte des Klägers; sie können daher gegen ein Urteil, das ihnen nicht gefällt, nicht selbständig ein Rechtsmittel einlegen. Was von den Mitverletzten, gilt auch von den Mittätern: „Kumpane können nicht zeugen." In England ist man freilich darin nicht so ängstlich und bedenklich, dort kann ein Mittäter als sogenannter „Kronzeuge" von der Strafe befreit werden, wenn er gegen die anderen Zeugnis ablegt. Das widerspricht unserer Anschauung von Gerechtigkeit, die gleiche Schuld gleich bestraft wissen will. Auch ist doch recht fraglich, ob einer, der durch seine Teilnahme am Verbrechen gezeigt hat, daß er krumme Wege nicht scheut, in seiner Eigenschaft als Zeuge nun die reine Wahrheit sagen wird.

In alter Zeit band das Gesetz zwar streng an die von ihm aufgestellten Beweisregeln; es war aber doch klug genug, Unterschiede

zwischen den Zeugen zu machen: „Zeugen sind verschieden.“ Aber wie es bei geistig noch unentwickelten Völkern geschieht, machte es die Unterschiede in zu verallgemeinerter und unreifer Weise. So hieß es: „Ein armer Mann kann kein Zeuge sein.“ Dem Schöpfer dieses Wortes schwebte dabei vielleicht ein ähnlicher Gedanke vor wie Schiller, als er die Verse schrieb: „Etwas muß er sein eigen nennen, oder der Mensch wird sengen und brennen.“ Aber nicht jeder Arme wird von Mißgunst verzehrt und daher zu unwahrer Aussage geneigt; auch Jesus und der Philosoph Diogenes rühmten sich ihrer Armut. Eher verständlich war es, daß, wer nicht selbst vor Gericht stehen, sondern sich durch andere vertreten lassen mußte, auch nicht Zeuge sein konnte. Daher: „Eine Frau kann in keinem Stücke einen Mann überzeugen“, „Pfaffen und Frauen können niemand verzeugen“. Man erinnere sich, daß in der lateinischen wie in der deutschen Sprache das gleiche Wort benutzt wird für die Bekundung vor Gericht wie für den männlichen Anteil bei der Fortpflanzung. Immerhin konnten die Frauen schon in alter Zeit nicht ganz von der Fähigkeit ausgeschlossen werden als Zeuge aufzutreten; so namentlich, wenn an ihnen insgeheim ein Sittlichkeitsverbrechen begangen worden oder ein Ereignis eingetreten war, bei dem regelmäßig eine Frau, aber kein Mann behilflich war. Darum mußte man sie als Zeugin wenigstens beschränkt zulassen. So hieß es denn: „Keine Frau kann mehr bezeugen als Notzucht und Ehe“ und „Geburt und Ehe können Frauen bezeugen“. Auf die allgemeine Entrechtung der Juden im Mittelalter ist das Wort zurückzuführen: „Keines Juden Eid geht über einen Christenmenschen.“ Zur Vorsicht gegenüber dem Zeugnis von Personen, die von einem anderen abhängig sind und seine häusliche Gemeinschaft teilen, mahnt das Wort: „Wes Brot ich ess', des Lied ich sing'.“

Einen berechtigten Unterschied machte man weiter zwischen Zeugen, die das zu Bekundende selbst mit Augen wahrgenommen hatten, und solchen, denen bloß davon erzählt worden war: „Ein Augenzeuge gilt mehr als zehn Ohrenzeugen“, „Die Augen glauben sich selbst, die Ohren anderen Leuten“, „Hörensagen ist halb gelogen“; daher „Zeuge vom Hörensagen gilt im Rechte nicht.“ Eine gewisse Überschätzung des Sehens liegt freilich in dem Worte: „Was die Augen sehen, betrügt das Herz nicht.“ Wir wissen sowohl aus den Vorstellungen von Zauberkünstlern wie aus den neueren wissenschaftlichen Versuchen, wie leicht auch das Auge selbst des gewissenhaften Menschen getäuscht werden kann. Auch sonst haften dem Zeugenbeweis, so wertvoll und vielfach unentbehrlich er ist, doch gewisse Mängel an: die Erinnerung an einen Vorgang verblaßt im Gedächtnis des Menschen dadurch, daß immer neue Eindrücke auf die Seele wirken. Weiter aber: rasch tritt der Tod den Menschen an. Daher die Worte, die den Mangel kundtun und die zum Teil auch den Ausweg andeuten: „Vergessenheit ist die Mutter des Irrtums“, „Zeugen können vergessen, aber Handfeste nicht“, „Schrift klebt fest“ und „Wenn die Zeugen sterben, sind Briefe immer stät“. Das ist in der Tat der Vorzug der Urkunde vor dem Zeugen, und so ist es zu verstehen, daß manche Rechtsordnungen den Zeugenbeweis beschränken. So gibt es ein deutsches Sprichwort: „Die Sachsen dulden kein Zeugnis.“ Ebenso läßt das französische Recht den Zeugenbeweis nur für Alltagssachen zu, über die man nichts aufzuschreiben pflegt. In größeren Sachen aber ist der Beweis nicht durch Zeugen, sondern durch Urkunden zu führen: „Briefe sind besser als Zeugen.“ Natürlich ist auch wieder ein großer Unterschied zwischen Urkunden. Hat sie bloß ein Teil allein geschrieben, so werden sie meist nur das enthalten, was ihm günstig ist: „Muß man schlichter Schrift glauben, so kann sich ein Mensch hastig reich schreiben.“ Daher hat man sich daran gewöhnt, eine einseitig aufgenommene Urkunde im allgemeinen nur zum Nachteil des Schreibers, nicht aber zum Nachteil des Gegenbeteiligten zu verwerten.

Etwas anderes ist es wohl bei der Buchführung der Kaufleute, weil ihnen nicht bloß die Gesetze vorschreiben ordnungsmäßig Bücher zu führen, sondern weil das ihnen auch ihr eigenes Wohl und Wehe gebietet; denn sonst wüßten sie selbst nicht mehr, welche Forderungen und welche Schulden an einem Tage fällig sind und wie es mit ihrem Vermögen steht. Aber ob alle Eintragungen vollständig und richtig sind, hängt auch hier von der Gewissenhaftigkeit und Ehrbarkeit des einzelnen ab. Daher sagt das Sprichwort: „Was Kaufleute in ihren Büchern haben, soll man nicht ganz glauben.“ Das ist in der Tat sachgemäß, fordert aber doch die Frage heraus: Gibt es denn nun gar keine Urkunden, auf die sich sowohl der einzelne wie die Gesamtheit verlassen kann? Um das dringende Bedürfnis nach solchen Urkunden zu befriedigen, sind im Staate gewisse Personen mit öffentlichem Glauben ausgestattet, und ihre Urkunden

begründen, wenn sie in der vorgeschriebenen Form aufgenommen worden sind, vollen Beweis des von ihnen bekundeten Vorgangs. So ist es z. B., wenn ein Notar eine Urkunde über ein vor ihm erklärtes Rechtsgeschäft (Hauskauf, letzter Wille usw.) aufnimmt. In früherer Zeit wurden wichtige Erklärungen oft vor versammelter Gemeinde abgegeben und ins Ratsbuch aufgenommen; daher leitete sich der Satz her: „Übers Stadtbuch geht kein Zeugnis." Diese Stadtbücher sind übrigens eine der Quellen, aus denen unser neuzeitiges Grundbuch entstanden ist. Dieses dient dazu, in jedermann erkennbarer Weise festzustellen, wer Eigentümer einer Liegenschaft ist, und wem daran ein Grundpfandrecht (Hypothek) oder ein anderes dingliches Recht wie Wohnrecht, Überfahrtsrecht und dergleichen zusteht.

11. Eid und Gottesurteil

Zeugen, Urkunden und Augenschein sind zwar die wichtigsten Beweismittel, aber sie reichen nicht aus, wenn ein Mord auf einsamer Heide begangen worden ist oder wenn ein Streit entsteht über das, was zwischen zwei unter vier Augen mündlich ausgemacht worden ist. Heute sind in der Strafrechtspflege bedeutsame Hilfen zur Erforschung des Tatbestands die Lichtbildaufnahme des Tatorts und der Leiche, die chemische Untersuchung von Blutflecken an der Waffe oder an den Kleidern des Verdächtigen, die Prüfung der am Tatorte gefundenen Fingerabdrücke usw. Das kannte man alles in früheren Zeiten nicht. Wo aber der menschliche Verstand aufhörte, half nach allgemeinem Glauben Gott selbst aus: „Die Schuld weiß niemand als Gott, der scheidet sie auch zu Recht", „Wo man die Wahrheit mit Recht nicht finden kann, muß man sie ahnden mit Gottesurteil", „Gott richtet, wenn niemand spricht". Echt germanisch war nun die Meinung, daß ein Zweikampf zwischen dem Ankläger und dem Angeklagten Recht und Unrecht an den Tag bringe, weil Gott dem Unschuldigen beistehe: „Kampf ist der Gottesurteile eines" und „Wer den Sieg behält, der hat recht". So kämpft Lohengrin für die des Brudermords beschuldigte Elsa von Brabant und bringt durch Besiegung des Anklägers Telramund ihre Unschuld an den Tag. Mit der Zeit mußte man aber doch erkennen, daß sich die Menschen diese Vorstellung selbst zurecht gemacht hatten; nicht anders als in anderen Kämpfen entschied den Sieg nicht das größere Recht, sondern die größere Stärke oder List. Der Zweifel an dem Glauben, daß durch den Zweikampf über Recht und Unrecht entschieden werde, klingt vernehmlich aus dem Sprichworte: „Gott hilft dem Stärksten." Nachdem aber der Glaube gewichen war, mußte allmählich auch die Einrichtung selbst fallen, und lebte nur noch bei einzelnen Ständen fort, wo der Zweikampf zur Entscheidung von Ehrenhändeln weiter geübt wurde bis in unsere Tage.

In diesen Rahmen gehört dann noch der Parteieid. Der von ihm geltende Satz: „Der Eid allein ist Gottesurteil" hat einen doppelten Grund. Man glaubte nämlich, daß Gott selbst den Meineidigen bestrafen werde: „Gott richtet den Eid." Vor allem aber: was einer der Streitteile vor Gericht beschworen hatte, das mußte der Richter als wahr ansehen und darnach seinen Spruch fällen, auch wenn er von der Wahrheit des Beschworenen innerlich nicht überzeugt war. Der Parteieid ist daher auch heute noch kein Beweismittel, das den Richter zu überzeugen hätte, sondern ein Beweisersatz, der an die Stelle eines wirklichen Beweises tritt. Dessen ist sich auch das Sprichwort bewußt gewesen, wie sich aus folgendem ergibt: „Wo der Beweis abgeht, gehen die Eide zu" und „Was man beweisen kann, braucht man nicht zu beschwören". Daher darf auch heute auf einen Eid nicht erkannt werden, solange andere Beweismittel, die einen Erfolg versprechen, angeboten und noch nicht erschöpft sind. Der Parteieid wird zuletzt ins Feld geführt und entscheidet schließlich; daher das aus der Schrift entlehnte Sprichwort: „Der Eid ist ein Ende alles Haders."

Ganz entbehrt kann dieser Eid auch heute noch nicht werden. Klagt z. B. ein Mädchen auf Schadensersatz aus dem Bruche eines Verlöbnisses, das wegen des befürchteten Widerstandes der Angehörigen geheimgehalten worden sein soll, so wird es oft fraglich sein, ob eine bloße Liebschaft vorgelegen hatte, oder ob die künftige Schließung der Ehe versprochen war. Vielleicht können aus einem Briefwechsel oder aus gewechselten Geschenken Schlüsse gezogen werden. Sonst wird die Streitfrage nur von einem der angeblich Verlobten zuverlässig beantwortet werden können. Diese sind aber Kläger und Beklagter und können daher nicht als Zeugen vernommen werden. Die klagende Braut wird daher den ihr obliegenden Beweis nur dadurch führen können, daß sie dem untreuen Liebhaber den Eid dar-

über zuschiebt. Dieser hat dann zwei Möglichkeiten: er kann entweder beschwören, daß in Wahrheit kein Verlöbnis bestanden habe, oder er kann den Eid „zurückschieben". Das bedeutet: Der in erster Linie Schwurberechtigte erklärt, nicht selbst schwören zu wollen und dies dem andern Teil zu überlassen, der über den Streitpunkt gerade so gut unterrichtet ist. Meist aber wird der Eid angenommen; die Parteien kämpfen geradezu um den Eid, wie wenn es ein „Rübengraben" wäre zu schwören. In Wahrheit aber kann doch höchstens einer mit gutem Gewissen schwören. Es liegt eben eine große Versuchung darin, das Unterliegen in einem Prozesse durch den Eid, den man selbst schwören darf, von sich abzuwenden. Man hat daher schon bald damit gerechnet, daß der Eid so wenig wie der Zweikampf einen gerechten Ausgang des Streits verbürge. „Kommt der Dieb zum Eide und der Wolf zur Heide —, so haben gewonnen beide." Daher hat man den Meineid, das ist den wissentlich falschen Parteieid, mit schweren Strafen bedroht. Im Strafverfahren aber läßt man den Angeklagten in neuerer Zeit nicht mehr schwören. Aber auch im bürgerlichen Verfahren dürfte vom Parteieid ein sparsamerer Gebrauch gemacht werden als es vielfach geschieht. Er ist manchmal entbehrlich, wenn der Richter alle Möglichkeiten ausschöpft, die sich bei dem Grundsatz der freien Beweiswürdigung durch die Erhebung der sonst angetretenen Beweise und durch sorgfältige Beachtung aller Umstände des Falles darbieten.

12. Urteil und Vollstreckung

Das gerichtliche Verfahren endet regelmäßig mit einem Urteil. Im Strafverfahren wird der Angeklagte entweder verurteilt oder freigesprochen: „Urteil bindet und löst", — „Alle Beklagten henkt man nicht."

Das Gesetz stellt über die Rechtshandlungen und Rechtsverhältnisse, wie Kauf, Ehe, die Beerbung eines Verstorbenen usw. meist nur allgemein leitende Grundsätze auf und kann sich nicht klügelnd in Einzelheiten ergehen. Sie richtig zu erkennen und unter die gesetzliche Regel einzureihen, ist Sache der Gerichte. Wie dies im einen Fall geschehen ist, soll es auch in verwandten geschehen: „In gleichen Sachen soll man gleiches Recht bezeugen." Haben z. B. junge

Burschen gemeinsam gestohlen und hat man die zuerst entlarvten nach ihrer geistigen und sittlichen Entwicklung für fähig gehalten, das Ungesetzliche ihrer Tat einzusehen (§ 3 des Jugendgerichtsgesetzes), so muß bei den später ermittelten derselbe Maßstab für die Beurteilung der Reife angelegt werden; jedenfalls dürfen nicht Rücksichten auf die Stellung und auf die politische Zugehörigkeit der Eltern und dergleichen bei der Beantwortung der zu prüfenden Fragen mitspielen.

Auch ein sorgfältiger Richter kann sich in der Entscheidung eines Streits vergreifen, entweder bei der Feststellung des tatsächlichen Vorgangs oder bei der Anwendung des Gesetzes auf den Vorgang. Daher muß man den Beteiligten die Möglichkeit geben, ein Urteil nochmals prüfen zu lassen. Das geschieht durch ein höheres Gericht, das befugt ist, das angegriffene Urteil entweder zu bestätigen, oder abzuändern oder ganz aufzuheben. Darüber sagt das deutsche Sprichwort: „Von welch höherer Hand das Gericht ist, an das kann man sein Urteil ziehen" und zwar „Vom Dorfgericht zum Stadtgericht, vom Stadtgericht zum Hofgericht, vom Hofgericht zum Kammergericht." In diesem Verlangen, die Sache immer wieder an ein höheres Gericht weiter ziehen zu können, offenbart sich übrigens der Hang des Deutschen zur Rechthaberei.

Da in Urteilen oft über Leben und Freiheit eines Menschen entschieden wird, ist es wohl begreiflich, daß sich das Wort bildete: „Das Schaf muß des Hirten Urteil fürchten." In gesitteten Staaten ist man jedoch gegen grobe Mißbräuche hinreichend gesichert. Wie wir schon gehört haben, muß jeder Angeklagte geladen werden und Gelegenheit haben, sich zu verantworten: „Kein Urteil schadet jemand, das man über einen Ungeladenen findet." Auch kann jedermann verlangen, von dem Richter abgeurteilt zu werden, der vom Gesetz über ihn gesetzt ist. Freilich gibt es auch hier manchmal Rückfälle in die Zustände roher Zeiten. So wollte der Feindbund über die deutschen Heerführer einen Gerichtshof entscheiden lassen, der aus lauter Feinden zusammengesetzt gewesen wäre. Von solchen Ausnahmen abgesehen aber gilt heute wie früher das Wort: „Das Urteil bindet nicht, gibt es der rechte Richter nicht." Es ist ein unheilbarer Fehler, wenn das Gericht nicht vorschriftsmäßig besetzt war. Früher schon (S. 144) haben wir gehört, daß niemand wegen derselben Sache zweimal *verurteilt* werden darf. Der Schutz gegen staatliche Willkür geht aber

noch weiter. Auch wer einmal rechtskräftig freigesprochen worden ist, darf grundsätzlich wegen derselben Sache nicht noch einmal vor Gericht gestellt werden. Vielmehr gilt: „Niemand kann in einer Sache zweimal antworten“ und „Wo einmal gerichtet wird, ist darnach immer gerichtet.“

Weil gegen die meisten Urteile ein Rechtsmittel möglich war und ein höherer Richter angerufen werden konnte, so war der Kläger regelmäßig außerstande, ein Urteil sofort zu vollstrecken, nachdem es erlassen war. Darauf bezieht sich der Spruch: „Der Kläger soll nicht gleich mit einem Sacke kommen.“ Die Möglichkeit, durch Anrufung des höheren Richters zunächst die Vollstreckung abzuwenden, führt allerdings den Schuldner in die Versuchung, durch Einlegung eines Rechtsmittels die Erfüllung seiner Schuld auf unbestimmte Zeit hinauszuschieben. Dieser Gefahr hat man dadurch einigermaßen abgeholfen, daß auch die Urteile der unteren Gerichte für vorläufig vollstreckbar erklärt werden konnten. Sie können also einstweilen im Zwangswege durchgeführt werden; hebt sie aber das höhere Gericht auf, so wird alles wieder rückgängig gemacht. Den alten bekannten Gegensatz zwischen der Rechtslage und ihrer wirtschaftlichen Durchführbarkeit behandelt der Satz: „Das Recht kann niemand zu mehr zwingen als er hat.“ Es kann z. B. ein Arbeiter durch einfache Fahrlässigkeit im Bergbau oder in der Fabrik den Tod oder die Erwerbsunfähigkeit von Mitarbeitern herbeiführen; das gleiche Unglück kann ihm auch in den Stunden der Erholung beim Fußballspiel oder beim Rudersport gegenüber seinen Kameraden zustoßen. Er wird dann ihnen und ihren Hinterbliebenen unter Umständen in einem Umfang haftbar, daß er auch bei gutem Willen seine Verpflichtungen nicht ganz erfüllen kann. Hat ein solcher Schuldner eigenes Vermögen, so können seine Gläubiger durch Pfändung und Versteigerung daraus Befriedigung suchen, soweit nicht das Gesetz einzelne Vermögensstücke von der Pfändung ausschließt (den sogenannten „Notbedarf“). Die Gläubiger können aber nicht bloß auf das gegenwärtige Vermögen greifen, sondern auch auf den künftigen Verdienst im Wege der Lohn- und Gehaltspfändung. Diese Fürsorge für die Gläubiger birgt aber die schwere Gefahr in sich, daß der Schuldner die Lust zur Arbeit verliert, weil deren Erträgnisse nicht mehr ihm und seiner Familie zugute kommen, sondern im wesentlichen nur seinen Gläubigern. Es ist daher wohl begreiflich, daß ein

so bedrängter Schuldner auf jede Weise die ihn in eine gewisse Fronschaft versetzende Lage von sich abwenden will. Ein Weg ist der, daß er mit seinem Arbeitgeber vereinbart, es solle ihm persönlich nur ein Lohn bis zur Höhe der Pfandfreiheit gewährt, sein etwaiger höherer Verdienst aber seiner Frau versprochen und gezahlt werden. Diese Vereinbarung, die eine Berechtigung hat, aber auch mißbraucht werden kann, ist viel bekämpft worden. Das deutsche Reichsgericht aber hat sie für unentbehrlich gehalten, als rechtswirksam anerkannt und zwingt so einen Schuldner zu nicht mehr als er hat.

3. Hauptstück: Staats- und Verwaltungsrecht, Völker- und Kirchenrecht

1. Reich und Länder

Ein tief religiöser Zug beherrschte das Mittelalter. Er durchdrang das ganze Leben und so auch das Recht, und ein Ausfluß von ihm ist die Anschauung, daß Staat und Kirche, Kaiser und Papst zusammengehören und aufeinander angewiesen sind. Davon zeugen die Sprichwörter: „Alle Gewalt kommt von Gott“ und „Petri Schlüssel flüchtet unter Pauli Schwert.“ Im Reiche selbst war der Widerstreit zwischen dem Ganzen und den Teilen, zwischen Kaiser und den Stammesherzögen lebendig, und er blieb es in der ganzen deutschen Geschichte. So hieß es zwar: „Der Stärkste ist der Kaiser, er ist aller anderen Herr,“ aber auch: „Jeder Fürst ist Kaiser in seinem Land.“

Das heilige römische Reich deutscher Nation — das war ja der Name des mittelalterlichen deutschen Reichs — war nach dem Aussterben der Karolinger ein Wahlreich geworden. Und zwar waren ursprünglich alle weltlichen und geistlichen Fürsten wahlberechtigt. Schließlich aber hatten nur noch die sieben Kurfürsten den Kaiser zu wählen. Dabei ist bemerkenswert, daß einer der sieben Wähler der König von Böhmen war, ein Name, den nur auszusprechen heute schon eine Versündigung gegen die Empfindlichkeit der Tschechen ist. Ja, der Böhme, der nach Schillers Ballade „der Graf von Habsburg“ bei der Kaiserkrönung den perlenden Wein schenkte, ist sogar „der Kurfürsten Obermann“.

Frühzeitig entwickelte sich schon der Gedanke, daß die Länder nicht wie sonstiges Besitztum eines Mannes nach dem Tode unter die Erben verteilt werden sollen. Aber der deutsche Geist war noch nicht reif für die Unterscheidung zwischen öffentlichem und bürgerlichem Recht und für die Erkenntnis, daß Fragen des öffentlichen Rechts vielfach anders behandelt werden müssen als die des häuslichen und bürgerlichen Verkehrs. Und wenn man dies erkannt hätte, so wäre es doch schwer gewesen, die Erkenntnis ins Leben einzuführen. Denn ein starkes Hemmnis war der Eigennutz fürstlicher Familien, deren sämtliche Mitglieder am väterlichen Besitztum teilhaben wollten. Man denke nur an die unseligen Teilungen in den sächsisch-thüringischen Landen. Hier hat erst in der Nachkriegszeit das Gefühl für die Schäden der Kleinstaaterei wieder zusammengebracht, was jahrhundertelang durch erbrechtliche Einrichtungen, die in ihrer Entwicklung hinter den Bedürfnissen der Zeit zurückblieben, auseinander gerissen worden war. Denn der Sinn dafür, daß Land und Leute nicht wie ein Acker in so viel Teile geteilt werden dürfe, als Erben vorhanden sind, ist in Deutschland erst recht spät durchgedrungen. Daher wurde vorsichtigerweise in die im 19. Jahrhundert gegebenen Verfassungen der deutschen Länder die Bestimmung aufgenommen, daß die Länder unteilbar und unveräußerlich seien. Die Zuständigkeit zwischen Reich und Ländern hat sich im Laufe der Jahrhunderte ständig zum Nachteil des Reiches verschoben. Ehedem hieß es z. B.: „Das Wasser ist des Reiches Straße." Später aber rissen die Länder die Hoheit über den Flußverkehr an sich. Erst in neuester Zeit (vgl. Art. 97 der Weimarer Verfassung) sind die dem allgemeinen Verkehr dienenden Wasserstraßen wieder vom Reiche übernommen worden; freilich haben durch die Schmach von Versailles die Feindstaaten mehr in die Verwaltung der deutschen Ströme hineinzureden als das Reich selbst.

Auch unsere Vorfahren hatten schon ein Verständnis für die rechte Staatsgesinnung: „Wo man gemeinen Nutzen tut, dient man dem Reiche." Das Sprichwort warnt des weiteren vor dem gegenteiligen Verhalten: „Eigennutz ist Zerstörer des gemeinen Nutzens" und „Eigennutz — ist böser Putz."

Neben den Ländern haben sich im Laufe des Mittelalters auch die Städte reich entwickelt. Der Städtebund der Hansa hat ganz Nordeuropa beherrscht, und das Recht der freien und Hansestadt Lübeck,

das sogenannte lübische Recht, ist zahlreichen Städten Osteuropas verliehen worden. Aber auch das Recht der oberdeutschen Städte stand in hoher Blüte. So konnte im Stadtrecht der alten deutschen Stadt Straßburg das stolze Wort ausgesprochen werden, ihr Rat richte nicht nach dem Landrechte, sondern nur nach der Wahrheit und dem Stadtrechte. Länder und Städte sind uns bisher als Körperschaften des öffentlichen Rechts und Träger von Hoheitsrechten, wie der Straf- und Steuergewalt entgegengetreten. Sie sind daneben aber auch Eigentümer von Häusern und Äckern und schließen darüber Kauf- und Pachtverträge ab wie sonstige Eigentümer. Wer aber Träger von Rechten und Pflichten ist, ohne ein Einzelmensch von Fleisch und Blut zu sein, wird in der Rechtslehre juristische Person genannt. Wenn einer solchen Person ein Recht eingeräumt wird, das sonst mit dem Tod des Berechtigten erlischt, wie die Nutznießung an einem Grundstücke, oder die Zahlung einer Rente, so gibt es hier kein natürliches Ende der Berechtigung (§ 1061, BGB.). Diese Erkenntnis hat man in die Worte gefaßt: „Der Länder Privilegien sind ewig" und „Eine Gemeinde stirbt nicht."

Eine besondere Stellung nahmen im Mittelalter die Juden ein. Aus religiöser Engherzigkeit und Feindseligkeit heraus — des Unterschieds der Rasse war man sich kaum bewußt — hieß es von ihnen: „Sie sind der Handfeste des angeborenen Rechts beraubt und in die Sünde der Verdammnis jämmerlich verführt; doch sind sie uns gleich an der Gestalt, und wir sollen die Menschheit an ihnen achten." An sich rechtlos, genossen sie doch des Kaisers Schutz: „Die Juden sind des Reiches Knechte", allerdings nicht aus reiner Menschenfreundlichkeit, sondern mehr aus Eigennutz. Sie wurden Melkkühe und ihr Schutz war eine nutzbare Gerechtsame; denn sie durften allein Geld gegen Zins verleihen (vgl. S. 103) und aus den reichen Erträgnissen dieses Gewerbes fiel für die Schutzherren mancherlei ab. Erst im Laufe des 19. Jahrhunderts wurden die Juden den Christen sowohl im bürgerlichen wie im öffentlichen Recht völlig gleichgestellt; nur das in den Banden des kanonischen Rechts liegende ö. BGB. verbietet noch in § 64 die Ehe zwischen Christen und Nichtgetauften, also namentlich den Juden. Art. 136 Abs. 2 der Weimarer Verfassung dagegen bestimmt: „Der Genuß bürgerlicher und staatsbürgerlicher Rechte sowie die Zulassung zu öffentlichen Ämtern sind unabhängig von dem religiösen Bekenntnis."

2. Pflichten und Rechte der Staatsbürger

Wir sprechen heute meist von Staatsbürgern. Die Zeit dagegen, in der die Rechtssprichwörter entstanden sind, kennt im allgemeinen nur den Begriff Untertan. Damals war oberster Grundsatz: „Gehorsam ist die Grundfeste aller Ordnung“ und „Wo kein Gehorsam ist, kann kein Regiment bestehen.“ Übrigens ist Gehorsam gegen die Gesetze und die Obrigkeit auch beim freien Staate eine Bürgerpflicht. Wo sie nicht erfüllt wird, kann das Staatsganze nicht gedeihen. Dem einzelnen aber wird der Gehorsam namentlich dadurch erleichtert, daß er die Überzeugung gewinnt, ihm werde grundsätzlich nicht mehr zugemutet, als jedem anderen. Das kann man ertragen; denn „Gleiche Bürde bricht niemand den Rücken.“

Eine der ersten Pflichten des Deutschen war von jeher die Wehrpflicht. Der Germane trieb ja das Waffenhandwerk am liebsten. Es haben sich daher auch Sprichwörter gebildet, aus denen sein Zweck und die damit verknüpften Gefahren herausleuchten. Soweit der Krieg nach ihnen die Bekämpfung Andersgläubiger bezweckte, findet er in unserem Herzen keinen Widerhall mehr: „Für Gottes Wort und Vaterland — nimmt man mit Fug das Schwert zur Hand.“ Dagegen mag das Wort „Kein schärfer Schwert denn das für Freiheit streitet“, das sich der siegestrunkene Feindbund bei der willkürlichen Zuteilung Deutscher an feindliche Staaten nach dem Abschluß des Weltkriegs und bei der Knechtung Deutschlands selbst nicht vor Augen gestellt hat, auch in der Zukunft seine Wahrheit erweisen. In einem Lande mit allgemeiner Wehrpflicht kann für den Fall des Krieges gesagt werden: „Jeder muß seine Haut zu Markte tragen.“ Was aber im Heere das Beispiel und Vorbild des Vorgesetzten bewirken kann, sagt das Sprichwort: „Freudiger Hauptmann macht freudige Kriegsleute.“ „Freudig“ ist hier aber so viel wie freidig, mutig. Jeder freie Deutsche war ursprünglich wehrpflichtig, und das ist im Bewußtsein des deutschen Volks geblieben. Der Machtspruch von Versailles untersagt freilich dem Deutschen Reiche die Beibehaltung der allgemeinen Wehrpflicht, die der Feindbund wenigstens in seinen Festlandstaaten durchführt, und nötigt zur Haltung eines Söldnerheeres. Das Söldnerwesen hat allerdings schon einmal zu Beginn der Neuzeit geblüht. Namentlich haben Mittel- und Oberdeutsche ihre Knochen für fremde Kriegsherren jahrhundertelang zu Markte getragen. Aus oberdeutschem Gebiete stammt denn auch das berühmte Wort, das den Zusammenhang zwischen Dienst und Sold in gelungener Weise verkündet: „Kein Kreuzer, — kein Schweizer.“

Die Wehrpflicht schützt vor inneren und äußeren Feinden. Der einzelne Bürger aber genießt den häuslichen Frieden und hat ein Recht darauf: „Binnen Haus und Hof hat jedermann Frieden“, „Daheim bin ich König“, „Der beste Anker ist das Haus“, „Mein Haus ist meine Burg“. Natürlich haben an diesem Frieden nicht nur die Wohnhäuser der Menschen teil, sondern auch das Gotteshaus: „Jede Kirche ist in Gottes eigenem Frieden.“ Besonderen Schutz genoß seine heiligste Stätte: „Der Altar ist der Ehren wohl wert, er ist das Herz des Gotteshauses.“ Er war daher zeitweise eine Zufluchtsstätte für Verfolgte.

Wie die Kirche allmählich ihren Gläubigen den Zehnten aufzuerlegen gewußt hat, so legten die Landesfürsten den Untertanen zur Deckung der Kosten ihrer Hofhaltung und der Landesverwaltung Steuern auf. Das konnte aber doch nicht immer ohne eine gewisse Mitwirkung der Volksangehörigen geschehen. So traten die Landtage der alten Zeit, die freilich nicht wie die heutigen aus allgemeinen Wahlen hervorgegangen waren, wenigstens zur Bewilligung neuer Steuern zusammen. Da sie regelmäßig aber auch nur zu diesem Zwecke einberufen wurden, konnte sich das Sprichwort bilden: „Neuer Landtag, gewisse Steuer“ und „Landtage sind Geldtage“. Das war in der Tat ihre einzige Aufgabe. Namentlich hatten sie bei der Erlassung neuer Gesetze im bürgerlichen oder Strafrecht noch nicht mitzuwirken. Das war vielmehr alleinige Sache des unumschränkten Herrschers und seiner Räte.

3. Gemeinde- und Gewerberecht

Deutschland war ursprünglich ein reines Bauernland. Im Mittelalter entwickelten sich dann auch die Städte als Sitze des Gewerbes. Und Stadtbürger konnte man auch ohne eigenen Grundbesitz werden, wenn man nur eine eigene Feuerstätte hatte: „Haushalt braucht Feuer, aber kein Land.“ Es galt jedoch noch keineswegs der Grundsatz der Freizügigkeit. Man konnte daher einen Haushalt noch nicht gründen, wo man wollte, vielmehr mußte man erst das Bürgerrecht

erwerben: „Wer kein Bürger ist, soll nicht beischlafen.“ Aber nicht nur wer einen Haushalt begründen wollte, mußte das örtliche Bürgerrecht erwerben, sondern auch wer ein Handwerk oder einen Kramladen eröffnen wollte: „Erst Bürgerrecht, dann Kaufmannsrecht.“ Mit der Erteilung des Bürgerrechts aber war man knauserig. Wer selbst das Bürgerrecht und damit das Gewerberecht hatte und so gewissermaßen im Fette saß, wollte sich unbequeme Bewerber vom Halse halten. Nur um der Meisterswitwen und -töchter willen, die einen fremden Gesellen heiraten wollten, wurde mit der Zeit auch den so Eingeheirateten das Bürgerrecht verliehen. Gewerbe und Amt sollen ihrem Träger das tägliche Brot verschaffen. Sie geben manchmal aber auch Gelegenheit, den Verdienst auf krummem Wege zu vermehren. So sagte man den Müllern und den Schneidern gerne nach, daß sie von den ihnen zur Verarbeitung gebrachten Früchten und Stoffen beträchtliche Teile auf die Seite zu schaffen wüßten. Von den Krämern hieß es gar: „Betrug — ist der Krämer Acker und Pflug.“ Auch hier zeigt sich wieder der Zug, im Sprichwort lieber die Schwächen als die Tugenden der Mitmenschen festzuhalten.

Im allgemeinen war man stolz auf sein Handwerk: „Handwerk belohnt seinen Meister“, „Handwerk hat goldnen Boden“, wobei man aber, um die nicht seltenen Müßiggänger und Weinschläuche anzuspornen, den Zusatz machte: „aber man muß ihn bis zum Ellenbogen suchen“; also nur wer so tief gräbt, daß sein Arm bis zum Ellenbogen bedeckt wird, findet das Gold im Boden. Die Freude an der Arbeit und die Neigung zum Handwerk war nicht allen angeboren. Man mußte sie immer wieder durch ermunternde Reden neu beleben: „Arbeit schimpft nicht“ und „Handel und Wandel müssen getrieben werden,“ allerdings unter Einhaltung der gesetzten Grenzen.

Wie nämlich manche Völker mit ihrem Landbereiche zufrieden sind, während andere einen starken Drang zur Ausdehnung entfalten, so gibt es auch im Einzelleben genügsame Menschen und solche, deren Betätigungsdrang keine Grenzen kennt. Damit nun das eine Handwerk dem anderen nicht das Wasser abgrabe, hielten die Zünfte, die Vereinigungen der Handwerker, streng darauf, daß jeder nur die Arbeit verrichte, die seinem Handwerk entsprach. „Wer Leder gerbt, soll nicht Schuhe machen“, „Wo ein Brauhaus steht, kann kein Backhaus stehen.“ Dieses Sprichwort wird freilich auch in dem Sinne

gebraucht: wer viel trinkt, ißt nicht viel. Es spricht alsdann eine allgemeine Lebenserfahrung aus und entbehrt eines rechtlichen Gehalts. Man widerstrebte mit vollem Bewußtsein der Gewerbefreiheit. Gänzlich abgelehnt wurde der Gedanke, daß man ein Bodenerzeugnis vom Anfang bis zum Ende seiner Bearbeitung im selben Betrieb belasse und durcharbeite; also daß der gleiche Gewerbebetrieb die Roherze bergmännisch gewinne, sie durch Verhüttung zu reinem Eisen mache, das Eisen zu Stahl verarbeite, diesen wieder in Pflüge oder Waffen umwandle und die fertigen Erzeugnisse selbst absetze. Dieses Verfahren ist erst im Großgewerbe der neuesten Zeit aufgekommen.

Für das Verbot, mehrere Handwerke gleichzeitig zu betreiben, war man auch um eine Begründung nicht verlegen. Gründe sind ja billig wie Brombeeren, sagt ein der allgemeinen Volkssprache angehöriges Sprichwort. Und so führte man die Befürchtung an, daß, wer mehrere Gewerbe betreibt, keines recht erlerne und damit sich und der Kundschaft schade: „Gar oft verdirbt ein Handwerksmann —, der viel Gewerbe und Handwerk kann“, „13 Handwerker, 14 Bettelleute“, „Bei vielen Künsten wird man zum Narren.“ Hätte Goethe einige Jahrhunderte früher gelebt, so hätte man sich wohl auf sein Wort berufen: „In der Beschränkung zeigt sich erst der Meister.“

Die Zünfte wachten eifersüchtig darüber, daß kein Außenstehender ihnen wirklich oder vermeintlich ins Handwerk pfusche. Auch zwischen Meistern und Gesellen wird es nicht immer friedlich zugegangen sein. Es gab daher nicht selten Streitigkeiten, von deren Schlichtung das Sprichwort handelt: „Handwerkssachen gehören vor den Rat“, also vor eine städtische, nicht aus Rechtskundigen bestehende Behörde. Hier sind vielleicht auch die Zusammenhänge mit den Gemeindegerichten, wie sie noch jetzt in Baden und Württemberg bestehen. Im übrigen werden auch heutzutage gewerbliche Streitigkeiten seit dem Gewerbegerichtsgesetze durch nichtstaatliche Gerichte entschieden, nämlich durch die Gewerbegerichte. Sie sind zusammengesetzt aus einem von der Gemeinde bestellten rechtskundigen Vorsitzenden und einer gleichen Anzahl von Beisitzern, die zur einen Hälfte aus dem Kreise der Arbeitgeber und zur anderen aus dem Kreise der Arbeiter entnommen werden.

Der Gemeinderat selbst war zu verschiedenen Zeiten ganz verschieden zusammengesetzt. Es wiederholt sich auch hier die Erschei-

nung, daß, wer die Macht hat, das Recht setzt und die Verwaltung führt. Machthaber konnten einige herrschenden Geschlechter oder ein weiterer Kreis von Gemeindeangehörigen sein. Waren nur wenige ratsfähige Geschlechter vorhanden, die dann meist durch Heiraten alle miteinander verschwägert waren, so tauchte die Gefahr der Vetterleswirtschaft auf. Dagegen suchte man schon in alter Zeit anzukämpfen, wie sich aus dem Sprichwort ergibt: „Solang ein Mann den Rat besucht, kann sein Sohn nicht Ratsmann sein." Dieses Verbot ist heute auch auf Geschwister und nahe Verschwägerte ausgedehnt.

4. Öffentlicher Haushalt

Der Haushalt eines Stammesfürsten unterschied sich ursprünglich kaum von dem eines anderen reichen Adeligen. Die Einnahmen wurden lange Zeit aus den Erträgnissen der Krongüter gedeckt. Auch als diese nicht mehr zureichten, vermied man es zunächst, sich an den Geldbeutel der Landeseinwohner unmittelbar zu wenden, sondern verschaffte sich die erforderlichen Mittel durch nutzbare Hoheitsrechte, die schon in anderem Zusammenhang besprochenen Regalien (vgl. S. 70). Hierzu dienten die Nutzungen der Jagd und der Fischerei, die Bannmühlen und Bannbrauereien. Jeder Bewohner des zum Bann, zum Zwangsbereich der Mühle oder Brauerei gehörigen Gebietes mußte in der Mühle sein Getreide mahlen lassen und aus der Brauerei sein Bier beziehen. Weiter wurden dank dem Bergregal die Bodenschätze herangezogen: „Eisen und Salz ist keine Kaufmannsware, sondern königliche Handlung." Zu schmählichem Gewinn wurde weiter die Münzhoheit ausgenützt. Anfangs geschah dies meist im Zusammenhang mit einem Thronwechsel: „Pfennige verschlägt man, wenn neue Herren kommen", „Pfennig erneuert man, wenn neue Herren kommen." Später beschränkte man die Verkleinerung der Münzen und die Verschlechterung ihres Silber- oder Goldgehalts nicht nur auf solche Anlässe, die zu unregelmäßig und zu selten eintraten.

Weiter dienten den Herren als Einnahmequelle ein Heer von Zöllen: Straßen-, Wasser-, Brückenzölle usw. Man sagte zwar: „Straßen müssen allzeit offen sein." Aber „Straßen muß man pflegen." Das kostet Geld, das man einzubringen sucht. So werden

auch heute noch während der Fahrt z. B. in Bayern Pflasterzölle von den Gemeinden und in Tirol von den Kraftwagen für die Benutzung der Staatsstraßen Landessteuern erhoben. „Die Furt gehört zwar allen Leuten", aber „Von Schleusenzoll und Brückengeld ist niemand frei". Auch das Wörtchen „niemand" ist freilich nicht ganz wörtlich zu verstehen. Denn „Ein Edelmann gibt keinen Zoll", weil er durch seinen Wehrdienst der Öffentlichkeit dient, und „Pfaffen und Pilgrime geben keinen Zoll"; sie verdienen ihn mit ihrem Beten. Kein Wunder, daß man gegenüber diesen Befreiungen von den gemeinen Lasten sang:

„Der Kaiser will zwar seine Pflicht,
Die Pfaffen aber zahlen nicht,
Der Edelmann ist gleichfalls frei,
Der Jud' treibt seine Wucherei,
Soldaten geben wieder nichts
Und Bettelleute haben nichts.
Der Bauer spricht: ‚Das muß Gott walten,
Muß ich all diese doch erhalten ...'"

Auch heute noch wird bei Zoll- und Steuergesetzen, allerdings mit feineren Waffen, darum gekämpft, die Hauptlast auf andere Berufsstände abzuwälzen und den eigenen möglichst frei zu halten.

Im Laufe der Zeit ging es nicht mehr ohne eigentliche Steuern ab. Und zwar erhebt man sie teils von dem, der sie auch endgültig auf sich behalten soll, wie Einkommens- und Vermögenssteuer. Teils hält man sich an den Erzeuger der abgabepflichtigen Waren, bei dem die Steuern besonders einfach und ohne weiteren Aufwand eingezogen werden können, und überläßt es dann ihm, sie auf andere, insbesondere die Verbraucher abzuwälzen. Wir haben hier den Unterschied zwischen den unmittelbaren und den mittelbaren, oder wie man gewöhnlich sagt, zwischen den direkten und den indirekten Steuern. Von den unmittelbaren Steuern verlangt das geläuterte Rechtsgefühl, daß sie jeder im Staate nach seinem Einkommen und Vermögen zu tragen habe, ohne daß ein Stand besonders begünstigt und ein anderer besonders belastet wird. „Ein Pfund soll so viel tun wie das andere." Zu diesen Steuern wird regelmäßig nur herangezogen, wer im Lande wohnt, nicht aber, wer sich bloß vorübergehend darin aufhält. „Wer nicht mit uns schießt, ist ein Gast und kein Bürger." Die mittelbaren Steuern, wie Bier-, Tabak- und Salzsteuer treffen

jeden, der sich im Lande auch nur kurz aufhält und etwas genießt. Allerdings werden von ihnen die großen Familien härter getroffen als die kleinen. Deshalb wurden sie von den Vertretern der kinderreicheren Arbeiterschaft grundsätzlich bekämpft, ein Grundsatz, der freilich mehr von grauer Lehre stammt und nicht auf des Lebens goldenem Baum gewachsen ist. Denn darüber sind alle einig, daß von Wein, Bier und Schnaps Steuer erhoben werden muß. Man kann aber nicht zu jedem Wirtshausgast und häuslichen Trinker einen Steuerbeamten stellen. Viel einfacher und klüger ist es, die Steuer beim Erzeuger zu erheben, der sie auf den Verbrauchspreis schlägt. Auch zahlt der Mensch, wie er einmal ist, die öffentlichen Abgaben lieber im Preis des Getränkes als unmittelbar ans Steueramt. Das wußten schon unsere Altvorderen, als sie das köstliche Sprichwort erfanden: „Lieber aus der Flasche als aus der Tasche."

5. Amtleute

Wer ein Amt hat, neigt leicht zur Überhebung. Shakespeare läßt seinen dänischen Prinzen Hamlet den Übermut der Ämter beklagen und auch das deutsche Sprichwort erhebt seine mahnende Stimme: „Die Obrigkeit ist Gottes Dienerin", „Obrigkeit, bedenk dich recht, — Gott ist dein Herr und du sein Knecht" und „Der Rat sitzt auf seinem Eid"; hat er doch beschworen, Hüter des Rechts zu sein. Was das Amt fordert, ist aber nicht immer leicht; denn es gebietet, dem Unrecht und den Übergriffen zu steuern, auch wenn sie von den Mächtigen der Erde ausgehen. „Die Tugend vor aller Tugend geht, — die bösem Mute widersteht"; „Würden sind Bürden". Das zeigt sich auch darin, daß, wer hoch steht, die allgemeine Aufmerksamkeit auf sich lenkt und von jedermann beobachtet und bekrittelt wird. „Große Herren, große Sorgen", „Hoher Baum fängt viel Wind", „Wer hoch steht, den sieht man weit", „Wem viel befohlen wird, von dem wird viel gefordert", („befehlen" ist hier gleich dem heutigen „anbefehlen", wie im Paul Gerhartschen Lied: „Befiehl du deine Wege ...").

Da sich an die Hohen dieser Erde viele männliche und weibliche Schmeichler und Schmarotzer herandrängen, mag es auch oft heißen: „Große Herren, große Fehler." Dabei bringt das Amt selbst allerlei

Ablenkung und Versuchung mit sich, der sein Träger manchmal unterliegt: „Bisweilen verschläft auch ein guter Magistrat", „Kein Amt ist so klein, es kann Hängens wert machen", „Es ist kein Amt so gering, es bezahlt den Strick", „Amt — macht verdammt". Verdammt wird freilich nicht bloß, wer seine Stellung mißbraucht, sondern auch schon, wer im Amt keine besonderen Erfolge aufweisen kann. So waren die alten Athener gleich bei der Hand, ihre nicht vom Glück begünstigten Staatsmänner und Feldherrn in die Verbannung zu schicken. Besteht das Amt aus einer Reihe von Personen, so ist für etwaige Fehler regelmäßig sein Vorstand verantwortlich: „Des Amtes Schaden geht auf Amtes Vorstand", „Der Schmied steht für das Vernageln" (nicht sein Geselle).

Man war sich von jeher bewußt, daß, wer ein Amt verwalten will, besondere Eigenschaften haben muß. „Wer nicht tun kann, was die Leute verdrießt, gibt keinen Schulzen", „Der Mensch ist eher geboren als der Amtmann." Um ein Amt recht versehen zu können, bedarf es einer besonderen Erfahrung, die freilich zum Teil erst im Amte gewonnen werden kann. „Amt lehrt den Mann," „Das Amt ist des Mannes Lehrmeister." Das Wort „Wem Gott ein Amt gibt, dem gibt er auch Verstand" ist wohl nie ernst genommen worden, sondern war spöttisch gemeint. Bitter, aber wahr klingt es, wenn es heißt: „Das Amt macht wohl satt, aber nicht klug" und „Was der Mann kann, zeigt das Amt an". Zu schwarzseherisch ist der Satz: „Wie einen das Amt findet, so läßt es ihn auch." Hier möchte doch nicht selten Schiller Recht behalten mit seinem vertrauenden Worte: „Es wächst der Mensch mit seinen größeren Zwecken." Auch das den Deutschen von jeher innewohnende Mißtrauen in die Fähigkeiten und den guten Willen der Behörden ist nicht immer begründet. Schon mancher, der in den Gemeinderat gewählt worden war, um den „Schafsköpfen und Gaunern" ordentlich auf die Finger zu sehen, ist von seiner Voreingenommenheit und Selbstüberhebung geheilt worden.

Nicht immer muß man ein angebotenes Amt annehmen. Vielmehr kann man sich meist überlegen, ob man des Amtes Bürde tragen will. Hat man aber angenommen, dann gilt: „Wer sich anspannen läßt, muß ziehen." Im allgemeinen ist es auch kein besonderes Unglück, wenn ein Mann die Übernahme eines Amtes ablehnt; denn meist kann ein anderer für ihn eintreten: „Eines Mannes wegen bleibt kein Pflug stehen." Aber in Not und Gefahr kommt es aller-

dings manchmal auf einen Mann an, der allein retten kann: „Eines Nagels wegen kann das Schiff untergehen“ und „Das Schiff hängt mehr vom Ruder ab als das Ruder vom Schiff.“ Was ein Mann ausmacht, dafür ein Beispiel aus alter Zeit: Hätten die 10 000 Griechen, die mit Cyrus dem Jüngeren ins Hochland von Persien hinaufzogen, nach der heimtückischen Ermordung ihrer Führer nicht noch einen Xenophon gehabt, so hätte wohl keiner seine Heimat wieder gesehen.

Wie der Stammesvater Jakob nach 1. Mose 37, 3 seine besondere Liebe zu seinem Sohn Josef dadurch kundgab, daß er ihm einen bunten Rock machte, so hat auch Staat und Kirche ihre Diener aus der sonstigen Menschheit herausgehoben, indem sie ihnen ein besonderes Amtskleid verliehen. Auch das ist vom Sprichwort festgehalten worden: „Amt bringt Käppchen“, „Amt — bringt Samt“ und „Welchem Herren du dienst, dessen Kleider trägst du“. Bei der Verleihung prächtiger Amtstrachten ließen sich die hohen weltlichen und geistlichen Herren übrigens von verschiedenen Gründen leiten. Teils wollten sie sich durch ein Gefolge schön gekleideter Diener selbst erhöhen, teils suchten sie ihre Würdenträger über die manchmal recht kärglichen und nicht immer pünktlich bezahlten Gehälter hinwegzutrösten. Denn wenn ein solcher Herr für seine Jagden, Pferde und Geliebten viel Geld brauchte, reichte es manchmal für die Beamten und die Dienerschaft nicht mehr aus. Anderseits aber weiß man: „Amt ohne Sold macht Diebe“ und „Niemand ist schuldig, um eigenen Lohn zu dienen“, „Es ist niemand des heiligen Grabes Hüter umsonst“. Wie sehr um die eigentlich doch selbstverständliche Gewährung ausreichender Entlohnung gekämpft werden mußte, beweisen die zahlreichen Sprichwörter darüber: „Wer das Amt hat, nimmt billig den Vorteil vom Amte“, „Wer da hat die Mühe, — hat billig auch die Kühe“, „Küsters Kuh weidet auf dem Kirchhof“, „Der Vogt ist ein Knecht um seinen Lohn“. (Vogt ist eine veraltete Bezeichnung für irgendeine Art von Vorgesetzten; vgl. z. B. die Überschrift einer Novelle Gottfried Kellers: Der Landvogt von Greifensee.) Im übrigen hat bei der menschlichen Eitelkeit auch die ihren Träger über seine Mitmenschen erhöhende Tracht ihren manchmal zauberischen Einfluß nie verfehlt. In der gleichen Richtung liegt auch die Verleihung von Titeln und Orden. Sie haben noch das Besondere, daß sie den Begünstigten dem Verleiher verbindlich machen, ohne diesem dauernde

Pflichten aufzuerlegen. Denn „Titel kosten kein Geld“ und Orden kann man sich nach dem Tode des damit Geehrten zurückgeben lassen und neu verleihen. Wie freigebig sind zum Beispiel manche amerikanische Freistaaten mit dem Generalstitel!

Nach dem Zerfall des Kaisertums gab es in Deutschland viele Landesherren. Dazu suchten noch fremde Könige nach Mietlingen, um sich von ihnen über alles unterrichten zu lassen, was ihren Raubplänen dienen konnte. Daher hielt jeder Herr darauf, daß seine Beamten nicht noch einem anderen verpflichtet waren und ihm selbst nur mit halber Seele dienten. Das Wort der Schrift: „Niemand kann zween Herren dienen“ ist daher auch fürs Beamtenrecht von Bedeutung und will besagen: kein Beamter darf von einer ausländischen Regierung ein Amt oder einen Orden annehmen ohne Zustimmung seines Landesherrn. Umgekehrt war es aber auch nicht gut, wenn sich die Fürsten, die vom Glanz des französischen Hofs geblendet waren, gern mit Ausländern umgaben und sie zu ihren Vertrauten und maßgebenden Beratern machten. Hatte doch selbst Friedrich der Große eine merkwürdige Vorliebe, um nicht zu sagen Schwäche für den französischen Philosophen und Dichter Voltaire, nach seinem Ausspruch einen wunderbaren Geist, mit dem eine nichtswürdige Seele verbunden war! Gegen solche Neigungen wandte sich das Sprichwort: „Landeskinder soll man vor anderen befördern“, „Städte und Länder werden nie so verwüstet, als wenn man fremde Leute in den Rat nimmt“. Freilich darf man bei der Ernennung der Beamten auch nicht engherzig sein. Eine kluge Regierung, die ihr Land in einer bestimmten Richtung vorwärts bringen will, nimmt die dazu brauchbaren Männer, wo sie sie findet. Haben doch auch Japan und Chile deutsche Gelehrte und Offiziere zur Förderung der Landeswohlfahrt beigezogen! Darauf weist das Sprichwort hin: „Zu Ämtern braucht man nicht Landeskinder, sondern Männer.“ Ganz allgemein gegen Günstlingswirtschaft, mag diese von einem Hofe oder von den herrschenden Parteien ausgehen, wenden sich die Sprichwörter: „Nach Tugenden und nicht nach Gunsten“, „Man muß die Ämter mit Personen und nicht die Personen mit Ämtern versehen“ und „Man muß die Ämter den Leuten und nicht die Leute den Ämtern geben“. Wenn danach verfahren wird, dann heißt es: „Amt zeugt vom Mann“ und es muß das Spottwort schweigen: „Wer ein Amt erhält im Land — der erhält auch den Verstand.“

6. Regierungsweise

Da das deutsche Recht im Mittelalter noch keinen Unterschied zwischen der Landeshoheit und Privateigentum machte, kam es, wie schon früher erwähnt, beim Tode eines Fürsten öfter zu Landesteilungen. Wenn aber ein Gebiet zum Teilen zu klein war, traten wohl die mehreren Söhne des Herrn als sogenannte Ganerben gemeinsam in die Landesherrschaft ein. Das war für solche Landstriche kein Segen. Denn „Viele Herren haben nie wohl regiert", „Es ist nicht gut, wenn viele regieren, — das Steuer soll nur einer führen".

Des Fürsten Macht reicht über sein ganzes Land und was er nicht selbst wahrnimmt, wird ihm von den Behörden berichtet oder von Ohrenbläsern zugetragen: „Fürsten haben lange Hände und viele Ohren". Wenn sie aber mehr erfahren als der gemeine Mann und wenn sie dazu noch den rechten Verstand haben, dann ist auf ihr Urteil mehr zu geben als auf das der anderen: „Die höher stehen, sehen weiter als die nieder stehen." Diese Überlegenheit ist freilich nur dann da, wenn der Herrscher die Menge der Einzelbeobachtungen und -nachrichten zutreffend deuten kann: „Wer nicht übersehen kann, kann nicht regieren." Von diesem Gesichtspunkt aus betrachtet, verbürgt allerdings die stets auf den ältesten Sohn übergehende Herrschergewalt nicht, daß der zur Herrschaft Berufene auch eine besondere Tauglichkeit mitbringt. Dagegen sichert das Recht der Erstgeburt vor staatsgefährlichen Streitigkeiten über die Nachfolge. Dieser Grund war für ihre Einführung hauptsächlich maßgebend.

Der gute Herrscher darf sich nicht bloß mit Höflingen umgeben, die nur das an sein Ohr bringen, was er gern hört. Er soll sich über alles unterrichten lassen, was sein Volk angeht: „Wenn die Untertanen bellen, soll der Fürst die Ohren spitzen." Er kann dann manchmal daraus entnehmen, daß seine Regierungsweise nicht auf dem rechten Wege ist, und kann das Steuer umwenden. Natürlich muß er unterscheiden, von wem das Gerede kommt, und darf nicht allen gleichen Wert beimessen: „Wer regieren will, muß hören und nicht hören." Im alten Deutschen Reich kamen mit Ludwig dem Kinde, Otto III. und Heinrich IV. unmündige Kinder auf den Thron. Deutschland mußte daher wiederholt die Wahrheit des Spruches an sich erfahren: „Wehe dem Lande, wo der Herr ein Kind ist." Das Wort

Kind braucht freilich nicht bloß auf das Lebensalter des Herrschers bezogen zu werden, sondern kann auch für seine Geistesrichtung überhaupt gelten. Das drückt mit deutscher Derbheit der Satz aus: „Wenn der Kopf ein Narr ist, muß es der ganze Leib entgelten." Im übrigen haben alle Länder mit unumschränkten Herrschern, am wenigsten vielleicht Frankreich trotz Ludwig XIV. und Napoleon I. erleben müssen: „Wo die Herren raufen, müssen die Bauern Haare lassen" und „Der Herren Sünde, der Bauern Buße."

Um wie vieles sich auch große Herrscher wie Harun al Raschid, Friedrich der Große und Napoleon I. kümmern mögen, einen guten Teil der Regierungsgeschäfte müssen sie doch ihren Räten und Amtsleuten überlassen. Sie können das auch, wenn sie sich die geeigneten Leute aussuchen: „Wenn der Hund wacht, mag der Hirte schlafen." Jedoch darf der Herr in seinem Vertrauen nicht zu weit gehen, muß vielmehr sein Auge überall offen haben. Denn wie „des Herrn Auge den Acker düngt und das Vieh fett macht", so gilt andererseits: „Wenn der König schläft, schläft auch der Rat."

Ein guter Herrscher will zwar, wie Heinrich IV. von Frankreich gesagt hat, daß jeder Bauer am Sonntag sein Huhn im Topfe habe. Aber er soll nicht auch in den Topf hineinsehen wollen, wie etwa Friedrich Wilhelm I. von Preußen. Er soll sich nicht um alles, namentlich nicht um Kleinigkeiten und um die persönlichen Angelegenheiten der Untertanen kümmern: „Wenig regieren macht guten Frieden", „Wer wenig herrscht, erhält viele zu Freunden".

Ist ein Herrscher nicht innerlich ganz gefestigt, so steigt ihm seine Macht leicht zu Kopf; er bekommt den Größenwahn. Dann heißt es: „Herrenwille ist Gesetz" und „Was die Fürsten geigen, müssen die Untertanen tanzen". Wer das nicht mag, schüttelt wohl den Staub der Heimat von seinen Füßen, geht in die Fremde und spricht: „Besser frei in der Fremde, als Knecht daheim." Und wie man vom russischen Selbstherrschertum gesagt hatte, es sei eine durch Tyrannenmord gemäßigte Despotie, so meint auch das Sprichwort: „Zwang — währt nicht lang", „Strenge Herren regieren nicht lange", „Tyrannengewalt — wird nie alt"; als Gegensatz dazu sagt man: „Wer Gerechtigkeit hält in der Hand — des Gewalt hat guten Bestand." Wer die Geschichte kennt, weiß freilich, daß diese Worte mehr Wünsche und Tröstungen zum Ausdruck bringen als den Tatsachen entsprechen. Aber das ist richtig, daß der Herrscher Vertrauen und Anhänglichkeit

erntet, der sie selbst gesät hat: „Hält unser Herr, so halten wir auch", „Getreuer Herr, getreuer Knecht", „Vorangehen — macht nachfolgen". Das hat sowohl Preußen unter dem Alten Fritz, wie Frankreich unter Napoleon I. gezeigt. Gegen das Ende des Weltkrieges ist es freilich in Deutschland anders gewesen. Den Volksteilen, die auch im Unglück den angestammten Herrscherhäusern anhingen, aber verzagten, traten gewaltsam andere Volksmassen gegenüber, die beeinflußt von den Lockungen des Feindbundes hofften, durch die Vertreibung des Kaisers und der übrigen Landesherren den Krieg rascher zu beendigen und einen günstigeren Frieden zu erlangen. Sie haben sich getäuscht. Die damals aufgewühlten Gegensätze im Volksleben stechen scharf ab von der Einigkeit bei Beginn des Weltkriegs und ihren Erfolgen. Die vom einigen Deutschland vollbrachten Taten haben die Welt in Erstaunen gesetzt und die Wahrheit der Worte gelehrt: „Eintracht — hat große Macht", „Es gibt keine festere Mauer als Einigkeit" und „Der Bürger Eintracht ist der Städte beste Festigkeit".

Die Sprichwörter vom Herrscher und seinen Eigenschaften haben für die heutigen deutschen Staaten, in denen sich die Staatsgewalt vom Volke herleitet, anscheinend nur noch geschichtliche Bedeutung. Aber auch im freien Staate stehen Männer an der Spitze des Volks und dazu manchmal Männer, denen es nicht an der Wiege gesungen worden ist und die in der Jugend nicht auf diesen Beruf vorbereitet worden sind. Auch sie können wohl aus den Erfahrungen früherer Jahrhunderte, wie sie in den überlieferten Sprichwörtern niedergelegt sind, manches lernen.

7. Völkerrecht

Der Mensch ist als geselliges Wesen geschaffen. Es entspricht nicht seiner Naturanlage, als Einsiedler zu leben. Auch die staatlichen Vereinigungen, zu denen sich die Menschen im Laufe der Jahrhunderte zusammengeschlossen haben, können sich nicht durch eine Mauer wie die chinesische völlig voneinander absondern. Sie sind vielmehr schon seit uralten Zeiten in Handelsbeziehungen zueinander getreten, und ihre Angehörigen haben hinüber und herüber geheiratet; connubium et commercium nannten die Römer diesen friedlichen Verkehr. Die Regeln, die sich allmählich darüber herausgebildet haben, sind ein Teil des Völkerrechts. Dieses ordnet die Beziehungen der Staaten zueinander. Freilich gab und gibt es nicht bloß friedlichen Verkehr. Die Staaten gleichen darin den einzelnen Menschen. Wie mancher Bauer oder Kaufmann nicht Land oder Kapital genug erwerben kann, wie einzelne Menschen ein unstillbarer Ehrgeiz plagt, so haben manche Staaten im Altertum und in der Neuzeit den unbezähmbaren Drang, sich andere Völker und Länder untertan zu machen. Das Mittel dazu ist der Krieg. Er bewegt auch die Seele des Einzelnen, der mit hinausziehen muß oder dessen Hab und Gut durch einen feindlichen Einbruch gefährdet wird, viel stärker als die friedlichen Verhältnisse. So ist es begreiflich, daß die Rechtssprichwörter aus dem Gebiete des Völkerrechts viel mehr vom Kriege als vom friedlichen Verkehr der Staaten handeln.

In den Zeiten der unbeschränkten Fürstenmacht waren die Völker selbst fast nur die Leidtragenden: „Wenn sich die Herren raufen, müssen die Bauern Haare lassen." Seit der französischen Revolution gibt es keine „dynastischen" Kriege im strengen Sinne mehr, sondern nur noch „Volkskriege". Aber auch wenn ein Volk ein anderes unterjochen will, so gibt es diese Absicht weder dem Bedrohten noch den unbeteiligten Völkern kund. Es stellt die Sache vielmehr immer so hin, als ob es einschreiten müsse, weil seine Rechte vom anderen verletzt worden seien oder weil dieser nicht fähig sei, die Ordnung in seinem Land aufrecht zu erhalten. Der Mensch hat ja die Sprache nach dem Worte des französischen Staatsmanns Talleyrand dazu, seine Gedanken zu verbergen. Ein niederdeutsches Sprichwort aber meint spöttisch: „Politik is anners seggen as don." Indem beim Verkehr der Staaten untereinander im Hintergrund der Krieg als äußerstes Mittel steht, mußte man verzagt bekennen, daß das Völkerrecht auf des Schwertes Spitze ruhe. Seine Entwicklung im Sinne wahrer Gerechtigkeit war bis jetzt dadurch besonders erschwert, daß kein allgemein anerkannter Gesetzgeber besteht und bestimmt, was unter den Staaten Rechtens sein soll. Ebensowenig gab es einen Richter, vor dem sich die Stärkeren beugten und der im Notfall seinem Urteil mit Zwangsmaßregeln Nachdruck verschaffen konnte. Es galt vielmehr der Satz: „Wer mehr vermag, tut mehr", als er sollte und als wirkliche Gerechtigkeit zuläßt. „Gewalt geht vor Recht", „Wo Gewalt Recht ist, da ist die Gerechtigkeit Knecht", „Wer stark ist,

stößt den andern in den Sack". Ist der andere schwach und gibt gleich klein bei, so heißt es von ihm: „Wer sich nicht wehrt, ist gleich geschlagen" und „Wer sich nicht wehrt — den man nicht ehrt". Auch ist es nicht immer ratsam, einem rücksichtslosen Feind auch nur in Nebenpunkten nachzugeben; denn: „Wer sich ein Haar krümmen läßt, dem krümmt man bald den Rücken." Ist der Gegner aber selbst stark und gerüstet, so beruhigt ihn das Bewußtsein: „Ein Schwert hält das andere in der Scheide." Das war ja Bismarcks stete Sorge, daß das deutsche Schwert so scharf bleibe wie das der Franzosen und ihrer Verbündeten. Schlägt der Gegner dennoch los, so heißt es: „Auch dein Schwert muß sich regen, — zieht der Feind den Degen." Ist man aber entwaffnet wie Deutschland infolge des Versailler Machtspruchs, so muß man gewärtig sein, daß mit einem verfahren wird nach dem Spruche: „Eine Hand voll Gewalt ist besser als ein Sack voll Recht." Diese bittere Erfahrung mußte Deutschland im Januar 1923 machen, als Frankreich mit einer fadenscheinigen Begründung das Herz des Deutschen Reichs, das Ruhrbecken besetzte. Damals zeigte sich mit fürchterlicher Wucht die alte Wahrheit, die man im Herbste 1918 vergessen hatte: „Man muß das Schwert nicht aus der Scheide geben" und „Ein zerbrochenes Schwert muß man in der Scheide stecken lassen". Was half uns das Bewußtsein, daß Frankreich wieder einmal schwer gegen den sittlichen Grundsatz verstoßen hatte: „Was du nicht willst, des überheb auch einen anderen"? Gegen den feindlichen Einbruch hätte Deutschland damals nur die Reichswehr einsetzen können, die zur Abweisung eines mit neuzeitlichen Waffen ausgerüsteten Heeres unzulänglich ist. Daher blieb nichts übrig als sich in das Schicksal zu ergeben: „Wer ein rostiges Schwert hat, muß es stecken lassen." Und auch weiterhin muß Deutschland, in Ost und West umgeben von Nachbarstaaten, die in Waffen strotzen, in dem beklemmenden Gefühl leben: „Niemand hat länger Frieden als seine Nachbarn wollen."

Die Beschränkung der staatlichen Hoheitsrechte, die man nach Abschluß des Weltkriegs Deutschland und seinen Verbündeten auferlegte, hat man für oberflächliche Beobachter mit der Behauptung begründet, Deutschland habe den Weltkrieg allein verschuldet. Das ist gewiß nicht wahr. Eine etwas wackelige Stütze für diese Behauptung, die Deutschland durch seine eigene Unterschrift anerkennen mußte, ist freilich folgendes: Deutschland hat im Jahr 1914 ehrlich, jedoch politisch unklug, die ersten Kriegserklärungen ausgesprochen. Von ihm konnte man daher sagen: „Wer ausschlägt, bricht den Frieden." Rußland und Frankreich aber, die eine friedliche Lösung der österreichisch-serbischen Wirren vereitelt hatten, konnten ihr Verhalten mit dem Worte verteidigen: „Wer mich angreift, den greife ich wieder an." Das konnte allerdings England nicht von sich sagen. Da es aber derlei Dinge stets besonders fein einzufädeln gewußt hat, gab es als Grund seiner Kriegserklärung die Verletzung der belgischen Neutralität an. So war man in den Augen der Zuschauer im Vorteil.

Man muß aber nicht bloß bei Beginn eines Krieges schlau sein. Das gleiche empfiehlt sich auch während des Feldzugs, namentlich wenn man sich über die Widerstandskraft des Gegners getäuscht hat und wenn man ihn in offenem Kampfe und mit ehrlichen Waffen nicht besiegen kann. Da ringt man um die Seele der beiseite stehenden Völker z. B. durch die Behauptung, der barbarische Feind verschone weder Frauen noch Greise, ja er hacke den unschuldigen Kindern die Hände ab. Mit dem Mittel der neuzeitigen Lichtspielkunst stellt man irreführende Bilder her und versendet sie in alle Welt. „Helfe, was helfen mag." Kriegslisten hat es ja jederzeit gegeben. Freilich sind sie verschieden zu bewerten. Mit einer Art täuscht man bloß den Feind, ohne ihn herabzusetzen; so setzten z. B. deutsche Kreuzer einen weiteren Schornstein auf, um nicht sofort erkannt zu werden. Die erwähnte Bekämpfung des Gegners durch Wort und Bild aber greift seine Ehre und seine sittlichen Eigenschaften an und sucht ihn in den Augen der ganzen Welt sittlich zu vernichten. Das ist keine Kriegslist mehr, sondern man kann darüber nur sagen: „Im Kriege wird viel gelogen" und vielleicht noch: „Wo die Löwenhaut nicht ausreicht, knüpft man den Fuchsbalg an" oder „Was der Löwe nicht kann, kann der Fuchs".

Einmal muß jeder Krieg zu Ende gehen. Wann dies geschehen soll, bestimmt in einem gut geleiteten Staate nicht der Heerführer, sondern der oberste Staatsmann. So hat unser Bismarck 1866 in meisterhafter Weise den Bruderkampf mit Österreich rechtzeitig beendigt. Da konnte man im guten Sinne sagen: „Die Feder regiert das Schwert." Denn der Krieg war selbst für einen Napoleon I. nicht Selbstzweck. Das Ziel des Krieges bleibt immer der Friede: „Krieg bringt Frieden." Aber nicht jeder Krieg bringt wirklich ein

Ende des Haders. Es hat immer auch schlechte Friedensschlüsse gegeben, und wie eine Vorahnung des Versailler Machtspruchs klingt der Vers: „Ein Krieg ist köstlich Gut, der auf den Frieden dringt, — ein Fried' ist schändlich arg, der neues Kriegen bringt."

Diesen Zuständen hatte schon im Mittelalter die Kirche Einhalt zu tun vermocht, indem sie für sich ein Schiedsamt über alle christlichen Staaten in Anspruch nahm. Sie hatte damit aber auf die Dauer keinen Erfolg. Darf man hoffen, daß jetzt in diesen Dingen durch die Schöpfung des Völkerbundes ein dauernder Anfang zum Besseren gemacht worden sei? Uns Deutschen wird es nicht leicht sein, daran zu glauben. Der Vater dieses Bundes ist der weltfremde Präsident Wilson, der bei der Ausarbeitung der Satzungen den besten Teil seiner Grundgedanken preisgegeben hat. Diese Satzungen aber bilden den ersten Teil jenes Versailler Machtspruchs, bei dem die Sieger es abgelehnt hatten, mit den Unterlegenen zu verhandeln, sie vielmehr unter der Androhung weiterer Aushungerung zum Unterschreiben zwangen. Vorerst wird man daher die bange Frage aufwerfen, ob dieser Baum gute Früchte bringen könne.

Den Wirren der Kriegsführung hat sich von jeher mancher Staat namentlich dann zu entziehen gesucht, wenn ihn die Gründe, die zum Krieg geführt hatten, nicht nahe berührten. Ein solches Fernbleiben ist ihm freilich nicht immer leicht gemacht worden. Denn wie der einzelne Mensch, so kämpft auch der einzelne Staat nicht gern allein, sondern sucht andere mit in den Streit hereinzuziehen. Es ist immer aussichtsreicher, gemeinsam über einen anderen herzufallen. Auch hält man sich dadurch unbequeme Kritiker vom Halse, wenn man sich bei der Beurteilung der eigenen und der fremden Kriegsführung nicht immer das Gleichnis vom Splitterrichter vor Augen hält und stets nur dem Gegner Verstöße gegen die Gebräuche des Kriegs vorwirft. Daher sah man das Fernbleiben vom Kriege schon als eine Unfreundlichkeit an und trat ihm mit dem Worte entgegen: „Wer nicht mit mir ist, der ist wider mich." Gleichwohl haben sich manche Staaten auf den Standpunkt gestellt: „Bleib du bei dem Deinen und laß mich bei dem Meinen" und sind keinem der beiden Streitteile zur Seite getreten. Man nennt sie neutral. Das Wort kommt her vom lateinischen neuter, keiner von beiden, wofür der Holländer zutreffend ohnseitig sagt. Die Schweiz hat sogar grundsätzlich erklärt, an keinem Kriege teilzunehmen, und diese dauernde Neutralität ist in der Wiener Bundesakte 1815 anerkannt worden. Dieser Rechtslage muß sich jeder Staat fügen und hat davon sogar den Vorteil, daß er der Grenze eines neutralen Staates entlang keine Festungen zu unterhalten und im Kriege keine Beobachtungsheere aufzustellen braucht. Insofern konnte man auch sagen: „Wer nicht wider uns ist, der ist für uns." Aber wie der Feindbund während des Weltkriegs die zunächst neutral gebliebenen Staaten durch alle Mittel und mit ungeahntem Erfolg auf seine Seite in den Krieg hereinzuziehen wußte, so war man auch in früherer Zeit der „Ohnseitigkeit" nicht hold und verspottete sie mit den Worten: „Neutral will auf Eiern gehen und keines zerbrechen". Man durchsucht die neutralen Schiffe, man sperrt die Meereszugänge, ja, um den Handel mit dem Feinde auch zu Lande zu erschweren, verlangt man Einblick in die Geschäftsbücher seiner Kaufleute, kurz, man macht ihm das Neutralsein recht schwer. So gilt auch heute noch der merkwürdige Satz: „Der Neutrale wird von oben begossen und von unten gesengt."

In Kriegszeiten herrschte von jeher eine besondere Nachfrage nach Kriegsbedarf. Er kann ja im Gebiete der Kämpfenden oft schon aus dem Grunde nicht immer hergestellt werden, weil die Rohstoffe dazu fehlen. Auch sind die zur Herstellung erforderlichen Arbeitskräfte vielfach zum Heere eingezogen worden. Es blüht dann der Handel mit solchen Waren. Das ist namentlich ein Geschäft für die Kauf- und Seeleute der Neutralen. Dabei begünstigt der kriegführende Staat diesen Handel soweit, als er selbst davon Vorteil hat, bekämpft ihn aber mit aller Macht, soweit er dem Gegner Nutzen bringt. Zu diesem Zwecke verbietet er den Handel mit „Bannware" und macht das Verbot dadurch wirksam, daß er seine Kriegsschiffe Jagd auf alle Handelsschiffe machen, sie nach Bannware durchsuchen und gegebenenfalls wegnehmen läßt. Man nennt dieses sonderbare Treiben das Prisenrecht, abgeleitet vom französischen prendre, pris, wegnehmen, weggenommen. Es ist wie alles Kriegsrecht einseitig von den Seemächten zu ihren Gunsten ausgestaltet. Über die Grundsätze des Seehandels im Kriege haben sich ebenfalls Sprichwörter gebildet, die aber auf keine allgemeine Geltung Anspruch machen können. Die jeweiligen Machthaber haben sich nämlich nach den aufgestellten Regeln nur so lange gerichtet, als sie Vorteil davon

hatten. Die Sprichwörter: „Freies Schiff, freie Ladung", „Befreundete Flagge erhält feindliche Ladung" und „Die Flagge deckt die Ware" besagten: Was auf dem Schiff eines am Kriege unbeteiligten Staates fährt, ist gegen Wegnahme gefeit. Daran hat sich im Weltkriege niemand gehalten. Ebenso ist noch völlig verschleiert, welche Richtung das Prisenrecht in der Zukunft einschlagen wird.

Die Lehre von der Notwehr ist auch im Völkerrecht anerkannt. Aber auch der Grundsatz, daß ein Tun in unverschuldetem Notstand kein Unrecht enthalte (vgl. S. 134) gilt wie für das Verhältnis des Einzellebens, so erst recht für ganze Völker. Als das deutsche Heer im Sommer 1914 den um Deutschland geschlungenen eisernen Ring mit dem Durchzug durch Belgien durchbrechen wollte, war dies nach damaliger Ansicht die einzige Möglichkeit, sich der Feinde zu erwehren. Es war daher nicht bloß ein verhängnisvoller politischer Fehler des damaligen Reichskanzlers Bethmann-Hollweg, sondern auch ein Rechtsirrtum, von einem *Unrechte* zu reden, das Belgien zugefügt werde. Ein Recht des so Betroffenen auf Entschädigung erkannte er dagegen mit gutem Grunde an, wie dies auch § 904 BGB. in einem ähnlichen Falle tut, ohne daß deshalb der Täter ein „Unrecht" beginge. Die Feinde aber, die mit diesem Worte des Reichskanzlers die ganze Welt gegen Deutschland aufhetzten, hatten dazu keine innere Berechtigung. Denn Jahrhunderte lang hatten sie nicht anders verfahren; man denke nur an die Kriege Ludwigs XIV. und Napoleon I. Ja, im Grunde darf ein Staatsmann nicht anders verfahren. Denn der Einzelne kann sich in sittlicher Entsagung selbst opfern, ein Volk aber muß sich anderen gegenüber behaupten. Diese Lebensanschauung hat auch in Sprichwörtern und Redensarten aller Völker ihren Ausdruck gefunden. Schon der Römer sagte: necessitas non habet legem, der Franzose: nécessité n'a point de loi und besoin ou nécessité n'ont loi, gleich unserem deutschen „Not kennt kein Gebot". Der Engländer sagt sogar, wenn es sich um das Wohl des Vaterlandes handelt: right or wrong, my country! zu Deutsch: Recht hin, Recht her, mein Vaterland! Im Verhältnis der Völker untereinander *handelt* man auch nach diesen Grundsätzen, gibt es aber nicht zu, sondern hängt sich ein anderes Mäntelchen um. Die Zeit ist daher noch nicht gekommen, in der das folgende Verschen nur noch eine Erinnerung an längst überholte Kulturstufen wäre:

„Wer oben sitzt, der läßt sich grüßen
Und tritt die Untersten mit Füßen,
Der Stärkste hat allenthalben recht,
Der Schwächere ist geplagter Knecht,
Wer mächtig ist, der wird vermessen,
Und große Fische die kleinen fressen."

8. Die Stände

Seit der großen Umwälzung am Ausgang des 18. Jahrhunderts, deren Grundgedanken auch in Deutschland bei den freieren Geistern einen mächtigen Widerhall gefunden hatten, kommt in Frankreich den Ständebegriffen, die das Mittelalter ausgebildet hat, keine rechtliche Bedeutung mehr zu. In den Vereinigten Staaten von Amerika war das von Anfang an so. In England mit seiner das Alte bewahrenden Art dagegen hat der Adel eine gesellschaftlich besonders angesehene Stellung bewahrt. Noch in unseren Tagen wird verdienten Männern der Adel oder eine höhere Rangstufe desselben verliehen; so ernannte der englische König den Feldmarschall French noch während des Weltkriegs zum Viscount von Ypern. Das neue Deutsche Reich hat damit gebrochen. Art. 109 der Weimarer Verfassung bestimmt: „Öffentlich rechtliche Vorrechte oder Nachteile der Geburt oder des Standes sind aufzuheben." In den uns überkommenen Sprichwörtern über Standeswesen steckt jedoch so viel Lebensweisheit und Humor, daß sie auch dem deutschen Volke von heute nicht ganz vorenthalten werden sollen; sie mögen daher hier ihren Platz finden.

Von den alten drei Ständen handelt das Wort: „Gott hat drei Dinge geschaffen: den Adel, den Bauern und den Pfaffen." Die Lehre, daß die Stände auf göttliche Anordnung zurückzuführen seien, hat man freilich nicht immer gläubig hingenommen, sondern auch die verfängliche Frage gestellt:

„Als Adam grub und Eva spann,
Wo war denn da der Edelmann?"

Ebenso klingt das Wort: „Ritterschaft ist keine Sünde" wie die Verteidigung einer nicht mehr unangefochtenen Stellung.

Daß jeder Stand vor seinem eigenen Standesgericht abgeurteilt worden ist, haben wir an anderer Stelle gehört; vgl. S. 178. Die Stände unterstanden aber nicht bloß verschiedenen *Gerichten*, sie

lebten auch nach verschiedenem Rechte. Das besagen Sätze wie: „Ritters Recht ist anders denn Bauernrecht", „Wer Ritter ist, hat Ritters Recht", „Ein Schuh ist nicht jedermann gerecht", „Weis' mir den Mann, ich weise dir das Recht." Die Verschiedenheit des Rechts lief meist darauf hinaus, daß die höheren Stände mehr Rechte, die niederen mehr Pflichten hatten. Das veranschaulicht eindringlich Ramlers Gedicht ‚Der Junker und der Bauer' mit dem bekannten Schluß: „Ja, Bauer! das ist ganz was anders".

Der Adel wurde ursprünglich vom Kaiser, später auch von den Landesfürsten verliehen. Daß der Beliehene dadurch über den gemeinen Mann erhöht werde, wurde durch den Ritterschlag und die damit verknüpfte Mahnung versinnbildlicht: „Ertrag' — diesen Schlag — und keinen mehr." Im Adel selbst machte man den Unterschied zwischen altem und neuem. Man hat sich von jeher viel auf sein Alter und auf seine Ahnen eingebildet. Einen Neugeadelten sahen daher seine Standesgenossen von oben herab an, und über den Versuch, seinem Alter durch Verleihung sogenannter gemalter Ahnen nachzuhelfen, ging man mit dem Sprichwort hinweg: „Gemalte Ahnen zählen nicht." Dagegen hieß es ernsthaft: „Die Söhne sind adeliger als die Väter; denn sie zählen ein Glied mehr".

Von dem niedern schied sich im Laufe der Jahrhunderte der hohe Adel ab. Er setzte es schließlich durch, daß nur Angehörige des hohen Adels würdig waren, einander zu heiraten und ebenbürtige Kinder zu erzeugen. Wer eine Ehe mit dem Angehörigen eines anderen Standes einging, schloß eine Mißheirat, auch wenn dieser andere den hochadeligen Gatten körperlich, geistig und sittlich turmhoch überragte. Solche Anschauungen sind auf Selbstüberhebung und Geringschätzung anderer gegründet und nicht gerechtfertigt. Schon zu der Zeit als sie entstanden, kannte man die Tatsache, daß sich gewisse körperliche und geistige Eigenschaften vererben. Man hatte aber noch kein Verständnis dafür, daß einem alten aufgezüchteten Stamme auch wieder einmal neues Blut und unverbrauchte Nervenkraft zugeführt werden müsse, wenn er nicht verdorren soll. Der französische Dichter A. Daudet führte gegen den Gedanken der Ebenbürtigkeit in seinem Roman „Könige in der Verbannung" einen grimmigen Hieb: Die Königin von Illyrien kommt dort unerkannt mit dem Kronprinzen zu einem Arzt, dessen Urteil lautet: „Das schlechteste, verdorbenste Blut". „Königsblut" flüstert sie leise.

Übrigens hatte auch das deutsche Volk über Wert und Unwert des Adels sehr verständig geurteilt, wie folgende Sprichwörter zeigen: „Adel sitzt im Gemüt — und nicht im Geblüt", „Edel sein ist gar viel mehr — als adelig sein von den Eltern her", „Geburt macht weder böse noch gut", „Wer recht tut, ist wohlgeboren", und „Tugend macht edel, aber Adel macht nicht Tugend." Auch der Adel, der oft auf das übrige Volk geringschätzig herabschaute, hielt nicht immer sein gegebenes Wort. Diese Erfahrung führte zu dem bittern Wink: „Versprechen ist herrisch, halten bäurisch." Wer Reichtum oder Herrschaft ererbt und zu ihrer Benutzung erzogen worden ist, unterliegt anderseits den mit seiner Stellung verbundenen sittlichen Gefahren weniger leicht als einer, der rasch und unerwartet emporgestiegen ist. Das Sprichwort gibt diese Erfahrung in verschiedener Fassung wieder: „Wenn sich der Bauer aufs Pferd setzt, reitet er schärfer als ein Edelmann", „Kein Messer ist, das schärfer schiert, — als wenn ein Bauer ein Edelmann wird", und „niemand so nahe (an der Haut) schiert —, als wenn der Bauer Herr wird." Er übt die herrschaftlichen Rechte mit besonderer Schärfe aus. Denn ein Emporkömmling kennt keine Hemmungen und Verpflichtungen, die dem echten Erben angeboren sind und anerzogen werden.

Unser heutiges Recht kennt nicht mehr den Unterschied zwischen Freien und Unfreien, der im Altertum und Mittelalter eine überragende Rolle spielte. Indes sollte diese Unterscheidung nur im bürgerlichen Rechte weggefallen sein? Für den heutigen Deutschen, dessen Vaterland durch den Abschluß des Weltkriegs in die Stellung eines halb unfreien Staates herabgedrückt wurde, ist es auf alle Fälle erhebend, wie seine Vorfahren den Wert der Freiheit fühlten: „Freiheit geht über Silber und Gold", „Freiheit ist lieber als Aug' und Leben", „Besser arm und frei, denn ein voller Kragen und eine goldene Kette um den Hals", „Armut ist keine Schande", „Besser ein freier Vogel als ein gefangener König", „Wer sein eigener Herr sein kann, der diene keinem anderen." Und bei unseren niederdeutschen Stämmen ist der Drang zur Freiheit so stark gewesen, daß ihr Name in Sprichwörter aufgenommen worden ist: „Alle Friesen sitzen auf freiem Stuhle" und „Die Holsten verteidigen ihr Recht mit dem Schwert." Freilich beschränkte sich dieser Kampfeseifer nur auf die Verteidigung der Landesgrenzen; denn da sich der freie Heerespflichtige nicht nur selbst ausrüsten, sondern auch ver-

pflegen mußte, so ging er über die Grenzen im allgemeinen nur soweit, daß er mit dem gleichen Sonnenschein vom Hause weg und wieder heimkommen konnte: „Aus mit der Ebbe, heim mit der Flut."

Den Gegensatz zu den Freien bildeten die Leibeigenen. Ihre schlimme Lage wird im Sprichwort erschütternd dargestellt: „Eigenleute werden für nichts geachtet", „Ein Eigenmann ist tot im Rechte", „Der Knecht wird verkauft wie der Hengst" und „Er ist mein, ich will ihn sieden oder braten."

In alter Zeit wies man den aus der Fremde Eingewanderten dem Grundherrn zu; er kam unter dessen Schutz und Frieden als Höriger. Das war der Name derer, die zu einem großen Hof „gehörten" und an die Scholle gebunden waren, ihren Wohnsitz also nicht beliebig wählen konnten. Sie hatten Kopfzins, Heiratsabgaben und Erbschaftssteuern zu entrichten. Auch konnten die Fremden nicht frei über das Vermögen verfügen, das sie im Lande erwarben. Vielmehr hieß es: „So einer ziehet ein, soll man ihm helfen mit Rat, — so einer ziehet aus, soll man ihm nehmen was er hat." Dieser rohe Zustand galt als längst überwunden. Dem Feindbund blieb es erst vorbehalten, ihn wieder aufzunehmen. Er beschlagnahmte nämlich das Vermögen aller Deutschen, die in einem feindlichen Lande wohnten, zog es vielfach für sich ein (so namentlich in Frankreich und Italien) und überließ es dem verarmten und mit ungemeßnen Zahlungsverpflichtungen belasteten Deutschland, die so ihres Vermögens beraubten Deutschen zu entschädigen.

Hörige und Leibeigene hatten den weltlichen und geistlichen Herren mancherlei Dienste zu leisten, die teils persönlich, teils durch ihr Zugvieh auszuführen waren, die sogenannten Hand- und Spanndienste. Jedoch machte man auch schon früher die Erfahrung: „Gezwungener Dienst hat keine Kraft." Die Arbeit, die man nicht mit Lust und Liebe tut, geht nicht voran und taugt nicht viel. Man bedarf vieler Aufseher. Diese aber sorgen oft mehr für sich als für den Herrn: „Wenn der Fürst einen Apfel braucht, nehmen seine Diener den ganzen Baum." Als Frucht solcher rücksichtsloser Ausnutzung traten wirtschaftliche Erscheinungen ein, die zu dem Worte geführt haben: „Je näher dem Kloster, desto ärmer der Bauer."

Von besonderer Bedeutung war, wie man in die Stände hineingeboren wurde. Denn mochte man die Mauer zwischen den Volksschichten im allgemeinen noch so hoch aufrichten, der Trieb der Geschlechter zueinander fragt nicht nach Standesunterschieden. Er führt sie zusammen und schafft Nachkommenschaft, ähnlich wie seit der Besiedlung fremder Erdteile ganze Mischlingsvölker in Afrika und Amerika aus der Verbindung weißer Einwanderer mit der Urbevölkerung entstanden sind. Das Recht verfuhr freilich im allgemeinen nicht glimpflich mit den Früchten solcher Verbindungen. Ganz rechtlos waren — unter dem nicht immer segensreichen Einfluß der Kirche — die Unehelichen. Diese Wirkung ist bis zum heutigen Tage in England zu vermerken. Von ihnen hieß es wegwerfend: „Alle Bankerte sind der Herrschaft." Wo sich aber Freie und Unfreie ehelich verbanden, da wogte ein heftiger Kampf, welches Blut den Sieg davontragen solle. Bald sollte der Stand des Vaters entscheiden: „Jedes Kind behält seines Vaters Recht", „Der Sohn behält seines Vaters Schild", bald gab der Stand der Mutter den Ausschlag: „Ein freies Weib kann kein (leib)eigenes Kind haben", „Sohn und Tochter gehören der Mutter", „Das Kind folgt dem Busen", „Das Kalb folgt der Kuh", „Das Bier schmeckt gern nach dem Fasse". Bisweilen unterschied man nach dem Geschlecht der Kinder: „Der Sohn behält des Vaters Recht, die Tochter das der Mutter". Oder der freie Elternteil entschied über die Rechtsstellung der Kinder: „Das Kind geht nach der besseren Hälfte", „Kinder folgen dem frei Geborenen". Die häufigste Lösung aber war die: „Wir Sachsen schlagen den bösen Eltern nach", „Das Kind folgt der ärgeren Hand", „Die geringe Hand zieht das Kind nach sich". Ja der Einfluß der ärgeren Hand beschränkte sich nicht bloß auf die Kinder, sondern ergriff auch den Ehegatten. Der Freie, der eine Unfreie zum Weibe nahm, wurde selbst unfrei und trat in die Hörigkeit der weiblichen Herrschaft: „Trittst du mein Huhn, so wirst du mein Hahn." Natürlich wurde nicht bloß der Mann durch die Verheiratung mit einer Unfreien hörig, sondern auch die Freie, die einen unfreien Mann ehelichte: „Unfreie Hand zieht die freie nach sich" und „Luft macht eigen". Hier wurde also der Höherstehende herabgedrückt. Diese Rechtswirkung ist auf das allgemeine Streben der Höhergestellten zurückzuführen, den Kreis ihrer Angehörigen möglichst eng zu halten und alle daraus zu entfernen, denen ein äußerlich feststellbarer Mangel nachgewiesen werden kann. Dem gegenüber verkörperten die Städte die fortschreitende Entwicklung im Sinne der allgemeinen Menschlichkeit und Gleichheit. Wie sie sich selbst allmählich von Grundherren freige-

macht hatten, so erkämpften sie das Recht, daß die neu in ihr Gemeinwesen Aufgenommenen von keiner andern Herrschaft mehr abhingen. Sie faßten dies in die Worte: „Gleich frei sind, die in einer Stadt sitzen“ und „Luft macht frei“. Dieses Sätzchen steht in strahlendem Gegensatz zu dem für das Gebiet der Grundherren geltenden Wort: „Luft macht eigen.“

9. Lehenrecht

Seit in Deutschland das gesamte Volk Träger der Staatsgewalt ist, hat das Lehenrecht den letzten Rest der Macht verloren, den es im Mittelalter über ganz Westeuropa ausgeübt hat. Einige geschichtliche Erinnerungen mögen gleichwohl auch hier am Platz sein. Im alten Deutschen Reich war die Heerespflicht nicht eine allgemeine Bürgerpflicht im heutigen Sinne, vielmehr war sie die Gegenleistung für eine dem Pflichtigen übertragene Landnutzung. Der Kaiser, der grundsätzlich der Eigentümer des gesamten Grund und Bodens war, verlieh entweder auf Lebenszeit oder darüber hinaus die Herzogtümer und Grafschaften an Waffenfähige, die, mit dem Lehensherrn durch das Band der Treue vereint, dafür zu jedem Dienste, insbesondere dem Wehrdienst bereit sein mußten. Die großen Lehensträger ihrerseits gaben Teile ihrer Lehen weiter an den niederen Adel unter ähnlichen Verpflichtungen. So galt das Wort: „Das Lehen ist der Ritter Sold.“ Von Bedeutung aber war: „Lehen gibt kein Eigentum.“ Vielmehr konnte der Lehensherr nach dem Heimfall des Lehens, also namentlich nach dem Tode des Lehensmanns, das Lehen anfänglich beliebig weiter verleihen. Mit der Zeit wurden dann die Lehen wie andere Rechte erblich. Seitdem mußte es der Lehensherr dem Sohn oder einem anderen männlichen Verwandten des Lehensmanns neu verleihen: „Lehen vererbt auf das nächste Blut, den ältesten auf der Straße, den Mann vor der Frau“. Wer die Pflicht zum Heeresdienste nicht selbst erfüllen konnte, war grundsätzlich vom Lehen ausgeschlossen: „Pfaffen und Frauen sollen Lehenrechts darben.“ Jedoch wurde nicht immer an diesem Grundsatz festgehalten, es gab vielmehr auch „geistliche und Kunkellehen“. Wie alles Ding seine Zeit hat, so starb auch das Lehenrecht allmählich ab. Im 30jährigen Krieg war zum letztenmal die Lehenspflicht die Grundlage des Heeresdienstes; dann traten Söldnerheere an die

Stelle des Aufgebots der Lehenspflichtigen. Das bloß zur Nutzung verliehene Gut aber wurde im Laufe der Zeit volles Eigentum des Lehensmanns. Jedoch galten für die Rechtsnachfolge in frühere Lehengüter bis in die neueste Zeit hinein noch vielfach besondere Grundsätze: „Lehen darf nicht gespalten werden“, diese Güter waren unteilbar, und nur der Mannesstamm war erbberechtigt. Diese Besonderheiten sind in den einzelnen Ländern beseitigt worden im Zusammenhang mit dem Satz der neuen Verfassung, daß öffentlich rechtliche Vorrechte oder Nachteile der Geburt oder des Standes aufzuheben seien (Art. 109).

10. Geistliche Würde und geistliches Gut

Der Kampfruf „Trennung von Kirche und Staat“ ist ein Erzeugnis der Neuzeit. Im Mittelalter wußte man nicht anders, als daß Staat und Kirche zusammengehörten. Ihren engen Zusammenhang zeigte schon der Name „das heilige römische Reich deutscher Nation“. Die Kirche sah den Staat im Grunde als ihren Diener an, der ihr seinen mächtigen Arm zu leihen hatte und ihren Willen vollstrecken sollte. Nur einige besonders selbständige und mächtige Kaiser, namentlich der Hohenstaufe Friedrich II., traten dieser Anschauung grundsätzlich entgegen. Im allgemeinen aber galt: „Die Kirche ist die Mutter des Heiligen Reichs“ und „das Heilige Reich hat Bestand durch die Geistlichkeit“. Wie der gesamten Kirche, so wurde auch dem einzelnen Priester eine besondere Ehrenstellung zuerkannt: „Die Pfaffen sind Meister der Christenheit“, „Priester sind Engel des göttlichen Volks“ und „Bischöfe sind Boten und Lehrer des göttlichen Worts“. Aber man war doch nicht blind gegen die Gefahren, die aus der Überschätzung des Priesterstandes und aus den sittlichen Versuchungen für die also Überhöhten erwuchsen. „Gefährlich ist es, wenn der Blinde den Blinden führt“, „Irrender Hirte, irrende Schafe“, „Des Volkes Leichtfertigkeit kommt von der Priester Bosheit“, „Gott ist ein Herr und der Abt ein Mönch“, „Bischöfe sollen wissen, daß sie Priester sind, nicht Herren“ und „Christus hat viele Diener, aber wenig Nachfolger“. Die römische Kirche hat im Laufe des Mittelalters das Gebot durchgeführt, daß der Priester ehelos sein müsse. Das steht allerdings im Widerspruch mit der Mah-

nung, die der Apostel Paulus gegenüber der heidnischen Vielweiberei im ersten Brief an Timotheus 3, 2 gegeben hat: „Es soll aber ein Bischof unsträflich sein, eines Weibes Mann." Um diesen Widerspruch zu verdecken, erklärte die Kirche das Verhältnis des Priesters zur Kirche als geistige Ehe: „Die Kirche ist des Priesters Gattin." Neben der geistigen Ehe durfte der Priester keine leibliche mehr eingehen; sonst würde er sich des Verbrechens der Doppelehe schuldig machen.

Auch die Kirche und ihre Diener haben irdische Bedürfnisse und brauchen zu ihrer Befriedigung eines Einkommens und Vermögens. Es ist nicht verwunderlich, daß auch diese Fragen und die Sorge ums tägliche Brot wohl bedacht wurden. In früherer Zeit kannte man ja noch keine eigentlichen Kirchensteuern, und der Versorgung eines Pfarramts konnte nicht die Steuerkraft der Kirchspielgenossen als Grundlage dienen. Vielmehr wurden andere Wege beschritten. Um eine Pfarre errichten zu können, mußte zunächst ein solches Vermögen sichergestellt werden, daß aus den Erträgnissen ein Priester besoldet werden konnte, die Pfründe. Um die himmlischen Güter vermitteln zu können, legte die Kirche daher den Gläubigen nahe, ihr unter Lebenden oder von Todeswegen irdische Güter zuzuwenden. Dabei ergab sich aus dem sogenannten Totenteil eine Anlehnung an vorchristliche Gebräuche. Vor alters wurden nämlich dem Toten gewisse Waffen und Gebrauchsstücke ins Grab mitgegeben und andere, wie etwa das Leibpferd des Verstorbenen, bei der Bestattung geopfert und verbrannt. Dieser Totenteil ward nun zum Seelgeräte. Er fiel jetzt der Kirche zu, die damit für das Seelenheil des Verstorbenen sorgte. Das Seelenheil der Germanen war aber recht gefährdet, teils wegen ihrer Kriegslust, teils wegen ihrer Anhänglichkeit an heidnische Gebräuche. Es mußte daher nach Ansicht der Geistlichkeit durch hohe Zuwendungen gesichert werden. Gegen ein Übermaß wandte sich freilich das Wort: „Niemand soll der Kirche geben und sein Kind enterben." Denn was einmal auf solche Weise oder durch Hingabe an ein Kloster aus der Familie hinausgegeben war, war für die Familie entgültig verloren: „Der Tod und das Kloster geben nichts zurück", „Kirchengut hat Adlersklauen" und „Kirchengut hat eiserne Zähne", die fest halten, was sie einmal erfaßt haben. Denn „Weltlich Gut läßt sich geistlich machen, aber geistliches nicht weltlich". Man soll einen derartigen Versuch gar nicht

machen, denn „Die Heiligen lassen nicht mit sich spaßen" und „Die Heiligen reden nicht, aber sie rächen sich". Anderseits sollen am Erträgnis des Kirchenguts die Armen einen gewissen Anteil erhalten: „Kirchengut ist armer Menschen." Namentlich soll ihnen das Sakrament nicht deshalb vorenthalten werden dürfen, weil sie keine Sportel oder sonstige Gebühren entrichten können. „Der Arme bedarf Gottes so gut wie wer mehr hat." Die Reichen dagegen sollen sich gesagt sein lassen: „Mit leerer Hand darf niemand vor Gottes Angesicht erscheinen." Und „Umsonst wird kein Altar gedeckt"; das mochten auch die Hinterbliebenen bedenken, die wollten, daß für den Verstorbenen Seelenmesse gelesen würde. Wer die nicht nach einer bestimmten Höhe gemessene Gebühr allzu nieder ansetzte, der durfte sich nicht über die Erfahrung wundern: „Kupferner Pfennig macht hölzerne Messe". Denn „Das Evangelium muß nach Brot gehen". Das war in der Tat so bei den Leutpriestern, deren Einkommen meist recht kärglich war. Das Sportel- und Gebührenwesen wurde auch nach der Reformation grundsätzlich nicht geändert. Auch in der evangelischen Kirche hieß es: „Niemand speist, der nach der Beicht — nicht sein Judenkreuzerl reicht" (Judenkreuzerl wurden die Abendmahlsgroschen genannt). Diese Gebühren waren nämlich ein Teil des Diensteinkommens und es galt der Grundsatz: „Wer dem Altar dient, soll vom Altar leben." In neuerer Zeit sind die Gebühren für gewisse Amtshandlungen, wie Taufen, Beerdigungen, die sogenannten Casualien, die nicht in regelmäßiger Wiederkehr vorzunehmen sind, sondern so, wie sie gerade anfallen (vom lateinischen casus, der Zufall) häufig durch festbestimmte Ablösungssummen ersetzt worden. Ferner ist es kein Ding der Unmöglichkeit mehr, geistlich Gut weltlich zu machen. Vielmehr unterliegt auch das kirchliche Gut den Enteignungsgesetzen und es kann z. B. die Erbauung einer Eisenbahn oder eines Kanals nicht deshalb erschwert werden, weil die geplante Linie durch kirchlichen Besitz führt.

Als Gegenstück zum Satz: „Wer dem Altar dient, soll vom Altar leben" entwickelte sich in früherer Zeit die Mahnung: „Wer vom Altar lebt, soll dem Altar dienen." Es hatten sich nämlich im Laufe des Mittelalters das sogenannte Commendenunwesen ausgebildet (von commendare = anvertrauen). Mancherorts wurden die Einkünfte erledigter Pfründen den kirchlichen Zwecken entfremdet oder an Laien verliehen und zur priesterlichen Verrichtung ein armselig

besoldeter Mittelsmann bestellt. Dann zog der weltliche Nutznießer aus der Pfründe heraus, was er konnte, und der geistliche Schaffner mußte doch auch leben. Die Leidtragenden aber waren die Angehörigen des Kirchenspiels. Die mußten doppelt zahlen und gaben ihrem Verdruß über dieses Gebahren durch Worte Ausdruck wie: „Ein guter Hirt schert seine Schafe, ein schlimmer zieht ihnen das Fell ab“ und „Was nicht nimmt Christus, das nimmt der Fiskus“; damit ist hier der weltliche Nutznießer gemeint, während man sonst mit diesem Wort, das eigentlich Geldkorb bedeutet, die Staatskasse bezeichnet.

Nach der Reformation nahmen die Fürsten, die ein Herrschaftsrecht des Papstes und der Bischöfe nicht mehr anerkannten, die Befugnisse, die bisher jenen zustanden, nunmehr für sich in Anspruch. Hierüber bildete sich das Wort: „Ein jeder Herr ist Papst in seinem Land.“ Es ist dies die Rechtsstellung, die man später als Landesbischofstum bezeichnet hat.

11. Geistliche Zucht

Die katholische Kirche hat im Mittelalter ihre Macht über die Menschen in steigendem Maße ausgedehnt und befestigt. Sie verlangt grundsätzlich Gehorsam, nicht bloß inneres Einverständnis mit ihren Geboten. Heute wie vor Jahrhunderten verwirft sie die Forderung der Gewissensfreiheit. „Ungläubige stehen gleich Heiden und Juden“ und „Alle, die wider den christlichen Glauben leben, sind ungläubig“. Von dem Glauben aber, der nicht nach Gründen fragt und alle Lehren willig hinnimmt, wird anerkennend gesagt: „Des Köhlers Glaube ist der beste.“ Jedoch war man sich von jeher bewußt, daß die Menschen verschieden geschaffen sind. Manche grübeln, prüfen alles und nehmen nicht unbesehen hin, was die weltliche oder die geistliche Obrigkeit vorschreibt: „Niemand kann frommer sein als es ihm Gott zugemessen“ und „Der Glaube muß von Gott kommen.“ Es wäre gut, wenn die Kirchen des immer eingedenk wären.

Die Kirche setzt nicht bloß die Glaubenslehren fest, sie bestimmt auch, welche Lehren durch besondere Festtage gefeiert werden sollen. Danach hat sich der Gläubige zu richten, ob ihm auch ein Feiertag

beim Stande seiner Arbeiten im einzelnen Fall mehr oder weniger paßt: „Man muß die Feste feiern, wie sie fallen.“ Diese Feste gelten entweder für die ganze Christenheit, oder für einzelne Länder oder nur für ein Kirchspiel: „Kein Dorf ist so klein, es ist des Jahres einmal Kirchweih“ und „Keine Kapelle ist so klein, sie hat jährlich einmal Kirchweih.“

Wer die Gebote der Kirche nicht hält, dem werden kirchliche Strafen auferlegt, wie Ausschluß vom Genuß der Sakramente oder bei stärkeren Vergehen die Ausstoßung aus der kirchlichen Gemeinschaft, der Kirchenbann: „Des Papstes Schwert ist der Bann.“ Die Kirche begnügte sich jedoch nicht damit, rein religiöse Vergehen mit rein kirchlichen Mitteln zu sühnen, vielmehr verstand sie in immer weiterem Umfange die Gerichtsbarkeit an sich zu ziehen; zunächst einmal über alle Kleriker, deren es ja bei dem ausgedehnten Ordenswesen recht viele gab. Die Laienwelt bezeichnete man mit Vorliebe als Schafe, die zur Erlangung des Seelenheils eines Hirten bedurften. Da konnte dieser als Träger der geistlichen Weihen, die ihn über die sonstige Menschheit hinaus hoben, auch strafrechtlich nicht einem Laien unterstellt werden. „Die Schafe dürfen ihren Hirten nicht strafen.“ Dann aber beanspruchte die Kirche das Richteramt weiter in allen Verhältnissen, die eine religiöse Beziehung hatten; und das war im Mittelalter nicht wenig. Dahin gehörte zunächst der Eid, weil dabei der Name Gottes angerufen wurde. Hier vertrat die Kirche übrigens die Ansicht, daß der Eid nicht gehalten werden dürfe, wenn er ein unsittliches Verhalten oder Versprechen bekräftige, und nicht gehalten zu werden brauche, wenn er erzwungen worden war. Daher: „Alle Eide kann man nicht halten“, „Dem Teufel braucht man keinen Schwur zu halten“, „Gezwungener Eid — ist Gott leid“ und „Gezwungener Eid soll nicht binden“. Wie bedenklich diese Anschauungen waren, zeigt der von der Kirche veranlaßte Bruch des Geleitbriefs, den Kaiser Sigismund dem der Ketzerei beschuldigten Johann Huß von Prag für das Konstanzer Konzil gegeben hatte. Dieser Wortbruch und die anschließende Verbrennung war mit ein Anlaß zu den blutigen Hussitenkriegen. — Eine religiöse Beziehung fand man weiter in allen Ehesachen, da die Ehe als kirchliches Heilmittel aufgefaßt worden war. Sie ward ein beliebter Gegenstand der kirchlichen Gesetzgebung, der die Macht der geistlichen Gerichtsbarkeit bis ins kleinste Dorf hinein trug. Dazu war das Ehe-

recht durch die ungemessene Ausdehnung der Ehehindernisse eine Quelle von Einnahmen, weil von vielen Ehehindernissen durch die kirchliche Obrigkeit Befreiung (Dispensation) erteilt werden konnte. Neben den auf natürlichen Verhältnissen beruhenden Ehehindernissen der Verwandtschaft und Schwägerschaft schuf man noch geistliche, vgl. S. 28. Von diesen handelten die Worte: „Meines Paten Kind nehm' ich nicht mit Recht", und „Der Taufstein scheidet".

Als sich der neuzeitige Staat auf seine Aufgaben besann, brach er grundsätzlich (wie beim Verbot der Scheidung) mit diesen Anschauungen, die in der Naturordnung keinen Rückhalt haben. Er wollte nur verhüten, daß bei naher Verwandtschaft der Ehegatten die vielfach beobachteten Gefahren der sogenannten Inzucht für die geistige und körperliche Gesundheit der Nachkommen hervortraten, und ferner sollte die Unbefangenheit des Familienverkehrs nicht darunter leiden, daß sich zu nahe Verwandte heiraten. Ehehindernisse, die über diese Schranken hinausgehen, hat er nicht aufgenommen.

Die Kirche begnügte sich auch nicht damit, die bürgerlichen Wirkungen der Ehe zu regeln und durch ihre Gerichte durchzuführen, sie zog sogar die strafrechtliche Seite in den Bereich ihrer Gerichtsbarkeit. Dabei sah sie das Verbrechen als Sünde und als Auflehnung gegen Gott an und ihr Ziel war die Versöhnung des Sünders mit Gott. Die kanonische Lehre war daher von Haus aus Gegnerin der Todesstrafe: „Die Kirche dürstet nicht nach Blut", „Die Kirche vergießt kein Blut", „Bann schadet der Seele und nimmt doch niemand den Leib". Später aber schreckte die Kirche vor der Todesstrafe nicht mehr zurück und überlieferte Zauberer und Hexen dem Scheiterhaufen; vgl. S. 147. Eine Besonderheit des kirchlichen Strafrechts war noch die Unterscheidung in der Behandlung der öffentlich und der heimlich begangenen Verfehlungen: „Offenbare Sünde, offenbare Buße", „Heimliche Sünde soll man heimlich büßen". Das legte natürlich die Gefahr nahe, daß man die Verfehlungen derer, die sich unliebsam bemerklich machen, vielleicht die kirchlichen Machtansprüche angegriffen hatten, an die große Glocke brachte, die eines andern aber, dem man wohl wollte, heimlich sühnte. Die Neigung, das Tun eines anderen bald zu vertuschen, bald aber aufzubauschen, scheint ja eine unausrottbare allgemeine menschliche Erscheinung zu sein.

Grundsätzlich enthielt die kirchliche Buße nichts Entehrendes: „Kirchenbuße ist kein Staupbesen." Ihnen unterzogen sich daher selbst

deutsche Könige, und der berühmte Gang Heinrichs IV. nach Kanossa war zwar gewiß eine Demütigung, aber doch ein Mittel, das die abtrünnigen deutschen Fürsten zwang, von ihrem Ungehorsam gegen den ihnen verhaßten König abzulassen. Denn nachdem sein Hauptgegner, der Papst Gregor VII. den Kirchenbann hatte aufheben müssen, war den Fürsten der Rechtsschein zur Abspenstigkeit genommen und die verletzte Ehre des Königs so wieder hergestellt wie nach den Anschauungen späterer Zeiten durch die Ausfechtung eines Zweikampfs. Die kirchlichen Strafen, denen im Mittelalter selbst ein Kaiser nur selten zu trotzen wagte, haben in neuerer Zeit für weitere Kreise ihre schreckende Wirkung verloren.

Verzeichnis der Rechtssprichwörter

A

Abbitte ist die beste Buße. 143.
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Gott hat drei Dinge geschaffen, den Adel, den Bauern und den Pfaffen. 217.
Adel sitzt im Gemüte und nicht im Geblüte. 219.
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Alle Beklagte henkt man nicht. 192.
Alle Eide kann man nicht halten. 227.
Allein getan, allein gebüßt. 136.
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Alt ist darum nicht Recht. 58.
Wer dem Altar dient, muß vom Altar leben. 225.
Wer vom Altar lebt, soll dem Altar dienen. 225.
Der Altar ist der Ehren wohl wert, er ist das Herz des Gotteshauses. 199.
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Das Alter geht vor. 67.
Alte Marksteine soll man nicht verrücken. 13.
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Der Ältere soll teilen, der Jüngere kiesen. 121.
Die ältesten Briefe gehen vor. 67.
Amt bringt Käppchen. 206.
Amt bringt Samt. 206.
Wem Gott ein Amt gibt, dem gibt er auch Verstand. 205.
Das Amt macht wohl satt, aber nicht klug. 205.
Wie einen das Amt findet, so läßt es ihn auch. 205.
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Das Amt ist des Mannes Lehrmeister. 205.

Was der Mann kann, zeigt das Amt an. 205.
Amt zeugt vom Mann. 207.
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Amt ohne Sold macht Diebe. 206.
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Amt macht verdammt. 205.
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Erst anklagen, dann richten. 173.
Ohne Anklagen kann niemand verurteilen. 173.
Wer sich anspannen läßt, muß ziehen. 205.
Wen man beschuldigt, der muß antworten. 183.
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Sprich lieber des Antworters Wort als des Klägers. 177.
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Wer nicht arbeitet, soll auch nicht essen. 97.
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Das Kind folgt der ärgeren Hand. 221.
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Das Bier schmeckt gerne nach dem Faß. 221.
Man muß fastend zu Gerichte sitzen. 159.
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Die Feder regiert das Schwert. 213.
Es ist nichts so fein gesponnen, es kommt doch endlich an die Sonnen. 153.
Man muß Feste feiern, wie sie fallen. 227.
Das Feuer ist ein Dieb. 154.
Ein Dieb findet so leicht wie der Glöckner den Kelch. 154.
Wer findet, ehe verloren wird, stirbt, ehe er krank wird. 153.
Find' ich dich, so richt' ich dich. 174.
Wer sich vor dem Gericht verbirgt, der läßt sich finden. 174.
Wer das Urteil findet, ist des Richters Ratgeber. 167.
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Keine Frau kann mehr bezeugen als Notzucht und Ehe. 188.
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Jeder mag das Seine frei gebrauchen und besitzen. 58.
Freiheit geht über Silber und Gold. 219.
Freiheit ist lieber als Aug' und Leben. 219.
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Besser ein freier Vogel als ein gefangener König. 219.
Ein freies Weib kann kein eigenes Kind haben. 221.
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Gleich frei sind, die in einer Stadt sitzen. 222.
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Alle Friesen sitzen auf freiem Stuhle. 219.
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Sachverzeichnis

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★ Deutsche Stämme — Deutsche Lande ★

Niederdeutsche Volkskunde Von Professor Dr. O. Lauffer. 2., verbesserte Auflage. 141 Seiten mit einer Tafel. Gebunden M. 4.60

„Darstellung ist für Schilderungen andersstämmigen Volkstums bereits vielfach vorbildlich geworden. In sachlicher und doch gemütvoller Sprache werden Volkskunde, Stammeskunde nach körperlicher und geistiger Veranlagung, äußere Lebensformen und Gemütswesen in ihren Anlässen und Auswirkungen in bezug auf Sprache, Dichtung und Glaube vorgeführt." Kölner Tageblatt

Westfälische Volkskunde Von Prof. P. Sartori. 209 Seiten mit 16 Tafeln. Gebunden M. 5.40

„Der Bearbeiter der Volkskunde Westfalens ist in einer besonders glücklichen Lage. Diese Landschaft ist eine der eigenartigsten in unserem Vaterlande; Paul Sartori hat da mit großem Glück und mit geschickter Hand die rechte Mitte getroffen. Er hat mit kluger Umsicht und rühmlichem Fleiß aus der Masse des Quellenstoffes eine äußerst wertvolle Auswahl getroffen."
Literarisches Echo

Rheinische Volkskunde Von Professor Dr. A. Wrede. 2., verbesserte Auflage. 363 Seiten mit zahlreichen Abb. Geb. M. 8.—

„Die rheinische Volkskunde hat einen der hervorragendsten Kenner der geschichtlichen, insonderheit der sprachgeschichtlichen und mundartlichen Überlieferung des Rheinlandes zum Verfasser, der in jahrelanger, sorgsamer Forschungs- und Sammeltätigkeit eine unerschöpfliche Fülle von Material zusammengebracht und nunmehr ein Werk bedeutungsvollen Ranges vorlegt."
Kölnische Zeitung

Badische Volkskunde Von Professor Dr. E. Fehrle. 199 Seiten mit zahlreichen Abbildungen. Gebunden M. 4.—

„Dieser Band gibt einen sehr guten Überblick über badisches Volkswesen und seine Entwicklung, über Sprache, Empfindungs- und Denkart, Wohnung, Siedlung und Sitten, zumal sich der Verfasser der vielen Schwierigkeiten wohl bewußt ist, die der Schreiber einer Volkskunde, und im besonderen einer badischen Volkskunde, überwinden muß." Sächsische Schulzeitung

Ostdeutsche Volkskunde Von Professor Dr. K. Brunner. 291 S. mit zahlr. Abb. auf 32 Tafeln. In Leinenband M. 7.—

„Gestützt auf die wertvollen Sammlungen des Museums für deutsche Volkskunde in Berlin, gibt der Verfasser einen glänzenden Überblick über das Leben des märkischen und ostmärkischen Volkes in der Mark Brandenburg, Posen, Ost- und Westpreußen. Das schöne Werk ist hervorragend geeignet, Verständnis und Liebe zur Heimat zu wecken und zu pflegen."
Lehrerzeitung für Ost- und Westpreußen

VERLAG VON QUELLE & MEYER IN LEIPZIG

★ Deutsche Stämme — Deutsche Lande ★

Sudetendeutsche Volkskunde Von Dr. E. Lehmann. 240 S. mit zahlreichen Abbild. auf 24 Tafeln. In Leinenband M. 6.—

„Das verdienstvolle Werk, dessen Frische und Lebendigkeit zum großen Teil aus dem lebendigen Mitschaffen im Volkskörper herstammt, ist die erste Gesamtbehandlung des Gebietes und als solche schon von allergrößter Bedeutung. Die sachliche Wirkung des Buches wird unterstützt durch hübsche Ausstattung und durch zahlreiche Bildertafeln nach zum Teil unbekannten Motiven."
Kreuz-Zeitung

Siebenbürgisch-Sächsische Volkskunde im Umriß. Von Senator Dr. D. A. Schullerus. 190 Seiten mit zahlreichen Abbildungen im Text und auf 16 Tafeln. In Leinenband M. 5.—

Die Volkskunde Siebenbürgens ist besonders interessant, da Römer, Goten und Griechen hier ihre Spuren hinterließen; auch sind hier von der großen Kolonisation im 12. Jahrhundert eine Menge fränkischen und alemannischen Kulturguts erhalten. Dieses legt Verfasser bloß, indem er uns in siebenbürgisches Leben einführt und ihre Sprache, Arbeit und Brauch schildert.

Grundzüge der deutschen Volkskunde Von Professor Dr. phil. H. Naumann. 158 Seiten. Gebunden M. 1.80

Eine Volkskunde in ihren Grundzügen liegt hier vor, die zum ersten Male den ungeheuren Stoff, der sich in zwei Menschenaltern gehäuft hat, ordnet und in sich wieder einheitlich verbindet, die aber durch die Überlegenheit des Forschers einen wesentlich neuen Aufbau zeigt. Systematische und gut begründete Unterscheidung einer mythologischen und gesunkenen Überlieferung durchzieht alle Kapitel des inhaltreichen Buches. Das ganze Werk ist eine wissenschaftliche Tat, der sich so leicht kein anderes an die Seite stellen kann.

Die deutschen Stämme und ihr Anteil am Leben der Nation. Von Oberstudiendir. Dr. Th. Lenschau. 95 Seiten. Geb. M. 1.80

„Dies Buch wird besonderem Interesse begegnen, da es die deutschen Stämme aus ihrer Geschichte, ihrer rassemäßigen Zusammensetzung, ihren wirtschaftlichen Kulturen und politischen Leistungen und der Natur des von ihnen bewohnten Gebietes heraus in ihrer Eigenart charakterisiert. Lenschau hat die Aufgabe, die er sich gestellt hat, sehr geschickt gelöst." Weser-Zeitung

Deutsche Altertümer im Rahmen deutscher Sitte. Von Prof. Dr. O. Lauffer. 142 Seiten. Gebunden M. 1.80

„In diesem Werke wird die Kunde deutscher Altertümer in einem knappen Grundriß einem größeren Leserkreise anschaulich und in fesselnder Darstellung vermittelt. Es werden darin die gegenständlichen Denkmäler deutscher Vergangenheit von den Karolingern bis zur Neuzeit behandelt. Die Anordnung der Denkmäler ist nach dem kulturgeschichtlichen Zwecke, dem sie dienten, vorgenommen."
Hamburgischer Korrespondent

Das Wortkunstwerk
Mittel seiner Erforschung

Von Geheimrat Professor Dr. O. Walzel

365 Seiten. In Leinenband M. 14.—

Wenn ein Meister seines Faches in einem Werke wie dem vorliegenden die Ernte seines Lebens in die Scheuer fährt, so ist damit schon sein Werk gekennzeichnet. Aber Walzel ist auch ein Künstler des Stils, so daß es für jeden ein Genuß ist, diese feingeschlossenen Essays zu lesen, in denen er uns über Gehalt und Gestalten in den Werken unserer Dichter erzählt. Eine Fülle geistvoller Gedanken werden hier vor dem Leser ausgebreitet.

Geschichte des deutschen Stils
in Einzelbildern

Von Professor Dr. E. Hoffmann-Krayer

172 Seiten. In Leinenband M. 6.—

„Das vorliegende Buch versucht auf knappem Raum eine Entwicklungsgeschichte des deutschen Stils, und es tut dies in einer so frischen, originellen und sachkundigen Weise, daß man es nicht aus der Hand legt, bis man auf der letzten Seite angelangt ist. Das Büchlein ist sehr gut angelegt und mit einer Fülle vorzüglich gewählter Stichproben ausgestattet."

Neue Züricher Zeitung

Wortschatz und Sprachform
Sprachliche Plaudereien und Betrachtungen

Von Dr. G. A. Brüggemann

141 Seiten. In Leinenband M. 4.—

„Erquickende sprachliche Plaudereien und Betrachtungen nicht nur für alle Deutschlehrer von der Volksschule bis zur Hochschule, auch für einigermaßen gebildete Laien, gründliches weitausgreifendes Wissen in anziehender, meist volkstümlicher Form. Warm wird wohl jeder beim Lesen der verschiedenartigen Aufsätze. Das wertvolle Büchlein kann jedem Freunde der Sprache empfohlen werden."

Mitteiluugen aus dem höheren Schulwesen

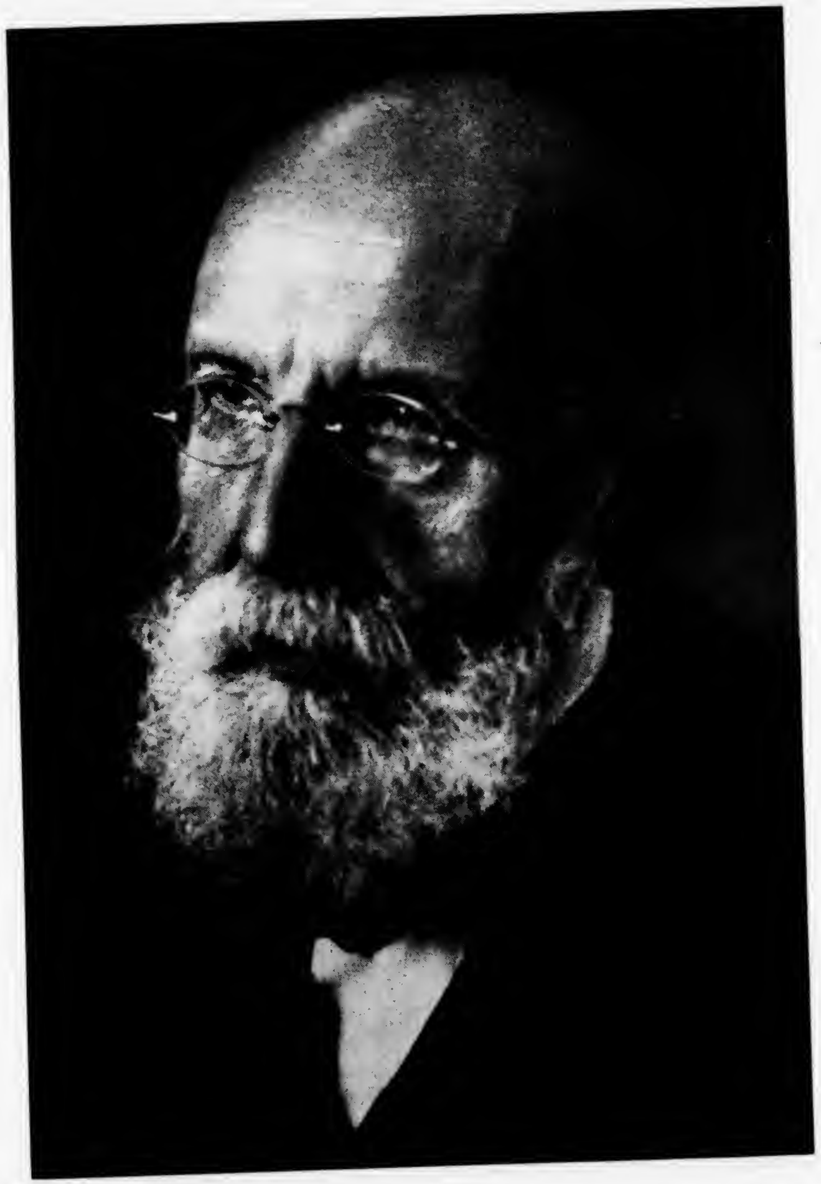
Aus dem Leben unserer Muttersprache
Eine Einführung in das Verständnis deutscher Sprache und deutscher Art

Von Studiendirektor Professor W. Oppermann

180 Seiten. Gebunden M. 4.—

„Das wertvolle Buch gehört zu den Werken über unsere Muttersprache, die Sturm laufen gegen die ‚Überfremdung' unserer Schule und Kultur, die uns den überquellenden Reichtum unserer Sprache an erzieherischen und bildenden Werten eindringlich vor Augen führen."

Zentralblatt f. d. gesamte Unterrichtsverwaltung



Julius Ofner

JULIUS OFNER
RECHT UND GESELLSCHAFT

GESAMMELTE VORTRÄGE UND AUFSÄTZE
HERAUSGEGEBEN UND EINGELEITET VON
WALTHER ECKSTEIN

Mit einem Bildnis

1931
WIEN UND LEIPZIG
DRUCK UND VERLAG VON CARL GEROLD'S SOHN

Verlagsnummer 5183

INHALTSVERZEICHNIS

EINLEITUNG DES HERAUSGEBERS

Es war der letzte Wille Julius Ofners, daß nach seinem Tode eine Sammlung seiner „wertvolleren Aufsätze und Vorträge" — wie er selbst sich in dem Kodizill ausdrückte — herausgegeben werden möge. Der vorliegende Sammelband will diesen Wunsch verwirklichen. Er will ein Denkmal sein, das sich dem ehernen Denkmal, das in diesen Tagen zum Andenken an Ofner errichtet werden soll, zur Seite stellen möge. Das Buch soll deshalb ein Bild der geistigen Persönlichkeit Julius Ofners geben — mit dem ganzen Reichtum ihrer mannigfaltigen Interessen, welche die Fortschritte der Naturwissenschaft ebenso umfaßten wie die Probleme des modernen Weltverkehres, die Lebensphilosophie der chinesischen Weisen ebenso wie die neuesten Theorien von Schuld und Strafe. Es zeigt den sozialwissenschaftlichen Forscher und den Gesetzeskritiker und -fortbildner, es zeigt den Kämpfer für Recht und Menschlichkeit und es zeigt damit den *Menschen* Julius Ofner, in dem glühende Gerechtigkeitsliebe und tiefe Menschlichkeit zu jener Güte zusammenklangen, die das innerste Wesen seines Charakters ausmachte und die sich wie ein Lichtstrahl in den zahllosen Facetten eines Prismas in all den wissenschaftlichen Studien und Arbeiten brach, deren tiefsten Kern und deren letzte Gemeinsamkeit sie bildete.

Aber die Sammlung soll zugleich mehr sein als das Denkmal, das die Pietät seiner Freunde und Verehrer ihm errichtet. Sie soll dasjenige erhalten, was an Ofners Arbeit von *dauernder* Bedeutung war, und soll zugleich die Aufmerksamkeit weiterer Kreise auf die zu wenig beachtete wissenschaftliche Leistung Ofners lenken. Mag man auch diese oder jene Position Ofners für überholt halten, so darf man doch nicht übersehen, daß er durch manche seiner Untersuchungen (wie durch die Erforschung des sozialen Gehaltes und der sozialen Bedeutung des Privatrechtes) durch seine Reformvorschläge auf allen Rechtsgebieten, durch seine Erkenntnis der Wichtigkeit der Soziologie für die Fortbildung des Rechtes, vor allem aber durch seine weittragende Forderung nach einer Gesetzgebungswissenschaft Bahnbrechendes geleistet hat.

Freilich — auch das Buch gibt kein Bild des *ganzen* Julius Ofner. Vor allem deshalb, weil Ofner eben nicht nur Schriftsteller und Gelehrter, sondern auch, ja in erster Linie, ein Mann der Tat war. Was Ofner aber als Anwalt und als Politiker, insbesondere durch seine Mitwirkung an der Gesetzgebung, geleistet hat — „die Geschichte des sozialen Wirkens Julius Ofners", wurde 1915 nicht mit Unrecht gesagt [1]), „wäre die Geschichte der Sozialpolitik in Österreich überhaupt" —, das kann naturgemäß in einer Sammlung seiner Schriften nicht oder doch nicht hinreichend zum Ausdruck kommen. Dann aber auch deshalb, weil das Buch doch nur eine Auswahl aus den überaus zahlreichen Publikationen Ofners bringen konnte. Es wurden vor allem solche Arbeiten aufgenommen, die einerseits durch ihren gedanklichen Gehalt, anderseits durch die Allgemeinheit der Problemstellung oder die Weite des Ausblickes, den sie eröffnen, von bleibender und zugleich allgemeiner Bedeutung zu sein schienen; daneben aber auch solche Aufsätze, in denen Fragen des öffentlichen Lebens behandelt sind, die heute noch als *aktuell* gelten dürfen: sei es, weil es sich um strittige Probleme handelt (wie die des Geschwornengerichtes), die heute noch den Gegenstand der Diskussion bilden, sei es, weil sie Forderungen an die Gesetzgebung enthalten, die heute noch nicht oder nicht ganz erfüllt sind, wie dies von Ofners Vorschlägen zur Eherechtsreform, zum Strafvollzug, insbesondere aber von der Frage der „Ausweisung" [2]) gilt, ein Problem, das Ofner immer wieder beschäftigt hat und das heute noch einer befriedigenden Lösung harrt. Wenn Ofners Worte zu diesen Fragen aber in dem neuen Rahmen weiterwirken und so zu

[1]) Colbert-Alpheus: „Julius Ofner, der Sozialpolitiker in der Volksvertretung von 1896—1915" in der Festschrift zum 70. Geburtstag Julius Ofners (Wien 1915). Auf diese Festschrift, insbesondere auf den Artikel Wilhelm Jerusalems: „Ofner als Ethiker und Forscher", und auf die Abhandlung von Rudolf Bienenfeld: „Julius Ofner und die Rechtswissenschaft", die nicht nur eine Analyse der wichtigsten Arbeiten Ofners bietet, sondern auch die Stellung Ofners in der Geschichte der österreichischen Rechtswissenschaft eingehend darlegt, sei hier zur weiteren Orientierung verwiesen. Ebenso auf die letzte Schrift Ofners: „Das soziale Rechtsdenken" (Erfurt 1923), die im Sinne der letztwilligen Verfügung Ofners in das vorliegende Buch nicht aufgenommen wurde.

[2]) Um einen Ausdruck zu gebrauchen, den Franz Kobler in der eben erschienenen Schrift „Recht und Unrecht der Ausweisung" (Wien 1931) — der ersten zusammenfassenden Darstellung der hiehergehörigen Probleme — auch in die österreichische Terminologie einbürgern will.

ihrer Lösung beitragen würden — es könnte keinen Erfolg dieses Buches geben, der mehr im Sinne des immer regen, immer kampfbereiten Tatmenschen Ofner gelegen wäre.

Dieser Drang zu *wirken* durchzieht aber auch Ofners ganzes schriftstellerisches Werk. „Mein Denken gilt dem Recht der Lebenden", so sagte er selbst einmal [3]) und charakterisiert damit aufs treffendste den Grundzug seiner wissenschaftlichen Interessen. Alles, was er schreibt, ist dem Leben zugekehrt, will das Leben gestalten und vor allem — fördern. Von diesem Grundprinzip aus versteht man erst Ofners ganze Rechtsauffassung, in diesem Grundprinzip wurzelt das begeisternde Pathos und das höchste Ethos seiner Arbeit. Hier wurzeln aber auch gewisse Züge seiner Rechtstheorie, die uns heute vielleicht einigermaßen fremd oder ungewohnt erscheinen.

Von diesem Leitmotiv aus erklärt sich vor allem Ofners Abneigung gegen jeden übertriebenen Historismus im Recht. Gesetz und Recht vergangener Zeiten und Völker mögen auch für die Rechtswissenschaft lehrreich sein, aber nur als frühere Versuche zur Gestaltung des sozialen Lebens und — wie er meint — vielleicht öfter durch ihr Mißlingen als durch ihren Erfolg. Für die Rechtswissenschaft aber maßgebend „ist das Leben der Gegenwart, die Erfahrungen der Gegenwart, das Wissen und Forschen der Gegenwart" [4]). Daher auch Ofners Kampf gegen die Methode unseres Rechtsstudiums, das den jungen Juristen in die Rechtsordnungen längst verschollener Jahrhunderte einführt, anstatt ihn mit dem sozialen Leben seiner Zeit vertraut zu machen [5]). Daher seine Opposition gegen die historische Rechtsschule, deren Romantik — mit ihrer Berufung auf eine „mystische Volksüberzeugung" [6]) — seinem

[3]) Das Konkordat, Wien 1921.

[4]) Die Wende in der deutschen Rechtswissenschaft („Frankfurter Zeitung", 13. März 1911).

[5]) S. u.: Die Ausbildung der Juristen, ferner Zur Reform der juristischen Studien („Zentralblatt f. d. jur. Praxis", 1896).

[6]) Rechtstheorie und historische Schule, Wien 1888, bes. S. 5.

rationalen Denken ebenso fremd ist, wie ihre rein nationalhistorische Auffassung des Rechtes seinem Ideal einer allgemeinen Rechtswissenschaft widersprach. Vor allem aber ist es ihr Versuch, alles Recht aus seiner Vergangenheit zu verstehen, aus der es in organischem Wachstum entsprungen sei, der Ofners der Zukunft zugekehrtem Denken antipathisch sein mußte: ihm lag es näher zu experimentieren, als auf organisches Wachstum zu warten. Dabei darf freilich nicht übersehen werden, daß sich einer genaueren Betrachtung zahlreiche Gemeinsamkeiten zeigen, die Ofners Ansichten mit denen der älteren historischen Schule, insbesondere ihres Begründers Savigny, verbinden. Die Abneigung gegen den Gesetzeskultus — obgleich bei Savigny etwas anderen Motiven entspringend [7]) —, die Tendenz zu einer Art von Freirechtslehre und einer Auffassung des „lebenden Rechtes", die der gewisser rechtssoziologischer Richtungen unserer Zeit durchaus verwandt ist, das alles sind Einstellungen, die Ofner ebenso kongenial hätten erscheinen müssen, wie die evolutionistische Grundidee [8]) der historischen Schule und der in ihrer Lehre von der Geschichtsgebundenheit des Gesetzgebers sich ausdrückende strenge Determinismus [9]) seiner naturwissenschaftlichen Denkweise im Grunde durchaus wesensgemäß sein mußten. Allerdings richtet sich Ofners Polemik — besonders in den späteren Schriften — weit weniger gegen die historische Schule in ihrer ursprünglichen Form, deren Bedeutung er anerkennt, als vielmehr gegen die positivistische Rechtsschule der späteren Zeit, die man nicht mit Unrecht die Epigonin der ersteren genannt hat [10]). Sie war charakterisiert durch einen „Gesetzesabsolutismus", der mit seiner Beschränkung der Rechtswissenschaft und der Rechtsfindung auf bloße Gesetzesauslegung Ofner schon aus dem Grunde schädlich,

[7]) Da Savigny von der Wirkungslosigkeit der Gesetze ausgeht (vgl. Beruf, 3. Aufl., S. 47). Auf die Verwandtschaft mit freirechtlichen und rechtssoziologischen Gedankengängen verweist besonders Manigk, Savigny und der Modernismus im Recht, Berlin 1914.

[8]) Eugen Ehrlich, Soziologie des Rechts, S. 361 ff., rühmt es der historischen Schule als ihre größte, bahnbrechende Tat nach, daß sie den Entwicklungsgedanken siegreich in die Rechtswissenschaft eingeführt habe — zu einer Zeit, wo er in den Naturwissenschaften kaum einigen der auserlesensten Geistern aufleuchtete.

[9]) Vgl. Landsberg, Geschichte der deutschen Rechtswissenschaft, III/2, S. 208.

[10]) So Hans Reichel, Gesetz und Richterspruch, Zürich 1915, S. 11.

ja verderblich scheinen mußte, weil er seiner Meinung nach das Recht dem Leben entfremdete. Daher hebt er immer wieder die um die Mitte des 19. Jahrhunderts einsetzenden Versuche hervor, das Recht mit dem realen Leben wieder in Verbindung zu setzen, und verweist er insbesondere immer wieder auf die Arbeiten Dankwardts, der, wie dieser selbst gelegentlich von sich sagt, das Recht zu verstehen suchte „als Ausfluß der praktischen Bedürfnisse, als notwendige Folge der faktischen Verhältnisse des Lebens [11]). — Vor allem aber trennt Ofner von dieser rein positivistischen Richtung ihr Autoritätsglaube [12]), der Mangel jeder kritischen Einstellung zum positiven Recht. Die uralte Frage, ob das, was gesetzlich ist, auch gerecht sei, ob das νομιμον identisch sei mit dem δικαιον, diese Kernfrage einer jeden Rechtsphilosophie als Rechtswertbetrachtung war dieser Richtung fremd und gleichgültig geworden. Und hier setzt Ofners grundsätzliche Opposition zum strengen Rechtspositivismus ein. Er fühlt zu stark den Gegensatz, in den das überkommene Recht zu den veränderten Wirtschafts- und Gesellschaftsverhältnissen getreten ist, um nicht immer wieder allem positiven Recht kritisch gegenüberzutreten und an „das Recht, das mit uns geboren ist", zu appellieren. Nicht ganz im Sinne des alten Naturrechtes, dessen Dogmatismus er ablehnt [13]), obgleich er seine Verdienste (besonders in den späteren Arbeiten) gegenüber der romanistischen Scholastik seiner Zeit ebenso anerkennt wie seine befreienden fortschrittlichen Tendenzen [14]). Wohl aber im Sinne eines konkreten, von bestimmten ethischen Forderungen ausgehenden „rationellen" Rechtes. Er selbst setzt dieses rationelle Recht gelegentlich dem früheren „natürlichen Recht" gleich [15]), will aber darunter eben nur die im Bereich der Möglichkeit gelegenen Forderungen an die Gesetzgebung verstehen, nicht das Ideal eines absolut richtigen Rechtes. Wenn er es aber einmal Rudolf Jhering nachrühmt [16]), er habe — nach langer Zeit, während welcher das Naturrecht ver-

[11]) H. Dankwardt, Nationalökonomie und Jurisprudenz, Rostock 1859, I. Seite 3.

[12]) Über diesen Autoritätsglauben vgl. Anton Menger, Die sozialen Aufgaben der Rechtswissenschaft, Rektoratsrede, Wien 1895, S. 14.

[13]) Rechtstheorie und historische Schule, S. 19.

[14]) S. u.: Der soziale Charakter des ABGB.

[15]) S. u.: Das Recht zu leben.

[16]) Rudolf v. Jhering, Nachruf in „Gerichtshalle", Wien 1892.

spottet und verhöhnt war — gewagt, den moralischen Charakter des Rechtes hochzuhalten, so spricht sich in dieser Anerkennung auch das Hauptbestreben von Ofners eigener schriftstellerischer und politischer Tätigkeit aus, die Tendenz, das Recht mit ethischem Inhalt zu erfüllen [17]). Zugleich weist diese Bemerkung auch auf Ofners tiefste Auffassung vom Recht hin: Das Recht enthält seinem Wesen nach den Anspruch, eine richtige, eine sittliche Ordnung zu sein. Die Rechtswissenschaft aber im höchsten Sinn ist, wie Ofner einmal sagt, „die Kunde guten, zweckmäßigen Rechtes und seiner Vorbedingungen" [18]). Und trotz der Erkenntnis, „daß nur der Gedanke des Rechtes (sein Zweck, die Menschen zu vereinigen) ewig, jeder einzelne Satz des Rechtes aber vergänglich ist" [19]), glaubt er doch, daß sich Grundsätze finden lassen, die allen berechtigten Ansprüchen der Menschen zugrunde liegen: vor allem der aus dem Recht zu leben als allgemeinem Menschenrecht fließende Grundsatz der Lebensnähe: „Je näher ein Bedarf dem Leben steht, desto stärker ist der Anspruch im Recht", oder kürzer: „Je näher dem Leben, desto stärker im Recht" [20]). Es ist ein Satz des „idealen Rechtes", nicht des geltenden, positiven Rechtes, aber es scheint, daß er nach Ofners Meinung doch mehr bedeuten sollte als ein wirkungsloses Ideal. Er enthielt ihm vielmehr (als eine Art Idee in regulativer Absicht) die konkrete Forderung an den Gesetzgeber sowohl als an den Richter, den praktischen Juristen überhaupt, die Verhältnisse des *Lebens* vor allem zu beachten, das Recht nach dem Leben zu gestalten, dem „lebendigen Recht" zum Durchbruch zu verhelfen [21]).

Zu diesem Zweck kann aber, wie Ofner nicht müde wird zu

[17]) Vgl. Die neue Weltordnung („Mitteilungen der Ethischen Gesellschaft", Jänner 1918): „An Stelle der Tradition der Gewalt, die unser gesellschaftliches Leben beherrscht, gilt es, die Forderungen der Gerechtigkeit und Gleichheit zu setzen, *die Ethik zu Recht zu erheben.*"

[18]) Das soziale Rechtsdenken, S. 57.

[19]) Die Jurisprudenz als soziale Technik. S. u.

[20]) Das soziale Rechtsdenken, S. 12.

[21]) Vgl. Der Oberste Gerichtshof über die Dispensehen („Arbeiter-Zeitung", 29. Juli 1921): „Die Jurisprudenz hat es seit jeher nach dem Vorbild ihrer Meister, der römischen Juristen, für ihr Recht und ihre Pflicht gehalten, wenn Gesetze und Einrichtungen, besonders solche aus alter Zeit, mit den Interessen von Staat und Volk in Widerstreit getreten sind, auf einem durch das Gesetz ermöglichten Wege, selbst mit gewissem Zwang, der Natur der Sache, dem *lebendigen Recht* zum Recht zu verhelfen."

versichern, nur ein gänzlicher Umschwung in der Methode der Jurisprudenz führen. Sie muß die bisherige, noch in scholastischen Bahnen befangene, rein deduktive Methode aufgeben und sich die Induktion, oder wie Ofner mitunter allgemeiner sagt, die naturwissenschaftliche Methode zu eigen machen. Das mag manchem auf den ersten Blick ein unberechtigtes Ansinnen scheinen — begreiflich vielleicht aus der naturwissenschaftlichen Zeitströmung, unter deren Einfluß Ofners Denken erwachsen war, für uns heute aber um so unhaltbarer, als gerade unsere Zeit jeden „Methodensynkretismus" verpönt und insbesondere eine scharfe Trennungslinie zwischen Naturwissenschaften und Kulturwissenschaften zu ziehen versucht hat [22]). Vor allem aber in der Jurisprudenz als dogmatischer Normwissenschaft scheint die naturwissenschaftliche Methode durchaus verfehlt. Freilich — gegen den möglichen Einwand, daß die Induktion ihrem Wesen nach auf einen allgemeinen Sachverhalt (z. B. ein allgemeines Naturgesetz) abzielt, den sie auf Grund der Erfahrung festzustellen sucht [23]), während es der Jurisprudenz niemals um allgemeine Sachverhalte zu tun sei — meint Ofner selbst gelegentlich, man könne auch bei Erforschung einer vergangenen Situation oder bei Einleitung einer künftigen Tätigkeit von induktiver oder deduktiver Methode sprechen, je nachdem, ob man „auf einer breiten Tatsachengrundlage langsam und vorsichtig nur einen Schritt über die Konstatierung hinaus vorschreitet", oder ob die gestaltende Phantasie „rascher, schwungvoller, aber auch sprunghaft über Zwischenglieder hinweg zu entfernteren Annahmen eilt" [24]). Ofner denkt hier, wie aus dem Zusammenhang klar wird, in erster Linie an den Richter, dessen Aufgabe, wie er selbst sagt, darin besteht, „klar und vollständig zu beobachten und das Beobachtete an der Hand der Erfahrung ... denkend zu verarbeiten". In diesem Sinne muß der Richter, soweit seine Tätigkeit in der Tatsachenforschung, Tatbestandsfeststellung, besteht (dem Gewinnen des Befundes, als

[22]) Ofner selbst polemisiert einmal („Induktion im Recht" in der Zeitschrift „Recht und Wirtschaft", 1913) gegen Rumpf, der in einem Artikel diese (Windelband-Rickertsche) Unterscheidung vertreten hatte.

[23]) So neuerdings auch Kraft, Grundformen der wissenschaftlichen Methoden, Wien 1925, S. 216.

[24]) Der prozessuale Aufbau des Rechtsfalles (Sonderabdruck aus „Allg. öst. Gerichtszeitung", 1904, S. 5).

welcher sich nach Ofners Meinung der Urteilstatbestand darstellt [25]), zweifellos *beobachtend, erfahrungsmäßig* vorgehen. Daraus wird aber zugleich klar, worauf es Ofner mit seiner Forderung nach naturwissenschaftlicher Methode eigentlich ankommt: auf das von der Erfahrung ausgehende, die lebendige Wirklichkeit nicht vernachlässigende, sondern beobachtende Verfahren, wobei es zunächst ziemlich gleichgültig ist, ob dies noch als Induktion im strengen Sinne bezeichnet werden kann. Es gibt daneben zweifellos Rechtsdisziplinen, in denen die eigentliche Induktion durchaus am Platz ist und an die Ofner offenbar gleichfalls gedacht hat: Einerseits die Rechtssoziologie, sofern sie sich die Aufgabe stellt, aus den Rechtsphänomenen verschiedener Länder und Zeiten allgemeine Entwicklungslinien der Rechtsbildung und Rechtswandlung zu gewinnen [26]); sie ist in diesem Sinne ein Zweig der vergleichenden Soziologie und teilt mit dieser die induktive Methode. Anderseits ist diese Methode auch angebracht für das Studium der tatsächlichen gesellschaftlichen Verhältnisse, die durch die Gesetzgebung beeinflußt werden sollen, ein Studium, das die Grundvoraussetzung jener Gesetzgebungswissenschaft darstellt, die Ofner vielleicht nicht als erster erfaßt, aber doch sicher als erster in ihrer großen Bedeutung begriffen und mit unermüdlichem Eifer immer wieder gefordert hat. Und das ist wohl der letzte Sinn seiner Forderung nach induktiver oder naturwissenschaftlicher Methode: Die Rechtswissenschaft darf sich in Hinkunft nicht mehr darauf beschränken, als bloße „Auslegungswissenschaft" die Rechtsbegriffe und Rechtssätze der Pandekten oder des Bürgerlichen Gesetzbuches zu deuten und fortzuspinnen [27]) (wie

[25]) Auch Reichel hat, wenn er von Induktion in der Jurisprudenz spricht („Grünhuts Zeitschrift", Bd. XXXII, S. 99 ff.), vor allem die Feststellung des Tatbestandes im Auge.

[26]) Vgl. den interessanten Artikel von René Hubert, Science du droit, Sociologie juridique et Philosophie du droit („Archives de Philosophie de droit et de Sociologie juridique", 1931), bes. p. 58: „La méthode de différence et les méthodes de variations concomitantes, sont . . . les méthodes essentielles de la sociologie juridique."

[27]) Ofner nennt gelegentlich (Soziale Jurisprudenz, „Die Wage", 1908) diese Art von Jurisprudenz („die Jurisprudenz des beschränkten Untertanenverstandes, welche an dem Wort der Obrigkeit nicht zu mäkeln, sondern es zu hören und ihm zu gehorchen hat") die *legale*, im Gegensatz zur *sozialen*. Diese soziale Jurisprudenz stellt eine höhere Jurisprudenz dar, sie hat Pläne zur Reorganisierung der Gesellschaft, u. zw. vorzugsweise durch die Gesetzgebung aufzustellen, sie ist wesentlich Gesetzgebungswissenschaft.

es ja tatsächlich die Aufgabe der dogmatischen Jurisprudenz ist, die Rechtsnormen aus den Rechtsquellen zu gewinnen und zu einem in sich geschlossenen System zu vereinen), sondern sie muß ihre Aufgabe vor allem darin erblicken, die wirtschaftlichen und gesellschaftlichen Zustände ihrer Zeit zu erfassen und die Fortbildung des Rechtes nicht an der Hand des Buchstabens bestehender Gesetze, sondern unter der Leitung des pulsierenden Lebens herbeizuführen. Kann dies die Rechtswissenschaft als Gesetzgebungswissenschaft oder, wie man zumeist sagt, als Rechtspolitik sicher durchführen, so ist es bis zu einem gewissen Grad auch Aufgabe der „niederen" Jurisprudenz. Einerseits ist es in der Jurisprudenz als *dogmatischer Wissenschaft vom positiven Recht* möglich, sich in der Interpretation geltender Rechtsnormen durch die Bedürfnisse der Erfahrung oder — anders ausgedrückt — durch praktische Forderungen der Gerechtigkeit, anstatt ausschließlich durch den Gedanken der inneren Geschlossenheit der Rechtsordnung (vom Geist des Gesetzes oder gar von dem historisch erfaßten Willen des Gesetzgebers) leiten zu lassen, und anderseits ist es für die *Rechtsanwendung* [28]) eine Grundforderung, die Ofner eben auch im Auge hat, daß sie von der Beobachtung der konkreten Verhältnisse — darauf läuft *hier* im Grunde seine Forderung nach induktiver Methode hinaus — ausgehe und so dem einzelnen Fall *sein* Recht gebe. So erst wird es nach Ofners Ansicht dazu kommen, was er als das nächste Ziel des Umschwunges in der Methodik der Jurisprudenz betrachtet [29]): „Das Recht des Lebens wird das tote, abstrakte Begriffsrecht über-

[28]) Von ihr gilt in erster Linie, was Ofner mit Recht immer wieder betont, nämlich, daß die Jurisprudenz soziale Technik, eine Kunst, aber keine Wissenschaft ist. (S. u.: Die Jurisprudenz als soziale Technik.) Ebenso ist es aber richtig, wenn er dort der Jurisprudenz im allgemeinen (als dogmatischer Normwissenschaft) die Aufgabe abspricht, das *Wahre* zu finden. (Vgl. dazu den Aufsatz des Herausgebers: Jurisprudenz und Grammatik in „Zeitschrift f. öffentl. Recht", Bd. 7.)

[29]) Der prozessuale Aufbau des Rechtsfalles (Sonderabdruck aus „Allg. österr. Gerichtszeitung", 1904), S. 2. Vgl. aber auch schon „Die Lehre vom streitigen Recht", in „Beiträge zur exakten Rechtswissenschaft" (1883, S. 37): „Sie (sc. die neue Lehre vom streitigen Recht) ist — und dies ist ihr Kennzeichen — durchaus real und dem Leben zugewendet, dessen Verhältnisse sie als das einzige Objekt, wie das Wohl der Menschen als den einzigen Zweck alles praktisch-juristischen Denkens betrachtet. Jedes Rechtsverhältnis ist ihr *nur* Lebensverhältnis, jedes Rechtsprinzip wie jedes Gesetz *nur* Mittel zur Ordnung der Lebensverhältnisse."

winden. Das Recht wird wieder Volksrecht werden, eine aus dem Empfinden des Volkes geschöpfte soziale Ordnung." — —

Es wurde schon eingangs hervorgehoben, daß in diesem Buch nicht der *ganze* Julius Ofner zu Worte kommen kann, da Ofner eben nicht nur Gelehrter, sondern auch und vor allem aktiver Politiker war. Aber das Bild, das die hier veröffentlichten Abhandlungen geben, würde doch in einem Punkte allzu unvollständig bleiben, wenn nicht zum Schlusse noch auf eine Seite von Ofners schriftstellerischer Tätigkeit hingewiesen würde, die bisher nicht berührt wurde, und die auch in den hier folgenden Artikeln nicht genügend zum Ausdruck kommt. Denn Ofners rechtswissenschaftliche Schriftstellerei war nicht nur theoretischen Fragen gewidmet, sondern in erster Linie praktischer Arbeit. Und da ist es vor allem *ein* Gebiet, auf dem Ofner als unermüdlicher Kämpfer immer wieder seine warnende, mahnende Stimme erhoben hat: nämlich alle jene Fälle, wo die *Grundrechte* in Frage gezogen wurden, ja wo auch nur die Gefahr einer reaktionären Mißachtung der Verfassung bestand [30]). „*Ofner als Hüter der Verfassung*", könnte man eine ganze Reihe von Aufsätzen und Zeitungsartikeln überschreiben, von denen einige hier angeführt werden mögen.

Angesichts einer Entscheidung des Verwaltungsgerichtshofes, der in einem konkreten Fall „den Träger der Krone" als „das eigentliche Subjekt des gesetzgeberischen Willens" bezeichnet hatte, ruft Ofner aus [31]): „Österreich hat, wenn diese Entscheidung als Präjudiz gelten könnte, aufgehört, ein konstitutioneller Staat zu sein. Denn nach konstitutionellen Grundsätzen steht die Gesetzgebung dem Parlament und der Krone gemeinsam zu, keiner der beiden Faktoren hat ein größeres Recht als der andere." Und man hört die verhaltene Empörung durch, wenn er in einem anderen Fall schreibt: „Kein Richter darf sich zu dem Urteil herabwürdigen, daß in einem Verfassungsstaat ein verfassungswidriger Befehl, sei es des Ministers, sei es der Krone, als gültig und rechtswirksam anzuerkennen sei . . ." [32]).

[30]) Vgl. dazu Hock, Julius Ofner als Abgeordneter, in Festschrift, S. 114 ff. — Zur Theorie der Grundrechte vgl. Ofner: Die Tragweite der Grundrechte („Zeitschrift für öffentliches Recht", IV, 1924).

[31]) Das Staatsgrundgesetz vor dem Verwaltungsgerichtshof. „Juristische Blätter", 1909.

[32]) Der Verwaltungsgerichtshof über die böhmische Verwaltungskommission. „Die Wage", 25. Oktober 1913.

Immer wieder weist er auf die Unzulänglichkeiten der Rechtspflege und Verwaltung des konstitutionellen Österreich hin, die noch allzuviel von dem Bureaukratismus der absolutistischen Zeit aufbewahrt haben: „Wir haben Staatsgrundgesetze", bemerkt er 1895 in einem Artikel [33]), „welche die Rechtsgleichheit vorschreiben, Bezirkshauptmann kann aber nur ein Adeliger werden, und die große Volksmasse ist stimmlos und gedrückt wie ehedem. Wir haben parlamentarische Regierungen und durch Geschäftsministerien herrscht die alte Aristokratie. So haben wir denn auch einen Strafprozeß mit Geschworenengericht, welches letztere zunächst als Garantie für die Preßfreiheit eingeführt wurde, und nebstbei eine fast unbeschränkte Zensur." Und im gleichen Jahr in einer anderen Zeitschrift [34]): „Die Justiz unserer Verwaltungsbehörden verdient diesen Namen nicht. Der Polizeistaat ist hier noch allmächtig. Für einen österreichischen Verwaltungsbeamten, möge er einer staatlichen oder autonomen Behörde angehören, gibt es keine Staatsbürger, sondern nur Untertanen. Das bureaukratische Überlegenheitsgefühl wird gedrillt. Die Bescheide ergehen, wo nicht eine ausdrückliche Gesetzesvorschrift hindernd in den Weg tritt, nach einem rein inquisitorischen Verfahren; sie sind nicht motiviert und die Partei erhält die Einsicht der Akten nicht. Es braucht nicht ausgeführt zu werden, daß das Gegenteil aller dieser für die österreichische Verwaltungsjustiz charakteristischen Merkmale Voraussetzung für ein Rechtsverfahren ist."

Von seiner Auffassung ausgehend, daß es die wichtigste und höchste Aufgabe des Juristen und insbesondere des Advokaten darstellt, ein Anwalt des gekränkten Rechtes zu sein [35]), tritt Ofner wiederholt für das Recht des Advokaten ein, Kritik an den Ent-

[33]) Zensur im Strafverfahren. „Neue Revue" VI/2, 1895.

[34]) Unsere Verwaltungsjustiz. „Die Zeit", Bd. IV, S. 3, 6. Juli 1895.

[35]) Über Ofners Auffassung von der Aufgabe der Advokatur vgl. ferner seine Schrift „Die Lehre vom streitigen Recht" (in „Beiträge zur exakten Rechtswissenschaft" 1883) sowie den Aufsatz: Kann die nach § 236 StPO. verfügte Ordnungsgeldstrafe in Arreststrafe umgewandelt werden? („Juristische Blätter", 1910), ferner Advokatie und Staatsanwaltschaft in ihrem Verhältnis zum Richterstand („Zentralblatt für die juristische Praxis", Bd. IX). Über Ofners Bedeutung als Advokat sowie insbesondere über sein Eintreten für die Freiheit und Unverantwortlichkeit des Standes vergleiche man Josef Jerusalem: „Julius Ofner als Advokat" in Festschrift für Julius Ofner.

scheidungen der Gerichte und Verwaltungsbehörden zu üben. So schreibt er einmal anläßlich eines konkreten Falles, in dem dieses Recht auf Kritik in Frage gezogen wurde: „Der Anwaltsstand hat den hohen Beruf, Schützer der Freiheit zu sein, Schützer des Individuums und in ihm der Bevölkerung gegenüber versuchten Übergriffen der Staatsgewalt und ihrer Organe. Zu ihnen gehört auch der beamtete Richter. Er ist stets versucht, pro rege, pro imperio, pro fisco zu urteilen. Darum die Gefahr des inquisitorischen Verfahrens im Zivil- und Strafprozeß, sein Zusammenhang mit absolutistischer Regierungsform, seine Abschaffung, wenn das Volk Macht erhält, und die sodann eingeführte Kontrolle durch Anwalt und Öffentlichkeit — wenn schon im regulären Verfahren — wie erst im politischen ... Der Anwaltsstand hat hier insbesondere auf der Wacht zu stehen, und wenn ein politisch Urteil — ein schlechtes Urteil ergangen ist, es offen und scharf anzugreifen. Er verletzt seine Pflicht gegen das Volk, wenn er es nicht tut“ [36]). Und in einem anderen Artikel, in dem gleichfalls das Recht auf Kritik gerichtlicher Urteilssprüche verteidigt wird, und zwar mit Bezug auf die harten Urteile, welche gegen die zum Teil jugendlichen Teilnehmer an den Teuerungsdemonstrationen des 17. und 18. September 1911 gefällt worden waren, heißt es: „Nur durch freie Kritik bleibt das Recht lebendig, und möge man noch so sehr versuchen, uns schwarze Bilder von einer solchen Kritik vorzugaukeln, wir wissen es besser; wir haben von Jahrhunderten gelernt; wir wissen, daß Richter Folter angeordnet und Hexen verbrannt haben, wir wissen auch von Klassenjustiz ein Wort zu reden, und wenn ein Urteil schlecht, grausam, hart und unmenschlich ist, dann lassen wir es uns nicht verbieten, es schlecht, grausam, hart und unmenschlich zu nennen!“ [37])

Auch während des Krieges, angesichts der weitgehenden Aufhebung der verfassungsmäßigen Rechte der Staatsbürger, die der Ausnahmszustand und seine zum Teil über das gesetzliche Maß hinausgehende Durchführung mit sich brachten, setzt sich Ofner für die Wahrung oder vielmehr für die Wiederherstellung der Verfassung ein. „Es ist höchste Zeit“, schreibt er 1915, anläßlich einer

[36]) Advokatorische Kritik gerichtlicher Erkenntnisse. „Juristische Blätter“, 1906.

[37]) Justiz. „Die Wage“, 1911, S. 949.

Erörterung der damals in der höchsten Blüte stehenden Zensurmaßnahmen [38]), „daß wir aus dem Ausnahmszustand der Not in den normalen des Gesetzes zurückkehren.“ Er erhebt 1916 seine Stimme gegen die §-14-Verordnungen und für die Verfassung [39]) und klagt über die Zerstörung des Rechtsgefühls durch den Krieg [40]). Und es ist gewiß charakteristisch für ihn, wie er 1917 anläßlich der Beratung einer neuen Geschäftsordnung des Abgeordnetenhauses an einem Wort des neuen Gesetzes Anstoß nimmt, nur aus dem Grund, weil er — eben durch dieses Wort — verfassungsgesetzlich gewährleistete Rechte gefährdet sieht. „Wir haben zu wenig öffentliche Rechte“, ruft er aus, „um auf *eines* verzichten zu können!“ [41])

Diese Mission, Wahrer der Freiheit, Hüter der allgemeinen Menschenrechte zu sein, erfüllt Ofner auch, nachdem Österreich ein republikanisches Staatswesen geworden ist. In vollen Zügen erlebt er die Verwirklichung demokratischer Ideale. Und in einer ganzen Reihe von Tagesartikeln zeichnet er der jungen Republik ihre hohe Aufgabe vor. „Die Liquidation des Mittelalters“, schreibt er Anfang 1919, „und die Errichtung einer allgemein menschlichen Gesellschaft, die keine Unterschiede im Rechte der Menschen kennt, macht den apostolischen Beruf unserer Zeit aus. Das Mittelalter war die Zeit des verschiedenen Rechtes. Die einen waren von Gottes wegen zu Herren, die anderen zu Untertanen geboren. Herren waren der Monarch, der Adel, die Bureaukratie und der Herr aller Herren, die Kirche. Eine feudale Agrarordnung war die wirtschaftliche Unterlage. Eine Stufenreihe umfaßte alles Volk, von dem Allerhöchsten, wie man den Monarchen nannte, die Leiter hinab bis zum gemeinen bürgerlichen Volk. Wir wollen diese Ordnung der Ungerechtigkeit aufgehoben wissen. Es ist nichts getan, wenn wir durch

[38]) Zensur und Beschlagnahme. „Juristische Blätter“, 1915, S. 543 ff.

[39]) Die Novelle zum ABGB. Ebenda 1916, S. 181 ff.

[40]) Soziale Sperren. Ebenda 1916, S. 589 ff.

[41]) Recht zu Bittschriften. „Der Morgen“, 18. Juni 1917. — Es handelt sich hier darum, daß das Wort „Petition“ durch „Bittschrift“ ersetzt werden soll. Das Petitionsrecht bedeutet nach Ofners Meinung ein Recht auf eine Art von Volksinitiative und nicht nur die Befugnis, Gnadengesuche zu überreichen, auf deren Vorbringen man doch kein Recht haben könnte. „Bei großen Anlässen“, meint Ofner, „wirkt es (sc. das Petitionsrecht) als unmittelbarer Ausdruck der Volksströmung mit ... Das Recht aber wollen wir als Recht behaupten und nicht erniedrigen lassen.“

den Zusammenbruch des alten Reiches ohne eigene Arbeit eine Republik bekommen haben. Der Monarch ist gegangen, das System ist geblieben . . ." [42]).

Aber er sieht bald, daß es nicht möglich ist, mit einem Schlag Menschen und Institutionen zu ändern. Es klingt wie eine leise Resignation, wenn er, wenige Jahre später, erklärt [43]): „Oft erinnere ich mich der feinen Legende in der Bibel, daß Mose das Volk vierzig Jahre in der Wüste herumführt, bis alles gestorben ist, was in Ägypten gelebt hat. Denn wer als Sklave erzogen ist, urteilt Mose, wird kein freier Mann. Auch wir sind keine Republikaner. Haben wir nicht in der Republik Orden und Titel in Masse verliehen, selbst neue geschaffen? Die Hofräte schießen aus der Erde, und ein alter Hofrat setzt, um Verwechslung zu vermeiden, die Jahreszahl seiner Ernennung zu seinem Namen. Die Greislerin erzählt, sie erwarte den Besuch ihrer Tochter, der Frau Betriebsrätin. Mit Schamröte denke ich daran, daß nach Abschaffung des Titels Kaiserlicher Rat keine Laienrichter für das Handelsgericht zu erlangen waren und der ‚Kommerzialrat' geschaffen werden mußte, um die Kaufleute anzuziehen. Nein, wir sind noch keine Republikaner, deren Sinnbild nach Montesquieu die Mannestugend (vertu) ist. Dazu muß erst die neue Generation erzogen werden, und wir haben die Pflicht, Richtung zu halten, bis die Übergangszeit und unsere eigene Schwäche überwunden ist."

Aber wenn Ofner für Demokratie und Freiheitsrechte eintritt, wenn er gelegentlich die Forderung ausspricht [44]): „Wir müssen ein Recht erhalten, welches auf der Gleichheit alles dessen beruht, was Menschenantlitz trägt", so sieht er doch schon am Anfang seiner schriftstellerischen Tätigkeit, zu einer Zeit, wo die endlich errungenen Grundrechte der Dezemberverfassung noch mit dem frischen Lorbeer eines ungeheuren Sieges der freiheitlichen Bestrebungen geschmückt schienen, daß die bloß negativen Grundrechte zum Fortschritt der Menschheit allein nicht genügen. Schon 1885 sagt er in einem Vortrag, betitelt: „Die neue Gesellschaft und das Heimstättenrecht":

[42]) Adel, Würden und Titel. „Der Morgen", 31. März 1919.

[43]) Gefahr. „Die Wage", 13. Oktober 1923. (Geschrieben vor den Wahlen in den österreichischen Nationalrat.)

[44]) Soziale Jurisprudenz, „Die Wage", 1908. (Der Artikel gibt eine in der Budgetdebatte des österreichischen Abgeordnetenhauses gehaltene Rede wieder.)

„Der Ausdruck für die demokratische Anlage der Gesellschaft besteht in der Anerkennung des *Menschenrechtes*. Wo die demokratische Ordnung einzieht, proklamiert sie das Menschenrecht; so in den Vereinigten Staaten, so in Frankreich, in Deutschland und in Österreich. Das Menschenrecht ist die reale Freiheit. Es bezeichnet die soziale Stellung und Macht, welche dem Menschen eingeräumt werden muß, soll er nicht privat- oder staatsrechtlich als Höriger erscheinen. Bis jetzt werden die einzelnen Menschenrechte negativ, kritisch gefaßt; sie richten sich gegen die Formen und Mittel der bisherigen Knechtung. Allein . . . mit den negativen Menschenrechten allein ist nichts getan; soll Positives erstehen, so muß man positiv handeln; die Kritik muß in der Organisation ihre Ergänzung finden. Was nützt die Freiheit der Lehre, wenn nicht gelehrt wird? Will die Gesellschaft ein geistesstarkes Volk, so muß die Freiheit der Lehre ihre Ergänzung in der Organisation der Bildung finden. Was nützt die Freiheit des Eigentums, wenn der Mann kein Eigen hat? Will die Gesellschaft ein wirtschaftlich starkes Volk, so muß die Freiheit des Eigentums ihre Ergänzung finden in der Organisation des Erwerbes, der Arbeit. Die erstere Organisation haben wir prinzipiell gefunden; die zweite ist die soziale Frage unserer Zeit."

Die Sicherung erträglicher ökonomischer Lebensbedingungen erscheint ihm schon damals als unumgängliche Voraussetzung für die wirkliche Realisierung der Freiheitsrechte. „Wie wenige Menschen", schreibt er später einmal, „haben Verständnis für *Sozialpolitik*, und doch betrifft sie die wichtigste Grundlage der Freiheit und des Friedens . . . Der arbeitende Mensch muß sich erhalten und seine Kinder arbeitsfähig aufziehen können; er darf in Zeiten der Not nicht hilflos bleiben und durch sie nicht seine Ehre als Staatsbürger verlieren. Es ist eine große und schöne Aufgabe des Staates, und in erster Linie des Volkshauses, dahin zu wirken. Die glückliche Lösung würde ein gesundes, kräftiges, erwerbstüchtiges Volk schaffen, das für die Macht des Staates bedeutsamer ist als die teuersten Kriegsschiffe und Kanonen [45])." Sozialpolitische Maßnahmen erscheinen

[45]) Die sozialpolitische Aufgabe des Parlaments, „Der Morgen", 12. Juni 1911. — Es ist aus dem gleichen Geist heraus gesprochen, wenn Ofner in einer Rezension von Wiesers Schrift „Über Vergangenheit und Zukunft der österreichischen Verfassung" einwendet: „Die soziale Frage läßt Wieser beiseite. Das wäre sein gutes Recht, wenn er bloß die nationale Frage besprechen wollte.

ihm als Garantie der „wirtschaftlichen Freiheit", ohne die die politische Freiheit seiner Meinung nach nicht existieren kann. „Der Hunger tötet die Freiheit", schreibt Ofner einmal in einem kurzen Artikel, in dem er Wesen und Aufgabe der Sozialpolitik erörtert [46]). „Die demokratische Gesellschaft verlangt zu ihrer Festigung das Recht auf wirtschaftliche Existenz und dessen umfassende Organisation [47])." Diesem Thema sind aber im Grunde schon die beiden Aufsätze: „Das Recht zu leben" und „Das Recht auf Arbeit" gewidmet, in denen Ofner die wichtigsten jener Forderungen behandelt, welche Anton Menger kurze Zeit später als „ökonomische Grundrechte" bezeichnete — Grundrechte, die bekanntlich in der Deutschen Reichsverfassung vom 11. August 1919 ihre gesetzliche Verankerung gefunden haben.

Es würde hier zu weit führen, wenn gezeigt werden sollte, wie viele von Ofners Forderungen heute verwirklicht sind. Das Arbeitsrecht, dessen bescheidene Anfänge in den achtziger Jahren Ofner begrüßt hatte, ist heute eine eigene weitverzweigte Disziplin geworden, und in dem sich neu gestaltenden Wirtschaftsrecht haben so manche von Ofners Bestrebungen, das Recht den konkreten Lebensbedürfnissen anzupassen, ihre Realisierung gefunden. Das „soziale Recht", das Ofner gefordert, und als dessen Vorkämpfer er sich stets gefühlt hat, ist heute immer mehr im Vordringen. Viel, allzuviel aber von dem, was Ofner erkannt und gefordert hat, ist heute noch ein Postulat an die „soziale Technik" (um seinen Ausdruck zu gebrauchen) unserer und künftiger Zeiten. Aber nicht darauf allein kommt es an. Sein Glaube an die Zukunft der Menschheit, sein guter Wille, an der Gestaltung dieser Zukunft mitzuarbeiten, und sein voraussehender Blick, von dem auch die folgenden Blätter Zeugnis ablegen werden, zeigt uns Ofners geistige Gestalt in ihrem eigentlichen tiefsten Wesenskern:

Ein Bürger derer, die da kommen werden.

Wenn er aber die „Zukunft der österreichischen Verfassung" bespricht, dann geht es wohl nicht an, ein Moment außer acht zu lassen, das von dem größten Einfluß auf die Verfassung ist und seit Beginn derselben gewirkt hat." („Österreichisches", „Die Wage", 1905.)

[46]) Sozialpolitik. „Deutsch-Demokratische Rundschau", 1. Februar 1913.

[47]) Das Recht des Konsumenten. „Der Morgen", 30. August 1915.

I. AUFGABEN UND ZIELE DES RECHTS UND DER RECHTSWISSENSCHAFT

DER WENDEPUNKT IN DER DEUTSCHEN RECHTSWISSENSCHAFT

1883

Daß wir an einem Wendepunkt in der Rechtswissenschaft stehen, wurde nicht bloß ausgesprochen, sondern zeigt sich in dem Auftauchen zahlreicher neuer Theorien über die ersten Grundsätze von Zweck, Bildung und Methodik des Rechtes.

Welches ist nun aber der Wendepunkt? an welche Erscheinung schließt sich die neue Epoche an? wo trennt sich Mittelalter und Neuzeit in der deutschen Wissenschaft?

Kuntze bezeichnet in seinem genannten Werk die Lehre von den Rechtsverhältnissen (Savigny) oder Rechten (Puchta) als Beginn der neuen Zeit. Andere knüpfen sie an das System (Puchta) oder die Lehre vom Gewohnheitsrecht oder an Hugos nationalhistorische Theorie an.

Allein formale Theorien sind wie Zahlen bloße Weiser; sie zeigen Epochen an, aber sie begründen und kennzeichnen sie nicht.

Das Ereignis, welches die neue Zeit eröffnet, ist *der Eintritt des Volkes in das öffentliche Leben und in die Gesetzgebung. Ihre Signatur ist der Kampf gegen die Lehre von der sogenannten „positiven" Rechtswissenschaft,* nach welcher die staatliche Satzung den Ausgangspunkt der Wissenschaft bildet und diese keine andere Aufgabe erfüllen soll und darf, als die bestehenden Satzungen eines bestimmten Staates in einer bestimmten Zeit auseinanderzusetzen und dessen Beamten in der Ausführung zu unterweisen.

Die Lehre war den römischen Juristen fremd. Das Gesetz, das sie als bindend achteten, wenn sie auch selbst dieses in Fällen, wo es mit den Bedürfnissen des Lebens in zu schroffen Widerspruch trat, achtungsvoll umgingen, war auf wenige Bestimmungen (die 12 Tafeln) beschränkt. Das große Rechtsbuch, das edictum praetoris, war freie Schöpfung des praktischen Rechtsgeistes, war der Kritik jedes einzelnen Nachfolgers im richterlichen Amt unterworfen und verdankte seine Herrschaft also nur seiner anerkannten und immer wieder anerkannten Nützlichkeit für das Gemeinwohl.

Diese dauernde Macht der praktischen Wissenschaft über das Gesetz war es, welche das römische Recht zur geschriebenen Vernunft (raison écrite) machte, und die römischen Juristen waren sich der Weite und Freiheit ihrer Wissenschaft auch bewußt; sie war ihnen die ars boni et aequi, die scientia rerum humanarum ac divinarum, das heißt *die ungeteilte, volle Sozialwissenschaft.* —

Erst in der späteren Kaiserzeit und im Mittelalter, mit der faktiösen Scheidung zwischen Obrigkeit und Untertan und der Aufstellung des Grundsatzes vom unbedingten Gehorsam gegenüber dem Wort des Herrschers, trat die Lehre auf: daß die Satzung des Herrschers selbst über aller wissenschaftlichen Untersuchung stehe und oberste Rechtsquelle sei, daß sie höchstens vom philosophischen, daß heißt unpraktischen Standpunkt aus nach ihrer Weisheit oder ethischen Vollkommenheit geprüft werden könne.

Erst wenn die Satzung gegeben ist, kann also juristische Wissenschaft und wissenschaftliche Kritik beginnen; aber die Kritik nur zur Sichtung des Textes, die Wissenschaft nur zur Klarlegung von Wort und Sinn der Satzung. Eine schöpferische Freiheit der Wissenschaft ist nur dort gelassen, wo das Gesetz zu befehlen aufgehört hat, und dann nur als stillschweigendes Gesetz.

Das ist nun die Lehre vom „positiven Recht", welche es begreiflich macht, wie in Deutschland ohne Widerstand der Juristen ein fremdes Recht ohne alle Rücksicht auf veränderte Zustände und veränderten Volkscharakter eingeführt werden konnte. Sic regis voluntas. —

Dies konnte währen und gefallen, solange das Gesetz von Herren für Untertanen erging; denn alle praktische Wissenschaft ist mit Kritik verbunden und alle Kritik von Untertanen ist Herren mißliebig. Die Wendung trat ein, als anfangs freisinnige Fürsten, welche sich als Diener des Volkes und seiner Interessen bekannten, und später das Volk selbst zur Gesetzgebung traten.

Fürsten und Volk wollten da nicht Gesetze ihres Willens, sondern Gesetze des Volkswohles schaffen. Sie wollten daher von Sachverständigen erfahren, welche Gesetze sie geben sollten, *um diesen Zweck zu erreichen*, und an wen sollten sie sich um Bescheid wenden, als an die Männer der Rechtswissenschaft?

Sie hatten keine Ahnung, daß sich die Juristen selbst den freien Ausblick in ihr Gebiet verhängt hatten, um dann frischweg die

Existenz dieses Gebietes zu leugnen, und daß sie nach ihrer Lehre vom „positiven Recht" antworten mußten:

„Was für Gesetz ihr geben sollet, wissen wir nicht und kümmert uns nicht. Das gehört in die uns fremde ‚Gesetzgebungskunst' (Stahl). Gebet Gesetze, welche ihr wollt! Wenn ihr erst ein Gesetz gegeben haben werdet, wollen wir euch in Latein erklären, was ihr für Gesetz gegeben habt."

Diese praktische Folge der Positivistik zeigte sich auch in der Tat ebenso bei Verfassung des preußischen Landrechtes wie der österreichischen Rechtsbücher. Die heute so gern verspotteten Naturrechtler zeigten sich als viel kräftigere und praktischere Denker als die geschulten Juristen. Man lese nur z. B. die vielen grimmig-spöttischen Bemerkungen der Mitglieder in der Kommission zur Verfassung des österreichischen bürgerlichen Gesetzbuches über das „Ungeheuer der romano-canonico-germanischen Jurisprudenz". —

Die Scham hat denn in jener Zeit das Bewußtsein der falschen Richtung in wissenschaftlichen Geistern geweckt und es ist für das Ereignis, welches dies bewirkte, bezeichnend, daß von den beiden Schulen, die gleichzeitig in gewissem Gegensatze zueinander auftraten, die eine (Hugo, Puchta) das *Volksrecht* (National-, Gewohnheitsrecht), die zweite (Thibaut) die Notwendigkeit der *Gesetzgebung* betonte [1]).

Von da beginnt nun das neue juristische Leben. Es lehnt sich mit Recht an die Römer an, sobald es sie in ihrem Geist erkennt: in dem Streben, die Verhältnisse des Lebens, soweit nicht ein absolutes Gesetz vorlag, und bei schroffem Gegensatz selbst gegen dieses, ex natura rei, d. h. im wohlverstandenen Interesse aller Beteiligten zu ordnen, in ihrer Überzeugung, daß die Wissenschaft das Gesetz zu leiten und zu schaffen habe.

Dies wurde aber freilich vielfach verkannt. Die Anlehnung erfolgte zu sehr an das Wort, und nur langsam geht die Befreiung der Wissenschaft von dem Joch des Denkens nach vorgeschriebenem

[1]) Savigny hat sich in der Grundidee von Hugo und Puchta leiten lassen. Seine Kraft bestand in der Säuberung des römischen Rechtes von den Überwucherungen der Scholastik. Aber sein *„allgemeiner Teil"* des Systems bedeutet ebenso wie Puchtas *„heutiges* römisches Recht" auch zugleich den Beginn einer modernen Rechtslehre. Die Vermischung der letzteren mit historisch-römischem Recht, welche bei den Begründern der neuen Wissenschaft erklärlich war, ist noch immer nicht überwunden.

Gesetzeswort vor sich. Die empfindliche Schwäche, welche der Rechtswissenschaft durch die positive Methode anhaftete, und welche dadurch verschlimmert wurde, daß man zugleich ein *fremdes* Recht lernte und sich um die Bedürfnisse, die Lebensstellung und die Neigungen des eigenen Volkes nicht kümmerte — ist heute noch nicht überwunden. Sie zeigt sich bei allen Gesetzgebungsarbeiten der Neuzeit, deren praktisch-schöpferische Ideen (Wechselordnung, Handelsgesetz u. a.) weit mehr auf Laien als auf Rechtsgelehrte zurückzuführen sind. Sie zeigt sich in der unfreien historisch-römischen Lehrmethode, die noch immer die Hochschulen beherrscht und in der noch immer fortbestehenden Theorie vom „positiven Recht". Sie ist nach meiner Überzeugung auch der tiefere Grund für die Einrichtung von Schieds-, Schöffen- und Geschwornengerichten; das Volk zieht das unklar erkannte eigene Recht dem schablonenhaft angewandten fremden oder abstrakten Rechte vor.

Es gilt hier im Geiste der Begründer die Idee der neuen Zeit wieder fester aufzugreifen. Die Signatur besteht — obwohl der Gedanke noch wenigen zu vollem Bewußtsein gekommen ist — in der Erkenntnis, daß die Wissenschaft nicht Gesetzeskunde ist und nicht mit dem Gesetze (als Quelle) beginnt; daß sie vielmehr für die Organe, welche das Gesetz ausführen müssen, ohne ein Recht der Verbesserung zu haben („Pariere Order und tue Unrecht"), mit dem klaren Wortlaut eines absoluten Gesetzes ihren unmittelbaren praktischen Wert verliert. Denn sie müssen gehorchen und die Wissenschaft kann nur denjenigen leiten, der sich durch sie leiten lassen *darf* [2]).

Die Wissenschaft besteht daher in erster Reihe für die Gesetzgeber selbst; in zweiter erst, soweit nämlich der Gesetzgeber dem Ermessen des Richters Spielraum gelassen hat, für diesen. Sie ist aber dann nicht bloßes Surrogat des Gesetzes, sondern eigenberechtigt neben ihm. Diese Würde muß sie erkennen. Während die Rechtswissenschaft des Mittelalters dem Gesetze die Schleppe getragen hat, hat die neue Wissenschaft das Ziel, dem Gesetz voranzuschreiten und ihm den Weg zu weisen [3]).

Das ist der Wendepunkt der Rechtswissenschaft.

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[2]) Vom Standpunkt der juristischen Erziehung kann das Memorieren freilich auch als Anfang betrachtet werden. — [3]) Den Alten bleibt unbestritten ihre Ehre. Ich scheide nicht zwischen den Geistern, sondern zwischen den Wegen. Ich bin kein Richter, sondern ein Wegweiser. Baco, Nov. Org. I, 32.

ÜBER DIE NATURWISSENSCHAFTLICHE METHODE IM RECHT

Vortrag, gehalten in der Juristischen Gesellschaft in Wien am 30. Dezember 1879

Die Methode der Naturwissenschaft, meine Herren, besteht in der Erforschung allgemeiner Gesetze der Erscheinungen aus der Erfahrung. Die Anwendung der Methode hat also die Voraussetzung, daß man die Erfahrung als Quelle der Erkenntnis betrachtet.

Diese Voraussetzung war für das Gebiet des menschlichen Lebens im Mittelalter und bis zum Schlusse des vorigen Jahrhunderts nicht vorhanden. Man schied damals strenge zwischen dem Reiche der Natur und dem des Geistes. Die Notwendigkeit, die in der Natur herrscht, wurde dort, wo der menschliche Wille auftrat, ausgeschlossen. Im Reich des Geistes sollte die Freiheit — als Gegensatz der Notwendigkeit, als Ursachlosigkeit gedacht — herrschen.

Wenn nun der Willensakt ohne notwendigen, das ist erfahrungsmäßig zu erforschenden Zusammenhang mit der Naturanlage des Individuums und Vorereignissen angenommen wurde, so konnte aus einer noch so großen Erfahrung *kein* Schluß auf weitere Fälle, und somit kein allgemeines Gesetz entnommen werden. War ein öfteres Zusammentreffen mit vorhergehenden Tatsachen reiner Zufall, so war in jedem folgenden Falle die Wahrscheinlichkeit für eine andere Kombination größer als für die Wiederkehr der früheren. Die Wiederholung eines Zufalles ist niemals anzunehmen.

Wenn eine Wissenschaft praktisch ist, so kümmert sie sich um allgemeine Dogmen nicht. Ein Colbert läßt sich durch den gelehrten Streit über Willensfreiheit oder Willenszwang in seinen Maßnahmen nicht stören. Ebenso hatte sich die römische Rechtswissenschaft, welche sich des Einverständnisses mit dem Volke bewußt war, durch ihr Rechtsgefühl leiten lassen, ohne theoretische Dogmen zu pflegen.

Die Rechtswissenschaft des Mittelalters war aber nicht praktisch. Juristenrecht und Volksrecht standen einander feindlich gegenüber. Die Billigung oder Mißbilligung des Volkes konnte den Juristen nicht belehren, ob er das für *ihn* maßgebende Recht richtig oder unrichtig angewendet habe. Er war also auf die Schule angewiesen

und konnte nur durch ein wissenschaftliches Prinzip, welches die *Erfahrung* als Quelle der Erkenntnis annahm, mit dem Leben in Berührung bleiben. Dies war nicht der Fall, und so verfiel die Rechtswissenschaft des Mittelalters in Grübelei über einen überkommenen Gesetzeswortlaut und erwarb höchstens das Verdienst einer gewissen Formalisierung der Begriffe, während die Ideenwelt des Rechtes am Schlusse des vorigen Jahrhunderts genau in demselben Stande übernommen wurde, in welchem sie von den Römern verlassen worden war.

Das Dogma des freien Willens war nun wohl schon früher von einzelnen Denkern durchbrochen worden. Insbesondere sprach es Spinoza scharf aus, daß das Denken und Wollen des Menschen gezwungen sei wie Ruhe und Bewegung. Aber vereinzelte Forscher begründen keine Wissenschaft. Die Entstehung einer Wissenschaft verlangt, daß ein Geist viele Denker durchdringe, daß die einzelnen Entdeckungen sich ergänzen und übereinander schichten. Diese Massenbewegung, die notwendig ist, wenn eine Wissenschaft erstehen soll, fand erst am Schlusse des vorigen Jahrhunderts unter dem Einflusse aller Elemente, welche die Aufklärungsperiode kennzeichnen, statt.

Das Problem der Willensfreiheit zu behandeln, meine Herren, würde meinem Vortrage zu ferne stehen. Nur einen Punkt gestatten Sie zu berühren. Wir haben in den meisten Fällen unleugbar ein Gefühl, als ob wir zwischen „ja" und „nein" frei wählen könnten. Nur in sehr seltenen Fällen ist uns der zwingende Einfluß eines Gedankens auf unseren Entschluß klar, und wir sprechen dann von einer Zwangslage. Die Erfahrung lehrt nun, daß wir nicht zwischen Fällen der Freiheit und der Zwangslage, sondern nur zwischen Fällen unbewußter und bewußter Zwangslage unterscheiden dürfen, daß unser Gefühl der Freiheit nur scheinbar und mit dem Phantasiebild von der Mondesscheibe vergleichbar ist, welches gleichfalls nicht vergrößert wird, wenn wir auch die Größe des Körpers selbst erkannt haben.

Auch die Unterscheidung, die Jhering in seinem jüngsten Werke (über den „Zweck im Recht") zwischen Zweck und Ursache macht, beruht auf einem Irrtume. Von der Anregung des Wunsches an, welcher in der Phantasie mit Hilfe der bisherigen Erfahrung die Vorstellung einer Tätigkeit weckt, deren Schluß die Befriedigung

des Wunsches ist (Zwecktätigkeit), zieht eine geschlossene Kausalkette bis zur Tat. Es bezeugt dies auch die Bestrafung des Täters mit Berücksichtigung aller für seinen Entschluß maßgebenden Faktoren. Jhering konnte also nur zwischen vorbedachtem und nicht vorbedachtem Wirken unterscheiden, aber nicht zwischen Zweck und Ursache.

Mit dem Dogma des freien Willens fiel die Schranke für die erfahrungsmäßige Forschung auf sozialem Gebiete und es hat denn diese wissenschaftliche Tätigkeit auch am Schlusse des achtzehnten Jahrhunderts auf allen Gebieten der gesellschaftlichen Wissenschaft, insbesondere auch im Rechte, begonnen. Für das Recht traten zwei praktische Momente fördernd hinzu:

Erstens die Zerstörung der nach bisheriger Anschauung feststehenden Rechte durch Akte der Gesetzgebung. Das Gesetz, welches Quelle des Rechtes war, schaffte Klöster, Sklaverei, Grundlasten und anderes, was als Recht galt, ab, und was bisher Unrecht war, wurde plötzlich Recht. Der Denker konnte daher an das Gesetz als Rechtsquelle für ihn nicht mehr glauben.

Zweitens und noch maßgebender, der Drang der Zeit nach Gesetzgebung. Der Gesetzgeber steht auf anderem Standpunkte als der Ausleger. Für den Ausleger des Gesetzes ist dessen Wortlaut der Ausgangspunkt und die Schranke seines Denkens. Ist der Wortlaut klar, so ist sein Denken zu Ende. Nur Unklarheit berechtigt ihn, durch andere Mittel den Sinn des gesetzgeberischen Wortlautes zu erforschen. Wo er weiter geht, ist er Gesetzgeber für den Fall.

Auch die gegenwärtige Doktrin hat bloß die Gesetzesauslegung im Auge. Jedes Lehrbuch fängt damit an, daß das Gesetz die erste Quelle des Rechtes sei. Um die Quelle des Gesetzes selbst kümmert man sich nicht.

Dies kann dem Gesetzgeber aber nicht genügen. Er hat kein Gesetz vor sich. Er muß aus einem Gebiete, das außerhalb des Gesetzes liegt, den Inhalt dessen entnehmen, das er erst zum Gesetze macht. Hier entsteht und entstand auch am Schlusse des achtzehnten Jahrhunderts die Frage, *wer* denn der Führer für den Gesetzgeber sei und was ihm die Richtung gebe, wie sie der Gesetzeswortlaut dem Ausleger gibt?

Von hier aus begann die reformatorische Tätigkeit der großen

Gegner Thibaut und Savigny, welche die neue Zeit einleitete. Ich verweise für die Würdigung aller dieser Momente auf die zahlreiche Literatur, die sich darüber entsponnen hat.

Von besonderem persönlichen wie sachlichem Interesse für die geehrte Gesellschaft dürfte die geistvolle Erörterung sein, welche sich hierüber in der Vorrede Freih. v. Hyes zu dessen Kommentar über das österreichische Strafgesetzbuch findet. —

Die naturwissenschaftliche Methode, zu welcher alle die verschiedenen, seit Anfang des neunzehnten Jahrhunderts entstandenen Methoden als ihrem Zielpunkte führen, beruht im Wesen auf dem Satze, daß die Erscheinungen des Menschenlebens ebenso allgemeinen Grundsätzen unterstehen, erforschlich und berechenbar sind, wie die Erscheinungen in der außermenschlichen Natur. Dieser Satz zerlegt sich zunächst in die folgenden Sätze:

Die Erscheinungen im Menschenleben unterstehen allgemeinen Grundsätzen (Naturgesetzen). Diese Grundsätze sind aus der Erfahrung und nur aus dieser erforschlich; wo die Erfahrung aufhört, hört das Wissen auf.

Jeder Grundsatz wird durch ein Zusammenwirken von Wahrnehmung und Verallgemeinerung gebildet, indem eine Tatsache, die in vielen Fällen vorgefunden wird, vorläufig, mit Vorbehalt der Prüfung durch weitere Wahrnehmung, als allgemein angenommen wird. Das Verfahren wird deduktiv oder induktiv genannt, je nachdem Verallgemeinerung oder Wahrnehmung überwiegt. Ein prinzipieller Unterschied beider Verfahrensarten besteht nicht. Sie bilden gemeinschaftlich (als naturwissenschaftliche Induktion) den Gegensatz zur abstrakten, d. i. rein logischen Behandlung des Gegenstandes.

Das Gebiet der Forschung ist das Gesamtgebiet des menschlichen Lebens, die Mittel sind Beobachtung und Versuch.

Unter den Grundsätzen für das menschliche *Handeln* werden gewohnheitsmäßig einige als Rechtsgrundsätze ausgeschieden, welche sich nicht sowohl auf die Tätigkeit selbst, als auf deren Paralysierung, auf Herstellung von Ruhe und Frieden beziehen.

Die Unterscheidung ist aber rein methodisch. In jedem einzelnen Rechtsfalle ist eine Anzahl von Grundsätzen maßgebend, welche nach dem Herkommen nicht als Rechtsgrundsätze, sondern als wirtschaftliche, soziale oder ethische Grundsätze bezeichnet wer-

den müssen. Die Einheit der Sozialwissenschaft dringt immer durch. —

Von den juristischen Forschern sind Kurator, Anwalt und Richter im einzelnen, Politiker, kritischer Rechtshistoriker und Gesetzgeber im großen tätig.

Das Massengebiet der Beobachtung ist die Geschichte, kritisch behandelt; die große soziale Versuchsstation ist die Legislative.

Hier, meine Herren, dürfte der Punkt sein, wo die Verschiedenheit der naturwissenschaftlichen Anschauung von der gegenwärtigen klar wird.

Das einzelne Staatsgesetz steht mit den allgemeinen Grundsätzen nicht auf gleicher Stufe, verhält sich zu ihnen auch nicht wie Spezies zur Gattung. Das Staatsgesetz ist vielmehr die Anordnung eines gewissen allgemeinen Handelns oder Unterlassens, durch welches der Gesetzgeber im Interesse des Volkes irgendeinen Zweck zu erreichen sucht. Es ist also eine Zweckmaßregel der Staatsverwaltung und verhält sich zu den allgemeinen Grundsätzen über das menschliche Handeln wie jeder Apparat zu den Grundsätzen, auf denen er beruht. Das Gesetz über die Arrondierung der Grundstücke verhält sich zu den Grundsätzen über die Ertragsfähigkeit der Landwirtchaft nicht anders als eine Dampfmaschine zu den Gesetzen über die Expansion des Dampfes.

Der Gesetzgeber muß die allgemeinen Grundsätze kennen, weil jeder Fehler gegen dieselben sich am Erfolge des Gesetzes rächen würde. Wenn er nicht weiß, welche Grundsätze die Zinsenbewegung bestimmen, so wird ein Gesetz, welches er verfaßt hat, um den Zins zu regulieren, eine entgegengesetzte Wirkung ausüben. Aber der Gesetzgeber hat im Gesetze nicht die Grundsätze selbst auszusprechen, sondern nur auf Grund derselben, unter Ausfüllung der Lücken durch praktische Erfahrung und Takt, das Mittel, durch welches er ein Bedürfnis des Volkes befriedigen zu können erwartet.

Auf die Natur der Staatsgesetze, nicht der Grundsätze des Rechtes, beziehen sich also einige Theorien, die neuerlich aufgetaucht sind, so die Normentheorie von Bentham, Binding und Thon; die Zwecktheorie von Jhering.

Das Staatsgesetz ist eine Norm, das Staatsgesetz hat einen Zweck. Aber die Grundsätze des Rechtes sind keine Normen und haben keinen Zweck. Sie sind nichts als allgemeine Tatsachen, nicht

gut, noch schlecht, nicht nützlich oder schädlich, sie sind, sie haben sonst kein Prädikat.

Aus dem Charakter des Staatsgesetzes ergeben sich namentlich zwei Folgerungen:

Erstens, daß die Justiz nicht im Gegensatze zur Verwaltung steht, sondern einen Teil derselben bildet. Die Unabhängigkeit des Richterstandes ist keine Folge begrifflicher Differenz. Was man mit Scheidung von Justiz und Administration bezeichnet, ist vielmehr nichts anderes als die Wahrung eines unabhängigen Wahrspruches, bevor der Staat gegen einen Menschen eine bedeutendere Maßregel ergreift.

Zweitens, daß der Gesetzgeber kein Lehrer, sondern ein Politiker ist, der also die Grundsätze des menschlichen Handelns kennen muß, um die rechte Maßregel treffen zu können, der aber für diese Maßregel selbst durch Gründe der Zweckmäßigkeit zu bestimmen ist.

Für den Forscher wiederum ist jedes Gesetz nur ein Versuch zur Anwendung eines oder mehrerer allgemeiner Grundsätze, nur ein Mittel, um die Richtigkeit dieser Grundsätze zu untersuchen. Dieses Verhältnis zu erkennen, ist die Voraussetzung für ein freies wissenschaftliches Leben. Die Wissenschaft, welche hierauf fußt, ist eine Wissenschaft der Rechtsforschung, während bisher nur eine Wissenschaft der Auslegung positiver Satzungen bestand. —

Ich habe bereits erwähnt, daß die Methode sich seit Anfang des neunzehnten Jahrhunderts allmählich entwickelt. Die Kluft zwischen der abstrakten Grübelei des Mittelalters und einer Wissenschaft, welche das menschliche Handeln mit derselben kritischen Nüchternheit untersucht wie der Chemiker die Grundstoffe in seinem Laboratorium — konnte nur allmählich überbrückt werden.

Im Zivilrechte entstanden zugleich die historische und vergleichende Methode; die erstere unter Hugo und Savigny, die zweite unter Thibaut. Die historische Schule, nach ihrem Grundgedanken in Opposition gegen ein Universalrecht, das Recht in den Sitten und Gebräuchen des Volkes suchend, wurde schon von Savigny aus Vorliebe für das römische Recht nicht konsequent verfolgt und verfiel in ihrer weiteren Entwicklung in eine Doktrin rein römischen Rechtes.

Die vergleichende Schule unter Thibaut legte das Hauptgewicht auf die Vergleichung der europäischen Gesetzgebungen. Thibaut schrieb selbst die Institutionen des französischen Rechtes, worin er

das System des gemeinen Rechtes auf ein modernes Gesetz anwandte, eine Form, in welcher ihm später Wächter, Unger, Bruns u. a. nachfolgten. Die Methode ist in der Wissenschaft bereits allgemein geübt, in den Universitäten vernachlässigt. Doch wird zweifellos in kurzer Zeit (gleich wie in der Sprachenfrage) der Zweifel auftauchen, ob es für die praktische Jurisprudenz wichtiger sei, altrömisches und altdeutsches Recht, oder die lebenden Rechte der großen Nachbarstaaten zu studieren, und es ist jedenfalls die Pflege der letzteren und Errichtung von Professuren für sie zu verlangen.

Von den modernen Methoden, die ich nur berühren kann und die sämtlich mehr deduktiven Charakter haben, ragen hervor: die *juristisch-philosophische* Methode (Kierulff, Jhering), die „durch das römische Recht über dasselbe" hinausstrebt; die *volkswirtschaftliche* (L. v. Stein, Roscher, Rösler, Wagner — Einert, Dankwardt), welche die Rechtsverhältnisse als volkswirtschaftliche und soziale Verhältnisse erkennt, aber in der Methode nicht schlüssig ist; die *naturhistorische* (Jhering im „Zweck im Recht", Schäffle), welche Analogien aus der Mechanik oder dem menschlichen Organismus zur Erklärung der sozialen Erscheinungen anwendet.

Ähnliche Wandlungen wie das Zivilrecht machte auch das Strafrecht seit seiner Verjüngung durch die Aufklärungszeit und (theoretisch) durch Feuerbach ; doch ist die Entwicklung hier nicht so scharf ausgesprochen. Das menschliche Handeln wird als Objekt der Forschung erkannt, über seine Motivation und seinen Fortgang werden scharfe Untersuchungen gepflogen ; das Wesen der Strafe aber als Verwaltungsmaßregel bricht sich in der Erkenntnis nur langsam Bahn. —

Dies, meine Herren, ist die äußerste Umrahmung der Methode, ihres Einflusses auf die Erkenntnis einzelner bedeutsamer Begriffe des Rechtslebens, und ihrer Entwicklung. Die Erweiterung des wissenschaftlichen Gesichtskreises verdanken wir nicht Gelehrten, sondern einerseits der großen geistigen Bewegung, die wir die Aufklärungszeit nennen, anderseits der Entwicklung des Weltenverkehres. Wenn die Völker aneinander rücken, lernen sie ihre für unantastbar angesehenen Dogmen als individuelle Anschauungen erkennen, andere Anschauungen achten, sie bedürfen einander, versuchen sich zu verstehen und miteinander zu verkehren. *Der Weltenverkehr verlangt ein Weltenrecht.*

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Sie sehen dieses neue Recht auch in verschiedenster Weise durch Zusammenkünfte Gelehrter und Staatsverträge sich entwickeln. Die Begründung des Weltenrechtes ist die *nächste* praktische Aufgabe der Rechtswissenschaft. Sie verlangt eine allgemeine, von jedem nationalen, konfessionellen oder sonstigen Vorurteile befreite Wissenschaft.

Neben diese stellt sich eine z w e i t e Aufgabe, zu der die jüngst entstandene allgemeine Sprachwissenschaft (Linguistik) anregt. Es gilt, die Rechtsidee in den verschiedenen Gewohnheiten und Gesetzen der Völker aufzusuchen, die gegenwärtige durch fortgesetzte Arbeitsteilung und Arbeitsvereinigung so mannigfach gestaltete Gesellschaft durch Untersuchung ihrer allmählichen Entstehung zu begreifen.

Beide sind jedoch nur Ausläufer der allgemeinen Wissenschaft. Neben ihnen verbleibt selbständig die Wissenschaft der Naturgesetze für das Menschenleben, das edelste Objekt menschlichen Forschens.

DAS EXPERIMENT IM RECHT.

Vortrag, gehalten in der Juristischen Gesellschaft in Wien am 28. Dezember 1881

Meine Herren! Zwei mächtige Feinde hat die Sozialwissenschaft: Parteileidenschaft und falsche Moral.

Parteileidenschaft verhindert jede unbefangene Betrachtung und Prüfung, so daß ein scharfer Denker bereits den Ausspruch getan hat: Wenn dem Satze, daß zwei mal zwei vier sei, ein starkes Interesse entgegenstünde, würde derselbe wahrscheinlich heute noch ebenso zweifelhaft sein wie die sozialen Probleme. Falsche Moral aber sucht die großen Gesetze der Menschheit jeder wissenschaftlichen Untersuchung zu entziehen und verpönt jeden Versuch, eine natürliche Erklärung für dieselben zu finden, als unmoralisch, gemein, oder der Würde der Sittengesetze nicht entsprechend. Als ob das Streben nach Wahrheit nicht die höchste Moral enthielte, oder die Entdeckung, daß große Felsenmassen aus infusorischen Geschöpfen entstanden sind, der Gewalt und Erhabenheit dieser Felsenmassen irgend welchen Eintrag täte! Unter dem Drucke dieser beiden Mächte ist die Sozialwissenschaft noch jetzt so verkümmert, daß wir eigentlich erst ihr Gebiet aufsuchen müssen; und während Sie, meine Herren, bei Ankündigung eines Vortrages über das Experiment in der Naturwissenschaft sich wahrscheinlich fragen würden, was man denn über einen so viel besprochenen Gegenstand Neues sagen könnte, dürfte Ihnen ein Vortrag über das Experiment im Recht — das Experiment in seiner wissenschaftlichen Bedeutung — als etwas Barockes, Unverständliches erschienen sein.

Woher nun der Unterschied zwischen beiden Wissenschaften? Ich glaube, die Erklärung kann in wenigen Worten gegeben werden.

Stellen Sie sich vor, meine Herren, ich träte vor Sie mit folgender Theorie: „Es gibt zwei Wissenschaften der Mechanik, eine positive und eine natürliche. Die positive Mechanik beschäftigt sich mit den derzeit bestehenden Maschinen, ihren Einrichtungen und Arbeitsweisen. Die natürliche Mechanik beschäftigt sich mit denselben Maschinen und ihren Einrichtungen, wie sie sein sollen." —

Sie würden mir gewiß zur Antwort geben, meine Herren, ich befinde mich da in einer Begriffsverwirrung; ich verwechsle die Mechanik, die allgemeine Wissenschaft von den Gesetzen der Bewegung, mit der Maschinenkunde, einer praktischen Kenntnis, welche für denjenigen, der mit Maschinen zu tun hat, gewiß sehr wichtig ist, welche aber ihre wissenschaftliche Bedeutung und die Fähigkeit zu weiterem Fortschritte erst durch die allgemeine Wissenschaft erhält. Denn um die Worte des großen Lordkanzlers von England Franz Baco anzuführen: Wenn jemand sein ganzes Leben mit großem Fleiße bloß dem Studium der Maschinen und Widder der Alten gewidmet hätte, so würde er doch nie auf die Erfindung von Waffen, welche durch Schießpulver wirken, gekommen sein. — Wie steht es nun in der Rechtswissenschaft, meine Herren? Wir unterscheiden eine positive Rechtswissenschaft und eine natürliche. Die positive Rechtswissenschaft beschäftigt sich mit den Gesetzen, wie sie derzeit bestehen, die natürliche mit den Gesetzen, wie sie sein sollen. Die letztere haben wir derzeit gleichfalls so ziemlich zu den Toten geworfen und haben nur die Kenntnis der bestehenden (positiven) Gesetze als des Juristen würdig befunden. — Wie nun? Ist hier nicht dieselbe Begriffsverwirrung? Haben wir nicht Gesetzeskunde anstatt Rechtswissenschaft? Und wenn ein bestehendes Gesetz versagt, wenn zum Beispiel die alte Zivilprozeßordnung als nicht mehr tauglich erkannt wird, kann ihre Kenntnis uns die Möglichkeit gewähren, ein neues Gesetz auf besserer Grundlage zu erfinden? Trifft hier nicht das Wort Bacos voll ein, daß man mit allem Studium über die Widder der Alten niemals neue Waffen auf anderer Grundlage erfinden könne?

Wenn Sie nun aber, meine Herren, von der Gesetzeskunde verschieden, eine allgemeine Wissenschaft von den Grundsätzen der menschlichen Tätigkeit annehmen, dann öffnet sich Ihnen ein reiches Gebiet des Forschens und des Experimentes! das ganze Gebiet der menschlichen Tätigkeit, möge es nun hohe Politik und Verwaltung und Gesetzgebung sein, oder die Tätigkeit des einzelnen in seinem Privat-, Familien- und Geschäftsleben! Denn alle menschliche Tätigkeit steht unter denselben Gesetzen, so wie das Gesetz der Gravitation den Lauf der Sterne bestimmt, und der Apfel nach ihm zur Erde fällt. In der Privatstube, durch Erforschung des Einzellebens und Experiment in demselben, kann der

Forscher die Gesetze aufsuchen und finden, welche das Schicksal der Völker bestimmen. Wie viele Experimente hat jeder von Ihnen gemacht, meine Herren, als Anwalt, Richter, Freund und Ratgeber, um die Tätigkeit von Menschen anzuregen, abzuhalten oder zu regeln! Nur das wissenschaftliche Auge hat gefehlt.

Das Experiment, meine Herren, ist wissenschaftlich, wenn dasselbe aus Forschungsstreben, oder, um ein geflügeltes Wort Rankes zu gebrauchen, aus wissenschaftlicher Neugier hervorgeht. Es ist praktisch, wenn derjenige, welcher das Experiment macht, einen günstigen Ausgang erwartet und aus demselben Nutzen ziehen will. Das Objekt ist bei beiden ganz gleich, und wenn mehrere experimentieren, so kann dasselbe Experiment bei dem einen wissenschaftlich, bei dem anderen praktisch sein. Gerade in unserer Zeit finden wir sehr oft die Verbindung von Männern der Wissenschaft mit Männern des Geldes, welche jenen die nötigen Summen für ihre Experimente beschaffen, um bei etwaigem Gelingen derselben Nutzen zu ziehen. Ebenso waren anderseits die Streitigkeiten zwischen den italienischen Fürsten und Republiken für den geistvollen Sekretär der florentinischen Republik, Nicolò Machiavelli, die Bausteine für sein unsterbliches Werk: „Über den Fürsten" oder „Wie man Macht über die Menschen erhält." —

Die Erkenntnis, daß wir für die Sozialwissenschaft dieselbe Art der Forschung anwenden können und sollen wie in der Naturwissenschaft, daß der Unterschied beider nur in der größeren Verwicklung der sozialen Erscheinungen (im allgemeinen) besteht, ist noch sehr jung. Beispiele aus dem Einzelleben würden daher von wenigen noch als Beweise für allgemeine soziale Gesetze betrachtet werden. Ist es doch z. B. eine bekannte Übung, Einzel- und Staatswirtschaft einander entgegenzustellen und die für die ersteren anerkannten Grundsätze in ihrer Gültigkeit für die Staatswirtschaft zu bestreiten!

Gestatten Sie mir daher, meine Herren, nachdem ich das große Gebiet unserer Wissenschaft gezeigt habe, mich in den ferneren speziellen Untersuchungen und bei Anführung von Beispielen auf ein Gebiet einzuschränken, bei welchem ich mich von der gewöhnlichen Denkweise nicht allzu sehr entferne, auf das Gebiet des *praktischen Experimentes in der Gesetzgebung.*

Hier tritt uns nun wohl die Frage mit doppelter Kraft ent-

gegen: Ist ein Experiment in der Gesetzgebung möglich und gestattet?

Zwei Merkzeichen hat das Experiment. Es ist eine *absichtliche* Veränderung von Zuständen, und es ist eine Veränderung bei *unsicherem* Erfolge, welcher eben erforscht werden soll. Bei jedem Experiment ist bewußtes Wagnis. Kann und darf der Gesetzgeber nun bewußt wagen? Die heutige Doktrin ist dagegen; abgesehen von der theologischen und metaphysischen Anschauung, welche bestimmte Normen entweder als Willen Gottes oder als logische Konsequenzen einer ewigen Vernunft annimmt und daher selbstverständlich jedes Versuchen ausschließen muß, insbesondere die historische Schule. Denn die historische Schule findet alles Recht in dem gegenwärtigen Rechtsbewußtsein des Volkes enthalten; Gewohnheit und Gesetz haben dieses Recht nur darzustellen; sie sind deklarativ, nicht schöpferisch. In diesem Falle, meine Herren, kann nun der Gesetzgeber finden oder nicht finden; aber dort, wo er weiß, daß eine Norm im Rechtsbewußtsein des Volkes noch nicht enthalten ist, darf er gewiß keinen Versuch machen.

Demgegenüber kann sich das Experiment jedoch auf einen kräftigen Vertreter stützen, auf die Erfahrung aller Zeiten und Länder.

Ich will nicht in das Altertum zurückgreifen; ich will Ihnen selbst nicht diejenigen Gesetze aus neuer Zeit als Beweise vorführen, welche wir heutzutage als Wagnisse erkennen, welche aber von den Gesetzgebern vielleicht nicht als solche gewußt waren. Zu ihnen gehört z. B. die Einführung des römischen Rechtes in Deutschland gegen alle Tradition und gegen den Willen des Volkes, das sich mit aller Macht gegen dasselbe aufbäumte; die Reformen am Ende des vorigen Jahrhunderts von Friedrich II., Josef II., Katharina II.; die Beschlüsse der denkwürdigen Nacht vom 4. August 1789, welche eine ganze Gesellschaftsordnung umstürzen und durch eine andere ersetzen wollen. Allein jeder Widerspruch muß gewiß entfallen, wenn ich Beispiele von Gesetzen nenne, die als Experimente gewußt, als solche gesetzt sind und gegen welche wir trotzdem keinen Vorwurf erheben können. Solche waren in unserem Heimatlande: das westgalizische Gesetzbuch, welches mit der bestimmten Absicht in Westgalizien eingeführt wurde, um, wenn es sich bewährt hätte, in dieser oder in verbesserter Gestalt in ganz

Österreich eingeführt zu werden; in neuerer Zeit das galizische Wucher- und Trunkenheitsgesetz, bei deren Beratung ausdrücklich gesagt wurde, daß man sie, wenn sie sich bewährten, über Österreich erweitern wolle. Ebenso kennen Sie als bewußtes Experiment die Einführung des öffentlichen und mündlichen Verfahrens für Bagatellsachen, bei welcher ausdrücklich ausgesprochen wurde, daß man dasselbe in Bagatellsachen, wo geringere Gefahr verbunden sei, versuchen, und wenn es sich bewährt, auch bei großen Streitigkeiten anwenden wolle. Nun, meine Herren, werden wir gegen den Gesetzgeber, welcher dieses Gesetz versuchsweise für Bagatellstreitigkeiten gegeben hat, einen Vorwurf erheben können?

Ich will die Sphäre des Privatrechtes und des bekanntesten Gebietes (Österreichs) nicht überschreiten; sonst würde ich die Versuche mit der Altersversorgung in Deutschland, das irische Landgesetz und andere Vorschläge aus jüngster Vergangenheit als ebenso beredte Beispiele anführen können. —

Die Bedingungen für ein richtiges soziales Experiment sind dieselben wie für ein Experiment auf anderem Gebiete. Insbesondere müssen auch hier die Verhältnisse untersucht werden, unter welchen das Experiment gemacht wird. Wie ein chemisches Experiment bei dem einen Temperaturgrade gelingt, bei einem anderen mißlingt, so kann dasselbe soziale Experiment je nach den Verhältnissen, unter denen es unternommen wird, gelingen oder nicht. Je größer Gefahr und Schaden bei Mißlingen, desto größer die Sorgfalt, die angewendet werden muß. Zu den bestehenden Verhältnissen gehören insbesondere die Neigungen, Ansichten und Rechtsüberzeugungen des Volkes. Hier, meine Herren, beginnt und endet zugleich die Berechtigung der historischen Anschauung. *Die Rechtsüberzeugung des Volkes sagt uns nicht immer, was recht ist, das heißt, was dem Volke frommt.* Nur auf dem Gebiete, welches dem Volke unmittelbar zugänglich ist und wo es nur durch sein Streben nach zweckmäßiger Handlungsweise geleitet wird, also beim Landwirt auf landwirtschaftlichem, beim Kaufmanne auf kaufmännischem Gebiete, da wird das Volk durch seine Erfahrung oft besser geleitet als der Gesetzgeber bei noch so großer Umsicht durch sein allgemeineres Denken; und die neuere Gesetzgebung, insbesondere das Handelsrecht, verweist hier auch auf die bestehenden Usancen. Wo aber das Gebiet dem Volke nicht ganz zugänglich ist und wo

es nicht allein durch sein Zweckmäßigkeitsstreben geleitet wird, da kann ihm auch das größte Unrecht zur Rechtsüberzeugung gemacht werden; da kann dem Volk zur Überzeugung gemacht werden, daß Hexenprozesse, Tortur, Autodafés, Steuerprivilegien, Fronden und Robot gerecht seien, und das Volk kann mit Fanatismus dafür eintreten. Die Überzeugung des Volkes sagt also nicht immer, was recht ist, allein — und dies ist sehr wichtig — *sie sagt immer, was vorhanden ist;* sie ist eine Kraft, mit welcher der Experimentator rechnen muß. Gerade in Österreich, meine Herren, haben wir ein trauriges Beispiel an den Experimenten des edelsten Fürsten, welche nur, weil er mit den vorhandenen Kräften nicht genug gerechnet hatte, mißglückten. —

Über das Verhältnis des Experimentes zu den allgemeinen Sozialgesetzen gestatten Sie mir, meine Herren, Ihnen anstatt einer Abhandlung einige Beispiele zu bieten. Wir haben derzeit im Strafverfahren die öffentliche Verhandlung eingeführt und wir sind im Begriffe, sie auch auf das Zivilverfahren auszudehnen. Wir glauben, daß die öffentliche Kritik, das Bewußtsein und teilweise die Furcht derselben dazu dienen, den Richter zu besonnenem und gerechtem Urteile anzuregen. Die allgemeinere Tatsache, von welcher wir ausgehen, ist also die Macht der öffentlichen Meinung. Auf dieser Macht ruht auch unser ganzes Preß-, Vereins- und Versammlungsrecht, sowohl in jenen Punkten, welche die Macht als für das Gemeinwesen vorteilhaft begünstigen, als auch in den Vorsichtsmaßregeln, weil die Macht gefährlich werden könnte. Auch bei dem öffentlichen Verfahren wird ja auf diese Gefahr Rücksicht genommen und in manchen Fällen aus öffentlichem Interesse oder durch das Ordnungsrecht des Präsidenten die Öffentlichkeit ausgeschlossen.

Wir müssen jedoch in der Abstraktion etwas weiter gehen.

Die öffentliche Meinung ist die Meinung der vielen. Wenn aber die Meinung der vielen eine Macht ist, so muß dies auch schon die Meinung des einzelnen sein, denn hunderttausendmal Null gibt immer nur Null. Wir kommen also zu dem Satze, die Meinung jedes anderen habe Einfluß (Triebkraft) auf unser Handeln. Wenn wir diesen Satz im Leben verfolgen, so finden wir ihn in manchen sozialen Maßnahmen bestätigt. Wir finden ihn zum Beispiel in dem Gewichte, welches jedermann auf die Umgebung legt: „Sage mir, mit wem du umgehst, und ich will dir sagen, wer du bist." Wir

finden ihn darin, daß man, um jemanden zu einer Meinung zu bestimmen, ihm diese Meinung recht oft sagt: „Man kann die Wahrheit nicht oft genug sagen" — „calumniare audacter, semper aliquid haeret" — das Geheimnis aller Reklame. Auf dem Rechtsboden finden wir ihn im § 5 StG., nach welchem man durch Lob die Übeltat einleiten kann; im § 163, wonach des Duells mitschuldig wird, wer demjenigen, der die Herausforderung abzuwenden sucht, Verachtung gedroht oder bezeigt hat; im § 305, daß derjenige, welcher verbotene Handlungen öffentlich anpreist oder zu rechtfertigen versucht, oder die Einrichtungen der Ehe oder Familie öffentlich herabwürdigt, eines Vergehens schuldig wird.

In einer Lehre von den Triebkräften des menschlichen Handelns würden wir also als eine Triebkraft die Meinung anderer bezeichnen und als eine Anwendung derselben in der speziellen Form der öffentlichen Meinung die Einführung des öffentlichen Verfahrens anführen können. —

Wir halten den Einfluß der öffentlichen Meinung der Gerechtigkeit der Urteile für günstig, weil gerechte Urteile im Interesse des Volkes sind. Wir gehen also davon aus, daß das Volk für sein Interesse sorgt. Auf dem Satz ruht bekanntlich auch unser Verlangen nach Selbstregierung des Volkes. In weiterer Abstraktion sagt der Satz, daß jedermann für sein Interesse sorgt, und als eine der vielen Anwendungen desselben nenne ich Ihnen das Prinzip der formalen Wahrheit im Zivilprozeß. Der Richter wird an den Antrag der Parteien gewiesen, weil diese selbst für ihr Interesse sorgen. — Im Zivilrechte sind hauptsächlich die volkswirtschaftlichen Gesetze der Produktion, der Preisbildung und Verteilung maßgebend. Der Unterschied des Handelsrechtes vom gemeinen Rechte ruht fast allein auf dem Einflusse einer raschen Abwicklung und pünktlichen Zahlung für die Herabsetzung des Preises. Stellen Sie sich nun selbst, meine Herren, die Frage, und stellen Sie sie an die Erfahrung: hätte das eifrigste Studium des römischen Rechtes jemals die Vorschrift des Art. 306 HGB. (§ 367 des ABGB.) erzeugen können? Mußte sich die Handelswelt nicht Wechsel- und Handelsrecht gegen die Jurisprudenz erzwingen, und ist es nicht bezeichnend, daß die bahnbrechende Arbeit von Einert nicht vom Recht ausging, sondern vom Papiergeld? Welche Mühe gaben sich denn die Romanisten, durch eine Delegation ohne Ende oder durch Litteralkontrakt das

neue Institut, das gar nicht römisch war, unter die römischen Formen zu bringen! Als ob man jemals die Kuppel durch die griechische Säulenordnung erklären könnte! Es wäre eine interessante Frage, wie Europa zu einer anderen Grundlage für sein Rechtssystem hätte kommen wollen, wenn nicht England zufällig in glücklicher Isolierung sich entwickelt hätte!

Ich kann Ihnen hier, meine Herren, für die Bearbeitung der allgemeinen Wissenschaft selbst nur einzelne ganz allgemeine Andeutungen geben. Ich bin auch überzeugt, daß das positive System, an dem ich arbeite, die Lehre von den Formen der menschlichen Triebkraft, bald durch ein besseres System ausgelöst sein wird. Allein die Methode selbst, meine Herren, die Unterscheidung der allgemeinen Wissenschaft von der Gesetzeskunde und die Behandlung derselben gleich den Naturwissenschaften, soll, wie ich hoffe, mich und unsere Zeit überdauern! —

Die Erkenntnis des Gesetzes, meine Herren, und seines oft experimentalen Charakters ist insbesondere für die Gegenwart wichtig. Wir leben geradezu in einer experimentalen Ära.

Die Verkehrsverhältnisse haben sich erweitert und sind den alten Rechtsformen entwachsen. Eine ganze Reihe von Verhältnissen ist entstanden, welche ganz ungeregelt waren. Das Kommissions-, Speditions-, Transport-, Versicherungsgeschäft, die Bank-, Börsen- und Wechslergeschäfte, das Post-, Telegraphen- und Bahnwesen, das ganze geistige Eigentum — alles das ist uns fast gänzlich ungeregelt überkommen.

Wenn wir nun gezwungen sind, diese Verhältnisse zu regeln und kein Vorbild haben, was sollen wir anderes tun, als experimentieren! Betrachten Sie zum Beispiel das Patentwesen! Sie wissen, daß eine Reihe von Prinzipien für die Regelung desselben nebeneinander besteht. Der eine Staat schützt allgemein, der andere beschränkt, der dritte gar nicht.

Man hatte versucht, sich zu einigen, es ging nicht, die Erfahrung hatte zu geringe Anhaltspunkte geboten. Was sollte man tun, als nach bestem Wissen und Gewissen dasjenige System einzuführen, welches man als das wahrscheinlich beste hielt?

Hier, meine Herren, ist die erste Wirkung der neuen Erkenntnis. Die Kritik eines Gesetzentwurfes, dessen experimentalen Charakter man kennt, wird immer konkret und positiv sein. Mit

dem bloß schönen systematischen Aufbau, mit der Kritik nach Camestres und Baroco ist nichts getan. Nur die aus sorgfältiger Erwägung aller Umstände und genauer Berücksichtigung der bisherigen Erfahrung hervorgehende Wahrscheinlichkeit, ob die Vorschrift gemeinnützig sei, darf das Urteil bestimmen. Ebensowenig darf aber das Werk als getan gelten, wenn der Entwurf Gesetz geworden ist; *erst die Bewährung des Gesetzes zeigt, daß es recht war*. In gleicher Weise kann nur Rücksicht auf das Gemeinwohl bestimmen, ob ein als mangelhaft erkanntes Gesetz durch ein anderes ersetzt, oder bei geringeren Mängeln, wegen der mit raschem Gesetzeswechsel verbundenen Gefahr für die Rechtssicherheit, belassen werden solle.

Die zweite Konsequenz ist die Beurteilung der Gerechtigkeit überhaupt. Wenn gewisse Rechtssätze als logisch notwendige, ewige Wahrheiten angenommen werden, derart, daß sie ohne jede Bedingung und Rücksicht eingehalten werden müssen: dann, meine Herren, ist freilich die Gerechtigkeit die unbarmherzige Göttin, welche verlangt, daß ihr Befehl beobachtet werde, möge die Welt darüber zugrunde gehen; welche Aug' um Auge, Blut um Blut verlangt. Wenn man aber erkannt hat, daß alle Gesetze nur Zweckmaßregeln der Staatsverwaltung sind, um auf Grund der erkannten oder vermuteten Gesetze für die Tätigkeit des Menschen, das Wohl des Volkes zu fördern: dann, meine Herren, wird die Gerechtigkeit menschlich; sie ruht auf Menschenliebe, bezweckt Menschenglück, sie will nicht, daß der Sünder sterbe, sondern nach dem ewigen Worte, daß er „sich bessere und lebe".

Die dritte Konsequenz aber und vielleicht die wichtigste ist die für die Wissenschaft selbst. Wie kahl und unfruchtbar war die Naturwissenschaft im Mittelalter bis zur bewußten Anwendung der induktiven Methode! Aller Fortschritt der Naturwissenschaft ist erst von da ab zu rechnen. Und das edelste Geschöpf, der Menschengeist, meine Herren, sollte uns nicht ebenso viele Schätze bieten können, wenn wir uns liebevoll in sein Studium versenken? wenn alle die Kraft, der Fleiß und Verstand, welcher derzeit noch immer in dem Aufgrübeln kleinster Pandekten- und Basilikenstellen verschwendet wird, auf die Erforschung des Menschengeistes, der Menschenkraft verwendet würde? Man werfe mir nicht Mißachtung der Pandekten oder gar der römischen Juristen vor. Gewiß, die Aus-

sprüche der letzteren enthalten eine Fülle von Verstand, praktischer Würdigung der Umstände und lebendigem Rechtsgefühle. Aber hat Newton vielleicht Euklid beleidigt, wenn er die Differentialrechnung schuf? sind wir zur Unselbständigkeit verdammt, weil jene schöpferisch waren?

Warum, meine Herren, hören wir von Asien- und Afrikareisenden so selten eine Beschreibung des Rechtes der Völker, durch deren Land dieselben gezogen sind? warum reden sie uns von deren Kleidern, von der Art ihres Essens und Trinkens und allem möglichen Tand, und nicht von ihrem Rechte? Weil die Juristen sich nicht darum kümmern; weil all dasjenige, was über das geltende Gesetz hinausgeht, für sie „griechisch" ist: graeca sunt, non leguntur. Nur Frankreich auf dem Kontinent macht eine rühmliche Ausnahme und pflegt vergleichende Rechtskunde in weiterem Umfange; die Vorbereitung zum grundsätzlichen Studium, wie die vergleichende Sprachenkunde die Vorbereitung zur Linguistik war. Langsam, sehr langsam rückt Deutschland nach. —

Die Rechtswissenschaft muß zur Erkenntnis ihrer selbst kommen, meine Herren! Sie muß wissen, daß, wie es keine europäische und amerikanische Physik gibt, so wenig eine römische oder deutsche Rechtswissenschaft besteht.

Die Wissenschaft ist international, sie hat kein anderes Vaterland als den Menschengeist.

Von dem Experiment aber, meine Herren, muß endlich der Bann des Mißtrauens und Vorurteiles fallen, welcher derzeit auf ihm liegt und Experimentieren als notwendig gefährlich und schlecht erscheinen läßt.

Im Privatrecht, wo Vorurteil, Parteileidenschaft und falsche Moral nicht so übermächtig sind wie auf allen anderen Gebieten der sozialen Tätigkeit, muß sich die Überzeugung durchbrechen: Das schlechte Experiment ist schlecht, das ist reine Tautologie; aber das rechtzeitige, besonnene Experiment ist die Grundlage alles Fortschrittes, so der Wissenschaft wie der Menschheit.

DAS RECHT ZU LEBEN

Vortrag, gehalten im Wissenschaftlichen Klub in Wien am 29. November 1883

Wir wollen vor allem den Gegenstand unserer Besprechung klarstellen. Was ist das: „Recht zu leben", was bedeutet „Recht" und was „Leben"?

Der Zweck aller Gesetzgebung ist das allgemeine Wohl. Das Wort ist unbestimmt, wird aber deutlich, wenn man eine ähnliche Erscheinung in der Natur vergleicht.

Die Bewegung eines jeden Himmelskörpers (z. B. eines Planeten) wird bestimmt durch die allgemeine Gravitation. Das heißt: der Körper gravitiert zu jedem der anderen Körper, welche ihn umgeben. Allein die Gravitation zu dem einen Körper würde ihn nach rechts, die zu dem andern nach links führen; der Einfluß des einen beschleunigt seine Bewegung, der des andern hemmt sie.

So entsteht eine Resultierende, welche die Größe und die Richtung seiner Bewegung feststellt und welche wir als die „allgemeine Gravitation" bezeichnen könnten.

Dieselbe Bedeutung hat auch das allgemeine Wohl. Das Glück jedes einzelnen will erreicht werden, aber das Glück des einen verlangt oft die entgegengesetzte Maßregel als das Glück des andern. So muß denn die Gesellschaft mittlere Wege einschlagen, welche dem Glück aller möglichst entsprechen. Das Ziel heißt dann das „allgemeine Wohl". —

Die Gesetzgebung strebt also das Wohl jedes einzelnen an.

Sprechen wir aber dem einzelnen auch ein *Recht* auf Glück zu?

Wir gelangen hier zu einem vielverlästerten, vielverspotteten und dennoch ganz konkreten Begriff, zu dem des *rationellen* oder früher sogenannten natürlichen Rechtes.

Das rationelle Recht steht inmitten des *positiven* — geltenden — Rechtes, welches infolge von erlassenen Gesetzen oder festwurzelnder Gewohnheit den Schutz des Staates genießt, und dem *idealen* Rechte, dem Traum von Dichtern und dichtenden Rechtsphilosophen.

Der Jurist hat dafür den treffenden Ausdruck: „lex ferenda", „das zu erlassende Gesetz".

Es ist der Inhalt des Gesetzes, welches wir von unserer Gesetzgebung für unsere Zeit erwarten und verlangen. Es ist der Inhalt der Rechtsreformen, der Gesetzesvorschläge und der Beschlüsse von Juristentagen und Konferenzen. Sein Unterschied vom idealen Recht kann dahin festgestellt werden:

Wenn wir von der Gesetzgebung die Sicherung eines gewissen Zustandes für die Gegenwart vollständig oder ziemlich vollständig verlangen, so ist der Zustand rationelles Recht. Wenn wir dagegen mit Rücksicht auf die gegenwärtigen Verhältnisse einen so ausgiebigen Schutz derzeit noch nicht für möglich halten, sondern uns zufriedenstellen, wenn die Gesetzgebung den Schutz erstrebt und durch, wenn auch nur unvollständige, Anfänge ihren guten Willen zeigt, dann sprechen wir von einem idealen Rechtszustand, einem Ziel der Gesetzgebung, einem sittlichen Anspruch, aber nicht von einem Recht (rationellen Rechtsanspruch).

So werden wir also dem Individuum noch kein *Recht* auf Glück zugestehen, weil die Gesellschaft noch nicht imstande ist, dafür zu sorgen, daß, nach dem bekannten Wort, „jeder Bauer am Sonntag sein Huhn im Topfe habe" [1]).

Wir können nur verlangen, daß die Staatstätigkeit bestrebt sei, Ackerbau und Gewerbe möglichst zu fördern, den Wohlstand der Bürger möglichst zu heben. Ein bestimmtes Maß des Wohlstandes mit Rechtsschutz zu umgeben, ist sie vorläufig nicht imstande.

Und nun werden Sie den ersten Teil der Frage verstehen: Gibt es ein *Recht* zu leben? Ist der Anspruch ein rationeller Rechtsanspruch?

Wir kommen zum Umfange.

Das Recht tritt namentlich in zwei Formen auf. Sobald wir geboren sind, befinden wir uns in einem physiologischen Zustande, den wir Leben nennen, und dieser Zustand kann uns durch äußere Gewalt genommen werden. Der Anspruch, gegen solche Gewalt geschützt zu werden, wäre das Recht: *nicht getötet zu werden.* Weiters aber sterben wir nach den Bedingungen unserer Organisation jeden Tag ab, wir müssen jeden Tag neu geschaffen werden und bedürfen hiezu einer Reihe äußerer Hilfsmittel, welche unter dem

[1]) Ich will damit Glück und „das Huhn im Topfe" nicht als identisch hinstellen. (A. d. V.)

Namen „unentbehrliche Lebensmittel" bekannt sind. Der Anspruch, gegen den Tod aus Mangel dieser Lebensbedingungen geschützt zu werden, könnte mit einem, wenn auch unvollständigen Schlagworte bezeichnet werden, als das Recht: *nicht verhungern zu müssen.*

Der zweite Anspruch ist, wie Ihnen allen bekannt ist, weit mehr bestritten als der erste und darum werden sich die Beispiele, welche ich anführe, auf ihn beziehen. Man kann jedoch stets dabei ein Beispiel für den ersteren Anspruch anfügen.

Eine Nebenbemerkung für Juristen!

In dem herrschenden formellen Systeme würden die beiden Ansprüche weit voneinander entfernt stehen.

Das eine ist von dem Logiker der modernen Jurisprudenz (Puchta) als Eigentum an der eigenen Person vor das Sacheigentum gestellt worden; das zweite wird in jenen beschränkten Fällen, in welchen es einzelnen Personen gegen einzelne Personen gewährt wird, als Alimentationsanspruch unter den Obligationen aus zufälligen Verhältnissen (Quasikontrakte) behandelt.

In einem rationellen, d. h. auf dem wesentlichen Inhalt der Verhältnisse beruhenden Systeme werden wir die beiden Ansprüche ebenso zueinander stellen müssen wie die Ansprüche der verschiedensten Art aus Familienverhältnissen, weil sie Formen desselben Grundrechtes sind. —

Jetzt, da wir alle Merkmale kennen gelernt haben, stellen wir also nochmals die Frage: Gibt es ein Recht zu leben?

Die Schiedsrichter sind, da das positive Gesetz für das rationelle Recht nur die Ansicht seiner Autoren und keine selbständige Entscheidungsquelle ist, das gemeine Rechtsgefühl oder der sogenannte gesunde Menschenverstand, welcher aber eine Verbindung von Verstand und Gefühl ist, und die Rechtswissenschaft. Beide sind miteinander verbunden, aber sie urteilen in anderer Weise. Der gesunde Menschenverstand urteilt nach dem unmittelbaren Eindrucke, welchen man aus der Anschauung des Verhältnisses erhält, und nach der Dringlichkeit des Verlangens, ob ein Verhältnis hergestellt, erhalten oder zerstört werden soll. Die Wissenschaft urteilt nach festgestellten Rechtsprinzipien und ihren Konsequenzen.

Beides hat seine Vorteile und seine Schwächen.

Der gesunde Menschenverstand schöpft, da alles Urteilen auf der Empfindung beruht, aus der ersten Quelle.

Der einzelne Fall tritt mit allen ihn kennzeichnenden Momenten in ihrer natürlichen Verbindung vor ihn; sein Urteil ist konkret und individuell.

Dies sind seine Vorzüge.

Dagegen ist er auch manchen Gefahren ausgesetzt. Im einzelnen Falle treten die an der Oberfläche liegenden leicht sichtbaren Momente zu sehr vor; die tiefer liegenden, aber durch ihre Dauer oder ihre Folgen bedeutsameren, zu sehr zurück. Die Empfindung wird von den Vorurteilen, in denen wir alle befangen sind, und von Empfindungen ästhetischer und sozialer Art leicht verwirrt, wie z. B. die bekannte Katharina Steiner wahrscheinlich durch ihr vorlautes Betragen zu ihrer Verurteilung beigetragen hat. Der gesunde Menschenverstand kann auch nur bei einfacher und anschaulicher Sachlage sicher urteilen. Bei größerer Verwicklung muß die juristische Berechnung eintreten, welche denn bei Geschwornengerichten das Amt des Vorsitzenden im Resümee ist.

Den Gefahren des Urteils nach dem einzelnen Falle weicht die Wissenschaft aus. Sie sammelt die Fälle, vergleicht sie, scheidet die einzelnen Momente und bildet unter Beobachtung der Empfindung in allen Fällen, sowie der Erfahrungen bei Gesetzen und im Leben, allgemeine Rechtsgrundsätze, mit denen sie nun, als mit einem objektiven Maßstabe, zur Beurteilung des einzelnen Falles tritt. Sie ist ihrerseits aber der Gefahr ausgesetzt, daß sie ihre Prinzipien für die erste Rechtsquelle hält und vergißt, daß die Prinzipien künstlich gebildet wurden und bei ihrer Bildung Irrtümer und Unvollständigkeiten unterlaufen sein konnten; daß sie ferner vergißt, daß die Prinzipien bloße Elemente des Rechtsurteils sind und durch andere Elemente aufgewogen werden können.

Wer aus dem Eigentumsprinzip folgern wollte: es dürfe kein Zustand geduldet werden, welcher mit dessen strenger Konsequenz unverträglich sei, der gliche dem Naturforscher, welcher aus dem Gravitationsgesetze das Schweben des Vogels in der Luft für unmöglich hielte.

In diesem Fehler des wissenschaftlichen Urteils liegt auch das „summum jus summa injuria" („höchstes Recht ist höchstes Unrecht"). Es bezieht sich auf die logisch unerbittliche Verfolgung eines einzelnen Rechtsprinzips.

Daher müssen denn beide Rechtsquellen einander stets ergänzen.

Der gesunde Menschenverstand muß sich an die Wissenschaft um ruhige und objektive Prüfung seines Urteils wenden; die Wissenschaft, wenn sie eine Zeit lang logisch fortgeschritten ist, muß sich bei dem gesunden Menschenverstand Rates erholen: „ob sie der Natur — noch sei auf rechter Spur".

Eine Probe für die Richtigkeit der Schlußfolgerung und Empfindung liegt auch in der Nützlichkeitsberechnung.

Wir wollen alle diese Quellen zur Beurteilung des Anspruches vernehmen. —

Wenn wir uns an das Rechtsgefühl als Schiedsrichter wenden wollen, so müssen wir ihm das Verhältnis in einem einfachen, anschaulichen Bilde bieten.

Denken Sie sich also bei einem fröhlichen Feste versammelt, in welchem Sie für verschiedene Annehmlichkeiten — Geschenke, Mahlzeit — bedeutende Summen ausgegeben haben. Sie sind recht fröhlich und beglückt. In diesem Momente tönt an Ihr Ohr ein Schrei, Sie stürzen hinaus, vor Ihnen ist ein Mensch zusammengebrochen. Der Arzt wird herbeigerufen und konstatiert in der üblichen gelehrten Form: „Verhungert".

Ich bin überzeugt, verehrte Anwesende, daß in diesem Augenblicke der Vorfall auf Sie alle denselben erschütternden Eindruck ausüben wird, als ob ein Erschlagener vor Ihnen läge; daß Sie im Momente gern auf einen Teil der genossenen Vergnügungen verzichtet hätten und für alle Zukunft verzichten würden, um ein so furchtbares Schicksal zu verhüten; daß Sie alle den festen Willen haben und aussprechen: es dürfe keinen Moment länger geduldet werden, daß im Rechtsstaate neben Personen, welche, ohne Arges zu denken, Hunderte zum Fenster hinauswerfen, ein Mensch verhungern könne!

Was wir im Augenblicke, wo ein Zustand anschaulich vor uns tritt, empfinden, das gebietet uns die Vernunft, zum Leitfaden unserer Handlungen auch dort zu nehmen, wo wir es nicht sehen, aber sehen können.

„Solange ein Engländer ein Pfund übrig hat, darf kein Engländer verhungern!" sprach Pitt, echt englisch in seiner Kraft und Beschränktheit. Es ist dies das Urteil des einfachen, gesunden Menschenverstandes.

Fragen wir nun bei der Wissenschaft an.

Wir finden dort zwei Grundanschauungen: die individualistische und die soziale.

Die individualistische Anschauung geht stets unmittelbar vom Fühlen und Wünschen des Individuums aus.

Die Gesellschaft ist ihr bloß eines der Mittel, durch welche das Individuum seine Befriedigung erstrebt. Wenn sie aber einem Verlangen des Individuums entgegen ist, so muß sie sich fügen oder gehen.

Die soziale Anschauung faßt die menschliche Gesellschaft als erfahrungsgemäß zur Erreichung der menschlichen Zwecke notwendig auf und verlangt daher von jedem einzelnen Verlangen des Individuums, daß es den Bestand der menschlichen Gesellschaft nicht gefährde. Die Gesellschaft ist der Reform fähig, aber selbst als notwendig vorgeurteilt.

Der individualistische Rechtsdenker kann über den Anspruch nicht zweifelhaft sein. Geht er von den Bestrebungen des Individuums aus, so ist der Trieb nach Selbsterhaltung der erste und stärkste Trieb, und namentlich ruhen alle wirtschaftlichen Bestrebungen, die Grundlagen der „erworbenen" Rechte, auf ihm. Wir erwerben, weil wir leben wollen; wir suchen Verkehr und schließen Verträge, weil wir erwerben und leben wollen. Der Grund anerkannter Rechte muß wohl selbst Recht sein!

Nimmt man das Fühlen des Individuums zum Maßstab für das Recht: welche Lust gibt es ohne Leben? welcher Schmerz gleicht dem, der dem Tode durch Gewalttat oder Hunger vorangeht?

Geht man endlich vom Nutzen aus: was kann dem Menschen nützlich sein, wenn er nicht lebt?

Die stete Rücksicht auf die Gefühle und Wünsche des einzelnen Menschen ist notwendig; denn das Recht ist für die Menschen bestimmt und ihrem Wohl gewidmet.

Allein die individualistische Anschauung selbst führt nicht zum Recht, sondern zum (bekannten) Kampf aller gegen alle.

Wenn jeder einzelne nur sein Wohl im Auge hat, so mag er auch einen ihm mißliebigen anderen ermorden; er hat seinen Wunsch erfüllt.

Das Recht entsteht erst, wenn die Menschen friedlich miteinander leben wollen. Das Prinzip des Rechtes ist also das Prinzip der Gesellschaft. Recht ist seinem Wesen nach Lebensordnung der Gesellschaft.

Aus diesem Grunde will ich hier von der Sozialtheorie aus an der Hand der anerkannten Grundsätze für die Ordnung jeder Gesellschaft — u. zw., soweit mir bekannt ist, in dieser exakten Form zum ersten Male — den Anspruch untersuchen.

Die Sozialtheorie beginnt mit Hugo Grotius. Grotius, der erste staatswissenschaftliche Theoretiker der neuen Zeit, nennt den Staat sofort eine Gesellschaft. Der Staat beruht bei ihm auf einem sozialen Trieb der Menschen und ist die vollkommene Vereinigung freier Menschen zu ihrem gemeinsamen Wohl.

Diese Grundauffassung erscheint sofort so klar und überzeugend, daß sie von allen staatswissenschaftlichen Denkern angenommen wird; mögen sie nun darauf, wie Hobbes, den absolutistischen Staat oder, wie Locke, die Volkssouveränität gründen, oder mögen sie, wie Spinoza, die ganze Einrichtung daraus als rein konventionell beweisen.

Diese Aufstellung des gesellschaftlichen Prinzips ist der erste große Schritt in der Entwicklung der Sozialtheorie. Der zweite erfolgt durch Jean Jacques Rousseau im „contrat social". Es gibt kaum einen Menschen und ein Buch, welchem mehr Unrecht geschehen wäre als Rousseau und dem „contrat". Man wollte die ganze Revolution auf das Buch schieben, als könnte ein Buch eine Revolution erzeugen, als würde jemals eine Revolution anders entstanden sein als durch Druck und Not!

Rousseau nimmt im ersten Teile des „contrat social" die Auffassung Grotius' von dem Staate als Gesellschaft auf. Seine originelle Zutat bezieht sich auf die volonté générale. Er sagt: Solange die Menschen nicht in Gesellschaft sind, hat jeder seinen Willen und alle haben den Willen aller, die volonté de tous. Wenn sie in Gesellschaft treten, so vereinigen sie alle ihre Willen zu einem Ganzen, der volonté générale, und erhalten von diesem Ganzen einen verhältnismäßigen Teil, entsprechend dem früheren Verhältnisse ihres Willens zu dem Willen aller. Wenn hundert Menschen zusammengetreten sind, so erhält jeder den hundertsten Teil der volonté générale. So haben sie, wie Rousseau meint, nichts eingebüßt; sie erhalten dasselbe zurück, was sie gegeben haben.

Das ist nun ein Irrtum.

Es kann mich unmöglich trösten, wenn ich in einem Falle majorisiert werde, daß ich in einem anderen Falle vielleicht andere

majorisieren kann. Der einzelne verliert einen Teil Freiheit und erhält einen Teil Herrschaft; das ist nicht identisch.

Was aber die volonté générale selbst betrifft, so spricht Rousseau für den Staat nur dasselbe aus, was die römischen Juristen 2000 Jahre früher einmütig als Grundgesetz für *jede private Gesellschaft* erkannt hatten. Wenn die Gesellschaft handeln soll, so *muß* sie bei jedem Akt nach einem bestimmten Willen handeln, und wenn die Gesellschafter uneinig sind, wenn der eine „ja", der andere „nein" sagt, so *muß* ein Mittel gefunden werden, um *einen* Willen zu bilden.

Die Frage, wie dies geschehen soll, darf indessen nicht rein arithmetisch gelöst werden; das Recht ist kein bloßes Rechenexempel. Sie ist vielmehr eine Frage der durch Erfahrung zu bewährenden Zweckmäßigkeit.

In unserer Zeit, wo das Assoziationswesen unseren ganzen Verkehr beherrscht, hat die Theorie des Privatrechtes sich mit der volonté générale sehr eingehend beschäftigt und wir sind da zu einer Reihe ganz verschiedener Regeln gekommen.

Bei der offenen Handelsgesellschaft verlangt man zu jeder Handlung, wenn die Gesellschafter nichts anderes vereinbart haben, Einstimmigkeit.

Wenn also drei „ja" und der vierte „nein" sagt, so ist die volonté générale *„nein"*; sie wird gegen die drei durch die Stimme des Vierten gebildet. Bei Gesellschaften großen Umfanges — Aktiengesellschaften, Genossenschaften, Vermögensmassen — unterscheidet man gewöhnlich zwischen einfachen und grundsätzlichen Beschlüssen.

Bei den ersteren läßt man die einfache Majorität entscheiden, verlangt dagegen bei den anderen eine Zweidrittel- oder Dreiviertel-Majorität, oder eine Verbindung mehrerer Majoritäten, z. B. zwei Drittel Personen- und drei Viertel Kapitalszahl u. a.

Die heutige Zeit beschäftigt sich auch sehr eindringlich mit der Frage über den Schutz der Minoritäten, und mit dem Prinzip der volonté générale ist der ausgiebigste Schutz der Minorität verträglich. Es ist immer nur eine Zweckmäßigkeitsfrage, ob die Handlungskraft der Gesellschaft durch eine einzelne Vorsichtsmaßregel zum Schutze der Minorität nicht allzusehr geschwächt werde.

Das war der zweite Schritt in der Entwicklung der Sozialtheorie.

Wir kommen nun zu dem dritten.

Um die Notwendigkeit dieses dritten Schrittes zu erkennen, genügt ein Beispiel, welches wohl manche von Ihnen selbst in einem heiteren Kreis erlebt haben. Es macht jemand den Vorschlag, daß ein Zweiter der Gesellschaft etwas, z. B. eine Flasche Wein, zum besten gebe. Dieser weigert sich und der Erste stellt nun den Antrag, darüber abzustimmen. Es ergibt sich immer dasselbe Resultat: alle sind dafür, mit Ausnahme desjenigen, welcher zahlen soll.

Das ist nun sehr heiter, wenn es sich um eine Flasche Wein handelt und wenn derjenige, der doch nicht zahlen wollte, an den Beschluß nicht gebunden ist.

Aber es ist furchtbar, wenn es sich um Leib, Freiheit und Vermögen handelt und wenn der Überstimmte *muß*.

Es ist durch dieses Beispiel augenscheinlich, daß auch die größte Vorsicht bei Bildung von Majoritäten vor Vergewaltigung des einzelnen nicht schützt, und daß es gewisse Rechte des Gesellschafters geben muß, welche jeder Majorisierung entzogen sind.

Zu dieser Einsicht gelangte man auch schon im Privatrechte. Es ist Gewicht darauf zu legen, daß die Erkenntnis im Privatrechte sich Bahn brach, weil dort die Untersuchung unbefangen ist, weil nicht, wie es bei Staatsdebatten unausweichlich ist, Sympathie und Vorurteil die Entscheidung beeinflussen, und weil deshalb die Konsequenzen, zu denen die Wissenschaft im Privatrecht gelangt, als rein wissenschaftlich angenommen werden können.

Bei den Aktiengesellschaften, wo der eine Gesellschafter für den anderen nicht mehr als eine Nummer ist und wo daher Versuche zu gegenseitiger Ausbeutung viel mehr zu fürchten sind als bei Vereinigungen weniger, die sich kennen und achten, hat Rechtstheorie und Gesetz gewisse Ansprüche des Genossen jeder Majorisierung entzogen.

Man nennt sie *Individualrechte*.

Man kann wesentliche und unwesentliche Individualrechte unterscheiden. Die unwesentlichen bedeuten nur den weitestgehenden Schutz der Minorität.

Wenn eine Generalversammlung einen Beschluß gefaßt hat, so kann das Statut verfügen, daß zehn Aktionäre zusammen den Beschluß anfechten können; es kann aber auch verfügen, daß jeder Aktionär das Anfechtungsrecht besitzt. In letzterem Falle entsteht ein Individualrecht; es ist dies offenbar nur ein höherer Schutz gegen die Majorisierung, und es ist Frage der Zweckmäßigkeit, ob und

inwieweit dieser Schutz oder die Handlungskraft der Gesellschaft den Vorzug verdient.

Die wesentlichen Individualrechte sind diejenigen, welche mit dem Prinzip der Gesellschaft und der Eigenschaft des Gesellschafters so innig verbunden sind, daß derjenige, der sie nicht besitzt, gar nicht den *Namen eines Gesellschafters verdient*, sondern unter einem klingenden Titel nur der Diener der anderen ist.

Einen Beweis gibt Ihnen das vorangeschickte Beispiel. Wenn der einzelne durch die Majorität gezwungen werden kann, für alle zu zahlen — ist er dann noch Genosse, noch Gleicher unter Gleichen? Ist dies nicht Unterdrückung unter dem Judaskuß der Freundschaft?

Von den Individualrechten wollen wir hier nur *ein* Recht hervorheben. Es ist das Recht aus der *Einlage*.

Die Einlage ist das Gut, welches der Genosse aus seinem Eigen in die Gesellschaft eingebracht hat. Sie wird hier mit dem Vermögen der anderen vereinigt, verliert ihre abgesonderte Existenz und wird zu einem Teil des Grundfonds der Gesellschaft. Allein der Gesellschafter behält einen eigentumsähnlichen Anspruch auf das von ihm eingetauschte Gut.

Fürs erste steht sein Anteilrecht am gemeinschaftlichen Vermögen und an dem etwaigen Gewinne der Gesellschaft außer Frage. Die Aktie, der Anteilschein ist sein Eigentum.

Außerdem aber ist auch der Grundfonds, welcher seine Einlage enthält, der Verfügung der Gesellschaft weit mehr entrückt als der von der Gesellschaft erworbene Gewinn. Er ist wirtschaftlich ein der Gesellschaft von den einzelnen Mitgliedern zur nutzbringenden Verwaltung anvertrautes Gut. Sie kann daher über ihn nicht frei bestimmen wie über den von ihr selbst erworbenen Gewinn, auch nicht durch Statut. Sie kann auf Kosten des Fonds keine Begünstigung an einzelne Mitglieder gewähren, und solange der Fonds nicht gesichert, und wenn er durch Verluste gekürzt worden war, nicht ergänzt worden ist, kann von Gewinn und Gewinnverteilung nicht die Rede sein.

Die deutsche Gesetzgebung hat das Prinzip in einer Novelle zu dem etwas unklar gehaltenen Handelsgesetzbuche zur vollen Geltung gebracht, in Österreich liegt der Entwurf zu einem gleichen Gesetze bereits vor.

Das Prinzip der Individualrechte, insbesondere auch der Erhaltung der Einlagen, gilt wie für freiwillige, so für Zwangsgenossenschaften.

Der Unterschied der beiden besteht nicht darin, daß die Zwangsgenossenschaft einen anderen Zweck oder ein anderes Prinzip hätte. Jede Zwangsgenossenschaft setzt vielmehr voraus, daß die Mitglieder, wenn sie vernünftig ihren eigenen Vorteil erwägen, freiwillig in die Genossenschaft eintreten. Nur ist das Interesse des einzelnen mit dem Interesse anderer so innig verknüpft und das letztere so wichtig, daß man nicht warten kann, bis der einzelne vernünftig geworden ist, sondern ihn aus Rücksicht für die anderen zu seinem Vorteile zwingt. Aber das Gesellschaftsprinzip ist das gleiche wie bei der freiwilligen Gesellschaft und die Rechte der Mitglieder sind die gleichen.

Im Gegenteile: während die freiwillige Gesellschaft gewisse Ausnahmen verfügen kann, weil sie es dem einzelnen freigestellt hat, einzutreten, und er sich gewissermaßen durch seinen freiwilligen Eintritt der Ausnahme unterwirft, ist die Zwangsgenossenschaft, welche dem einzelnen die Freiheit nimmt, an die Grundsätze der Billigkeit fest gebunden. Was bei der freiwilligen Gesellschaft rationell ist, wird bei der Zwangsgenossenschaft Gerechtigkeit.

Eine solche Zwangsgenossenschaft ist nun auch bei vorgeschrittener Kultur die menschliche Gesellschaft — Kulturgesellschaft —, deren Funktionen derzeit durch die einzelnen Staaten ausgeübt werden.

Der einzelne wird in sie gezwungen, er muß einem der Staaten, in welche sie sich abteilt, angehören. Er wird aber dann auch Gesellschafter mit den Rechten eines solchen und insbesondere auch mit Individualrechten, welche wir als Grund- und Privatrechte des einzelnen kennen.

Was sind nun die Einlagen, welche die einzelnen in die Gesellschaft bringen und aus deren Vereinigung der Fonds der Gesellschaft entsteht, zu deren nutzbringender Verwaltung die Gesellschaft gebildet ist?

Nichts anderes als ihre *menschliche Existenz und Kraft*.

Gäbe es keine Gesellschaft, so würde der einzelne seine Kraft im Kampfe gegen die anderen rücksichtslos zu seinem Vorteil verwenden, und gerade die Enterbten der Gesellschaft hätten in ihrer rüstigen und gewalttätigen Natur eine gewisse Wahrscheinlichkeit für ihr Fortkommen.

Dieses Wollen und Können muß er nun in die Gesellschaft einlegen, aus der Vereinigung der einzelnen zu einem Ganzen bildet sich das *Volk*, aus der Vereinigung ihrer Kräfte die *Volkskraft* — der Fonds der Gesellschaft.

Der einzelne erhält diese Einlage nicht zurück.

Er hat die Freiheit des vereinzelten Menschen verloren und darf nicht mehr unbefangen und rücksichtslos seinen Vorteil verfolgen. Er ist Mitglied der menschlichen Gesellschaft geworden, muß sich als solches wissen und seine Lebensweise derart einrichten, daß er als Glied des Ganzen in und mit den anderen lebt und wirkt. Sein Streben hat zum unmittelbaren Ziel nicht mehr sein Wohl, sondern das Wohl des Ganzen, in welchem sein Wohl begriffen ist.

Diese große Umwandlung im Willen des Individuums durch die Bildung der menschlichen Gesellschaft nennen wir — *Moral*.

Möge man als Prinzip der Moral aussprechen: „Liebe deinen Nächsten wie dich selbst" — oder „was du nicht willst, daß dir geschehe, das tue auch dem andern nicht" — oder sonstwie: es ist immer dasselbe, es bedeutet den Willen, in Frieden und Eintracht mit allen anderen zu leben.

In dem Worte „Eintracht", „zu einem ganzen trachten" bietet die Sprache hiefür einen trefflichen Ausdruck.

Soweit die soziale Lebensweise des Individuums zur Erhaltung der Gesellschaft notwendig oder außergewöhnlich nützlich ist, soweit sie deshalb eingehalten werden *muß:* soweit ist sie *Rechtsinhalt*, Rechtspflicht.

Durch Einlegung seiner Kraft hat nun aber auch das Individuum die beiden Grundrechte erhalten. Es darf als Mitglied der Gesellschaft nicht verleugnet werden und seine Existenz ist ein Teil des Grundfonds der Gesellschaft geworden.

Vor der vollständigen Sicherung dieses Fonds darf nach den Grundsätzen aller Gesellschaft kein Gewinn, besonders keine Begünstigung an einzelne Mitglieder verteilt werden. Die Gesellschaft darf also keine wie immer geartete Luxusausgabe machen, möge sie auch von noch so großer wissenschaftlicher, künstlerischer oder industrieller Wichtigkeit sein. Vor allem muß der Fonds gesichert sein.

Was wir mit gesundem Menschenverstand erkannt haben, wenn uns der Gegensatz zwischen Luxus und Hunger anschaulich vors Auge trat, was wir klar empfinden, wenn wir uns das Bild einer

großen Familie vorstellen — welches Haupt einer noch so großen Familie wird einem einzelnen Mitgliede Luxus erlauben, wenn es nicht für *alle* das zum Leben Nötigste zurückgelegt hat? — das ist nun eine logische Konsequenz aus dem Prinzip der Gesellschaft.

Das Individualrecht ist in der sozialen Theorie überhaupt von großer Wichtigkeit. Es ist der Punkt, wo die individualistische Anschauung eintritt, es ist der Sitz der menschlichen und bürgerlichen Freiheit, das *erste* Individualrecht aber ist: *das Recht zu leben.* —

Machen wir nun die Probe der Nützlichkeitsrechnung für die Gesellschaft.

Daß die Sicherung der friedlichen Bürger gegen Gewalttat die Bedingung für jeden ruhigen und sicheren Verkehr, für alles gesellschaftliche Leben ist, bedarf keiner Erörterung.

Die Not aber ist die Quelle der Verbrechen; 70 bis 80% aller Verbrechen erfolgen aus Not. Was gegen die Not geschieht, geschieht also präventiv gegen das Verbrechen. Außerdem muß der Staat den Verbrecher versorgen. Der Arme braucht nur zu stehlen, um vom Staate erhalten zu werden; kann der Staat einen unmittelbaren und so kräftigen Antrieb zum Verbrechen bieten?

Die Not ist die Quelle aller Aufstände und Revolutionen, und ein einziger Aufstand zerstört mehr Kapital, als die rationelle Armenversorgung für viele Jahrzehnte kostet. Denken Sie an die Kommune, an Irland!

Die Not ist ein Seuchenherd; die Krankheit, welche noch keine Kraft über den Gesunden hat, vermag schon den durch Not abgezehrten Körper zu bewältigen, und hat sie sich durch einige Opfer gekräftigt, so ist sie stark genug, um dann auch Gesunde anzugreifen.

Die Not ist die furchtbarste Kapitalsverschwendung.

Quetelet berechnet den Kapitalswert, welchen Frankreich nach den Verhältnissen und Preisen des Jahres 1821 bloß an jenen Kindern verliert, welche vor dem 15. Jahre, also vor Beginn ihrer Arbeitskraft sterben, mit 432 Millionen Francs. Davon kommen mindestens 350 Millionen auf den Einfluß der Not zu stellen. Dabei ist der Verlust an Arbeitskraft und Lebenszeit bei denjenigen, welche das 15. Jahr überlebt haben, nicht gerechnet. Bekanntlich wird der Rentier durchschnittlich 60 Jahre, der Arbeiter 33 Jahre alt; die Verkürzung des Lebens ist aber keine Folge der Arbeit, sondern der

Not, der ungenügenden Krafterneuerung. Welcher Kapitalsverlust! Und das Kapital, welches hier verlorengeht, ist nicht etwa eine bloße Hoffnung auf Gewinn, eine Börsenchance, es ist die solideste aller Güterquellen, es ist Menschengeist, Menschenkraft.

Und das ist nach rein kapitalistischer Berechnung der Verlust, wobei die Bedeutung des Menschen für die Integrität, Freiheit und Machtstellung des Staates gar nicht in Betracht kam. Man kann sich gewiß keinen stärkeren Verlust von Nationalvermögen denken! —

Auch die Gefahren wollen erwogen sein. Man könnte fürchten, daß durch eine allgemeine Versorgung der Existenz Vagabunden gezüchtet werden. Die Furcht ist unbegründet. Gerade jetzt, wo man den Armen, der versorgt sein will, zum Betteln zwingt, sobald er aber bettelt, ihn aus der Gesellschaft der ehrlichen Leute ausschließt, züchtet man einen Bettler- und Vagabundenstand. Der Arme, dem sein Ehrgefühl nicht geraubt wird, verwirft sich selten oder nie.

Es wird auch gar nicht verlangt, daß die Versorgung stets ohne Arbeitsentgelt gegeben werde, das ist Sache der rationellen Ausführung. In Wilhelmsdorf z. B. ist eine Arbeitskolonie gegründet, bei welcher sich jeder Zureisende beteiligen und durch eigene Arbeit einen Zehrpfennig für die nächste Zeit erwerben kann. Die Kolonie hat sich schön bewährt.

Es ist nicht einmal zu hoffen, daß mit der Versorgung Friede zwischen den Menschen werde. Wer Brot hat, will Fleisch, das ist ein altes Gesetz. Nur schwingt der Hunger nicht seine Peitsche und verwandelt ernstes Streben in Haß und Zerstörungswut; der Kampf wird menschlich, menschenwürdig!

Wenn also der gesunde Menschenverstand, wenn individualistische Rechtsanschauung, wenn endlich Konsequenz und Nützlichkeit für die Gesellschaft in so dringendem Maße für den Schutz des Lebens sprechen, so können wir nunmehr mit voller Beruhigung sagen: Der Anspruch zu leben ist ein rationeller Rechtsanspruch. —

Die Bedeutung des Anspruches ist unschätzbar.

Das Recht, nicht getötet zu werden, ist ein Protest gegen den Krieg, die internationale Massentötung, und insbesondere gegen den im jetzigen Europa herrschenden allgemeinen Konskriptionszwang zum stehenden Heere, eine Institution, welche unter dem schillernden Namen der allgemeinen Volkswehr sich selbst die Billigung von Idealisten errungen hat, ihren wahren Charakter aber dadurch ent-

hüllt, daß sie eine Schöpfung Napoleons I. ist, des großen Verächters des Menschenlebens!

Das Recht, nicht getötet zu werden, ist auch ein Protest gegen die Todesstrafe — ein bereits zu oft besprochenes Thema — und gegen die Modenarrheit der Zeit: das Duell.

Ein verdienstvoller Offizier soll zu einer Stelle befördert werden, ein Kritiker bezweifelt seine Fähigkeit hiezu.

Man möchte nun bei dem Offizier den Gedankengang vermuten: Wenn ich drei Jahre die Stellung bekleidet haben werde, so werde ich dem Herrn beweisen, daß ich zu derselben fähig war! Doch nein! Der Offizier fühlt einen Flecken an seiner Ehre, welcher nur durch Blut ausgewaschen werden kann. Er fordert den Kritiker, er nötigt ihn zum Duell und ist in wenigen Sekunden eine Leiche. Jetzt ist der Flecken ausgewaschen! Die Sache wäre geradezu komisch, wenn sie nicht so traurig wäre!

Das Recht zu leben in der zweiten Form ist der Kernpunkt der sozialen Frage. Alle Vertreter des Sozialismus, mögen sie nun entweder die Armen überhaupt, oder die Arbeiter als die durch die heutigen Produktionsverhältnisse zur Armut gezwungene Klasse vertreten, wollen Abhilfe gegen die Not, und sie wenden sich dabei stets an die Gerechtigkeit, sie verlangen den Schutz des Staates als *Recht der Notleidenden.*

Seitdem der konservativste Mann unserer Zeit — der deutsche Reichskanzler — den Rechtsstandpunkt angenommen hat, ist derselbe aus einem revolutionären, als welcher er verschrieen war, zu einem konservativen geworden.

Und er ist konservativ im vollen und ganzen Sinne, er erhält die Gesellschaft und die Staaten!

Nicht Versorgung aus Gnade, welche launisch und unzuverlässig ist und welche das Ehrgefühl des Nehmers erstickt oder in Undank und Haß gegen den Besitz verkehrt! Nicht Versorgung aus nüchterner Politik im Interesse der Besitzenden, welche rücksichtslos und pedantisch ist — denken Sie an unser Schubwesen, diese Schande unserer Zeit, wo man Ehrliche und Verbrecher untereinander wirft und mit dem ersten Male das Ehrgefühl für alle Zeit erstickt!

Bei beiden fühlt sich der Arme als Gegner der Gesellschaft betrachtet und handelt danach.

Nein, Versorgung als Akt ausgleichender Gerechtigkeit, als Ver-

söhnung mit der Verschiedenheit der Lebensgüter, welche wir derzeit noch nicht vermeiden können.

Die Gesellschaft darf nur zwischen gut und böse, nicht zwischen reich und arm unterscheiden. Dem Armen muß das Ehrgefühl, das Bewußtsein des Gleichen unter Gleichen gelassen werden. Er muß die Gesellschaft der anderen als Wohltat fühlen, ohne sich erniedrigen und danken zu müssen.

Dann ist die Kluft zwischen Besitzenden und Besitzlosen überbrückt, eine feste Grundlage für die Anhänglichkeit aller aneinander und das Gemeinwesen geschaffen, und dann können wir hoffen, zu einem wirklichen und dauernden Frieden zu gelangen.

DAS RECHT AUF ARBEIT.

Vortrag, gehalten im Wissenschaftlichen Klub zu Wien am 24. November 1884.

Motto:
Der Lebende hat recht.
An Stelle des Schwertes der Pflug!

Verehrte Anwesende!

Soziale Ideen haben oft seltsame Schicksale. Was gestern noch als radikal betrachtet wurde, ist heute konservativ; von dem man gestern den Umsturz der Gesellschaft fürchtete, gilt heute als deren Stütze. Ein Beispiel bietet Ihnen die Grundentlastung. Wer noch wenige Monate, bevor das befreiende Wort gesprochen wurde, die Aufhebung der gutsherrlichen Rechte, zum Teil ohne Entschädigung, verlangt hätte, wäre als ein Hochverräter schlimmster Art behandelt worden. Da kam für Österreich das Jahr 1848, der Antrag Kudlichs, das Gesetz vom 7. September.

Die Revolution wurde niedergeworfen, alle ihre Schöpfungen wurden zerstört, aber an die Grundentlastung rührte kein Mensch. Sowie das Wort gesprochen war, erschien die Freiheit von Grund und Boden so selbstverständlich, so innig verwachsen mit unseren Verhältnissen, so festgewurzelt im Rechtsbewußtsein des Volkes, daß auch die Kreise, welche sich allen neuen Ideen verschlossen hatten, dieser Überzeugung sich beugen mußten.

Die Grundentlastung war über Nacht konservativ geworden.

Eine ähnliche Wandlung trat vor kurzer Zeit bei dem *Recht auf Arbeit* ein. Seit der großen Debatte in der französischen Februarrevolution zwischen Thiers, Louis Blanc, Proudhon und ihren Anhängern war das Wort geächtet; wer es in den Mund nahm, erschien als Feind der Gesellschaft. Da bekannte sich plötzlich der deutsche Reichskanzler als dessen Anhänger und ließ es in die kaiserliche Botschaft vom Jahre 1881 aufnehmen. Mit diesem Moment trat die Wendung ein. Wenn der deutsche Kanzler, diese durchaus konservative Natur, dieser nüchterne und weitblickende Realpolitiker, das Recht verfocht, dann konnte es doch nicht so staatsgefährlich sein. Es wurde wieder in die Gesellschaft aufgenommen und ist seither viel besprochen.

Sie erinnern sich, meine Verehrten, an die Aufregung, welche das Wort im deutschen Reichstag hervorrief, an den Sturm, welcher sich gegen den Kanzler erhob.

Was war der Grund hievon? Der Kanzler konnte sich auf das preußische Landrecht, ein 100jähriges Gesetz, berufen; er hätte sich auf ein weit älteres Gesetz, die Akte von 1604 unter Elisabeth von England berufen können, und deutsche Stadtrechte hatten (zuerst, wie ich glaube, Nürnberg 1522) das Recht noch früher aufgenommen. Alle diese hatten zwischen arbeitsfähigen und arbeitsunfähigen Armen geschieden und enthielten die Vorschrift, daß die letzteren Versorgung, die arbeitsfähigen Arbeit auf öffentliche Kosten erhalten sollen. Woher also im Jahre 1881 die Erregung? Es scheint das rätselhaft und die Erklärung ist dennoch leicht: *das Wort war seit der Zeit sozialistisch geworden.*

Denken Sie sich, meine Herren, eine Bittschrift von wenigen Personen dem leitenden Minister eines Staates vorgetragen; und denken Sie sich dieselbe Bittschrift, in derselben Art abgefaßt, in demselben Ton vorgetragen, aber von einer Deputation, während 500.000 Mann vor den Fenstern stehen und sich zu derselben bekennen. Das Gesuch ist dasselbe, ganz dasselbe — und dennoch nicht dasselbe; die Masse, welche hinter ihm steht, wirkt wie ein großer Resonanzboden, welcher den leisen Ton, welchen das Instrument angeschlagen hat, zu lautem Schall verdichtet.

Der Unterschied besteht aber nicht bloß, wenn das Bittgesuch vorgetragen wird, er ist auch dann vorhanden, wenn es vorgetragen werden könnte. Es ist ein Unterschied, ob ein Wunsch bei wenigen Personen und in geringer Stärke vorhanden ist, oder ob er große Massen des Volkes mit starker Energie ergriffen hat. Im ersten Falle mag der Gesetzgeber den Wunsch prüfen, er mag ihn auch billigen und in sein Gesetz aufnehmen; aber er fühlt sich frei, er handelt nur aus eigenem Antriebe, aus seiner Humanität und Staatsweisheit. Im zweiten ist der Wunsch ein Machtfaktor; der Staatsmann mag sich zu ihm stellen wie er will, aber er muß mit ihm rechnen, er muß wissen, daß eine Macht vor ihm steht.

Das ist nun der Unterschied in der Situation des Rechtes auf Arbeit noch am Ende des 18. Jahrhunderts und heute. Das Landrecht war noch nicht durch politische Motive beeinflußt; es war beseelt durch die Humanität, den Geist der Aufklärungszeit.

Zwischen 1791 und 1881 aber liegt das 19. Jahrhundert mit seinem Aufschwunge der Industrie, welcher die Arbeitermassen erst geschaffen hat, mit seinen Fabriken, in welchen Hunderte und Tausende in einem kleinen Raume sich versammeln, mit seinen Krisen, durch welche Hunderttausende mit einem Schlage brotlos werden; das 19. Jahrhundert mit seinen Menschenrechten, durch welche die Arbeiter erst denken, mit seiner Schule, seiner Presse, seinen Vereinen und Versammlungen, in welchen die Arbeiter ihre Lage und ihre gemeinsamen Wünsche kennen lernen; mit seinem Parlamentarismus, in welchem die streitenden Parteien der herrschenden Klasse sich beide an die Arbeiter wenden, ihnen ihre Macht zeigen, sie auffordern, diese Macht zu gebrauchen, freilich zu ihrer, der Mahnenden, Vorteil. So sind am Ende des 19. Jahrhunderts die Arbeiter eine Macht geworden!

Der deutsche Reichskanzler ist kein Humanist; nicht eine Ader von ihm ist humanistisch getränkt; aber er ist ein weitsichtiger Politiker, und aus Politik ist er zu demselben Ziele gelangt, welches hunderte Jahre vorher die Humanität gewiesen hatte. So innig verwandt sind wirkliche, weitblickende Politik und Humanität!

Woher aber die Opposition? Wenn es gilt, für Hunderttausende zu sorgen, so ist doch die Hilfe dringender, als wenn man geglaubt hatte, es handle sich um wenige. Gewiß ist sie dringender, meine Verehrten! Aber es zeigt das wieder, wie mißtrauisch wir gegen die Logik sein müssen. Man muß erst ein Verhältnis nach allen Seiten durchforscht haben, bevor man Konsequenzen ziehen darf. Gewiß ist die Hilfe dringender, aber sie kostet auch mehr. Früher konnte man glauben, mit ziemlich geringem Aufwande durchzudringen. Jetzt, da man erkannt hat, die Sorge treffe die ganze Volksmasse, jetzt mußte man auch wissen, daß es sich um mächtige und dauernde Einrichtungen handelt. Und diese Einrichtungen müssen in gewissem Gegensatz stehen zu dem Massenerwerb von einzelnen, und diese einzelnen wehren sich um ihre Sonderstellung. Das ist der Unterschied der Situation.

Es ist aber auch ein Unterschied im Inhalte zwischen den Vorschriften des Landrechtes und zwischen dem Recht auf Arbeit. Das Landrecht kennt noch keine Arbeiter, es kennt nur Arme. Die Armen sind die natürliche Last der Gesellschaft, welche sie versorgen muß. Aber die Gesellschaft kann vernünftige Bedingungen stellen.

So teilt sie die Armen in arbeitsfähige und arbeitsunfähige, versorgt die letzteren ohneweiters und verlangt von den ersteren Arbeit, nicht sowohl um aus dieser Arbeit Vorteil zu ziehen, sondern um Bettel- und Vagabundensinn zu ersticken. Der unmittelbare Nutzen aus der Arbeit steht in zweiter Linie. Eben deshalb wird aber durch diese Arbeit der Charakter der Gabe, welche die Gesellschaft bietet, nicht verändert. Die Gabe bleibt Armenunterstützung und dagegen richtet sich das Recht auf Arbeit. Der Arbeiter behauptet, daß er imstande ist, sich selbst zu erhalten, daß er keine Unterstützung von anderen brauche, und er weist diese zurück. Er verlangt von der Gesellschaft nur, aber er verlangt es, daß sie ihm Gelegenheit gebe, sich durch seine Arbeit selbst zu erhalten. Das Recht auf Arbeit ist wesentlich ein Anspruch, durch sich selbst zu leben, durch eigene Kraft, eigenes Wirken.

Es ist auch nicht immer Armenrecht; das lehrt die folgende Erscheinungsform des Rechtes. Wir alle hassen Nepotismus und Protektionswesen; wir alle erkennen es als Unrecht, wenn Ämter und Stellen, wie das alte Rechtssprichwort sagt, „nach Gunsten und nicht nach Tugenden" verliehen werden, wenn der Würdige aus kleinlichen Ursachen zurückgesetzt wird, der Untüchtige die Stelle erhält. Was ist das aber anderes, als mit konkretem Gefühl den Anspruch eines jeden auf eine seiner Tüchtigkeit entsprechende Arbeit anerkannt? Auch diese Erscheinungsform des Rechtes ist wichtig; Sie wissen, meine Verehrten, daß sie jetzt eben in den Vereinigten Staaten den Kampf um die Präsidentschaft entscheiden half. — Aber freilich, die große soziale Wichtigkeit hat das Recht *nur* dort, wo der Arbeiter Arbeit verlangt, um das zum Leben nötige Brot für sich und seine Familie zu erwerben.

Nun ist die Frage: Kann der Arbeiter behaupten, daß seine Arbeit ihn erhalten kann, und wie kommt er dazu, von der Gesellschaft zu verlangen, daß sie ihm Gelegenheit dazu verschaffe? Die wirtschaftliche Grundlage des Rechtes ist von Wissenschaft und Erfahrung anerkannt. Sie liegt in dem Satze von der Produktivität der Arbeit. Die Arbeit ist imstande, ihre Kosten zu decken und überdies einen Ertrag zu liefern. Wir brauchen uns darüber nicht in weitläufige Untersuchungen einzulassen. Eine Betrachtung genügt. In den Ländern, in welchen noch Sklaverei herrscht, hat jeder Arbeitssklave einen Kaufpreis. Dieser Kaufpreis ist kein Entgelt für einen

unmittelbaren Genuß, welcher ja nicht besteht, sondern *Kapitalisierung des Arbeitswertes*. Der Käufer verspricht sich gemäß erfahrungsmäßiger Berechnung nach Abzug der Erhaltungskosten für den Sklaven sowie aller sonstigen Spesen, nach Abzug einer Assekuranzprämie für die Gefahr des plötzlichen Todes des Sklaven oder eines sonstigen plötzlichen Verlustes seiner Arbeitskraft, nach Abzug einer Amortisationsquote, weil mit dem zunehmenden Alter die Arbeitskraft allmählich erlischt, noch immer einen jährlichen Gewinn, welcher nach landesüblichem Zinsfuß den Zinsen des Kaufpreises entspricht. Wenn also jemand für einen Arbeitssklaven bei landesüblichem Zinsfuß von 3 Prozent 10.000 Dollar gibt, so verspricht er sich erfahrungsmäßig nach Abzug aller Spesen, insbesondere der Erhaltungskosten des Sklaven, nach Abzug von Amortisationsquote und Assekuranzprämie noch immer einen jährlichen Gewinn durch dessen Arbeit von 300 Dollar. Nun ist es bekannt, daß die Arbeit des freien Mannes, weil sie durch das eigene Interesse angeregt wird, viel produktiver ist als Zwangsarbeit, und wenn also die Arbeit des Sklaven mehr bietet als die Erhaltungskosten des Arbeiters, um wieviel mehr die Arbeit des Freien!

Eine andere Betrachtung! Die Arbeit kann ohne Kapital — ich rechne zum letzteren auch Grund und Boden — nicht produzieren; das Kapital ohne Arbeit gewiß nicht; sie müssen vereinigt werden. Wenn wir also die Erhöhung der Produktivität der Arbeit durch das Kapital dem Kapitalisten ganz allein zugute kommen lassen — es ist dies nicht notwendig —, so besteht infolge der gemeinsamen Produktion zwischen Kapitalisten und Arbeiter jedenfalls ein Gesellschaftsverhältnis und die Teilung des Produktes hat dementsprechend zu erfolgen. Der Kapitalist hat das Kapital eingesetzt, der Arbeiter seine Arbeitskraft oder, im wirtschaftlichen Äquivalent ausgedrückt, die Kosten der Erhaltung seiner Arbeitskraft, das Arbeiterminimum.

Das letztere ist höher als das bloße Existenzminimum, weil es nicht bloß das Leben, sondern auch die Arbeitskraft erhalten soll. Der Kapitalist erhält sein Kapital und den landesüblichen Zins; der Arbeiter hat also das Arbeiterminimum und einen dem landesüblichen Zinse desselben entsprechenden Gewinn zu erhalten. Sie sehen, die Arbeit kann den Mann nähren, die wirtschaftliche Grundlage für den Anspruch des Arbeiters besteht.

Kann er aber von der Gesellschaft beanspruchen, daß sie ihm Gelegenheit zur Arbeit verschafft? Hat sie irgendwelche Rechtspflicht gegen ihn?

Es gibt jetzt im ganzen und großen drei verschiedene Anschauungen über Rechtspflicht. Die ältere rechtsdogmatische Schule unterscheidet zwischen negativem und positivem Verhalten. Rechtspflicht ist, niemanden zu schädigen, zugefügten Schaden wiedergutzumachen; ein Handeln zum Vorteil des andern gehört in das Gebiet der Moral. Die neuere rechtsdogmatische Schule stellt den Grenzpunkt etwas höher und nimmt ein gewisses Maß positiver Energie in das Gebiet der Rechtspflicht auf, ein Charakterminimum. Wenn jemand einen gewissen minimalen Grad von Aufmerksamkeit und Kraft nicht anwendet, so vergeht er sich rechtlich durch Unterlassung, wird straffällig und ersatzpflichtig. Die höhere soziale Energie gehört in die Moral. Die dritte Anschauung, die rechtspolitische, kümmert sich um den Unterschied zwischen negativ und positiv nicht. Sie sagt: Zweck alles Verhaltens ist das Wohl der Menschen in ihrem Zusammensein. Was hiezu notwendig oder fast notwendig ist, das ist Rechtspflicht; was nützlich ist, ohne notwendig zu sein, ist moralisch. Aber auch sie stimmt darin überein, daß im allgemeinen die Negative wichtiger ist, daß es notwendiger ist, nicht zu schaden als zu nützen. Wir wollen deshalb untersuchen, ob der Arbeiter die Negative geltend machen kann, um seine Ansprüche gegen die Gesellschaft zu stützen, d. h. ob er behaupten kann, durch sie *geschädigt* zu sein.

Da kann nun schon der Arme gegen die Gesellschaft den Vorwurf erheben, daß sie ihn eingesperrt habe, und daß er dadurch allein gezwungen sei, Not zu leiden. Um ihn sind Lebensmittel genug: urbarer Boden, Holz im Walde für Hütte und Werkzeuge, Früchte auf den Bäumen, Geflügel in der Luft. Aber er darf nicht zugreifen, alles ist Eigentum, und mitten im Überfluß ist er zum Elend verdammt: nicht durch die Natur, nur durch die Gesellschaft. Nach allgemeinen Grundsätzen des Strafrechtes handelt derjenige, welcher einem anderen Hilfe versagt, unschön, manchmal straffällig. Wenn er ihn aber früher eingesperrt hat, daß er sich selbst nicht versorgen kann, und ihm nunmehr die Nahrung versagt, so daß der Mann verhungern muß, so hat er den Mann gemordet. Es ist nicht mehr ein Unterlassen, sondern nur ein *Eintretenlassen* der notwendigen

Folgen der Handlung, ein Geschehenlassen, wie Glaser sagt. So kann also der Arme sagen: wenn die Gesellschaft ihm nicht das Unentbehrliche zum Leben gebe, so habe sie ihn gemordet. Sie habe ihn durch ihre Ordnung oder Mißordnung eingesperrt und überlasse ihn nun seiner Pein.

Wir bemerken, daß der Arme auch hier schon bereit sein muß zu arbeiten; ohne Arbeit gibt der Boden nicht die Frucht, gibt der Wald nicht die Hütte. Aber der Arbeiter stützt sich auf eine andere Tatsache, und das ist *die Arbeitsteilung mit ihren natürlichen Folgen.* Stellen Sie sich einen Zustand der Gesellschaft vor, in welchem die einzelnen Wirtschaften voneinander getrennt sind und jeder produziert, was er braucht. Der Zustand ist, wenn auch nicht in voller Reinheit, noch an manchen Orten zu treffen. Nun tritt die Arbeitsteilung ein. Was soll denn geteilt werden? So lange jeder für sich arbeitet, kann er mit niemandem teilen. Sie sehen, meine Herren, die Grundlage für die Arbeitsteilung muß erst geschaffen werden. Die einzelnen müssen zusammentreten — wenn auch nicht durch förmlichen Vertrag und mit Feststellung genauer Punkte des Dürfens und Sollens, sondern durch Vertragen, durch Erkenntnis des gemeinsamen Interesses — sie müssen ihren Bedarf zu einem Gesamtbedarf vereinigen. In die Versorgung *dieses Gesamtbedarfes* teilen sie sich nun, indem jeder gewisse Artikel zu arbeiten übernimmt. Dabei ist der Zweck aller, daß ihre Arbeiten sich ergänzen und gemeinschaftlich den Gesamtbedarf decken. Das Wort „Arbeitsteilung" ist also verführerisch; es drückt nicht dasjenige aus, was es bedeuten soll. Bedeuten soll es: *Gesamtarbeit zur Versorgung des Gesamtbedarfes aller,* und um den Begriff zu erklären, wäre das Wort Arbeitsvereinigung oder Organisierung der Arbeit weit besser am Platze; denn gerade die Teilung einer Gesamtarbeit nach Funktionen nennen wir Organisierung. Nur tritt das Moment des Geteiltseins anschaulich vor und dadurch ist das Wort beliebt geworden. Durch die Organisierung wird infolge der Gleichförmigkeit der Arbeit jedes einzelnen Kraft erspart, und die Folge ist oder soll sein, daß ein jeder Mitarbeiter — das Verhältnis der Gleichheit ist ja nicht berührt — mit ebensoviel oder weniger Arbeit besser leben und Zeit ersparen soll zur Vervollkommnung seiner nicht unmittelbar produktiven, aber human hochstehenden Fähigkeiten und Eigenschaften. Jeder Mitarbeiter müßte dabei willkommen sein, denn er bringt den

Konsumenten in sich selbst mit, und die Arbeitsteilung erweitert sich.

Wie schaut es nun bei uns aus? Ist diese Folge eingetreten? Wir sehen, daß die große Menge der beschäftigten Mitarbeiter in ruhigen Zeiten notdürftig lebt, bei jeder kleinen Stockung dem Hunger ausgesetzt ist; wir sehen weiters, daß eine große Menge Arbeiter keine Arbeit findet, daß ihre Mithilfe direkt zurückgewiesen wird. Woher kommt es denn, daß die natürliche Folge der Arbeitsteilung nicht eintritt? Daß man sogar hilfsbereite Kraft nicht mag? Da muß *ein positiver Fehler* in unserer gesellschaftlichen Organisation liegen, welcher zum Schaden der Arbeiter die vernünftige Entwicklung stört! Wenn also der Arbeiter verlangt, daß dieser positive Fehler beseitigt wird, so steht er auf dem Standpunkte der negativen Rechtspflicht, auf dem strengsten Rechtsstandpunkte.

Wir wollen kein Zeit verlieren, um zu beweisen, daß, wenn wir von der Nützlichkeit und Notwendigkeit für die Gesellschaft ausgehen, der Anspruch auf das beste unterstützt ist. Was kann humaner sein, als eine Maßregel, welche Millionen versorgt und zugleich ihr Selbstgefühl schont, diese Quelle einer Anzahl der edelsten Eigenschaften des Menschen? Was kann nützlicher sein, als das ausgiebigste Mittel zur Beseitigung des Proletariates, dieser Last und Gefahr unserer Gesellschaft? Denn das Proletariat ist gerade dadurch so gefährlich, weil es in seiner großen Masse aus arbeitskräftigen Leuten besteht, bei welchen Kraft und durch Not entfachte Leidenschaft sich vereint. Aber noch mehr! Wenn der Arbeiter in den Stand gesetzt wird, durch seine Arbeit zu leben und einen Familienstand zu gründen, so wird er seßhaft, erhält Liebe für Heimat und Familie und bildet jenen kleinen Mittelstand, welcher zu allen Zeiten die Grundlage für Dauer und gesunde Kraft der Gesellschaft war. Man kann kühn den Satz aufstellen, daß auf der Selbsterhaltung der Arbeiter die Regeneration unserer Gesellschaft beruht!

Allein der wichtigste Einwand, der erhoben werden kann, ist wohl der: Wir erkennen die Nützlichkeit der Maßregel an, wir sind bereit, eine solche zu treffen; wir wollen über Recht und Moral nicht streiten; denn da wir bereit sind, so ist der Grund gleichgültig. Aber ist denn die Ausführung möglich? Sind denn die Schwierigkeiten nicht unüberwindlich?

Meine Herren, wir sollten über Möglichkeit und Unmöglichkeit nicht sprechen. Der Mann, welcher in unserem Jahrhunderte die Energie verkörpert hat, Napoleon I., hat das Wort „impossible" nichtfranzösisch genannt. Man könne das Wort „unmöglich" ebenso — wenn man von jenen metaphysischen Ideen absieht, welche außerhalb unserer Erfahrung liegen — als nicht wissenschaftlich bezeichnen. Unsere naturwissenschaftlichen Versuche haben zu Erfolgen geführt, welche man noch vor 100 Jahren ins Fabelreich versetzte.

Aber vielleicht wäre eine allzu große Schwierigkeit praktische Unmöglichkeit; wir sprechen ja nicht von theoretischer, sondern von praktischer Macht. Ja, meine Verehrten, bevor irgendeine naturwissenschaftliche Erfindung gemacht oder praktisch gestellt wird, werden hunderte und tausende von Versuchen gemacht. Haben wir denn schon ernsthaft probiert? Haben wir an dieses größte der Zeitprobleme schon wirklich Zeit und Mühe angewendet? Und noch mehr, wenn wir die winzig kleinen Versuche, welche bis jetzt gemacht wurden, betrachten, haben sie denn schon einen großen Mißerfolg aufzuweisen, welcher zurückschrecken könnte? Sind denn Bruderladen, Alters- und Krankenversorgung, Arbeitsvermittlung, Fabriksinspektoren und anderes schlecht gewesen? Können wir sagen, daß sie Schaden gestiftet haben? Daß sie nicht im einzelnen besserten? Ist nicht im Gegenteil die Situation derart, daß sie laut fordert, man solle weiter gehen, man solle endlich Versuche im großen machen? Liegt nicht das Übel darin, daß wir uns gegen den Versuch stemmen, daß wir uns fürchten zu beginnen?

Wir wollen indes heute die einzelnen Vorschläge, welche zur Verbesserung der Lage der Arbeiter gemacht wurden, nicht prüfen, wir wollen sie auch nicht durch einen weiteren Vorschlag vermehren. Wir wollen dem Probleme wissenschaftlich etwas näher gehen und wir wollen die Frage aufstellen, welche wir bereits dem Arbeiter in den Mund legten: *Wo ist denn der Fehler in der heutigen gesellschaftlichen Organisation,* daß der Erfolg der Arbeitsteilung nicht eintritt?

In der Produktion liegt er nicht. Freilich produzieren wir zu wenig, und eine statistische Berechnung hat ergeben, daß bei gleicher Teilung der Produkte in Frankreich 100 Frcs. per Jahr auf die Familie kämen. Das ist zu wenig. In Deutschland würde gewiß nicht mehr, in Österreich weniger entfallen. Allein, meine Verehrten,

wenn wir nur den sicheren Konsumenten hätten, produzieren könnten wir sehr leicht das Zehnfache.

Aber auch an der Konsumtion liegt es nicht. Freilich konsumiert die Masse unseres Volkes fast nicht, aber nur weil sie nicht konsumfähig ist, weil ihr die Mittel fehlen. Geben wir ihr die Mittel, und wir haben den Konsumenten schon geschaffen.

Der Fehler kann nur in der Verteilung liegen. Die Verteilung der Güter geht unter Aufsicht und Schutz des Staates vor sich. Wir nennen die Lehre von der Verteilung zwischen mir und dir, als Typen der Personen, unter welche geteilt wird, *die Lehre von Mein und Dein* oder *das Vermögensrecht*. Im Vermögensrecht muß der Fehler liegen, und dort ist er auch. Er besteht, um die Sache in kurzem Satze auszudrücken, *in der Herrschaft des römischen Rechtsgeistes*, d. h. jener Grundsätze, welche im römischen Recht ihren klarsten und vollendetsten Ausdruck gefunden haben. Sie brauchen nicht zu fürchten, daß ich Sie mit einem Traktat aus dem Corpus juris belästigen werde, Sie werden, was ich meine, nach wenigen Worten verstehen.

Das römische Volk war ein Kriegervolk. Es lebte von Eroberung und Beute. Im Frieden war es müßig, der Friede war ihm eine Erholungspause, in welcher man ruhte, genoß und sich zum künftigen Kriege vorbereitete. Bechäftigung im Frieden war dem Römer fremd, höchstens bebaute er seinen Acker; aber den Handel hielt er für eine geringe Art von Betrug, und Arbeit war Sklavenbeschäftigung.

Wie ein Volk ist, so ist sein Recht. Das Recht ist das Spiegelbild des Charakters und der Beschäftigung des Volkes. Es bezeichnet die Handlungsweise eines würdigen Mitgliedes des Volkes. — Wie der Römer, so war sein Recht. Es ist der Typus eines Kriegerrechtes, voll Hochschätzung für die Eroberung, die Okkupation, welche ihm die ursprüngliche, gottbegnadete Quelle alles Rechts und Eigentums ist, voll Geringschätzung für Verkehr und Arbeit. Ich will Ihnen dieses durch ein Beispiel für die Arbeit, welche ja allein das Thema unseres Vortrages ist, darlegen.

Das Arbeitsrecht ist in Rom sehr wenig entwickelt, aber einige Arbeitsverträge kennt man doch, so insbesondere die Verwahrung und die Vollmacht. Den Inhalt der Verträge erkennen Sie aus ihrem Namen. Aber diese Verträge waren wesentlich unentgeltlich, die Dienste wesentlich Gefälligkeiten. Wenn sich der Bevollmächtigte

für seine Mühe oder Zeit etwas bezahlen ließ, so war der Vertrag kein entgeltlicher Vollmachtsvertrag, o nein! Wer sich von jemandem bezahlen läßt, der ist sein Bedienter geworden. Das ganze Geschäft ist degradiert. Es liegt gar keine Vollmacht mehr vor, sondern eine einfache Dienstmiete. Damit hängt bekanntlich das Honorar zusammen. Als man später nicht mehr auskommen konnte, ohne sich für Arbeiten bezahlen zu lassen, als der reiche Born der Ausbeutung fremder Völker versiegte, da gestattete man, für höhere Dienste mit Belassung ihres standesgemäßen Charakters Ehrengeschenke auszubedingen, und gab dafür auf einem Seitenwege, in einem außerordentlichen Verfahren, eine Klage; das römische Zivilrecht gab sich zur Klage niemals her. — Nun, meine Herren, eine größere Verachtung für die entgeltliche Arbeit, und das ist alle Arbeit im sozialen Sinne des Wortes, für die Arbeit, welche den Mann nährt, können Sie sich gewiß nicht vorstellen!

Der Achtung, welche die Arbeit genoß, entspricht ihr Recht, d. h. ihre Rechtlosigkeit. Ein Beispiel! Es baut jemand auf einem Grund ein Haus, dessen Wert den Wert des Grundes um das Fünfzigfache übersteigt. Wem gehört das Gebäude? Der Römer sagt: dem Grundbesitzer; der Erbauer soll sich seine Steine wegnehmen, wenn er kann! Wenn ein Dichter, ein Schiller oder Goethe, seine Dichtungen auf fremdem Papier geschrieben hat, wem gehört wohl das Manuskript? Der Römer sagt: dem Besitzer des Papiers, der Dichter soll sich sein Geschreibsel wegnehmen, wenn er kann! Wir haben in Wien eine Reihe von Kunstwerken aus gegossenem Metall. Wenn der Künstler fremdes Material genommen hat, wem gehört wohl das Kunstwerk? Der Römer sagt: es muß umgegossen werden und der Materialbesitzer erhält sein Material zurück; der Künstler soll sich seine Kunst nehmen, wenn er kann!

Ich denke, meine Verehrten, es ist an diesen wenigen Beispielen genug, um Ihnen zu beweisen, daß das römische Recht für die Würde und den Anspruch der Arbeit nicht das geringste Verständnis hat. Es ist eben Kriegerrecht, Bedeutung hat nur, was sich greifen, was sich nehmen läßt. Der Verkehr verändert den Ort, die Arbeit verändert die Form der Sache; läßt sich Ort und Form greifen? Arbeit und Verkehr vervielfältigen den Wert auf das Hundertfache; läßt sich der Wert greifen? Auf diesem Boden erwächst das römische Vermögensrecht, und nunmehr werden Sie dessen leitende Grund-

sätze wohl begreifen. Im Frieden ist das Eigentum unveränderlich; es gibt ja keinen ursprünglichen Erwerbstitel! Zugleich ist die Sache alles; der Grund ergreift das Gebäude, der Stoff ergreift das Produkt. Menschliche Tätigkeit gilt nichts; was Verkehr und Arbeit schaffen, ist Zuwachs zum bisherigen Besitz. Die Tätigkeit selbst ist auf das Wohlwollen des Besitzers, auf einen freien, unkontrollierten, unkontrollierbaren Vertrag gewiesen.

Aus diesem Rechte, für welches die Sache alles, die Arbeit des Menschen nichts ist, haben wir nun die beiden großen Übel unserer Gesellschaft erhalten, das Latifundienwesen und das Industriemonopol. Die Latifundien sind die reifste Frucht des Systems. Wer einmal einen größeren Besitz erlangt hat, kann ruhig genießen, die Arbeit der anderen vermehrt ohne sein Zutun seinen Reichtum: *das Eigentum heckt,* um ein Wort Lassalles über das Kapital zu gebrauchen. So schwillt der Besitz immer mehr an und wird endlich der Arbeitskraft des Landes verderblich. Das sind die Latifundien. Sie kennen ihre verderbliche Kraft. „Latifundia Romam perdiderunt"; der Großgrundbesitz hat Rom zerstört.

Das Industriemonopol hat eine teilweise andere Entwicklung. Die Gesellschaft war rein kriegerisch geschult. Jede Bildung für Arbeit und Verkehr fehlte. Die große Masse des Volkes war hörig und ganz vernachlässigt; aber auch der Ritter konnte nicht schreiben. Das Leben, welches sich in den Städten anfangs entwickelt hatte, war nach Untergang der Selbständigkeit der Städte erloschen, handwerks- und zunftmäßig erstarrt. In Frankreich und England hatte die Nähe des Meeres noch den freien Geist erhalten; im östlichen Europa war alles erstorben. Als nun die neue Zeit kam und es möglich wurde, durch freie Unternehmung Ansehen und Wohlstand zu gewinnen, da fand die große Aufgabe ein ganz unerfahrenes, unvorbereitetes Geschlecht. Es fehlte und fehlt noch heute an praktischer Intelligenz, an Verstand und Mut zur Unternehmung — Verstand und Mut, meine Verehrten! Verstand ohne Mut ist theoretische, aber keine praktische Intelligenz! Die wenigen, welche beides vereinten, hatten also ein reales Monopol und nutzten es aus. Wenn sie einen gewissen Besitz erlangt haben, dann wirkt zugleich das alte Recht für sie, die Arbeit der anderen kommt ihnen zugute. So hat ihr Erwerb einen richtigen Anfang durch Arbeit; aber dann gewinnen sie zweifach, einmal aus ihrem realen Monopol durch die

mangelnde Intelligenz der anderen, dann aus dem alten Recht; und so stehen sie noch besser als die Latifundienbesitzer, welche bloß genießen.

Das römische Recht gilt bei uns nicht mehr in seiner vollen Strenge. Thomasius schon hatte die Unbill des fremden Rechtes bekämpft. Locke war meines Wissens der erste, welcher die Arbeit als die natürliche Quelle des Eigentums betrachtete. In Frankreich traten die Physiokraten ein, in Deutschland Naturrechtslehrer, namentlich Johann Gottlieb Fichte, welcher das Eigentum bloß als eine Sphäre freier Tätigkeit anerkannte. Im neunzehnten Jahrhundert kam die sozialistische Doktrin, in Frankreich St. Simon, Fourier, Louis Blanc, Proudhon, in England George, Hyndman, Wallace, Bradlaugh, in Deutschland Marlo, Rodbertus, Engels, Marx, Lassalle u. a. Für Juristen besonders interessant ist Rodbertus, welcher den Einfluß des positiven Rechts auf die Nationalwirtschaft klar erkennt, gemäßigt in seinen Ansprüchen für die Gegenwart praktische Verbesserungsvorschläge macht, in seinen Endresultaten aber, was zu denken gibt, mit dem leidenschaftlichen Proudhon fast in vollem Einverständnis ist.

Auch die Gesetzgebung war nicht müßig. Für den Verkehr geschah sehr viel. Er hatte sich im Mittelalter sein Recht bereits ausgebildet, und dieses wurde nun als Grundbuchs-, Wechsel- und Handelsrecht aufgenommen. Für den Arbeiter geschah weniger. Er war hörig gewesen und konnte nicht für sich vorarbeiten. Erst in neuester Zeit beginnen Versuche zu einer Gewerbe- und Arbeitsordnung, deren Schwierigkeit ihre verschiedenen Lücken und Auswüchse entschuldigt.

Tief befangen im alten System ist noch die Rechtswissenschaft. Männer von Scharfsinn und Tiefe finden die Sätze des römischen Rechts noch für selbstverständlich. Wenn man schon einen Satz angreift, so geschieht es in der Art, daß man einen Satz des altdeutschen Rechtes entgegenstellt. Daß aber über Alt-Rom und Alt-Deutschland Jahrhunderte vorübergerauscht sind, daß unsere wirtschaftlichen Verhältnisse einen gänzlichen Umschwung erlitten haben, daß die Wissenschaft der wirtschaftlichen Erscheinungen erst geboren wurde, das wird außer acht gelassen. Männer von Scharfsinn und Tiefe finden es selbstverständlich, daß der Stoff das Produkt ergreift, und dennoch gibt es vielleicht keinen Satz, der auf den ersten

Blick so überzeugend wirkt — man glaubt ein Rechtssprichwort zu hören — als den Satz: *Wessen die Arbeit, dessen das Recht — wer das Gut geschaffen hat, der hat das Recht erworben.*

Darin ist nun aber unsere ganze nationalökonomische Wissenschaft einig: die große Quelle, aus welcher wir unsere Güter beziehen, ist die *Arbeit*. Werk der Arbeit sind auch die Maschinen und die sonstigen Produktions- und Zirkulationsmittel, welche, weil sie Besitz sind, mithelfen, die Arbeit zu drücken. Werk der Arbeit ist nach einer gewissen Zeit selbst die Fruchtbarkeit des Bodens. Wohl muß uns die Natur stets ihre Mithilfe gewähren; aber unsere Schaffens- und Erwerbsquelle ist die Arbeit allein. Wenn aber die Arbeit unsere Güter erworben hat, so sollte unser Recht auf Arbeitslohn zu reduzieren sein.

Das ist nun die innere Krankheit, an der wir leiden; der Gegensatz zwischen Produktion und Verteilung; und diese Krankheit wird immer schlimmer. Denn je weiter die Produktion greift, desto offensichtlicher wird der Gegensatz, desto augenscheinlicher wird dem einen zugeteilt, was der andere gearbeitet hat, desto tiefer wird die Verbitterung des Zurückgesetzten.

Das Recht soll das Spiegelbild der Gesellschaft sein. Das römische Recht konnte der ritterlichen Gesellschaft des Mittelalters entsprechen, denn auch sie war kriegerisch. Seit der Proklamierung der Menschenrechte aber, seit Aufnahme der großen Volksmasse in die Gesellschaft ist diese eine andere geworden. Die neue Gesellschaft verlangt ein neues Recht — ihr Recht. Sie ist eine Friedens- und Arbeitsgesellschaft, sie verlangt ein Friedens- und Arbeitsrecht. Dort, wo der Römer den Satz hingestellt hatte, daß Eroberung die Quelle alles Rechtes sei, dort hat in unserem Kodex mit mächtigen Lettern der Satz zu stehen: *Arbeit ist die Grundlage alles Rechtes; Arbeit ist die ursprüngliche Rechtsquelle, welche keiner weiteren Begründung bedarf.*

Nicht in diesem Satze liegt ein Elixir, meine Verehrten: der Satz, das Wort ist tot, nur der Geist ist lebendig. Aber so wie aus dem römischen Satz, daß alles Recht auf Eroberung beruht, ein Logiker von der Tiefe eines Johann Gottlieb Fichte in reiner Konsequenz die leitenden Grundsätze der römischen Verteilung der Güter entwickeln konnte; so liegt in dem Satze, daß Arbeit die Quelle des Rechtes sei, der Keim für ein Rechtssystem, welches den *Schutz der lebendigen Arbeit* zu seinem bewußten Ziel nimmt;

dessen Normen die Erhaltung der Arbeitskraft, die Förderung der Gesamtarbeit, die zweckentsprechende Verteilung des Produktes unter die Mitarbeiter, die Regelung der Besitzverhältnisse im Dienste der Arbeit, den Schutz der lebendigen Arbeit vor Benachteilung durch die im Eigentum erstarrte Arbeit der Vergangenheit — kurz *eine Organisation der Arbeit* unter Aufsicht und Schutz der Gesellschaft enthalten. Und das, meine Verehrten, ist auch Ziel und Realisierung des Rechtes auf Arbeit. Das Recht auf Arbeit gab das Problem, das Recht der Arbeit gibt die Lösung.

Haben wir damit ein ideales Rechtsprinzip aufgestellt, welches Geltung für alle Zeiten und alle Länder beanspruchen kann? Nein! Das Prinzip alles Rechtes ist das Wohl der Menschen; die Arbeit ist nur eine Bedingung hiefür. Wenn wir eine Bedingung, ein Mittel an Stelle des Zwecks als Grundlage des Systems gesetzt haben, so haben wir damit schon unsere Einseitigkeit bekannt; wir haben bekannt, daß auch die äußerste Konsequenz unseres Systems zweckwidrig, daß auch hier höchstes Recht höchstes Unrecht werden kann. Wir werden eine starke Beschränkung sofort selbst setzen. Allein, meine Verehrten, wir werden uns anderseits dadurch nicht beirren lassen. Es ist ein anderes, wenn man über die Eigenschaften des besten Lichtes theoretisch nachdenkt; ein anderes, wenn man das beste Licht herzustellen sich bemüht. Im letzteren Falle ist man an die Lichtquellen gewiesen, welche uns geboten sind. Jede derselben hat Vorzüge und Schäden; wir können nur diejenige suchen, welche die meisten Vorteile, die wenigsten Schäden hat. Das gilt, wie für physikalische, so für soziale Probleme. Und da unsere Gesellschaft auf Arbeit beruht, so ist das relativ beste Rechtssystem das der Arbeit.

Ist es vielleicht eine ideale Teilung, wenn wir jedem Arbeiter die Frucht seiner Arbeit zuteilen? Nein, auch das nicht. Das Rechtsprinzip der idealen Gesellschaft wäre die Solidarität aller, das Einstehen jedes einzelnen für alle, aller für jeden einzelnen. Jeder müßte also arbeiten nach seiner Kraft, beziehen nach seinem Bedarf: die Formel Cabets und Louis Blancs. Allein, meine Verehrten, dieser Teilungsmodus verlangt eine solche Pflichttreue, eine solche Mäßigung, eine solche Rücksicht auf Art und Charakter des anderen, daß er nur in einem kleinen Kreise auserlesener Freunde möglich ist. Wenn es sich um Ordnung einer Gesellschaft von Millionen handelt, muß das Prinzip praktischer sein, damit nicht die Müßiggänger auf Kosten der

Fleißigen genießen. Und da empfiehlt sich der Teilungsmodus, welcher von Fichte und Fourier vorgeschlagen und von Fouriers Schüler Considérant zuerst klar formuliert wurde: „Jedem nach seiner Arbeit, allen das Unentbehrliche." Dies ist auch die Beschränkung, welche wir sofort der Konsequenz unseres Systems setzen. Das Unentbehrliche ist von jedem Verhältnis ausgeschlossen; für das Unentbehrliche Solidarität, für das Entbehrliche Proportionalität. Es soll damit nicht gesagt sein, daß die Natur uns den Teil der Güter, welcher für das Leben aller unentbehrlich ist, freiwillig gibt. Auch das will erarbeitet sein, und wir könnten daher vom einzelnen dafür ein Minimum von Arbeit verlangen. Allein Zwangsarbeit ist schlechte Arbeit. Und deshalb wollen wir dazu erst greifen, wenn die äußerste Not es verlangt. Wahrscheinlich ist es, daß, wenn wir nur jedem außer dem Unentbehrlichen die Frucht seiner Arbeit gewähren, diese Belohnung für ihn Sporn genug sein wird, um Müßiggang zu vermeiden. Nur wenn der Müßiggang gemeingefährlich wird, mag ihm ein Einhalt gesetzt werden, aber auch nur, soweit es der Schutz der anderen verlangt.

Wir haben damit auch das Verhältnis des Arbeitssystems zur Humanität gekennzeichnet. Das bleibt außer Frage: kein Mensch darf Not leiden. Es ist eine Schande für das gesamte menschliche Geschlecht, wenn ein Mensch aus Not hungert, aus Not friert, aus Not obdachlos umherirrt. Allein das Arbeitssystem sorgt auch hiefür; für die Masse des Volkes direkt, weil sie sich selbst erhält; für den geringen Prozentsatz der Arbeitsunfähigen indirekt, denn wenn 80—90 Prozent der Bevölkerung sich durch ihre Arbeit erhalten können, so ist die Versorgung der anderen keine schwere Last.

Wie ist das Verhältnis zu dem erworbenen Vermögen des einzelnen? Es soll niemandem mehr genommen werden als billige Steuer. Es handelt sich nur um Maßregeln für die Zukunft, um Ersetzung des bestehenden Rechtes durch ein besseres im ruhigen, friedlichen Wege der Gesetzgebung ohne sonstige Mittel.

Wie verhält sich das System zu den verschiedenen Vorschlägen, welche zugunsten der Armen und Arbeiter gemacht werden? Wird die Rechtsreform selbst als Maßregel betrachtet, so verhält sie sich zu ihnen wie das Mittel, welches der Arzt anwendet, um einen Körper für die Dauer gesund, stark und widerstandsfähig zu machen, so daß Krankheiten selten kommen, und wenn sie da sind,

leicht überwunden werden, zu jenen Mitteln, welche er gebraucht, um plötzlich hervortretende Krankheiten zu mildern und zu heilen. Sie stehen nebeneinander, sie können sich nicht ersetzen. Die augenblickliche Not verlangt vor allem Sorge für die Armen; die dauernde Hilfe liegt in der Sorge für die Arbeiter. Wenn Sie aber das Prinzip selbst ins Auge fassen, dann sind alle Vorschläge, die gemacht wurden, entweder Vorschläge zur Organisation der Humanität, der Armenpflege — oder Vorschläge zur Organisation der Arbeit. Die meisten gehören zur letzteren. Die Not der Zeit ist es, welche sie hervorruft, aber das Arbeitsprinzip ist die wissenschaftliche Wurzel, aus welcher sie sprießen. Ich brauche sie nicht zu nennen. Die Erweiterung des Bruderladensystems in Deutschland, die Organisierung der Arbeitsvermittlung in England, in Schweden, jetzt auch in Deutschland; die Fabriksinspektoren, der Normalarbeitstag, der Normallohn, die zusammengesetzte Tätigkeit der friendly societies in England, sie alle sind Vorschläge zur Organisierung der Arbeit.

Und hier, meine Verehrten, schließt sich auch der Ring um das Recht auf Arbeit. Auch der Ruf nach Arbeit wurde durch die Not der Zeit hervorgerufen. Er ist erhoben worden, als die Krise Hunderttausende brotlos gemacht hatte. Der Ruf ging nach Arbeit und Brot. Das Gefühl, aus welchem er quoll, war gemischt; wenn Weib und Kind nach Brot schreien, erstirbt auch im stolzesten Mann das Selbstgefühl. Aber der Sozialforscher weiß es, daß es sich hier nicht um eine Armen-, sondern um eine Arbeiterfrage handelt. Er wird veranlaßt, die Stimmung, aus welcher der Ruf stammt, in einer ruhigeren Zeit zu untersuchen, wo sie nicht durch äußerste Notlage getrübt ist. Und hier, bei einer gewissen regulären Lage, findet er in dem normalen, das heißt tüchtigen Arbeiter jene Arbeitsfreude, jene Lust am eigenen Werk, jenen schönen Stolz auf Existenz durch eigene Kraft und eigenes Verdienst, welche schon von unserem edlen Schiller in ihrem Wert begriffen und verherrlicht wurden. Und in dieser Charakterstimmung, in der Ehre der Arbeit, findet er die Grundlage für den Wohlstand der Staaten, in ihr findet er den wahren, echten Gehalt des Rechtes auf Arbeit.

DER GRUNDGEDANKE DES WELTRECHTES

Vortrag, gehalten im Wissenschaftlichen Klub zu Wien am 3. Dezember 1888.

Wir wollen über die Grundidee des Weltrechtes sprechen; nicht über die Idee zu einem Weltrechte, über die Frage der Möglichkeit oder Unmöglichkeit eines solchen, sondern über die Idee, welche dem Weltrecht zugrunde liegt, aus welcher die einzelnen Vorschriften desselben wie Konsequenzen hervorgehen. Weltrecht ist uns aber nicht gleichbedeutend mit einem einheitlichen Weltgesetze, wenn es auch in diesem seinen klarsten Ausdruck erhält. Es ist die gedeihliche Ordnung des Weltverkehrs. Auch bei einer Rechtsgewohnheit, oder wenn sich die einzelnen Staaten ihre selbständige Gesetzgebung vorbehalten, ihre Gesetze aber dem Weltverkehr dienen, ist ein Weltrecht vorhanden.

Betrachten wir, um unser Objekt näher zu kennen, eine verwandte Erscheinung auf religiösem Gebiete! Nach einer alten Legende kam ein Heide zum Religionsgelehrten Hillel und erbot sich, zum Judentum überzutreten, wenn Hillel imstande sei, ihm dessen Lehre zu nennen, so lange er, wie sich die Legende naiv ausdrückt, auf einem Fuße stehe; und Hillel antwortete: „Liebe deinen Nächsten wie dich selbst! Das ist unsere ganze Lehre." Hillel hatte offenbar keine volle Erkenntnis von der Bedeutung dieser Worte, denn er beschäftigte sich nach wie vor mit den kleinen dogmatischen und zeremoniellen Streitigkeiten seiner Zeit und wurde so ein bedeutender Religionsgelehrter seines Stammes, aber kein religiöser Reformator. Das war einem Größeren vorbehalten. Aber die *Grundidee* der Weltreligion, ihre Gleichgültigkeit gegen alles Dogma, ihr ausschließliches Betonen der Moral und bei dieser selbst des moralischen Gefühles, ist in keiner Erzählung der Evangelien so scharf hervorgehoben wie in der kurzen, bestimmten Antwort Hillels.

Man darf nicht glauben — und die Erfahrung kehrt im Rechte wieder —, daß eine so tiefe Lehre, wie es die Zurückführung aller Religion auf Liebe ist, obzwar sie so einfach und unserem Herzen so verwandt klingt, am Beginne der religiösen Entwicklung ent-

stehen konnte; sie bezeichnet vielmehr den höchsten Reifepunkt. Jede Wissenschaft rankt sich zunächst an Dogmen empor. Wir kennen die religiöse Entwicklung in China, Indien und Persien bis zu den Lehren der Laotse, Kungfutse, Buddha, Zarathustra zu wenig, um daraus Schlüsse zu ziehen; in Judäa ist sie uns näher bekannt. Wir wissen hier, daß zuerst die Lehre des einen Gottes, welche bereits in Ägypten Mysterium des Priesterstandes war, zur Nationalreligion gemacht wurde, und ein national-religiöses Dogma entstand. Dann verliert die Gottheit allmählich den Charakter eines Stammesgottes und wird international (Aufruf Salomos). An Stelle des Dogmas tritt die Moral in den Vordergrund (Prophetenzeit). Die Lehre Zarathustras im Exil, die griechische Philosophie nach demselben zerstörten endlich das Dogma vollständig. Eine sozialistische Grundstimmung wurde durch Ereignisse geschaffen, welche wir noch berühren wollen. Bei der Neubildung wirkte unvermerkt der alte Liebeskult jener Gegenden mit, der Kultus der großen Göttermutter Aphrodite-Aster. So entstand die Lehre von der Liebe zunächst als Mysterium, zaghaft, mehr geahnt als gedacht. Es fehlte der Mut, sie durchzudenken und ins Volk zu tragen; der Opfermut, den Interessen, welche mit der Aufrechterhaltung der alten Lehre gegenüber dem Volke verbunden waren, offen den Krieg zu erklären. Da halfen gleichfalls die Weltereignisse! Eine furchtbare sozial-politische Revolution, welche mit den Gracchen begann, in den Kämpfen des Marius und Sulla ihre Schreckenszeit, in den Sklavenkriegen ihre letzten sozialistischen Ausläufer hatte, durchtobte das römische Reich. Judäa wurde erobert. Scham und Zorn über die Knechtschaft, Streben nach Befreiung und nationalem Königtum, in welches sich der aus der Lehre Zarathustras entnommene Glaube an eine Welterlösung einmischte, versetzten die Gemüter in eine wilde Ekstase. Eine neue Prophetie predigte Kasteiung und Wüstenleben. Ein Rausch entstand, wie wir ihn in den Zeiten der Kreuzzüge, der Reformation, der Revolutionen von 1789 und 1848 wiederfinden. Wahrlich, das Gefühlsleben mußte in seinem tiefsten Innern aufgewühlt, ein Meer von Leidenschaften erregt werden, bis aus den schäumenden Wogen eine neue Aphrodite-Anadyomene sich erhob — die Weltidee der Liebe.

So wie jener Heide zu Hillel, so könnte heute ein Laie zum Rechtsgelehrten hintreten und ihm sagen: „Ich will mich eurem Recht

unterwerfen. Aber ich bin nicht imstande, Tausende von Paragraphen zu lernen, ich so wenig wie ein anderer ungelehrter Mann. Kennen ja selbst eure Juristen nicht alle Gesetze, und was sie kennen, nicht vollständig. Gib mir einen Satz, daß ich mich nach ihm halte und recht handle!" Was werden wir ihm antworten?

Die Römer hatten einen Grundsatz, auf welchen sie alles Recht zurückführten: das *Eigentum*, das „suum cuique". Es gab auch eine Zeit, wo dieser Grundsatz ausreichte, heute genügt er nicht mehr. Was ist suum, *sein* Eigentum? Wir haben die Sklaverei, die Leibeigenschaft, die Hörigkeit, die Robot aufgehoben, wir haben die Grundlasten zwangsweise abgelöst; haben wir dabei jedem das „Seinige" gelassen? Rodbertus, der Begründer des wissenschaftlichen Sozialismus in Deutschland (wie man ihn nennt, obgleich schon Thünen das Anrecht auf diesen Ehrentitel hat), verlangt die Nationalisierung aller Produktivmittel, die Beschränkung des Privateigentums auf bloße Konsumtionsgüter und schließt seine betreffende Abhandlung mit den Worten, daß dann die Welt erblühen werde „unter dem strahlenden suum cuique". Welches ist also das suum? Was Rodbertus will, oder was unsere heutigen Gesetze verfügen?

Das Eigentum wird seit langer Zeit angegriffen; nicht bloß von Führern des Sozialismus, welche es als Diebstahl (Proudhon) oder als Fremdtum (Max Stirner und Lassalle) bezeichnen wollen, sondern von ruhigen, nüchternen, mit der gegenwärtigen Rechtsordnung im ganzen befreundeten Denkern. Professor Hugo aus Göttingen, ein sehr konservativer Mann, nennt die Zustände der Armen, der Opfer des Privateigentums, „Dinge, bei welchen allen für die Haustiere der Reichen besser gesorgt ist", und gibt der Sklaverei vielfach den Vorzug. Ebenso urteilt der gelassene Hume. Und John Stuart Mill, der gewiß ein nüchterner und kühler Denker war, nennt es zweifellos, „daß im zivilisierten Europa der Zustand großer Massen von Menschen ein elenderer ist als bei den meisten uns bekannt gewordenen Stämmen von Wilden". Das Eigentum verdient Lob und Tadel. Es setzt feste Grenzen zwischen Mein und Dein, und das fördert den Frieden. Aber diese Grenzen sind auch schroff; neben dem größten Reichtum steht unvermittelt die nackte Armut, und das Eigentum kennt kein Mittel, die Kluft zu überbrücken. So entsteht auf der einen Seite Hochmut, Härte, Verschwendung, auf der anderen alle schlimmen Folgen des Elends für Körper und Geist, dazu Haß, Neid

und Empörungssucht. Wo das Eigentum herrscht, dort finden wir diese Wirkung. Die römische Geschichte ist wirtschaftlich eine fortlaufende, nur durch Empörungen gemäßigte Ausbeutung der Plebs durch Patrizier und Optimaten. Die großen Römer, welche wir wegen ihres Patriotismus bewundern, waren Wucherer der schlimmsten Art.

Das Eigentum wirkt also nur in gewissen Grenzen wohltätig. Es muß nach dem Zweck, dem es zu dienen hat, dem möglichst glücklichen Zusammenleben der Menschen, Richtung, namentlich Maß erhalten, und wenn es das Maß überschritten hat, in dasselbe wieder zurückgedrängt werden. Das gleiche gilt von allen anderen Rechtsinstitutionen, von welchen ohnehin keine — vielleicht die Ehe ausgenommen — als absolut gültig aufgefaßt wird. Sie alle sind Zweckmaßregeln und bedürfen der Regelung nach Ort und Zeit, wie es die Bedürfnisse der Gesellschaft verlangen. Sie können daher nicht Führer sein. Was ist aber ein allgemeiner Regulator unserer Handlungen?

Man hat in der Theorie bis vor kurzer Zeit — und der Gedanke haftet auch jetzt noch in manchen Köpfen — das Zusammenleben der Menschen sich als ein Nebeneinandersein gedacht, gleichsam als ob jeder zwar neben den anderen, aber für sich isoliert in einem abgeschlossenen Gebiete lebte. Daraus ergab sich die Forderung eines freundnachbarlichen Verhältnisses und hiefür der Grundsatz: „Wahre die Grenze!" Jeder ist in seinem Gebiete unumschränkter Herr, kann nach Gefallen tun und lassen, was er will; mit der Grenze hört seine Macht auf. Das ist das Prinzip des Eigentums oder, wie es im Völkerrechte heißt, das Prinzip der Nichtintervention. Es ist richtig, solange es eine isolierte Wirtschaft gibt, solange jeder für sich allein und für seine eigenen Bedürfnisse sorgt. Er hat dann im allgemeinen mit den anderen nichts zu tun; er verträgt sich mit ihnen, wenn er ihnen nichts zuleide tut.

Anders ist es im Zustande einer höheren Kultur. Die erweiterten Bedürfnisse können nicht mehr durch Einzelarbeit befriedigt werden. In unserer Zeit wirken alle Weltteile mit, nicht bloß um die Wünsche eines verwöhnten Lebemannes zu befriedigen, sondern um dasjenige zu schaffen, was wir noch nicht einmal für genügend zu einem menschenwürdigen Dasein halten. Die Beispiele vom Zündholz und von der Nähnadel sind bekannt; man kann sie beliebig

vermehren. Adam Smith entwickelte zuerst in klarer Weise, daß unser Verhältnis zueinander nicht das der Nachbarschaft, sondern das einer weitverzweigten Arbeitsteilung und Arbeitsvereinigung ist. Die *Mitarbeit* kennzeichnet das Zeitalter der Kultur. Man arbeitet vereint, um jedem einzelnen die Bedingungen einer erhöhten Lebensfreudigkeit zu verschaffen. Freilich ist die Teilung sehr ungleich, die große Mehrzahl wird empfindlich verkürzt. Aber dies eben gehört zur Rechtsfrage unserer Zeit. Wir müssen nach jener Handlungsweise forschen, welche geeignet ist, um eine willige Vereinigung, eine sichere, rasche Arbeitsteilung herbeizuführen.

Es ist nicht zufällig, daß das Problem in unserer Zeit erwacht ist; noch niemals hat die Arbeitsteilung annähernd eine solche Ausbreitung erlangt wie jetzt. Aber mit der Erkenntnis ist uns auch eine neue und schwere Aufgabe geworden. Was bisher unbewußt und deshalb unorganisch, einseitig, mit manchem Rückschritt und Seitenweg zum unverhältnismäßig großen Vorteil von wenigen sich entwickelt hat — die *Organisation der menschlichen Arbeitsgesellschaft* — das müssen wir, da wir erkannt haben, daß alle Kultur und aller Fortschritt der Menschen damit zusammenhängt, nunmehr planmäßig und zielbewußt in Angriff nehmen. Man darf sich in seinem Urteile über das Wesen der Verkehrsverhältnisse nicht dadurch täuschen lassen, daß sie verschiedene scheinbar feste Formen annehmen, wie Kauf, Darlehen, Miete, Lohnvertrag. Sobald man sie mit der Tätigkeit in der isolierten Wirtschaft vergleicht, erkennt man sie als Mitarbeit mit fixierten Gewinstanteilen. Deshalb gelten auch alle Fragen für die Mitarbeit, insbesondere die der richtigen Teilung, auch für die scheinbar festen Verträge; die Frage nach dem soliden Kaufpreise ist dieselbe wie nach dem angemessenen Anteile eines Gesellschafters.

Welche Handlungsweise ist nun geeignet, um zu gemeinsamer Arbeit zu vereinen?

Es gibt gewisse Sätze, welche voraussetzungslos scheinen und doch wichtige Voraussetzungen haben. Nur sind letztere psychischer Natur, und so wie die Medizin sich lange geweigert hat, nervöse Störungen als Krankheiten anzuerkennen, so ist man in der Sozialforschung geneigt, psychische Voraussetzungen zu übergehen. Eine der scheinbar absoluten Tatsachen ist die Kraftersparnis durch Arbeitsteilung. Die Argumente dafür sind bekannt. Dadurch, daß

jemand sich dauernd mit gleichartiger Arbeit beschäftigt, wird seine Geschicklichkeit größer, er kennt die Schwierigkeiten, welche zu beseitigen sind, die Mittel, mit welchen sie beseitigt werden, gründlicher u. dgl. m. Die Schattenseiten werden gewöhnlich nicht berücksichtigt. Ich spreche nicht von der geistigen Abspannung, welche die einförmige Arbeit nach sich zieht; hier muß durch Erholung und geistige Anregung nach der Arbeitszeit geholfen werden. Aber wenn jemand allein und für sich ein ganzes Werk schafft, so ist er unabhängig; hat er gut gearbeitet, so ist das Werk auch gut und er hat den Nutzen. Wenn er aber nur ein Stück von einem für einen Dritten bestimmten Werke übernimmt, so ist er auf andere angewiesen, insbesondere auf denjenigen, der das zweite Stück übernommen hat. Wenn dieser nicht richtig arbeitet, wenn die Teile nicht zueinander passen, so ist das Ganze nichts wert und seine eigene Anstrengung war umsonst; ebenso wenn dieser die Verwertung und Verrechnung hat und sich den Gewinn behält. Nehmen wir nun an, daß der Arbeiter diese Besorgnis hat, daß er, während er arbeitet, stets von dem Gedanken verfolgt wird, vielleicht sei die ganze Mühe nutzlos; daß er hiedurch zerstreut wird, von Zeit zu Zeit aufspringt, zum anderen läuft, vergleicht, und mißt, und nachrechnet, und wir werden finden, daß die Zeit und Kraft, welche auf der einen Seite erspart wurde, auf der anderen wieder verlorengeht. Soll daher eine Arbeitsteilung real möglich, d. h. mit Kraftersparung verbunden sein, so hat dies eine Voraussetzung. Es muß jeder seinen Teil entsprechend leisten; es muß aber auch jeder von dem Gefühl durchdrungen sein, daß er sich nicht wegen des anderen zu sorgen habe, daß dieser seine Aufgabe ebenso entsprechend lösen werde. Dieses Gefühl nennen wir *Vertrauen*, und die Leistung erscheint ihm gegenüber als Vertrauensrechtfertigung. Vertrauen ist daher die Voraussetzung der Arbeitsvereinigung, die Grundlage der Arbeitsgesellschaft. Jeder Genosse muß dem anderen Vertrauen geben, das ihm gegebene bewähren.

Und wenn die logische Entwicklung, welche ich im vorhergehenden unternommen habe, nicht ausreichen würde, dann könnte ich mich getrost auf die eigene Erfahrung jedes einzelnen berufen. Alle, welche entweder in einer Arbeitsgesellschaft waren oder einen tieferen Einblick in eine solche nahmen, werden sich überzeugt haben, daß ohne gegenseitiges Vertrauen eine Mitarbeit unmöglich ist. Dies

gilt wie für die einzelne, so auch für die allgemeine Gesellschaft der Menschen. Jeder von uns steht in dieser Gesellschaft. Seine menschenwürdige Existenz ist an die Arbeit der anderen gewiesen, er kann sich daher gleichfalls der Arbeit nicht entziehen. Es genügt nicht, wenn er nicht verletzt, nicht stört, kurz nichts tut — er muß *mittun,* an seiner Stelle und in seiner Art sich beteiligen an der gemeinsamen Arbeit.

Die Kulturgesellschaft ist eine Arbeitsgesellschaft und hat deren Voraussetzung. Vertrauen ist der Gedanke alles Rechtes, Vertrauensrechtfertigung der Typus aller Pflicht; in beiden verkörpert sich der Begriff der Rechtschaffenheit.

Die Bedeutung der Vertrauensrechtfertigung, d. h. einer vertrauenswürdigen Handlungsweise, ist leicht erkennbar. Sie verlangt Tüchtigkeit im Fach, und wir sprechen von einer ehrlichen oder rechten Arbeit, indem wir eine tüchtige meinen. Auch die Gesetze verlangen von jedem, der sich zu einem Beruf, einem Handwerk oder einer Kunst bekennt, die entsprechende Tüchtigkeit; bei jeder Ware, die man in den Verkehr setzt, mittlere Güte.

Die Vertrauensrechtfertigung verlangt ferner Anhänglichkeit an den anderen, welche den natürlichen Egoismus zurückdrängt, zwischen sich und dem anderen Gleichheit walten läßt und dessen Interessen mit derselben Sorgfalt wahrt wie die eigenen. Sie äußert sich in dem Fleiße, mit welchem man die gemeinsame oder scheinbar fremde Angelegenheit verwaltet, und in der Unparteilichkeit, mit welcher man bei Abrechnung und Teilung zwischen sich und ihm verfährt.

Die Pflicht der Sorgfalt (diligentia) wird auch in den Gesetzen oft betont, entweder mit subjektivem Maßstabe, als diligentia quam suis (Sorgfalt, welche man in eigenen Angelegenheiten anwendet), oder mit objektivem, als diligentia überhaupt, als Sorgfalt eines ordentlichen Kaufmannes oder Hausvaters. Die Unparteilichkeit bei Abrechnung und Teilung aber ist für viele der eigentliche Inhalt der Redlichkeit und Gerechtigkeit. Auch die aequitas der Römer, welche man mit „Billigkeit" übersetzt, welche aber nach Sprache wie nach Inhalt richtiger als „Gleichmaß" bezeichnet wird, weil sie bei widerstreitenden Interessen gleiches Maß für alle setzt, bezieht sich in erster Linie auf die Teilung bei Arbeit und Genuß. Die Philosophen nehmen manchmal eine besondere Unterart der „verteilen-

den" Gerechtigkeit an; aber, wie wir schon bemerkten, enthalten auch jene Verkehrsakte, wo die Parteien scheinbar einander entgegenstehen, eine Teilung, und der Verkäufer, welcher einen zu hohen Preis verlangt, will einen übermäßigen Anteil am gemeinsamen Gewinn für seinen Arbeitsteil. Die Vertragsfreiheit ist nur ein Mittel, um gleiche Teilung zu bewirken, weil gemeinhin jeder seine Arbeit schätzen kann; aber wo das Mittel unzureichend ist, weil z. B. ein Teil durch Not gedrängt wird, muß ein anderes die Lücke ergänzen.

In einer größeren Gemeinschaft wird die Anhänglichkeit an die anderen mehr unpersönlich. Sie verschmelzen zu einem Ganzen, der Gemeine, und man spricht von *Gemeingefühl,* oder noch abstrakter von *Pflichtgefühl.* Das Pflichtgefühl ist scheinbar ganz unpersönlich und hat den Blick nur auf das Objekt der Pflicht, den eigenen Arbeitsteil gerichtet. Doch ist dies nur scheinbar. Es enthält stets den persönlichen Kern der Anhänglichkeit an die anderen, welche dem Egoismus entgegensteht und oft zu Handlungen führt, welche, einzeln betrachtet, direkt gegen das eigene Interesse gerichtet sind. Die Unpersönlichkeit, welche in dem Worte liegt, ist aber dennoch gefährlich. Sie verleitet leicht, sich auf den durch Gesetz oder eigene Ansicht fixierten Arbeitsteil zu beschränken und kann dann ein „suum" ebenso engherziger Art herausbilden wie der Eigentumsgedanke. Ibsen hat in seinem „Brand" dieses Philistertum der Pflicht gegeißelt. Die Unpersönlichkeit des Pflichtgedankens hat selbst den großen Denker Kant verführt, Unparteilichkeit als eine abstrakte Eigenschaft aufzufassen. Kant hat hiebei den logischen Fehler gemacht, absolute Gesetze anzunehmen. Sein Pflichtgesetz lautet: „Handle so, daß dein Handeln zum allgemeinen Gesetze werden kann." Aber was schreibt dieses allgemeine Gesetz vor? Es ist ein Irrtum, wenn Kant glaubt, durch die bloße Form der Allgemeinheit den Inhalt der Handlungsweise bezeichnet zu haben. Ein allgemeiner Kampf ist ebenso denkbar wie ein allgemeiner Friede. Was Kant subintelligiert, das ist das Handeln, welches zu allgemeinem Frieden, zu allgemeiner Eintracht führt. Die Satire Schillers, man müsse suchen, die Freunde zu verachten, um seine Pflicht gegen sie zu üben, ist daher, wenn auch zu scharf, weil sie dem Sinn des Denkers unrecht tut, doch logisch gerechtfertigt. Wesentlich von dem Kantschen Gesetze verschieden ist die Vorschrift,

gegen den anderen *so* zu handeln, *wie* wir wünschen, daß er gegen uns handle. Hier wird unser Lust- und Schmerzgefühl zum Richter gemacht; das „so — wie" bestimmt den Inhalt.

Nicht so erkannt in seiner Bedeutung wie die Vertrauensrechtfertigung ist ihr Korrelat, das Vertrauen selbst, das Vertrauengewähren.

Es ist die Voraussetzung der Arbeitsteilung, der Konzentration seiner Kraft auf seinen Arbeitsteil. Wir haben diese Folge bereits kennen gelernt, finden hiefür auch im Leben zahlreiche Beispiele. Die hervorragendsten Männer in ihrem Spezialgebiete sind außerhalb desselben naiv, unerfahren, vollständig auf die anderen angewiesen. Namentlich ist dies bei den großen Männern in Kunst und Wissenschaft auffallend. Auch die Gesetze haben den Zusammenhang zwischen Arbeitsgröße und Vertrauen wohl erkannt. Je weiter der Verkehr, je schwieriger und zeitraubender die Nachforschung nach den Verhältnissen der anderen, desto mehr verdrängt in den Gesetzen der Schutz des verkehrsüblichen Vertrauens alle sonstigen Rechtsgrundsätze. Die Erscheinung tritt namentlich im modernen Rechte hervor. Wir haben eine Reihe öffentlicher Register eingeführt, in welchen juristisch wichtige Tatsachen eingetragen sind; wer im Vertrauen auf dieselben handelt, geht sicher. Wir haben für den großen Verkehr besondere Rechtsurkunden (Order- und Inhaberpapiere) geschaffen, und wer ein solches Recht im Vertrauen auf die Urkunde erwirbt, geht sicher. Im Mobiliarverkehr verlangen wir lediglich den redlichen Kauf bei einem befugten Gewerbsmanne, damit der Erwerber gegen jedes frühere Recht geschützt sei. Alle diese Vorschriften sind nicht durch formale Logik geschaffen worden; denn das römische Recht, welches einen geringeren Verkehr vor Augen hatte, traf entgegengesetzte Bestimmungen, und Romanisten bezeichnen den modernen Rechtserwerb noch immer als eine Vergewaltigung des früheren Eigentümers. Sie sind die Folge der Erkenntnis, daß ein großer Verkehr unmöglich ist, wenn man verlangt, daß jeder vor Abschluß eines Verkehrsaktes die Verhältnisse des anderen Vertragsteiles genau untersuchte; daß man daher, wenn man den Verkehr nicht unterbinden will, eine bestimmte erfahrungsmäßige Grenze der Vorsicht — welche man *verkehrsübliche* Vorsicht nennt — setzen und denjenigen, der dieses Maß aufgewendet hat, schützen muß. Jeder Eigentümer soll seine Sache sorgfältig be-

wahren, er muß es sich zuschreiben, wenn ihm die Sache infolge seiner Unachtsamkeit verlorengeht.

Eine weitere Folge des Vertrauens ist eine eigenartige Anhänglichkeit an den Vertrauensmann. Diese Anhänglichkeit ruht auf dem Glauben an dessen Tüchtigkeit in Arbeit und Gesinnung und ist daher stets mit Achtung vor demselben verbunden. So vereinigt sich der Gedanke der *Ehre* mit dem des Vertrauens. Vertrauenswürdigkeit und Ehrlichkeit, Ehrenhaftigkeit werden identisch.

Das Gefühl für den Vertrauensmann hat durch den Glauben an seine Tüchtigkeit und hiedurch auch an den Erfolg seiner Tätigkeit etwas Befriedigendes, Zufriedenstellendes an sich, eine gewisse Ruhe, durch welche es sich wesentlich von der Liebe, die ein mehr erregtes Gefühl ist, unterscheidet. Dieser Unterschied besteht denn auch zwischen der Liebe vor und in der Ehe. Die Liebe zwischen Ehegatten als Lebensgenossen ist vorwiegend Vertrauen. Ohne gegenseitiges Vertrauen ist eine zufriedene Ehe unmöglich. Wenn vor der Ehe Liebe vorhanden war, muß sie durch Vertrauen ergänzt werden; einer Ehe ohne Liebe aber fehlt es wohl an einer gewissen lebendigen Wärme; wenn jedoch ein kräftiges Vertrauen zwischen den Gatten herrscht, leben sie trotzdem in ruhigem Glück. Das ist die Lösung des so oft besprochenen Rätsels, wie sich Liebe und Ehe zueinander verhalten.

Die Anhänglichkeit aus Vertrauen hat die Folge, daß man dem Vertrauensmann jene Macht-, Arbeits- und Hilfsmittel gewährt, welche er braucht, um seine Funktionen zu verrichten. So schicken wir die Männer unseres Vertrauens — nicht die unserer Liebe — in die Körperschaften der Gesetzgebung und Verwaltung und überantworten ihnen die Macht über unser Leben und Gut. Im kaufmännischen Leben hat das Anvertrauen von Gütern einen besonderen Namen, es heißt *Kredit*. Kredit ist lediglich die Übersetzung des Wortes Vertrauen; seine Wichtigkeit für den Verkehr ist zu anerkannt, als daß ich sie weiter auseinandersetzen müßte.

Das Vertrauen hat aber noch eine weitere wichtige Folge. Gegen denjenigen, dem man vertraut, ist man aufrichtig, wahrhaft, ohne Rückhalt und Hintergedanken; und gerade diese Wahrhaftigkeit, der einfache, schlichte Gedankengang, die Übereinstimmung von Wort und Tat mit der inneren Überzeugung ist der Kern dessen, was wir im Verkehre als Ehrlichkeit, beim Richter in bezug auf sein

Urteil als Gerechtigkeit bezeichnen. Wohl verlangt objektive Gerechtigkeit auch Wissen und verständigen Überblick; aber wer nach seiner Überzeugung, nach seinem besten Wissen und Gewissen geurteilt hat, ist ein ehrlicher, ein seiner Gesinnung nach gerechter Mann. Offen und ehrlich werden gar oft miteinander genannt; Recht ist einfältig, Recht ist wahr, Wahrheit ist das beste Recht — kehrt in den Rechtssprichwörtern immer wieder. So wie sich das Schöne und Gute miteinander verbinden, weil beide auf der unmittelbaren Empfindung für ein anderes (oder für einen anderen) beruhen, so einen sich Recht und Wahrheit, weil beide der inneren Überzeugung entsprechen; und es ist ein gewaltiger Gedanke gewesen, welcher seinen Autor unter die ersten Denker versetzt, wenn der seit der Herrschaft Schopenhauers arg verkannte Johann Gottlieb Fichte die Überzeugung des Menschen in den Mittelpunkt seines Systems stellte und von ihr aus in zwei großen Strahlen, aus der theoretischen Überzeugung das Wahre, das Sein, aus der praktischen Überzeugung das Rechte, das Seinsollen hervorgehen ließ.

Die Pflicht zur Wahrheit ist auch in den Gesetzen vorgeschrieben, z. B. für Zeugen und mit einer gewissen Schonung menschlicher Schwäche auch für Parteien in eigener Sache. Der Eideszwang ist lediglich eine Verstärkung der Wahrheitspflicht. Wie Meineid und Eidesbruch nebeneinander gestellt werden, so ist auch das Worthalten nur eine Art der Wahrhaftigkeit, die Konsequenz eines aufrichtigen Versprechens.

Die Folgen des Vertrauens sind offenbar zugleich dieselben Eigenschaften, die vertrauenswürdig machen; und die beiden Korrelate treffen sich also in einer einzigen Charaktereigenschaft. Die Sprache, das Denken des Volkes hat dies längst erkannt. Sie nennt diese Eigenschaft *Treue*, fides.

Treue bedeutet Vertrauen, wie in den Worten: treuherzig, gemeine Treue, in dem Rechtssprichworte: Wo du deine Treue gelassen hast, dort sollst du sie suchen. Es bedeutet Vertrauensrechtfertigung, wie namentlich in seinem Gegensatz, der Untreue = Vertrauensmißbrauch. Es bedeutet aber vorzugsweise die Anhänglichkeit des Genossen, die feste, innige, auf Vertrauen beruhende und Vertrauen verdienende Anhänglichkeit an den Gatten, den Herrn, den Freund; in übertragener Bedeutung an die Sache, der man sich weiht, an das Wort, die Pflicht, die Wahrheit, die Überzeugung. Dieselbe Doppel-

bedeutung hat „Treu und Glauben", das auf gegenseitigem Vertrauen beruhende Entgegenkommen im Verkehr. Man verlangt Schutz für denjenigen, der in Treu und Glauben gehandelt hat, und meint damit sein Vertrauen; man macht denjenigen verantwortlich, der nicht in Treu und Glauben gehandelt hat, und meint seine Vertrauensrechtfertigung.

Treue in ihrer umfassenden Bedeutung ist die Seele des Verkehrs, der Gemeinschaft, des Rechtes; durch sie wird alles Verhalten der Menschen zueinander bestimmt, um ein einträchtiges und zufriedenes Zusammenleben zu schaffen. Alle Übel unseres heutigen Rechtszustandes sind in ihrem Wesen Untreue. Dem Manne, der nach dem Grundsatze seines Handelns fragte, können wir nunmehr getrost antworten: *„Handle nach Treue; vertraue und rechtfertige Vertrauen; das ist alles Recht."*

Der Treuegedanke hat sich, wie es bei dem Grundgedanken des allgemeinen menschlichen Rechtes nicht anders möglich war, frühzeitig in den Gesetzen gezeigt. Nur ist er in denselben nicht in seiner hohen Bedeutung erkannt, wird bloß hie und da in einzelnen Vorschriften wirksam und wird in eine Kategorie gesetzt mit verschiedenen kleinlichen Formbestimmungen, gleichsam als ob es dasselbe wäre, ob man einem anderen die Treue bricht, oder ob man aus der feierlichen Formel, welche für ein Rechtsgeschäft vorgeschrieben ist, ein Wort vergißt oder falsch ausspricht.

Aus der Entwicklung im römischen Rechte möchte ich nur eine einzelne kleine Episode erzählen, weil sie den Charakter des Treuegedankens so recht klarstellt. Das alte römische Recht war streng formal. Es gab für Rechtsakte einige wenige Formeln; was in dieselben paßte, war Recht, was nicht paßte, stand außerhalb des Rechtes. Für einen Pfandvertrag z. B. war keine Formel. Nun kam aber bald — wer kennt nicht das launige Gedicht von Scheffel? — auch der Tag, an welchem der Gläubiger dem Schuldner zum erstenmal sagte, er traue ihm persönlich nicht und verlange reale Sicherheit. Verpfändung gab es nicht; man einigte sich also dahin, der Schuldner übertrage dem Gläubiger die Sache zum Eigentum, und wenn er seine Schuld bezahlt habe, solle der Gläubiger die Sache zurückübertragen. Das erste war in Form Rechtens möglich, das zweite aber nicht, für die bedingte Zusicherung des Gläubigers war keine Formel. Der Schuldner war daher auf die Treue des Gläu-

bigers gewiesen, und man nannte ein solches Geschäft auch fiducia = Vertrauen. In ähnlicher Weise finden wir im englischen Gesetze für derartige Vertrauensgeschäfte das Wort Trust = Vertrauen. Wie nun, wenn der Gläubiger die Treue brach, wenn er sich weigerte, die Sache zurückzuübertragen? Das Recht half nicht, aber der Beistand kam von anderer Seite. Die Römer hatten einen Magistrat, den Zensor, welcher die Bürgerlisten führte und zugleich über die Sitten der Bürger wachte, welcher berechtigt war, den Bürger, der sich unehrenhaft benommen hatte, in eine niedere Klasse einzureihen oder aus der Liste ganz zu streichen. Wenn nun der Gläubiger sein Wort brach, so ging der Schuldner zum Zensor und dieser erklärte den Mann, der sich so unehrenhaft benommen hatte, für infam und strich ihn aus der Bürgerliste. Das half, und die Strafe wurde so billig gefunden, daß sie, nachdem schon längst dem Schuldner die Klage auf Rückstellung gegeben worden war, noch fortdauerte und der Treubruch bei besonderen Vertrauensverträgen Infamie nach sich zog.

An diesem einen Ursprung des Treuerechtes im römischen Recht mag ersehen werden, daß der Treuegedanke nicht aus dem Rechtsdogma entstammt, sondern gegen dasselbe in das Recht eindrang. Nicht aus der Satzung ging er hervor, sondern aus dem Gefühl der eines Bürgers würdigen Handlungsweise. Dieses Gefühl ist aber allgemein menschlich und bezeichnet auch das Treuerecht als Typus des rein menschlichen Rechtes.

Wie der Treuegedanke allmählich das römische Recht eroberte; wie sich neben das Eigentum der gutgläubige Besitz, neben den Kontrakt der gutgläubige Vertrag, neben die alte Prozeßweise der Prozeß auf Treu und Glauben stellte, so daß schon in der ersten Kaiserzeit der Grundsatz galt, jedes Urteil müsse nach Treu und Glauben gefällt werden (omnia judicia bonae fidei); wie in der Kaiserzeit griechische, asiatische, germanische Rechtsprinzipien eindrangen; das quiritische Sonderrecht durch die Verallgemeinerung des römischen Bürgerrechtes verschwand; Reform auf Reform folgte, so daß die Gesetzgebung Justinians mit dem alten Recht fast nur geschichtlich zusammenhängt; wie das römische Recht nach langer Pause bei den romanisch-germanischen Völkern wieder erwachte und deutsche Grundsätze, insbesondere die des Registerwesens und formlosen Vertrages aufnahm; wie die Kaufmannschaft sich ein neues

Recht schuf, das wesentlich auf Treu und Glauben ruhte und vielfach das gemeine Recht beeinflußte; wie diese Änderungen in der Rechtsüberzeugung des Volkes als Naturrecht sich geltend machten; wie das Registerwesen sich ausbreitete, Order- und Inhaberpapiere entstanden, Arbeit und Gesellschaft sich in neuen Formen Anerkennung verschafften; wie endlich die Völker durch den großen Verkehr der Neuzeit einander näherrückten und durch internationale Verträge, wie eigene internationale Gesetzgebung die Anfänge eines Weltrechtes herausbildeten: alles das — die Einzelausführung würde den Raum eines Vortrages weit überschreiten — vereinigt sich zu einer gewaltigen historischen Symphonie, in welcher das Grundmotiv der Treue bald leise anklingt, bald sich erhebt zu mächtigem Schwung, dann scheinbar untersinkt in der Tonflut, um an ungeahnter Stelle wieder emporzutauchen und die Führung zu nehmen und zu behalten bis zum Schluß. Und dennoch würden wir den Bann des Dogmas nicht überwunden haben, wenn nicht die Gesellschaftsordnung des Mittelalters in einer Nacht zerstört worden wäre, wenn man der bestürzten Welt nicht gezeigt hätte, daß das, was durch Jahrhunderte gesetzliches Recht war, morgen gesetzliches Unrecht sein könne. Das stürzte das Gesetz von seiner Höhe hinab und legte den Sitz des Rechtes wieder in das Herz des Menschen.

Die Gesellschaft ist für die Existenz und das Glück der einzelnen unentbehrlich, und dasjenige gegenseitige Vertrauen, welches notwendig ist zur Erhaltung der Gesellschaft, erhält dadurch selbst den Charakter der objektiven Notwendigkeit. Das wurde bei den Völkern bald gefühlt, und lange bevor Gesetze entstanden, haben Sitte und Gewohnheit des Volkes ein gewisses Minimum der Vertrauensrechtfertigung von jedem einzelnen verlangt, unter sonstigem Zwang. Über ein gewisses Maß hinaus aber soll der Zwang nicht gehen, nicht weil es nicht möglich, sondern weil es nicht recht ist. So wie sich die Kreisbewegung in zwei Bewegungen abteilt, die eine zum Mittelpunkt, die andere von ihm ab, welche beide gleich nötig sind, um die Bewegung zu erhalten, so teilt sich das Prinzip der Treue in zwei Grundsätze ab, in den unmittelbaren Vertrauensschutz und in den Freiheitsschutz als Mittel zur Erziehung vertrauenswürdiger Charaktere. Denn die Erfahrung hat gezeigt, daß ein starker, vertrauenswürdiger Charakter sich nur durch Selbstdenken,

Selbstbestimmen entwickelt. Wer immer am Gängelbande geführt wurde, ist nicht verläßlich. Beide Prinzipien sind daher immer zu beachten und bilden zu jeder Zeit eine Resultierende, welche die Grenze des Zwanges bestimmt. Man unterscheidet so Zwangs- und zwangslose Rechte, Zwangs- und Anstands-, Ehren- oder Moralpflichten. Man scheidet danach Recht und Rechtsmoral, juristische und moralische Verantwortlichkeit. Die zwangslosen Pflichten liegen nicht außerhalb des Rechtsgedankens, aber außerhalb seines Befehls und Banns.

Bei den letzteren berührt sich das Recht unmittelbar mit der heutigen, auf religiösem Grunde entstandenen Moral, welche man christliche Moral zu nennen pflegt, obwohl sie dem Christentum nicht allein angehört. Beide — Religionsmoral und Recht — gehen aus der Sitte, der Gewohnheit des Volkes hervor; beide sind allgemeine Regulative für das Handeln der Menschen. Die Verkörperung des einen ist die religiöse Gemeinschaft, die Kirche; die Verkörperung des anderen ist der Rechtsstaat.

Wie verhalten sich nun die idealen Prinzipien beider, Liebe und Vertrauen?

Die Liebe entsteht aus der unmittelbaren Empfindung für den anderen, das eigene Selbst tritt zurück. Sie ist reiner Altruismus, Selbstentäußerung; sie will direkt die Freude des anderen und ihr Ausdruck ist die Wohltat, die Bereicherung des anderen auf eigene Kosten.

Das Vertrauen ist nicht so selbstlos. Es hat zunächst das eigene Wohl im Auge, aber es findet dasselbe mit dem Wohl des anderen innig verknüpft. Es beruht auf dem Gedanken der Solidarität der Interessen. Es ist also Sozialismus, Mutualismus, wie man es auch genannt hat, indem man sich an den Tausch (mutare) oder das Darlehen (mutuum), die beiden Typen der gegenseitigen Verträge, anlehnte. Es schenkt nicht, sondern es gibt auf Wiedergabe, hilft auf Wiederhilfe. In Deutschland hatte es von alters her geherrscht, bei der Gesamthand und in den Genossenschaften. „Bei allen Vorkommnissen des Lebens" — sagt Gierke von der deutschen Gilde — „sollten die Genossen sich gegenseitig unterstützen. Für den erkrankten, verarmten oder notleidenden Bruder hatte die Gesamtheit zu sorgen. Die Zunftkasse war zugleich Kranken-, Armen- und Sterbekasse." Zu der Zunftkasse trugen aber die einzelnen bei, es

war eine Art gegenseitiger Versicherung gegen alle Not. Und das soll nach dem Prinzipe des Vertrauens die ganze Kulturgesellschaft sein!

Die Liebe steht nach dieser Vergleichung ethisch höher, weil wir als Höhe die Entfernung vom Egoismus auffassen. Aber einerseits steht sie *zu* hoch und ist darum kein sicheres Band. Die Gemeinschaft aus Wohlwollen ist nicht so fest wie die aus Interessen-Solidarität; die Wohltat ist dünner gesät als der Kredit. Aber auch ethisch hat das Vertrauen einen wichtigen Vorzug vor der Liebe — es achtet das Selbstgefühl. Wer sich seiner Arbeitskraft bewußt ist, der weist die Wohltat zurück und drückt die Hand, die ihm vertraut; denn das Vertrauen erkennt ihn als gleichberechtigten, ebenbürtigen Genossen an, während die Wohltat ihn demütigt. Der Unterschied erinnert an das verschiedene Ideal von Jüngling und Mann. Der Jüngling strebt nach Liebe, der Mann nach Vertrauen!

Das führt uns zu einem weiteren Unterschiede zwischen den beiden Prinzipien. Jede Organisation sucht diejenigen Eigenschaften zu erwecken, welche das maßgebende Prinzip fördern. Die Liebe wendet sich der Schönheit und den Eigenschaften zu, welche der Schönheit gleich wirken, der weichen, wohlwollenden, milden Gesinnungsweise, die wir vorzugsweise *Gemüt* nennen. Das Vertrauen richtet sich zunächst auf die Kraft und die kräftigen Eigenschaften: Aufrichtigkeit, Festigkeit, Ausdauer, Vereinigung von Wollen und Können, Selbstbeherrschung, die nicht mehr verspricht, als sie halten kann. Wir pflegen diese Eigenschaften *Charakter* zu nennen. Die Liebe ist gefühls-, das Recht ist charakterbildend.

Es gibt Völker, in welchen die einen oder anderen Seeleneigenschaften — Gemüt oder Charakter — durch natürliche Verhältnisse besonders entwickelt sind, und solche Völker könnte man als prädestiniert für die eine oder andere Organisation bezeichnen. Ich habe oben bemerkt, daß in den Gegenden, wo sich die Religion der Liebe entwickelte, lange vorher der Liebeskultus geherrscht hatte. Die Deutschen wiederum sind ein reines Charakter-, ein reines Rechtsvolk. Das Recht ist die germanische Moral. Wollen wir uns davon überzeugen, so untersuchen wir den Inhalt des deutschen *Gewissens!* Es enthält in seinem Kerne nicht das Wohlwollen, sondern die Treue. Es ist reines Pflichtgefühl, Streben nach Vertrauenswürdigkeit. Gewissenhaft, pflichtgemäß und vertrauenswürdig sind

synonyme Begriffe. Ähnliche Bedeutung hat die römische virtus, die Mannestugend; und ebenso jene vertu, welche Montesquieu zur Voraussetzung der Republik macht.

Freilich enthält das Pflichtgefühl auch Wohlwollen, so wie die Gerechtigkeit auch die Gnade umfaßt. Die Gnade ist Gerechtigkeit für die Individualität des Falles gegenüber der Strenge des Gesetzes oder eines allgemein gefaßten Rechtsgrundsatzes. Aber der Ausgangspunkt für das gerechte Urteil liegt doch in der Mitte, dem μέσον des Aristoteles. Die Gerechtigkeit hält die Waage in der Hand, während das Mitleid seinem Objekt ursprünglich ein Präzipuum gibt und sich erst durch Erfahrung, durch entgegenstrebendes Mitleid mit den anderen zu Gerechtigkeit verdichtet.

Mit der Erkenntnis des allgemeinen Prinzips sind noch nicht alle Folgerungen bekannt. Auch bei einem Naturgesetz kennt man die Wirkungen in dem einzelnen Falle noch nicht, wenn man die allgemeine Formel weiß. Es ist daher immerhin möglich, daß man im besten Glauben eine Tat vollbringt, welche nach der Erfahrung das allgemeine Vertrauen schädigt. Es ist ebenso möglich, daß mehrere Menschen in gutem Glauben handeln und dennoch Konflikte vorkommen. Nur die Erfahrung kann lehren, auf welche Weise bei einem Zusammenleben vieler Menschen die wenigsten und die wenigstscharfen Konflikte entstehen. Aber sobald jemand in gutem Glauben handelt, ist seine objektiv unrechte Tat doch nur ein Irrtum, der Charakter des rechtschaffenen Mannes bleibt ihm gewahrt; und bei Konflikten ist gewiß der schärfste Antrieb zur Feindschaft beseitigt, wenn beide Teile überzeugt sind, daß der andere in gutem Glauben gehandelt hat, daß es ihm nicht beigefallen war, den zufälligen Gegner verletzen zu wollen. Durch gegenseitige Nachgiebigkeit, das beste Mittel, andernfalls durch den Ausspruch eines Dritten, des Richters, wird der Konflikt geschlichtet werden ohne Zurücklassung von persönlichem Haß.

Freilich wohl, der Schmerz ist ein arger Friedensstörer, und es liegt im Geiste einer gerechten Verteilung, daß, wer in gutem Trauen handelt, nicht zu sehr geschädigt werde. Namentlich zufällige Schäden sollen den einzelnen nicht allzu schwer treffen. Das ist auch die Idee der modernen Versicherung, welche einen sozialistischen Charakter trägt und deshalb mehr und mehr von öffentlichen Korporationen gepflegt wird. Auch die Arbeiterversicherung gehört hieher, obwohl

sie nebstbei eine Lohnregulierung ist. Es gibt ja auch kaum ein Mittel, das die Eintracht mehr verstärken könnte, als wenn der einzelne, den ein Schaden getroffen hat, weiß, daß er durch denselben sehr empfindlich getroffen, vielleicht in seiner Existenz vernichtet worden wäre, wenn er nicht durch ein gesellschaftliches Band mit anderen vereinigt wäre, welche den größten Teil des Schadens von ihm abnehmen. Diese Teilnahme in der Tat, nicht bloß im Gefühl, dieses Mittragen, nicht bloß Mitempfinden, verlangt die Treue von der Kulturgesellschaft.

Der Gedanke der Treue führt sicherlich seinem Wesen nach zu Frieden und Eintracht; und dennoch ist er streitbar, denn er verbannt alles Dogma. Er erklärt, daß es keine Rechtsvorschrift gibt, welche nicht um der Eintracht willen durchbrochen werden kann und bei dem erfahrungsmäßigen Wechsel der Lebensbedingungen nach gewisser Zeit durchbrochen werden muß; keine Vorschrift, welche Ewigkeit und Unveränderlichkeit in Anspruch nehmen darf. Nur der Gedanke des Rechtes, sein Zweck, die Menschen zu vereinigen, ist ewig, jeder einzelne Satz ist vergänglich. Auch die Dogmen, welche man bis vor kurzer Zeit für unnahbar gehalten hat: Ehe, Eigentum, Erbrecht, Vertrag, müssen sich der Prüfung unterziehen, ob und in welchem Maße sie zur Eintracht beitragen.

Betrachten wir die empfindlichste dieser Institutionen, die Ehe. Die moderne Ehe ist eine Staatsinstitution, kann auch zwischen Genossen verschiedener Religionen geschlossen werden, und ist im Prinzipe löslich, wenn man auch die Bedingungen aus manchen Ursachen erschwert. Vergleichen Sie diese Gestalt mit der mittelalterlichen des Sakramentes, so werden Sie sich nicht wundern, daß der Anhänger des mittelalterlichen Systems sich weigert, die moderne Ehe als Ehe anzuerkennen.

Bei dem Eigentum können wir heute geradezu mit Variation eines Ausdruckes Eduard von Hartmanns von einer „Selbstzersetzung" sprechen. Es gibt bei uns kein Eigentum mehr im Sinne der Römer. Wir geben dem Eigentümer, wenn wir auch regelmäßig (vgl. § 387 ABGB.) keinen Zwang hiefür üben, prinzipiell nicht die Macht, mit seiner Sache zu tun, was er will; wir verlangen von ihm Rücksicht auf die anderen. Die Naturstoffe sind zur Ernährung aller da. Das konsequenteste Mittel, sie dieser Bestimmung zuzuwenden, wäre die Nationalisierung. Aber die bürokratische

Verwaltung hat ihre eigentümlichen großen Fehler. Wir autonomisieren also derzeit, wir übergeben die Dinge den einzelnen, weil sie besser, nutzbringender verwalten. Aber der einzelne hat sein Recht nicht von Gottes Gnaden, sondern durch die Gesellschaft. Sein freies Verfügungsrecht ist mit moralischer Verantwortung für gute Verwendung verbunden. Wir betrachten das Eigentum als ein Amt, als ein Recht, das entsprechende Pflichten auferlegt, als einen umfassenderen Fruchtgenuß. Für Juristen mag als Beweis für die geänderte Auffassung dienen, daß wir heute von einem „Eigentümer mit den Rechten und Pflichten eines Nutznießers" sprechen; das österreichische Gesetz gebraucht den Begriff überall, wo rechtliche Anwartschaft besteht. Der Römer hätte diese Verbindung nie verstanden.

Das Erbrecht hat im gemeinen Rechte allein solche Veränderungen durchgemacht, daß man sagen kann, es gebe keine Vorschrift für Erbberechtigung, deren Gegensatz nicht gleichfalls einmal geltendes Recht gewesen wäre.

Dasselbe gilt vom Vertragsprinzip. Wohl ist das Einhalten eines Vertrages höchst wichtig, mit dem Treuegedanken auf das innigste verwebt. Aber dennoch kann der Freiheitsschutz bewirken und bewirkt, daß wir einzelnen Verträgen überhaupt, anderen in gewisser Ausdehnung oder ohne eine vorgeschriebene, die reife Überlegung vorsorgende Form die Wirksamkeit absprechen.

Wir sehen also, es gibt in der Tat für die Forschung nach dem Wahren und Rechten im Gebiete der menschlichen Gesellschaft keine andere Grenze wie im Gebiete der Natur; wir können, unbehindert durch metaphysische Dogmen, danach streben, die Menschen kennen zu lernen, die Eigenschaften, welche sie trennen und einigen, ihre Handlungen und deren Folgen. Wir können unsere Beziehungen regeln, bloß durch den Zweck geleitet, einig als treue Genossen miteinander zu leben, und durch die besonnene Überlegung, wie wir dies erfahrungsgemäß am besten tun.

Nur ein Satz steht fest, der Satz vom *Menschenrecht;* der Satz, daß, wenn die Natur jemandem den Stempel des Menschentums auf die Stirne gedrückt hat, sie ihn damit zu unserem Genossen gemacht hat, daß wir diese Tatsache anzuerkennen, nicht mehr zu bestimmen haben. Dieser Satz ist kein Dogma, kein Akt der Willkür, kein Mittel zum Zweck. Er ist eine Wahrheit, die

von gereiften Geistern zu allen Zeiten erkannt wurde. Immer wieder sind große Männer aufgestanden und haben ihn gepredigt, haben für ihn gekämpft und gelitten, und wenn auch nach ihnen die Völker wieder verroht sind, so haben sie dennoch die Namen dieser Männer auf den Schild gehoben und anerkannt, daß ihre Lehre geeignet sei, die Menschheit zu führen. Und wenn das Menschenrecht allzu stark verletzt wurde, wenn bevorrechtete Klassen ihre Macht zu sehr mißbrauchten, dann ist immer wieder das empörte Menschengefühl emporgeschlagen in heiligen Flammen und hat zerstört, was sich ihm in den Weg setzte.

Obwohl der Treuegedanke sich auch in allen Nationalrechten Anerkennung verschafft, sein eigenes Gebiet ist das Weltrecht. Die Nationen haften, so lange sie in sich geschlossen leben, an ihren alten Gewohnheiten, und nur wenn ein offenbarer Widerspruch mit der geänderten Rechtsüberzeugung hervortritt, entschließen sie sich zur Änderung. Wenn aber verschiedene Nationen zusammentreten und miteinander verkehren wollen, Nationen mit anderer Sitte und Geschichte, so kann keine derselben beanspruchen, daß die andere ihr Recht deshalb annehme, weil es ihr Recht sei. Wenn die europäischen Völker derzeit ein gemeinschaftliches Frachtrecht beraten, so kann weder Deutschland noch Frankreich oder England verlangen, daß die anderen Mächte sich ohneweiters seinem bisherigen Recht anschließen. Da gibt es nur den Wahlspruch: „Prüfet alles und das Beste behaltet." Die Erfahrung ist der Führer, aber die Erfahrung, wie sie vom Praktiker, vom naturwissenschaftlichen Denker benützt wird, daß nämlich das Bestehende geprüft werde nach seinen guten und bösen Seiten, daß die guten beibehalten, die bösen vermieden werden, daß auch Rücksicht auf die geänderten Verhältnisse genommen, und wenn sich keine bisher geltende Vorschrift als nachahmenswert zeigt, ein besonnener Versuch mit neuen Maßregeln gemacht werde.

Der leitende Grundsatz für das Weltrecht aber ergibt sich aus dem Weltverkehr. Es soll ein Verband, eine Arbeitsteilung geschaffen werden zwischen Menschen, welche Tausende von Meilen voneinander entfernt sind, welche einander nicht kennen und nicht in der Lage sind einander kennen zu lernen. Alle Folgen, die wir aus der Arbeitsteilung gezogen haben, gelten daher in erhöhtem Maße für den Weltverkehr. Das ist wohl bereits zum Teile erkannt, und

der Vertrauensschutz ist schon heute herrschender Grundsatz. Nur wird Vertrauen und Treue noch in einem zu beschränkten Sinn genommen. Ihr Zusammenhang mit dem Gesellschaftsgedanken, die Pflicht, mitzuarbeiten und dem anderen seinen rechten Teil am Gewinn und Lebensgenuß zu gewähren, muß sich noch einleben. „Die Gesellschaft erwartet, daß jeder seine Pflicht tue", möchte als Wahlspruch der Bewegung gesetzt werden. Der Treuegedanke, der die Organisation der menschlichen Arbeitsgesellschaft enthält, die Verwerfung alles Dogmas, die Auffassung aller Satzung als Mittel zum Zweck, als Maßregel zur Herbeiführung des einmütigen Zusammenwirkens aller für das Wohl aller — er ist der Grundgedanke des Weltrechtes.

DIE JURISPRUDENZ ALS SOZIALE TECHNIK

1894

Ist es nicht seltsam, daß die Jurisprudenz, deren Gegenstand die größten Interessen berührt, selbst kein Interesse hervorruft; daß sich freie Geister von ihr abgestoßen fühlen und wenn die Not des Lebens sie an das Rechtsstudium weist, sich anderwärts geistige Anregung suchen? Vor einiger Zeit stieß ich auf ein Büchlein, das mich der Lösung dieses Rätsels näher brachte. Es enthielt einen Vortrag, den 1848 der damalige Staatsanwalt und spätere philosophische Schriftsteller Kirchmann in der Juristischen Gesellschaft in Berlin gehalten hat, betitelt: „Die Wertlosigkeit der Jurisprudenz als Wissenschaft" (Berlin, 1848, Jul. Springer). Der Vortrag faßt in kurzen Zügen die Vorwürfe zusammen, welche gegen die Jurisprudenz erhoben werden.

„*Die Jurisprudenz* — sagt Kirchmann — *ist keine Wissenschaft und erreicht nicht den wahren Begriff derselben; sie entbehrt auch des Einflusses auf die Wirklichkeit und auf das Leben der Völker, wie ein solcher jeder Wissenschaft zukommt.*" Das heißt mit einiger Umschreibung: *Die Jurisprudenz ist nichts und leistet nichts.*

Die Begründung ist in kurzem folgende:

Die Jurisprudenz hat es wie jede andere Wissenschaft mit einem Gegenstande zu tun, der selbständig, frei und unabhängig in sich besteht, unbekümmert ob die Wissenschaft existiert, ob sie ihn versteht oder nicht. *Dieser Gegenstand ist das Recht, wie es in dem Volke lebt* und von jedem einzelnen in seinem Kreise verwirklicht wird. Man könnte es das natürliche Recht nennen.

Die Aufgabe der Jurisprudenz ist, diesen ihren Gegenstand zu verstehen, seine Gesetze zu finden, die Verwandtschaft und den Zusammenhang der einzelnen Bildungen zu erkennen und endlich ihr Wissen in ein einfaches System zusammenzufassen. Sie ist aber seit Bacos Zeiten stationär geblieben.

Die Erklärung liegt zunächst im Gegenstande. Er ist *veränderlich*. Sonne, Mond und Sterne scheinen heute wie vor Jahrtausenden,

die Rose blüht heute noch so wie im Paradiese, das Recht aber ist seitdem ein anderes geworden. Die Ehe, die Familie, der Staat, das Eigentum haben die mannigfachsten Bildungen durchlaufen. Für andere Wissenschaften erwächst daher aus ihrem langsamen Schritt kein Schaden. Ihre Gesetze bleiben wahr für alle Zukunft. Die Rechtswissenschaft kommt dagegen bei der fortschreitenden Entwicklung immer zu spät, *niemals kann sie die Gegenwart erreichen.*

Deshalb steht die Rechtswissenschaft dem Fortschritt des Rechtes stets *feindlich* entgegen und zwängt, selbst wenn sie dem Fortschritt nachgibt, die Bildungen der Gegenwart in die Kategorien verstorbener Gestalten.

Sie wurde ferner dadurch verleitet, über das vergangene Recht *das der Gegenwart völlig zu vergessen* und dem verachteten Handwerk der Praktiker zu überlassen. Die geschichtliche Schule liefert hiefür der Belege genug.

Eine andere Eigentümlichkeit des Gegenstandes der Jurisprudenz zeigt sich darin, daß das Recht nicht bloß im Wissen, sondern auch im *Fühlen* ist. Die Objekte anderer Wissenschaften sind von diesem Zusatze frei. Nur die Wahrheit wird verlangt. Im Rechte dagegen werden alle großen Fragen des Tages zu Parteifragen. Es muß erst die Zeit mit ihrer beruhigenden Kraft über die Frage hinweggegangen sein, ehe die Wissenschaft hervortreten und frei die Wahrheit finden kann, aber freilich dann meist zu spät.

Eine weitere Eigentümlichkeit des Rechtes, deren Folgen die bisher besprochenen weit überragen, ist *die Gestalt des positiven Gesetzes.*

Jedes positive Gesetz ist bedingt durch den Grad der Kenntnis des natürlichen Rechtes; daher der Inhalt neben dem Wahren auch genug des Unwahren enthält. Form und Ausdruck sind vielfach mangelhaft. Das positive Gesetz ist starr, abstrakt, in seiner letzten Bestimmtheit Willkür, endlich die allzeit bereite Waffe, wie für die Weisheit des Gesetzgebers, so auch für die Leidenschaft des Despoten. Die Wissenschaft wird durch das positive Gesetz *zu einer Dienerin des Zufalls.* Soweit das Gesetz der wahre Ausdruck des natürlichen Rechtes ist, bleibt ihr nur das Werk des Erklärens, das Werk des Schulmeisters. Für die Forschung bleibt ihr nur das Unwahre. Damit wird sie aber selbst zur Zufälligkeit; drei berichtigende Worte des Gesetzgebers und ganze Bibliotheken werden zu Makulatur.

Die Wissenschaft äußert aber auch *selbst* durch die Aufnahme des Gegenstandes in ihre Form eine zerstörende Kraft auf den letzteren. Ein Volk muß wissen, was das Recht im einzelnen Fall fordert, und es muß mit Liebe seinem Rechte ergeben sein. Werden dem Rechte diese Momente genommen, so ist es ein totes, kein Recht mehr. Indem die Wissenschaft an das Recht herantritt, ist die Zerstörung dieser Elemente unvermeidlich. Das Volk verliert die Kenntnis seines Rechtes und seine Anhänglichkeit an dasselbe. Die wahren Prozesse, wo das Recht streitig ist, sinken durch die zerstörende Wirkung der Wissenschaft zu einer bloßen Spekulation herab. *Die Rechtspflege ist durch die Wissenschaft zum Glücksspiel geworden.*

Aus diesem inneren Widerspruch zwischen Zweck und Resultat der Jurisprudenz ist auch die sonderbare Empfehlung und Begünstigung der Vergleiche hervorgegangen, das klarste testimonium paupertatis.

Was hat die Rechtswissenschaft, fragt Kirchmann, für *Werkzeuge erfunden,* für Einrichtungen geschaffen, um ihren Gegenstand, das Recht, den Menschen zugänglicher zu machen, die Last, den Schmerz der Entwicklung ihnen zu mildern? Ich suche eifrig nach allen Richtungen, und was ich finde, sind Formulare zu Rechtsgeschäften und Prozeßhandlungen, eine Menge von Verwarnungen, Belehrungen, Formen und Klauseln, endlich das Gebäude des gemeinen Prozesses voll Gründlichkeit und Gelehrsamkeit, kurz alles, nur nicht den Weg, bei seinem Leben zu seinem Rechte zu kommen. Die große Masse der Nation ist im Beginn einer Entwicklung stets besonnen; sich selbst unklar, wendet sie sich fragend an die Wissenschaft nach Lösung der Zweifel. Aber die Wissenschaft hat von jeher sich dazu ohnmächtig erwiesen, die Gegenwart hat sie noch niemals verstanden. Man wende nicht ein, daß dergleichen Dinge nicht zur Rechtswissenschaft, sondern zu Politik und Kunst der Gesetzgebung gehören. *Dies eben ist das Klägliche der Jurisprudenz,* daß sie die Politik von sich aussondert, daß sie damit sich selbst für unfähig erklärt, den Stoff, den Gang der neuen Bildungen zu beherrschen oder auch nur zu leiten, während alle anderen Wissenschaften dies als ihren wesentlichsten Teil, als ihre höchste Aufgabe betrachten. Jene vielgerühmte Fortbildung des Rechtes durch die Juristen, von der man jetzt in allen Kompendien lesen kann, läuft nur auf das Spielwerk des kleineren Details hinaus. Das Fundament legen, den neuen Bau kräftig in die Höhe führen, das können die Juristen nicht. —

So weit Kirchmann. Seine Ausführungen sind ein Gemisch von Wahrheit und Irrtum. Aber der Jurist muß mit Beschämung zugestehen, daß die realen Vorwürfe, die sie enthalten, noch heute begründet sind. Handwerksmäßig und spitzfindig — so ist noch heute wie vor 200 Jahren die juristische Tätigkeit. Die großen Fortschritte der Methodik, der Denk- und Forschungsweise seit Baco sind an ihr abgeglitten. Sie steht der Aufgabe, welche ihr die großen sozialen Fragen der Gegenwart stellen, fremd gegenüber. Sie ist zur Lösung nicht reif, und, was das schlimmste ist, sie will es nicht sein. Sie wehrt sich selbst gegen ihren Beruf. Sie will nicht frei denken. Sie lehnt jede Forschung nach allgemeinen Grundsätzen ab und nennt sie verächtlich Naturrecht. Sie erklärt sich ausdrücklich stolz als bloße *Auslegungswissenschaft* und geltende Satzung allein als ihren Gegenstand. Es gibt für sie nur *bestehendes*, nur römisches, deutsches, österreichisches Recht, aber kein Recht der Gegenwart und kein der Wissenschaft genügendes Recht.

Man darf selbstverständlich aus dem Gegensatz kein Wortspiel machen wollen. Geltendes und wissenschaftlich entsprechendes Recht sind wesentlich verschieden. Es ist auch geraten, sie schon im Ausdruck derart zu trennen, daß man nicht in die Gefahr gerät, sie zu verwechseln; so wie es in der Volkswirtschaftslehre gut ist, Gebrauchs- und Tauschwert mit anderen Namen zu bezeichnen. Wenn man bloß in diesem *sprachlichen* Sinn das Wort Recht für geltendes Recht vorbehalten will, so ist dagegen nichts zu erinnern, obwohl es mit dem Sprachgebrauch nicht ganz übereinstimmt. Aber das, was nach wissenschaftlich durchdachter Erfahrung (nicht allerorten und allezeit, sondern jetzt und bei uns) gelten soll, wird *objektiv* als Gegenstand des juristischen Nachdenkens verworfen. Die Jurisprudenz, sagen ihre Lehrer, hat sich *grundsätzlich* nur mit positivem Recht zu beschäftigen; bevor ein Satz, der seinem Inhalte nach Rechtssatz ist, in einem Lande sanktioniert wurde, gehört er nicht in ihr Gebiet. *In welches denn?* Die Frage hat den Juristen nicht zu kümmern. „Solche Fragen, sagt Hölder („Über den Entwurf eines deutschen bürgerlichen Gesetzbuches"), lassen mit den Mitteln der Jurisprudenz sich nicht entscheiden und würden daher für den Juristen nicht existieren, wenn er ausschließlich Jurist wäre." Der kürzlich gestorbene Windscheid, das jüngste geistige Haupt der orthodoxen Schule, hat in diesem Sinne die Jurisprudenz ausdrücklich als „Magd" der Gesetzgebung bezeichnet. „Eine Magd mit einer Herrscherkrone", hat er hinzugefügt. Aber die Krone könnte nur bezeichnen, was die Magd war oder sein sollte; das Zeichen ihrer wirklichen Stellung ist die Kette.

Die Wissenschaft ist frei. Eine Doktrin, welche dient, hat auf den Gehalt der Wissenschaft verzichtet. Der Ausspruch eines Gesetzgebers kann für weiteres Denken nur eine schwankende und unzuverlässige Grundlage sein. Wenn der Gesetzgeber sich geirrt hat, ist die sogenannte Wissenschaft, die ihm folgt, nur eine Erweiterung und Vertiefung dieses Irrtums. Alle Wissenschaft, darin hat Kirchmann zweifellos recht, hat das Wirkliche, an sich Wahre zum Gegenstand. Wenn der Forscher richtig beobachtet und geschlossen hat, so muß auch sein Resultat richtig sein. Der Jurist, der ein Gesetz über Folter oder Hexenprozeß, über Sklaverei, Schuldknechtschaft oder despotische Gewalt zum Gegenstand seiner Auslegung genommen hat, muß aber, je getreuer er ist, zu desto unrichtigeren Folgerungen gelangen. Solange die Jurisprudenz nicht den Irrweg verläßt, nur Auslegung sein zu wollen, solange kann sie nicht wissenschaftlich sein.

Der Beweis ist auch praktisch leicht zu führen. Niemand wird zweifeln, daß ein Gesetz auch schlecht sein kann, und die römischen Juristen — *gute Juristen* — haben es dann abgeschwächt oder umgangen; nach welchem Gesichtspunkt haben sie das Gesetz beurteilt und ausgelegt?

Savigny hat nicht die Herrschaft des römischen Rechtes, wie es zu Justinians Zeit bestand, sondern des *heutigen* römischen Rechtes verlangt; von welchem Gesichtspunkt aus wird ein Satz zum heutigen Recht gewiesen?

Die neue Zeit hat eine Reihe sozialer Erscheinungen hervorgebracht, die noch nicht gesetzlich geregelt sind und doch den Richter brauchen; nach welchem Gesichtspunkt wird er entscheiden?

Die Schlagworte: Billigkeit, Natur der Sache, Zweckmäßigkeit, Rechtsanalogie, die man anwendet, weisen alle auf ein *freies* Denken hin, welches von dem Gesetze unabhängig ist und es seinen Grundsätzen unterzieht.

Mit dem bestehenden Gesetz kann diese freie, wissenschaftliche Jurisprudenz nur in doppeltem Verband stehen. Das Gesetz muß, solange es Gesetz ist, befolgt werden. Das verlangt nicht bloß der

Wille der Mächtigen, sondern auch die bewährte Erfahrung, daß eine schlechte Ordnung noch immer besser ist als keine. Die Jurisprudenz, soweit sie an das geltende Recht gebunden ist, muß daher die Aufhebung eines von ihr als schlecht erkannten Gesetzes verlangen, inzwischen aber ihre Aufgabe in den Grenzen, welche es ihr stellt, bestmöglich zu erreichen suchen. Außerdem ist das geltende Recht selbst Material der wissenschaftlichen Forschung. Die verschiedenen geltenden Rechte können gesammelt, verglichen und allgemeinere Tatsachen des menschlichen Verkehrs aus ihnen erkannt werden. Aber was man geltendes Recht nennt, ist unter diesem Gesichtspunkt eine verwickelte Tatsachenmasse, welche zerlegt und deren ursächlicher Zusammenhang mit den zu ihrer Zeit bestandenen Verhältnissen erforscht werden muß, bevor sie belehren und zu allgemeineren Schlüssen Anlaß geben kann. Die Gesetze Roms und der germanischen Stämme, des alten Roms und der justinianischen Zeit geben durch ihre einfache Zusammenstellung noch kein wissenschaftliches Ergebnis; die Begriffe, welche die Rechtsgelehrsamkeit des Mittelalters gebildet hat, um verschiedene Institute ohne Prüfung ihrer wirtschaftlichen Bedeutung in eine Gruppe einzuordnen, haben keinen realen Wert. Nur als Ergebnis einer kausalen Entwicklung, als Folgen veränderter sozialer Verhältnisse und als Ursachen weiterer Veränderungen sind die geltenden Gesetze wissenschaftliches Material; ihre Eigenschaft, positives Recht zu sein, tritt in den Hintergrund.

Was vom Gesetze gesagt wurde, gilt in ähnlicher Weise auch vom Gewohnheitsrecht. Die beiden Quellen des geltenden Rechtes unterscheiden sich in ihrem Verhältnis zur freien Forschung nur wenig. Kirchmann teilt einen verbreiteten Irrtum, wenn er das gewohnheitsmäßig entstandene oder von ihm sogenannte *natürliche Recht* als Objekt der Rechtswissenschaft auffaßt. Es kommt dies von der vielfachen Bedeutung des Wortes *natürlich* her, welche schon manche Verwirrung angerichtet hat.

„Natürlich" steht zunächst dem „übernatürlich" gegenüber. Dieser Gegensatz ist für den Juristen nicht von Wert. In seiner Sphäre ist *alles* natürlich. Gesetz und Gewohnheit, Gedanke und Tat, Vertrag und Verbrechen sind ebenso natürliche Tatsachen wie Geburt und Tod.

Dann aber bedeutet das Wort einmal das *Ursprüngliche*, vom

Menschen Unabhängige, im Gegensatz zu dem durch Zutun des Menschen Gewordenen, und man spricht von der Natur, die sich nicht austreiben läßt, vom Naturzustand, von natürlichen Heilquellen, natürlichen Fähigkeiten und Leidenschaften des Menschen, von dem natürlichen Rechte der Gewalt u. a. Das andere Mal bedeutet es das *Logische*, *Vernünftige* und dadurch Selbstverständliche, und man spricht von den natürlichen Folgen einer Handlung, von natürlicher Billigkeit, man sagt, daß man mit dem Zweck natürlich auch die Mittel wolle, daß ein Vertrag natürlich (nihil tam naturale est) so gelöst wie geschlossen werde, und anderes.

Das Ursprüngliche wird wiederum einmal der wirklichen Kultur und Bildung, das andere Mal der Hyperkultur und Verbildung gegenübergestellt. Unter einem natürlichen Menschen stellen wir uns etwas anderes vor, als unter einem Naturmenschen; natürliche Erziehung, natürliches Benehmen, natürliche Freundlichkeit haben mit dem Naturzustande Rousseaus nichts gemein. Für die Römer war das jus naturale der Gegensatz zum jus civile und bezeichnete entweder das rein tatsächliche oder animalische Verhältnis (jus quod natura animalia docet), oder das jus gentium, oder das vom Zivilrecht nicht anerkannte, aber doch aus Ordnungs- oder Billigkeitsrücksichten geschützte Verhältnis. Das Naturrecht des Mittelalters lehnte an das jus gentium an, betrachtete aber die Vernunft als allgemeine charakteristische Eigenschaft des Menschen und suchte deshalb aus Grundsätzen der Vernunft ein allgemeines Recht abzuleiten.

Kirchmann versteht unter natürlichem Recht zuerst die Ordnung der sozialen Verhältnisse, welche sich ohne Jurisprudenz und, wie es sich aus seiner weiteren Darstellung zeigt, auch ohne Gesetz entwickelt, also das Gewohnheitsrecht. Bei der Beurteilung der Gesetze aber sagt er: „Soweit das Gesetz der wahre Ausdruck des natürlichen Rechtes ist, bleibt der Wissenschaft nur das Werk des Erklärens" (S. 23), und versteht also hier natürlich als richtig oder sachgemäß. Darin liegt aber ein Irrtum.

Das Gewohnheitsrecht hat gegenüber dem Gesetze wichtige Vorzüge, es hat auch viele Nachteile. Der mächtigste Trieb des Menschen ist der Eigennutz. Eigennutz vorzugsweise hat die ursprünglichen sozialen Verhältnisse geschaffen. Eigennutz, Stolz, Trägheit und Mißtrauen stellen sich allen, auch den notwendigen Neuerungen

entgegen. Ein Fortschritt, der nicht mit augenscheinlichen Vorteilen verbunden ist, findet in der seßhaften Bevölkerung oft den hartnäckigsten Widerstand. Die großen Reformen im 18. und im Anfang des 19. Jahrhunderts in Deutschland waren von erleuchteten Fürsten getragen. Auch das Gewohnheitsrecht ist ein Herr, und manchmal ein harter Herr, und die Doktrin, die ihm dienen würde, wäre keine freie Wissenschaft. Die Jurisprudenz hat nicht das von Kirchmann sogenannte natürliche Recht, sondern Gewohnheits- und Juristenrecht haben gemeinschaftlich *die sozialen Beziehungen und Interessen* zum Gegenstand.

Das Verhältnis zwischen Gewohnheitsrecht, Gesetz und Jurisprudenz mag durch eine Vergleichung anschaulicher gemacht werden.

In eine öde Gegend (die Vereinigten Staaten Amerikas und Polynesien bieten noch heute Beispiele genug) kommen Ansiedler. Sie bauen ihre Hütten und Häuser, jeder wie er es versteht und wünscht. Macht einer eine Verbesserung, welche sich bewährt, so ahmen ihm andere nach. Allmählich entsteht in dieser „natürlichen" Weise ein Baustil, und wenn er längere Zeit unverändert bleibt, so bietet dies Gewähr für eine gewisse Festigkeit und Bewohnbarkeit der Häuser. Entsteht ein Dorf, werden Gassen notwendig, wohnen mehrere Familien vereint, oder wird die Festigkeit und Lichte eines Hauses von der Anlage des Nachbarhauses abhängig, so entwickelt sich eine Bauordnung, d. h. man nimmt und verlangt bei dem Bau Rücksicht auf die anderen. Die Bauordnung wird desto strenger und greift desto tiefer in Einzelheiten ein, je größer die Häuser werden, je enger sie aneinanderrücken und in ihrem Zustande, ihrer Zugänglichkeit und Bequemlichkeit voneinander abhängiger, Feuer-, Einsturz-, Krankheitsgefahren größer, Straßen, Kanäle, freie Plätze notwendiger werden.

Die Vergleichung der naturalen und der durch Bauordnung geregelten Bauweise zeigt bei jeder Vorzüge und Schäden. Die Bauordnung verkümmert den Einfluß der Individualität, die eigenartige Schönheit einer scheinbar ungeordneten und durch die Zweckmäßigkeit des einzelnen Baues doch geregelten Anlage; sie kann auch, soweit sie eine bestimmte Bauweise anordnet, objektiv bessere Anlagen verhindern. Dagegen bietet sie regelmäßig eine größere Sicherheit für Ausnützung des Raumes, gesunden, festen und die Nachbarn nicht beeinträchtigenden Bau. Naturale und durch Vorschriften

geregelte Bauweise unterscheiden sich also, — *aber nicht gegenüber der Architektur*. Jeder Kundige würde über die Annahme lächeln, daß die „naturale Bauweise" Gegenstand einer Wissenschaft sei, deren unmittelbare Beziehung zu ihrem Gegenstand durch eine Bauordnung gestört werde, so wie es Kirchmann für Jurisprudenz, natürliches Recht und Gesetz behauptet.

Die Bauweise ist, weil sie Tätigkeit ist und Zwecken dient, überhaupt nicht Gegenstand einer Wissenschaft im engeren Sinn (reinen Wissenschaft), sondern einer *Kunst* oder angewandten Wissenschaft. Diese Kunst will nicht den „natürlichen", sondern einen *zweckmäßigen* und *schönen* Bau. Die von den Bewohnern ohne Anleitung hergestellten Bauten werden von ihr berücksichtigt werden, soweit sie sich objektiv als zweckmäßig und schön erweisen. In einer Gegend, wo sich eine gewisse Bauweise eingebürgert hat, mag man auch, soweit es die Zweckmäßigkeit gestattet, die Neubauten ähnlich errichten. Aber eine weitere Bedeutung hat die naturale Bauweise nicht. Soweit sie unzweckmäßig ist, wird sie verlassen, und sobald sich die Bewohner der Gegend von den Vorzügen der neuen Gebäude überzeugt haben, ahmen sie sie auch nach; ebenso wie die Bauern trotz ihres bekannten Mißtrauens gegen alles Neue die Maschinen anschaffen, von deren Nützlichkeit sie sich durch Selbsterfahrung überzeugen. Wenn eine genügende Zahl von Baumeistern vorhanden ist, werden Laien einen größeren Bau selten führen. Dadurch wird aber der Sinn des Volkes für schönen Bau nicht gestört, sondern gefördert. Selbst die Geschicklichkeit für Eigenbauten hört nicht auf, und die kleinen Häusler wissen sich bei Ausbesserungen und Umarbeiten gar wohl zu behelfen. Ein Gegensatz zwischen Volk und Baumeistern tritt nicht ein, und selbst der Befehl, bei größeren Bauten einen Baumeister zu bestellen, wird nicht als Bedrückung empfunden.

Mit der Bauordnung eines einzelnen Landes oder Ortes befaßt sich die Theorie der Baukunst nicht. Wer aber an einem Ort seine Kunst ausüben will, muß die dort geltende Bauordnung kennen und wahren. Die Bauordnung im eigenen Land wird daher auch an jeder technischen Anstalt erläutert. Ebenso werden die Bauten großer Meister und die hervorragenden Baustile erläutert — nicht zu erzwungener Nachahmung, aber als Beispiele, an denen man sich erziehen und im Zweifel an sie halten mag.

Die wissenschaftliche Grundlage der Baukunst ist die *Mechanik*,

zu welcher einzelne Teile anderer Wissenschaften hinzutreten, die sich auf Objekte, Mittel und Zwecke des Baues beziehen.

Die Anwendung der Parallele auf Rechtsordnung, Rechtskunst (Jurisprudenz) und die ihr zugrunde liegende Wissenschaft (Jurisszienz) ist leicht zu ziehen. Wie die Bauweise so hätte auch die volkstümliche, die durch sanitäre Vorschriften angeordnete, und die wissenschaftliche Methode, Krankheiten zu verhüten und zu beseitigen, zur Vergleichung herangezogen werden können. Aber ein Beweis durch Gleichnis ist selbstverständlich stets mangelhaft, weil zwischen den verglichenen Gegenständen wesentliche Unterschiede bestehen können. Vergleichung kann die Erkenntnis nur anbahnen, nicht gewähren.

Wo Menschen leben, treten sie zusammen und bildet sich auf die verschiedenste Weise, in Krieg oder Frieden, freundschaftlich oder zwangsweise, durch bewußte und nachgeahmte Zwecktätigkeit ein Recht, d. h. eine Ordnung ihres Lebens und Verkehrs. Diese Ordnung hat bei jedem Volk eine gewisse Eigentümlichkeit, welche teils aus dem Charakter des Volkes, seiner Umgebung und Beschäftigung stammt, teils aus unauffälligen Gründen, die man Zufall nennt. Sie hat, wie man sagen könnte, Erdgeruch, so wie Tracht, Dialekt, Wohnung, Unterhaltungsweise und anderes.

Diese Eigenart kommt weder dem Recht, noch auch den Beziehungen der Menschen allein zu. Bei jedem existenten Objekt der Forschung bleibt ein individueller Rest der Tatsachenreihe zurück, der einer positiven Ausgestaltung spottet. Jede Pflanzenart hat ihre eigentümliche Bildung der Äste und Zweige, ihre eigentümliche Gestalt und Anordnung der Blätter und Blüten; und wenn wir auch überzeugt sind, daß dies alles seine vollständig erklärenden Ursachen habe, so wird die Wissenschaft kaum jemals dazu gelangen, die ursächliche Reihe mit Genauigkeit festzustellen. Auch bei Gesteinen ist an jedem Fleck der Erde eine eigenartige Mischung und Lagerung vorhanden, und wer irgendwo Anlagen errichten will, muß sich neben den allgemeinen noch besondere örtliche Kenntnisse verschaffen. Das hindert jedoch Forschung und Fortschritt nicht, hindert nicht die Auffindung von Gesetzen für die gemeinsamen Eigenschaften und Verhältnisse, die trotz der Eigenart anwendbar sind.

Dies gilt auch für das Recht. Nur ein geringer Teil in der getroffenen Ordnung ist eigenartig, der größere steht unter der Herr-

schaft von Zweckbestrebungen, welche den Menschen überhaupt oder auf einer gewissen Kulturstufe gemeinsam, und welche so bedeutend sind, daß z. B. die Anordnungen der alten Römer noch vielfach die Grundlage unseres Privatrechtes sind. Der Mensch will sein Leben fristen und sein Geschlecht vermehren; Hunger und Liebe, wie Schiller sang und Marx deduzierte, sind die großen Triebfedern seines Handelns. Die Erfahrung weist ihn zur Erreichung dieser Zwecke auf die Gesellschaft mit anderen; denn seine Waffe im Kampf des Lebens ist der Geist, der sich nur in der Gesellschaft entwickeln kann und selbst, wenn er entwickelt ist, vereinzelt im Kampfe gegen die Naturmächte unterliegt. Aber wenn der Mensch durch diese Bedingungen seiner Existenz *sozial* (gesellschaftlich) wird, so wird er damit nicht *sozialisch* (moralisch, gemeinsinnig). Das bewußte Zusammenwirken aller für alle ist nur das Ideal der Entwicklung. In Wirklichkeit betrachtet der einzelne mit seltenen Ausnahmen die gesellschaftlichen Einrichtungen als Mittel für sein Eigenwohl. Dieses Wohl (Interesse) bestimmt auch sein Urteil über das Recht. *Was ihm nützt, ist ihm recht.* Das Verlangen der einzelnen, Einrichtungen zu treffen, welche ihnen nützen, hat von Ursprung an die Rechtsbildung geleitet. Die Stärkeren haben stets ausgiebig für sich gesorgt, die Schwächeren so gut sie konnten. Die ersteren haben nach Herrschaft gestrebt, die anderen nach Gleichheit. Neben dem Eigeninteresse wirken im Menschen wohl auch Mitleid und Unparteilichkeit (Rechtssinn), Mißtrauen, Trägheit, Hartnäckigkeit, welch letztere man oft mit Rechtssinn verwechselt, und andere Eigenschaften. Im allgemeinen ruht aber alle positive Rechtsbildung auf Zweckdenken für das Eigeninteresse (Locke).

Es ist für die Beziehung des sogenannten natürlichen, d. h. durch die Gewohnheit der Interessenten zustande kommenden Rechtes zur Jurisprudenz wichtig, zu erkennen, daß es gleichfalls unter diesem Grundsatz steht und jederzeit stand. Auch das natürliche Recht ist nicht gewachsen wie die Blume auf dem Felde, sondern durch *Zweckdenken* für das Eigenwohl entstanden. Auch die ersten Rechtsgenossenschaften und die ersten Rechtseinrichtungen sollten den Mitgliedern *nützen*, sie *besser* stellen, als sie sich ohne die Genossenschaft befunden hätten, wobei die Schwachen aber allerdings oft nur die Wahl zwischen der ihnen angewiesenen Stellung und dem Tod hatten. So entstanden im Wege Rechtens Sklaverei, Paria- und

Helotentum. Sie zeigen den harten, vom Gesichtspunkte der Billigkeit aus sehr *unnatürlichen* Egoismus, der die erste Rechtsbildung, welche man „natürlich" nennt, kennzeichnet.

Eine größere Verwicklung der Verhältnisse macht überall *Gesetze* notwendig. Die Unterschiede zwischen Gewohnheitsrecht und Gesetz sind vielfach erörtert worden; sozial wichtiger ist der Unterschied zwischen Volks-, Fürsten- und Aristokratenrecht. Die Gesetze können vom Volk ausgehen, und das Gewohnheitsrecht ist wohl niemals Fürstenrecht, aber oft aristokratisch; die Zwölftafelgesetze in Rom waren von den Plebejern als Schutz gegen das Gewohnheitsrecht verlangt worden.

Gewohnheits- und Gesetzesrecht sind geltendes Recht. Sie beruhen auf Zweckdenken. Ob und wie weit dieses Denken und mit ihm der Rechtssatz, den es schafft, *richtig* ist und den angestrebten Zweck erreicht, hängt von der Einsicht und Unbefangenheit des Autors sowie von mancherlei zufälligen Ereignissen ab. Aber sie zwingen. Sie gestatten dem einzelnen nicht, die Zweckmäßigkeit der ihm vorgeschriebenen Handlungsweise zu prüfen und danach zu handeln. Er muß gehorchen, auch wenn das Mittel schlecht ist. Es geschieht ihm oftmals hart, zu hart, aber allerdings wird dadurch allein die reale Ordnung erhalten, unabhängig von der Willkür der Individuen.

Dem Beteiligten wie dem Gesetzgeber gegenüber ist der Jurist *der Sachverständige für die Ordnung der sozialen Verhältnisse*. Auch sein Denken ist Zweckdenken, das aber nach einem trefflichen Ausdruck von Brinz nicht Potestät, sondern Autorität hat, nicht zwingt, aber, durch wissenschaftlich durchdachte Erfahrung geleitet, vorhersieht. Der Jurist soll die nach dieser Erfahrung *objektiv zweckmäßige Einrichtung der sozialen Verhältnisse* treffen. Die Jurisprudenz ist wegen dieses konkreten Charakters wissenschaftlich, aber keine Wissenschaft. Sie ist eine *Kunst*, eine Abteilung der sozialen Technik, oder, nach dem hier gebräuchlicheren Ausdruck, der *sozialen Politik*. Der Jurist muß können; *wissen* nach der Auffassung Sokrates', daß nicht der zu schwimmen wisse, der die Bewegungen der Schwimmer kennt, sondern der sie auszuführen versteht. Ein gelehrter Gesetzeskenner ist noch kein guter Jurist, sondern nur wer auf Grund seiner Kenntnis die Lebensverhältnisse der Menschen den Interessen der Beteiligten und der Gesamtheit gemäß zu gestalten weiß. Der Jurist muß *praktisch* sein, er bewährt sich in der Ausübung.

Es ist daher ganz verkehrt, wenn die gemeinrechtliche Doktrin des 19. Jahrhunderts Juristen auszubilden glaubt, indem sie (auch im Gegensatz zu Savignys Lehre vom *heutigen* römischen Recht) den Hörer mit den Einzelheiten alter Rechte erdrückt, während sie weder sein Auge für die bestehenden Verhältnisse, zu deren Ordnung er doch beitragen soll, noch sein Urteil für die konkrete Zweckmäßigkeit einer Einrichtung schärft. Nicht der Unterricht, in wie vielen Abschriften eine Eingabe zu überreichen oder wie groß die für ein Geschäft zu leistende Stempelgebühr sei, macht das Praktische der Jurisprudenz aus — obwohl ein Arzt auch verstehen muß, wie man einen Finger verbindet —, sondern *die Richtung des Studiums auf das Leben der Gegenwart*, das Bewußtsein, daß aller juristischer Unterricht darauf hinzielt, den Jünger zur Ordnung der sozialen Verhältnisse seiner Mitbürger, insbesondere zur Erkenntnis drohender oder bereits vorhandener Störungen und zur Auffindung der zu ihrer Verhütung oder Beseitigung dienlichen Mittel geeignet zu machen. Wer kann dem Landwirt einen Rat für die Abgrenzung seiner Rechte gegen den Nachbar oder für die Vereinbarung mit seinen Miterben geben, dem die Bedingungen landwirtschaftlicher Tätigkeit gänzlich unbekannt sind?

Die Erkenntnis der Jurisprudenz als Kunst beweist auch, wie fehlerhaft der Gegensatz ist, welcher noch immer zwischen ihr und *Gesetzgebungskunst* angenommen wird. Es ist, als ob man die Baukunst von der Kunst des Architekten lostrennen und auf die Tätigkeit derjenigen beschränken wollte, welche den Bau ausführen. Hier könnte man die von Jhering in unrechter Art versuchte Unterscheidung zwischen *niederer* und *höherer* Jurisprudenz einstellen. Die Rechtsübung im Rahmen eines gegebenen Gesetzes ist die *niedere*, weil gebundene und nur im kleinen tätige Jurisprudenz. Die *höhere*, freie Jurisprudenz betätigt sich in der Aufstellung und Durchführung originärer Pläne zur Organisierung der Gesellschaft und daher praktisch vorzugsweise in der Gesetzgebung. Welcher Widerspruch liegt z. B. darin, die Schaffung eines Autorrechtsgesetzes von der Jurisprudenz auszunehmen, welche doch das fertiggestellte Gesetz durchzudenken, logisch zu erweitern und vernünftig zu begrenzen hat! Und welcher knechtische Sinn liegt in der Ansicht, daß die wissenschaftliche Theorie nur die Bestimmung habe, gegebenes Herrenwort durchzuführen, dieses Wort selbst aber gehorsam erwarten müsse!

Aber selbst in der Auffassung der Tätigkeit des Juristen innerhalb des Gesetzes ist die heutige Rechtslehre beschränkt. Sie befaßt sich ausschließlich mit der Tätigkeit des urteilenden *Richters*. Das Urteil — das ist richtig — muß auf vernünftiger Auslegung der bestehenden Normen ruhen. *Die ganze heutige Rechtslehre ist grundsätzlich nichts anderes als eine Anleitung für die Richter eines bestimmten Landes zu gesetzmäßiger Rechtsprechung.* Das ist die Bedeutung des Lehrsatzes, daß sich die Jurisprudenz nur mit dem geltenden Recht zu befassen hat. Jurisprudenz heißt hier subjektiv Richterstand, prädikativ richterliches Denken.

Der hohe Beruf des Richters und die Wichtigkeit seiner Ausbildung ist nun gewiß außer Streit. Aber wie die Einhaltung der Bauordnung nur die Grenze der Baufreiheit ist, ebenso ist die Einhaltung der gesetzlichen Vorschriften für die Staatsbürger nur die *Grenze* der freien Ordnung ihrer Lebensverhältnisse. Der Jurist, der nicht Richter ist, und auch dieser in Verwaltung der außerstreitigen Gerichtsbarkeit, soll aber bei der freien Ordnung selbst als Sachverständiger wirken. Er soll die Formen neuer Lebensverhältnisse schaffen. Er soll deren Entwicklungsfähigkeit prüfen, die Ursachen von Störungen erkennen und Anstalten treffen, um sie zu vermeiden oder unschädlich zu machen. Er soll, wenn Störungen eingetreten sind, sie beseitigen, ohne das Verhältnis selbst, wenn es noch lebenskräftig ist, zu zerstören. Darin besteht die Kunst des Anwalts (Advokat, Notar, Kurator, Oberkurator), die *kautelarische* und *kontentiose Jurisprudenz*. Sie hat in dem unparteiischen Richterspruch ihre Stütze, aber ihre wichtigste, ihre lebendige und volkstümliche Tätigkeit hat den Zweck, den Richter unnötig zu machen.

Auch die niedere Jurisprudenz ist also nicht bloße Auslegungskunst. Die Kenntnis des Gesetzes ist ihr notwendig, aber nur damit sie nicht durch Widerstreit mit demselben ihre Zwecke verfehle. Sie ist die Kunst, das soziale Leben der Menschen *innerhalb der Gesetze* zweckmäßig, dem Frieden und Wohlstand förderlich zu gestalten. Außer Kenntnis des Gesetzes verlangt sie Kenntnis der konkreten Lebensverhältnisse und ihrer Störungen, Kenntnis, Übung und Scharfsinn, um die allgemeinen und besonderen Mittel zu ihrer richtigen Gestaltung anzuwenden, Störungen zu verhüten und zu beseitigen. Je weiter das Gesetz in das Innere der Lebensverhältnisse eindringt, desto mehr ist wohl der Jurist an dasselbe gebunden. Aber

nur in einem Kasernenstaat wäre rechtlich zulässige und gesetzlich vorgeschriebene Lebensweise identisch. Die heutige Doktrin, welche die Jurisprudenz nur auf die Auslegung des Gesetzes beschränkt, enthält daher nur *einen Teil der niederen Jurisprudenz*. Sie bietet nur dem Richter seinen Stoff und dies in nüchterner, kirchturmpolitischer Art; sie bietet dem Anwalt zu wenig, dem Gesetzgeber fast nichts. Ist es zu wundern, daß freie Geister sich von ihr abwenden?

Die Doktrin dieses Charakters rührt aber erst aus dem Mittelalter her. Die römischen Juristen waren keine bloßen Gesetzesausleger. Sie schufen im prätorischen Edikt ein ewig lebendiges, anpassungsfähiges Gesetz. Sie ließen sich auch als Respondenten durch Billigkeit, Nützlichkeit und Natur der Sache leiten, und wenn das alte Gesetz dem Leben zu schroff entgegentrat, scheuten sie selbst nicht, ihm Zwang anzutun. Die Art, wie sie Streitfragen mit Rücksicht auf die Gesetze ihres Landes entschieden, ist mustergültig für alle Zeit. Schon die Juristen der byzantinischen Epoche waren aber nur mehr Beamte. Die Juristen des Mittelalters entbehrten vollends der produktiven Kraft, welche die römischen Klassiker aus dem steten Verband mit dem Volke geschöpft hatten. Das gemeine Recht war nicht Volksrecht. Die Jurisprudenz arbeitete vom grünen Tisch und wurde dadurch zu toter Logik. Die theologische Lehre vom Gehorsam wirkte dann mit, um das Auslegungsprinzip auszugestalten: Erklärung des Herrenwortes, ohne an ihm zu deuten.

Die Gegenbewegung begann mit der Reformation. Man fing an, selbst zu denken und damit auch zu begreifen, daß das römische Recht nicht unbedingt, für alle Länder und Zeiten, ratio scripta sei. Die Form, in welcher der Gegensatz auftrat, war *das Naturrecht*. Die hervorragendsten Juristen wandten sich ihm zu. Das Naturrecht war der Sitte der Zeit gemäß logisch-abstrakt; wo es indessen zu schaffen galt, zeigten sich seine Anhänger (Kreittmayr, Suarez, Martini) als kräftige und konkrete Denker, während die Romanistik unfruchtbar blieb und immer kleinlicher wurde. Am Ende des vorigen Jahrhunderts ward es auch im Recht lichter. Auch die historisch-nationale Theorie war durch einen Naturrechtler, Hugo, begründet worden, der sich für die Fehler der bestehenden Rechtsordnung freien Blick bewahrt hatte und die Gewohnheit nur als Entschuldigung, nicht als Sanktion gelten ließ. Noch Savigny und Puchta

lenkten den Blick auf das Leben der Gegenwart. Aber sie waren durch ihre Neigung zum römischen Recht, welches sie mit Gewalt als deutsches Volksrecht zu deuten suchten, nicht frei, der Anschluß an die Vergangenheit diente dem Geist der Reaktion und die historische Schule wirkte demgemäß. Zur gleichen Zeit mit ihr entstand aber die vergleichende Rechtswissenschaft, vorzüglich durch Montesquieu geweckt; im Strafrecht wirkte der Humanitätsgedanke klärend, während das Staatsrecht durch die Lehre vom Gesellschaftsvertrag revolutioniert wurde. Im 19. Jahrhundert verlangte dann der moderne Verkehr eine Regelung, wofür alles alte Recht versagte. Wechsel- und Handelsrecht brachten in die Theorie des gemeinen Rechtes den Zwiespalt, und ihnen sowie dem freieren Geist, der seit der konstitutionellen Regierungsweise durch die Mitwirkung des Volkes an der Gesetzgebung geweckt wird, ist es zu danken, daß derzeit langsam, wenn auch immer noch an dem Grundgedanken der Auslegung festhaltend, der neuestens in dem ersten Entwurf des deutschen Zivilgesetzbuches einen klassischen Ausdruck gefunden hat, auch die gemeinrechtliche Theorie sich dem starren Dienst des positiven Gesetzes entwindet. Dankwardt war durch seinen ökonomisch-psychologischen Grundgedanken der tiefste, Jhering durch seine Zwecktheorie, welche im Strafrecht durch die internationale kriminalistische Vereinigung vertreten wird, der kräftigste Vorkämpfer. Der Zweckgedanke ist alt; insbesondere haben ihn die englischen Philosophen Locke, Hume, Bentham vertreten. Nur die bisherige Lehre, daß der Jurist über das Gesetz nicht nachzudenken, sondern es anzunehmen und zu befolgen habe, macht es begreiflich, daß die Lehre Jherings als ein Neues, Unbekanntes bewundert und angefeindet wurde.

Die Jurisprudenz als Kunst ist das unmittelbare Objekt der Theorie. Die Hochschule hat die Aufgabe, sachverständige Männer heranzubilden, welche — frei oder im Rahmen des geltenden Rechtes — die sozialen Verhältnisse ihrer Mitbürger in gute Ordnung bringen und so erhalten: Gesetzgeber, Richter, Anwälte.

Die Kunsttheorie für Straf- und Verwaltungsrecht ist durch alte Gesetze nicht beeinflußt, aber noch zu abstrakt und zu wenig auf das Studium der Lebensgebiete, deren Ordnung sie lehren soll, bedacht. Das Strafrecht insbesondere muß auf Psychologie ruhen (Dankwardt). Das Ausmaß der Strafe ist kein Rechenexempel; die

Strafe verfolgt Zwecke und muß nach Art und Größe geeignet sein, diesen Zwecken zu dienen.

Die Kunsttheorie für das Privatrecht wird derzeit, vermengt mit Erläuterungen über altrömisches Recht, in den *Digestenvorlesungen* gelehrt. Das gemeine Recht hat zwei Eigenschaften, durch welche es eine freiere theoretische Forschung einläßt. Es ist kein geltendes Recht mehr und dadurch entfällt das Bedürfnis nach einheitlicher Praxis, die Rücksicht auf den Richter, welcher dem gelehrten Recht gemäß zu urteilen hat. Es ist ferner reich an dunkeln und einander widersprechenden Stellen, dann in Entscheidungen einzelner Fälle, deren Inhalt sich erweitern oder einengen läßt. Es gibt daher der Deutung einen breiten Spielraum, und entgegengesetzte Anschauungen können sich gleichmäßig auf Quellen stützen. Auch ist von Savigny das Stichwort des „heutigen" römischen Rechtes ausgegeben worden, wodurch jedem Forscher die Möglichkeit geboten ist, einen Satz aus den Quellen als derzeit veraltet zu erklären und eine entsprechendere Bestimmung dafür einzusetzen. Auf diese Art ist z. B. die unmittelbare Stellvertretung in das System aufgenommen worden.

Durch Ausbildung dieser freien Forschungstheorie könnte die Digestenlehre sich zur allgemeinen Privatrechtstheorie erheben, wenn sie nicht durch das Vorurteil gedrückt wäre, daß die Jurisprudenz ihrer Natur nach Auslegungswissenschaft sei, sich daher stets auf *ein* positives Recht beziehen müsse, welches hier das römische ist. Institute germanischen oder modernen Ursprunges werden daher von den Digestenvorlesungen unbedingt ausgeschieden; wesentlich geänderte Anschauungen über Rechtsmaterien, z. B. über Ehe- und Familienrecht, getraut man sich nicht zu behandeln; von Gesellschaften mit verschiedenem Recht nach innen und außen, wie dies z. B. das Handelsrecht normiert, glaubt man, weil sie nicht gemeinrechtlich seien, nicht sprechen zu dürfen usw. So hat man sich selbst an eine Kette gelegt und höhnt den als Naturrechtler, der die Kette Kette nennt. Wollte jemand für die Theorie der Baukunst vorschreiben, sie müsse in so viele voneinander vollständig getrennte Fächer zerfallen, als es Baustile gibt, so würde niemand zögern, dies als eine Schrulle zu bezeichnen.

Das hier gezeichnete Verhältnis der freien Jurisprudenz zur Digestentheorie genügt, um den Vorwurf der Unwissenschaftlichkeit

abzuwehren, den die Verteidiger des Alten gegen sie erheben. Praktisch-wissenschaftlich ist nicht eine Theorie, welche die althergebrachten, sondern welche die zweckmäßigen Mittel lehrt. So wenig das Alter die Talgkerze über das Gaslicht, den Dreschflegel über die Dreschmaschine erhebt, so wenig vermag es die Güte von Rechtsinstituten zu entscheiden.

Auch schon eine Reihe von Lehren in den heutigen Digestenvorlesungen ist nicht durch Auslegung der Quellen entstanden. Die Lehre Savignys von der zeitlichen und örtlichen Geltung des Rechtes, Puchtas vom Gewohnheitsrecht, Jherings vom negativen Interesse, die Lehren vom Vertrag zugunsten Dritter, von der höheren Gewalt und andere — wenn die Autoren auch regelmäßig bemüht waren, Quellenbelege zu finden — sind Werke freien Nachdenkens, das sich seiner Ketzerei nur nicht bewußt ist oder sie nicht gestehen mag. Bis vor kürzester Zeit war man einverstanden, daß die Quellen die reine Culpatheorie für Schadenersatz enthalten und verurteilte jede Abweichung von ihrer strengen Konsequenz; heute findet man schon die Lehre von der custodia (Baron) und vom Handeln auf eigene Gefahr (Unger) als quellengemäß. Ein kühner Mann wird auch die Grundlage unserer Arbeiterfürsorge in den Digesten zu finden wissen. Das Suchen nach Quellenbelegen ist hier überall nur ein Zugeständnis an die herrschende Theorie, die Lehren selbst stammen nicht aus ihnen und entsprechen ihnen oft nicht. Unwissenschaftlich sind sie darum gewiß nicht. Der Befehl, der im geltenden Gesetz enthalten ist und keine Kritik zuläßt, kann die Wissenschaftlichkeit nur töten, nicht begründen.

Man hat die freie Jurisprudenz auch als Naturrecht denunziert. Aber das Naturrecht, welches trotz seiner Fehler höher steht als seine Spötter, war der Richtung seiner Zeit gemäß abstrakt und glaubte reines Recht entwickeln zu können, wie man reine Mathematik und Physik betrieb. Das war sein Fehler. Die Jurisprudenz als soziale Technik hat die Pflichten der Technik. Die Grundsätze, nach welchen sie konstruiert, müssen aus dem Leben entstammen. Sie muß die bestehenden Verhältnisse erkennen und würdigen. Sie ist frei, aber konkret, nüchtern und berechnend.

Praktisch beginnt die Kunstlehre heute in den seminaristischen Übungen. Doch sind diese noch zu abstrakt. Die Fälle, welche bearbeitet werden, *sollen Typen der Fälle sein, welche den Jünger*

dereinst beschäftigen. Statt dessen erinnern sie oft an die scharfsinnigen und doch wertlosen Streitigkeiten der Scholastiker. Sie sind noch zu sehr im Dienste der Schule; es fehlt ihnen der praktische Zug; es fehlt zu ihrer Auslese die Erkenntnis, daß die Hochschule für das Leben vorzubereiten habe (vgl. Ofner, Beiträge zur exakten Rechtswissenschaft, S. 24 ff.).

Die Erkenntnis der Jurisprudenz als eines lebendigen Wissens wirkt befreiend. Solange die Jurisprudenz nichts als Gesetzkunde und antiquarische Grübelei ist, muß sie den jugendlichen offenen, strebenden Geist abschrecken. Die Erkenntnis ihrer wirklichen Aufgabe zeigt, daß der Jurist nicht durch Bestimmung Formalist und Pedant ist, daß seine Kunst ihn vielmehr mitten ins Leben stellt, daß sie ihm Kenntnis von Menschen und Verhältnissen als Grundlagen seiner Wirksamkeit zeigt, von ihm konkretes und modernes Denken verlangt, welches an Beispielen früherer Zeit reifen soll, in ihnen aber nicht sein Ziel und in ihrem Studium nicht seine Lebensaufgabe erblicken darf. Mehr als Jhering vertritt darum Dankwardt unter den deutschen Juristen die neue Denkart, indem er Psychologie und Ökonomie als Grundlagen der Jurisprudenz lehrt. Denn das Recht ist Recht der Menschen und ruht deshalb auf Menschenkenntnis. Sein Zweck ist Ordnung und der des Privatrechtes zunächst Ordnung der Wirtschaft; wie will man aber ordnen, was man nicht versteht? Die juristische Theorie lehrt derzeit, ein soziales Verhältnis in der Art zu regeln, wie dies seit alter Zeit gewesen sei. Die wissenschaftliche Untersuchung muß oft zu entgegengesetztem Schlusse kommen. Die Ordnung entsprach den damaligen Verhältnissen und Zwecken; haben sich Verhältnisse und Zwecke geändert, so muß auch das Recht ein anderes werden. Ruht unsere Wirtschaft nicht mehr auf Sklaverei, sondern auf Eigenarbeit der Bürger, so muß auch das Recht auf Arbeit gestellt werden.

Die freie Jurisprudenz, welche unbefangen und sachgemäß die Bedingungen für eine gute, zweckmäßige, Frieden und Wohlstand des Volkes fördernde Ordnung der Lebensverhältnisse untersucht, kann allein auch die großen sozialen Fragen der Zeit lösen. Ist Recht die Ordnung der Gesellschaft, so sind alle sozialen Fragen Rechtsfragen. Wer anders als der Jurist ist z. B. berufen, die Bedingungen für ein gedeihliches Verhältnis zwischen Unternehmer und Arbeiter, die Ursachen der Streitigkeiten zwischen ihnen und

die Mittel zu deren Verhütung zu untersuchen? Wenn man sanatorische Maßregeln trifft, rät der Arzt, bei technischen der Ingenieur; wenn es aber zur Verfassung eines Zivilrechtes kommt, sagt der Jurist (Hölder) — wohlgemerkt, nicht in abstracto, sondern angesichts eines vorgelegten Gesetzentwurfes —: „Die Frage nach dem besten Inhalte von Privatrechtsnormen sei *keine juristische* und würde für den Juristen nicht existieren." Für den Juristen heutiger Doktrin ist das leider richtig, denn er kennt nur geltende Gesetze und diese nicht als Zweckmaßregeln, sondern als etwas, was gilt und Gehorsam verlangt. Aber die freie Jurisprudenz kann gewiß kein edleres Objekt haben, als die Neugestaltung des Rechtes für die neue, der alten Ordnung vielfach entwachsene Gesellschaft.

Die Kunsttheorie ist von einer allgemeinen Wissenschaft im Sinne der Naturlehre nicht unbedingt abhängig. Die römischen Juristen waren große Rechtskünstler, ohne daß eine theoretische Gesellschaftswissenschaft bestanden hätte, so wie die griechischen Architekten große Künstler waren, ohne theoretische Mechanik zu kennen. Aber ist die Wissenschaft entstanden, so greifen beide ineinander wie Mechanik und Baukunst. Die Jurisprudenz lehrt Zwecktätigkeit. Die Zwecke, die sie anstrebt, die Mittel, die sie anwendet, die Verhältnisse, die sie ordnet, die Einrichtungen, die sie trifft, sind für den wissenschaftlichen Forscher *Tatsachen,* die er aufzulösen und in elementare Gesetze zu fassen bestrebt sein muß.

Die juristische Forschung sucht wie alle Wissenschaft nur die Wahrheit. Der Zweck ist für sie eine gewollte Wirkung, das Mittel eine Ursache, welche wegen ihrer Wirkung gesetzt wird. Sie sieht bei den geltenden Einrichtungen — gesetzlichen oder gewohnheitsrechtlichen — von ihrem besonderen Charakter, von der Heiligkeit, mit der man sie praktisch umgibt, ab und faßt sie lediglich als *soziale Erscheinungen,* als Glieder inmitten einer ununterbrochenen Kette sozialer Ursachen und Wirkungen auf. Die allgemeinen Gesetze (Sozialgesetze), von denen diese Erscheinungen beherrscht werden, sind nicht gut oder schlecht, nicht lobens- oder tadelnswert, sondern wie alle Naturgesetze einfache allgemeine *tatsächliche* Beziehungen. Sie unterscheiden sich auch — was vielfach verkannt wird — von praktischen *Grundsätzen,* d. h. leitenden Gedanken für eine ausgedehnte Zwecktätigkeit. Ein Zivilprozeß mag z. B. auf dem Grundsatz der Mündlichkeit beruhen, d. h. das Gesetz *will*

überall, wo nicht besondere Gründe eine Ausnahme verlangen, mündliches Verfahren; für den Forscher ist das mündliche Verfahren eine Anzahl tatsächlicher Vorgänge, deren Ursachen und Wirkungen er untersucht.

Der Rechtsforscher sucht Gruppenformeln, durch welche er die sozialen Vorgänge umfassen und verstehen will; der Jurist sucht Normen für das Leben bestimmter Menschen, Mittel, um in bestimmtem Land und bestimmter Zeit zufriedenstellende Ordnung zu schaffen. Ihr Denken ist also verschieden, aber es greift doch innig ineinander und trifft auch in einzelnen Personen zusammen, so wie in der Physik Theorie und Technik in großen Geistern sich einigen — in unserer Zeit öfters als je. Die Resultate des Forschers geben dem Juristen die Handhabe, um die Zweckmäßigkeit der Mittel, die er anwenden will, zu prüfen; die Resultate des Juristen geben dem Forscher sein Material.

Die Rechtswissenschaft ist ein Teil der Sozialwissenschaft, deren charakteristisches Merkzeichen, das sie von der Naturlehre sondert, in der *psychologischen* Grundlage aller ihrer Untersuchungen gelegen ist. Alle Gesetze, welche sie findet, sind Gesetze des menschlichen Denkens oder ruhen auf solchen. Das Denken ist wissenschaftlich noch wenig erforscht. Die Lehren von der Göttlichkeit der Seele und von der Freiheit des Willens, die noch die jüngste Zeit beherrschen, haben Gesetze des Denkens verfemt. Die Sozialwissenschaft ist deshalb noch sehr jung. Die Tatsachenreihen, welche sie bisher entdeckt hat, sind gering. Sie enthält kaum mehr als den Keim, Wissenschaft zu werden. Aber *sie* ist die scientia rerum humanarum ac divinarum, welche die Römer (wohl nur als konkretes Wissen) vom Juristen verlangten.

Ein Teil der Sozialwissenschaft — man könnte ihn die soziale Mechanik oder Energetik nennen — hat die Gesetze der menschlichen *Handlungen* zum Gegenstand und kann wie die Mechanik in zwei Unterabteilungen zerlegt werden: in die soziale Dynamik, welche die Gesetze der *Tätigkeit* erforscht und Grundlage der Verwaltungskunst ist (Politie, Politik als Wissenschaft), und in die soziale Statik, welche die Gesetze des *Friedens,* d. h. jener Gegenhandlungen untersucht, durch die friedenstörende Handlungen verhütet oder im Erfolg beseitigt werden (*Jurisszienz,* Rechtswissenschaft i. e. S.). Die Analogie mit der Mechanik reicht so weit, daß auch zwischen den beiden

Unterabteilungen der Energetik kein grundsätzlicher Unterschied besteht, und der methodische, den man noch macht, mit wachsender Erkenntnis verschwinden wird.

Die Jurisszienz untersucht nach Art und Größe die Handlungen (Entgelt, Ersatz, Strafe, Lohn, Preis, Zahlung u. a.), welche geeignet sind, andere Handlungen (oder Strebungen), die in irgendeiner Weise den sozialen Frieden gestört haben oder stören würden, zu paralysieren. Ist die störende Handlung und der vor ihr bestandene wiederherzustellende Zustand bekannt, so ist die Gegenhandlung *Vergeltung, Sühne;* soll ein noch nicht bekannter Zustand hergestellt werden, der zwei Handlungen oder Strebungen gegenüber Frieden schafft, so spricht man von *Ausgleichung.* Zu den Einrichtungen, deren man sich bedient, um wirtschaftlich den Frieden zu erhalten oder wieder zu schaffen, gehören insbesondere *Eigentum* und *Obligation.* Das erstere verlangt Gleichwert zwischen dem Genommenen und Gegebenen, den Inhalt des Tausches (quantum-tantum); die Obligation verlangt Gleichwert zwischen dem Versprochenen und Gezahlten. Das ist aber bloß ihr *logisches* Gesetz, ihre Konsequenz. Wenn der Grundsatz des Eigentums oder der Obligation konsequent angewendet wird, muß dieser Gleichwert bestehen. Ob er aber bei Regelung eines Verhältnisses *anzuwenden* sei, ob in seiner ganzen logischen Strenge, ob und inwiefern seine Folgen durch andere Grundsätze zu beseitigen seien, das ist eine Frage, welche die *Rechtskunst* zu beantworten hat, eine Frage der Rechtsvernunft oder Gerechtigkeit. *Hier ist der Punkt, wo die Aufgabe der Jurisprudenz besonders hervortritt.* Rechtslogik und Gerechtigkeit sind nicht dasselbe. Die Rechtslogik kümmert sich nicht um die Beschaffenheit der Folge. Sind die Prämissen vorhanden, so zieht sie den Schluß. Die Rechtsvernunft dagegen denkt praktisch, anschaulich, zielbewußt. Der Logik schwebt die Formel vor, der Vernunft die Maßregel. Die Gründe, aus denen die Rechtsvernunft handelt, lassen sich wohl gleichfalls unter Sozialgesetze bringen. Aber diese Gesetze können anderen Gebieten als dem Recht angehören, können auch noch fehlen, und das Leben wartet nicht. Die Rechtsvernunft muß daher stets die Wahrscheinlichkeitsschlüsse der konkreten Erfahrung zu Hilfe nehmen, an ihrer Hand die Zweckmäßigkeit der Folge für die Gesellschaft untersuchen und sie danach zulassen oder ausschließen. Das ist denn auch die Bedeutung des summum jus summa

injuria. Die letzte Folge eines im großen und ganzen richtigen, d. h. gemeinnützigen Rechtssatzes kann unrichtig sein. Nicht Konsequenz, sondern die nach Gründen des Gemeinnutzens mit konkretem Blick für die einzelne Folge urteilende *Rechtsvernunft ist Gerechtigkeit.* Bei einem geltenden Gesetz kann die Rechtsvernunft allerdings verlangen, daß um der Unparteilichkeit des Richters willen dessen Ermessen eingeengt und ihm die logische Anwendung des Gesetzes nach den bekannten Auslegungsregeln aufgetragen werde. Die Frage, ob Logik des Gesetzes oder Ermessen vorzuziehen sei, ist gerade in unserer Zeit sehr bestritten. Aber man muß festhalten: auch ihre Beantwortung ist nicht Sache der Logik, sondern der Vernunft, und auch bei ihr kann summum jus summa injuria sein.

Der Unterschied zwischen Rechtslogik und Rechtsvernunft mag kurz an dem vorzüglichsten Institute unseres heutigen Vermögensrechtes gezeigt werden — an dem *Eigentum.*

Das Eigentum ist der Schutz des wirtschaftlichen Eigeninteresses, es sanktioniert und erzeugt dessen Vorzüge und Schäden. Es macht den Menschen für die Zukunft bedacht, läßt ihn um späterer Vorteile willen Entbehrungen auf sich nehmen, läßt ihn Unternehmungen ausführen, die erst in späterer Zeit lohnen, macht ihn sparsam und eifrig, und indem er für sich sorgt, vermehrt er auch den Gesamtreichtum. Es macht den Menschen auch durch Besitz selbständig und erzeugt die Tugenden, die mit Selbstgefühl verbunden sind. Anderseits ist das Eigentum überall gefährlich, wo das Interesse des gegenwärtigen Besitzers mit den Gesamtinteressen der Gegenwart oder Zukunft in Widerspruch tritt; daher schon derzeit z. B. an Wasser und Wald kein oder doch nur sehr beschränktes Eigentum gestattet, für äußerste Fälle der Kollision die Enteignung vorbehalten wird u. a. m. Es macht ferner den Besitzlosen zum Hungersklaven. Wo die Konsequenz des Eigentums herrscht, steht neben Reichtum, der sich durch die Fruchtbarkeit des im Eigentum befindlichen Objekts von selbst vermehrt, drückende, hoffnungslose Armut. Daher die besondere Schädlichkeit des großen und des gebundenen Eigentums, weil hier die Vorzüge des egoistischen Wirkens verschwinden und die Schäden in erhöhtem Maß hervortreten. Mit der Frage des Großeigentums fällt auch praktisch die moderne Frage des Kapitaleigentums zusammen;

nicht das Eigentum an einem einzelnen Werkzeug oder Grundstück ist das Objekt des Angriffs, sondern jenes Eigentum, welches durch den Zoll, den der Arbeiter für den Gebrauch entrichten muß, den Nichtarbeiter bereichert. Der Kampf der Sozialisten gegen das Kapital ist Kampf gegen Einkommen durch fremde Arbeit.

Die Jurisprudenz hat nun Vorteile und Schäden des Eigentums zu prüfen. Sie darf sich nicht durch sein Alter abschrecken lassen; das älteste und hiedurch heiligste Institut wäre sonst die Sklaverei. Sie darf aber auch nicht soziale Poesie treiben. Sie hat nüchtern zu untersuchen, ob nach den Ergebnissen der Erfahrung der Grundsatz des Eigentums durch einen anderen abgelöst werden könne, welcher seine Nachteile vermeidet, ohne die Vorteile aufzugeben oder größere Nachteile herbeizuführen; oder ob der Grundsatz selbst zu erhalten sei und in welcher Weise er dann eingeschränkt oder anderen Grundsätzen unterordnet werden könne, um arbeitsloses Einkommen zu verhüten, oder um äußerste Not des Besitzlosen zu beseitigen. Sie darf Einrichtungen nicht erhalten wollen, bloß weil sie bestehen, und darf Vorschläge ohne Versuch und Vorbild nicht einführen, bloß weil sie gefallen. Sie ist *wissenschaftliche soziale Technik*.

Ähnlich wie die Konsequenz des Eigentums kann auch die des *Vertragszwangs* schädlich sein. Der Vertragszwang schafft und erhält den Kredit; die Kette, welche die Arbeitsteilung in der heutigen Produktion um die Teilunternehmer schließt, wäre ohne ihn unmöglich. Aber er ist auch hart. Die Übereilung eines Momentes kann das Leben zerstören, weshalb auch z. B. heutzutage Eheschließung immer, Schenkung, Bürgschaft und andere Freigebigkeitsakte oft an Formen gebunden werden, welche die ernste Überlegung sichern. Die Schuldenlast mit bestimmten Zahlungsterminen kann ein Unternehmen vernichten, das sonst lebensfähig wäre. Namentlich bei Grundeigentum, wenn Zinsen- und Kapitalzahlungen nach dem durchschnittlichen Ertrage berechnet werden, können einige Mißjahre eine Krise erzeugen. Auch das öffentliche Interesse kann verbieten, daß ein Vertrag eingehalten werde, weshalb gewisse Arten von Verträgen als unzulässig oder unverbindlich erklärt werden.

Von besonderer Bedeutung für die Entwicklung der gesellschaftlichen Zustände — eine Verewigung des einmal erworbenen Eigen-

tums — ist ein drittes Institut: das *Erbrecht*. Es hat sich aus dem alten Familieneigentum entwickelt und ist heute zum Teil Schenkung (testamentarisches Erbrecht), zum Teil Alimentation (Pflichtteilsrecht). Rechtsvernunft hat an der Hand seiner erfahrungsmäßigen Folgen zu entscheiden, ob und in welchem Maß es beizubehalten oder abzuändern ist.

So wie die zivilrechtlichen Anordnungen über Erfüllung oder Ersatz, so sind auch die *Strafverfügungen* Zweckmaßregeln. Der Grundsaz der Vergeltung trifft für sie nicht zu und wird heute allgemein verlassen. Wenn jemand einem anderen ein Auge ausgeschlagen hat, so wäre es Vergeltung, wenn er gezwungen werden könnte, ihm das Auge wiedereinzusetzen; dann wäre der alte Zustand wiederhergestellt. Wenn man ihm aber ein Auge ausschlägt, so erreicht man nur, daß anstatt eines nunmehr zwei Augen fehlen. Was die Strafe zu leisten hat, kann daher nur Verhütung ähnlicher Handlungen in Zukunft sein, psychischer Druck zur Herstellung eines Charakterminimums im Volk, welches ausreicht, um schuldhafte Friedensstörungen höheren Grades hintanzuhalten. Rechtsvernunft hat die tauglichen Maßregeln hiefür zu wählen und zu begrenzen.

Das gleiche Verhältnis wie zwischen Rechtswissenschaft und Rechtskunst gilt auch für Politie (Verwaltungswissenschaft) und Verwaltungskunst. Rechtswissenschaft und Politie sind selbst eng verschwistert. Politie ist die Wissenschaft von den Gesetzen menschlicher Tätigkeit. Störende und vergeltende Tat, welche von der Rechtswissenschaft verglichen werden, sind aber beide Taten; die Gesetze der Tätigkeit sind also auf sie anwendbar; man kann sagen, Rechtstätigkeit sei Tätigkeit unter dem Einfluß gewisser Grundsätze und Einrichtungen. Auch setzt die Friedensstörung einen Friedens*stand* voraus, dessen Inhalt also nicht durch das Recht bestimmt wird, sondern selbst alles Recht bestimmt. Das Recht als Wissenschaft erscheint so nur als Glied der Politie und die Rechtsforschung nur als eine hervorragende Abteilung der politischen Forschung. Auch praktisch besteht zwischen Recht und Verwaltung ein gleiches Verhältnis. Die Rechtspflege ist nur ein Teil der Verwaltung, der durch seine Wichtigkeit und durch die Massenhaftigkeit seines Materials hervorragt, aber doch nicht wesentlich von anderen Verwaltungszweigen verschieden ist. Die Einführung der

Verwaltungsgerichtsbarkeit, in welcher das Richtertum sich klar als *Kontrolle* der Verwaltung erweist, hat zur Erkenntnis dieser Gleichartigkeit beigetragen; der Anwaltszwang, der z. B. in Österreich für Verwaltungsgerichtshof und Reichsgericht gilt, beweist, daß man auch die von ihnen beurteilte Tätigkeit als Jurisprudenz auffaßt. Die Staats*wissenschaft* forscht nach den Gesetzen des menschlichen Wirkens, der es bestimmenden Neigungen und Triebe; Sache der Staats*kunst* ist es, jenen Neigungen das Übergewicht zu schaffen, welche dem Interesse aller günstig sind, jene Wege zu bahnen, auf welchen das Wohl aller durch Tätigkeit der einzelnen am sichersten und dauerndsten erreicht wird. —

Die Angriffe Kirchmanns und Gleichgesinnter sind nunmehr leicht in ihrer Grundlage zu erkennen. Sie sind gegen die derzeitige Auffassung und Lehre der Jurisprudenz gerechtfertigt, aber nicht gegen diese selbst.

Die Jurisprudenz ist Technik. Sie sucht *nicht das Wahre*, sondern das der Gesellschaft Nützliche. Die Rechtseinrichtungen: Ehe, Eigentum, Obligation, Erbrecht u. a. sind *soziale Maschinen*. Die Reformen des Rechtes entsprechen den Verbesserungen physikalischer Maschinen und ihrer Anwendung, welche gleichfalls nie stillstehen; die Einzelheiten und Formen der juristischen Institute entsprechen den Teilen und Teilchen, aus denen sich jede Maschine zusammensetzt und auf deren zuverlässiger Arbeit ihr Erfolg beruht. Deshalb ist es unrecht, wenn Kirchmann die Kommentare zu einem unklaren Gesetzestext als unnütz angreift. Gewiß, sie entfallen mit dem besseren Gesetz. Aber die Maschine will bedient sein. Solange man keine bessere hat, müssen die Arbeiter bedacht sein, mit der schlechten möglichst vorteilhaft zu arbeiten, und man muß sie darin unterweisen. Unrichtig wäre es nur, wenn man die Maschine als Grundlage und Ziel der Wissenschaft betrachten, oder wenn man ihre Fehler verschweigen und nicht bestrebt sein wollte, sie zu verbessern.

Die Jurisprudenz ist nicht mehr als jede andere angewandte Wissenschaft, als Medizin oder Baukunst, auf das Studium der Alten angewiesen. Die Geschichte lehrt, aber nur durch Kritik und Vergleichung. Lehrreicher aber, und wenn sich die Verhältnisse wesentlich geändert haben, auch zur Verwertung der Geschichte notwendig ist Beobachtung und Versuch; notwendig ist das Studium

der Gegenwart, ihrer Bedürfnisse und Verhältnisse, damit man für sie sorgen, ihrer Einrichtungen, damit man deren Vorteile bewahren, die Schäden vermeiden lerne. Der Gegenstand der Jurisprudenz hindert ihren Fortschritt nicht, weder das veränderliche „natürliche" Recht noch das Gesetz. Denn das Handeln des Menschen ist ebenso stetig wie das Wachstum des Baumes, und die Jurisprudenz sucht nicht das natürliche als ursprüngliches, sondern als vernünftiges Recht. Die freie Jurisprudenz stört auch nicht das Gefühl des Volkes für das Recht, sondern leitet es. Der Kampf um das I-Tüpfelchen eines Anspruchs ist nicht der Ausdruck des höchsten Rechtsgefühls, das sich vielmehr stets der Zusammengehörigkeit mit den anderen bewußt sein muß. Die ungezähmte Rachelust, welche die Strafgesetzgebung einleitete, wird durch den Zweckgedanken kultiviert, vermenschlicht. — Die juristische Maschinerie unserer Zeit arbeitet wohl noch lange nicht gut, sicher und rasch genug und verlangt eindringliche Reformen. Aber wer die Einrichtungen von heute mit denen des Mittelalters vergleicht, wird große Fortschritte zugestehen müssen; und ob die Männer, denen die Fortschritte zu danken sind, die akademische Laufbahn vollendet haben, ist für die Natur ihrer Leistungen ebenso gleichgültig, als es für die Natur der Entdeckungen Robert Mayers oder der Erfindungen Edisons unentscheidend ist, ob diese Männer an einer technischen Anstalt approbiert wurden.

Die freie juristische Forschung ist auch interessant. Was kann den Menschen mehr anregen als der Mensch, als die Untersuchung der Gesetze, welche die geordnete Tätigkeit unser selbst beherrschen.

Richtig ist, daß das Recht mit den Interessen der Menschen tief verwachsen ist, und daß die Leidenschaft der Parteien sich seiner bemächtigt. Der juristische Denker muß deshalb einen besonders hohen Grad von Unbefangenheit und Pflichttreue bewähren. Um so höher ist sein Beruf. Mehr als vom Künstler gilt von ihm das Wort: „ Der Menschheit Würde ist in eure Hand gegeben."

RECHTSTHEORETISCHE BEMERKUNGEN

Unger zu seinem 70. Geburtstage gewidmet (1898)

1. Anbetung hindert Verständnis; hätte man die Römer nicht vergöttert, man hätte mehr von ihnen gelernt. Die römischen Juristen waren Künstler, bekennen sich auch als solche (jus ars boni et aequi). Sie schufen ihre Rechtssätze wie die griechischen Bildhauer ihre Statuen — mit genialem Blick aus konkreter Erfahrung. Ihr Wissen war praktisch, kein bloßes Kennen, sondern ein Können, wie auch die griechischen Denker, besonders Sokrates, getreu dem Erziehungssystem ihrer Zeit, das Wissen stets auffaßten. Das Gesetz betrachteten sie nicht als ihren Herrn, sondern als ihr Erzeugnis, „virorum prudentum consultum" (l. 1 D. III. 1.). Der bedeutsame Ausspruch von Celsus (scire leges non est verba earum tenere sed vim ac potestatem) unterscheidet sich wesentlich von dem Grundsatze der modernen Auslegung; er ist freier und kräftiger. Nicht die Absicht des Gesetzgebers ist ihm das Entscheidende. Er erkennt in dem Gesetze eine soziale Macht (vis ac potestas), welche die Lebensverhältnisse nach gewisser Richtung hinlenkt. Das Nachdenken, wohin es führe, wenn das Gesetz auf die eine oder andere Art gedeutet wird, bildet ihm die Grundlage seines Urteiles.

Die hohe, seither nicht wieder erreichte Kunst der römischen Juristen beruhte auf der politischen Reife ihres Volkes; auf einer Organisation, welche der Behörde Vertrauen entgegenbrachte und Gewalt gab, die Kontrolle in der öffentlichen Meinung, in der freien Wahl, in der Kürze des Amtes und der Verantwortlichkeit nach Ende desselben fand. Diese Einrichtung gab auch dem Edikt der Prätoren schöpferische Freiheit, und das Gutachten der angesehenen Juristen hatte gesetzesgleiche Wirkung. Die römischen Juristen waren in ihrer Entwicklungszeit *Gesetzgeber;* das machte ihr Denken originell und charaktervoll. Zugleich hatten sie ein altes nationales und aristokratisches Gesetz mit demokratischen Zuständen eines Weltreiches in Einklang zu bringen; das machte sie besonnen und menschlich. Von dem nationalen Rechte der Römer ist nichts geblieben;

nur was ihre Juristen nach Billigkeit und Natur der Sache geschaffen haben, ist ewiges Gut geworden.

Mit der politischen Freiheit verkümmerte auch die juristische Kunst. Die großen Aufgaben, welche ihr in der ersten Kaiserzeit durch die Häufung des Stoffes und die beibehaltenen republikanischen Formen auferlegt wurden, brachten wohl alle ihre Fähigkeiten zu voller Blüte, so daß gerade diese Zeit den höchsten Ruhm juristischer Kunst errungen hat. Aber die Blüte trug den Wurm in sich. Charakter wurde Gefahr, Selbstdenken verboten; der Herr verlangte Gehorsam, Auslegung wie er wollte.

So erlosch die Kunst; was ihr folgte, war gedankenloses Handwerk. Keine Brücke führt von ihr zur neuen Zeit.

2. August Comte unterscheidet bekanntlich drei Epochen in der Entwicklung des menschlichen Denkens: die theologische, metaphysische und positive. Diese Dreiteilung, als allgemeines Paradigma bestreitbar, ist der Entwicklung der europäischen Wissenschaft seit Beginn des Mittelalters entnommen und für sie zutreffend. Die theologische Epoche dauert bis zur Reformation, die metaphysische bis zur Revolution. Man mag daraus erkennen, in welch nahem Zusammenhange auch die Wissenschaft mit den sozialen Ereignissen steht.

Die Rechtsauffassung der theologischen Epoche gipfelt in dem Gedanken, daß die Obrigkeit göttlichen Ursprunges, ihr Befehl göttlichen Geistes, Gehorsam gegen sie unbedingte Pflicht ist. Es war die Zeit der stärksten Despotie, weil diese durch die Gottheit geheiligt war; zugleich die Zeit, in der Kirche und Rittertum vereint das Volk leibeigen machten.

Für die Juristen war das corpus juris das heilige Buch. Sie wandten ihm gegenüber dieselbe Methode an wie die Theologen gegenüber der Bibel. Schöpferisches Denken war ausgeschlossen; Jurisprudenz war nur Auslegung. Man kroch vor dem Worte, machte Kommentare und Kommentar-Kommentare, suchte Ähnlichkeiten und Verschiedenheiten in den einzelnen Stellen der Sammlung, um seinen Scharfsinn in ausgeklügelter Kasuistik zu erproben. Man war auch ebenso sophistisch wie die Theologie, beugte den Sinn des Gesetzes zugunsten der Starken und war deren Scherge gegenüber dem Volk. Man machte aus lassitischem Eigentume Ususfrukt, half die Bauern legen, Gemeindewald und Gemeindeweide zu Herrengut machen.

Das römische Recht ist deshalb auch in Deutschland niemals volkstümlich geworden. Es blieb Herrenrecht. Nur sein feines anationales Obligationenrecht erwarb sich in den kaufmännischen Kreisen verdiente Anerkennung.

3. Ein wissenschaftlich reicheres Leben entsteht im Zeitalter der Reformation; der Kampf gegen Kaiser und Papst erzeugt den Kampf gegen die Theologie, der seinen theoretischen Mittelpunkt im *Naturrecht* hat. In der ersten Hälfte des 19. Jahrhunderts viel geschmäht, weil die dritte Epoche begann und jede neue Richtung sich zunächst ihres Gegensatzes zur vorhergehenden bewußt wird, ist es bei seinem Entstehen ein Befreiungswerk. Die Theorie vom Urmenschen, der entweder durch Instinkt oder durch allgemeinen Kampf zur Bildung der Gesellschaft gedrängt wird, ist nur in ihrem Gegensatze zur Lehre von dem göttlichen Ursprung der Obrigkeit und von der Unfehlbarkeit des corpus juris richtig zu schätzen. Gesellschaft, Recht und Obrigkeit sind Werke menschlicher Vernunft — das ist die gemeinsame Lehre aller Vertragstheorien und ihr Verdienst. Was die Vernunft geschaffen hat, kann sie auch prüfen, kritisieren und aufheben.

Damit ist die Herrschaft des Pergaments und des Gottesgnadentumes abgewälzt, freies Denken und Reform gestattet. Deshalb drängt von Juristen alles, was denkt, zum Naturrecht und alle größeren Reformen kommen von dort. Neben das Zivilrecht stellt sich das Staatsrecht, neben die Digesten, wenn auch von der Universität noch ausgeschlossen, das Recht des Landes, neben das Doktorat die Staatsprüfung. Die Grundsätze der Freiheit und Vernünftigkeit, von denen man die Konsequenzen ableitete, waren auch nicht so abstrakt, als man derzeit anzunehmen geneigt ist. Sie entsprachen einer Zeit, in welcher die feudale Ordnung allen Boden verloren hatte, der protestantische Glaube sich auf das Bürgertum stützte und die Fürsten sich als Diener des Staates bekannten. Die Naturrechtler sind in ihren gesetzgeberischen Arbeiten auch nicht abstrakte Schwärmer, sondern bekunden einen konkreten klaren Verstand, der seine Zwecke mit Beachtung der bestehenden Zustände wohl zu vereinigen weiß.

Allerdings lag aber das konkrete Nachdenken außerhalb des Systems. Aus allgemeinen Vernunftbegriffen ersteht keine individuelle Gestaltung, und der gesunde Menschenverstand schuf nicht

sowohl die Sätze des Systems, als daß er sie aus anderen Quellen ergänzte und einschränkte, dadurch aber die Konsequenz, welcher er in allerlei Ausnahmen entgegentrat, damit theoretisch und grundsätzlich widerlegte. Wie die römische, so war die naturrechtliche Juristenschule in ihren bedeutenden Vertretern eine Kunstschule; das philosophische Studium regte sie an, lehrte sie denken, gab ihnen aber keinen Stoff und keine wissenschaftliche Grundlage.

Die Romanistik jener Zeit hat die scholastische Epoche noch nicht überwunden. Wohl hatte die Reformationszeit auch bei ihr ein logisches Element eingeführt, das sich in dem Entstehen von Systemen (Donellus), im Ramismus und bei der sächsischen Schule in größerer Rücksichtnahme auf das Volksrecht äußerte. Aber die Folgezeit schwächte diesen Fortschritt eher ab, als daß sie ihn verstärkte, und das Ende des 18. Jahrhunderts bot noch dieselbe geistlose Exegetik, das (von Zeiller so genannte) Ungeheuer der romano-canonico-germanischen Jurisprudenz. Von ihr aus ist es zu begreifen, daß das Zurückgehen Savignys auf den Wortlaut der Digesten in ähnlicher Weise befreiend wirkte wie vordem Luthers Hinweis auf den Wortlaut der Bibel.

4. Die Aufklärungszeit und die Revolution weckten allenthalben die Geister. Auf die Juristen wirkte von den Männern insbesondere Montesquieu, von den Tatsachen die gesetzliche Abschaffung des Feudalsystems (4. August 1789). Es war aber verhängnisvoll, daß die positive Forschung unter den Einfluß der konservativen Gegenströmung kam.

„Alles was wir irgendwo finden" — erklärt Hugo, der Begründer der historischen Schule — „hat seine natürliche Veranlassung gehabt und soll, als nun einmal vorhanden, *geachtet* werden; auch die privatrechtliche servitus und auch die gutsherrlichen Rechte. Die Vorteile und Nachteile der meisten Rechtssätze halten sich so das Gleichgewicht, daß von allen hier irgend in Betracht kommenden Umständen derjenige am meisten entscheidet, ob sich ein Volk schon an etwas gewöhnt hat." Der Pietismus, der in diesem Bekenntnis liegt, hat den kritischen Anstoß, den Hugo genommen hatte, lahmgelegt. In seinem Naturrecht unterwirft er z. B. das Privateigentum einer nüchternen Beurteilung, mit voller Empfindung seiner schweren sozialen Nachteile (§ 93 ff.), um zuletzt bei dem Urteile anzulangen: „Der entscheidende Grund für die Beibehaltung liege darin, daß die

Menschen dieses nun einmal gewohnt sind." Man wird an die bekannte Anekdote erinnert: die Krebse seien das Lebendiggesottenwerden schon gewohnt.

Kräftiger gehen Savigny und Puchta vor. Sie verwerfen die Beurteilung aus allgemeinen Grundsätzen überhaupt. Sie finden den Ursprung des Rechtes in dem Volke, seinen Lebensverhältnissen und der sich aus ihnen entwickelnden Volksüberzeugung. Diese Überzeugung drücke sich im Rechte aus und die Quellen des Rechtes seien um so klarer, als sie der Volksüberzeugung näher stehen; das Gewohnheitsrecht also klarer als das Gesetz. Mit diesem Grundgedanken war der Forschung in der Tat ein positiver Boden gewiesen, eine festzustellende Reihe von Tatsachen und Beziehungen. Das ist auch der verdiente Ruhm beider Männer. Die Bewegung, welche sie hervorriefen, wäre noch bedeutender geworden, wenn bei ihnen nicht dieselbe Erscheinung eingetreten wäre, die wir bei vielen Gründern einer neuen Richtung antreffen: daß sie nämlich die neue Idee nicht über einen gewissen Punkt hinaus zu verfolgen vermögen und dann in den hergebrachten Gedankengang zurückfallen. Wir finden dies bei Descartes, wenn er aus der Idee die Existenz und so aus der Gottesidee die Existenz Gottes ableitet; wir finden es in Kants Kritik der praktischen Vernunft, welche mit einem erkennbaren „Ich an sich" arbeitet; wir finden es ebenso bei Savigny und Puchta. Mit einem gewaltsamen logischen Sprung erklären sie das gemeine Recht als historisches oder Gewohnheitsrecht des deutschen Volkes und werden von da an reine Romanisten. Ebenso wird die Schule, welche sich von ihnen ableitet, eine rein geschichtliche, gegen die Anforderungen ihrer Zeit unempfindliche Gelehrtenschule.

Man wird durch die Gestalten der Begründer und durch die weitere Entwicklung der historischen Schule lebhaft an die gleichzeitig entstehende volkswirtschaftliche Schule in England erinnert.

Smith und Ricardo stehen zueinander in ähnlichem Verhältnisse wie Savigny und Puchta: der eine ist systematisch, breit und klar, der andere logisch, kurz und scharf. Ebenso widerfährt ihnen der Irrtum, daß sie an Stelle des von ihnen als Wertschaffer erkannten Arbeiters durch Rückfall in die herkömmliche Auffassung den Unternehmer setzen und dadurch das arbeiterfeindliche Manchestertum hervorrufen.

5. Nur die Gegenwart lehrt begreifen. Vouloir comprendre le

présent par le passé c'est vouloir comprendre le connu par l'inconnu (Sieyès). Das gilt auch für das Verhältnis zwischen wissenschaftlichen Ideen und sozialen Ereignissen.

Die historische Schule hatte in ihren Reihen gelehrte Forscher der römischen Rechtsaltertümer, denen aber für die Rechtsforderungen ihrer Zeit jedes Verständnis fehlte. Sie schieden Gesetzgebungskunst und Rechtswissenschaft und lehnten alles reformatorische Nachdenken als nicht juristisch ab; nur das Geltende sei Recht. Aber die Verhältnisse waren stärker als die gelehrten Herren. Sie schufen neue Bedürfnisse, neue Wünsche und Kräfte, welche sich Eingang in die Gesetzgebung erzwangen und endlich auch Eingang in den Gedankenkreis der Juristen.

Es entstand eine junghistorische Schule, Jhering in Deutschland, Unger in Österreich an der Spitze, welche zwar noch den Grundsätzen der historischen Schule anhing, aber sich reformatorischen Bestrebungen nicht mehr verschloß, durch das römische Recht über dasselbe hinausstrebte und allenthalben das juristische Leben kräftig erweckte. Neben ihr entstand eine ökonomische Schule, welche die Rechtsverhältnisse als juristisch geformte Lebens-, insbesondere Wirtschaftsverhältnisse erkannte und derzeit durch die materialistische Geschichtsauffassung gefördert wird. Ihr erster Vorkämpfer war Dankwardt. Die Vertreter von Reformen zugunsten der besitzlosen Klasse bilden keine geschlossene Gruppe, sondern gehören teils der historischen, teils der ökonomischen Schule an. Eine neue Grundauffassung für die juristische Forschung scheint indessen noch nicht gefunden zu sein. Mindestens ist das letzte Werk Stammlers von ihr weiter entfernt als manche früheren Versuche.

Wir sind derzeit — mindestens theoretisch — in das Zeichen des Rechtsstaates getreten. Als hauptsächliche Forderung desselben gilt die Mitarbeit des Volkes an der Gesetzgebung und die Herrschaft des Gesetzes. Der Rechtsstaat hat das Verdienst und die Aufgabe, die Herrschaft obrigkeitlicher Willkür zu brechen. Daß Gesetz und Richter an Stelle des unverantwortlichen Kabinetts- und Polizeibefehles treten, bedeutet zweifellos einen großen Fortschritt. Aber die Gesetzesherrschaft hat selbst wieder ihre eigenartigen Fehler. Dem Satze, daß lex munus dei est, decretum vero prudentum hominum steht der andere entgegen: pessima res publica plurimae leges. Das deutet einen Widerspruch in der Funktion des Gesetzes an, dessen Er-

kenntnis mir die Voraussetzung für eine wissenschaftliche Rechtsforschung zu sein scheint.

6. Das Gebiet des Rechtes ist die Tätigkeit der Menschen in ihrem Zusammenleben, und „Recht" bezeichnet eine Eigenschaft, welche dem „Wert" ähnelt. Eine Tätigkeit, eine Norm, eine Einrichtung ist *recht*, wenn sie für die Zusammenlebenden, das Volk, Wert hat. Wert hat hiebei ebenso wie in der Volkswirtschaft einen doppelten Sinn. Objektiv bedeutet es, was dem Volke nützt; subjektiv,was das Volk zufriedenstellt, was vom Volke geschätzt und gewollt wird; des Menschen Wille ist sein Himmelreich. So unterscheiden sich auch die dem Volke nützliche und die ihm genehme Ordnung als (sogenannt) *wahres* und *wirkliches (lebendes)* Recht. Sie werden durch die Meinung getrennt, welche im Volke über die Nützlichkeit einer Einrichtung oder Tätigkeit besteht. Wenn das Volk etwas Unnützes oder selbst Schädliches als nützlich vermeint, so strebt es danach; wenn es etwas Nützliches für schädlich hält, widerstrebt es ihm. Es ist die Tragik vieler großer Volksfreunde gewesen, daß dieses subjektive Moment ihnen nicht günstig war, sodaß ihre Verfügungen erst bei der besser unterrichteten Nachwelt Anerkennung fanden.

Das Wollen des Volkes darf indessen aus seinen Aussprüchen über das, was es wolle, nicht unbedingt gefolgert werden. Diese Aussprüche sind oft unwahr; sie werden aus Gehorsam oder Furcht, anderen zu Gefallen, um Vorteile zu erringen oder Nachteile zu vermeiden, gemacht. Deshalb nennt der Logiker Puchta als Grundlage des Rechtes nicht das „Wollen" des Volkes, was sowohl das innere als auch das ausgesprochene Wollen bezeichnen könnte, sondern seine „Überzeugung", die dem Wollen zugrunde liegende gefestete Meinung. Um zu erfahren, was das Volk meint und will, muß man es in seinem täglichen Leben belauschen. Sein Denken ist seltener unrichtig als unklar. Oft weiß es nur, daß es sich bei der bestehenden Ordnung schlecht befindet und will Besserung, ohne aber deren Art und Mittel zu kennen. Es läßt sich dann leicht führen und urteilt nach dem Erfolge. Hier insbesondere liegt das reiche Gebiet für originelle Rechtsreformen.

7. Das Wollen des Volkes hat die sichere Grundlage in seinem Interesse. Es will friedlich und menschenwürdig leben. Der Inhalt des Rechtes ist zuletzt nichts anderes, als die Organisation der

Arbeitsteilung unter den Mitgliedern der Gesellschaft, die Verteilung der Arbeit sowie des Produktes aus der Gesamtarbeit unter sie. Man darf sich bei der Beurteilung nicht dadurch beirren lassen, daß der Staat in der Sphäre des Privatrechtes scheinbar nur eine sekundäre Stellung einnimmt, im allgemeinen aber den einzelnen gestattet, nach eigenem Ermessen ihr Gut zu gebrauchen und ihre Vereinbarungen festzustellen. Dieses Gestatten selbst ist ein Mittel der Verteilung, was wir namentlich bei fehlerhaften Folgen wahrnehmen. Der freie Vertrag zwischen einem wirtschaftlich Starken und Schwachen überwälzt z. B. regelmäßig dem letzteren eine unverhältnismäßig große Arbeit. Daß aber der erstere wirtschaftlich stärker ist, beruht auf der Art, wie unter dem Schutze der Gesamtheit der Besitz der einzelnen entsteht, erhalten wird und übergeht. Die großen Einrichtungen des Eigentumes und des Schuldzwanges gestatten nicht, sondern weisen unter Zwang gegen den anderen zu. Es ist meines Wissens das Verdienst von Rodbertus, gezeigt zu haben, welch großen Einfluß die staatlichen Einrichtungen auf die Volkswirtschaft (und dem ähnlich auf die anderen gesellschaftlichen Verhältnisse) nehmen. Man darf das Recht nicht (wie Stammler) als bloße *Form* der Wirtschaft auffassen; man muß *dynamisch* denken. Die Rechtseinrichtungen sind eine soziale Macht (vis ac potestas); der römische Jurist hatte dies besser erkannt als die modernen.

In der Verteilung von Dienst und Herrschaft, von Arbeit und Genußmöglichkeit liegt das Wesen des wirtschaftlichen und indirekt alles Rechtes. Die zugewiesene Tätigkeit heißt Pflicht, die zugewiesene direkte oder indirekte Genußmöglichkeit Recht. Das Volk in seiner Masse will stets gleichmäßige Verteilung. Es ist eine aus der Erfahrung festzustellende Tatsache, daß immer, wenn die große Masse des Volkes ihr Wollen kundgeben konnte, sie Gleichheit verlangte (Als Adam grub und Eva spann, wo war da der Edelmann?). Noch sicherer wird dieser Volkswille aus dem Inhalte der *Moral* bewiesen. Die Moral bezeichnet das Empfinden, Wollen, Tun, welches gewünscht und geschätzt wird. Die Moral aller Kulturreligionen ist aber die Lehre von der Gleichheit der Menschen. Das Volk wird über die bestehende Ungleichheit vertröstet, indem man diese entweder als Schein erklärt oder in ein Idealreich ausmünden läßt, in welchem Gleichheit herrscht. Die Jurisprudenz kennt den

Grundsatz in negativer Fassung als „Unparteilichkeit". Nur bei einem auf Gleichmaß beruhenden Verhältnisse lassen sich ohne Änderung seines Inhaltes die Rollen wechseln. Deshalb ist die Gleichheit aller Gerechtigkeit inhärent; die aequitas enthält das aequum.

8. Das Volksrecht findet seinen unmittelbaren Ausdruck im *Verkehr*. Wenn die volkstümliche Verkehrsweise als Gewohnheit bezeichnet wird, so liegt darin die Gefahr eines Mißverständnisses. Freilich zeigt sich die Verkehrsweise in einer größeren Anzahl von Verkehrsakten, aber in gleichzeitigen. Das von den Juristen sogenannte Gewohnheitsrecht entspricht ihr daher nur, wenn es sie unmittelbar ausdrückt, wie es heute bei den Handelsusancen geschieht, und gleichzeitig mit ihr seinen Inhalt verändert. Die Übung alter Zeit ist dagegen mit der bestehenden Volksmeinung oft in schroffem Gegensatz; und wenn man sie dann trotzdem festhält und staatlich schützt, so herrscht das *abgestorbene* Recht über das lebende. In dieser Verwechslung von Verkehrsweise und Gewohnheit lag auch der Fehler der historischen Schule. Sie fand das römische Recht in Deutschland herrschend. Da die lex Lothari eine Fälschung war, konnte es nach der Zweiteilung der Rechtsquellen nur als Gewohnheitsrecht bezeichnet werden; und nunmehr erklärte Puchta dieses, dem Volke durch Herrengewalt aufgezwungene fremde Gesetz als „Volksüberzeugung". Man sprach vom Volke und meinte die Juristen.

Die zweite Form, in welcher das Recht ausgedrückt wird, ist das *Gesetz*. Das Verhältnis, welches zwischen den beiden Ausdrucksformen (Verkehrsweise und Gesetz) betreffs Klarheit, Verläßlichkeit, Dauerhaftigkeit und anderer Eigenschaften besteht, soll nicht weiter besprochen werden. Gewiß ist, daß, sowie die Gesellschaft sich kräftiger organisiert hat, das Gesetz die hauptsächliche Rechtsquelle wird. Wenn es nur Ausdruck des Rechtes sein will und in diesem Geiste gehandhabt wird, ist es auch zweifellos ein vortreffliches Mittel, um die Erkenntnis und Übung des Rechtes allenthalben zu erwecken. Es bringt das unbewußte Wollen des Volkes zu dessen Bewußtsein, das unbestimmt Gewollte in feste Gestalt, es weckt die Tatkraft, welche einer klaren Erkenntnis folgt, und fördert dadurch bestens die Entwicklung des Rechtes.

Diese *ideelle* Seite — das Gesetz als Ausdruck des Rechtes —

war von Puchta allein ins Auge gefaßt worden. Das Gesetz hat aber ein Janusgesicht. Nach seiner zweiten *tatsächlichen* Seite ist es ein Befehl, dessen Inhalt durch die organisierte Zwangsgewalt des Staates in das Leben des Volkes eingeführt wird und Recht schafft. Dabei ist es gleichgültig, ob der Befehl von einem Trajan oder einem Caracalla ergeht. Solange im Staat eine Maschinerie arbeitete, in deren letzte Triebkräfte man keinen Einblick hatte, solange auch der kritische Sinn noch nicht erwacht war, konnte der Gegensatz zwischen den beiden Seiten des Gesetzes verkannt und mit der Fehlerhaftigkeit aller menschlichen Einrichtungen verdeckt werden. Anders ist es im modernen Parlamentarismus. Hier tritt der Gegensatz offen vor. Das Kennzeichen des Parlamentarismus ist die *Parteiherrschaft*. Es bilden sich Parteien unter den Bürgern, dann in den gesetzgebenden Körpern, und die Majorität der letzteren hat die gesetzgebende Gewalt. In welchem Sinne übt sie nun diese aus? Sind alle Kämpfe um die Herrschaft der Partei lediglich deshalb geschlagen worden, damit sie den allgemeinen Volkswillen zum Ausdruck bringt und das gleiche Recht für alle verwirklicht?

9. Karl Marx unterscheidet bekanntlich in seinem „Kapital" das Verhältnis Ware—Geld—Ware von einem zweiten: Geld—Ware—Geld. Das erste bezeichnet den normalen Verkehr, das andere den Verkehr der Habsucht. Denn das Geld, welches Ware eintauscht, um wieder Geld zu erhalten, kann nur *mehr* Geld schaffen wollen. Ähnlich stellen sich Recht (Verkehrsweise) und Gesetz zueinander. Nach der normalen Entwicklung bildet sich Recht, wird in Form des Gesetzes gefaßt und hiedurch in seiner Fortbildung gefördert; der Gang ist also: Recht—Gesetz—Recht. Wenn der Gesetzgeber aber nicht vorhandenes Recht formen, sondern neues, noch nicht bestehendes Recht schaffen will, so muß man fragen, was er damit beabsichtigt. Die Erfahrung gibt die Antwort. Er will regelmäßig die bestehende Verteilung von Arbeit und Genuß zum *Vorteil* der ihm zugehörigen Gruppe verändern. Er will statt Recht *Vorrecht* schaffen. Das ist auch der ausgesprochene Zweck des Parteigesetzes. Den Angehörigen der anderen Partei soll ein größerer Teil der Arbeit, den Angehörigen der eigenen ein größerer Teil vom Genusse zugewiesen werden. Das Recht ist seiner Natur nach unparteilich, das Parteigesetz bewußt parteilich.

Daß diese Entgegenstellung nicht etwa eine abstrakte Klügelei,

sondern Darstellung der wirklichen Sachlage ist, beweist die tägliche Erfahrung aller Kulturländer. Jedes parlamentarische Gesetz trägt die Richtung der herrschenden Partei an der Stirne. Die Scheu, welche im Beginne des Systems bestand und die Parteilichkeit leugnete, ist zum großen Teile geschwunden. Man gesteht sie zu, man rühmt sich ihrer sogar und wirbt Anhänger, indem man Gesetze zu ihren Gunsten verspricht.

Es wäre ein Irrtum, wollte man die Gesetze der Selbstsucht mit dem parlamentarischen Systeme entstehen lassen. Die Gesetzesmächtigen haben stets das Gesetz als Mittel betrachtet, sich und den Ihrigen einen größeren Anteil am Gesamteinkommen zu verschaffen. Die Folge: Gesetz—Recht—Gesetz ist so alt wie die Gesetzesform selbst. Man wandelte die bestehende Ordnung zu seinen Gunsten, nannte den Widerspruch Rebellion und erstickte ihn, ließ die veränderte Ordnung sich einleben, bis das Volk resigniert zufrieden war, um dann mit weiteren Gesetzen zu seinem Vorteile fortzufahren. So ist die gegenwärtige Ordnung überall entstanden. Sie ist Unrecht, das durch Resignation des Volkes, durch dessen halb erzwungenes, halb erlistetes Wollen Recht geworden ist; freilich Recht, dessen Eigenschaft so zweifelhaft ist, wie die des erzwungenen Wollens selbst (coactus voluit, sed voluit?). Der Parlamentarismus unterscheidet sich aber von früheren Regierungsformen dadurch, daß in ihm das System der Parteilichkeit organisiert ist.

10. Der Einblick in das doppelte Wesen des Gesetzes zeigt den Grundfehler, in welchen die historische Schule verfallen ist. Sie schuf die juristische Theorie des Parlamentarismus, indem sie beide Funktionen des Gesetzes vermischte. Sie wies Untersuchungen über einzuführende Sozialeinrichtungen (lex ferenda) als nicht in ihr Bereich gehörig zurück und erklärte als alleiniges Objekt der Rechtswissenschaft die positiven Gesetze. Diese aber faßte sie wiederum nicht als reine Tatsachen auf, sondern verlangte für sie *Respekt*, weil sie Ausdruck des wirklichen Rechtes seien. Sie identifizierte den Willen der jeweilig herrschenden Persönlichkeit oder Partei unterschiedlos mit dem Rechtsgedanken. Dadurch verlor sie die Grundlage jeder Induktion und konnte nichts anderes als historisches Material schaffen. Denn eine wissenschaftliche Untersuchung kann vor der Tatsache, daß das eine Gesetz von Fürsorge für das Volk getragen, das andere der Willkürakt eines

Despoten ist, das Auge nicht verschließen. Der Versuch Jherings, aus den tatsächlich gegebenen Gesetzen das Gebiet einer höheren Jurisprudenz abzuleiten, mußte an dieser Ungleichartigkeit des Materials scheitern. Folgerungen der Respektabilität hätten nur aus der Zusammenstellung und Vergleichung respektabler (gemeinnütziger) Gesetze gezogen werden können. Dafür fehlte der historischen Schule, welche jeden Zusammenhang von Recht und Moral leugnete, von vornherein der Maßstab. Außerdem aber ist Respektabilität eine Schlußfolgerung aus sehr vielen Prämissen und kann daher nicht Grundlage einer Wissenschaft sein. Ohne diese unterscheidende Eigenschaft sind Gesetze aber nichts anderes als Vorschriften der Regierung; einflußreich, weil sie durch Zwangsgewalt gestützt werden, im übrigen aber den Maßregeln einzelner Personen oder Vereine *gleichgeartet*. Eine besondere Wissenschaft kann auf sie nicht gegründet werden.

Diese Erkenntnis, daß es eine induktive, d. h. eine Wissenschaft, welche aus den Erscheinungen der Erfahrung allgemein gültige Elementarbeziehungen erforscht, für die Gesetzesinhalte als alleiniges Objekt *nicht gibt und nicht geben kann;* daß sich diese für die Induktion unter die Akte der menschlichen (sozialen) Tätigkeit einreihen, ohne irgendwelche besondere Eigenschaft oder Bevorzugung beanspruchen zu können: ist der Anfang alles wissenschaftlichen juristischen Forschens. Respekt vor dem Gesetze als solchem vernichtet die freie Wissenschaft.

Jedes Gesetz ist *eine einzelne konkrete Zweckmaßregel.* Daß sie sich auf Tausende von Personen und von Fällen bezieht, stört ihren konkreten Charakter nicht. Der Feldherr, der eine Armee zum Angriffe kommandiert, erläßt einen einzelnen konkreten Befehl. Zwischen dem Staatsgesetze und dem, was man Naturgesetz nennt, ist nicht die geringste Ähnlichkeit, und es wäre sehr förderlich, wenn man für die beiden grundverschiedenen Begriffe auch verschiedene Namen gebrauchen würde. Nur weil die Erscheinungen der Natur der gefundenen Formel ihrer Beziehung zueinander ebenso zu gehorchen scheinen wie die Menschen dem Befehl der Obrigkeit, hat man den Namen des letzteren auf die Formel übertragen. Nach seinem Wesen dagegen kann das Staatsgesetz nur mit einem Werkzeuge oder einer Maschine verglichen werden. Es gehört wie diese einerseits zu den Tatsachen, aus welchen die Elementar-

beziehungen (Naturgesetze) abgeleitet werden, es ist anderseits deren Anwendung, um konkrete Zwecke zu erreichen.

Der Zweckgedanke in der Rechtsnorm ist von der englischen Philosophenschule erkannt worden, unter den gemeinrechtlichen Juristen insbesondere von Jhering. Der letztere hat auch die Eigenschaften des Gesetzes aus diesem Gesichtspunkte besprochen, insbesondere die der Praktikabilität. Zur wissenschaftlichen Untersuchung fehlte aber bisher die Auffassung der Gesetze als einfacher menschlicher Handlungen, die nicht zu respektieren, sondern nur zu begreifen sind, sowie der Zusammenhang mit Volkswirtschaftslehre und Sozialpsychologie.

11. Von diesem Zusammenhange aus ist eine kausalwissenschaftliche Untersuchung der bestehenden Gesetze in verschiedenen Ländern und Zeiten möglich. Das Gesetz steht mit den gesellschaftlichen Interessen und Machtverhältnissen in doppelter kausaler Beziehung.

Es ist zunächst ihre *Wirkung*. Der Gesetzesinhalt führt zur Erkenntnis der herrschenden Interessen und Interessenklassen und wird durch sie erklärt. Das Gesetz ist nomadisch, agrarisch, industriell; es ist despotisch, aristokratisch, demokratisch u. a. (Montesquieu). Jede Periode in der Entwicklung eines Volkes prägt ihnen einen ausgesprochenen wirtschaftlichen, politischen und sozialen Charakter auf. Wo Gesetze verschiedener Perioden nebeneinander bestehen, kann ihre Zugehörigkeit aus ihrem Inhalt ebenso festgestellt werden, wie die von Gesteinen zu einer entwicklungsgeschichtlichen Erdzone, und sie sind dadurch auch ein wichtiger Behelf für die soziale Geschichte eines Landes. Die Erforschung dieser Beziehung in den verschiedenen Ländern und Zeiten ist die Aufgabe der juristischen Historiker. Sie schließt sich an die Arbeit der historischen Schule an, unterscheidet sich von ihr aber durch die *kausale* Richtung, welche ihr wissenschaftlichen Gehalt verleiht.

Eine Untersuchung zweiter Art bezieht sich auf das Gesetz als *Ursache* sozialer Verhältnisse, auf den Einfluß, welchen es auf die gesellschaftliche Arbeits- und Genußverteilung übt. Sie hat sich zunächst mit der Gegenwart zu beschäftigen, weil sie für die Vergangenheit auf Berichte angewiesen ist, während die Verhältnisse der Gegenwart unmittelbar beobachtet werden können. Freilich ist bei den Angaben, welche das Material bilden, die Parteilichkeit zu

fürchten; das Ergebnis von Enqueten ist nur mit großer Vorsicht anwendbar. Die Gefahr kann und wird aber wohl durch Zusammenwirken der ehrlichen Männer der Wissenschaft überwunden werden. Die heutige Zeit bietet durch die Menge neuer Verhältnisse, die in ihr entstehen oder sich doch wesentlich verändern, ein großes Beobachtungsfeld; jedes neue Gesetz hat auch den Charakter eines Versuches, u. zw. um so vollständiger, als es in seiner Art originell ist. Die ihm zugrunde gelegten Ansichten und Schlüsse der Verfasser können durch den Erfolg auf ihre Richtigkeit geprüft werden.

Das Feld der Beobachtung und des Versuches sind aber — und das ist die wichtigste Folge der sozialen Betrachtungsweise — nicht mehr die Gesetze allein. Die Wirtschaft des Staates ist nicht wesentlich von der Privatwirtschaft verschieden. Die Erfahrung im kleinen liefert dieselben Erscheinungen, dieselben kausalen Beziehungen wie die Erfahrung im großen. Der Fall des Apfels folgt dem gleichen Gesetze wie der Lauf der Sterne, und dieselben psychologischen Gesetze beherrschen die Entwicklung der Völker und das Einzelleben. Mit gleichartigen Mitteln erhält man den Frieden und fördert man das Wohlergehen im Hause, in der Fabrik, im Verein und im Staat. Vor dem Auge des Juristen zeigt sich ein von ihm unbeachtetes gewaltiges Beobachtungs- und Versuchsgebiet, aus welchem er sich die Kenntnisse verschaffen kann, um bestehende Gesetze zu beurteilen und künftige zu schaffen.

12. Es ist wichtig, zu erkennen, daß nicht bloß die einzelnen Gesetze, sondern auch die von ihnen abstrahierten *Grundsätze* des Rechtes den Charakter von Befehlen oder Zweckmäßigkeitsurteilen haben, obwohl sie scheinbar Tatsachen enthalten. Der Grundsatz servitus in faciendo consistere nequit bedeutete bei den Römern nicht, daß eine Grundlast dem Verpflichteten keine positive Leistung auferlegen könne, sondern daß man sie nicht gestatte. Der Satz, niemand könne mehr Recht abtreten, als er selbst hat, wird bei Übertragung eines erlisteten Inhaber- oder Ordrepapieres an einen redlichen Dritten widerlegt. Zweckmäßigkeit entscheidet — um einige der wichtigsten Probleme zu nennen — zwischen den verschiedenen Wechseltheorien und setzt jeder Theorie ihre Grenze. Das Bestreben, dem geistigen Arbeiter die Anerkennung seines Verdienstes und einen angemessenen Lohn zu sichern, schafft die

Theorien des Urheber- und Namenrechtes. Das Eigentum ist, obwohl eine auf Millionen rückwirkende und dadurch für die soziale Entwicklung höchst bedeutsame, aber doch nur eine *konkrete* und, wie Hugo, der historische Jurist, offen einbekannt hat, von schweren sozialen Nachteilen begleitete Einrichtung. Ebenso der Schuldzwang, den neuerlich wieder der Nationalökonom Neurath als Grund aller sozialen Übel betrachtet.

Ein sehr lehrreiches Beispiel gibt uns die Wendung, welche die Lehre vom Schadenersatz heute nimmt. Das Culpa-Prinzip, das man für selbstverständlich hielt, weicht dem kausalen; nicht, weil die juristischen Kenntnisse sich erweitert, sondern weil die sozialökonomischen Verhältnisse sich geändert haben, weil Großindustrie und Großverkehr aus den mannigfachen Ursachen, welche in den Streitschriften über die Prinzipienfrage erläutert werden, das Kausalprinzip zweckmäßiger erscheinen lassen. Ebenso sind es sozialökonomische Veränderungen, welche unseren Arbeitsvertrag, unser Gesellschaftsrecht u. a. grundsätzlich umgestaltet haben. Alle Jurisprudenz ist Nachdenken über die Zweckmäßigkeit sozialer Einrichtungen, künstlerisch-technisches, nicht exakt wissenschaftliches Denken. Die Induktionswissenschaft, unter welche die in den Gesetzen enthaltene Tätigkeit gehört, ist die Sozialwissenschaft, deren Grundlage die Psychologie und deren gegenwärtig fast allein zu einer gewissen Höhe gelangter Bestandteil die Nationalökonomie ist. Juristik und Sozialforschung gehören zueinander wie Medizin und Naturwissenschaft, und es ist ein schwerer Fehler, daß sie sich noch nicht wie diese zusammengefunden haben.

Die Unterscheidung zwischen juristischer Kunst und sozialwissenschaftlicher Forschung löst auch die Frage über die Bedeutung der *Logik* für den Juristen. Damit ein Rechtssatz in seiner ganzen Tragweite erkannt werde, muß er mit logischer Schärfe in alle Verzweigungen und letzten Konsequenzen verfolgt werden. Diese Konsequenzen sind aber dann in ihrem Verhältnis zu den für das Wohl des Volkes maßgebenden Erscheinungen zu prüfen und danach als Recht oder Unrecht zu qualifizieren. Der Jurist als Gesetzestechniker (sowohl als Gesetzgeber, wie im Rahmen des Gesetzes als Richter und Anwalt) wird nunmehr den Grundsatz so weit einschränken, daß er nach Möglichkeit nur gemeinnützige, nicht gemeinschädliche Folgen nach sich zieht. Die wissenschaftliche Forschung verlangt Logik, die juristische Kunst Vernunft. Diesen Unterschied hat insbesondere auch Puchta verkannt, indem er von allgemeinen Grundsätzen die vollen Konsequenzen zog und sie als Recht postulierte.

13. Nach jahrhundertelanger Irrfahrt, während welcher theologische und bürokratische Despotie den Glauben verbreitet hatte, der Jurist habe nur zu erklären, was andere, von ihm unabhängig und unkontrollierbar, ausgesprochen haben: führt ihn das freiere Leben der Gegenwart zur Auffassung der Römer zurück. Die Jurisprudenz wird wieder in ihrer Reinheit erkannt. Sie ist eine Kunst, keine historische oder exakte Wissenschaft; aber eine *freie,* von der eigenen Beobachtung und der eigenen Schlußfolgerung getragene Kunst, die bestrebt ist, Einrichtungen, welche die Tätigkeit der Menschen im Zusammenleben leiten, zugunsten des Volkes herzustellen und zu handhaben: ars aequi et boni. Der einzige, wenn auch große Unterschied zwischen uns und den Römern besteht darin, daß wir an Stelle ihrer genialen Naturalistik Wissenschaftlichkeit zu setzen uns bemühen. Wir suchen die tatsächlichen Beziehungen, welche sie mit Natur der Sache, Billigkeit, Nützlichkeit u. a. bezeichneten, zu erkennen; wir stellen — ich spreche von der werdenden Jurisprudenz — wie vor die Baukunst die Mechanik, so vor die Rechtskunst die Nationalökonomie und Sozialpsychologie. Selbstverständlich wird sowenig wie die Baukunst sowenig auch die praktische Rechtspflege warten können, bis die Wissenschaft sich genügend weit entwickelt hat, um ihre Führerin zu sein. Sie wird stets die konkrete Erfahrung mit zu Rate ziehen und ihre Ergebnisse teils als Ausgangspunkt nehmen, teils zur Kontrolle von Maßregeln, welche sich aus allgemeinen, als zweckmäßig erscheinenden Grundsätzen ergeben würden. Aber bisher konnte sie durch bewußte Wissenschaftlichkeit überhaupt nicht gestützt werden. Die juristischen Theoretiker unterscheiden noch immer lediglich (ich erinnere mich an einen diesbezüglichen Streit zwischen mir und Exner in der Wiener Juristischen Gesellschaft) Historie und Unwissenschaftlichkeit. Daß Beobachtung und Versuch auch in der Jurisprudenz Grundlage des Forschens sein können und müssen, sträuben sie sich noch anzuerkennen.

Ist es Wissenschaft, wenn man die bisher gebrauchten Pflüge und die Ackerung mit ihnen oder die bisherigen Lichter und ihren Gebrauch zusammenstellt? Wodurch unterscheidet sich hievon die

Darstellung bisheriger Gesetze und ihrer Ausführung? Der Respekt der Juristen vor dem Gesetz hat ihre Wissenschaftlichkeit erschlagen. Sie konnten nicht ernstlich kausale Beziehungen aufsuchen, wenn sie — in Mißverständnis des Satzes, daß das jeweils bestehende Gesetz bis zu seiner Aufhebung, teils im Interesse des sozialen Friedens, teils wegen des drohenden Zwanges, beobachtet werden müsse — das Gesetz als solches mit Respektabilität bekleideten. Was man bei den Juristen bis jetzt Wissenschaftlichkeit nennt, ist Analyse von Begriffen und Analogie bestehender Gesetze. Der Gedanke Bacons ist bei ihnen noch nicht eingekehrt.

Die Großtaten der einzelnen Männer werden hiedurch nicht berührt. Die führenden Geister empfinden regelmäßig am tiefsten die Schwächen, an denen das Wissen ihrer Zeit leidet und streben über sie hinaus. Sie vollenden die *alte* Zeit und leiten die neue ein. Die Mitte des 19. Jahrhunderts verlangte praktische Reformen. Die Einführung einer neuen Unterrichtsmethode, welche Scharfsinn und Vernünftigkeit weckte, eines Rechtssystemes, welches zum Nachdenken, zur Vergleichung und zur Aufnahme der in ihm enthaltenen besseren Verfügungen anregte, war für das einzelne Land eine erlösende Tat. In Österreich hat Unger diese Tat vollbracht; er hat das nahezu erstorbene juristische Denken neu belebt, und er wird deshalb mit Recht als Begründer der modernen österreichischen Jurisprudenz gepriesen.

DIE AUSBILDUNG DER JURISTEN

Referat auf dem XXXI. Deutschen Juristentag 1912 [1])

Meines Erachtens hat der Deutsche Juristentag, indem er das Problem, über welches wir derzeit verhandeln, auf seine Tagesordnung setzte, sich, wie es sich gebührt, in den Mittelpunkt der großen geistigen Bewegung gestellt, welche die deutsche Juristenwelt endlich, ich darf es nach dreißigjähriger, jahrelang völlig aussichtsloser Anstrengung wohl sagen, *endlich* ergriffen hat. Erlauben Sie mir, dabei zu erwähnen, daß die deutschen Juristen es bis jetzt unterlassen haben, einem großen deutschen Rechtsdenker die Ehre, die er verdient, zu geben. Der Nationalökonom Roscher hat seine gründlichen Arbeiten in deren Wichtigkeit erkannt und anerkannt. Aber die Juristen haben die Leistungen des kleinen Advokaten von Rostock achtlos beiseite gestellt und haben weiterhin zu ihren alten Götzen, zu ihren Windscheids und Arndts gebetet. Auch heute noch sind es wenige Juristen, welche den Namen Heinrich Dankwardt, und noch weniger, die seine Bedeutung kennen.

Das Problem, über welches wir sprechen, betrifft das Verständnis der Juristen für psychologische, wirtschaftliche und soziologische Fragen. Das Wort „Verständnis" nimmt man regelmäßig — auch meine Herren Vorredner haben es getan — in dem Sinne, daß es eine allgemeine, übersichtliche Kenntnis bezeichnet gegenüber dem tiefer eingehenden Spezialwissen des Fachmannes. In diesem Sinne, glaube ich, haben wir es überhaupt mit einem Problem nicht zu tun, sondern nur mit der Frage, welches die besten Mittel sind, um solche Kenntnis zu erzielen. Meine Herren Vorredner haben derartige Anträge gestellt, die sich ziemlich gleichen . . .

Auf alle von ihnen angeführten Einzelheiten möchte ich aber nicht weiter eingehen. Sie sind sehr wichtig, ich stimme ihnen auch zu, allein sie haben nicht die nötige bildende Kraft und lösen nicht das Problem. Wir haben in Österreich seit mehr als 50 Jahren obligatorische Vorlesungen über Nationalökonomie und doch hatte in

[1]) In dem Text wurden einige Kürzungen vorgenommen. (Anm. d. H.)

derselben Zeit die historisch-schematische Begriffsjurisprudenz die unbeschränkte Herrschaft. Das bloß nebenherige Studium genügt nicht. Ich fasse das Wort „Verständnis", welches in unserer Frage enthalten ist, ernster und tiefer auf. Ich möchte nur kurz einstreuen, daß ich es auch nicht in dem Sinne meine, welchen eine neue kulturphilosophische Schule unter Dilthey, Windelband und Rickert diesem Ausdruck gibt. Bekanntlich will diese Schule in dem Gegensatz von Verständnis und Erkenntnis die Marke für den Gegensatz zwischen historischer oder Kulturwissenschaft und nomothetischer oder Naturwissenschaft finden. Das heißt doch dem Worte eine viel zu große Bedeutung beilegen. Alles was gesprochen wird, will verstanden sein, alles was zusammengesetzt ist, jede Formel eines Naturgesetzes will verstanden sein und spricht doch ein Naturgesetz aus. Wir verstehen Menschen besser, weil wir auch Menschen sind — kann das einen grundsätzlichen Unterschied bilden? Außerdem sind die Wissenschaften nicht in zwei, sondern mindestens in drei Gruppen zu unterteilen: in historische, in exakte und in technische Wissenschaften oder wissenschaftliche Künste, Anleitungen für menschliche Tätigkeit. Zu den letzteren gehört beispielsweise die Baukunst, die Heilkunst, und zu ihnen gehört auch die Rechtskunst, die Jurisprudenz, welche weder eine historische noch eine im engeren Sinn exakte Wissenschaft ist, sondern eine technische, eine praktische Wissenschaft, eine wissenschaftlich geschulte Zwecktätigkeit, welche deswegen weder in die eine noch in die andere jener beiden Kategorien eingereiht werden darf. Ich fasse das Wort „Verständnis" in unserer Frage als Verständnis der *organischen Verbindung*, der grundlegenden Bedeutung von Psychologie, Wirtschaftslehre und Soziologie für das wissenschaftliche Rechtsdenken auf. Ich will das erläutern. Was würde ein medizinischer Fachmann dazu sagen, wenn auf einem allgemeinen Kongresse, einem deutschen Medizinertage die Frage aufgestellt würde: „Was kann geschehen, um bei der Ausbildung der Mediziner das Verständnis für anatomische, physiologische und pathologische Fragen in erhöhtem Maße zu fördern?" Ich glaube, meine Herren, er würde dann zunächst die Gegenfrage stellen: „Was unterrichtet man denn eigentlich bei euch an der Universität?" Und wenn man ihn aufklären würde, unterrichtet werden die vorgeschriebenen oder üblichen Heilmethoden für verschiedene Krankheiten und ihre geschichtliche Entwicklung, so würde er, glaube ich, antworten:

„Dann fehlt euch doch die Wissenschaft, dann treibt ihr doch nur Handwerkerei, und wenn ihr euch in ihre Geschichte vertieft, so treibt ihr geschichtlich verbrämte Handwerkerei! Wie kann man wissenschaftliche Heilkunst lehren, wenn man nicht die Struktur des Körpers, seine Funktionen, die verschiedenen Störungen derselben und ihre Ursachen studiert!" Meine Herren, ist es nicht bei uns ähnlich? Lassen Sie mich ein Paradigma gebrauchen! Ein Unternehmer kommt in eine bisher industrielose Gegend. Er eröffnet hier eine Fabrik, er bringt seine Maschinen aus einem anderen Lande mit. Aber er hat keine Arbeiter, keine Beamten und errichtet nun Fachschulen, in welchen lediglich Beamte und Arbeiter für seine Fabrik ausgebildet werden. Die Leute lernen nichts als die Kenntnis der Maschinen dieser Fabrik, zu ihrer Instruktion auch die der früher gebrauchten Maschinen und die Art ihrer Handhabung. Es versteht sich von selbst, daß hier ganz gute Arbeiter erzogen werden können, aber Sie begreifen, meine Herren, wenn eine neue Maschine kommt, so sind sie unvorbereitet und müssen von frischem zu lernen anfangen. Neue Maschinen selbst zu konstruieren lernt man in dieser Schule nicht, der Lehrer muß vielmehr erklären: das Konstruieren gehört nicht hieher. Ebensowenig die wissenschaftliche Grundlage der Arbeit. Einzelne Lehrer mögen für sich weiter ausgreifen, aber das System wird sie allenthalben hindern. Nun, meine Herren, ist es nicht bei uns ebenso? Lernt man nicht an unseren Fakultäten, nach dem was uns noch jetzt überall gesagt wird, grundsätzlich nur das Gesetz des eigenen Landes und seine Vorgeschichte? Sagen uns nicht noch heute Lenel oder Jacobi: die Gesetzgebung gehöre nicht zur Jurisprudenz? Auch im Gutachten Gerlands ist ein ähnlicher Gedanke enthalten: die Gesetzgebung sei eigentlich Politik. Bedenken Sie, meine Herren, überall werden derzeit neue Gesetze geschaffen, aber die Juristen, welche sich anstrengen, um die Gesetze gut zu machen, sind gar keine Juristen, sondern Politiker. Erst wenn das Gesetz geschaffen ist, wird es ein Justizgesetz, und sie sind wieder Juristen geworden. Wenn die juristischen Vertreter der verschiedenen Staaten im Haag zu internationaler Gesetzgebung zusammentreten, so treiben sie Politik. Und wir, meine Herren, im Deutschen Juristentag treiben alle Politik; erst wenn der eine oder andere Staat das, was wir geraten haben, zu seinem Gesetz erhebt, dann sind wir wieder Juristen. Können Sie sich die Baukunst vorstellen, welche die Archi-

tektur als fremd erklärt, welche erst beginnen will, wenn der Plan fertiggestellt und nur auszuführen ist?

Meine Herren! Als ich dereinst, nach mehrjährigen Studien naturwissenschaftlicher und philosophischer Art wieder zur Jurisprudenz zurückkehrte, hat mich diese Selbstentmannung am meisten betroffen. Ich habe meinen Groll damals, es war 1883, in einer Abhandlung, „Der Wendepunkt in der Rechtswissenschaft", dahin ausgedrückt: „Fürsten und Volk wollten da nicht Gesetze ihres Willens, sondern Gesetze des Volkswohles schaffen." Sie wollten daher von Sachverständigen erfahren, welche Gesetze sie geben sollten, *um diesen Zweck zu erreichen*, und an wen sollten sie sich um Bescheid wenden, als an die Männer der Rechtswissenschaft? Sie hatten keine Ahnung, daß sich die Juristen selbst den freien Ausblick in ihr Gebiet verhängt hatten, um dann frischweg die Existenz dieses Gebietes zu leugnen, und daß sie nach ihrer Lehre vom „positiven Recht" antworten mußten: „Was für Gesetz ihr geben sollet, wissen wir nicht und kümmert uns nicht. Das gehört in die uns fremde ‚Gesetzgebungskunst'. Gebet Gesetze, welche ihr wollt! Wenn ihr erst ein Gesetz gegeben haben werdet, wollen wir euch in Latein erklären, was ihr für Gesetz gegeben habt."

Meine Herren! Wir haben uns praktisch über die positivistische Lehre schon vielfach erhoben, so daß diese Worte nicht mehr richtig scheinen, sie bildet aber doch noch das feste Gerippe unseres Rechtsunterrichtes. Wie kann man aber zu einem tieferen Verständnis von dem Verhältnis zwischen Rechtsdenken und soziologischem, psychologischem und volkswirtschaftlichem Wissen gelangen, wenn man als die eigentliche Aufgabe des Juristen die Auslegung der bereits bestehenden geltenden Gesetze ansieht? Die Voraussetzung, daß wir unser Problem lösen können, liegt also darin, daß sich die Jurisprudenz von dem Dienst des geltenden Gesetzes loslöst, daß sie das Gesetz als ihr Produkt, nicht als ihren Ursprung auffaßt, daß sie erkennt, sie sei eine freie Wissenschaft. So wie es keine Wissenschaft irgendwelchen Inhaltes geben kann — die Freiheit gehört zum Wesen der Wissenschaft —, welche nicht auf eigenem Nachdenken beruht, auf eigener Beobachtung, eigenem Versuch, eigener Erforschung von Gesetzen und Erlangung eines gewissen prophetischen Blickes für die Zukunft, so muß sich auch die Rechtswissenschaft diesen freien Blick schaffen, wenn sie überhaupt den Namen einer

Wissenschaft tragen soll. Solange sie das nicht erreicht, hat Kirchmann recht, wenn er erklärt: Jurisprudenz sei keine Wissenschaft; sie häufe Massen von Büchern auf, man brauche aber lediglich einen Paragraphen zu ändern und alle diese Bücher haben keinen Wert. Meine Herren, ich spreche nicht von dem Richter. Der Richter ist ein Organ der Rechtspflege im Lande und muß auf das andere Organ derselben, den Gesetzgeber, die entsprechende Rücksicht nehmen. Das Recht wird im Gesetzesstaat durch sie beide, durch Gesetzgeber und Richter zusammen, vertreten. Deshalb war es ein Fehler, den viele Verteidiger des Freirechtes begingen, wenn sie den Richter in den Mittelpunkt der Debatte gestellt haben. Die Organeigenschaft des Richters mußte störend wirken.

Vollkommen freirechtlich kann nur derjenige denken, der kein Organ über und neben sich hat, der freie Forscher und insbesondere der Lehrer an der Hochschule. Hier ist der Anfang der Reformarbeit. Der Rechtsunterricht an der Hochschule darf nicht ein bloßer Unterricht in den geltenden Gesetzen des Landes sein, in ihrer historischen Entwicklung, in ihren Leitsätzen und Konsequenzen, er muß Unterricht in einer freien Wissenschaft sein.

Wenn aber, meine Herren, das Gesetz als Unterlage fehlt, was ist nunmehr die Unterlage dieses Unterrichtes, der freien, wissenschaftlichen oder, wie man sie gegenüber dem Legalwissen nennen kann, der sozialen Jurisprudenz? Wir erhalten ein Wort, das nahezu Modewort der modernen Juristen ist, zur Antwort: *das Leben*. Leben ist allerdings ein allgemeiner Ausdruck, wie Natur oder Welt; man meint auch Verschiedenes darunter. Die meisten meinen die Wirklichkeit gegenüber dem Begriff, gegenüber dem Paragraphen, der bloß auf dem Papiere steht, oder einem Prinzip, das nicht in die Wirklichkeit treten kann. Andere meinen die Gegenwart gegenüber einer abgestorbenen Vorschrift oder Sitte, durch welche der Tote den Lebenden würgt. Andere wieder die Bewegung, die Betätigung des Lebens gegenüber der Ruhe des Friedhofs oder die Persönlichkeit, den unmittelbaren Verkehr, wieder andere das Wohl der Menschen gegenüber einer Justiz, quae fiat, pereat mundus. Immer aber ist es das *soziale Leben*, das Leben der Menschen in ihrem Zusammensein und Zusammenwirken; in unserer Zeit eine umfassende Arbeitsteilung, in welcher jeder nach seinem Platze hascht; eine Besitz- und Erwerbsverteilung, welche einigen mühelos Reich-

tümer in den Schoß wirft, tausende andere für ihr ganzes Leben zur Sorge um das tägliche Brot oder zum Hungertode verurteilt; eine Schichtung in Familien, Stämme, Klassen, Staaten und der Streit dieser Gruppen um Besitz und Macht, welcher auch im Staate nicht aufhört; ein ewiger Kampf um das Dasein, in diesem Kampfe aber dennoch eine sich immer mehr und mehr durch das Interesse der einzelnen durchringende Erkenntnis von der Notwendigkeit des gesellschaftlichen Lebens der Menschen, damit sie Menschen sein und bleiben können — eine einfache soziale Tatsache, welche der Ursprung aller Ethik und alles Rechtes ist. Ethik eine Gewissensmahnung, eine Ewigkeitsmahnung an die einzelnen zu vollkommener Gemeinschaft; tief, reich im Inhalt, aber von geringem Einfluß auf das Leben. Recht eine Gegenwartsorganisation, eine Ordnung der Verhältnisse und des Verhaltens der Menschen zueinander, welche verlangt, daß sie jetzt verwirklicht werden soll, welche deshalb an die verschiedenen Energien des Lebens gebunden ist, abhängig ist von den Existenzbedingungen, von den Auffassungen, von den Machtverhältnissen der Gruppen, welche beschränkt ist auf das Durchsetzbare, im Inhalt unter der Ethik steht, sie aber überragt dadurch, daß es das Wollen der rechtschaffenen und verständigen Menschen, welche *leben,* vertritt und deswegen selbst *eine Macht des Lebens* ist. Es ist ein Irrtum, welchen ein sehr tüchtiger Mann in einem sehr tüchtigen Werk, nämlich Stammler in „Wirtschaft und Recht" begeht, wenn er Wirtschaft als Stoff und Recht als Form derselben erklärt. Gewiß, meine Herren, man kann die Sklaverei als eine Wirtschaftsform betrachten, allein, ist sie bloß das? Schlägt nicht die Peitsche des Aufsehers den Rücken wund und greifen nicht die Zähne des Fanghundes in lebendiges Fleisch, wenn er den Flüchtling erjagt? Bei der Gummigewinnung in Peru haben wir vor kurzem ähnliche Formen der Wirtschaft erlebt.

Nein, Recht ist keine bloße Form; Stammler hat den Menschen, er hat die Empfindung und ihre Agitationskraft, das dynamische Moment vergessen, das hier wirkt. Das Leben ist ein Kampf sozialer Energien, in welchem die stärkere die schwächere oft unterdrückt, oft zerstört, und das Recht selbst ist Inhalt einer der Lebensenergien, von welcher zu hoffen und zu wünschen ist, daß sie stärker werde als jede andere.

Hier tritt nun die wissenschaftliche Jurisprudenz ein. Sie schafft

Gesetze, sie belehrt den Richter und den Anwalt. Die Jurisprudenz ist, wie schon gesagt, keine historische und keine exakte, sondern eine technische Wissenschaft, die wissenschaftliche Anleitung zu einer Tätigkeit. Sie ist die Kunst, soziale Einrichtungen zu schaffen und zu handhaben, welche mit möglichst großer Sicherheit und für möglichst große Dauer Frieden unter den Menschen wirken. Sie ist soziale Technik, und wenn man vom Juristischen spricht und Juristifizieren, so meint man das Technische. Die Erfordernisse der Technik sind es, durch welche sich die Jurisprudenz von der Ethik unterscheidet. Sie muß ordnen, sie muß zwingen, deshalb muß sie aber klar sein, klare Ausdrücke haben und klare Grenzen ziehen. Deswegen kommt es allerdings vor, daß ökonomische oder gesellschaftliche Verhältnisse in der juristischen Fassung dem Leben gegenüber eine schärfere, manchmal auch eine zu scharfe Form erhalten. Die Jurisprudenz ist — erlauben Sie mir, das zu betonen — die Kunst, soziale Einrichtungen zu treffen, um Frieden zu wirken; aber diese Einrichtungen sind nicht unbedingt, nicht an sich friedlich, sie wirken nach ihrer Art und fördern nur dann den Frieden, wenn sie richtig gehandhabt werden. Das Eigentum ist beispielsweise friedenwirkend dadurch, daß es Eingriffe in fremdes Gebiet hindert: aber es gestattet anderseits und schützt die größte Rücksichtslosigkeit des Besitzers, stellt neben den Verschwender unmittelbar die nackte Armut, den blanken Hunger, und wenn der Hungernde nach dem Überfluß des anderen greift, um nicht zu vergehen, so ist das Eigentum auf Seite des Verschwenders. Ebenso ist der bindende Vertrag die Voraussetzung für einen weiteren Verkehr, aber die Unvorsichtigkeit einer Stunde zerstört das Lebensglück. Nicht die Logik, nicht die abstrakte Konsequenz einer sozialen oder sogenannten Rechtseinrichtung ist also Recht, sondern *Rechtsvernunft* ist es, welche Recht macht. Rechtsvernunft muß erwägen, in welcher Art, an welchen Gegenständen, in welchen Grenzen die soziale Einrichtung zu handhaben ist. Rechtsvernunft hat auch das Verhältnis zwischen Gesetzgeber und Richter zu entscheiden und ebenso das Verhältnis zwischen gegebenem Gesetz und neuen Resultaten der Wissenschaft. Rechtsvernunft ruht aber auf Erforschung der Folgen einer sozialen Einrichtung im Leben, in der sozialen Erfahrung, auf Vergleichung dieser Folgen mit dem Zweck des Friedens. Hier liegt das Gebiet, welches die Jurisprudenz systematisch betreiben müßte. Nicht das

einfache geschichtliche Nacheinander von Rechtssätzen kann uns unterrichten, was sein soll, was recht ist. Wenn man wissenschaftlich untersuchen will, so muß man prüfen, wie eine vom Recht aufgenommene soziale Einrichtung auf das Volk und dessen Lebenshaltung wirkt oder gewirkt hat, wie z. B. das eigenartige Erbrecht in England oder die Agrarverteilung in Frankreich oder die Fideikommisse bei uns, wie der freie Vertrag oder die unlösliche Ehe auf das Volk, auf dessen ökonomischen und gesellschaftlichen Bestand gewirkt haben. Das allein kann eine Grundlage für weitere juristische Einrichtungen abgeben.

Ich habe, meine Herren, gesagt, daß die Rechtsvernunft ihre Grundlage in der sozialen Erfahrung hat. Soziale Erfahrung und Leben ist nämlich dasselbe. Das Leben, indem es in das Denken des Menschen eintritt, wird zur sozialen Erfahrung. Erfahrung, gesammelt, vertieft, denkend verarbeitet, ist aber Wissenschaft, und so, meine Herren, hat die freie Jurisprudenz, die wissenschaftlich geschulte Rechtsvernunft, ihre *organische* Unterlage in der verarbeiteten sozialen Erfahrung, d. h. in der Sozialwissenschaft, deren verschiedene Zweige Sozialpsychologie, Sozialökonomie, Soziologie sind.

Man hat darüber gestritten, was eigentlich Soziologie sei. Aber sind nicht ebenso, wie Kauf, Tausch, Miete zunächst wirtschaftliche Verhältnisse sind, so Ehe, Familie, Stand, Gemeinde zunächst soziale Beziehungen, die dann juristifiziert werden? Man hat der Soziologie die Existenz abgesprochen, weil noch keine richtige Definition aufgestellt sei. Aber, meine Herren, beruht denn die Wissenschaft auf der Definition? Als ich kürzlich in einer Interpellation an den österreichischen Unterrichtsminister Dozenturen für Soziologie an den juristischen Fakultäten verlangte, habe ich die Soziologie erklärt als die Lehre von den gesellschaftlichen Zusammenhängen der Menschen, ihren Tatbeständen, ihren Wirkungen, ihrer Entwicklung und den sie beherrschenden Gesetzen. Man kann sie auch kürzer bezeichnen als die Lehre von den sozialen Zusammenhängen, ihren Tatbeständen und Gesetzen. Ist das nicht genug deutlich, wenn man wissenschaftlich arbeiten will? Muß man sich wirklich erst um eine allgemein befriedigende Definition umschauen? In ganz derselben Weise hat Claude Bernard seinerzeit einen Kampf um den Bestand der Physiologie führen müssen. Auch die Pathologie war zu Zeiten Rokitanskys und Virchows noch keine ausgebildete Wissenschaft wie heute. Sie ist aus dem Geiste der modernen Medizin entstanden, und ebenso wird die Soziologie als reife Wissenschaft aus dem Geiste der freien Jurisprudenz hervorgehen.

Über die grundlegende Wichtigkeit von Psychologie, Volkswirtschaft und Soziologie für das wissenschaftliche Rechtsdenken erlauben Sie mir, nur wenige Beispiele anzuführen. Wer darf über Schuld, Strafe, Strafvollzug mitsprechen, der nicht Psychologie kennt? Ich meine nicht abstrakte, sondern konkrete Psychologie. Aber nicht bloß der Verbrecher, auch der Zeuge ist bereits, wie Sie wissen, in sehr aktueller Weise Gegenstand wissenschaftlicher Prüfung geworden, und die Untersuchungen von Stern, Liszt und anderen werden jedem Richter die gewichtigsten Zweifel an mancher Zeugenaussage einflößen.

Nebenbei bemerkt, meine Herren, es würde auch die Psychologie des Sachverständigen, des Psychiaters, des Anwaltes, die Psychologie des Richters eine interessante Ausbeute geben. Aber nicht bloß das Strafrecht braucht die Psychologie, auch im Zivilrecht treffen wir Freiheit der Entschließung, Furcht, List, Irrtum, Treu und Glauben. Das alles ist psychologisch. Und schließlich ist doch das ganze Recht für Menschen geschaffen, für Menschen, die denken, fühlen und wollen. Ich erlaube mir, einen Satz zu wiederholen, welchen ich 1888 in einem Vortrag über „Rechtstheorie und historische Schule" ausgesprochen habe: „Lust und Unlust, der Ursprung unseres Wollens, ist auch der Ursprung alles Seinsollens. Was dem Menschen Lust erweckt, ist im Keime Recht, was ihm Leid schafft, im Keime Unrecht. Und wenn eine Maßregel Hunderte von Jahren besteht und eine andere heute zum ersten Male gedacht wird, so kann Lust und Leid des Menschen Schiedsrichter zwischen beiden sein und die Waagschale kann tief zugunsten der letzteren sinken."

Über den Einfluß der Volkswirtschaft auf das Recht brauche ich wohl nicht ausführlicher zu sprechen. Wer die Umwälzung unseres Rechtes, namentlich unseres Privatrechtes kennt, weiß: Nicht durch die Juristen, sondern gegen sie ist sie erfolgt; die Volkswirtschaft hat sie gebraucht, die Volkswirtschaft hat unser Recht revolutioniert. Die Juristen haben das Neue so wenig verstanden, daß z. B. Vangerow Zeit seines Lebens die Übertragung einer Forderung nicht begreifen konnte und selbst unser Unger das Giro auf eine zusammenhängende Reihe von Novationen und Novationsmandaten zurückgeführt hat. Der Gedanke, daß Rücksicht auf den Dritten die

Konsequenz der Übertragung durchbrechen könne, konnte dem Romanisten, solange er sich nicht selbst vom Romanisten befreite, nicht zum Bewußtsein kommen. Aber, meine Herren, einen einzigen Grundsatz will ich anführen: „Die Volkswirtschaft erzeugt, das Recht verteilt." Das Recht verteilt nach anderem Maßstab als erzeugt wird, es teilt beispielsweise das Gebäude, das im guten Glauben auf dem Grunde eines anderen aufgebaut worden ist, dem Grundeigentümer zu, die Erfindung des Angestellten dem Dienstgeber, das ganze Arbeitsprodukt dem Unternehmer. Die soziale Frage unserer Zeit, die wesentlich wirtschaftlicher Natur ist, ist im Kern in diesem Grundsatz enthalten. Was nun aber die Soziologie betrifft, welcher man wegen einer mangelnden Definition die Existenz absprechen will, so ist gerade sie der Ursprung der Reform des Rechtes gewesen. Denn die historische Schule ist aus dem Satz entstanden, daß das Recht ein Teil des Volkslebens sei, und daß aus diesem Grunde ein allgemeines Naturrecht nicht geschaffen werden könne. Leider hat die Romanistik gehindert, daß die Schule den Gedanken weiter verfolgt hat. Wir finden ihn dann bei Marx wieder, wenn er die Kategorien des Rechts historische Kategorien nennt. Ein konkretes Beispiel! Wenn wir im römischen Recht finden, daß praecipue id suum putabant, quod manu cepissent, wenn wir hören, daß zu ihrer familia die ländlichen, nicht aber die städtischen Servituten gehörten, daß sie Annahme von merces für unfrei hielten und dem Mandat und Deposit ihren Namen absprachen, wenn der Mandatar oder Depositar Zahlung nahm: wissen wir dann nicht, daß wir es mit dem Rechte eines kriegerischen und ackerbautreibenden Volkes zu tun haben, das mit Sklaven arbeitete? Und wenn wir in unserem Rechtsdenken neben mancherlei manchesterlichen und auch feudalrechtlichen Ideen, welche beispielsweise noch im Fideikommiß oder in dem unbegrenzten Familienerbrecht des deutschen Gesetzes enthalten sind, wenn wir zugleich eine gewisse Hochschätzung des Menschentums und der Arbeit finden, halten wir uns nicht für besser als unsere Vorfahren! Es ist nicht unser Verdienst, es ist die Folge der sozialen Umwälzung eines Jahrhunderts, welches Millionen Menschen in die Gesellschaft aufgenommen hat, die nichts ihr eigen nennen, als ihr Menschentum und ihre Arbeitskraft. Dadurch ist der Gedanke, daß auch diese ein Recht zu leben haben, in das Gewissen der verständigen und redlichen Menschen gedrungen und hat in unser

Recht einen gewissen humanitären und sozialen Zug gebracht. —

Sie sehen, meine Herren, es ist ein anderes, was gegenüber den Vorschlägen meiner Herren Vorredner das Verständnis für soziologische, psychologische und volkswirtschaftliche Fragen von uns verlangt. Wir müssen erkennen, daß Jurisprudenz die Disziplin der sozialen Fürsorge ist und auf der Sozialwissenschaft *beruht*, daß diese ihre theoretische Grundlage ist, und daß der Rechtsunterricht deshalb auf sozialwissenschaftlichem Boden, nicht auf historischem, aufgebaut werden muß. Er muß also gründlich umgestaltet werden. Die Juristen, die in die Hochschule kommen, müssen vom ersten Augenblick an wissen, daß die Rechtskunde nicht in bloßer Gelehrsamkeit besteht, nicht im Studium alter Senatus-Consulta und papyri, und nicht im bloßen Auseinanderlegen von Paragraphen, daß sie vielmehr ein Können verlangt, Arbeit gegen die sozialen Leiden des Volkes, für sein Schaffen, für sein ganzes Sein und Tun. Dazu müssen sie es aber kennen. Und deshalb müssen Psychologie, Volkswirtschaft und Soziologie am Beginn des Studiums gelehrt werden. Der Jurist muß schon wissenschaftlich denken können, wenn er an das Studium der Gesetze seines Landes herantritt. Sie werden also begreifen, daß ich mich nicht zufrieden geben kann mit den Einzelheiten, welche meine verehrten Herren Vorredner vorgeschlagen haben, obwohl sie gut sind, weil mit solchen Einzelheiten allein nichts getan ist. Der leitende Gedanke des Unterrichtes muß umgewandelt, der ganze Charakter des Rechts muß anders verstanden werden, man muß erkennen, daß die Jurisprudenz eine Lebenswissenschaft ist, auf dem Leben ruhend, für das Leben tätig. Das habe ich mir nun erlaubt, in einen Satz zu fassen, den ich Ihnen zum Beschluß vorschlage:

„Der Deutsche Juristentag erklärt es für notwendig, daß dem Juristen bei seiner Ausbildung nicht bloß die Kenntnis der Landesgesetze nebst ihrer geschichtlichen Entwicklung und ihren Leitsätzen, sondern ein allgemeines wissenschaftliches Rechtsdenken vermittelt werde, für welches ausreichende psychologische, volkswirtschaftliche und sozialwissenschaftliche Kenntnisse die unentbehrliche Grundlage bilden, und hält zu diesem Zweck insbesondere eine gründliche Umgestaltung des Unterrichts an der Hochschule für erforderlich."

Das ist der einzige Satz, den ich Ihnen vorschlage. Wichtig ist mir nur das Prinzipielle, und es würde mich freuen, wenn Sie mit mir im Prinzip einig wären.

FREIRECHT UND SCHUTZZWANG

1914

Bei dem Worte Freirecht denkt man gewöhnlich an die freie Urteilsfindung des Richters, an das Verlangen, daß der Richter sich mehr durch die sachgemäße Würdigung des Falles leiten lasse als durch mühsame, logische Deutung des Gesetzes, das an den Fall nicht gedacht hat. Man könnte glauben, diese Ansicht sei die einfache Folge vernünftigen Nachdenkens. Das wäre ein Irrtum. Auch das Nachdenken schwankt, auch was man für vernünftig hält, ist ein soziales Produkt. Einsichtsvolle Fürsten, wie Friedrich der Große oder Josef der Zweite, haben vom Richter strenge Ausführung des Gesetzes verlangt und Anfrage in zweifelhaften Fällen. Solange die Ordnung der Herren und Untertanen bestand, solange der Herr zu befehlen und der Untertan zu gehorchen hatte, war das Gesetz Herrenbefehl und der Richter sein Werkzeug. Erst wenn die Ordnung freier Staatsbürger ersteht, tritt an die Stelle des Königswillens (regis voluntas) als oberster Richtschnur das Wohl des Volkes (salus publica), der im Leben, im Verkehr, in Verträgen und Übungen sich aussprechende Volkswille. *Nicht der Richter* soll vom Gesetz befreit werden — das Übergewicht, das der einzelne Richter bei dem Urteil nach freiem Ermessen erhält, bildet vielmehr eine Schwäche des neuen Verfahrens, den Angriffspunkt für seine Gegner —, sondern *das Volk* soll in seinem Leben frei werden vom Herrenbefehl. Das bedeutet aber nur für das allerdings große Gebiet des Verkehrslebens, das durch die Klugheit des Alltags, durch die Billigkeit der einzelnen gut geregelt wird, ein freies Ermessen. Für besonders geartete Fälle kann das sachgemäße Nachdenken dazu führen, ein solches Ermessen der Partei und des Richters *auszuschließen,* Verfügungen und Verträgen entweder die Wirksamkeit gegenüber Dritten zu versagen, oder selbst die Wirksamkeit zwischen den Parteien. Das erstere ist heute namentlich beim Registerwesen für Rechtsänderungen, Haftungen und Vertretungsbefugnisse üblich und will das Publikum vor unbekannten Abmachungen schützen, die es

schädigen. Das andere finden wir insbesondere beim Arbeitervertrag, bei Miete und Pacht, bei Darlehens- und Pfandverträgen; es schützt den schwächeren Vertragsteil gegenüber dem stärkeren, der seine Notlage ausnützen will. *Auch das stammt aus dem Leben,* und liegt im Freirecht, welches man also in seinem Wesen nicht mit Ermessensrecht gleichstellen darf, wenn es auch oft zu diesem führt, welches vielmehr in unserer Zeit die gleiche Aufgabe hat, die das Naturrecht zwei Jahrhunderte lang ausgefüllt hat und sich von diesem nur durch seinen konkreten lebendigen, erfahrungsmäßigen Charakter unterscheidet. Freirecht ist nicht immer und nicht wesentlich Ermessensrecht, aber immer und wesentlich ein vom *Herrenbefehl* freies, bloß durch vernünftiges Erfahrungsdenken geleitetes Recht. Es steht nicht dem Gesetze entgegen, aber das Gesetz ist ihm nur ein Mittel zu guter Rechtspflege, so wie das Ermessen des Richters ein zweites ist. Praktische Vernunft hat zwischen beiden zu wählen oder beiden eine entsprechende Teilfunktion zuzuweisen.

Man ist gewöhnt, bei Zwangsrechten, wie ich sie nannte, von einem Einschlag *öffentlichen Rechtes* in das Privatrecht zu sprechen. Aber was ist der grundsätzliche Unterschied zwischen Privat- und öffentlichem Recht? In früherer Zeit hatte man angenommen, die Menschen hätten zunächst isoliert gelebt und sich dann willkürlich aneinandergeschlossen. Die Privatrechte bestünden also *vor* der Organisation einer Gesellschaft und die Gesellschaft habe sie bloß anzuerkennen; sie selbst formiere nur die Rechte und Pflichten, welche die Organisation betreffen und das öffentliche Recht bilden. Von dieser Auffassung sind wir zurückgekommen. Die Erfahrung zeigt, daß wir den Menschen von den ersten Zeiten an in Gesellschaft treffen. Die Horde umfaßt bereits den ganzen Menschen, und die Entwicklung geht nicht vom freien zum gebundenen, sondern — obwohl man sich auch hier vor Schablone hüten muß — vom gebundenen zum freien, oder vielmehr von dem gezwungen sozialen zu dem durch Erkenntnis sozialen Menschen. Je weiter der Zusammenschluß geht und je mehr man sich auf eine gewisse soziale Kultur verlassen kann, desto mehr wird das Gebiet, das nicht für die Lebens- und Tatkraft, für die Organisation und Kultur des Volkes notwendig ist, der Autonomie der einzelnen überlassen; obwohl man sich immer wieder überzeugt, daß die Kultur den Eigennutz und die Rücksichtslosigkeit der einzelnen nur übertüncht und

daher immer wieder — jetzt wieder — Schutzzwang für die Bedrohten als notwendig erkennt. Das Gebiet der *individuellen Autonomie* ist nun das Privatrecht. Es fällt nicht mit einer bestimmten Gruppe von Lebensverhältnissen zusammen. In allen Verhältnissen tritt das Sozialinteresse als Leitgedanke und als Grenze für das Ermessen des einzelnen auf, in den meisten wird anderseits auch der individuellen Autonomie ein gewisser Raum gegeben. Wenn man systematisch Privat- und öffentliches Recht unterscheidet, so meint man die Gebiete, in welchen *vorwiegend* Autonomie oder vorwiegend das zwingende Interesse der Organisation reguliert. (Ofner, Wohnungsnot und Wohnungsmietrecht.)

In welch inniger Beziehung das Zwangsrecht zur Ordnung freier Staatsbürger steht, möge an den *Minimalrechten* gezeigt werden, die wir gewähren und auf die zu verzichten wir nicht gestatten. Wir schützen ein Existenzminimum vor Steuern und Exekution. Wir sichern dem Arbeiter eine Ruhezeit und beginnen mit der Sicherung einer gewissen Lohnhöhe (Lohnämter in England). Wir versichern den Arbeiter zwangsweise für Krankheit, Berufsunfähigkeit und Alter. Wir sichern den Pfandschuldner gegen übermäßigen Verlust, den Mieter gegen ungesunde Wohnung und wir sind daran, noch andere Minima mit Zwangsschutz aufzustellen. Sie verwirklichen in ihrer Gesamtheit die Idee *der wirtschaftlichen Freiheit*. Einer Freiheit, die der persönlichen und politischen Freiheit entspricht, auf welche wir den einzelnen ebensowenig verzichten lassen. Wiederum nicht aus reiner Vernünftigkeit oder Humanität. Auch der Inhalt unseres Fühlens ist soziales Produkt. Der einzelne ist in der Ordnung freier Menschen der Grundstein des gesellschaftlichen Gebäudes. Aus den einzelnen bildet sich das Volk, aus ihrer Lebens- und Tatkraft die Lebens- und Tatkraft des Volkes. In ihrem eigenen Interesse muß die demokratische Organisation dafür sorgen, daß ihre Grundlage fest und sicher sei. Der einzelne kann auf seine Freiheit nicht verzichten, weil sie nicht sein ausschließliches Eigentum ist, weil die Gesamtheit sie für sich braucht und verlangt. Auch das gehört zum Gedankengang des modernen Freirechtes.

SOZIALES RECHT

1917

Im Deutschen Reich, in Österreich und Ungarn haben sich Gesellschaften für soziales Recht gebildet, um in enger Arbeitsgmeinschaft für ihr gemeinsames Ziel zu wirken. Was wollen diese Gesellschaften? Was ist soziales Recht? Man kann die Einwendung erheben und sie ist erhoben worden, daß „sozial" kein Unterscheidungsmerkmal im Recht sein kann. Denn alles Recht sei sozial, Recht sei Ordnung der gesellschaftlichen Lebensverhältnisse und enthalte das Soziale im Begriff. Das ist in gewissem Sinn richtig — nicht in dem unserigen. Man könnte ebenso erklären, jeder Staat sei ein Volksstaat, weil ein Staat ohne Volk undenkbar ist, während der Volksstaat, den wir meinen, im Gegensatz steht zum Fürsten- und zum Ständestaat.

Gefehlt hat bisher vor allem die Erkenntnis des *organischen* Zusammenhanges, der Wechselwirkung zwischen dem Recht und der Lebenstätigkeit der vergesellschafteten Menschen. Das klingt seltsam, aber in einem von Leidenschaft und Vorurteil völlig abseits liegenden Gebiet finden wir ein anschauliches Beispiel. Die Heilkunde ist gewiß ihrem Wesen nach auf Heilung von Gebrechen des menschlichen Körpers bedacht und hat das Physiologische im Begriff. Dennoch ist die Physiologie als Wissenschaft selbst kaum 70 Jahre alt und ebenso alt ist die moderne wissenschaftliche Medizin. Sie konnte erst beginnen, als Physiologie, Pathologie, pathologische Anatomie entstanden waren und mit Hilfe des Mikroskops und anderer Mittel in die Geheimnisse der Körpertätigkeit hineinleuchteten. Bis dahin war die ärztliche Kunst trotz mancherlei naturphilosophischer Verbrämung kaum mehr als Empirie, welche die Symptome von Leiden beobachtete und mit allerlei Mixturen und Latwergen behandelte. Im Recht haben reale Kräfte mitgewirkt. Vorurteil und Macht haben gemeinsam die Entwicklung eines freien wissenschaftlichen Denkens lange Zeit verhindert. Die Erforschung der sozialen Zustände war während des Mittelalters und bis auf unsere Zeit durch das politische System ausgeschaltet, das auf Untertänigkeit und Herrengewalt von

Gottesgnaden ruhte. Diesem System entsprach die Auffassung vom Recht als einer Summe von *Gesetzen*, diese gedacht als *Befehle des Herrn*, denen die Untertanen blind zu gehorchen hatten und die von Beamten und Richtern blind auszuführen waren. Der Befehl des Herrn war Ursprung des Rechtes und jeder Kritik entzogen. Der Wille des Herrn war Recht, mochte er ein Titus oder Nero sein, ein Menschenfreund oder Menschenverächter. Bei solcher Auffassung konnte das Rechtsstudium nichts anderes enthalten als die Erlernung der Herrenbefehle und der Mittel, um nach Sprache und formaler Logik ihren Inhalt auszulegen. Zudem hatte das Deutsche Reich das römische Recht der byzantinischen Periode als sein gemeines Recht aufgenommen und so lag die wichtigste Auslegungsquelle in der *volksfremden* Rechtssammlung Justinians, dem corpus juris. Es war noch ein unverhofftes Glück für die Rechtsentwicklung, daß die Römer zur Zeit ihrer großen Juristen freier waren als in der letzten Epoche, und daß diese Meister klaren Denkens noch ein gutes Verständnis für die gesellschaftlichen Zwecke des Rechtes, für Billigkeit und Natur der Sache hatten. Das hinderte den vollen Zusammenbruch des Rechtsdenkens, und als die Reformbewegung begann, konnte sie sich gerade auf die römischen Meister als Stützen berufen.

Der *Richter* war unter diesem System der willenlose Diener des Gesetzes. Das fremde römische Recht, das er lange Zeit anzuwenden hatte, trennte ihn noch mehr vom Gedankengang des Volkes. Er war weltfremd aus der Konsequenz seines Berufes. Er durfte nicht selbst denken. Er durfte die Bedürfnisse des Volkes und seine Wünsche nicht beachten, außer in den engen Grenzen, in denen das Gesetz ihm es gestattete. Er hatte aber auch infolge seiner Erziehung gar nicht das Bewußtsein, daß dies seine Aufgabe sei. So galt in Wirklichkeit der Spruch: „fiat justitia pereat mundus."

Dem *Volk* mußte das Recht als etwas Aufgezwungenes, Äußerliches erscheinen, das zu seinem Fühlen und Wollen, seiner Sitte und Sittlichkeit in keiner Beziehung stand. Es war ein Polizeisystem, das lediglich der Tätigkeit Schranken setzte, jeden, der diese überschritt, mit Exekution und Strafe verfolgte, aber sich um das Leben des Volkes innerhalb der Schranken nicht kümmerte. Konkret gesprochen: wer stiehlt, wird eingesperrt; wie er lebt, leben kann, ohne zu stehlen, ist für das Recht gleichgültig. Das Recht erschien deshalb auch als rein negativ; noch Schopenhauer erklärte als das Positive,

Primäre das Unrecht; Rechttun heiße nur, kein Unrecht tun. Moral und Recht sind bei solcher Auffassung wesensfremd, sie stehen in keinem Verband, das Recht verlangt Legalität, die aber mit Immoralität durchaus vereinbar ist.

Dieses unselige System bestand allenthalben in Europa und wir spüren es noch am eigenen Leib. Denn soziale Beziehungen und Ansichten, besonders, wenn sich starke Interessen an sie knüpfen, verharren noch lange, nachdem sie grundsätzlich aufgegeben sind. Die Herren der alten Zeit haben noch jetzt eine Sonderstellung inne mit staatsrechtlichen und wirtschaftlichen Vorrechten. Gewohnheiten des früheren beschränkten Verkehrs, Auffassungen und Gefühlsstimmungen aus der alten Herrschaft und Untertänigkeit, auch das Mißtrauen des Volkes gegen Staat und Recht haben sich in unseren Einrichtungen und Sitten erhalten. Vielen unserer Juristen gilt das Recht noch immer als Gesetzessammlung und der Buchstabe des Gesetzes als ihr Herr. Wir leben noch großenteils im Mittelalter. Aber grundsätzlich hat das System, wie es in der Untertänigkeit seine Wurzel hatte, so auch mit der Untertänigkeit seinen Boden verloren. *Die Stunde, die freie Staatsbürger schuf, war auch die Geburtsstunde des neuen, des sozialen Rechtes.* Sozial, weil es auf dem Gedanken des Staates als des organisierten Volkes, der organisierten Gesellschaft freier Menschen fußt. Sozial, weil das Volk mindestens im Grundsatz berufen ist, an der Gesetzgebung teilzunehmen und die Verwaltung seiner Angelegenheiten selbst in die Hand zu nehmen, weil hiebei die Anliegen und Ansichten des Volkes zur Geltung gebracht werden und das Recht also sichtbar in den gesellschaftlichen Bedürfnissen und Wünschen seinen Ursprung nimmt. Sozial, weil der Zweck des Rechts erkannt wird, *dem Wohl der Gesellschaft und ihrer Mitglieder* zu dienen und an die Stelle des bisherigen Nachdenkens über den Herrenwillen das Nachdenken über die Lebens- und Wirtschaftsweise des Volkes und die Mittel zu ihrer Verbesserung tritt. Sozial, weil das Volk nicht mehr bloßes Objekt, sondern Subjekt, Schöpfer des Rechtes ist. Sozial im Gegensatz zum *legalen* Recht, das sich auf das bestehende Gesetz, und zum *formalen* Recht, das sich auf die Konsequenz von Rechtsbegriffen und Rechtseinrichtungen stützt. Auch die Gesellschaft ist für das soziale Recht kein abstrakter Begriff, sondern eine Gesamtheit wirklicher, warmblütiger Menschen, die fühlen und wollen, und deren jeder kraft

seines Lebens Mitglied der Gesellschaft ist. *Das soziale Recht geht daher vom Menschen aus und Urrecht ist ihm das Recht zu leben.*

Bei der Gesetzgebung, die im Vordergrund steht, zeigt sich sofort die Unzulänglichkeit der alten Rechtslehre. An wen anders sollte das Volk sich wenden, um Inhalt und Form der in ihrem Endziel gewünschten Gesetze zu finden, als an die Männer des Rechtes? Für die Juristen der alten Schule gehörte aber die Gesetzgebung gar nicht zum Recht, sondern zur Politik. Ihr Denken begann erst, wenn das Gesetz geschaffen war. Sie hatten in ihrer Rüstkammer auch wenig Zeug für einen Rat. Denn sie hatten nur dogmatisch und historisch denken gelernt, sie kannten nur das geltende Gesetz und altes römisches, deutsches und kanonisches Recht. Was konnte dieses Wissen viel nützen? Das bestehende Gesetz sollte abgeschafft werden, das alte Recht aber stammte aus anderem Volk und anderen Zeiten. Die Römer insbesondere, deren Recht den Kern des Studiums bildete, waren ein Kriegervolk gewesen, das Beute machte, mit Sklaven wirtschaftete, Gewerbe, Handel und Lohnarbeit verachtete, dessen Verkehr sich in engen Grenzen bewegte. Wir aber sind ein Volk friedlicher, freier Arbeit. Für uns ist Arbeitslohn ehrenwert und Beutemachen schädlich. Dampfkraft und elektrischer Strom sind in die Dienste des Menschen getreten und mit ihrer Hilfe haben sich Produktion, Transport, Verkehr in Umfang und Formen unendlich geweitet. Erdteile sind einander im Verkehr nähergerückt, als es früher Orte in der Entfernung einiger Wegstunden waren. Eine bisher ungeahnte Arbeitsteilung hat sich entwickelt. Zugleich aber sind Millionen früherer Halbsklaven in die Gesellschaft eingetreten und verlangen ihre Mitgliedsrechte, ihren Platz an der Sonne. Ihnen wendet sich das Interesse vorzugsweise zu und wir denken beim Begriff „sozial" zunächst an sie, an die besitzarme, arbeitende *Bevölkerungsmasse* gegenüber privilegierten Gruppen. Unsere wirtschaftlichen und Schichtungsverhältnisse, unsere Anschauungen und Bedürfnisse sind dadurch wesentlich andere geworden; die alten Ordnungen mit ihren engen Formen und ihrer engherzigen Auffassung sind unfähig, dem Wollen unserer Zeit zu entsprechen. Die gelehrte Rechtswissenschaft mußte also versagen, und die Not der Zeit, das Schicksal der Stunde trieb das Rechtsdenken zum Jungbrunnen aller Erkenntnis, *zur Erfahrung*, zur sozialen Induktion. Heute wird es kaum jemand begreifen, daß ich

vor 40 Jahren mit diesem Verlangen als ein Eigenbrötler, ein Sonderling angesehen wurde.

Seitdem ist die Erkenntnis erwacht und von allen Seiten hat das Schürfen begonnen. Es ist, wie wenn ein neues Goldland entdeckt wurde. Jeder faßt nach seiner Weise an, sozialpolitisch, freirechtlerisch, naturgeschichtlich, philosophisch, auslegungskritisch, soziologisch, psychologisch, organisatorisch usw. Alle Richtungen sind fruchtbar, alles Gefundene wird sich ergänzen, ungeahnte Schätze liegen offen.

Im neuen System ändern sich alle Beziehungen des Rechtes. Der Gedanke, seinen Inhalt aus der Erfahrung zu schöpfen, erlöst an sich das Rechtsdenken aus seiner Weltfremdheit; die Fundgrube seiner Erfahrung ist doch der lebende tätige Mensch! *Er führt Juristen und Menschen unmittelbarer Lebenserfahrung aus allen Gruppen des Volkes zusammen* zur Verständigung und zur gemeinsamen Arbeit. Nicht bloß bei der Gesetzgebung, auch im Richteramt, in der Verwaltung und bei der vielfältigen Tätigkeit der freien Organisationen, welche die staatliche vorbereiten und begleiten. Denn auch darin ist das neue Rechtsleben sozial, daß die Regelung nicht mehr dem Staat überlassen wird, sondern daß die Bevölkerung, die Gesellschaft neben dem Staat, zugreift und im Wege freier Organisation, durch Rede und Druckschrift selbsttätig mitwirkt.

Das *Gesetz* ist jetzt nicht Ursprung, sondern selbst Produkt *sozialorganisatorischen Denkens*, als das nunmehr das Rechtsdenken erkannt wird. Schon die Begründer der historischen Schule, die am Eingang der neuen Entwicklung stand, hatten statt vom Gesetz als Rechtsquelle, von Rechtserkenntnisquelle gesprochen. Aber Grundlage des Rechtes war ihnen eine mystische Volksüberzeugung, während das Gesetz für uns deutlich auf eine vorhergegangene Unzufriedenheit mit dem bestehenden Zustand, auf bewußtes Nachdenken über die Abhilfe, auf Vorschläge im Regierungsentwurf, in Kritiken aus den Volkskreisen, und bei der Beratung im Parlament hinweist, die endlich zum Gesetz führten.

Das Gesetz ist auch nicht mehr Herrenbefehl. Man darf wohl nicht Ideologe sein. Das Volk und seine Vertreter teilen sich in Parteien und die Mehrheitspartei gebraucht ihre Macht, so daß sich ihr Gesetz politisch von dem des absoluten Fürsten oft wenig unterscheidet. Dennoch hat es einen wesentlich anderen Charakter.

Es ist grundsätzlich ein Mittel für das Volkswohl, wird *in dieser Eigenschaft* beschlossen und ist zufolgedessen der Kritik zugänglich. Die *Mystik* des Herrenbefehls ist gebrochen. Der freien Forschung und der Verbesserung ist der Weg geebnet. Ist ein Rechtsgedanke in der Bevölkerung genügend stark geworden, so erzwingt er sich auch die Mehrheit im Gesetzgebungskörper. Das beweist die Rechtsentwicklung der neuen Zeit. Sie ist ein Spiegelbild unserer wirtschaftlichen und sozialen Entwicklung, wenn sie dieser auch nur zögernd folgt, weil die Machthaber der früheren Periode sich sträuben. Alle Energien des Volkslebens halten nach kurzer Zeit den Einzug ins Recht.

Der Einblick in die Entstehung des Gesetzes läßt dessen *Wortlaut* richtiger werten. Wir sehen, daß die Fassung eines Gesetzes immer nur einen Versuch bildet, dem Gedanken, den es verfolgt, einen möglichst klaren Ausdruck zu geben, daß aber dieser Versuch immer ungenügend ist und man den Gesetzgeber selbst mißversteht, wenn man sich zu ängstlich an den Wortlaut hält. Abgesehen davon, daß das Gesetz nach dem glücklichen Worte Thöls immer weiser ist als der Gesetzgeber, weil es nicht ihm, sondern dem Volke dient.

Das ist der Sinn *der freien Rechtsfindung* durch den Richter. Gewiß hat er das Gesetz zu beobachten, aber nicht mehr als Befehl eines Herrn. Er ist ein gleichwertiges Glied der Rechtspflege neben dem Gesetz. Er soll eine zum Wohl des Volkes getroffene Maßregel zum Wohl des Volkes durchführen. Er muß das Gesetz daher immer vernünftig verstehen und nötigenfalls aus der Vernunft des Lebens ergänzen und berichtigen. Der *Zweckgedanke des Falls* tritt als Rechtsquelle neben das Gesetz. Nicht mehr heißt es: fiat justitia pereat mundus; das Recht ist da, um zu helfen, um Leben zu schützen und zu fördern.

Das Rechtsdenken ist auch nicht mehr negativ, es sucht nicht mehr bloß die Grenze der Tätigkeit, sondern nimmt diese selbst in sein Bereich auf. Rechtspflege, Verwaltung und Selbsttätigkeit des Volkes bilden, wenn auch organisatorisch getrennte, so doch gleichwertige zusammenschließende Zweige eines einheitlichen Wirkens. Wie der neue Staat das organisierte Volk, so ist das Recht eine umfassende Organisation des Volkslebens; sein Ziel ist Vereinigung der Kräfte zum gemeinsamen Wohl. Auch der vermeintliche

Gegensatz zwischen öffentlichem und Privatrecht entfällt. Des engen Verbandes zwischen Familie und Gemeinwesen war man sich immer bewußt und das Familienrecht ist seit jeher mit Zwangsvorschriften durchzogen, die das Kennzeichen des öffentlichen Rechtes sind (Eingehe, Muntschaft, Noterbrecht). Aber die Wirtschaft der einzelnen, ihre Verfügung über ihr Gut und der Inhalt ihrer Verträge galten mit wenigen Ausnahmen als dem Eingriff des Staates entzogen, obwohl dieser mit seiner Macht das Gut schützt und die Erfüllung der Verträge sichert. Jetzt wird die Organisation des Wirtschaftslebens als ein hervorragender Bestandteil der Gesamtorganisation erkannt. Durch das geltende Recht unterstützt, fallen alle Vorteile der durch Maschinenkraft verdichteten Produktivität der Arbeit einigen wenigen zu. Millionenvermögen häufen sich an und pflanzen sich in der Familie fort. Zugleich sind die Millionen mehr als je eine Großmacht und greifen in alle inner- und zwischenstaatlichen Angelegenheiten bestimmend ein. Die Gesellschaft wird an der richtigen Art des Gütererwerbs und der Güterverteilung unmittelbar interessiert. Um so mehr, als der Reichtum der wenigen mit dem kärglichen Leben der Bevölkerungsmasse im schroffen Widerspruch steht. Die manchesterliche Auffassung hört auf.

Für das positive Rechtsdenken erwächst ein weites Feld der Betätigung. Ein kleiner, ganz unvollständiger Ausblick mag genügen! Durch Maschine und Volksbefreiung sind alle gesellschaftlichen Verhältnisse verschoben worden und es beginnt eine neue sachgemäße Regelung. Die Großindustrie hat die Arbeitsweise geändert, Arbeitermassen in den Fabriken gesammelt, neue Arten selbständiger und unselbständiger Hilfsarbeiter mit umschriebener Leistung geschaffen, neue Formen der Gesellschaftung gebildet. Der Verkehr in weite Entfernung mit Völkern anderen Rechtes und anderer Sitten erzeugt andere Verkehrs-, Leistungs- und Zahlungsarten. Ein- und Auswanderung der Menschen wird normale Massenerscheinung, Staatsangehörigkeit und Wohnort trennen sich immer häufiger.

Im öffentlichen Wesen tritt den allerlei Vorrechten aus Geburt oder Besitz der Anspruch der bisher ausgeschlossenen und nunmehr in die Gesellschaft aufgenommenen Bevölkerungsschichten auf Rechtsgleichheit entgegen. Zu ihnen gehören insbesondere Arbeiter und Frauen. Der Aufstieg der armen Bevölkerung, deren Besitz in ihrer Lebens- und Arbeitskraft besteht, wendet das allgemeine Interesse

der Lage des Armen zu — von der Wiege bis zum Greisenalter, das er wohl selten erlebt. Der Volksbildung, die nicht mehr ästhetischer Schmuck der Persönlichkeit ist, sondern Voraussetzung und Gewähr der Erwerbskraft. Dem Zustand des Arbeiters im Arbeitsverhältnis und wenn er nicht oder nicht mehr arbeiten kann. Der Lage des arbeitenden, des verwahrlosten, des straffällig gewordenen, des unehelichen Kindes. Die Konsequenz der sozialen Einrichtung tritt zurück, das Recht wird menschlich. Fürsorge als Rechtsbetätigung tritt an Stelle der einstmaligen Polizei, Güteverfahren will unnötigen Streit verhindern, Leben und Kraft des einzelnen wird als Nationalgut erkannt und der Verbrecher als ein verirrtes Mitglied, das die Gesellschaft nicht abstoßen, sondern wiedergewinnen will.

Das Verhältnis des *Volkes* zum Recht wird nunmehr innerlich. Das Gesetz ist nicht mehr alleinige Quelle des Rechtes. Die Lebensweise, die sich unabhängig von ihm bildet, Sitte und Gewohnheit, tritt neben das Gesetz. Dieses selbst aber ist gleichfalls Ordnung, die das Volk sich gibt, eine Festigung oder selbstgewollte Änderung seiner bisherigen Sitte. Der Gehorsam gegen das Gesetz ist keine Knechtschaft mehr, sondern notwendige Disziplin, um das gewünschte Ziel zu erreichen. Und wie Selbstdenken dem Menschen überall eine größere Tiefe und Kraft im Handeln gibt als blinder Gehorsam, so wird das Volk gesetzestreuer, weil es treu aus Bewußtsein ist.

Die *Rechtskunst* wird sich jetzt ihrer Aufgabe bewußt. Sie hat nicht mehr bloß Gesetze zu lernen und juristische Rätselfragen scharfsinnig zu lösen. Sie ist wissenschaftlich frei geworden. *Sie ist soziale Technik.* Sie soll die Menschen an der Hand der Erfahrung organisieren, ihre Verhältnisse zweckmäßig ordnen, Zwist, Unordnung, Leiden und Not verhüten, dem Leben, der Produktion, dem Verkehr die organisatorische Unterlage und Hilfe schaffen. Sie ist damit angewiesen, die sozial-wirtschaftlichen und sonstigen sozialen Zustände zu studieren, ihre Mängel und den Einfluß, den sie auf die weitere Gestaltung des Zustandes nehmen, die Ursachen der Mängel und die Tatsachen, welche ihnen entgegenwirken. *Eine Art sozialer Physiologie und Pathologie.* Das Rechtsdenken hört auf, nur historisch und logisch zu sein, es wird psychologisch, soziologisch, wirtschafts- und sozialpolitisch. Es nimmt die konstruktive Phantasie in seinen Dienst und manche seiner Erfindungen — öffentliche Register, Order- und Inhaberpapiere, Sozialversicherung, Unterstützungswohnsitz, Zwangsschutz des Schwächeren — sind ebenso genial und wohltätig wie die besten Erfindungen der Technik. Die Veränderung liegt aber nicht bloß in der Methode. So wie die Medizin, sobald sie wissenschaftlich wurde, von den alten Mixturen und Latwergen abging und die großen Heilkräfte der Natur, Licht und Luft und Wasser, für die Menschheit nützte, so wird sich auch die Jurisprudenz mit ihrer steigenden Wissenschaftlichkeit bewußt, daß für einen friedlichen und reichen Verkehr einzelne Gebote und Verbote wenig helfen. Sie geht auf die großen einfachen Grundsätze des einträchtigen Zusammenlebens der Menschen, die Grundsätze der *Moral,* zurück, deren Zusammenhang mit dem mos, *der Sitte,* wieder deutlich wird. Sie macht, was bisher gutes Herz und weitblickender Verstand gewünscht haben, zum Inhalt des Rechtes. Wohl nur in einem Minimum, weil das Recht nicht bloß wünscht, sondern fordert und zwingt und sich daher bescheiden muß. Es kann nur ein soziales Charakterminimum verlangen, wie es nur ein Existenzminimum schützen kann. *Aber die gute Sitte wird zum Maßstab des Rechtes.* Was ihr widerspricht, wird auch vom Recht nicht anerkannt. Nicht mehr abstrakte Logik aus allgemeinen Begriffen bestimmt, was Rechtens ist, sondern das Verhalten eines rechtschaffenen, verständigen Menschen. Rechtschaffen aber ist nicht schon, wer nicht mordet und nicht stiehlt. Soziale Rechtschaffenheit ist die Sinnesart des Gefährten, des guten Gesellschafters, die Vertrauen gibt und Vertrauen rechtfertigt. Auf Vertrauen ruht alles dauernde Zusammenleben, alle Mitarbeit und Organisation, ruht Weltwirtschaft und Weltrecht und ebenso alles öffentliche Leben im Volksstaat. *Treue wahren, nach Treu und Glauben handeln, ist die Seele des Rechttuns.*

Im Mittelpunkt alles Rechtsdenkens aber — das ist der Grundstein des sozialen Rechtes — steht *der Mensch,* der lebende Mensch mit seinem Leid und seiner Lust, seinem Lieben und Hassen, seinen Begierden, Wünschen und Leidenschaften, seinem Lebensdrang und seiner Lebensnot. Von ihm geht die Gesellschaft, von ihm geht alles Recht aus. Ein Strom von Menschlichkeit muß sich in das Recht ergießen, nichts Menschliches darf ihm fremd sein. —

Das sind die Grundzüge des neuen Rechtes, das vor unseren Augen ersteht, wenn auch erst von wenigen klar erkannt. Es ist wissenschaftlich frei, volkstümlich und wird vom Verkehr ebenso

verlangt wie von guten Menschen. In den Gesellschaften für soziales Recht *vereinigen sich nun Juristen und praktische Menschen aus allen Gruppen der Bevölkerung*, um es ins Leben einzuführen, es zu durchdenken und auszugestalten, seine Betätigung im Volke durch Belehrung, Vorschläge und Versuche anzuregen, *Gesetzgebungs- und Verwaltungsmaßnahmen in seinem Sinne* einzuleiten. Es tut not. Denn unsere Zeit ist bisher nur groß in der Technik; die Gesittung ist, wie es die Kriegserfahrung neuerlich gezeigt hat, arg zurückgeblieben. Die Selbstsucht hat Orgien gefeiert innerhalb der allgemeinen Not, und das formale Recht ist gegen sie ohnmächtig gewesen. Denn es ist ein Recht der Einrichtungen, nicht der Menschen. Wir wollen das öffentliche Gewissen aufwecken. Es ist Gefahr, daß selbst, was wir bereits errungen haben, unter den Sorgen des Tages, die dem Volk die Tatkraft lähmen, durch die Wühlarbeit der mächtigen Gruppen, die das alte Herrenwesen zurückführen möchten, wieder verlorengeht. Wir wollen die Geister aufrütteln, wollen sorgen, daß Recht und Sitte unserer Zeit auf gleiche Stufe sich heben wie ihre Technik. Gewiß ein Ziel, aufs innigste zu wünschen!

JURISTISCHE ERFINDUNGEN

1922

Jurisprudenz — das ist der Anfang aller juristischen Erkenntnis — ist sozial-organisatorische Technik, Kunst, die Menschen und ihre Beziehungen im Zusammenleben zu organisieren, Einrichtungen zu treffen und zu handhaben, welche Frieden und Eintracht wahren und das Wohlsein aller durch das Zusammenwirken aller fördern. Die Formel von dem größten Glück der größten Zahl, die Bentham dafür gebraucht, bezeichnet richtig aufgefaßt nur die Unmöglichkeit, das angestrebte Ziel, das volle Glück aller zu erreichen; sie bedeutet nicht ein Überrecht der Mehrheit, sowenig als dies Rousseau mit seiner volonté générale beabsichtigt hatte. In gewissen Fragen ist die Minderheit, in manchen Grundfragen der einzelne gegen *alle* anderen zu schützen. Das Gebiet der Rechtskunst ist aber nicht bloß die Organisation im großen, Gesetzgebung, Verwaltung und Rechtspflege. Sie widmet sich ebenso dem einzelnen als kontentiose und kautelarische Jurisprudenz, verhütet Streit und Unordnung, schafft durch Verträge Organisationen im kleinen u. a. All diese Tätigkeit steht in Beziehung zueinander, das ganze Gebiet der menschlichen Verbände, die kleinste und die größte Gruppe zeigen gleichartiges Gepräge, und heute wie immer gilt die Lehre des Kungfutse: „Wer sein Haus in Ordnung hält, hält die Gemeinde in Ordnung, wer die Gemeinde in Ordnung hält, hält das Reich in Ordnung."

Die Jurisprudenz umfaßt die Verwaltung *und* Rechtspflege, die organisierte Tätigkeit und deren Begrenzung, den Schutz der Menschen gegen Überschreitung der den Befehlenden in der Organisation gewährten Macht. Die letztere war stets gefürchtet, der Richter, der gegen den Herrn urteilte, stets gefährdet, daher in allen freieren Zeiten das Verlangen nach einer besonders hohen und besonders geschützten Unabhängigkeit des Richters. Daraus folgt aber nicht — und die bisherige Unfruchtbarkeit des juristischen Denkens ist in hohem Maß auf den Irrtum zurückzuführen —, daß dieses auf die Rechtspflege und diese auf das Privatrecht beschränkt sei. Soweit

das corpus juris reichte, soweit reichte das Mittelalter hindurch die Jurisprudenz. Das ganze öffentliche Wesen war ausgeschieden, wurde nicht durch Gesetze geordnet, sondern galt als Privatbereich des Fürsten. Erst das Naturrecht nahm auch hier den Kampf auf und schuf die Kameralistik. Den Zivilisten, welche ihr die Wissenschaftlichkeit absprachen, antwortete der derbe Ausspruch von Boccalini: meri civilisti puri asini. Langsam füllte sich der Abgrund zwischen den beiden Richtungen aus. Die Gesetzgebung ergriff auch das öffentliche Wesen und entzog es der Willkür. Öffentlich-rechtliche Satzung entstand, unter verwaltungsgerichtliche Kontrolle gestellt, und bildete ein Mittelding, über dessen Natur, ob Recht oder Verwaltung, man stritt. Den Unterschied zum Privatrecht fand man im Zwangscharakter des öffentlichen Rechtes. Aber die Zeit wurde scharfsichtiger. Sie wurde inne, daß Status, Ehe und Mundschaft, obwohl Teile des Privatrechtes, seit jeher Zwangscharakter trugen. Sie erkannte, daß selbst im Heiligtum des Privatrechtes, zur Begrenzung der Verfügungswillkür in Eigentum und Vertrag, stets gewisse Zwangsvorschriften bestanden, und sie schuf neue. Der Unterschied zwischen öffentlichem und Privatrecht schwand. Nicht mehr das Gebiet trennte, sondern die Art der einzelnen Bestimmung. Privatrecht konnte nur mehr als das Gebiet bezeichnet werden, in welchem vorzugsweise Verfügungsfreiheit herrscht. Aber selbst dieser Unterschied hielt nicht stand, sobald man die Einrichtungen ins Auge faßte, auf welche die Verfügungsfreiheit zurückführt. Denn Eigentum bannt und Vertrag zwingt; die sogenannte Verfügungsfreiheit über Güter, wenn sie eine angemessene Unterlage für den Lebenserwerb überschreitet, wird zur Herrschaft über die anderen, die eine solche Unterlage für ihr Leben brauchen und sich dem Besitzer derselben unterwerfen müssen. *So wird das Gebiet der Rechtspflege ein einziges Ganzes,* dessen Teile man nur aus Zweckmäßigkeitsgründen scheiden und besonderen Gerichten zur Entscheidung übergeben mag. Es eint sich aber auch mit dem Gebiet der Verwaltung, weil diese die Organisation, die Rechtspflege die Disziplin der organisierten Tätigkeit enthält. Die Jurisprudenz umfaßt beide: Organisation und Disziplin. Der Fortschritt der neuen Jurisprudenz besteht hauptsächlich darin, daß sie die Verwaltung aufnimmt, so wie der Fortschritt der modernen Mechanik darin bestand, daß sie der Statik die Dynamik angefügt hat. Auch die Jurisprudenz hat die

wesentlich dynamische Aufgabe der organisierten Tätigkeit zu erkennen. Der Schutz gegen Übermaß ist notwendig, aber er ist negativ, das Positive, das Fördernde, sozial Wirksame ist *die Tätigkeit selbst* in den notwendigen Schranken. Die Grundsätze einer guten Verwaltung aber gelten für die Privatwirtschaft ebenso wie für die Staatswirtschaft, so wie nach demselben Gesetz die Gestirne sich bewegen und der Stein zu Boden fällt.

Durch ihre Reihung unter die technischen Wissenschaften erhält die Jurisprudenz die Würde zurück, die sie als bloße Auslegetheorie verloren hatte. Diese traf mit Grund der Spott Kirchmanns, daß sie keine Wissenschaft sei, weil ihre Werke Makulatur werden, wenn ein Paragraph geändert wird. Anders, wenn das Gesetz nicht als Ursprung, sondern als Produkt der Rechtskunst erkannt wird, als soziale Einrichtung. Solange die Einrichtung besteht, muß sie möglichst zweckmäßig angewendet und die Anwendung muß gelehrt werden. Auch die Technologie verfaßt Werke über Maschinen, deren Bau und Handhabung. Niemand wird sie unwissenschaftlich nennen, weil die Maschinen immer wieder durch bessere ersetzt und die Werke über die alten unnütz werden. Im Gegenteil, die Verbesserung der Maschine ist ein *Erfolg* der Wissenschaft und die Makulatur, zu welcher die Werke über die alte Maschine geworden sind, ein Zeichen dafür. Auch die Werke über ein Gesetz haben eine doppelte Aufgabe: zu zeigen, wie die soziale Maschine gebaut und wie sie möglichst zweckmäßig anzuwenden ist, zugleich aber ihre Fehler und Unvollkommenheiten aufzuweisen und ihre Verbesserung vorzubereiten. Das bessere Gesetz ist ihr Erfolg. Die Erkenntnis des Gesetzes als soziale Maßregel verbietet auch die logische Konsequenz, die im alten Rechtssprichwort fiat justitia pereat mundus gelegen war. Ist die Webmaschine rissig, so wird jeder gute Arbeiter sie so verwenden, daß der Fehler dem zu verfertigenden Produkt möglichst wenig schadet. Nicht die wortstrenge Anwendung des Gesetzes macht den guten Richter, sondern das sozial richtige, sozial befriedigende Urteil im Rahmen des Gesetzes.

Die freie Jurisprudenz ist auch — was wesentlich zur Erkenntnis ihres Gehaltes beiträgt — *erfinderisch*. Einen Vortrag über die Frage des öffentlichen Eigentums (Archiv für öffentliches Recht, XXI, 4) begann Otto Mayer mit den Worten: „Die Freude des Mannes, der das Pulver erfunden hat oder die drahtlose Telegraphie,

ist dem Juristen versagt. In der Rechtswissenschaft gibt es keine Erfinder oder sollte sie wenigstens nicht geben."

Otto Mayer irrt. Der Satz, daß der Gesetzgeber nicht erfinden soll, hat richtig verstanden und in richtigen Grenzen rechtspolitischen Wert. Er wendet sich gegen unbedachte Neuerungssucht. Der Gesetzgeber, der sich zu weit vom Rechtsdenken des Volkes entfernt, verwirrt dieses, reizt zum Widerstand und wirkt nicht. Auch der Leiter eines weitverzweigten Wirtschaftsunternehmens wird neue Arbeitsweisen nur vorsichtig einführen. Aber dem wissenschaftlichen Rechtsdenken stehen Erfindungen frei und mit dem nötigen Bedacht soll auch der Gesetzgeber zu ihnen greifen. Die Jurisprudenz der Neuzeit hat eine Reihe solcher Erfindungen gemacht, die sich an Bedeutung für den Verkehr mit den physikalisch-technischen messen können. Ich nenne nur das sogenannte geistige Eigentum, das dem Urheber eine angemessene Zeit lang die ausschließliche Verwertung seines Werkes sichert — eine *erfundene*, keine bloß gefundene Einrichtung. Oder das System der öffentlichen Register mit seinen einschneidenden Wirkungen der Eintragung, das in neuer Zeit im hohen Maß ausgebildet wurde (Patente, Marken, Muster, Ehepakten, Pfandrechte u. a.). Eine Erfindung war die zwangsweise Unterscheidung zwischen der Wirksamkeit eines Gesellschafts- oder Vollmachtsverhältnisses nach innen und außen im Handelsgesetz. Eine juristische Erfindung ist der Unterstützungswohnsitz, ist die Unterscheidung zwischen weltlicher und kirchlicher Ehe, das proportionale Wahlrecht usw. Juristische Grundsätze sind nur vom sozialtechnischen Gesichtspunkt aus zu verstehen. Sie bezeichnen die Tätigkeitsweise, bei deren konsequenter Durchführung die soziale Organisation mit Wahrscheinlichkeit den Zweck erreicht. Es ist Sache eines vernünftigen, die Gesamtlage übersehenden, die einzelnen Grundsätze in ihrer gegenseitigen Beziehung vergleichenden Denkens, die Richtlinien für den einzelnen Fall zu finden.

Unsere Zeit steht — um von einem der wichtigsten Rechtsgrundsätze zu sprechen — im Zeichen ausgedehnter Arbeitsteilung. Bei einer solchen muß, damit der rechte Erfolg erzielt werde, jeder seinen Teil der Arbeit richtig leisten, während er sich verlassen kann und muß, daß auch der andere seinen Teil richtig leistet. Dieses gegenseitige Vertrauen ist die Unterlage jeder Arbeitsteilung und aus diesem sozialpraktischen Grund ist — sobald die ersten Anfänge

des gesellschaftlichen Lebens überwunden waren, sobald Kultur und Verkehr ein ausgedehnteres Zusammenarbeiten der Menschen verlangten — der Grundsatz des Treuewahrens, des gegenseitigen Vertrauengewährens und Vertrauenrechtfertigens entstanden. Aus Erfahrung, nicht rein gefühlsmäßig! Er ist das starke Gelenke, das zusammenschließt und deshalb gerade in unserer Zeit des großen Verkehrs und der ausgedehnten Arbeitsteilung so gebietend geworden.

Ein zweiter Grundsatz schließt sich an. Die technischen Fortschritte unserer Zeit haben den Menschen gewaltige Naturkräfte dienstbar gemacht. Sie haben ihren Reichtum — Reichtum als Besitz der Mittel zum Leben — in ungeahnter Weise erhöht. Aber mit der physikalischen Technik hat die soziale, die Kunst der richtigen Verteilung nicht gleichen Schritt gehalten. Der Reichtum konzentriert sich in wenigen Händen, der Gegensatz zwischen ihnen und der Bevölkerung im ganzen vertieft sich immer mehr. Unser Vermögensrecht — die Organisation der Verteilung von Arbeit und Genuß — steht noch unter den Richtlinien des Besitzerrechtes. Solange ein Herrenstand den Staat und das Recht beherrschte, der allen Grund besaß, seine Güter durch Leibeigene bearbeiten ließ, Kampf und politische Tätigkeit allein als würdig betrachtete, so lange war es begreiflich, daß die Frucht Zuwachs war, die Arbeit gleichgültig, das Eigentum ewig. Als das besitzende Bürgertum, aber noch nicht der Arbeiterstand seine Freiheit erobert hatte, setzte es das alte Rechtssystem in diesen Bestimmungen, die auch ihm günstig waren, fort. Die Frucht blieb Zuwachs, die Arbeit gleichgültig, die Maschinen arbeiteten für den Unternehmer. Sobald die Gesellschaft sich mit dem Bewußtsein füllt, daß sie Arbeitsgesellschaft ist, verlangt sie für das Recht einen ihr entsprechenden Grundsatz, den ich dahin ausdrückte: „Wessen die Arbeit, dessen das Recht; wer das Gut geschaffen hat, hat das Recht erworben." (S. o., Recht auf Arbeit.) Der Grundsatz ist schon in manchen Folgen ins Recht eingedrungen, seine nachdrücklichen, tief einschneidenden Wirkungen werden das ganze Rechtssystem verändern.

Ein dritter Grundsatz führt auf das Grundrecht des Menschen zurück. Die Massenarbeit der Großindustrie, der Wettbewerb, der durch sie und den Weltverkehr entstanden ist und sich durch die großen Trustbildungen vertieft, ist rücksichtslos wie eine Naturkraft und erdrückt den, der den Kampf nicht aushält. Die Preise, die sich

bilden, die Steuern, die der Staat auferlegt, helfen mit. Ein Grundsatz gleich der Einrichtung des Roten Kreuzes ist nötig geworden, der die schwersten Folgen des Wirtschaftskampfes beseitigt: das Recht zu leben, der Schutz des Existenzminimums. Es ist bisher fast nur im Negativen aufgenommen, als Schutz gegen Steuer und Exekution. Positiv besteht es bisher nur in einem etwas mehr ausgebildeten Armenrecht und in der Arbeiterversorgung, sei es durch das Versicherungssystem des deutschen, oder das reine Versorgungssystem des französischen und englischen Rechtes (neuestens der großzügige Vorschlag Popper-Lynkeus' über die allgemeine Nährpflicht).

Die Grundsätze des Rechtes sind, wie man aus der kurzen Darlegung erkennen mag, sozialtechnischer Art. Sie begleiten den Kampf der vergesellschafteten Menschen und erhalten im Kampf die Geselligkeit. Die Naturgesetze, auf denen sie beruhen, gehören der Psychologie, Ökonomie, Soziologie an; die Jurisprudenz ist angewandte Sozialwissenschaft. Dies zu erkennen, ist die Voraussetzung wissenschaftlichen Rechtsdenkens. Die Jurisprudenz ist Kunst der gesellschaftlichen Organisation, als solche unabhängig vom bestehenden Gesetz, das für sie ein Beispiel, ein Organisationsversuch unter anderen ist, an dessen Erfolg und dessen Mängeln sie studiert, um soziale Naturgesetze zu erkennen und bessere Einrichtungen, bessere Mittel zum Wohl aller zu schaffen. Erst wenn wir im Verwaltungsbeamten, Anwalt und Richter das Seitenbild des technischen Beamten in einem Produktionsunternehmen erkennen, der unter Benützung seiner allgemeinen technischen Kenntnisse mit den dort aufgestellten Maschinen zu arbeiten und *möglichst gutes Produkt* herzustellen hat, nach seiner Arbeitszeit aber ein freier, nur von seiner Wissenschaft geleiteter Denker ist: erhalten wir das Bild der Lehre, welche geeignet und berufen ist, Verwaltung und Rechtspflege den großen Aufgaben anzupassen, die ihr die neue Zeit aufzwingt — durch ihre Großproduktion und ihren Weltverkehr, durch die Aufnahme großer, bisher vernachlässigter Volksschichten in die Gesellschaft als gleichwertige Mitglieder, durch ihre technischen und sozialen Neubildungen aller Art — durch die tatsächlich bereits revolutionierte Gesellschaftsordnung, das tatsächlich bereits entstandene neue Recht.

MENSCHENRECHT [1])

1921

Für Frieden und Freiheit! Der Titel, den die Frauenliga gewählt hat, ist kräftig; es freut mich, daß sie neben dem Frieden auch die Freiheit als Leitwort aufgenommen hat. Ist es ein amerikanischer Einschlag? Spiegelt sich in ihm die Kolossalstatue der Freiheit in dem Hafen, der den Europäer empfängt? Gewiß, das siebenjährige und noch immer nicht geendete Morden in den Staaten, die sich Kulturvölker nennen, und durch sie, sowie die Unterdrückung, die sich zu Unrecht den Namen des Friedens geborgt hat, wurde zunächst der Friedensgedanke geweckt und er steht dem Sinn der Frau besonders nahe. Aber, was unserer Zeit die Weihe und Größe gibt, was uns alle ihre Wehen ertragen läßt, ohne die Zuversicht in eine bessere Zukunft zu verlieren, das ist doch der Befreiungskampf, den sie führt; der in den Vereinigten Staaten begonnen hat, auf Frankreich übergegangen ist und von hier aus die europäische Welt, zuletzt auch das Zarenreich, erobert hat. Der Befreiungskampf der Geister für alle in einer vorurteilsvollen Herrenordnung geknechteten Menschengruppen: Bürger und Bauern, Arbeiter und Neger, Frauen und Kinder, auch diese waren als eine Art Eigentum der Eltern und Stammesgenossen betrachtet worden. Der letzte Krieg hat die ganze Barbarei dieser alten sogenannten Ordnung gezeigt und alle, die redlichen Herzens sind, in der Überzeugung vereinigt, daß hier eine gründliche Umkehr nötig ist. Das ist die tragende Idee, welche die Bewegung unserer Zeit von den früheren unterscheidet.

Das furchtbare Leid, das der Krieg allenthalben geschaffen hat, insbesondere in den Ländern der Besiegten, die schon der Krieg selbst schwer getroffen hatte und die durch seinen Ausgang und den Frieden völlig verarmten, haben zunächst die guten Herzen in dem Bestreben geeint, zu helfen, wo und wie man helfen kann, die Übel zu heilen oder doch zu mildern, und insbesondere die Frauen haben

[1]) Geschrieben anläßlich der Gründung der „Österreichischen Frauenliga für Frieden und Freiheit". (A. d. H.)

sich diesem Liebeswerk gewidmet. Sie finden überall Dank, den besten in der eigenen Brust. Aber gerade hier wirkt das unterscheidende Moment. Auch in früheren Zeiten gab es mitleidige, menschlich fühlende Herzen, und wenn ein großes Unglück war, half man auch im Herrenstaat. Das Moment, das neben dem Mitleid heute wirkt, steht mit dem Freiheitsgedanken in tiefem inneren Verband. Freiheit ist Recht, und Knechtschaft ist Entrechtung. Was unseren Sinn erfüllt, ist der Rechtsgedanke, die Überzeugung, daß all das Elend, sei es nun zunächst und unmittelbar aus dem Krieg entstanden oder als vererbtes Übel aus der alten naturwidrigen Ordnung, verübtes *Unrecht* ist, und was wir leisten, nur Sühne, Nachholung von Versäumtem. Die alte Zeit hat Wohltaten, Almosen verteilt; wir fühlen Scham, wenn wir daran denken, die Gabe, die wir reichen, sollte als Almosen betrachtet werden, die Hilfe, die wir bieten, als Ausdruck einer mitleidigen Großmut. Wir fühlen uns vielmehr jeder einzeln für die Gesamtheit schuldig. Jeder Arme, der hungert, jedes Kind, das verwahrlost ist, jeder Kranke, dessen Leiden auf Unterernährung und mangelnde Pflege zurückführt, jeder Zurückgesetzte und in seinem Aufstieg ohne Schuld Gehinderte erscheint uns als Ankläger gegen unser Geschlecht und uns selbst. Der *Rechtsgedanke* hat uns ergriffen. Recht, das fühlen wir, wird nicht willkürlich durch Gesetze gegeben und genommen. Recht ist menschliches Leben. Was einem Menschen Leben und Lebensfreude schafft, ist im Keime Recht, was ihm Leid schafft, ist im Keime Unrecht, Ordnung, die Arme und Reiche, Vornehme und Niedrige, Hammer- und Amboßmenschen schafft, ist systemisiertes Unrecht. Der tiefe Spruch Kants, in dem sich dieses Menschenrecht ausspricht: „Gäbe es keine Gerechtigkeit, es wäre nicht der Mühe wert, daß Menschen auf Erden leben", durchdringt unsere Zeit. Alle Begriffe und Grundsätze, die in ihr entstehen, sind nur Varianten. Die Idee des Sozialismus ist nichts anderes als die Idee des Menschenrechtes.

Aus dem Rechtsgedanken darf nicht abgeleitet werden, was leider oft geschieht, daß nunmehr die Individuen zurückzutreten und die Organisationen, Staat, Gemeinde und andere öffentliche Körperschaften die Fürsorge zu übernehmen haben. Der Staat ist nur eine Form der Vereinigung, durch seine stramme Organisation auf bureaukratische Tätigkeit angewiesen, und diese ist immer formalistisch schablonenhaft und engbrüstig. Staat und freie Gesellschaft

müssen nebeneinander tätig sein. Die Tätigkeit der freien Fürsorge ist wärmer, sorglicher, sucht die Verschämten auf, individualisiert, arbeitet auch psychologisch und erzielt damit wichtige Erfolge. Die staatliche Fürsorge wird auch durch ihre gebundene Einrichtung immer schwere Lücken aufweisen, welche die freie Tätigkeit auszufüllen hat. Nein! Die einzelnen sollen und müssen mitarbeiten. Nur der tragende Gedanke muß in ihnen wach sein, daß jeder, der lebt, ein Recht hat, menschenwürdig zu leben. Das Miteinanderleben wird wohl immer Ungleichheiten mit sich bringen, kein noch so richtiges Prinzip der Arbeits- und Genußaufteilung wird sich völlig verwirklichen lassen und imstande sein, Unterschiede zwischen den Menschen und Menschengruppen zu tilgen. Aber das Bewußtsein ist nötig, daß in der Ungleichheit immer ein Unrecht enthalten ist, und daß, wer aus ihr Gewinn zieht, nicht Wohltat übt, sondern nur freiwillige Gerechtigkeit, wenn er sie freiwillig und immer nur teilweise ausgleicht. Dieses Bewußtsein muß das Hilfebestreben eines jeden von uns heißer, tiefer, kräftiger gestalten. Mitleid muß sich zu Pflichtgefühl verdichten. Wir arbeiten am Webstuhl des neuen Rechtes. Menschenrecht wollen wir schaffen und Menschenrecht üben.

II. ZUR GESCHICHTE UND FORTBILDUNG DES PRIVATRECHTES

DER KAMPF UM DIE ZIVILEHE

1894

Der Kampf in Ungarn, an dem das ganze Land teilnimmt, erregt das Interesse weit über die Grenzen des Landes hinaus. Er wird gewöhnlich Kampf um die Zivilehe genannt. Doch ist der Ausdruck zu eng; denn er bezieht sich lediglich auf die Form der Eheschließung. Man spricht von obligatorischer, fakultativer oder Not-Zivilehe, je nachdem der Staat den Abschluß der Ehe vor dem Staatsbeamten verlangt, um sie als rechtlich gültig anzuerkennen, oder bloß gestattet, während er auch die Ehe vor dem Seelsorger (kirchliche Ehe) anerkennt, oder endlich nur dann gestattet, wenn der Seelsorger seinen Beistand aus Gründen versagt hat, welche der Staat nicht anerkennt. Aber die Form der Eheschließung steht mit dem materiellen Eherecht in naher Verbindung. Wenn der Beistand des Seelsorgers notwendig ist, damit die Ehe zustande komme, so kann derselbe seine Mitwirkung und damit die Ehe selbst davon abhängig machen, daß gewisse Voraussetzungen vorhanden sind oder gewisse Verpflichtungen übernommen werden. Die gewöhnliche Ursache der Fehden zwischen Kirche und Staat bestand z. B. darin, daß bei Mischehen der katholische Pfarrer seinen Beistand von dem Reverse abhängig machte, daß die Kinder in der katholischen Religion getauft und erzogen werden. Ebenso ist das materielle Eherecht mit der Judikatur in Ehesachen enge verknüpft, denn der höchste Richter schafft das Gesetz für den einzelnen Fall. Wenn er die Ehe auch mit Unrecht als ungültig erklärt hat, so ist sie praktisch doch ungültig. In der Rechtsgeschichte Österreichs hat dieser Verband zwischen Gesetz und Gerichtsbarkeit in Ehesachen einen besonderen Ausdruck darin gefunden, daß das materielle Eherecht der Konkordatszeit in der „Anweisung für die geistlichen Gerichte" enthalten war.

Auch der Kampf in Ungarn bezieht sich nicht bloß auf die Ziviltrauung, sondern begreift überhaupt das materielle und prozessuale Eherecht. Wer außerhalb des Kampfes steht, muß sich nun

die Frage vorlegen, wer in diesem Kampfe grundsätzlich im Recht sei, ob Kirche oder Staat. Ist die Ehe ein kirchliches Institut, welches sich der Staat arrogieren will, ist sie ein weltliches, welches die Kirche bisher arrogiert hat? Die Antwort lautet: Die Ehe ist weder ein kirchliches noch ein staatliches: sie ist ein *soziales* Institut, sie ist ein natürliches, von gesellschaftlichen Rücksichten bestimmtes (sozialisiertes) Verhältnis.

Wenn man die Verhältnisse der Menschen untersuchen will, muß man zunächst die Binde ablegen, welche das Vorurteil des göttlichen Odems um die Augen legt. Man muß den Menschen als animalisches Wesen erkennen, welches sich allerdings durch ein besonders entwicklungsfähiges und beim Kulturmenschen bereits entwickeltes Denken von allen (anderen) Tierarten unterscheidet. Das Denken (das auch Empfinden und Wollen begreift) ist das Kennzeichen des Menschen, insbesondere des Kulturmenschen und wirkt bei allem seinem Tun und Lassen mit. Aber abgesehen hievon steht der Mensch unter animalischen Bedingungen und wird durch sie getrieben. Man muß deshalb auch z. B. jeden Versuch, zwischen Mann und Weib im Menschengeschlecht andere Unterschiede zu finden, als zwischen Mann und Weib, oder wie wir hier mit verächtlichem Diminutiv sagen, zwischen Männchen und Weibchen in den Tiergeschlechtern, zwischen Löwe und Löwin oder Kater und Katze, von vornherein zurückweisen. Diese animalischen Bedingungen bestehen auch für den Trieb der Geschlechter zueinander. Was wir Liebe nennen, ist Geschlechtertrieb, der das Denken phantastisch aufregt, und der Unterschied zwischen der Liebe eines Jünglings oder Mädchens und der eines Mannes oder Weibes beruht wesentlich darauf, daß die ersteren sich des Grundes und Zieles ihrer phantastischen Erregung nicht klar bewußt sind und deshalb die ganze Welt phantastisch auffassen, während die anderen Grund und Ziel ihrer Erregung kennen und deshalb klarer, zielstrebender und bei aller Leidenschaft nüchterner denken. Der Geschlechtertrieb führt zur natürlichen Ehe und natürlichen Familie. Das Zusammenleben der Verbundenen wird bei dem Menschen sowie schon bei manchen Tierarten durch Naturtrieb verlängert, weil das Kind durch längere Zeit unbeholfen, unfähig, sich selbst zu erhalten und dadurch auf die Eltern angewiesen ist — je höher die Kultur, desto länger. Zu diesem Grunde, aus der augenblick-

lichen Befriedigung des Geschlechtertriebes ein dauerndes Verhältnis zu schaffen, gesellt sich ein zweiter. Der Mensch ist ein animal sociale (ζῷον πολιτικόν), wie man dies schon von alters her erkannt hat. Er ist auf die Gesellschaft angewiesen, weil sich sein Denken, seine große Waffe im Daseinskampf, nur in der Gesellschaft entwickelt. Die Gesellschaftsbildung knüpft nun an die natürliche Familie an. Der Vater hat natürliche Autorität und die Mitglieder der Familie schließen sich zu natürlicher Wehr- und Erwerbsgemeinschaft zusammen. Bis zu den Zeiten, in denen sich der Territorialstaat bildet, erscheint die organisierte Gesellschaft direkt als erweiterte Familie. Aus der natürlichen wird die politische Familie, die Sippe, das Geschlecht, der Stamm, die Nation. Noch das Wort „Nation" weist auf die Geburt als Grund der Mitgliedschaft zur Gemeine. Im Territorialstaate verliert die erweiterte politische Familie ihre Rolle; die Wichtigkeit der natürlichen bleibt.

Die hohe Bedeutung der Familie und der sie begründenden Verbindung für die Gesellschaft bildet auch ihren ethischen Charakter. Ethisch nennen wir jede Frage bei menschlichen Beziehungen und jede solche Beziehung selbst, welche für die Entwicklung der Gesellschaft und des gesellschaftlichen (ethischen) Menschen von Bedeutung ist, deren Lösung und Regelung daher nicht dem Gutdünken des einzelnen überlassen, sondern nach höheren, d. h. nach Rücksichten des Gemeinwohles getroffen wird. Dem einzelnen wird danach auch gegen sein Belieben seine Stellung, sein Tun und Lassen vorgeschrieben. Solch Tun und Lassen heißt dann Pflicht, und das Moment der Pflicht kennzeichnet alles Ethische.

Die Vorschriften von Gesellschaftswegen sind aber selbst nicht immer vom Gemeinwohl diktiert. Im Leben heißt Gesellschaft herrschende Klasse oder Macht, und die soziale Herrschaft ist ein vortreffliches Mittel, um für die eigenen Interessen zu sorgen. Dies ist auch der Grund für die Fieberhitze, welche sich bei jedem Kampf um die soziale Herrschaft entwickelt. Die Bedeutung von Ehe und Familie für die Gesellschaft hat zur Folge, daß alle Klassen und Mächte, welche die Gesellschaft beherrschen wollen, nach Herrschaft über die Familie und das sie begründende Verhältnis streben. Durch die gesellschaftliche Regelung (Sozialisierung), möge sie wie immer sein, wird der Verband der Geschlechter zur eigentlichen *Ehe*.

Zu den herrschenden Mächten gehört die *Kirche*. Das Mittel-

alter ist die Zeit, in welcher ihre Herrschaft über die heutige europäische Gesellschaft beginnt, allmählich wächst, bis sie über das Kaisertum hinausragt und allmächtig wird, dann langsam zurückgeht. Den entsprechenden Ausdruck gibt uns die Entwicklung des Eherechtes im Mittelalter. Wir können sie bei den germanischen Stämmen mit Sicherheit bis zu der Zeit verfolgen, da die Kirche eintrat. Damals herrschte Sippenehe. Die Ehe ist ein feierlicher Vertrag zwischen den beiden Familien von Bräutigam und Braut. Die Braut wird gegen ein Ablösungsgeld aus der Mundschaft ihrer Familie entlassen und in die der anderen Familie übergeben. An diese Feier knüpft die Kirche an. Sie erklärt die Religion als Grundlage aller Moral; und alles Moralische zu ihrem Gebiete gehörig. Alles sozial Wichtige aber muß moralisch sein, und so ist das soziale Herrschaftsgebiet der Kirche unbegrenzt, jede Grenze nur Selbstbeschränkung der Kirche. Sie spricht dies niemals unumwunden aus, wenn sie es auch in den Zeiten ihrer höchsten Macht ausübt. Namentlich im Anfang ihres Vorschreitens ist sie, nach dem Evangelium, klug wie die Schlange. Sie weiß insbesondere die alten Gewohnheiten zu schonen und mit christlichem Gehalt zu erfüllen, wie dies Gregor der Große für die Feste und Zeremonien ausdrücklich vorschreibt. In gleicher Art weiß sie sich auch, ohne in schroffen Gegensatz zu den althergebrachten Anschauungen zu treten, das Familienrecht zu unterordnen. Zur Sippenverlobung tritt die kirchliche Einsegnung, um allmählich das alte bindende Element ganz zu verdrängen. Weil alles Geweihte kirchlich ist, nimmt die Kirche dann die Judikatur in Anspruch. Mit dem Wort, daß, was Gott verbunden hat, der Mensch nicht trennen solle, läßt sie die Trennung der Ehe, ohne sie aufzuheben, als ungehörig erscheinen. Sie schiebt sich in die einzelnen Ehe- und Familienhändel ein, besonders in den fürstlichen Häusern, und langsam und sicher bringt sie das gesamte materielle und prozessuale Eherecht in ihre Gewalt, welcher Prozeß unter den fränkischen und schwäbischen Kaisern vollendet ist. Auch Sachsen- und Schwabenspiegel kennen bereits die Ehe als Institut kirchlichen Rechtes. Alles dies erfolgt lediglich — nach einem derzeit üblichen Stichwort — im administrativen Wege. Bindende Dogmen sind noch im 14. und 15. Jahrhundert nicht aufgestellt. Erst als die Kirche bereits den Zenit ihrer Macht überschritten hat, im Konzil von Trient, wird die Ehe als Sakrament unauflösbar und an die Ein-

segnung gebunden, die Gerichtsbarkeit in Ehesachen als der Kirche gehörig erklärt; wer es nicht zugibt, anathema sit!

Der Kampf gegen die kirchliche Macht beginnt erfolgreich mit der Reformation. Europa war durch die Schätze beider Indien reich geworden. Mit dem Reichtum erwuchs der Drang nach Bildung und Macht. Beides richtete sich gegen Rom. Luther fand das durchgreifende Mittel, um die Fürsten für seine Gedanken zu gewinnen, indem er ihnen die kirchliche Obrigkeit überwies. Der Kampf gegen Rom wurde hiedurch ein politischer Freiheitskampf. Die Natur des Eherechtes wurde damals noch nicht berührt. Auch die Protestanten erklärten die Ehe für ein kirchliches Institut, beurteilten sie nach Kirchenrecht und hatten für sie geistliche Gerichte. Aber in das materielle Eherecht trat ein Riß. Denn die Protestanten erkannten das Konzil von Trient nicht an und stellten der neuen sakramentalen und unauflöslichen Ehe die Ehe des alten Kirchenrechtes entgegen, die kein Sakrament und, wenn auch die Lösung erschwert, doch im Grundsatz löslich war. Auch war das kirchliche Gericht in protestantischem Lande nicht mehr, was es im katholischen gewesen war; denn es stand unter dem Oberherrn der weltlichen Macht. Der Kampf gegen ihn war ausgeschlossen, die Zeit der beiden Schwerter war vorüber.

So war der Boden bereitet für die Wirksamkeit der neuen Idee, welche im 17. Jahrhundert ihren Siegeslauf in Europa antrat, der Idee des *modernen* Staates.

Sie war nicht im Kampf mit der Kirche, sondern im politischen Freiheitskampf der Völker entstanden. Die Männer, welche die Theorie begründeten, standen in entgegengesetzten Lagern und kamen deshalb auch theoretisch zu entgegengesetzten Folgerungen. Auf derselben Grundlage des Gesellschaftsvertrages, aus welcher für Hugo Grotius freisinnige Staats- und Rechtseinrichtungen folgten, baute Thomas Hobbes den absolutistischen Staat auf. Dennoch — und es beweist dies wieder den alten Satz, daß durch jeden Mann seine Zeit spricht — hatten alle eine gemeinsame Basis. Sie leiteten Gesellschaft, Staat und Recht von dem freien, vernünftigen Denken der Menschen ab. Die Menschen sind ihrer Natur nach gesellig oder sie führen vorher einen Kampf aller gegen alle und erkennen dies als verderblich, oder sie lassen sich durch andere mannigfach geartete Nützlichkeitsgründe leiten, stets aber bestim-

men sie sich selbst und errichten selbst die Gesellschaft. Jede unmittelbare übernatürliche Einwirkung ist abgelehnt. Auch bei Hobbes müssen die Menschen die Befehle des absolutistischen Monarchen nur deshalb über sich ergehen lassen, weil sie ihm selbst die Macht übertragen haben. Damit war ein prinzipieller Gegensatz zu der Anschauung geschaffen, auf welcher die Gewalt der Kirche beruht: daß Staat, Recht und Gesellschaft unmittelbar von der Gottheit herrühren, daß alle ihre Einrichtungen von Gottes Gnaden sind. Dieser Gegensatz wird indessen nur von wenigen erkannt. Gewohnheit und das Bestreben Frieden zu halten, lassen ihn wie absichtlich verdunkeln. Auch Grotius entscheidet bei Widerstreit zwischen Freiheit und Glauben zugunsten des letzteren. Aber der Gegensatz ist da und *er* ist der innere Grund für die von jetzt an nicht mehr endigenden Kämpfe zwischen Kirche und Staat. Man wird an das Wort Hegels von der *List der Vernunft* erinnert, daß sie die Leidenschaften für sich wirken läßt. In der Aufklärungszeit wird es, namentlich unter den Hammerschlägen Voltaires, lebendig. Im Eherecht war zuerst in Holland und Schottland, lediglich aus praktischen Gründen, die Zivilehe gestattet worden. Nunmehr trat eine allgemeine Bewegung ein. Friedrich II. in Preußen, Josef II. in Österreich erklärten materielles und prozessuales Eherecht als dem Staat gehörig. Beide behielten jedoch die kirchliche Ehe, paßten auch die materiellrechtlichen Bestimmungen der Konfession der Ehewerber an. In Frankreich gestattete Ludwig XVI. die Zivilehe für Nichtkatholiken. Die Konsequenz der allgemeinen und obligatorischen Zivilehe wurde dann von der Französischen Revolution gezogen, und bildet seitdem eine Forderung des Liberalismus. Sie wird in die Konstitution Belgiens 1831 aufgenommen, welche das Urbild für die weiteren Konstitutionen wird, insbesondere auch für die Grundrechte des deutschen Volkes (§ 20). Der Kulturkampf führt sie in Deutschland und Italien ein. In Österreich blieben die Vorschriften Josefs II., welche in das bürgerliche Gesetzbuch vom Jahre 1811 übergegangen waren, gesetzlich bis 1855 unverändert. 1855 aber weiß die Kirche ein Konkordat zu erlangen, welches ihr alle Rechte der mittelalterlichen Anschauung zurückgibt; darunter des Eherecht, dessen besondere Regelung dann 1856 erfolgt.

Im Jahre 1868, infolge der Staatsgrundgesetze, endigte die

Episode. Man kehrte zu dem Rechtszustand des bürgerlichen Gesetzbuches zurück. Nur um neuerliche Streitigkeiten aus dem Gegensatze zwischen staatlichem und kirchlichem Eherecht zu vermeiden, schuf man die Not-Zivilehe — einen indirekten statt des direkten Zwanges, den Josef II. gegen ungehorsame Priester geübt hatte. Der damalige überaus heftige Kampf ist aus zwei Gründen bedeutsam: einmal, weil sich in beiden Lagern das volle Verständnis zeigte, daß es sich nicht um ein einzelnes Gesetz, sondern um den Grundsatz der Staatskirche handelte (hierüber namentlich eine bedeutende Rede Rokitanskys); dann weil die Not-Zivilehe, trotzdem sie bloß ein Schutz gegen rechtswidrige Weigerung des Pfarrers war, bei dem Episkopat demselben heftigen Widerstand begegnete, wie die obligatorische, von dessen Wortführer (Kardinal Schwarzenberg) sogar ausdrücklich als „inkonsequent" bezeichnet wurde, „weil jede Zivilehe den Grundsatz betätige: es gibt kein Gesetz als das Gesetz des Staates". Der Staat muß, wie es sich zeigt, im Kampfe um das Eherecht bei jeder Form desselben Widerstandes gewärtig sein, und die gründliche Lösung durch die obligatorische Zivilehe erspart deshalb doppelten Kampf.

In Ungarn schien es lange friedlich zu bleiben. Deak hatte sich wohl zur freien Kirche im freien Staate bekannt. Aber die Gesetzgebung war konservativ und noch 1868 beließ man kirchliche Ehe und geistliche Ehegerichte für Katholiken.

Aber Ungarn ist seither ein moderner Staat geworden und die Hegelsche List der Idee bewährte sich. Die Leidenschaften entbrannten bei der Wegtaufenfrage. Die klerikale Partei hatte in letzter Zeit in ganz Europa Vorteile errungen und glaubte ihre Macht auch in Ungarn bewähren und festigen zu können. Deshalb stellte sich der Episkopat zur Wehr, als einige übereifrige Priester Kinder, welche nach dem Gesetz vom Jahre 1868 für den protestantischen Glauben bestimmt waren, katholisch getauft (weggetauft) hatten und die Regierung Abhilfe verlangte. Dieser Bedeutung des Widerstandes war sich aber auch die Regierung bewußt und deshalb nahm sie ihn so ernst und deshalb entstand auch aus dem kleinen Anlaß ein großartiger Kampf des ganzen Volkes. Er war ein Kampf der Ideen geworden.

Wer ist nun im Recht, Kirche oder Staat?

Die Gesellschaft ist nicht mit der einen, noch mit der anderen

Macht identisch. Die Allmacht des Staates ist in ihren äußersten Folgerungen ebenso gefährlich wie die der Kirche. Aber die Leitung der sozialen Verhältnisse steht in jeder Zeit der Macht zu, deren Grundsätze der Erkenntnis der Zeit entsprechen. Bedingungsloser Gehorsam gegenüber Vorschriften, welche, auf übernatürlichen Ursprung zurückgeführt, jedem Nachdenken und jeder Prüfung entzogen werden, kann nur im Kindesalter der Völker verlangt werden. Unsere Zeit verlangt Selbstdenken des Volkes. Wir erkennen im Denken die Eigenart der Menschen, das Zeichen der Kultur. Wir wollen gehorchen — aber *uns selbst*, den von uns beschlossenen Gesetzen. Dem entspricht die moderne Staatsidee. Sie führt den Staat auf das Volk, das Staatswohl auf das Volkswohl, den Staatswillen auf den Volkswillen zurück. Sie läßt Prüfung und Verbesserung der Gesetze nicht bloß zu, sondern verlangt sie. Es kann nicht zweifelhaft sein, daß sie gegenüber dem mystischen Wesen der Kirche und ihrer Vorschriften die Überzeugung unserer Zeit vertritt.

DAS RECHT DES ANDEREN, ERLÄUTERT AM SCHUTZ DES DRITTEN

Vortrag, gehalten in der Wiener Juristischen Gesellschaft am 21. Dezember 1898

Nach Ansicht Hegels sollte sich die Welt im dialektischen Prozeß, durch Antithese und Synthese, entwickeln. Die Ansicht ist mit gutem Grund fallen gelassen worden. Wer den Gang der Naturereignisse kennen will, muß beobachten; er mag die Lücken vorläufig durch Analogie und andere Hilfsmittel schöpferischer Phantasie ausfüllen, nimmermehr aber nach einem einzelnen formalistischen Schema. Dennoch enthält die Ansicht einen tüchtigen Kern, durch den auch Hegel befruchtend auf seine Zeitgenossen wirkte. Nicht der Weltprozeß, wohl aber der Prozeß des menschlichen Denkens wird in hohem Maße durch Logik und insbesondere durch das dialektische Gesetz beherrscht. Die Vorgänger Hegels hatten nur die das rezeptive Denken bestimmenden Formen untersucht; Hegel führte die Form ein, durch die das logische Denken produktiv wird. Wenn wir forschend oder strebend eine Idee erfassen, so sind wir gewohnt, sie zunächst rückhaltlos in ihre Konsequenzen zu verfolgen. Wenn sich dann in den Ergebnissen Lücken und Einseitigkeiten zeigen, was unvermeidlich ist, weil jede Idee nur ein Element des Wirklichen und seines Werdens enthält, so suchen wir, um die widerstrebenden Erscheinungen zusammenzufassen, eine *Gegenidee*, die jene Lücken und Einseitigkeiten vermeidet, die aber in der Folge andere neuartige Einseitigkeiten bietet, welche unser weiteres Nachdenken und weiteres logisches Erfinden veranlassen. Es ist wohl allzu formalistisch, wenn Hegel annimmt, daß die Entwicklung der Ideen stets im Dreiklang vor sich geht, daß der Kampf der beiden Ideen, durch den sie sich einander klären und ergänzen, stets eine dritte als Vereinigungsidee (Synthese) erzeugt. Oft wird vielmehr die neue Idee wiederum in reiner Opposition auftreten. Dennoch wurde die Philosophie in fruchtbare Verbindung mit dem aufstrebenden wissenschaftlichen und sozialen Leben gebracht, wenn sie erkannte, daß die Oppositionsidee nicht rein negativ sei und den Denkprozeß ab-

breche, sondern vielmehr ein neuer Antrieb zu weiterem Forschen und Streben werde. Freilich liegt der tiefere Grund darin, daß es *Ideen* sind, die hiebei in Betracht kommen, nicht Begriffe; Leitgedanken für das schaffende, nicht bloße Merkzeichen für das beobachtende, aufnehmende Denken. Der Fortschritt Hegels besteht wesentlich in dem von ihm entdeckten Unterschied der produktiven Idee von dem rezeptiven Begriff.

Die Entwicklung großer Ideen erfolgt nicht in einem Kopf. Sie nimmt oft viele Generationen in Anspruch. Ein Forscher übernimmt die Idee vom anderen, führt sie einige Schritte weiter und übergibt sie wieder einem Nachfolger, bei dem sich das gleiche wiederholt. Oft währt es Jahrhunderte, bis eine Gegenidee ersteht. Wie lange blieben die Astronomen bei der Ansicht, daß die Weltkörper sich in Kreisbahnen um die Erde drehen! Wie lange erhielt sich in der Physik die Lehre vom Kraftstoff, vom magnetischen und elektrischen Stoff, den man derzeit wieder in den Elektronen rekonstruiert! Die religiösen Ideen sind in dem Volke, bei dem sie entstehen, geradezu unsterblich. Die ganze Jurisprudenz des Mittelalters methodisierte an den Digesten herum, bis erst im Naturrecht eine entwicklungskräftige Gegenidee erstand. Was für die wissenschaftliche Entwicklung, gilt ebenso für die praktische, nur daß bei ihr der Inhalt der Ideen nicht bloß durch die unbefangen aufgenommene und denkend verarbeitete Erfahrung, sondern zugleich durch die den Menschen in seinem praktischen Tun beherrschenden Triebfedern, durch Interesse, Gewohnheit und Leidenschaft bestimmt wird.

In solcher Art gilt das dialektische Gesetz denn auch für die *soziale* Entwicklung. Familie und Klasse, Volk und Staat bestehen aus Menschen, und was den einzelnen bewegt, muß auch Klassen und Völker bewegen. Wohl haben Massenbewegungen ihre Eigentümlichkeit. Das Tun des einzelnen wird durch seine Individualität bestimmt, durch Motive, die fast bei jedem in verschiedener Art und Stärke gemischt sind. Bei der Masse entscheiden die gemeinsamen Motive der großen Zahl. Die meisten Menschen zeigen aber in ihrem Denken wenig Ruhe und Selbständigkeit. Sie lassen sich hauptsächlich durch das Interesse des Momentes, durch Leidenschaft und Nachahmungstrieb führen. Sie folgen auch leicht dem ersten, der einen für sie genehmen Gedanken ausspricht. Darauf beruht die Kunst des Demagogen. Doch müssen Augenblicksmengen von

organisierten und von Interessengruppen geschieden werden. Je mehr die Beschlüsse vorbereitet, durchdacht, von dem Augenblick, in dem man sie faßt, unabhängig werden, desto mehr überwiegt das Moment des Interesses das der Leidenschaft und nimmt weitere Zeiträume in die Erwägung auf. Was die Organisation bewußt vollbringt, das leisten bei Interessengruppen Entstehungsmotiv und Dauer. In dem Fortgang der Völker sind deshalb Interesse und Gewohnheit die hauptsächlich führenden Motive. Die sozialen Gruppen, welche bei der Entwicklung eines Volkes die Oberhand erhalten haben, finden durch eine gewisse Auffassung von Staat und Gesellschaft, durch eine gewisse Organisation der sozialen Verhältnisse, welche die Vorteile und Lasten verteilt, ihre Interessen gefördert, und trachten sie festzuhalten oder zu erringen. Anfangs nur, weil sie ihnen vorteilhaft ist, während sich später durch Gewohnheit nicht bloß bei den begünstigten, sondern oft selbst bei den belasteten Gruppen der Glaube anschließt, daß die Verteilung in dieser Weise natürlich, logisch und gerecht sei. Dieser Glaube führt dazu, daß, wenn neu entstehende Gruppen eine andere Auffassung, eine soziale Gegenidee zur Geltung bringen, letztere oft lange Zeit als Unrecht und Auflehnung gegen die gute Ordnung erscheint, was Nietzsche bekanntlich in die sprachgewaltigen Worte gefaßt hat: „Der die Tafeln der Werte bricht, der Brecher, der *Verbrecher*."

Nach gewisser Zeit, wenn die neuen Gruppen durch veränderte soziale Schichtung gestärkt werden, tritt dann eine Synthese ein, eine geänderte Auffassung von Recht und Staat, die dem Interesse der neuen Gruppen Rechnung trägt. Diese Form, in der sich soziale Kämpfe abspielen, war auch bei Marx das Bindeglied zwischen materialistischer Geschichtsauffassung und dialektischer Methode.

Im Recht hat die Antithese theoretisch und praktisch einen zutreffenden Ausdruck im *Recht des anderen*. Der andere — das ist an sich die Antithese. Er setzt begrifflich den *einen* oder *ersten* voraus, und sein Recht, sein Rücksicht verlangendes Interesse stellt sich dessen Recht gegenüber. Die Frage nach dem Recht des anderen ist theoretisch immer zu stellen, wenn die Konsequenz der Vorschriften, welche ein Verhältnis regeln, dem einen alles Recht gibt. Oft spricht für den anderen sofort eine gewisse Billigkeit, was nur eine Bezeichnung für unklar erkannte Ansprüche ist. Das Korrektiv, welches in der Frage nach dem Recht des anderen liegt, ist bei

jeder wissenschaftlichen Untersuchung eines Rechtsgrundsatzes nötig. Dem äußeren Anscheine nach manchmal eine rein tatsächliche Feststellung, manchmal ein logisch selbstverständlicher Satz, enthält jeder Rechtsgrundsatz seinem Wesen nach *Befehle*, gibt und nimmt, belastet und befreit, schafft Ansprüche und Verpflichtungen. Wer einen Rechtsgrundsatz erkennen will, muß sich ihn durch Beispiele anschaulich machen. Er wird dann stets finden, daß er, sei es allein oder im Zusammenhang mit anderen, eine Verteilung von Vorteilen und Lasten, von Genuß und Arbeit unter den Mitgliedern der Gesellschaft bedeutet. Am sichersten wird man einen konkreten Einblick erhalten, wenn man, nachdem man die logischen Folgen des Grundsatzes gezogen hat, den Standpunkt wechselt, das Interesse des anderen, des unter den Folgen Leidenden, zum Ausgang nimmt und vorurteilslos untersucht, ob und in welchem Maße es gegenüber jenen Folgen Berücksichtigung verdient.

Die Idee vom Recht des anderen ist also ein wertvoller kritischer Behelf. Sie geht aus der Erkenntnis hervor, daß so wie alle Ideen, so auch die Grundsätze des Rechtes und die nach ihnen verliehenen Ansprüche (Rechte) nur einzelne Elemente dessen sind, was erst in seiner Gesamtheit, als soziale Ordnung zum Wohle aller, *Recht* im wissenschaftlichen Sinne ist; daß ihre logische Anwendung daher immer Lücken und Einseitigkeiten zeigen muß, die in der Anwendung zu Härten werden und Recht (summum jus) zu Unrecht machen. Der andere erscheint bei näherer Betrachtung nicht als Individuum des einzelnen Falles. Das Verhältnis kehrt vielmehr in Variationen wieder, und mit ihm als *Typus* der gedrückte, leidende andere: Die Frau, der Haussohn, der Besitzer, der Käufer, der Gewerbsmann, der Arbeiter u. a. Die stete Frage nach dem Rechte des anderen und seine eingehende Untersuchung nach wirtschaftlichen und sozialen Rücksichten bildet daher ein wichtiges Moment zur wissenschaftlichen Fortbildunng der Rechtsgrundsätze und ihres gegenseitigen Verhältnisses.

Das Recht des anderen und sein Kampf ums Recht ist aber auch ein wesentliches Moment in der historischen Entwicklung geltender Rechtsordnung. In jeder sozialen Lage bilden sich, ihr entsprechend, in der Gesellschaft Rechtseinrichtungen und Rechtsgrundsätze. Nehmen wir den Fall an, der in Wirklichkeit wohl niemals genau zutrifft, daß sie zu einer bestimmten Zeit alle Mit-

glieder der Gesellschaft oder doch jene, die alle soziale Macht in sich vereinigen, zufriedenstellen. Sie werden daher in ungestörter Konsequenz ausgebildet und durchgeführt. Nunmehr ändern sich die Zustände. Der Stamm war nomadisch und lebte von Jagd und Viehzucht; er wird jetzt ansässig und ein Teil seiner Mitglieder tritt zum Ackerbau über. Oder in dem ackerbautreibenden Stamm entwickelt sich Gewerbe und Handel, die bisher nicht beachtet waren. Oder der Stamm hat einen anderen unterworfen und der letztere, der dienen muß, gewinnt allmählich Einfluß. Dann tritt zwischen den bestehenden Einrichtungen und dem Verlangen der neuen Bevölkerungsgruppen ein Gegensatz ein. Die letzteren verlangen Schutz ihres Interesses; die Rechtsvorteile der der alten Ordnung angehörigen Gruppen erscheinen ihnen als ungehörige Privilegien und es bildet sich bei ihnen mit wachsender Klarheit die Idee eines Gegenrechtes, welches ihrem Interesse entspricht. Wenn sie genügend erstarkt sind, entsteht ein Kampf um die künftighin geltende Ordnung, der zu Kompromissen, zur Aufnahme von neuen Rechtsgrundsätzen, anfangs vielleicht im Gewande von Fiktionen und Quasi-Rechten, dann immer offener, in weiterer Folge auch wohl zum vollen Sieg der neuen Gruppen und zur Aufnahme einer neuen Rechtsgrundlage führt.

Wie aus diesem Bild ersichtlich wird, zu dem jeder Kundige leicht die Beispiele finden kann, entsteht die Gegenidee auch im Recht nicht in logisch abstrakter Weise, so daß sie von vornherein erkennbar wäre. Sie ist vielmehr nur die Formel, in welche sich die neuen Interessen kleiden, und wenn sich zwei Volksstämme aus demselben sozialen Zustande nach verschiedener Richtung hin entwickeln, so erhält die Rechtsantithese bei ihnen auch verschiedenen Inhalt.

Man darf nicht glauben, daß sich der Kampf der Bevölkerungsgruppen auf das politische Gebiet beschränkt. Die Regelung der Familien- und Vermögensverhältnisse, der Inhalt des sogenannten Privatrechtes, trifft den einzelnen sicherer und unmittelbarer als jede andere, und der Kampf um sie ist deshalb, wenn er sozial entbrennt, der härteste. Bei dem Worte „Gruppen" darf man auch nicht immer an Klassen im engeren Sinn denken. Manchmal bezeichnet die neue Gruppenbildung nur ein verändertes Verhältnis zwischen denselben Personen. Ein Beispiel: Das römische Volk

bildet ursprünglich einen Verband kriegerischer, ackerbautreibender Stämme. Das Land ist unter die Familien verteilt, die Familienmitglieder wohnen gemeinsam auf dem Familiengut und bebauen es. Entsprechend der harten Disziplin des Volkes hat auch das Familienhaupt diktatorische Gewalt, Recht über Leben und Tod der Mitglieder, über Gebrauch und Verbrauch des Gutes. Das römische Eigentum bezeichnet nichts anderes als diese Diktatur des Familienhauptes. Die Härten des Systems waren in der alten Zeit durch das enge Zusammenleben, die Einfachheit der Sitten und die kriegerische Schulung der Mitglieder weniger fühlbar. Sie traten hervor, als Rom sich weitete, die kriegerische Organisation selbständig wurde, die Familiengemeinschaft sich löste. Die Diktatur des Hausvaters hatte ihren Zweck verloren, ihr Inhalt wurde unverständlich. Es wurde peinlich empfunden, daß der Mann, der Prätor oder Konsul war, wirtschaftlich unselbständig sein sollte. Und nun wurde praktisch die Frage gestellt: Haben die *anderen* Familienmitglieder kein Recht? Prätor und Juristen, die Träger der Billigkeit, traten ins Mittel. Die Form des alten Systems wurde wohl mit der Zähigkeit, die den alten Römer kennzeichnete, festgehalten, aber durch Emanzipation und Pekuliarrecht durchbrochen.

Hand in Hand mit der Lösung des Familienverbandes ging auch eine Veränderung im Erbrecht. Die Agnatenerbfolge beruhte auf der Stammesorganisation; die Familie ist die Gemeinde des Stammesstaates. So wie die Organisation territorial wurde und die politische Bedeutung der Familie zurücktrat, mußte die ungleiche Behandlung der Kinder, mußte namentlich der Vorzug weitschichtiger Seitenverwandter vor den Töchtern als Unrecht erscheinen und die Frage stellen: Hat denn das *andere* Kind kein Recht?

Gerade bei diesem Beispiel zeigt es sich aber wohl, daß hinter einem scheinbar mit sozialen Klassen nicht in Beziehung stehenden Gegensatz dennoch oft eine Klassenbewegung steht. Die Patrizier hätten die Agnatenfolge vielleicht aus Ahnenstolz noch lange erhalten. Aber die Plebejer hatten niemals die agnatische Auffassung gehabt und das Kognatenrecht verschaffte ihren Lebensgewohnheiten den Sieg. Wir vermögen diesen Zusammenhang gerade in unserer Zeit zu erkennen. Wir erleben eine gleichartige Veränderung in dem Begriff der Familie. In unserem Erbrecht herrscht noch die adelige Auffassung, welche die entferntesten Sprossen der gemeinsamen

Ahnen umfaßt, den anderen Gattenteil dagegen ausschließt. Fast in allen anderen zivil- und strafrechtlichen Beziehungen dagegen ist bereits die bürgerliche Auffassung geltend geworden, welche die Verwandten nur bis zum Geschwisterkind, daneben aber auch den anderen Gattenteil und die nächsten Verschwägerten begreift. Die Fortbildung, die sich auch schon in manchem Erbrechtgesetz zugunsten des Gatten geltend macht (betreffs der Verwandten hat das deutsche Zivilgesetz leider den Kreis noch weiter gezogen als das 100jährige österreichische Gesetzbuch), beweist den erstarkenden Einfluß der bürgerlichen Klasse.

Der Einfluß der wirtschaftlichen Klassen zeigt sich insbesondere beim *Vermögensrecht*. Ursprünglich ist z. B. in Rom der kriegerische Geburtsadel allmächtig. Erwerbsgrund des Eigentums ist daher Familienangehörigkeit und Eroberung. Der alte in sehr engen Grenzen gehaltene Verkehr lehnt noch an die Eroberung an und nimmt die Sache, die er erwerben will (mancipatio). Dann aber erstarkt der Kaufmannsstand und schafft seinem Erwerbsgrund, dem *Vertrag*, die rechtliche Anerkennung. Anfangs nur für die vier wichtigsten Verkehrsakte (Kauf, Pacht und Miete, Gesellschaft, Vollmacht), während im übrigen noch, mindestens fingiert, die handfeste Unterlage verlangt wird; dann, durch Edikte und Auslegung, in immer weiterem Umfang. Er erlangt die Übertragbarkeit des Eigentums; das manuelle Moment in der traditio, das noch die Spur des alten Nehmens an sich trägt, verflüchtigt oft zu einem Wort oder einer Gebärde. Das Obligationenrecht der Kaiserzeit, die großartige Leistung der römischen Juristen, steht schon ganz unter dem Einfluß des Kaufmannsstandes. Trotzdem bleibt Rom aristokratisch bis zum Schluß. Der Handel bleibt ihm ein Betrug im kleinen, die Arbeit gegen Lohn verächtlich. Auch hiefür haben wir ein Seitenbild in dem Verhältnis der beiden in unserer heutigen Gesellschaft mächtigen Klassen, des Adels und des Bürgertums zueinander.

Aus der jüngsten Zeit mag insbesondere an die Entwicklung des Arbeitsvertrages erinnert werden. Bis vor kurzem war er der freien Vereinbarung, d. h. der Willkür des wirschaftlich stärkeren Unternehmers überantwortet. Denn in Rom hatte es keine freien Arbeiter gegeben, im Mittelalter war das Gesinde auf dem Lande untertänig, in den Städten und im Bergwerkswesen entwickelte sich wohl ein gewisses Arbeitsrecht, jedoch als Sonderrecht und mit

zünftigem Charakter. Erst jetzt, seitdem die Hörigkeit aufgehoben ist, Fabriken entstanden sind und eine freie Arbeiterklasse zum Bewußtsein ihrer sozialen Existenz und Existenzberechtigung gelangt ist, erwacht auch langsam in der Jurisprudenz und im Gewissen der Gesamtbevölkerung die Frage: Hat denn der *andere*, der Arbeiter, kein Recht?

Die historische Erfahrung läßt übrigens erkennen, daß die von Karl Marx am Schlusse des ersten Teiles des „Kapitals" ausgesprochene Ansicht, als ob sich ein soziales System in ungestörter Konsequenz ausbilde, bis es — man möchte sagen, automatisch — durch die Logik seiner eigenen Erlebnisse gestürzt wird, eine zu starre Auffassung des dialektischen Prozesses enthält. Die soziale Gegenidee tritt vielmehr auf, sobald das bestehende System eine kräftige Gruppe verletzt, und oft schafft es sich unmittelbar und alsbald diese Gegengruppe. Die Entwicklung wird dann durch stetig sich wiederholende und ablösende Kämpfe und Kompromisse bezeichnet, so daß in der Gesellschaft ebenso wie in der Natur ein anscheinend plötzlicher Umsturz lediglich ein schroffer verlaufendes Glied der Entwicklung ist. Während in Rom das patrizische Recht noch unverkürzt die Situation beherrscht, treten die Plebejer auf den Plan und erringen langsam Zugeständnis auf Zugeständnis. Im Mittelalter entstehen sofort mit dem Feudalsystem die Städte und werden Sammelpunkte für eine mächtige Gegnerschaft. Auch heute, wo die kapitalistische Periode wahrscheinlich nicht, wie Marx vermeint hat, am Ende, sondern am Beginn ihrer Entwicklung steht, tritt in dem organisierten Arbeiterstand sofort eine rechtsbildende Gegenkraft ein. Zeit und Art, in welcher der andere und seine Idee vom Recht als Faktoren auftreten, ist daher ungewiß. Immer aber bezeichnet der andere den Typus einer durch die bestehenden Normen verletzten Interessengruppe, deren Ansprüche je nach ihrer Kraft entweder unter einem allgemeinen Schlagwort (Billigkeit, Natur der Sache, Schutz des Schwachen, öffentliches Interesse) geschützt oder zu einem selbständigen Rechtsprinzip verdichtet werden, welches das Hauptrecht begrenzt und einengt.

Ich will im folgenden zur Erläuterung dieses allgemeinen Satzes eine Anzahl von Rechtseinrichtungen besprechen, welche sich eine einzelne typische Gruppe (nicht eine soziale Klasse) im modernen Recht errungen hat. Man nennt sie gemeinhin: *der Dritte*. Der

Dritte ist der bei der Schaffung einer rechtlichen Situation *nicht Beteiligte*, der aber unter ihren Konsequenzen leidet. Das Wort ist üblich geworden, weil der Begriff zunächst bei Vertragsverhältnissen entstand. Den *beiden* im Vertrage stehenden Parteien gegenüber ist der Unbeteiligte ein Dritter. Wenn das Verhältnis, das die Parteien durch ihren Willen geschaffen haben, z. B. die Gesellschaft, der Eigentumsübergang, ohneweiters gegen jeden anderen, also gegen den Dritten als Typus, rechtswirksam ist, so wird dieser oft in seinen Interessen arg verletzt. Ich nenne das bekannteste Beispiel: Jemand hat in einem offenen Geschäfte gegen angemessenen Preis eine Ware gekauft, die, ohne daß er es weiß, dem Gewerbsmann nicht gehört hat. Der Eigentümer trifft sie bei ihm an und verlangt sie zurück. Soll er gezwungen sein, sie herauszugeben? Der Römer zweifelte nicht daran und wir — könnte man hinzufügen — zweifeln kaum mehr an dem Gegenteil.

Der Schutz des Dritten kann als *moderner* Rechtsgedanke erklärt werden. Wohl wurden schon früher, schon im römischen Recht und noch mehr in den Sonderrechten des Mittelalters, Maßregeln solcher Art getroffen. Sie waren aber vereinzelt und nur als Ausnahmen gedacht, von denen der Satz galt, daß sie keine logische Fortbildung vertragen. Erst der moderne Weltverkehr schuf sie in weiterem Rahmen. Er kann ohne ausgiebigen Schutz des im Verkehr stehenden Publikums nicht bestehen, und das Verkehrspublikum ist es, das den Typus des Dritten bildet. Sprachlich ist die Bezeichnung „Dritter" in manchen Fällen nicht üblich, in manchen gar nicht möglich, so daß sich juristischer und sprachlicher Begriff dann trennen. Wenn z. B. ein Vertragsteil eine Erklärung abgibt, weil er durch einen außerhalb des Vertrages Stehenden gezwungen oder in Irrtum geführt worden ist, so wird der andere Vertragsteil, der hievon nichts gewußt und den Vertrag geschlossen hat, von der modernen Gesetzgebung häufig geschützt. Er ist der Dritte gegenüber den beiden, die bei dem Zwang oder bei der Irreführung beteiligt waren. Da man aber gewohnt ist, von dem Vertrag auszugehen, so wird gemeinhin der Zwingende oder Betrügende als Dritter bezeichnet und der andere Vertragsteil, der juristisch den Typus des Dritten darstellt, als zweiter (§ 875 des österr. ABGB., § 123 des deutschen BGB.). Ist der Erklärende selbst an seinem Irrtum schuld, so daß überhaupt nur die beiden Vertragsteile in

Betracht kommen, so kann die Sprache gar nicht vom Dritten reden, und dennoch ist der andere Vertragsteil an der Situation, unter der er leiden soll, gleichfalls nicht beteiligt, also juristisch ein „Dritter". Ebenso ist der Erwerber oder Verarbeiter einer fremden Sache ein an dem erworbenen Eigentumsrecht Unbeteiligter, während aber drei Personen nur künstlich (dadurch, daß man den Eigentumserwerb einschiebt) geschaffen werden können.

Der Schutz gilt entweder den Personen, die mit den Beteiligten in Verkehr treten oder die in der Folge als Beteiligte hinzukommen. Im Sachenrecht ist es nach der geschichtlichen Entwicklung unseres Rechtes im allgemeinen *die Diktatur des Eigentümers,* im Obligationenrecht *die Diktatur der Partei,* gegen die der Schutz verlangt und allmählich in gewissem Maß gewährt wird. Ohne nunmehr in weitere Einteilungen und Abstraktionen einzugehen, will ich, indem ich mich zugleich auf das private Vermögensrecht beschränke, ohne besonderen Plan eine Anzahl von Rechtsbildungen vorführen, welche einen Schutz des Dritten enthalten und sei es in ihrer Anlage, sei es in ihrer weiteren Ausbildung und Verstärkung modernen Ursprunges sind . . . [1]).

Alle diese Einrichtungen und manche andere sind durch einen Grundzug verbunden; sie wollen Schutz eines weitverzweigten Verkehrs und deshalb des dem Vertrag oder Betrieb fernstehenden Dritten. Es ist bezeichnend, daß sie in der Doktrin zumeist in das

[1]) In den nun folgenden, hier um ihres allzu fachwissenschaftlichen Charakters willen weggelassenen Abschnitten behandelt der Verfasser den Schutz des Dritten auf folgenden Gebieten des Privatrechtes, wobei der allmähliche Werdegang der einzelnen Rechtsinstitute aufgezeigt wird:

I. Im Sachenrecht: 1. Fruchterwerb des redlichen Besitzers. 2. Eigentumserwerb des redlichen Erwerbers. 3. Vertrauensschutz durch das Grundbuchrecht. 4. Schutz des Bearbeiters einer fremden Sache. 5. Prozessualer Schutz des Besitzers und des redlichen Erwerbers. 6. Veränderung der Übertragungsform dinglicher Rechte unter dem Einflusse des Verkehrs.

II. Im Obligationenrecht: 1. Schutz des Partners gegen Anfechtung einer in wesentlichem Irrtum oder zufolge Betruges abgegebenen Willenserklärung. 2. Behandlung des Mandates. 3. Gesellschaftsrecht, insbesondere Haftung der Gesellschafter gegenüber Dritten. 4. Order- und Inhaberpapiere. 5. Registerrecht (Handels- und Genossenschaftsregister, Hypothekenbuch). 6. Die Zession und der Schutz des Dritten. 7. Verträge zugunsten Dritter. 8. Schadenersatzrecht. Verschärfung der Haftpflicht, Haftung für fremdes Verschulden, insbesondere für das der Gehilfen. (Anm. d. H.)

deutsche Recht verwiesen und höchst ungern in die Digestenvorträge aufgenommen wurden, obwohl sie ebensowenig altdeutsch wie altrömisch sind, und obwohl die Digesten nach Savignys Lehre modernes Recht enthalten sollen. Es wird dies aber verständlich, wenn man ihr Verhältnis zu dem Gepräge des national-römischen Rechtes erwägt, das sich trotz aller Umgestaltungen doch auch noch in der Justinianischen Gesetzessammlung erhalten hat. Sie gehören ihm in der Tat nicht an, sie sind anderen Geistes; die Aufnahme und Entwicklung des Verkehrsprinzips, dem sie entstammen, hat die unausweichliche Folge, daß wir das national-römische Recht, so wie schon seit langer Zeit im Familien- und Erbrecht, so nunmehr auch im Vermögensrecht verlassen. Die wissenschaftlichen Errungenschaften der römischen Juristen in Methode und Einzelforschung wollen wir dankbar anerkennen und festhalten; dagegen müssen wir uns bewußt von den national-römischen Einrichtungen loslösen, sie als unseren Verhältnissen und unserer Rechtsauffassung nicht entsprechend erkennen und dies offen erklären. Das römische Recht war das Recht eines Kriegervolkes, eines Volkes, welches alles außer dem Familiengut im Krieg erwarb, im Frieden das Familiengut bearbeitete, Gewerbe, Handel und Lohnarbeit dagegen verachtete, was bei Mandat und Deposit einen auffälligen Ausdruck erhielt. Sie sollten ihren Namen nicht mehr behalten, wenn sich der Mandatar oder Depositar einen Lohn geben ließ und damit der Handlungsweise eines freien Römers widersprach. Das Erkennungszeichen für den Charakter eines Rechtes sind stets seine originären Erwerbsarten. Jedes Volk erhebt die Grundlage seines Erwerbes zur Grundlage des Rechtes und schafft sich dadurch den sittlichen Halt. Das kriegerische stellt die Eroberung, das händlerische den Tausch, das industrielle die Arbeit, kurz, jedes stellt seine Erwerbsquelle oder die mehreren Erwerbsquellen der in ihm herrschenden Stände als unmittelbar und von Natur wegen Recht schaffend auf. Die Römer waren Krieger und ihr Recht in seinen Grundlagen ein Kriegerrecht. Deshalb erwarb man durch Okkupation, aber nicht durch Vertrag, nicht durch Verkehr oder Arbeit. Alle Zugeständnisse, die im Verlauf der Zeit der Kaufmanns- und in geringerem Maße der Gewerbestand errang, waren entweder juris gentium oder mußten künstlich in das System eingeschaltet werden. Das klassische Obligationenrecht hat in der Rücksichtnahme auf Billigkeit und Natur der Sache

im Rahmen der nationalen Gesetze Musterhaftes geleistet; aber diese Gesetze waren auch ihm ein ewiger Hemmschuh. Noch in der letzten Zeit des Römertums konnte sich, abgesehen von den vier Konsensualkontrakten, der Vertrag das Recht des Erwerbsgrundes nicht erobern. Um so weniger sollte ohne Willen des Rechtsherrn etwas geändert werden können. Ein Eigentumserwerb durch Verkehrsakt oder durch Arbeit war den Römern unbegreiflich. Diese Ohnmacht des friedlichen Verkehres ist auch die Erklärung der römischen Vindikation und ihrer Ewigkeit nach Raum und Zeit (ubi rem meam invenio), die nur im Wege der Klageverjährung gemildert wurde. Ich habe über diesen Charakter des römischen Rechtes schon zu Anfang gesprochen. Unsere Rechtsauffassung ist entgegengesetzt. Wir wollen, daß der Krieg Privatrechte nicht verkümmere, und sind bemüht, alle Vorschriften über Beuterecht, auch aus der völkerrechtlichen Übung auszumerzen. Wir wollen, daß Verkehr und Arbeit Recht schaffen, so wie sie die Güter schaffen. Auf ihnen baut sich die bürgerliche Gesellschaftsordnung auf. Von dem Grundgedanken, daß sie die originären Rechtsquellen sind, geht eine Fülle von Grundsätzen und Einrichtungen aus, welche in offenen Gegensatz zum römischen Recht *seinem Geiste nach* treten. Denn der Geist eines Rechtes besteht nicht, wie Jhering meinte, in seinen Formen und seiner Technik, sondern im wirtschaftlichen und sozialen Gehalt seiner Vorschriften, in der gesellschaftlichen Organisation, die sie ausdrücken, erhalten und fördern. Wenn Arbeit und Verkehr Recht erwerben, so kann das bestehende Eigentum nicht mehr absolutes Hindernis des Erwerbes sein. Das Eigentum wird zum rechtmäßigen Besitz. Der Besitzer hat seine Sache zu verwahren; wird sie ihm vom Strom des Verkehrs entrissen, so ist er ihrer nicht mehr gewiß. Er ist nur ein Glied der großen Verkehrsgemeinschaft, sein Recht eines, aber nur eines der zu schützenden Interessen. Das Prinzip des Erwerbes durch Arbeit enthält aber auch ein weiteres; es muß die Arbeit als dem Besitz überlegen anerkennen, so wie im kriegerischen Recht die Eroberung ihn überwindet. Das Werkzeug ist das Schwert des Friedens. Mit der Umbildung der Gesellschaft aus einer kriegerischen in eine Friedens- und Arbeitsgesellschaft verbindet sich also eine Rechtsumbildung, die mit dem von uns überkommenen Krieger- und Besitzerrecht in offenen Widerspruch tritt, die theoretisch geradezu als revolutionär bezeichnet werden kann,

die aber schon in unseren Gesetzen feste Wurzel gefaßt hat und sich faktisch in ruhiger reformatorischer Arbeit fortentwickelt. Diese Umbildung schuf und weitete das Recht des Dritten, sie schafft auch sonst Formen, in denen das neue Recht als *Recht des anderen* einem bisher unbezweifelten Recht entgegentritt.

Die Umgestaltung unserer hergebrachten Rechtseinrichtungen hat auch eine große *methodische* Bedeutung. Wie am Ende des vorigen Jahrhunderts das alte politische Recht zu Unrecht, das bisherige Unrecht zu Recht geworden war, so ist nunmehr auch im Privatrecht eine ähnliche Wandlung eingetreten. Jahrhundertelang geübte Grundsätze werden verlassen und neue, die verhaßt oder verspottet waren, werden aufgenommen. Das Naturrecht wird von uns nicht mehr für Wahnwitz gehalten. Wir verstehen es bei der vermoderten Romanistik jener Zeit, daß sich alle regeren Geister ihm zuwandten, als der, wenn auch phantastischen Werkstätte für neues volks- und zeitgemäßes Recht. Wir lernen insbesondere durch das wieder erstandene Gesetzgebungsrecht des Volkes das Recht als mehr verstehen denn eine scholastische Auslegung des Justinianischen oder auch eines beliebigen geltenden Gesetzes. Wir lernen erkennen, daß der Lebende Recht hat, und daß ein gutes Gesetz es ihm gibt. Das hat aber die Folge, daß wir, um wissenschaftlich nach Recht zu forschen, eine andere Methode als bisher einschlagen müssen. Die formale Logik kann uns nicht führen. Der Folgesatz wiederholt nur, was der Vordersatz gesagt hatte. Hatte dieser unrecht, so kann auch er nur Unrecht erweitern und verschärfen. Ja, er kann sogar, wenn der Vordersatz im allgemeinen recht hatte, aber Vorsichten und Einschränkungen verlangte, durch deren Ablehnung Recht in Unrecht wandeln. Das Recht soll Ordnung in den gesellschaftlichen Zuständen schaffen, es soll Friedensstifter unter den Menschen sein. Wer aber für Ordnung und Frieden die Bedingungen erkennen will, muß Zustände und Menschen studieren; für das Recht der Gegenwart also die bestehenden Zustände und die lebenden Menschen. Die Maßregeln aus früherer Zeit, die sich bewährt haben (was aber sorgfältiger untersucht werden muß als jetzt, wo man einen aufgestellten Rechtssatz sofort als bewährt annimmt), sind zu benützen, soweit die Voraussetzungen der Arbeits- und Erwerbsteilung gleichgeblieben sind, wobei aber auch alle neueren Erfahrungen mitbenützt werden müssen. Wenn sich jedoch die sozialen Verhältnisse wesentlich geändert haben, so

verlangt eben der innige Zusammenhang zwischen Leben und Recht, der Begriff des Rechtes, auch *seine* Änderung. Das Recht, das auf Sklaverei aufgebaut war, paßt nicht für freie Menschen, das Recht eines ackerbauenden Volkes nicht für das industrielle, das Recht eines geringen Binnenverkehres nicht für den Weltverkehr.

Die Begriffe und Grundsätze, in welche man den Inhalt einer gewissen Rechtsordnung zusammengefaßt hat, teilen deren Charakter und Einseitigkeit. Es ist ein Denkfehler, wenn man sie als Tatsachen und ihre allgemeinen Formeln als den Naturgesetzen entsprechend auffaßt. Sie enthalten — ich habe dies schon anfangs ausgeführt — in scheinbar unbefangener und tatsächlicher Form *Befehle;* sie schaffen Herren und Diener, verteilen Arbeit, Macht und Besitz. Die Juristen der Gegenwart verkennen zufolge ihrer Erziehung diesen Charakter des Rechtes. Man trägt ihnen bei Beginn ihres Studiums die Begriffe und Grundsätze eines einzelnen Rechtes, speziell des römischen, vor, als ob sie unveränderlich wären, absolute Grundlage alles Rechtsdenkens. Man weist allgemeine Doktrin als Naturrecht, d. h. als Phantasiegebilde ohne Wert, aus der Wissenschaft. Man lehrt, als ob man nur Gesetzesvollzieher ausbilden wollte, während das Gesetz ohne Rücksicht auf seinen Inhalt der juristischen Kritik entzogen sei. Man stellt Jurisprudenz sogar auch der Gesetzgebungskunst entgegen und spricht der letzteren den juristischen Charakter ab. Und doch ist auch das Gesetz und ein Inbegriff von Gesetzen nur Werk von Menschen, dem Einfluß des persönlichen und des Klassenegoismus, dem Irrtum und der Zeitströmung unterworfen. Auf solch veränderlicher Grundlage kann keine Wissenschaft aufgebaut werden. Die Wissenschaft ist frei. Auch das juristische Forschen muß, um wissenschaftlich zu sein, immer auf das Leben selbst, die Quelle des Wissens, zurückgehen.

Die Jurisprudenz selbst ist aber ihrer Natur nach keine Wissenschaft für sich, sondern angewandte Sozialwissenschaft. Sie muß deshalb ein inniges Bündnis mit der Nationalökonomie schließen, der einzigen ausgebildeten Gruppe der Sozialwissenschaft, während andere Teile es leider bisher zu einer größeren Entwicklung nicht gebracht haben. Ökonomie und Jurisprudenz gehören zueinander wie Naturwissenschaft und Medizin. Das Studium der Rechtsgeschichte wird durch Vergleichung fördern, vor sprunghaften Experimenten sichern, im ruhigen sicheren Geleise halten. Aber lehren, was Recht

ist, kann es nicht. Das wirklich historische Recht ist das der Gegenwart angepaßte; sein Zusammenhang mit dem Recht früherer Zeit ist kein anderer, als der zwischen der sozialen Schichtung der Gegenwart und jener der Vergangenheit besteht. Wenn man altes Recht erhalten will, während die Gesellschaft neu geworden ist, so erschlägt das Recht der Toten das der Lebendigen.

Die neue Gesellschafts- und Rechtsordnung bildet sich auf den Trümmern der alten langsam auf. Der Kaufmann hat schon festen Fuß gefaßt und beherrscht die unmittelbare Gegenwart; der Arbeiter folgt ihm langsam nach. Die neue soziale Schicht, die in unserer Zeit erstarkt, beginnt auch für den proletarischen Arbeiter (Lohnarbeiter) den Raum zu schaffen. Wie vordem Nützlichkeit und Natur der Sache, so ist jetzt öffentliches Interesse und Schutz des Schwachen der Schild, unter dem sich das erstehende Recht deckt. Es verlangt für die Arbeiterverträge Vorschriften, die dem freien Wollen des einzelnen entzogen sind, die dem „anderen", dem bisherigen Lohnsklaven, ein Minimum von Rechten gewährleisten. Der Lohnvertrag wird schon jetzt nach solchen Grundsätzen neu geregelt, Miete und Pacht dürften bald folgen. Expropriationsgesetze treten Eigentum gegenüber, welches die Entwicklung des Gemeinwesens hemmen will; nicht bloß für Eisenbahnen, Straßen und Gassen, sondern auch zur Aufhebung wirtschaftlicher Unfreiheit (Grundentlastung) und veralteter Rechtsgebilde (Lehenwesen, Fideikommisse, tote Hand). Wohnungsgesetze beginnen auch die Ausübung des Eigentums dem sozialen Bedürfnis anzupassen. Die nicht besitzende Erwerbsarbeit hat sich schon Prinzipien gebildet, die sie leiten (das Produkt gehört dem Arbeiter, die Produktivmittel sind Gemeingut) und wird sich im weiteren Verlaufe zweifellos noch manches juristische Werkzeug für ihr soziales Aufstreben schaffen. Auch unser Recht und auch das Recht, das die aufstrebende Arbeiterklasse sich bildet, wird aber nicht die absolute Gerechtigkeit schaffen können. Es wird wieder seine Härten und Einseitigkeiten haben. Neue Gruppen der Bevölkerung werden wieder sich zurückgesetzt fühlen und ihr Recht verlangen. So wie die menschliche Gesellschaft, so ist auch das Recht im steten Werden begriffen, der Typus des „anderen" ist ein ewiges Gebilde.

Aber wir wollen wenigstens nicht in den alten Fehler verfallen. Wir wollen gewarnt sein und nicht wie bisher Folgerungen aus abstrakten Ideen ziehen, die wir ohne Probe auf das Leben als Recht

behaupten. Die scholastische Art, die in der Jurisprudenz leider noch immer die Regel bildet, ist aus allen anderen Fächern, die wir wissenschaftlich nennen, längst verbannt. Auch wir wollen fortan bei jedem Rechtssatz, seine Konsequenzen prüfend, zum Leben zurückgreifen, die Theorie als Blüte des Lebens, das Recht als Recht der Lebenden erkennen. Wir wollen auch nicht das Recht des einen, konkret gefaßt: *der* einen durch die geltende Ordnung begünstigten Gruppe zum Ausgangspunkt juristischen Forschens nehmen. Mahnend und warnend soll uns stets vor Augen stehen: das Recht des anderen.

DIE REVISION DES ALLGEMEINEN BÜRGERLICHEN GESETZBUCHES

Vortrag, gehalten in der Wiener Juristischen Gesellschaft am 14. Februar 1906

Die Jahrhundertfeier für die drei großen Gesetzbücher des europäischen Kontinents scheint eine neue Ära der Zivilgesetzgebung zu eröffnen. Diesmal ist das Deutsche Reich nicht bloß, wie damals Preußen, in der Vollendung, sondern auch in der Vorberatung allen Staaten vorausgegangen. Sein Bürgerliches Gesetzbuch, welches zwar nicht in der Sprache, auch nicht in der Höhe sozialen Empfindens mustergültig ist, wohl aber in seiner Technik und juristischen Durcharbeitung, ist ein Gärstoff geworden für alle juristischen Geister. Bei der Zentenarfeier des Code civil wurde dies rühmend anerkannt und gleichfalls eine Revision beschlossen. In der Schweiz, in Ungarn werden Zivilgesetzbücher vorbereitet. Insbesondere aber mußte das deutsche Gesetz auf uns Österreicher wie ein Stachel wirken; als Mahnung, daß, während wir uns durch lange Zeit mit den anderen deutschen Staaten in der Werdezeit der Gesetze messen konnten, wir jetzt, abgesehen vom Zivilprozeß, nahezu 30 Jahre müßig waren und um die Ideenwelt einer ganzen Generation zurückstehen.

Der erste Entwurf des deutschen Gesetzes war allerdings nicht einladend und veranlaßte Unger zu einer warmen Lobrede auf das alte österreichische Gesetz. Dennoch war es nur ein Ausdruck des allgemeinen Verlangens, als ich 1901 eine Redaktionskommission zur Ausarbeitung eines neuen Zivilgesetzes verlangte. Als die bekannte Studie Ungers: „Zur Revision des Allgemeinen Bürgerlichen Gesetzbuches“ erschien, griff Minister Körber die Idee auf und setzte eine derartige Kommission ein, bestehend aus Unger, Klein, Randa, Schey und Madejski.

Leider hat Unger, der natürliche Referent der Kommission, ihrer Tätigkeit von Anfang an zu enge Grenzen gesetzt. Er erklärt in seiner Studie, daß die Ausarbeitung eines neuen Gesetzes nicht im Gedankengang unserer Zeit liege. Er schreibt: „Und wollte man selbst eine Kommission zur Umarbeitung des Gesetzbuches sofort ein-

setzen — einen Antrag in dieser Richtung hat Abgeordneter Ofner am 18. Oktober 1901 gestellt —, so würde doch ein Jahrzehnt vergehen, bevor das schwierige Werk zustande käme." Er schreckt sogar davor zurück, ganze Hauptstücke umzuarbeiten, insbesondere aber erklärt er: „Vor allem ist es das Eherecht, um das alsbald der alte Kampf zwischen Staat und Kirche in heftiger Weise entbrennen würde. Dieses Eherecht und andere gleichartige Stoffe stehen einer gänzlichen Umarbeitung als Hindernisse entgegen." Der Satz ist lehrreich. Schon heute fragen wir verwundert, ob er wirklich vor kaum länger als einem Jahr von einem ersten, auch im öffentlichen Leben bewährten Juristen, wie Unger, niedergeschrieben worden sei. So allgemein tönt schon jetzt der Ruf nach Reform des Eherechtes, ebenso von den Juristen, namentlich den Advokatenkammern, wie aus dem Volk. Aber auch die Umarbeitung der völlig veralteten Hauptstücke vom Besitz, vom Schadenersatz, von der Verjährung hat Unger in seiner Abhandlung nicht im Auge, sondern nur die Umänderung *einzelner* Vorschriften, welche mit den heutigen Lebensbedürfnissen und Rechtsanschauungen nicht mehr im Einklange stehen, mosaikartige Einzelkorrekturen.

Der Gedanke, daß es sich um Einzelkorrekturen handeln solle, wurde nach Unger auch von anderen unterstützt, insbesondere von Hofrat Schreiber [1]). Ich aber halte es für ausgeschlossen, daß wir uns angesichts der Stütze, die wir bei der Neuarbeit an dem deutschen Gesetz haben, angesichts der neuen Gesetze rings um uns, mit einem Flickwerk an dem alten Gesetz begnügen können. Möge die Bedenklichkeit des Meisters welche Ursache immer haben, persönliche, wissenschaftliche oder politische, wir sind seine besseren Jünger, wenn wir ihm hierin nicht folgen. Wohl hat Zeiller, der letzte Referent des Allgemeinen Bürgerlichen Gesetzbuches, eine immer wiederkehrende Revision im Sinne Ungers verlangt — alle 10 Jahre, meinte er —; aber was nach 10 und 20 Jahren richtig gewesen wäre, ist es nach 100 Jahren nicht mehr.

Wenn man aber glaubt, es sei so viel schwieriger, ein Gesetzbuch neu zu verfassen, als es auszubessern, so bietet die Entstehungsgeschichte unseres Bürgerlichen Gesetzbuches den Gegenbeweis. Als Martini zur Redaktion berufen wurde, lagen ihm zwei ausgearbeitete Gesetzentwürfe vor, der Codex Theresianus und der kürzere Entwurf Hortens, an die er sich anschließen konnte. Inzwischen war das preußische Landrecht erschienen. Martini ging nicht auf die alten Entwürfe zurück, sondern arbeitete mit Anlehnung an das Landrecht einen neuen Entwurf aus. Es erschien ihm leichter, ein neues systematisch geschlossenes Gesetz zu schaffen, als in einen alten Rahmen lose, mosaikartig, wie Unger sagt, neue Bestimmungen einzusetzen.

[1]) Derzeit auch von den Professoren Rob. v. Mayr und Till.

In der Ansicht Ungers liegt ein großes Lob für das Bürgerliche Gesetzbuch, und das Gesetz verdient das Lob. Es war ein Meisterwerk. Schon in der Form, durch seine klare, schöne Sprache, sein reines Deutsch, seine einfache, volkstümliche Satzbildung, so daß es sich liest wie ein Volksbuch und auch in der ersten Zeit vom Volke so gelesen wurde. Man vergleiche damit das neue deutsche Zivilgesetzbuch, in dem man als Jurist manchen Satz dreimal lesen muß, bevor man weiß, was er rein sprachlich enthält, oder unser Zivilprozeßgesetz, seine Einschiebesätze, Passivsätze, Verbalsubstantive, seine „ung" und „heit" und „keit", kurz, sein böses Juristendeutsch, von dem sich das Bürgerliche Gesetzbuch vollständig befreit hatte.

Aber nicht bloß in der Form zeichnet sich das Gesetzbuch aus. In Ungers Abhandlung wird schon hervorgehoben, daß es den Mangel politischer Freiheit durch ein großes Maß bürgerlicher Freiheit wettmachen wollte, daß es die Frauen besser stellte, die väterliche Gewalt verringerte, daß es Formfreiheit für Verträge gab, auch Testierfreiheit. Das Recht der Frau, Vormund zu sein, ist für Ausnahmsfälle anerkannt; sie ist dem Ausländer an die Seite gleichgestellt und vernünftige Praxis könnte schon derzeit, da sich die Frauen auch im Pflegewesen bewährt haben, die Ausnahme zur Regel machen. § 162 hat den tiefen Satz aus dem Gesetzbuch Josefs II. bewahrt: „Die uneheliche Geburt kann einem Kinde in seiner bürgerlichen Achtung und an seinem Fortkommen keinen Abbruch tun." Ein „kann", das wohl bedauerlicherweise noch heute ein „sollte" ist. Nur in der Behandlung der verführten Weibsperson (das Gesetz spricht sonst von Frauenspersonen) zeigt sich eine gewisse soziale Hoffart, in der sich das Gesetz aber mit den anderen seiner Zeit begegnet. Aber auch im rein wirtschaftlichen Recht ist eine große Anzahl von Grundsätzen teils neu, teils zuerst in klarer Konsequenz durchgeführt. Ich nenne das Grundbuchprinzip, das Treueprinzip des § 367, das Erklärungsprinzip der §§ 875—876, den Grundsatz der unmittelbaren Stell-

vertretung in § 1017, die Gleichstellung von Arbeit und Sachleistung in §§ 415, 1431.

Selbst dort, wo wir die Wege des Gesetzbuches verlassen, müssen wir oft seine moderne Absicht anerkennen. Das gilt namentlich von seinem Besitz- und Eigentumsrecht. Der Besitz des Bürgerlichen Gesetzbuches ist nicht die tatsächliche Herrschaft des römischen Rechtes, sondern — was späterhin Jhering in das gemeine Recht einführen wollte — die äußere Erscheinung des dinglichen Rechtes: „weil, wenn in der bürgerlichen Gesellschaft ein Recht als dingliches, gegen alle zu behauptendes Recht gelten solle, es zur *Sicherheit des Verkehrs* ein deutliches Merkmal geben müsse, woran alle das einem Dritten ausschließend zustehende Recht *erkennen* können (Ofner, Prot. I, S. 213)." Das ist auch das Bindeglied zwischen natürlichem und bürgerlichem Besitz, die es einander im Prinzip gleichstellt. Deshalb kennt es ganz allgemein (§ 427) Forderungen als Objekte des Eigentums und anderseits die Zession als allgemeine Umänderungsform für Personen- und Sachenrechte. Die Praxis hat diesen Gedanken des Bürgerlichen Gesetzbuches noch heute nicht begriffen. Sie betrachtet z. B. noch immer unsere Zession als gemeinrechtliche Übertragung der Forderung, die auch ohne Tradition gegenüber Dritten wirkt und nur den Schuldner ausnimmt. Neuestens zeigt wieder das Anfechtungsgesetz die Schwäche dieser Theorie gegenüber dem Verkehrsgedanken des Gesetzbuches. Der Bruder braucht die ihm übertragene Forderung nur ein Jahr lang nicht geltend zu machen und das Anfechtungsrecht des Benachteiligten ist verjährt. Wir gebrauchen allerdings, um die Wirksamkeit des Rechtes unter den Parteien von der gegenüber Dritten zu unterscheiden, nicht mehr das Zwischenglied des Erwerbsmodus; der richtige Ansatz des Gesetzbuches muß aber erkannt und anerkannt werden.

Das Bürgerliche Gesetzbuch war in jeder Hinsicht ein vorzügliches Werk, und es ist sehr bedauerlich, daß es das traurige Schicksal aller österreichischen Gesetze teilte: die Sünden seiner Anwendung büßen zu müssen. Das gleiche Schicksal hatte ja auch die allgemeine Gerichtsordnung. Es lohnt sich, sie ohne Novellen und Hofkanzleidekrete zu lesen. Österreichische Juristen werden sich verwundern, was für ein klares, einfaches und schönes Gesetz sie hatten, und noch mehr, daß man es in den früher österreichischen Niederlanden als das Gesetz preist, welches dort das mündliche Verfahren

begründet hat. In der österreichischen Praxis ist sein Sinn und Verstand untergegangen. Ein ähnliches Schicksal hatte das Bürgerliche Gesetzbuch. Es blieb im Auslande unbekannt. Jahrzehntelang studierte die deutsche Jurisprudenz französische und englische Rechtsquellen und kannte das gleichgestimmte, hochstehende österreichische Gesetz nicht, weil es unter seiner unwissenschaftlichen Theorie und Praxis verdorrte. Wenn die geistreichen „Briefe eines Unbekannten über die Rechtswissenschaft" — eine Gabe zur ersten Geburtstagsfeier des neuen deutschen bürgerlichen Rechts, wie sie sich nennen (Leipzig 1901) — eine zentrale Rechtsauskunftsbehörde verlangen, „als Präservativ gegen die Universitätsgelehrten und zur Sicherung von Stetigkeit und Schnelle": ich bin kein Freund des heutigen historisierenden Professorentums, aber vor dem Zustand, der in Österreich mit einer ähnlichen Institution verbunden war, möge das deutsche Recht in Gnaden bewahrt bleiben!

Eine Kommentaristik riß ein, die nichts kannte als die Buchstaben und Beistriche des Gesetzes, alles übrige war griechisch: graeca sunt, non leguntur. Der Hörer hatte die Empfindung, daß der Unterricht völlig unnötig und unnütz sei. Ich kenne noch die letzten Reste und erinnere mich noch wohl, wie ich aus Furcht zu ersticken, 1865 von Prag nach Wien floh, wo damals Unger, Glaser und Stein neues Leben wachriefen. Im Zivilrecht war Unger der Neuerer und Erneuerer, der zu freiem Forschen hinriß, weit über das Gesetz hinaus, zu den Quellen der deutschen Wissenschaft. Aber das Gesetz büßte leider seinen Zorn über die öde Theorie. Auch wegen seiner rein romanistischen Auffassung und in seinem Haß gegen das Naturrecht übergoß er es mit der Lauge seines scharfen Witzes. Er hat späterhin die Vorzüge des Gesetzes offen anerkannt. Damals aber konnte es ihm nichts recht tun. Die klassische Zeit der österreichischen Rechtswissenschaft war für das Gesetzbuch eine Zeit tiefer Erniedrigung.

Nach Unger kam ein Rückschlag — nach der Klassik die Romantik. Eine erneute, wenn auch modernere Kommentaristik, die wieder mit Beistrichen und Buchstaben spielte. Romantisch war auch die Mystik, mit der die Repräsentanten der Periode, Pfaff-Hofmann, die Materialien des Gesetzbuches umgaben. Sie sollten ungeahnte Aufschlüsse geben, aber zur einfachen Veröffentlichung nicht geeignet sein. Der Vorteil ihrer Publikation besteht daher nicht bloß in dem, was sie enthalten, sondern auch darin, daß wir nunmehr auch wissen, was

sie nicht enthalten, daß sie der Forschung den Weg frei lassen. Für das Gesetzbuch aber haben sich Harras von Harrasowsky und Pfaff-Hofmann große Verdienste erworben. Ihre Veröffentlichungen aus den Materialien zeigten zuerst, aus welch unermüdlicher Arbeit, und zugleich, aus wie nüchternem und konkret-praktischem Rechtsdenken das Gesetz hervorging.

Seitdem die Kommentaristik wieder überwunden ist, befindet sich die Theorie des bürgerlichen Rechtes in Österreich in einem eigenartigen Übergangszustand. Sie ist eklektisch und hat einen gewissen fahrigen Zug. Und doch ist ihr der Weg klar vorgezeichnet. Sie muß nur in der Vergangenheit zu lesen verstehen. Das Bürgerliche Gesetzbuch, ebenso wie das preußische Landrecht und wie Savigny, kam aus der Aufklärungszeit und Unger kam nach dem Jahre 1848, ohne das er und sein Einfluß nicht denkbar sind. Immer finden wir einen Höhepunkt der Rechtswissenschaft, wenn sie einer großen gesellschaftlichen Bewegung gegenübersteht, und wenn es ihr gelingt, die treibenden Ideen dieser Bewegung festzuhalten. So war es auch in Rom, so in der Zeit der Renaissance. Und auch jetzt ist wieder eine große gesellschaftliche Bewegung, und wieder ist es unsere Aufgabe, das juristische Bild derselben festzuhalten.

Darin besteht die *soziale Jurisprudenz*. Nicht bloß in der Rücksichtnahme auf die bisher vernachlässigten Interessen und Anschauungen der besitzlosen Klassen, obwohl deren machtvolles Hervortreten unserer Zeit ihr Gepräge gibt (Anton Menger), sondern in der Ausbildung des Gedankens, den schon die Begründer der historischen Schule gefaßt, dann aber wieder verlassen haben: daß das Recht eine Funktion des Volkslebens ist und daß seine wissenschaftliche Grundlage in der *Untersuchung der gesellschaftlichen Zustände und ihrer kausalen Zusammenhänge* besteht. Der ursächliche Verband zwischen Besitzverteilung und Armut, zwischen Arbeitszeit und Gesundheit ist ebenso erfahrungsmäßig festzustellen wie der zwischen Bewegung und Wärme. Die Lagerung der sozialen Organisationen ist ebenso auf Typen und Regeln zurückzuführen wie die Lagerung der Gesteinsarten, der Pflanzen- und Tierformen. Nur die Auffassung der Rechtsnormen als sozialer Maschinen, sozialer Zweckeinrichtungen, die bloß dann Erfolg haben können, wenn sie soziologische Kausalität verwerten, bahnt eine wissenschaftliche Jurisprudenz an.—

Das Bürgerliche Gesetzbuch war ein vorzügliches Werk, aber seit

seiner Verfassung sind 100 Jahre ins Land gegangen, und was für Jahre! Man hat das vergangene Jahrhundert das naturwissenschaftliche, das politische, das soziale genannt, man könnte es auch als das *revolutionäre* bezeichnen. Es brachte eine große und grundlegende Umwälzung auf allen Gebieten des gesellschaftlichen Lebens, eine politische, aber auch eine wirtschaftliche, eine soziale und wissenschaftliche Umwälzung. Alles das aber — das versteht sich bei der sozialen Auffassung des Rechtes von selbst —, alles das legt sich nieder in dem Inhalt des Rechtes und selbst in seinen Formen.

I. Die *rechtwissenschaftliche* Umwälzung knüpft an den Namen der *historischen* Schule an, welche erst entstand, als der Inhalt des Bürgerlichen Gesetzbuches bereits fertiggestellt war. Vielleicht war es gut, daß die neue Bewegung nicht mehr auf die Verfasser wirken konnte; vielleicht wären sie an ihren Ideen irre geworden, ohne doch das Neue klar genug fassen zu können. Aber jedenfalls hat mit der historischen Schule die Jurisprudenz wieder begonnen, ein selbständiges Forschungsgebiet zu werden, während sie eine Zeitlang entweder Digesten buchstabierte oder als Naturrecht Anhang der Philosophie war. Die späteren Sünden der Schule — daß sie aus einer historischen eine historisierende wurde, aus einer Schule des Volksrechtes eine Gelehrtenschule für Rechtsaltertümer, daß sie eine Begriffsjurisprudenz trieb, schlimmer, weil engherziger, als die des Naturrechtes — vermindern ihr Verdienst um das Erwachen des neuen Rechtsdenkens nicht. Mit ihr fing die Rechtstheorie wieder an zu arbeiten, der moderne Verkehr, der sein Recht brauchte, wirkte mit, und man kann wohl sagen, daß seit dem Bürgerlichen Gesetzbuch unsere ganze Konstruktion des Rechtes eine andere geworden ist. Das Gesetzbuch beruht z. B. noch auf dem System der *subjektiven* Rechte. Die Gesetze bestimmen nach ihm (§ 1) die Rechte und Pflichten der Einwohner des Staates unter sich, und der Staat ist da, um Berechtigte zu schützen, Verpflichtete anzuhalten. Daraus erklärt sich eine Reihe von Bestimmungen im Gesetz. So z. B. § 2. Wenn er sagt, „niemand könne sich entschuldigen, daß ihm ein gehörig kundgemachtes Gesetz nicht bekannt geworden ist", so will er nur erklären, daß das Gesetz auch gegen ihn gilt: die subjektive Auffassung läßt dies in die Worte kleiden, es sei seine eigene Schuld, wenn er das Gesetz nicht kennt. Oder § 21, der die Rechtsunfähigkeit oder den Rechtszustand einer Gemeinde als Ursachen nennt, welche

den besonderen *Schutz* der Gesetze erfordern. Die subjektive Reihung hat zur Folge, daß die Rechte aus demselben Verhältnis voneinander getrennt werden. Die persönlichen Verhältnisse der Ehegatten werden im ersten, die Ehepakten im zweiten Teil; das dingliche Pfandrecht im zweiten, der Pfandvertrag im dritten Teil; die Gemeinschaft der Güter in der ersten, der Vertrag über die Gemeinschaft in der zweiten Abteilung des Sachenrechtes behandelt. Wir dagegen betrachten nach Savigny das Recht als ein System von *Rechtsinstituten*, von Lebensverhältnissen, aus denen Rechte und Pflichten als Ausdruck von Funktionen der Beteiligten sich entwickeln. Wir unterscheiden die rechtlichen Beziehungen aus Ehe und Familie, aus Besitz und Verkehrsakten, aus Vermögensbeständen nach dem Tode u. a. So entsteht für uns bereits ein ganz anderes Gerippe.

Ebenso anders, viel reicher, aber durch die seitherige Forschung auch geklärt und verändert ist unsere Struktur des *Rechtsinhaltes*. Ich folge dem Gesetz in seiner Reihung. Die Lehre von der zeitlichen und örtlichen Wirksamkeit des Gesetzes ist erst seit Savigny durchgearbeitet. Über Todesbeweis und Todeserklärung haben wir schon derzeit eine Novelle vom 16. Februar 1883, und das Bürgerliche Gesetzbuch gilt nicht mehr. Es gilt auch nicht mehr für die Staatsbürgerschaft. Ganz veraltet ist seine Auffassung von den juristischen Personen; es kennt als solche lediglich Gemeinden und vermischt sie sonst mit erlaubten Gesellschaften (§ 26). Ebenso seine Lehre von Handlungsfähigkeit und Dispositionsbefugnis. Mit der Minderjährigkeit bis zum 24. Lebensjahr steht Österreich nahezu allein. Dagegen sind andere Altersvorschriften des österreichischen Rechtes minder vorsichtig. Es entbehrt nicht des Humors, wenn er auch bitter ist, daß man bei uns mit 14 Jahren ein Verbrechen begehen, mit 14 Jahren seine Religion wechseln, mit 18 Jahren Testament machen, mit 20 Jahren gehängt werden und mit 24 Jahren 5 Kronen ausleihen kann. Diese verschiedene Beurteilung der Reife erweckt zugleich — ich habe dies auch auf dem Innsbrucker Juristentag gesagt — den Verdacht einer, wenn auch unbewußten Klassenjustiz, denn Verbrechen werden in ihrer Mehrheit von Angehörigen der besitzlosen Klasse begangen und Verfügungsakte von Besitzenden. Die ersteren werden also früher als reif erklärt, obwohl ihre Erziehung völlig verwahrlost wird. Das Beispiel lehrt zugleich, wie scheinbar ganz objektive Grundsätze unbewußt ein soziales Gepräge haben.

Ich übergehe das Familienrecht, weil an den Reformen in diesem Teil die juristische Theorie weniger Anteil hat. Die Digestenlehre ist hier nur in geringem Maße aufgenommen worden, und die gemeinrechtliche Theorie war nur soweit tätig, als die Digesten gereicht haben. Aber Besitz, Eigentum und Eigentumserwerb, Nachbarrecht, Servituten, Reallasten haben bei uns eine ganz andere Struktur. Das Pfandrecht ist weit besser ausgestaltet. Im Erbrecht ist das Verhältnis der Erben vom Anfall bis zur Einantwortung, das Pflichtteilsrecht, die Verrechnung der Vorempfänge im Gesetzbuch lückenhaft, ungenau, zum Teil unrichtig geregelt. Das allgemeine Hauptstück über die Obligationen, namentlich die Lehre vom Irrtum und Betrug, Gewährleistung, die Bestimmungen in § 919 und § 934 u. a., die Hauptstücke über Deposit, Mandat und Geschäftsführung, Gesellschaft und Gemeinschaft der Güter, Kauf, Miete und Pacht, Gelddarlehen, das Hauptstück vom Arbeitsvertrag, vom Schadenersatz, von Novation und Assignation, von Ersitzung und Verjährung sind gänzlich umzuarbeiten. Kurz, wir finden überall so viel Reformbedürftiges, daß, wenn wir einmal anfassen, als Rest kaum mehr übrigbleibt als jene allgemeinen Leitsätze, welche die Jahrhunderte überdauern.

II. Ich habe bisher nur von dem Einfluß der Theorie gesprochen, von der durch sie veränderten Konstruktion der Institute. Zu ihr gesellen sich für den Inhalt des Rechtes *die politischen, wirtschaftlichen und sozialen Ereignisse der Zeit*. Die politische Revolution in der ersten Hälfte des verflossenen Jahrhunderts, zugleich eine soziale Revolution zugunsten des Bürgertums, war bestimmt, die Gesellschaftsordnung des Mittelalters zu beendigen. Vom Gegensatz zwischen Bürger und Arbeiter war sie noch nicht berührt. Ihr Ziel war die Errichtung des *souveränen Volksstaates* auf Grund allgemeiner Rechtsgleichheit; im Gegensatz zum mittelalterlichen Ständestaat, zur mittelalterlichen Teilung der Gewalt zwischen Staat und Kirche, und zum Untertanenstaat, der die Lebensverhältnisse des Volkes selbstherrlich ohne Mithilfe des Volkes ordnete. Der Kampf gegen den *Ständestaat* ist auf dem Gebiet des Privatrechtes beinahe ausgefochten. Die Institute, welche aus der Gutsobrigkeit und Untertänigkeit erstanden waren, die Formen des geteilten Eigentums, sind aufgehoben. Nur das Fideikommiß ist noch übriggeblieben und auch seine Bedenklichkeit ist schon von den Verfassern des Allgemeinen

Bürgerlichen Gesetzbuches erkannt worden (§ 627 und Ofner, Prot. II., S. 541—542). Nicht aus einem Kampf, aber aus der Verschiedenheit der Auffassung ist der Begriff der bürgerlichen Familie entstanden, der nicht mehr wie die adelige die Verwandten bis ins hundertste Geschlecht umfaßt und den Gatten ausschließt, sondern mit dem Geschwisterkind abschließt und den Gatten in erste Linie stellt. Er verlangt auch eine Reform des Intestat- und Pflichtteilsrechtes.

Der wichtigste Kampf, der aus der Idee des modernen Staates entsteht, für Österreich aus politischen Gründen zugleich der schwerste, richtet sich gegen das Verhältnis zwischen *Staat und Kirche*. Sein Gebiet im Privatrecht ist die Ehe, der Religionswechsel und die religiöse Erziehung der Kinder. Das Allgemeine Bürgerliche Gesetzbuch ist im Eherecht tolerant, aber konfessionell. Es hat daher für die Anhänger der anerkannten Konfessionen verschiedenes Recht, entsprechend ihrer religiösen Satzung; für Konfessionslose wurde es durch die Novelle vom 9. April 1870 ergänzt. Nur im § 111 macht es eine Ausnahme und läßt katholisches Recht, wenn ein Teil zur Zeit der Ehe katholisch war, auch für Nichtkatholiken gelten, um — wie die Verfasser zugestehen — nicht zum Übertritt anzuregen (Ofner, Prot. I, S. 124, 131 ff. zu § 102).

Die Idee des modernen Staates verlangt dagegen gleiche Behandlung aller Staatsbürger, volles Absehen von der Konfession, die dem Staate gleichgültig ist. Die Ehe ist ein soziales Institut, das der Staat nach den Sittlichkeitsanschauungen der Zeit regelt. Der Staat hat daher nur *ein* Eherecht für alle. Was die Sittlichkeit unserer Zeit verlangt, muß von allen beobachtet, was sie verbietet, muß von allen unterlassen werden. Es ist für uns widersinnig, daß Onkel und Nichte bei Juden heiraten können, bei Christen nicht. Was aber nur die Konfession verlangt, das mag die Konfession auf ihrem Gebiet ausmachen, dem staatlichen Eherecht ist es fremd. Dazu ist notwendig und fließt aus der Idee der staatlichen Souveränität, daß staatliche Beamte die Amtsfunktionen verrichten und die Register führen. Ich will gar nicht darauf eingehen, daß die Registerführung nach Konfessionen schon zu argen Unregelmäßigkeiten geführt hat. Erst kürzlich kam es z. B. bei einem Straffalle (Hervay) auf, daß der Pfarrer eine von ihm geschlossene Ehe nicht eingetragen hatte, und bei Religionswechsel wurden öfters beleidigende Bemerkungen in

den Taufschein gesetzt. Aber es ist gegen die Konsequenz der Staatlichkeit, daß Organe der Kirche die Staatsehe beglaubigen. Es steht den Ehegatten selbstverständlich frei, auch die konfessionelle Sanktion ihrer Ehe zu erwirken.

Der Kampf wiederholt sich beim Religionswechsel und bei der religiösen Erziehung der Kinder. Es gehört zur Geschichte dieses Kampfes und kennzeichnet seinen Charakter, daß der Oberste Gerichtshof auch katholische Ehen zwischen Ausländern im Ausland als ungültig erklärte, indem er die Rubrik zu §§ 61—68 (Abgang des sittlichen Vermögens zum Zwecke; sittlich = juristisch, ebenso wie moralische = juristische Person) mißbrauchte, um eine besondere österreichische Sittlichkeit zu schaffen und Ehen als unsittlich zu vernichten, die in Ungarn nach einem vom österreichischen Kaiser sanktionierten Gesetz geschlossen worden waren. Ebenso, daß der Verwaltungsgerichtshof aus Abneigung gegen nicht anerkannte Religionsbekenntnisse (sogenannte Konfessionslosigkeit) dem Worte „Bekenntnis" in Art. 2 des Gesetzes vom 25. Mai 1868, RGBl. Nr. 49, eine andere Bedeutung unterlegt als in § 16 StGG. und § 1 desselben Gesetzes. Nach § 1 des Gesetzes ist auch ein nicht anerkanntes Bekenntnis ein Bekenntnis im staatlichen Sinne. Wenn Konfessionslose ein Kind haben, ist es konfessionslos und wird so in die Matrik eingetragen. In § 2 aber soll das nicht anerkannte Bekenntnis plötzlich kein Bekenntnis, der Übertritt zu ihm kein Religionswechsel, und den Eltern nicht gestattet sein, ihre noch nicht sieben Jahre alten Kinder in dasselbe mitzunehmen. Aus ähnlichem Grund versuchen kirchenfreundliche Behörden, den Religionsunterricht konfessionsloser Kinder in den Lehren irgendwelcher Konfession zu erzwingen. Bei der Entführung jüdischer oder mohammedanischer Mädchen zur Taufe wird das Gesetz sogar direkt verletzt und die Behörden erklären sich gegenüber Klostermauern als hilflos.

Im Sachenrecht spricht sich die überlegene Stellung der katholischen Kirche darin aus, daß das Staatsgrundgesetz im Artikel 6 Bestimmungen gestattet, welche den Erwerb der toten Hand beschränken, die bestehenden Gesetze aber den Erwerb frei lassen und die Entäußerung beschränken (Gesetz vom 7. Mai 1874, RGBl. Nr. 50).

Der Kampf gegen die *Bureaukratie* hat im Privatrecht ein enges Gebiet. Wir finden ihn namentlich bei der Sorge für *Waisen*, für

arme und verwahrloste Kinder. Der leitende Gedanke des Allgemeinen Bürgerlichen Gesetzbuches muß hiebei nicht geändert werden. Aber die allein tätige Bureaukratie hat sich nicht bewährt, die Kinder werden auch unter ihrer Oberleitung vernachlässigt. Der gesteigerte Blick des 20. Jahrhunderts hat Mißhandlungen lästiger Kinder zum Vorschein gebracht, die man als unmöglich betrachtet hatte. Die erste der grausamen Mütter wurde sogar hingerichtet, obwohl ihr Verhalten der Behörde vorher bekannt und nur mit einem Verweise geahndet worden war. In die neue Organisation der Waisenämter nimmt man freiwillige Organisationen oder autonome Körperschaften auf. In Leipzig und Dresden hat die Stadt ein Pflegeamt und bestellt Waisenpfleger nach dem Elberfelder System. Im Sachenrecht hat die Entwicklung der Autonomie Einfluß auf das Recht des *öffentlichen Gutes*. Unter dem absolutistischen System war alles öffentliche Gut Staatsgut; der Staat aber stand, soweit er nicht Fiskus war, nicht unter dem allgemeinen Gesetz. Die Rechtmäßigkeit der Verwaltung beurteilte nur die Verwaltung selbst, nicht der Richter. Das galt insbesondere auch für öffentliche Straßen und andere Verkehrsmittel. Seither ist die Gemeindeautonomie eingeführt. Die Gemeinde hat öffentliche Funktionen und den Charakter einer Behörde. Sie hat aber eine eigentümliche Doppelnatur. Auf der einen Seite Behörde, ist sie auf der anderen, weit mehr als der Staat, eine im allgemeinen Verkehr stehende Körperschaft mit eigenem Vermögen, mit Forderungen und Schulden, mit Unternehmungen und sonstigen Eigeninteressen, durch welche sie mit den Interessen anderer, sei es ihrer Konkurrenten, sei es ihrer Kunden oder Nichtkunden, in Konflikt treten kann. Diese Doppelnatur kann sie veranlassen, sich als Behörde zur Unterstützung von sich als Körperschaft zu benützen, und wirkt dann besonders nachteilig auf das Verhältnis des zu öffentlichem Gebrauch dienenden Gemeindegutes, so daß es gewiß notwendig sein wird, die Rechtsverhältnisse des öffentlichen Gutes im modernen Geiste neu zu regeln.

III. Viel einschneidender als die politische hat die *wirtschaftliche Umwälzung* auf das Privatrecht gewirkt. Großbetrieb und Weltverkehr haben unsere Wirtschaft völlig umgewandelt, und die Erfahrung hat sofort den deutlichen Beweis erbracht, daß das Vermögensrecht Funktion der Volkswirtschaft ist. Der Verkehrskauf und seine Abarten haben sich in den wichtigsten Bestimmungen vom

Allgemeinen Bürgerlichen Gesetzbuche entfernt. Die Gefahren der Konjunktur haben das Versicherungsinstitut in seinen mannigfachen Formen geschaffen. Durch die gesteigerte Arbeit und Arbeitsteilung ist eine Reihe von Arbeitsverträgen entstanden, die man früher nicht gekannt, mindestens nicht rechtlich beachtet hatte. Die Arbeit hatte bekanntlich im römischen und gemeinen Recht überhaupt keine Bedeutung. Es kannte im Rechtsverkehr nur Sachverträge. Selbst der Lohnvertrag war ihm eine Art Pacht, und außer ihm kann man allenfalls noch Mandat und Deposit als Arbeitsverträge auffassen, die aber, um nicht Lohnvertrag zu werden, unentgeltlich sein mußten. Heute ist der Arbeitsvertrag ein Problem ersten Ranges geworden (Lotmar). Zugleich ist eine Reihe einzelner Arbeitsverträge mit festem Gepräge entstanden: Kommissions-, Speditions-, Fracht-, Verlagsvertrag u. a., die alle eine gesetzliche Regelung verlangen. Denn mögen selbst die Bestimmungen des Gesetzes für den Inhalt eines Vertrages nur Dispositivsatzung sein, sie geben doch den Parteien und Gerichten eine Weisung, deren Wert die Erfahrung bestätigt und für jeden häufig wiederkehrenden und deshalb sozial wirkenden Vertrag ein gesetzliches Formular fordert.

Die Vorteile des Großbetriebes haben veranlaßt, daß viele sich zum gemeinsamen Betrieb vereinigen, *Gesellschaften* oder gesellschaftsähnliche Verbände schließen. Wie dürftig ist noch, was das Bürgerliche Gesetzbuch über Gesellschaften enthält! Derzeit haben wir offene und stille Gesellschaften, Gesellschaften mit beschränkter Haftung, Kommandit- und Aktiengesellschaften, Genossenschaften mit unbeschränkter oder beschränkter Haftung, Gelegenheitsverbände, Anteilschaften und allerhand Vereine mit besonderer Gestaltung, und jede Art will ihr eigenes Recht. Der Großbetrieb braucht *Vertretungs-* und Vermittlungsorgane, Prokuristen, Generalbevollmächtigte, Reisende, Agenten, Mäkler. Sie alle wollen ihr Recht. Er kann weiters nicht mit dem eigenen Gelde des Unternehmers aufkommen, er braucht den *Kredit*. Es ist unnötig, im einzelnen darzustellen, wie reichhaltig sich die Formen für den Kredit entfaltet haben, für die Kreditgewährung, seine Bescheinigung und Sicherstellung. Kreditscheine haben das Bargeld verdrängt. Alles Gut ist mobilisiert worden, selbst das unbewegliche Gut im Grundschein. Der *Verkehr*, der noch im Anfang des 19. Jahrhunderts fast nur Nachbarverkehr war, umspannt derzeit die Kultur-

welt. Er hat in Bahn und Dampfschiff, in Telegraph und Telephon neue Wege und Mittel gefunden. Menschen treten zueinander in Vertragsverband, die in völlig verschiedener Umgebung aufgewachsen sind, verschiedene Gewohnheiten und Erziehung haben, und das Recht muß sorgen, daß solche Verschiedenheit nicht stört.

Für die Rechtslehre entstehen dadurch nicht bloß neue Objekte, die nach alter Art zu regeln sind. In einer Debatte, die in der Wiener Juristischen Gesellschaft über die geplante Reform der juristischen Studien und Prüfungen abgeführt wurde, hat Adolf Exner mir entgegen behauptet, eine Reform sei nicht nötig; wer die in den Digesten behandelten Institute und ihre Struktur wisse, sei dadurch imstande, auch alle anderen in ihrer Struktur zu erkennen. Das ist der verhängnisvolle Irrtum der Romanistik. Die Analogie kann uns ein gutes Stück weiterführen: aber doch nur so weit, als dieselben Grundsätze bestimmend bleiben. Neue Verhältnisse bringen aber nicht bloß neue Dinge, sie bringen auch *neue Grundsätze*. Es ist ein erster soziologischer Satz — ich habe schon manchmal auf ihn verwiesen —, daß jede Klasse ihren Lebenserwerb sichern will, daß sie ihn auch als gut und recht betrachtet. Herrscht sie, so macht sie diese ihre Auffassung zu geltendem Recht, und die wechselnde Herrschaft der Klasse bedingt daher auch den Wechsel des Rechtes. Jede Gesellschaftsordnung hat als Korrelat — soweit das Privatrecht in Frage kommt — eigene Prinzipien für Erwerb und Verlust des *Eigentums*. Die bevorzugte Erwerbsart löscht die rechtliche Vergangenheit der erworbenen Sache aus. Priesterherrschaft erklärt alle Rechte an einem Gegenstand für erloschen, wenn derselbe sacer wurde. Er ist heilig, d. h. er dient priesterlichen Zwecken. Sie umgibt auch ihr Eigentum mit besonderer Sanktion; auch was rechts- und moralwidrig erworben worden ist, wird makellos im Besitz der Hierarchie. Kriegergesellschaft erklärt Eroberung und Erbeutung, Okkupation als Ende jedes früheren Rechtes. Wo der Händler das Recht beherrscht, hat der Erwerb im Verkehr die gleiche Folge; er schafft dem Käufer der Sache, dem Übernehmer des Kreditpapieres reines Recht. Ähnlich tritt, so wie eine Arbeitsgesellschaft entsteht, die Arbeit als Rechtsquelle auf. Wer das Gut geschaffen hat, hat das Recht erworben. „Des Mannes Saat ist verdient", sagt das altdeutsche Rechtssprichwort, „sobald die Egge darüber fährt." Das ist auch der Sinn der Spezifikation, durch die eine neue Sache wird, an der das alte Eigentum nicht haftet; des Fruchterwerbs pro cultura et cura; des Eigentumserwerbes des Malers an dem Gemälde auf fremder Leinwand. Die Gegenwart hat die Idee ausgeweitet, sie setzt dem Maler jeden anderen redlichen Arbeiter an die Seite. Aber sie bringt aus derselben Idee eine neue Erscheinung: den *Minimallohn*. Eine neue Schicht ist in die Gesellschaft eingetreten, die der Lohnarbeiter, und will, so wie die anderen, ihren Erwerb sichern. Das heutige Eigentumsrecht bietet ihr keinen Platz, weil sie im fremden Namen arbeitet und sie negiert es deshalb. Sie findet vorläufig einen Schutz im Obligationenrecht, durch einen Durchbruch des freien Vertrages. Dem Unternehmer werden schon im geltenden Recht zugunsten der Arbeiter Minimalleistungen bindend vorgeschrieben; er hat nur die Wahl, sie anzunehmen oder keinen Lohnarbeiter zu dingen. Eine besonders merkwürdige Rechtsbildung ist hiebei der Kollektivvertrag, welcher alle Mitglieder des Arbeitszweiges in dem vorgesehenen örtlichen Bereich binden soll, ohne daß sie einverstanden sind — eine Art autonomer Satzung, wie sie der Gemeinde oder Genossenschaft für ihre Mitglieder zusteht.

Das Lebensinteresse der sozialen Gruppen spricht sich nicht so nüchtern aus, wie es dem Forscher erscheint, sondern kristallisiert sich in phantasiereichen Ideen und Grundsätzen. Ich nenne als Beispiel die deutschen Rechtssprichwörter: Wer Gott ehrt, ehrt seine Boten; was ich vom Feind bekomme, ist mein; wer säet, der mähet. Die Wirtschaftsordnung unserer Zeit hat den Kaufmann als Unternehmer und Händler zu Einfluß gebracht und hiedurch namentlich einen Grundsatz entwickelt, der scheinbar alt ist, den aber noch das Bürgerliche Gesetzbuch in dieser Form und Kraft nicht kennt, obwohl es schon der Verkehrsidee dient: den Grundsatz von *Treu und Glauben*. Treu und Glauben ist nicht, wie Lotmar meint und Steinbach zustimmt, ein bloßer Ausdruck der das Recht beschränkenden Moral. Nein, Treu und Glauben, wie unsere Zeit den Begriff faßt, ist die Rechtsidee, welche dem *Weltverkehr* entspricht und ihn zusammenhält. Ein Verkehr zwischen Personen, welche voneinander weit entfernt sind, sich nicht kennen, welche nicht imstande sind, einander zu kontrollieren, ist unmöglich, wenn nicht jeder, der das übliche Maß der Verkehrsvorsicht angewandt hat, sicher ist; sicher bei Übernahme von Vertragsrechten, für die deshalb das Wort und der natürliche Sinn des Wortes maßgebend sein

müssen; sicher bei Erwerb eines Wertgegenstandes, der deshalb aus nicht kundbaren Ereignissen nicht angreifbar sein darf. Ein internationales Recht ist nicht anders möglich als auf allgemein menschlichem Denken; es muß mit der Tradition der einzelnen Länder brechen, es muß Normen aufstellen, welche lediglich durch Nützlichkeit und Billigkeit diktiert und dadurch allen begreiflich sind. Auf Treu und Glauben im Verkehr führt der primäre, d. h. fehlerlose Erwerb durch *Handelskauf* zurück. Treu und Glauben schafft den Schutz des *Dritten*, d. h. in die Sprache des Verkehrs übersetzt, des Publikums gegen unbekannte Vereinbarungen der Parteien. Treu und Glauben verkörpert sich bei den Order- und Inhaberpapieren in der sogenannten Kreationstheorie, oder, wie ich sie verallgemeinert nenne, in der *Isolierung der Rechte*. Der Satz, daß niemand mehr Recht abgeben kann, als er hat, wird im Interesse des Verkehrs durchbrochen, indem man das übertragene Recht von seiner Vergangenheit loslöst und aus ihr nur gegen den Unredlichen eine persönlich wirksame Einwendung zuläßt.

Andere grundsätzliche Neuerungen sind mit der modernen *Unternehmung* verbunden, dem Kinde des Großbetriebes. Wir kannten bisher nur zwei Formen juristischer Personen, beide öffentlichen Charakters: Korporation und Stiftung. Heute besteht zwischen Individuum und Korporation, zwischen individuellem Vermögen und Stiftung eine Reihe von Zwischengliedern, die fast unmerklich ineinander übergehen. Von dem Individuum sondert sich die *Firma*. Schon die Einzelfirma ist gewissermaßen ein Ding für sich; sie kann z. B. einen anderen Namen führen als der Firmaträger, sie kann auch mit dem Geschäfte veräußert werden. Weit mehr vom Individuum trennt sich die offene Gesellschaft, noch mehr die Genossenschaft, die Aktiengesellschaft, der Verein, der aber noch immer nicht eine Korporation ist. Ebenso stehen zwischen dem Individualvermögen und der Stiftung die verschiedenen Formen der *Masse*, d. h. Vermögen, die wohl einzelnen Personen gehören, aber in besonderer, vom Eigentümer unabhängiger Verwaltung stehen: Sequestrations-, Konkurs-, Erbmasse; dann die Anstalten, die sich durch ihre freiere Organisation noch immer von Stiftungen unterscheiden. Wir kommen also nicht mehr mit dem alten „Entweder — Oder" aus, bequemen uns vielmehr dem Bedürfnis nach Abstufungen an. Eine eigene Art des Zweckvermögens ist die *Unternehmung*. Sie kann Firma oder

Verein, Masse oder Anstalt sein. Ausgezeichnet ist sie dadurch, daß sie eine kaufmännische, zum Erwerb bestimmte Vermögensorganisation ist. Die Unternehmung tritt im Verkehr als Einheit auf. Sie wird objektiv als Ganzes verkauft und in Exekution gezogen (Ohmeyer); wichtiger noch ist das Persönlichkeitsmoment bei ihr. Sie liefert, sie leistet, sie haftet. Wenn durch die Unternehmung ein Schade geschieht, so geht es nicht an, den unmittelbar Schuldigen zu greifen. Niemand kennt ihn; und wenn man ihn faßt, so ist er regelmäßig ein einzelnes, untergeordnetes abhängiges Glied in der Organisation, das auch wirtschaftlich gar nicht imstande ist, den Schaden zu ersetzen. Die Unternehmung hat durch ihn gehandelt, sie muß für seine Tat haften. Die moderne Kausalhaftung ist das Kind der Fabriks- und Weltwirtschaft.

Auch neue *Objekte* des Rechtes sind mit ihr und dem neuen wirtschaftlich-technischen Aufschwung entstanden. Ich nenne bloß das Wasser als Triebkraft, den elektrischen Strom, dann die Objekte des sogenannten geistigen Eigentums, Namen, Marke, Muster, Patent, durch die wir den persönlichen und wirtschaftlichen Erfolg der Gedankenarbeit sichern wollen. Von neuen Willensformen nenne ich die Spekulation, die zu begreifen und von ihrem unwirtschaftlichen Seitengänger, dem Spiel, zu trennen, eine wichtige Aufgabe ist.

IV. Zu der wirtschaftlichen Umwälzung des Jahrhunderts hat sich eine *soziale* gesellt.

Im Staatsgrundgesetz vom 21. Dezember 1867 ist für Österreich die Rechtsgleichheit aller ausgesprochen. Das Allgemeine Bürgerliche Gesetzbuch rührt aber aus dem Jahre 1811 her; unser Strafgesetz gar aus dem Jahre 1803, denn das Gesetz vom 27. Mai 1852 ist nur ein schlechter Abklatsch. Wie konnten sie den Prinzipien einer weit späteren Zeit Rechnung tragen? Die einfache Konsequenz aus den Staatsgrundrechten fordert eine gründliche Reform der Gesetze aus der früheren Zeit.

Auch die politische Revolution der Jahre 1789 und 1848 war im letzten Grunde eine soziale zugunsten des dritten Standes. Sie hob die Privilegien des Adels, sein Obereigentum, seine Fronrechte, seine gesteigerte Rechts- und Erwerbsfähigkeit auf. Die Klasse der selbständigen Bürger, der Unternehmer, Beamten, Gewerbsleute und freigewordenen Bauern, brauchte zu ihrer Entfaltung privatrechtlich nur die Negative. Die gemeinrechtlichen Grundsätze der Eigentums-

und Vertragsordnung waren ihr angepaßt. Anders die *proletarische Arbeiterklasse*, die in ihrer großen Mehrheit aus den Robotbauern hervorgegangen war, kein Eigentum besaß, keines durch Erbschaft zu hoffen hatte und bei dem Arbeitsvertrag durch Hunger wehrlos war.

Die Fabrik hat eine große Arbeitermenge in einem Raum gesammelt, bei ihr dadurch die Erkenntnis ihrer Interesseneinheit vermittelt, und so ist die moderne Arbeiterbewegung entstanden. Die Arbeiter verlangen praktisch eine rechtliche Erwerbsgrundlage, die Sicherstellung eines menschenwürdigen Lebens durch Arbeit ohne Besitz; prinzipiell wollen sie Errichtung der Arbeitsgesellschaft, einer Ordnung, in welcher Arbeit und nur Arbeit Quelle des Einkommens ist. Ihre Forderungen lassen sich begreiflicherweise oft nicht mit der Logik der bestehenden Rechtssätze vereinigen, und so ist wieder ein neues Schlagwort entstanden; soweit sie im positiven Recht anerkannt werden, geschieht es regelmäßig als Forderung des *öffentlichen Wohles*. Das Wort ist noch älter wie Treu und Glauben, die römischen Juristen haben stets die salus publica als prima lex erklärt, und Anton Menger verkennt den Zwiespalt zwischen Idee und Praxis, wenn er Herrschaft der Macht und Herrschaft des öffentlichen Wohles *zeitlich* aufeinander folgen läßt. Dennoch hat der Satz bei uns einen neuen Inhalt. Wir sprechen, namentlich im Privatrecht, von öffentlichem Wohl überall, wo wir bestehende Grundsätze durchbrechen, wo wir eine neue Ordnung als notwendig erkennen, während aber ihre Rechtsgrundsätze sich noch nicht kristallisiert haben.

Einer dieser Grundsätze, der schon schärfere Formen angenommen hat, ist der *Schutz des Schwächeren im Vertrag*. Die Erfahrung hat gelehrt, daß unbeschränkte Freiheit der vertragschließenden Teile nur dort am Platze ist, wo die Partner wirtschaftlich und geistig einander ungefähr gleichstehen, daß sie aber, wenn diese Bedingung fehlt, zur Ausbeutung des Schwächeren führt. Das hat dazu geführt, den Ausbeutungsbegriff zu erweitern und bei mancherlei Verträgen Zwangsbestimmungen zu treffen. So beim Arbeitsvertrag für den Arbeiter, beim Mietvertrag für den Mieter, beim Versicherungsvertrag für den Versicherten — der Ruf nach Zwangssatzungen im Privatrecht verstärkt sich derzeit immer mehr. Das Gesetz wird bei jeder einzelnen Frage bedachtsam sein müssen. Aber

Arbeits-, Miet- und Versicherungsvertrag in den Formen des bürgerlichen Gesetzbuches sind unmöglich geworden. Der Titel des allgemeinen Wohles deckt auch die *Expropriation*. Im Staatsgrundgesetz wird das Eigentum als unverletzlich erklärt, mit Ausnahme der Expropriation. Man dachte sie damals als eine singuläre Notmaßregel. Heute ist sie ein Regulierungsmittel geworden: nicht bloß für Eisenbahnen und Straßen, sondern auch um gesunde Wohnungen herzustellen, um Licht und Luft zu schaffen u. a. m. Wir gelangen hier zum Grenzgebiet zwischen *Privat- und öffentlichem Recht*. Mehr und mehr erweist sich der Gegensatz zwischen ihnen als schwankend. Die Grundsätze der Familienordnung, der Besitzverteilung, der Verkehrsorganisation werden als hervorragende Bestandteile der gesamten Ordnung des Volkslebens erkannt. *Privatrecht ist Autonomie des einzelnen*. Sie stellt das Eigeninteresse und die tüchtigen Eigenschaften, die es weckt, in den Dienst der Gesamtheit und wirkt dadurch bis zu einer gewissen Grenze wohltätig. Diese Grenze verschiebt sich aber, und wo die Autonomie des Individuums schädlich wird, tritt das öffentliche Recht ein, d. h. die Staatsmacht greift ein, zwingend oder selbstverwaltend.

Die soziale Umwälzung der neuen Zeit rührt von den Lohnarbeitern her, die ihren Platz an der Sonne wollen. Sie hat im Recht derzeit den Arbeits- und Mietvertrag ergriffen und wird noch weiter greifen. Der Grundsatz des gleichen Rechtes, unter dem sie kämpft, wirkt aber auch auf andere Gruppen und hat insbesondere eine geweckt, die bisher den aliasque simplicitate gaudentibus zugeteilt war. Es sind die *Frauen*.

Unser Bürgerliches Gesetzbuch ist, wie ich schon anfangs erwähnte, in der Behandlung der Frauen den Gesetzen seiner Zeit voraus, aber noch immer gegen sie eingenommen. Daß es sie nur ausnahmsweise als Vormünder zuließ, kann aus seiner Zeit verstanden werden. Die bürgerliche Frau ist erst in der unserigen aus dem Innenleben des Hauses getreten; es ist Sache der Judikatur, die Folge zu ziehen. Warum sollte aber die Frau nicht schon damals Testamentzeuge sein können? Die Frau ist als Gattin, Mutter und Witwe benachteiligt. Die Gatten sollen gleichgestellt sein, was sie nach §§ 91—92 ABGB. nicht sind. Die Mutter soll nicht Vormunds-, sondern Elternrecht über die Kinder haben. Im Falle der Scheidung gehören die Mädchen regelmäßig zur Mutter, nicht bloß bis zum siebenten Jahre. Die

bürgerliche Familie umfaßt zunächst die Gatten; der hinterbliebene Gatte soll daher Pflichtteilsrecht haben und ein weit größeres Intestaterbenrecht. Namentlich aber ist die Vermutung des § 1237 ABGB. für den Erwerb des Mannes unberechtigt. Ich denke dabei nicht bloß an die selbsttätige, sondern zunächst an die wirtschaftende Frau. Das vom Manne erworbene Gut wird erst zurückgelegt, nachdem die Frau die Kosten des Haushaltes gedeckt hat. Sie hat dabei ähnliche wirtschaftliche Tüchtigkeit zu bewähren wie der Mann. Das Ersparte ist also Reinertrag der gemeinsamen Tätigkeit.

Der proletarischen Bewegung unmittelbar zugehörig ist der Kampf um das Recht der *unehelichen Frau und der unehelichen Kinder*. Sie gehören in ihrer Mehrzahl der proletarischen Klasse an, und wenn sich bei dem unehelichen Zusammenleben die Klassen mischen, so gehört die Mutter der besitzlosen Klasse an, der Mann der besitzenden. Auch die *Fürsorge* für verwaiste und verwahrloste Kinder, die jetzt erwacht, für Kinder in der Schule und in der Erwerbsarbeit ist Folge der proletarischen Bewegung. Denn der Proletarier hat kein Familienleben, Mann und Frau sind von früh bis zum späten Abend in der Arbeit. Wer soll das Kind bewachen, wer soll es auf den rechten Weg leiten? Von dem hungrigen verwahrlosten Proletarierkind geht die geschlossene ursächliche Kette zu allen Übeln und Gefahren der Gesellschaft.

Alles das kann ich nur streifen. Aber schon dieser kurze Einblick in das viele, was unsere Zeit an gesellschaftlichem Leben, an Rechtsstoff und Rechtsideen gebracht hat, wird zu dem Schlusse genügen, daß die österreichische Jurisprudenz sich nicht darauf beschränken darf, ein 100 Jahre altes Gesetz ein wenig auszuflicken. Gegen Unger gilt, was vor 100 Jahren gegen Savigny sich bewährte: Gerade unsere Zeit ist geeignet, Gesetze zu schaffen. Sie steht inmitten zweier Epochen, die sie zu kitten hat. In den juristischen Köpfen Österreichs gärt es. Sie können und sie wollen arbeiten, sie brauchen nur aufgerufen zu werden. Wenn die Redaktionskommission noch länger zögert — was derzeit sehr wahrscheinlich wird —, dann glaube ich, darf nicht mehr gewartet werden, bis der Entwurf erscheint. Dann muß ihm vorgearbeitet, das Material an der Hand des deutschen Gesetzbuches, sowie unserer und deutscher Erfahrung zubereitet werden ähnlich wie es im Deutschen Reiche war, als dort das Bürgerliche Gesetzbuch entstand.

Unger hat bei der Begründung seiner novellistischen Reform bemerkt, daß auch ich in letzter Zeit seinen Weg gegangen sei und eine Novelle beantragt habe, welche die Rechte Minderjähriger betrifft. Das ist ein Irrtum. Ich will allerdings für die Zwischenzeit, die immerhin Jahre dauern wird, einstweilige Novellen für die dringendsten Reformen. Ich will aber das neue Gesetz, während er in der novellistischen Reform die Aufgabe erblickt. Auch das neue Strafgesetz ist dringend nötig und ich sehne es herbei und habe doch eine Novelle verlangt, die für die Zwischenzeit die 5 Gulden und 25 Gulden des jetzigen Gesetzes als Grenze der Verbrechensstrafe bei Vermögensdelikten abschafft, weil diese Ungebühr keinen Tag länger dauern sollte. Aber nur durch ein neues Gesetz, das nach Inhalt und Form des Bürgerlichen Gesetzbuches würdig ist, können wir ihm und auch dem Geiste Ungers gerecht werden. Denn Unger schließt seine Abhandlung mit den Worten: „Möge das Gesetzbuch, wenn es dereinst als Phönix aus seiner Asche emporsteigt, ein magnum opus, ein aureus codex sein und die Kraft besitzen, Jahrzehnte hindurch eine Leuchte der Gerechtigkeit und der Billigkeit zu sein." Ein notdürftiges Flickwerk wird eine solche Leuchte nicht werden. Nur wenn wir alle Kraft einsetzen, um ein ganzes, einheitliches und schönes Gefüge zu schaffen, wie es einstens das Allgemeine Bürgerliche Gesetzbuch war, können wir für das Werk das Lob erwarten, das der Meister will: es sei ein magnum opus, ein aureus codex.

DER SOZIALE CHARAKTER DES ALLGEMEINEN BÜRGERLICHEN GESETZBUCHES (ABGB.).

1911

I. Einleitung.

1. Das Rechtsdenken wird erst dann wissenschaftlich — ich vertrete diese Überzeugung seit mehr als dreißig Jahren —, wenn es die Tätigkeit des Juristen als soziale Technik, d. h. als wissenschaftlich geschulte Zwecktätigkeit zur Regelung menschlicher Lebensverhältnisse, anerkennt und für die wissenschaftliche Forschung, die ihr zugrunde liegen muß, die *induktive* (naturwissenschaftliche) Methode aufnimmt. Die Kenntnis der Gesetze im eigenen Land ist für den tätigen Juristen wohl immer notwendig, weil er unter ihnen steht und seine Wirksamkeit ihnen anpassen muß. Aber die Gesetze können schlecht sein, so wie eine Bauordnung schlecht sein kann, der sich der Architekt dennoch fügen muß. Sie haben an sich, wie Brinz es ausdrückte, Potestät, nicht Autorität. Das wissenschaftliche Denken ist von ihnen unabhängig; für die Wissenschaft ist der Gesetzgeber Mensch unter Menschen. Gesetze sind aber auch, wenn man sie für sich allein, losgelöst von ihrem gesellschaftlichen Milieu, betrachtet, gar nicht zu begreifen; sie entstehen aus dem Leben und nur das Leben erklärt sie. Die chemischen Untersuchungen Liebigs waren für die Landwirtschaftslehre von weit höherem Wert als die gelehrteste Sammlung und Erklärung der Pflüge von den ältesten Zeiten her. Es gehört mit zu den Voraussetzungen für ein wissenschaftliches Rechtsdenken, zu erkennen, daß man Pflüge und Gesetze vergleichen kann [1]).

Man wehrt das induktive Verfahren mit Recht manchmal mit dem Einwand ab, daß Erfahrung und Induktion sich nur auf Tatsachen, auf Seiendes beziehen kann; Seinsollendes sei ihr entzogen. Was *soll* denn aber sein? Alles Sollen ist *Werden, wie ich es will.*

[1]) Id est: daß man auch Gesetze als Werkzeuge zur Erreichung eines Zweckes betrachtet. Der Zweck aber ist: friedliches, gedeihliches Leben der Menschen. (Friedlich, gedeihlich = recht.) (A. d. V.)

Das *Wollen* des Urteilenden ist der naturale Ursprung alles *Seinsollens;* die Entwicklung seines Inhaltes im gesellschaftlichen Zusammenleben ist die Entwicklung der Sittlichkeit und des Rechtes. Erst mystische Abstraktion hat das Leben aus diesen Begriffen verdrängt und blutleere Schemen aus ihnen geschaffen.

Mit der Auflösung seines vermeintlich metaphysischen Inhaltes in den Inhalt eines wirklichen, lebendigen Wollens tritt das Seinsollen und so auch das Recht in die Welt der Tatsachen und ihrer Zusammenhänge ein, in den Kreis der Erfahrung und Induktion.

Wollen ist eine *innere* Tatsache. Seine Untersuchung ist zunächst individuell-psychologisch. Wir pflegen sie, wenn wir bei einer strafbaren Handlung die Momente der Schuld erforschen: geistige Gesundheit, Anlage, Lebensverhältnisse, Erziehung und Umgebung des Täters, Reizungen zur Tat durch andere Personen oder besondere Umstände u. dgl. Oder wenn wir bei einer Handlung im Verkehr nach Motiven und Zweck (causa), nach dem Ernst und der Freiheit des Entschlusses, nach Zwang, Betrug, Irrtum, Mißverständnis u. dgl. fragen.

Schon hiebei tritt aber die Untersuchung über die individuelle Sphäre hinaus. Denn das Wollen des einzelnen zeigt sich wesentlich beeinflußt durch allgemeine Zustände. Die Lebensverhältnisse, die es bestimmen, sind vom einzelnen unabhängig, und ebenso wirken Umgebung und Verkehr, von ihm unabhängig, nach den Gesetzen der Massenpsychologie. Homo animal sociale.

Weit mehr noch als das Wollen und Tun des einzelnen ist selbstverständlich das der *Masse* mit allgemeinen Zuständen verwachsen und ein *Massenwollen* ist auch im *Gesetz* ausgedrückt. Nicht bloß, wenn es unmittelbar vom Volke oder seinen Vertretern ausgeht, sondern ohne Rücksicht auf seinen unmittelbaren Ursprung.

Das Gesetz ist immer ein Produkt der gesellschaftlichen Zustände und Strömungen, ist mit ihnen organisch verwachsen und man kann bei ihm deshalb, wie bei allem Organischen Entwicklung, Vererbung und Anpassung, Absterben und Neubildung im Inhalt beobachten. Es hat immer sozialen Charakter, wird dadurch auch eine Quelle, aus welcher der spätere Geschichtsforscher ein Bild der sozialen *Zustände und Strömungen* zur Zeit seiner Entstehung zurückgewinnen kann.

2. Ich verstehe unter *sozialem Charakter* die kausale Stellung

(kausal im passiven wie im aktiven Sinn, als Wirkung und als Ursache), die das Gesetz zu den Lebensverhältnissen des Volkes einnimmt, welche in ihrer Gesamtheit die *Gesellschaftsordnung* ausmachen: zur Tätigkeits- und Erwerbsweise des Volkes, zu seinem Geschlechterleben, seinen familiären, beruflichen und territorialen Vereinigungen, insbesondere aber zur *Schichtung im Volke* und den Beziehungen der Schichten zueinander, ihrem Anteil an Arbeit und Erwerb, ihrer Über- und Unterordnung, ihrer Machtstellung in der politischen Organisation u. a.

Der Ausdruck „sozial" wechselt allerdings die Bedeutung. Er bezieht sich stets auf das gesellschaftliche Leben der Menschen. Aber er bezeichnet das eine Mal die *tatsächlichen* Erscheinungen desselben und bildet den Gegensatz zu individuell. Das andere Mal — so, wenn man von einem sozialen oder sozial denkenden Menschen, von sozialer Gesinnung und sozialen Grundsätzen spricht — bezeichnet er Absicht und Zwecktätigkeit, um entsprechende gesellschaftliche Zustände herbeizuführen, und steht im Gegensatze zu individualistisch (manchesterlich). Die Soziologie rechnet mit Tatsachen, Sozialpolitik und Sozialismus mit Bestrebungen und Maßregeln.

Der Ausdruck wechselt auch den Umfang. Er umfaßt in der Soziologie *alle* gesellschaftlichen Erscheinungen, auch die politischen, und ohne Zweifel ist die staatliche Organisation und sind deren Änderungen die folgenreichsten Tatsachen in der Geschichte der Menschen. Aber eben wegen ihrer Reichhaltigkeit werden die politischen Erscheinungen regelmäßig losgelöst und ihnen die sozialen entgegengestellt, so wie seit Lorenz v. Stein die Gesellschaft dem Staat. In ähnlicher Weise kann man auch andere Gruppen gesellschaftlicher Erscheinungen — ökonomische, ästhetische, kulturelle — vom Ganzen loslösen; der Begriff *sozial* verengt sich dann immer mehr und bezeichnet die noch verbleibenden, die *übrigen* Erscheinungen. Immer aber und wesentlich umfaßt er die Schichtungsweise im Volk und die Beziehungen der Schichten zueinander.

Es gibt noch eine wichtige Nebenbedeutung des Ausdruckes. „Sozial" bezeichnet häufig die Verhältnisse der *Masse der Bevölkerung* (des „Volkes"), im Gegensatz zu bevorzugten Schichten, sowie die Bestrebungen und Maßnahmen zu ihrer Verbesserung, zu einer Ausgleichung der Lebensverhältnisse für alle. Gerade in diesem Sinn spricht man von „Sozialisierung". Die Arten der Privilegien

und der privilegierten Schichten wechseln aber nach Land und Zeit, was man beachten muß, wenn man Menschen und Maßregeln aus anderer Zeit oder anderem Lande beurteilt.

Heute, seitdem durch die neue Industrie in Verbindung mit dem alten Recht inmitten von Massenarmut große Reichtümer in wenigen Händen sich häufen, heute bildet der Besitz das vornehmlich unterscheidende Merkmal. Heute stehen Besitzende und Besitzlose (Besitzarme) einander gegenüber, und der Vorteil der privilegierten Schichten beruht hauptsächlich auf der Willkür, mit welcher der einzelne seine Überlegenheit gebrauchen kann. Die Sozialpolitik verlangt demgegenüber gesetzliche Schranken, Zwangsvorschriften, die keine Abänderung und keinen Verzicht gestatten.

Das Mittelalter hatte andere Gegensätze. Der Bürger war beengt und in Zünfte eingeschlossen, der Bauer leibeigen und kaum als Mensch geachtet, der Fremde oder Andersgläubige rechtlos. Nicht übermäßige, sondern fehlende Freiheit war der soziale Schade. Schranken waren nicht zu schaffen, sondern zu lösen. Die bevorzugten Schichten bildeten Fürst, Priesterschaft und Adel. Ihren Privilegien gegenüber verschwanden alle sonstigen Unterschiede im Volk. Das ganze Volk war im dritten Stand zusammengefaßt: Qu'est-ce qu'est le tiers état? tout. Auf diesem Untergrund ersteht auch das ABGB., und seine Bedeutung ist nur durch ihn zu begreifen. Es „sozialisiert" das Recht — was man mit Unrecht bestritten hat — nur nach durchaus anderer Richtung, als die wir derzeit einschlagen.

3. Jedes Gesetz ist, wie gesagt, ein Spiegelbild seiner Zeit. Unmittelbar drückt es wohl den Willen des Gesetzgebers aus, die Zustände und Strömungen, welche er billigt und fördern, oder welche er mißbilligt und hemmen will. Die geschichtliche Untersuchung des Gesetzesinhaltes unterscheidet sich hier von dessen Auslegung. Diese soll dem Leben dienen. Für sie gilt der Satz Thöls, daß das Gesetz weiser ist als der Gesetzgeber. Je älter das Gesetz, desto kräftiger tritt als zweiter Faktor der Rechtsbildung das Bedürfnis der neuen Zeit ein. Dem geschichtlichen Forscher dagegen sind die Fehler und Lücken im Gedankengang des Gesetzgebers ebenso charakteristisch und wichtig wie dessen positiver Inhalt. Denn der Gesetzgeber bleibt stets Kind seiner Zeit und seines Volkes, teilt unbewußt dessen Urteile und Vorurteile. Der größte Teil des Gesetzesinhaltes entstammt in solcher Art unmittelbar dem Denken des Volkes. Aber

auch so weit der Gesetzgeber durch seine Befehle wirken will, darf er sich von dem Volksdenken nicht zu weit entfernen; sonst bleibt das Gesetz auf dem Papier, ohne lebendige Werbekraft.

Die mittelalterlichen Rechtsbücher wurden daher zutreffend „Spiegel" des Rechtes genannt, und auch die „Grundsätze zur Verfassung des allgemeinen Rechtes für gesamte kaiserl. königl. deutsche Erblande" (des Codex Theresianus) beginnen mit der Anmerkung: „Durch allerhöchste Entschließungen vom 14. Mai und 18. Juni 1753 ist die vorbesagte Commission dahin angewiesen worden, daß in Ausarbeitung des Codicis Theresiani die *vorhandene heilsamste Ländergesetze* gegen einander gehalten, das natürlichste und billigste ausgewählet, der Abgang nach gesunder Vernunft, dann allgemeinen Natur- und Völkerrecht erganzet, nach Bedürfnis neue Satzungen vorgeschlagen und so gestaltet die Länderrechte (ohne allen Vorurteil für eines oder das andere) in Gleichförmigkeit gebracht werden sollten" (Harrasowsky, Codex Theresianus, S. 16).

Die Relation des Gesetzesinhaltes zu den bestehenden Zuständen ist aber nicht gleichbedeutend mit Pflicht zu einer konservativen Haltung. Manchmal ist in der Richtung der Zeit eine radikale Umänderung des Bestehenden gelegen. Die sozialen Zustände sind stets in Bewegung. Namentlich ändern sich stets die Möglichkeiten und Mittel für die wirtschaftliche Tätigkeit, mit ihr für den Erwerb und durch ihn für die Macht der gesellschaftlichen Schichten. Nur daß die Bewegung in manchen Zeiten langsam, ruhig, für den entfernt stehenden oder gleichgültigen Beobachter unmerklich vor sich geht, in anderen schnell und nachdrücklich. In solchen Zeiten entsteht, wenn das Recht nicht folgt, ein Gegensatz zwischen ihm und dem Volksbedürfnis, das nach Befriedigung verlangt. Die Voraussicht und Energie des Gesetzgebers kann hier den Ausschlag geben, ob die soziale Bewegung ruhig oder stürmisch erfolgt, ob die durch die sozialen Ereignisse geschobenen Massen festen Grund unter sich behalten oder ihn verlieren.

4. Kann eine solche Einwirkung auf gesellschaftliche Zustände aber einem Gesetze zukommen, wie es das ABGB. ist, das nur *Privatrecht* enthält? Gierke hat die Frage in einem Vortrag „Die soziale Natur des Privatrechtes" behandelt. Er spricht dem römischen Recht soziale Natur ab, während er im deutschen Recht eine ständige Mischung von privat- und öffentlich-rechtlichem Inhalt sieht, wodurch

zwar die Schärfe der Begriffsbildung leide, dafür aber „das öffentliche Wesen den Charakter des Rechtes, das Privatrecht den Charakter des Sozialen" erhalte. Gierke gebraucht hier, wie man sieht, „sozial" im Sinne einer Tendenz, der Rücksicht auf das Gemeinwohl. Die Bedeutung des Privatrechtes ist aber von seiner Tendenz unabhängig. Die Gebiete des Statusrechtes, des Familien- und allgemeinen Vermögensrechtes bilden geradezu das Knochengerüst der Gesellschaftsordnung. Was kann diese mehr bestimmen als der Umstand, ob Sklaverei besteht oder ausgeschlossen ist? als die Ausgestaltung der Familie? ob die Sippe Gesamteigentum hat, ob das Gut des einzelnen nach seinem Tode zusammengehalten oder aufgeteilt wird und wie? Monogamie und Polygamie u. a. dgl.?

Auch die Erwerbs- und Wirtschaftsweise des Volkes, ob es von Beute oder Arbeit lebt, ob von Viehzucht, Ackerbau, Industrie oder Handel, wie weit die Arbeitsteilung bei ihm vorgeschritten ist, in welchem Maße es im internationalen Verkehr steht, prägt sich in seinem Privatrecht aus. Möge also die Regelung dieser Verhältnisse dem Eigenwillen des einzelnen mehr oder weniger entgegenkommen, möge sie ihm mehr oder weniger Beschränkungen und Rücksichten auferlegen: sie wird stets von den gesellschaftlichen Verhältnissen bestimmt und tritt anderseits selbst als bestimmender sozialer Faktor ein. Wie viele schwere Kämpfe hat das Privatrecht schon ausgelöst! Man denke an die Seisachtheia Solons, an die Auszüge der Plebs auf den heiligen Berg, an die Bauernkriege. Erst vor wenigen Jahren war wieder in Irland ein blutiger Aufstand; sein Abschluß war eine Änderung des Pachtrechtes.

Gierke hat übrigens für die römische Ordnung auch von seinem Standpunkt aus nicht recht. Sie war nichts weniger wie privatrechtlich.

Das dominium des paterfamilias war die Gewalt des Familienhauptes im gentilizischen Staat und durchaus öffentlich-rechtlicher Natur. Der Hausvater hatte bekanntlich auch über die Familienglieder das Recht über Leben und Tod und anfangs ewige Muntschaft. Im Zusammenhang steht das agnatische Erbrecht und zerbröckelt, sobald die alte Gentilverfassung untergeht. Zweitausend Jahre später finden wir eine ähnliche Umwandlung der Muntschaft und des Erbrechtes in Österreich. Um sie ist der härteste Streit, und als Josef II. sie in seinem Erbfolgepatent vom 11. Mai 1786

und seinem Bürgerlichen Gesetzbuch erledigt hatte, war das größte Hindernis für das neue Gesetzbuch beseitigt.

Auch das System der dinglichen Rechte in Rom war sozial. Es war anfangs streng geschlossen. Seine Entwicklung gibt ein lebendiges Bild, wie sich die Kleinbauernwirtschaft, die nur wenige und scharf begrenzte Servituten kennt, allmählich in eine Latifundienwirtschaft mit geteiltem Eigentum umwandelt. Im alten Rom war auch keine Vertragsfreiheit. Die agrarische Ordnung hatte den Verkehr an enge Formen gebunden. Die ersten Konsensualverträge entstehen mit Beginn der merkantilen Periode, welche einfache und international verständliche Abwicklung verlangt. Der Verkehr der Neuzeit hat gegenüber den Sitten des Mittelalters ebenso gewirkt. Kauf, Miete, Vollmacht und Gesellschaft sind nichts anderes als die üblichsten Verträge des gemeinen Verkehres; inhaltlich haben sie nichts gemein. Über den Rahmen des Notwendigen hinaus fand aber das freie Vertragsrecht in Rom selbst noch in der letzten Periode keinen Eingang.

Man hat überhaupt noch viel zu wenig Blick für die soziale Natur des Privatrechtes.

Im Rahmen der grundsätzlichen Ordnung und als teilweise Ausführung derselben wird dem einzelnen allerdings in jedem vorgeschrittenen Recht ein gewisses Maß von freier Verfügung mit seinem Besitz und freier Vereinbarung im Verkehr zugestanden. Aber diese Autonomie hat sozialen Grund und ist stets begrenzt. Auch wo die Theorie in der *Idee* des Eigentums die umfassendste Verfügungsgewalt und in der *Idee* des Vertrages die volle Inhaltsfreiheit sieht, treten die Rücksichten auf den psychischen Zwang der Verhältnisse, auf die Verzweigungen des Verkehrs, auf andere Forderungen des Gemeinwohles in der Gestalt kollidierender *Ideen* beschränkend ein. Das Maß der Freiheit und Beschränkung im Privatrecht kennzeichnet in hohem Grad den sozialen Charakter der Periode. *Man kann von Polizeistaat und Manchestertum im Recht ebenso sprechen wie in der Volkswirtschaftspolitik.*

Das Allgemeine Bürgerliche Gesetzbuch enthält übrigens — was hier nur berührt werden soll — nicht reines Privatrecht. Es regelt z. B. auch die Staatsbürgerschaft, die von uns in das öffentliche Recht gereiht wird.

II. Soziale Grundlage des ABGB.

5. Es wäre ein interessanter Versuch, aus dem reinen Inhalt des ABGB. ohne jeden weiteren Behelf die gesellschaftliche Ordnung zu entwickeln, die das Gesetz vorfand und leiten wollte. So, als ob ein Gelehrter nach einigen hundert Jahren das Gesetz aufgefunden und außer seinem Inhalt keine oder sehr wenige Hilfsmittel zur Verfügung hätte; ungefähr wie jetzt das Gesetzbuch Hammurabbis behandelt wird. Aber die Zeit, in der das Gesetz entstanden ist, liegt uns doch zu nahe, als daß nicht ein solcher Versuch gekünstelt sein müßte und das Wort Goethes von den „originellen Gemütern" anwendbar wäre.

Das 18. Jahrhundert war die Geburtsstätte *der bürgerlichen Gesellschaftsordnung,* in Österreich wie anderwärts. Technische Erfindungen, volkswirtschaftliche und kulturelle Entdeckungen, neue Waffen, die den Ritter entbehrlich machten, und ein neuer Reichtum, der den Kaufmannsstand hob, wissenschaftliche Renaissance und religiöse Reformation hatten die gesellschaftliche Ordnung des Mittelalters in langsamer, einige Jahrhunderte währender Arbeit zerbröckelt. Die Kämpfe des 17. Jahrhunderts hatten das Werk vollendet. Wohl benutzten manche adelige Herren die verworrenen Zustände, um ihre Bauern zu legen und ihren Hausbesitz zu vergrößern. Aber zur Zerstörung der alten Sitte und Schichtung trugen sie auch dadurch bei. Aus dem Blut der von Fürsten und Völkern geführten religiös-politischen Befreiungskämpfe entstand das Naturrecht; aus den Entdeckungen, dem neuen Reichtum und dem internationalen Verkehr, den sie hervorriefen, der Merkantilismus. Freies Menschentum und freier Verkehr wurden die Losung; an die Stelle von Kabinettsjustiz und Ordonnanzen sollte das von Willkür befreiende *Gesetz* treten.

Die bürgerliche Gesellschaft entwickelte sich aber aus der ständischen *durch ein eigenartiges Medium.* Von den Mächten des Mittelalters, die miteinander stets im Streit waren, stand die landesfürstliche dem Bürgertum und der neuen Entwicklung am nächsten. Das Rittertum war, seitdem mit der geänderten Kriegsweise seine Funktion und mit dem Beuterecht seine Einnahmsquelle geschwunden war, in Raubrittertum entartet, suchte mutwillige Fehde und brandschatzte. Der Landesfürst war ihm gegenüber ein relativ gerechter Herr und Schützer des Volkes. Der Kirche wiederum hatte

die Reformation große Massen des Volkes entfremdet. Zugleich führten Naturphilosophie und Naturrecht die Gesellschaft, ihre Ordnung, Moral und Recht auf das angeborene Wesen des Menschen zurück, lösten sie von allem Übernatürlichen los, ließen die Gesellschaft durch Übereinkunft der Menschen entstehen und deduzierten hieraus den Staat als die *einzige* allumfassende Organisation, neben welcher für eine zweite koordinierte Organisation kein Platz war.

6. Was hat man im Anfang des 19. Jahrhundertes, als der Zug wieder nach Restauration des Bestandenen ging, dem Naturrecht angedichtet! Unpraktische, abstrakte Begriffsdoktrin sollte es gewesen sein, fern von aller Wirklichkeit, eine Spielerei für große Kinder. Man ließ sich in diesem Urteil auch dadurch nicht beirren, daß alle geistigen Größen jener Zeit dem Naturrecht huldigten, daß die Lehre der Grotius und Spinoza im Befreiungskampf der Niederlande, die der Hobbes, Milton und Locke im Kampf zwischen König und Volk in England entstand.

Aber das Naturrecht war in jeder Fiber praktisch. Es enthielt, in ein System gefaßt, auf allgemeine Grundsätze zurückgeführt, die Forderungen der neuen, stark gewordenen Klassen der Gesellschaft nach gleichem Recht, nach Abschaffung der bestehenden Hörigkeiten. Die neue Zeit schuf sich gegenüber dem veralteten historischen Recht ein neues und nannte es *das Recht der Natur*, der natürlichen Vernunft und Gerechtigkeit. Auch die Verfasser des Codex Theresianus hatten als Kompilationsgrundsätze erklärt:

„. . . . IX. Solchenfalls kann man jenes vor denen bisherigen Gesetzen wählen oder ein zur allgemeinen Maßgab neues vorschlagen, welches dem *ungekünstelten Natur- und Völkerrecht* am meisten beikommet."

„. . . . XV. Es wäre dann, . . . daß die in ein und anderen Ländern eingeführte Gewohnheiten dem *allgemeinen Natur- und Völkerrecht und der natürlichen Billigkeit* näher beikämen, als das etwa anderländig vorfindliche geschriebene Recht."

„. . . . XXXI. Aus diesen und dergleichen Hauptquellen ergibt sich allemal eine sichere Richtschnur, wonach verläßlich geprüft werden kann, was in unterschiedenen oder undeutlichen Vorfällen *das Natürlichste und Billigste* seie, all jenes nämlich, was näher und reiner einer solchen Hauptquelle zugehet, weniger Beschwernis und Umfänglichkeit auf sich hat und *zur Erhaltung der menschlichen Gesellschaft fürträglicher ist*" (Harr., Cod. Ther., S. 18).

Die „natürlichen Rechtsgrundsätze" des § 7 haben die gleiche Bedeutung.

Das Naturrecht wendet sich nur gegen Adel und Kirche; *nicht gegen den Staat.* Im Gegenteil; mit verschiedener Begründung, sei es durch einen sozialen Trieb oder durch den Kampf der vereinzelten Menschen gegeneinander, durch Nützlichkeit oder Vertrag, erkennt es den Staat als organisierte Gesellschaft an und gibt ihm eine neue wissenschaftliche Stütze. Mit dem Staate aber verknüpft sich als reale Macht aus der vergangenen Zeit *die Gewalt des Landesfürsten.* Der alten Ordnung noch zugehörig, der neuen zugewandt, entsteht nahezu in ganz Europa unter der Patronanz des Naturrechtes eine Übergangszeit des landesfürstlichen Absolutismus. In manchen Ländern (England, Frankreich) ist dieser zu egoistisch und führt zu Revolutionen; in anderen erkennt er sich als Medium der neuen Idee, erkennt den Fürsten als ersten Diener des Staates an und bringt die Entwicklung unter seiner Flagge in friedliche Bahnen. So in Preußen, so auch in Österreich, wo das System unter dem Namen *Josefinismus* bekannt ist. Der Josefinismus enthält die Ideen des Naturrechtes in realpolitischer Abtönung — so daß an Stelle eines durchgreifenden Prinzips zumeist nur eine Regel, an Stelle der Gleichberechtigung eine abgestufte Toleranz tritt —; zugleich aber deren Durchführung im Einheitsstaate durch den alleinherrschenden Fürsten und seine streng disziplinierte Beamtenschaft.

Das System wird unter den Nachfolgern Josefs II. vielseitig abgeschwächt. Dennoch bestimmt es noch im ganzen das ABGB. Das möge in einigen allgemeinen Zügen an dessen Inhalt gezeigt werden. (Für die nächsten legislativen Beziehungen vgl. Saxl-Kornfeld.)

III. Rechtsorganisation im ABGB.

7. Das ABGB. ist der *juristische Ausdruck des österreichischen Einheitsstaates.* Dies bezeugt schon sein Titel, der im Codex Theresianus ausführlich lautete: „Codex, worin für alle dero königl. böheimische und österreichische Erblande ein jus privatum et universale statuiret wird." Es ist das erste allgemeine Gesetzbuch für die österreichischen Erblande.

Die Rechtseinheit hat nicht bloß politische, sie hat allseitige soziale Bedeutung. Wir haben in jüngster Zeit im Deutschen Reich eine ähnliche Erscheinung erlebt und haben dadurch Verständnis für

sie. Die Rechtseinheit bewirkt durch Einflüsse psychologischer und ökonomischer Art eine erhöhte gesellschaftliche Zusammengehörigkeit. Neben der Einheit des Staates und der Sprache ist die Rechtseinheit der stärkste Kitt. Reger Verkehr verlangt stets Rechtskenntnis und genau kennt man nur sein eigenes Recht. Die Normen jeder Rechtsgemeinschaft verlangen für Verkehrsakte gewisse Formen und Vorsichten; gilt zweierlei Recht mit zweierlei Anforderungen, so wird der Verkehr schleppend, unsicher, selbst gefährlich. Deshalb sucht der Weltverkehr, während er die Souveränität der Staaten nicht antastet, einheitliches Recht auf seinen Gebieten zu schaffen und überwindet, wenn auch langsam, nationale Empfindlichkeiten. Anderseits stört verschiedenes Recht auch in Ländern, die politisch geeint sind, den Verkehr sowie die Empfindung der Zusammengehörigkeit. Die Einheit des Rechtes hat die Sudeten- und Alpenländer Österreichs einander nach Verkehr und Stimmung wesentlich näher gebracht; bis dahin hatten sie sich gegenseitig als Fremde, wenn auch unter demselben Fürsten stehende Fremde, betrachtet.

„Das Übel aus dem Grund zu heben" — sagt hierüber das vorbereitete Kundmachungspatent zum Codex Theresianus — „ware bisher teils wegen Unzulänglichkeit und Unverläßlichkeit, teils wegen Verschiedenheit der in diesen Landen beobachteten, in ihrem Inhalt *zum öfteren einander ganz widersprechenden Gesetzen* nicht möglich, woraus notwendig die unliebsamen Folgen entspringen müssen, daß, was Uns am meisten am Herzen gelegen, Unsere getreue Landesinwohner und Untertanen durch diese Ungewißheit, Dunkelheit und Verschiedenheit des Rechtes in ihren Handlungen nicht selten einem beträchtlichen Schaden und Nachteil ausgesetzt, zumalen sich zum öfteren Fälle ergaben, daß nach denen Gesetzen des einen Landes recht ware, was nach jenen des anderen für unrecht geachtet und somit bei dieser Gestalt der Sachen *der Beförderung des gemeinsamen Handels und Wandels zwischen diesen Unseren Erblanden* keine geringe Hindernis in Weg gelegt wurde" (Harr., Cod. Ther., S. 27).

Dies gilt vom Verkehrs-, d. h. vom Privatrecht. Aber das Bürgerliche Gesetzbuch ist, wie schon erwähnt wurde, gar nicht rein privatrechtlich. Es statuiert namentlich die *eine österreichische Staatsbürgerschaft*, das Institut, für das allein sich noch heute, neben der österr.-ungar. Monarchie und neben dem unaussprechlichen Konglomerat der im Reichsrate vertretenen Königreiche und Länder, der

Name Österreich erhalten hat. (Erst in der neuesten internationalen Sprache erlangt er wieder erweiterte Geltung [2].) Die Wichtigkeit des staatlichen Heimatsrechtes kann aber nicht hoch genug eingeschätzt werden; Ausland ist immer noch Elend. Der Ausländer entbehrt noch heute gewichtiger wirtschaftlicher und persönlicher Rechte. Er ist noch heute unstet und kann, wenn er zehn und zwanzig Jahre und noch länger im Inland gewohnt und sich redlich erhalten hat, ohne Begründung als lästiger Ausländer über Nacht ausgewiesen werden. Selbst im gewöhnlichen wirtschaftlichen Verkehr und bei Geltendmachung seiner Privatrechte hat er unter mannigfachen Schwierigkeiten zu leiden.

Das weiß der Österreicher insbesondere. Denn die eine Hälfte der Monarchie ist in der anderen rechtliches Fremdland, und ein Mann, der nie den Fuß aus dem Gebiete der Monarchie gesetzt hat, kann in ihr heimatlos werden, weil er nach zehn Jahren seine ungarische Staatsbürgerschaft verloren hat und die österreichische nicht erwirbt. Nach dem ABGB. war dies allerdings anders. Gemäß der Tradition und dem naturrechtlichen Grundsatz, daß tatsächliche und rechtliche Heimat zusammenfallen sollen, hatte es verfügt, daß Fremde durch Antretung eines Gewerbes, dessen Betreibung die ordentliche Ansässigkeit im Lande notwendig macht, sowie durch zehnjährigen ununterbrochenen Wohnsitz (unter der Bedingung, daß der Fremde diese Zeit hindurch sich wegen eines Verbrechens keine Strafe zugezogen hat) die österreichische Staatsbürgerschaft erwerben (§ 29). Aber die erstere Bestimmung entfiel mit der Freizügigkeit (1860) und die letztere durch polizeistaatliche Unduldsamkeit. Das Hofdekret vom 12. April 1833, JGS. Nr. 2597, hatte sie dahin verschärft, daß das Benehmen des Fremden überhaupt zu keinem Verdacht oder Beschwerde Anlaß geben dürfe, in diesem Falle aber seinen Anspruch aufrechterhalten, so daß namentlich seine Mittel-

[2]) Bekanntlich hieß in der offiziellen Terminologie die zisleithanische Hälfte der Monarchie: „die im Reichsrat vertretenen Königreiche und Länder". Der Ausdruck „Österreich" kam (abgesehen von der Bezeichnung des Gesamtstaates als „Österreich-Ungarn" oder vielmehr „österreichisch-ungarische Monarchie") nur in dem Terminus „österreichische Staatsbürgerschaft" und erst in der letzten Zeit, als Ungarn im internationalen Verkehr selbständig zeichnete, in Staatsverträgen u. dgl. m. als offizielle Bezeichnung der österreichischen Reichshälfte vor. Ofner selbst schrieb über diese Frage in einem hier nicht aufgenommenen Artikel „Das neue Österreich" („Der Morgen" vom 14. Mai 1915). (A. d. H.)

losigkeit nicht in Betracht kommen durfte (arg. § 30). Die Judikatur hat daraus ein ungebundenes Ermessen der politischen Behörde gemacht und so ist die Erwerbung des österreichischen Staatsbürgerrechtes derzeit wieder völlig ungeordnet.

8. Im Gesetzbuch ist die Rechtseinheit durch die §§ 10—11 sanktioniert. § 10, der von Gewohnheiten spricht, schlichtet unmittelbar die Beziehung zwischen Gewohnheits- und Gesetzesrecht. Aber die Gewohnheiten haben zugleich Provinzialrecht enthalten, und die Aufhebung ihrer Wirksamkeit hob zugleich Provinzialrecht auf. § 11 verfügt ausdrücklich: „Nur jenen Statuten einzelner Provinzen und Landesbezirke wird Gesetzeskraft zuerkannt, welche *nach* der Kundmachung dieses Gesetzbuches von dem Landesfürsten bestätigt werden." Das bisherige Provinzialrecht ist also abgeschafft mit dem Vorbehalt, die etwa in den besonderen Verhältnissen des Landes begründeten Normen, auch diese aber als *landesfürstliche* Gesetze gelten zu lassen ...

9. Nach josefinischen Grundsätzen ist der Landesfürst im Staat alleiniger Oberherr, jede andere Gewalt im Staate ist ihm untergeordnet. In gleicher Weise ist im ABGB. das Verhältnis zwischen landesfürstlichem Gesetz und anderen möglichen Rechtsquellen geregelt. Unmittelbare Quelle des Rechtes ist *nur* das Gesetz. „Der Inbegriff der Gesetze" — sagt § 1 —, „wodurch die Privatrechte und Pflichten der Einwohner des Staates unter sich bestimmt werden, macht das bürgerliche Recht in demselben aus." Gesetz und Recht wird somit als gleichbedeutend erklärt und dies in den §§ 10—13 erläutert. Sie tragen die Überschrift: „*Andere* Arten der Vorschriften." Solche sind: Gewohnheiten, Provinzialstatuten, richterliche Aussprüche und Privilegien. Für sie alle wird betont, daß sie *keine* selbständige Rechtsquelle sind. Auf Gewohnheiten muß sich, wenn auf sie Rücksicht genommen werden soll, ein *Gesetz* berufen. Statuten erhalten *Gesetzeskraft*, wenn sie vom Landesfürsten bestätigt werden. Verfügungen der Behörden und Urteile der Richter haben im Gegensatz zu dem Gutachten- und Präjudizienkult des Mittelalters nie die Kraft eines Gesetzes. Privilegien und Befreiungen stehen unter den Gesetzen.

Von besonderer Bedeutung ist die Stellung des Gesetzes zu den „Gewohnheiten". Sie bezeichnen das Gewohnheitsrecht, nicht die tatsächlichen, zur Auslegung des Parteiwillens verwendbaren Gebräuche. Sie waren, wie bemerkt, zugleich Quelle des Provinzialrechtes. Die Schätzung des Gewohnheitsrechtes ist aber auch ein gutes Merkzeichen, ob im Staate Absolutismus oder mehr volkstümliches System herrscht. Absolutistische Gewalt will das Gewohnheitsrecht nicht, weil es von ihr unabhängig ist. In den Digesten ist die Gewohnheit selbständige Rechtsquelle, welche ein Gesetz abändern kann, im Kodex ist diese Wirkung abgeschafft. Im englischen Common law hat Gewohnheit mit Gesetz die gleiche Macht, im Statute law nicht. Der § 10 ABGB. bekundet also die absolute Fürstengewalt.

Eine Bestimmung, welche dem Landesfürsten selbst für das kundgemachte Gesetz ein oberstes Aufsichtsrecht gab, ist im ABGB. abgeschwächt. Das josefinische Gesetz hatte dem Richter jede Auslegung des Gesetzes über den wahren und allgemeinen Verstand der Worte verboten: „Wenn dem Richter ein Zweifel vorfiele ..., wenn ihm das Gesetz dunkel schiene oder falls besondere und sehr erhebliche Bedenken der Beobachtung desselben entgegenstünden, so solle die Belehrung allezeit von uns gesucht werden" (§ 26 Jos. Ges.). Ebenso § 437 allg. GerO.: „Sollte über den Verstand des Gesetzes ein gegründeter Zweifel vorfallen, so wird solcher nach Hof anzuzeigen und die Entschließung hierüber einzuholen sein." Das ABGB. hat den Richter zwar strenge angewiesen, der Absicht des Gesetzgebers nachzugehen (§ 6). Doch gibt es ihm die Freiheit, „in der Anwendung stufenweise zur nämlichen Urquelle, von welcher der Gesetzgeber selbst bei der Abfassung des Gesetzes ausgegangen ist, zurückzukehren" (Ofner, Prot. I, S. 6; § 7 ABGB.).

Alle außerordentlichen Rechte hat aber auch nach dem ABGB. nur der Landesfürst oder der Gesetzgeber — die beiden Begriffe decken sich im ABGB. Ihm steht die authentische Auslegung eines Gesetzes zu (§ 8). Er kann im außerordentlichen Wege legitimieren (§ 162). Er kann bei Adoption Adel und Wappen gewähren (§ 182). Er erteilt die Einwilligung zur Errichtung eines Fideikommisses (§ 627).

10. Neben dem Landesfürsten gibt es keine Rechtsgewalt. *Nicht die Kirche.* Das privatrechtliche Gebiet, welches sie im Mittelalter beherrscht hatte, war das *Eherecht.* Noch der Codex Theresianus weist es zur Erkenntnis den geistlichen Gerichten zu (I, 3, Nr. 7, 43, 48, dann Harras., Cod. Th., Anm. 2 zu I, 3). Erst das Ehepatent Josefs II. vom 16. Jänner 1783, JGS. Nr. 117, löst den weltlichen

Vertrag vom Sakrament los, ordnet ihn selbständig und weist die Ehestreitigkeiten an die weltlichen Gerichte (vgl. die belehrende Anmerkung Harras. zu Horten I, 3). Dies bleibt seitdem. Auch nach dem ABGB. ist die Ehe ein bürgerliches Vertragsverhältnis (§ 44). Ihre Regelung wird von Staats wegen unter rein staatlicher Sanktion vorgenommen. Die Kirchengewalt ist ausgeschaltet. Die Verkündigung der Ehe muß wohl in der Pfarrkirche (§ 71) und die feierliche Erklärung der Einwilligung vor dem Seelsorger geschehen (§ 75). Der Seelsorger aber handelt hiebei als ein vom Staat mit einer staatlichen Handlung beauftragter Mann. Er ist zur Vornahme verpflichtet und kann für Versäumnis gestraft werden (§ 74). Wenn die Verlobten sich durch seine Weigerung gekränkt fühlen, können sie sich bei der Landesstelle oder dem Kreisamte beschweren (§ 79). Die Dispens von Ehehindernissen wird von der Landesstelle erteilt (§ 83). Die Verhandlung über die Ungültigkeit der Ehe steht dem Landrecht zu (§ 97). Ebenso hat das ordentliche Gericht über die Scheidung (§ 103) oder Trennung zu entscheiden, welch letztere allerdings bei Katholiken ausgeschlossen ist (§§ 111, 112, 134). — Auch sonst steht die Kirche unter allgemeinen Gesetzen. Die Kirchen gehören zu den Gemeinden und zu anderen erlaubten Körpern (§ 1472).

Gleich der Kirche sind die *sonstigen* Rechtsgewalten alter Zeit aufgehoben. Mit den Ständen beschäftigt sich das ABGB. überhaupt nicht. Die *Gemeinden* sind ihm rechtlich nichts anderes als erlaubte Gesellschaften (§ 26), wenn sie auch unter besonderer Vorsorge der öffentlichen Verwaltung stehen (§ 27). Sie selbst gehören nicht zur öffentlichen Verwaltung; sie sind Privatvereinigungen und ihr Vermögen ist Privatgut. „Die Sachen in dem Staatsgebiet — sagt § 286 — sind ein Staats- oder Privatgut. *Das letztere* gehört einzelnen oder moralischen Personen, kleineren Gesellschaften oder ganzen Gemeinden" (§ 286).

11. Der Landesfürst des josefinischen Staates hat damit allerdings schwere Pflichten übernommen, und erkennt dies an. „Jeder Untertan" — so beginnt das josefinische Gesetz — „erwartet von dem *Landesfürsten* Schutz und Sicherheit. Es ist also *die Pflicht* des Landesfürsten, die Rechte der Untertaneen deutlich zu bestimmen und ihre Handlungen so zu leiten, *wie es der allgemeine und besondere Wohlstand erfordert*". Im ABGB. ist der genannte Satz wohl nicht enthalten; das Gesetz geht aber von der gleichen Schutz-

pflicht des Staates aus. Es gedenkt ihrer auch in Fällen, wo es uns befremdet. Wie ist z. B. über § 2 des Gesetzes gespöttelt worden! Der Paragraph verfügt nichts anderes, als daß das kundgemachte Gesetz auch *gegen den gilt*, dem es nicht bekannt geworden ist. Aber — verletzt der Staat damit nicht seine Schutzpflicht gegen den Unkundigen? § 2 wehrt diesen Vorwurf ab: Der Unkundige kann sich nicht beklagen; es ist seine Schuld, daß er das Gesetz nicht kennt. Ebenso ist Handlungsfähigkeit für das ABGB. gleich Schutzbedürftigkeit. „*Personenrechte* aus der Eigenschaft des Alters oder mangelnden Verstandsgebrauches" sagt die Überschrift zu § 21, und der Paragraph selbst erklärt: „Diejenigen, welche wegen Mangels an Jahren, Gebrechen des Geistes oder anderer Verhältnisse wegen, ihre Angelegenheiten selbst gehörig zu besorgen unfähig sind, stehen unter dem besonderen *Schutz der Gesetze*."

Das Gericht des ABGB. spricht deshalb nicht bloß Recht zwischen streitenden Parteien, sondern ist zugleich seinem Wesen nach Schutz- und Aufsichtsbehörde. Insbesondere umfaßt das adelige Richteramt die Obervormundschaft, die Überwachung der Legitimation und Adoptionen, die Sorge für die ordnungsmäßige Gebarung bei Fideikommissen und Verlassenschaften. Das System des Einzelvormundes unter richterlicher Obervormundschaft wird heute angegriffen. Man versucht es, durch Generalvormundschaft autonomer Behörden (Leipziger System) oder freiwilliger, der amtlichen Kontrolle unterstehender Korporationen (Frankfurter System) zu ersetzen. Man versucht auch, den Familienrat, der sich in manchen Ländern, namentlich denen des französischen Rechtes, aus älterer Zeit erhalten hat, wieder einzuführen. Die Vor- und Nachteile dieser Einrichtungen, insbesondere der Überwachung durch administrative statt der richterlichen Behörden, zu besprechen, gehört nicht hieher. Die Ehrenhaftigkeit und der gute Wille der österreichischen Vormundschaftsrichter sind in der Bevölkerung allseitig anerkannt, und das System war jedenfalls zu seiner Zeit, in welcher nicht bloß arme Kinder verwahrlost, sondern auch vermögende durch ihre Verwandten als Vormünder ausgebeutet wurden, eine Rechtswohltat ersten Ranges.

Die sonstige Überwachungstätigkeit des Gerichtes hat geringeren sozialpolitischen Gehalt. Adoptionen und Legitimationen verlangen wegen der wichtigen Folgen, die sich an sie knüpfen, Genauigkeit. Bei der Verlassenschaftsabhandlung überwiegt die Sorge für die zu

zahlenden Staatsgebühren; doch befördert das Eingreifen des Gerichtes auch die Aufteilung der Erbschaft unter Gläubiger und Erben, tut kleine Streitigkeiten ab und schafft Ordnung im Grundbuch. Bei Fideikommissen wirkt als eine Art obervormundschaftlicher Tätigkeit die Sorge für die nachgeborenen Anwärter. Es wurde schon erwähnt, daß die Fürsorge der Gerichte in außergewöhnlichen Fällen durch die des Landesfürsten ergänzt wird . . .

IV. Die Menschenrechte im ABGB.

12. So viel — richtiger so wenig — über die Rechtsorganisation im ABGB., soweit sie das Gesetz zugleich sozial kennzeichnet. Den eigentlichen sozialen Charakter gibt ihm die in die bisherige ständische Ordnung eingreifende, sie zersetzende bürgerliche Gesellschaftsordnung und deren Kodex: das Naturrecht. Es erklärt gegenüber der ständischen Ordnung die Menschen als von Natur frei und einander gleich; es gestattet ihre freie Betätigung in der bürgerlichen Gesellschaft nur so weit zu beschränken, als es der gesellschaftliche Friede und Wohlstand verlangt. Das Josefinische Gesetzbuch erklärt: „Unter dem Schutze und nach der Leitung der Landesgesetze genießen alle Untertanen die vollkommene Freiheit." Martini gibt im zweiten Hauptstück des ersten Teiles geradezu einen kurzen Abriß des naturrechtlichen Glaubensbekenntnisses. Er spricht von den angeborenen, von dem Menschen untrennbaren Naturrechten, die in der bürgerlichen Gesellschaft nicht aufhören, und erklärt als solche: „das Recht, sein Leben zu erhalten und die dazu erforderlichen Mittel oder Sachen sich eigen zu machen, seine Geistes- und Leibeskräfte auszubilden und zu veredeln, sich und seine Sachen zu verteidigen, einen unbescholtenen Leumund zu behaupten und überhaupt mit dem, was ihm angehört, nach freier Willkür schalten und walten zu können." Ferner: „Verträge zu schließen und andurch Sachen, d. h. alles, was zu irgendeinem Gebrauch dienlich ist, zu erwerben oder einem anderen etwas zu übertragen." „In Ansehung dieser eben durchgeführten Naturrechte hört die ursprüngliche Gleichheit der Menschen auch im Kreise des gesellschaftlichen Bürgerlebens nicht auf" (Martini I, 2, §§ 1—4). Nahezu gleich lautet der Urentwurf (I, 2, §§ 28—31). Das ABGB. unterscheidet sich von ihnen durch gedrängtere Fassung, stimmt aber im Gedankengang überein. *Es enthält in seinen §§ 16—39 eine kurze Erklärung der*

Menschenrechte. Es ist darin großzügiger als das Staatsgrundgesetz vom 21. Dezember 1867, das nur von den allgemeinen Rechten der „Staatsbürger" spricht, die Fremden ausschließt und ihnen dadurch das Recht nimmt, gegen Überschreitungen der administrativen Behörden die Hilfe des Reichsgerichtes anzurufen. Das ABGB. umfaßt auch die Fremden.

Als allgemeine Menschenrechte werden erklärt:

I. „Jeder Mensch hat angeborene, schon durch die Vernunft einleuchtende Rechte und ist daher als eine Person zu betrachten. Sklaverei oder Leibeigenschaft und die Ausübung einer darauf sich beziehenden Macht wird in diesen Ländern nicht gestattet" (§ 16).

II. „Was den angeborenen, natürlichen Rechten angemessen ist, dieses wird so lange als bestehend angenommen, als die gesetzmäßige Beschränkung dieser Rechte nicht bewiesen wird" (§ 17).

III. „Jedermann ist unter den von den Gesetzen vorgeschriebenen Bedingungen fähig, Rechte zu erwerben. Diejenigen, welche wegen Mangels an Jahren, Gebrechen des Geistes oder anderer Verhältnisse wegen ihre Angelegenheiten selbst gehörig zu besorgen unfähig sind, stehen unter dem besonderen Schutz der Gesetze" (§§ 18, 21).

IV. „Jedem, der sich in seinem Rechte gekränkt zu sein erachtet, steht es frei, seine Beschwerde vor der durch die Gesetze bestimmten Behörde anzubringen" (§ 19).

V. „Den vollen Genuß der bürgerlichen Rechte erwirbt man durch die Staatsbürgerschaft. Den Fremden kommen überhaupt gleiche bürgerliche Rechte und Verbindlichkeiten mit den Eingeborenen zu, wenn nicht zu dem Genusse dieser Rechte ausdrücklich die Eigenschaft eines Staatsbürgers erfordert wird (und der Staat, dem sie angehören, die hierländischen Staatsbürger in Rücksicht des Rechtes, wovon die Frage ist, ebenfalls wie die seinigen behandelt)" (§§ 28, 33).

VI. „Die Verschiedenheit der Religion hat auf die Privatrechte keinen Einfluß, außer insoferne dieses bei einigen Gegenständen durch die Gesetze insbesondere angeordnet wird" (§ 39).

Von diesen allgemeinen Menschenrechten sind allerdings nur die in den §§ 16 und 19 bestimmten absolut, die anderen sind bloße „Regel". Aber die Art, wie das ABGB. die Regel faßt, seine Forderung entgegenstehender *Gesetze*, um Ausnahmen zu begründen, schließt jedenfalls das Ermessen des Richters und die Berufung auf

Gewohnheiten aus; nach der Sinneslage seiner Verfasser bedeutet die aufgestellte Regel auch den Entschluß, Ausnahmen nur zuzulassen, wenn wichtige Ursachen vorlägen.

13. Die Erklärung der Menschenrechte im ABGB. bietet ein merkwürdiges Beispiel von dem sozialen Gehalt *allgemeiner*, scheinbar rein spekulativer Bestimmungen, die in einem Gesetz enthalten sind. Noch Horten sprach in I, 2, § 1, von der „in unseren Erblanden verschiedentlich eingeführten Untertänigkeit", „nachdem die Untertanen ihren Herrschaften in Ansehung ihrer Personen und Gründe verbunden sind". Dann erging das Patent vom 1. November 1781, mit dem Josef II. die Leibeigenschaft aufhob, und verfügte, daß „außer den auf den untertänigen Gründen haftenden Robotten, Natural- und Geldprästationen den Untertanen ein Mehreres nicht auferlegt werden dürfe".

Der Satz Hortens entfiel deshalb schon im Josefinischen Gesetzbuch und bei der Beratung über die §§ 28—33 UE. erklärt Sonnenfels (Ofner, Prot. I, S. 38): „Er habe zum Teile in Hinsicht der Notwendigkeit, zum Teile aber auch, um der österreichischen Gesetzgebung einen Vorzug vor der so gerühmten preußischen zu verschaffen, bei der Rew. H. K. den Antrag gemacht, in das Gesetzbuch die Vorschrift aufzunehmen: daß bei den österreichischen Staaten keine Leibeigenschaft bestehe und ebenso auch niemand grundfest oder an die Scholle als ein Zugehörstück des Grundes gebunden sei; und er habe dafür gehalten, daß gegen eine solche Vorschrift um so weniger ein Anstand obwalten dürfte, da hiedurch zwar ausdrücklich, aber doch nur dasjenige ausgesagt werden würde, was ohnehin schon gegenwärtig gesetzlich bestehet."

Er und Haan setzen sich auch lebhaft für „die allgemeinsten Bestimmungen über die Rechte und Pflichten der Bürger im Staate", den sogenannten status naturalis ein, und so entsteht § 16 ABGB. Der Paragraph ist also nicht etwa eine theoretische Redensart, er bekundet eine soziale Befreiungstat.

Ähnliches gilt von allen Vorschriften der §§ 16—39 ABGB. Sie sind zugleich sämtlich wirksame Gegenwartsgesetze, keine bloßen Maximen, keine Verheißungs- oder Zukunftsgesetze, wie es manche im Staatsgrundgesetz vom 21. Dezember 1867 sind. § 17 hebt unmittelbar alle, nicht gesetzmäßigen Beschränkungen der natürlichen Gleichheit auf und damit die Grundlage der ständischen Ordnung,

welche prinzipiell nur Angehörige bestimmter Stände sowie deren Rechte und Verbindlichkeiten kannte (Eichhorn, § 47 ff.).

Ebenso erhellt die Bedeutung des § 18, wenn man Horten vergleicht: „Allein in diesen letzteren Ländern mag ihnen weder das Eigentum, noch der rechtliche Besitz mittels Einverleibung des an sich gebrachten Gutes in die Landtafel zu Teile werden, insolange sie nicht die *Landmannschaft*, oder wo es üblich ist, von uns eine besondere *Besitzfreiheit* erworben haben" (I, 2, § 4). „Was wir von landschaftlichen Gütern und Rechten vorgeschrieben haben, ist im gleichen Maß auch von *bürgerlichen* Gründen und den ihnen anklebenden Rechten zu verstehen; es wäre denn, daß die Landesverfassung ein anderes vermag" (I, 2, § 9). Josef II. hob dann die meisten ständischen Rechte, namentlich die Agnatenrechte und die zahlreichen Einstandsrechte von Angehörigen, Nachbarn, Landmännern, Miteigentümern u. a. auf, und Martini erwähnt die Beschränkung nicht mehr. Man mag aber bei Harrasowsky (zu Martini I, 2, § 29, Anm. 18) nachlesen, welchen Widerstand die Neuerung, namentlich die Aufhebung der Einstandsrechte, hervorrief, die endlich in § 1141 ABGB. ausklang. Auch § 18 enthält also keinen Lehrsatz, sondern bezeugt vielmehr eine soziale Wandlung.

Ebenso ist § 19 kein bloßer Lehrsatz, erhält vielmehr seine Erläuterung durch § 20 (Rechtsgeschäfte und Privateigentum des Staatsoberhauptes) sowie durch die josefinische Regelung der Streitigkeiten zwischen den Grundobrigkeiten und ihren Untertanen. Er unterwirft alle ohne Unterschied des Standes „der durch die Gesetze bestimmten Behörde". Das gleiche gilt von den §§ 28, 33 und 39.

14. Die *Ausnahmen*, die das ABGB. selbst von den natürlichen Rechten der Menschen anführt, betreffen:

a) das *Untertänigkeitsverhältnis*. Es wird im § 1146 anerkannt und für seine besonderen Verhältnisse auf die Verfassung jeder Provinz und die politischen Vorschriften verwiesen. Das Erbpacht- und Erbzinsrecht selbst wird im Gesetz, wie schon erwähnt, als reines Privatrecht, durch Vertrag jederzeit errichtbar (§ 1122) behandelt. Nur einzelne Verweisungen auf Provinzialgesetz, Landesverfassung oder politische Verordnung (§§ 1132, 1142, 1149), und einzelne Verfügungen von ausgesprochen öffentlich-rechtlichem Charakter (§§ 1140, 1142, 1145, 1149) beweisen ihren organischen Zusammenhang mit der Untertänigkeit. Das besondere Erbrecht für

Bauerngüter (§ 761) hängt teils mit ihr, teils mit wirtschaftlichen Erwägungen zusammen, die sich in neuerer Zeit wieder geltend machen.

b) Von der Fähigkeit, Rechte zu erwerben, sind in § 539 für geistliche Gemeinden und ihre Mitglieder, in § 544 für unbefugte Auswanderer und Deserteure, in § 868 für Verbrecher Ausnahmen angedeutet, aber auf andere Vorschriften verwiesen.

c) Die Verschiedenheit der *Religion* kommt im Gesetze selbst in einzelnen Ausnahmen zugunsten der *katholischen* Religion zum Ausdruck. Zu ihnen gehört *nicht* die Behandlung des Eherechtes für Katholiken mit Rücksicht auf die Vorschriften des kanonischen Rechtes. Denn das ABGB. ist in seinem Eherecht tolerant, aber konfessionell. Es richtet sich ebenso „nach den Religionsbegriffen" (Worte des § 115) der nichtkatholischen Christen und der Juden. Auch die Bestimmung des § 71, der das Aufgebot der Ehen zwischen Nichtkatholiken auch in der katholischen Kirche vorschreibt, hat mehr den Zweck, die Ehe kundbar zu machen (Zeiller, Nr. 2 zu § 71). Aber zweifellos ist eine Bevorzugung in § 77 enthalten: wenn eine katholische und eine nichtkatholische Person sich verehelichen, muß die Einwilligung vor dem katholischen Pfarrer erklärt werden, während der nichtkatholische Seelsorger hiebei nur erscheinen kann.

Ebenso in § 111, Abs. 2, der das Band der Ehe für unauflöslich erklärt, wenn nur *ein* Teil, und nur zur Zeit der geschlossenen Ehe, der katholischen Religion zugetan *war,* selbst wenn beide Teile, da sie die Ehe trennen wollen, Nichtkatholiken sind. Bei der Beratung wird offen erklärt, daß die Vorschrift zugunsten der katholischen Religion getroffen werde: „eine solche Duldung könne wohl gar zum Abfalle von der Religion bestimmen" (Ofner, Prot. I, S. 124, zu § 102).

Eine Bevorzugung des *Christentums* liegt in § 593, der dem Nichtchristen die Fähigkeit abspricht, den letzten Willen eines Christen zu bezeugen, und in § 768, 1, der als Enterbungsgrund erklärt, wenn das Kind vom Christentume abfällt. Eine ausnahmsweise Härte wäre auch in § 129 gelegen, wenn er bedeuten sollte, daß Ungesetzlichkeiten, die eine Ehe zwischen Christen in ihrer Gültigkeit nicht beirren (§ 74), die Judenehe ungültig machen. Doch haben die Verfasser des ABGB. eine solche Unterscheidung nicht beabsichtigt, sonst hätte Zeiller in seinem Kommentar nicht die

einfache Erläuterung geben können: „Daraus kann man sich die hier nachfolgenden Abweichungen leicht selbst erklären."

Mit diesen im Gesetze selbst enthaltenen Ausnahmen ist allerdings die Zahl derselben bei weitem nicht abgeschlossen. Landesverfassungen und politische Verordnungen schränken vielmehr die Rechtsgleichheit vielfach in schroffem Maße ein. Erst das Staatsgrundgesetz vom 21. Dezember 1867 und seine Ausführungsgesetze verwirklichten manchen Grundsatz des ABGB., während mancher andere noch immer seiner Verwirklichung harrt. Aber die Erklärung der Menschenrechte im ABGB. war doch schon von wichtigen Folgesätzen begleitet und ehrt die Verfasser des Gesetzbuches in der letzten Periode um so mehr, als sie den Auftrag erhalten hatten, das josefinische Gesetz zu revidieren, und sich rückhaltlos zu seinen Grundsätzen bekannten.

15. Von den genannten Ausnahmen abgesehen, leitet das ABGB. Beschränkungen der Rechts- und Handlungsfähigkeit, wie erwähnt, nur aus einem besonderen Schutzbedürfnis ab. Sie ist ihm eine der betreffenden Person erteilte Rechtswohltat (§ 21). Zu den Schutzbedürftigen gehören Gemeinden (§ 21), aber nicht andere juristische, oder, wie das ABGB. sie nennt, moralische Personen. Diese sind für das Gesetz nichts anderes als „Gesellschaften" und haben, wenn sie nicht unerlaubt sind, „in der Regel gleiche Rechte mit den einzelnen Personen" (§ 26). Eine besondere Anerkennung ihrer Persönlichkeit wird im Gesetz nicht gefordert. Unter den Schutzbedürftigen fehlen die im gemeinen Recht als schutzbedürftig erklärten Bevölkerungsgruppen: die mulieres milites agricultores vel alias simplicitate gaudentes. Sie sind von Gesetzes wegen als mündig erklärt.

Insbesondere gilt dies für die Frauen. Noch Martini hatte von Rechtswohltaten gesprochen, „die einer Gattung von Bürgern als *dem weiblichen Geschlechte* oder den Minderjährigen durch das Gesetz überhaupt zugestanden sind" (I, 2, § 24).

Aber schon bei der Beratung seines Entwurfes wurden die Beschränkungen für die Bürgschaftsfähigkeit der Frau aufgehoben (III, 15, § 15 und Anm. 2) und im ABGB. hat das Geschlecht nahezu keine Bedeutung. Die Frau hat volle Handlungsfähigkeit und Verfügungsgewalt über ihr Eigentum. Die Mundschaft des Ehemannes ist entfallen. Im Ehegüterrecht besteht das reine Dotalsystem. Nur wenige Reste des alten Minderrechtes sind geblieben. Zu ihnen ge-

hört die regelmäßige Nichtberufung der Frau zur Vormundschaft und Kuratel (§§ 192, 281); die obligatorische Beigabe eines Mitvormundes, wenn die Mutter oder Großmutter die Vormundschaft übernimmt (§ 211); die Unfähigkeit der Frauen, Zeugen bei nicht begünstigten letzten Anordnungen zu sein (§ 591). Auch die besonderen Rechte des Ehemannes (§ 91) und des Vaters (§§ 142, 147—153) sowie die Vermutung, daß der Erwerb vom Manne herrühre (§ 1237), können hieher gezählt werden. Aber das Gesetz verfügt auch, daß nur der Mann verpflichtet ist, der Gattin den anständigen Unterhalt zu verschaffen, nicht die Frau dem Manne, auch wenn sie der reiche Teil ist. Das weist darauf hin, daß das Gesetz bei seinen wirtschaftlichen Bestimmungen nicht sowohl die Frau zurücksetzen wollte, als vielmehr von der Auffassung und den Zuständen seiner Zeit ausging, in welcher die Frau tatsächlich vom Erwerb ausgeschlossen und ihre Fähigkeit, sich im wirtschaftlichen Leben auszukennen, behindert war. Für den Anteil der guten Haushaltung an dem Reinerwerb der Familie hatte das Gesetz allerdings keinen Sinn. Immerhin war das ABGB. in der Behandlung der Frau seiner Zeit voraus und die Praxis des § 192 ist engherziger als das Gesetz.

V. Aus dem Familienrecht des ABGB.

16. Bei einer anderen Gruppe der sozial Zurückgesetzten hat das ABGB. gegenüber dem josefinischen Gesetz einen Schritt nach rückwärts getan. *Es sind die Unehelichen.* Wir treten hier in das Familienrecht des ABGB. ein, zu dem wohl schon das Recht der Frau als Gattin und Mutter gehörte. Der Uneheliche war im Mittelalter ehrlos, ausgeschlossen nicht bloß von allen öffentlichen Ämtern, sondern von jedem ehrenhaften Gewerbe, von Innung und Zunft. Aber auch privatrechtlich war seine Rechtsfähigkeit beschränkt. In Tirol z. B. hatten Uneheliche kein Recht, zu testieren (Harras. zu Horten I, 4, Anm. 4). Selbst den legitimierten Kindern blieb der Makel (Harras., Cod. Ther. I, 5, Anm. 4). Die familienrechtlichen Ansprüche des Unehelichen waren äußerst gering. Noch der Codex Theresianus hatte verfügt, daß die Verwandtschaft aus unehelicher Erzeugung außer der Verbindlichkeit der natürlichen Eltern zum Unterhalt solcher Kinder keine Wirkung hat (I, 4, Nr. 4), und daß uneheliche Kinder von der rechtlichen Erbfolge sowohl nach ihrem

natürlichen Vater als nach der natürlichen Mutter gänzlich ausgeschlossen sind (II, 20, Nr. 79). Sogar für testamentarische Verfügungen zugunsten ihres unehelichen Kindes sind die Eltern auf ein Sechstel, bzw. ein Zehntel der Verlassenschaft beschränkt (II, 12, Nr. 24, II, 20, Nr. 79). Die Schuldigkeit des Unterhaltes trifft nur die Eltern des unehelichen Kindes, nicht ihre Aufsteigende, welchen durch das Vorgehen ihres Kindes keine Last und Bürde zugezogen werden kann (II, 20, Nr. 81).

Auf diesem Standpunkt (mit Ausnahme des Verhältnisses zur Mutter) steht persönlich noch Horten (Harras. zu Horten, I, 4, Anm. 13). Josef II. hat auch auf diesem Gebiete Bahn gebrochen. Die Worte, mit denen er die Bande der Unehelichen löst, sind im ersten Satz des § 162 ABGB. aufbewahrt. Seine Entschließung vom 15. Juli 1783 hebt die öffentlich-rechtlichen Beschränkungen für sie auf, sein Gesetzbuch (I, 4, §§ 11—17) gibt ihnen auch ein Stück Familienrecht. Der Vater, der sein uneheliches Kind unterhält, hat die väterliche Gewalt (§ 12). Das Kind hat das Unterhaltungsrecht auch gegen die Erben der Eltern (§ 14). Insbesondere sind aber uneheliche Kinder zweier unverheirateter Personen und Kinder aus ungültiger Ehe, deren Ehehindernis behoben werden kann, den ehelichen gleichgehalten, sowohl von der väterlichen als auch von der mütterlichen Seite. Sie verlieren, auch wenn eines der Eltern sich mit einer dritten Person verehelicht, die Rechte der Ehelichkeit nur dann, wenn die Gerichtsstelle zwischen den Eltern betreffs der Kinder ein gütliches Abkommen getroffen hat; sonst bleiben ihnen die Gerechtsame vorbehalten (§§ 16—17).

Diese Bestimmungen Josefs II. finden aber bei der Geistlichkeit und bei den Ständen einen heftigen Widerstand und werden sofort nach dem Tode Josefs II. im Gesetz vom 22. Februar 1791, JBG. 115, aufgehoben. Die Entwürfe werden konservativer. Martini wiederholt noch: „Desto mehr aber muß der Staat ihre angeborenen Rechte schützen und verteidigen" (I, 4, § 24). Aber seine Verfügungen sind bereits dieselben, die auch das ABGB. trifft. Bestehen bleibt, daß „die uneheliche Geburt dem Kinde an seiner bürgerlichen Achtung und an seinem Fortkommen keinen Abbruch tun kann" (§ 162). Aber das uneheliche Kind tritt nicht in die Familie, weder in die des Vaters, noch auch in die der Mutter (§ 165). Der Vater selbst steht ihm so wenig nahe, daß es stets

einen Vormund erhält (§ 166), wenn auch das Gesetz den Vater mit Rücksicht auf seine natürliche Stellung verpflichtet, die Erziehung des Kindes zu überwachen (§§ 168—170). Verwandt ist das Kind nur mit seiner Mutter (§§ 165, 754, 786). Aber auch auf ihren Adel und auf ihre anderen Standesvorzüge hat es keinen Anspruch und führt den Geschlechtsnamen der Mutter (§ 165), das heißt ihren Namen zur Zeit des ledigen Standes. So kommt es, daß das uneheliche Kind einer geschiedenen oder getrennten Frau selbst einen anderen Namen als seine Mutter hat.

17. An das Recht des unehelichen Kindes reiht sich die Rechtsstellung der *unehelichen Frau und Mutter* gegenüber dem Mann und Vater an.

Sie ist im ABGB. völlig schutzlos gelassen. Wenn nicht das Strafgesetz eintritt, hat nur die *Verführte* einen Anspruch. Auch sie ist aber für das Gesetz eine „Weibsperson", welches Wort sonst durch ein für feiner gehaltenes („Frauensperson") ersetzt ist — und auch sie kann nur die Kosten der Entbindung und des Wochenbettes verlangen (§ 1328). Anders hatten die Vorentwürfe des ABGB. geurteilt. „Der eine ledige Weibsperson mit ihrem Willen schwängert" — sagt der Codex Theresianus (III, 2, Nr. 90) —, „ist schuldig, entweder sie zu ehelichen oder ihr ein durch richterlichen Befund abgemessenes Heiratsgut abzureichen." So auch Horten (III, 22, § 47). Noch Martini hatte ursprünglich die Bestimmung: „Der eine ledige Weibsperson zu Falle bringt, habe . . . . der geschwächten Mutter, wenn sie doch in einem unbescholtenen Rufe steht, eine ihrem Stande angemessene Ausstattung zu verschaffen, außer, wenn der Vater selbst sie auf eine anständige Art ehelichen wollte und könnte" (III, 13, § 37, Anm. 7). Der Satz wurde aber gestrichen und auch die Verfasser des ABGB. stimmten dem Verlangen einer starken Minorität, „der verführten und geschwängerten Frauensperson eine Vergütung für die nach ihrem Falle nun meistens verlorene Hoffnung einer anderen Verbindung, eine Genugtuung für den ihrer Ehre, ihrem guten Rufe angehängten Makel" zu gewähren, in ihrer Mehrheit nicht zu. „Das Mädchen" — meint der Präsident — „betrauert zwar ihr voreiliges Vertrauen . . . . ., allein sie will auch keine weitere Vergütung, als die Erreichung jenes als Beweggrund angestellten Zweckes, die Ehe" (Ofner, Prot. II, S. 195). Eine scheinheilige Begründung, welche man bei dem

Sprecher sonst nicht findet. Die Abwehr schwerer wirtschaftlicher Folgen einer Schwängerung für den Mann hing vielleicht (vgl. Zeiller, Kommentar zu § 1328) mit der Stellung der Gesetzesverfasser zu dem *Ehegelöbnis* zusammen. Das Ehegelöbnis hatte im kanonischen Recht nahezu bindende Kraft. Josef II. hielt dies für eine Beeinträchtigung der Ehefreiheit, wozu er durch die Gewohnheiten der Stände Grund hatte, und sprach dem Ehegelöbnisse jede Rechtsverbindlichkeit ab (I, 2, § 1). Nach seinem Tode wurde die Frage wieder aufgenommen und namentlich über den Fall der Schwängerung viel gesprochen (Harras. zu Horten I, 3, Anm.). Den Abschluß bilden die §§ 46 und 1328 ABGB.

Das *Eherecht* des ABGB. ist in seiner Besonderheit schon gekennzeichnet worden. Es ist eine eigenartige Mischung von Vertrags- und religiös beeinflußtem Sonderrecht. Der Abschluß wird nach den allgemeinen Vertragsgrundsätzen behandelt, aber strenger. Namentlich werden Irrtümer der Ehegatten über wesentliche Eigenschaften des anderen als gleichgültig erklärt — gegen die Bedenken einer großen Minorität, von welcher namentlich Sonnenfels eine verheimlichte, Abscheu erweckende Krankheit und eine entehrende öffentliche Strafe als Nichtigkeitsgründe erklären wollte (Ofner, Prot. I, S. 75, 79, 91 ff.). Die geschlossene Ehe wird durch ein genaues und, soweit es den Religionsbegriffen entspricht, der Aufrechterhaltung der Ehe günstiges Verfahren behütet (§§ 99, 101, 112, 115). Bei den vermögensrechtlichen Verträgen zwischen den Gatten (Ehepakten) wird auf gewohnte Abreden Rücksicht genommen und ihnen gemäß einige Regeln und Vermutungen aufgestellt; sie sind aber sonst nach allgemeinen Grundsätzen geordnet (§§ 1246, 1251).

Der *Umfang der Familie* ist im ABGB. noch in ständischer Weise bestimmt. Die bürgerliche Familie, welche den Ehegatten einschließt und die Sippe in der Seitenlinie regelmäßig nur bis zum Geschwisterkind umfaßt (vgl. die Bedenklichkeitsgründe für Richter), besteht bei ihm noch nicht. Doch ist das gesetzliche Erbfolgerecht der Sippe auf sechs Linien eingeschränkt (§ 751). Der hinterlassene Ehegatte erhält wohl gegen das Testament kein Pflichtteil, aber doch anständigen Unterhalt (§ 796) und erweitertes gesetzliches Erbrecht (§§ 757—759).

Das Haupt der Familie ist der Mann (§ 91). Aber seine Mundschaft über die Frau ist auf vermutete Vollmacht einge-

schränkt (§ 1238), und auch seine Mundschaft über die Kinder ist wenig mehr als normale Vormundschaft (§§ 148, 149, 152). Seine Vermögensverwaltung, die Pflicht der Eltern zur Pflege und Erziehung der Kinder, die Adoption, die Bestellung eines Vormundes oder Pflegers, sind unter Obhut des Gerichtes gestellt (§§ 52, 178, 181, 190). Die Über- und Unterordnung in der Familie ist also fast rein sittlich geworden; rechtlich ist das einzelne Familienmitglied beinahe frei, unter dem Schutze des Gerichtes.

VI. Aus dem Vermögensrecht des ABGB.

18. Freiheit ist aber insbesondere das Schibolet des Naturrechtes und auch des ABGB. für die Regelung der Besitz- und Verkehrsverhältnisse, für *das Vermögensrecht*. Niemand soll in seiner Betätigung mehr beschränkt werden, als es die öffentliche Ordnung und Wohlfahrt nötig macht. Alle sonstigen Einengungen eines Menschen in der Freiheit, über sein Eigentum zu verfügen und Verträge zu schließen, haben zu entfallen. Der Grundsatz wird derzeit als Manchestertum mit Recht angegriffen. Es gibt dem wirtschaftlich Starken unbegrenzte Übermacht, die den anderen leicht zu einem sogenannt *freien* Vertrag zwingen kann. Aber — wie schon zu Anfang hervorgehoben wurde — zur Zeit des ABGB. war das Eintreten für freies Eigentum und freien Vertrag sozialreformatorisch im besten Sinne. Noch jetzt ist bekanntlich, in Erinnerung an die alte Willkürherrschaft, die Freiheit des Eigentums in die Grundrechte der Staatsbürger aufgenommen (Art. 5). Die Mitte des 18. Jahrhunderts fand die ganze arbeitende Bevölkerung in den Banden der Untertänigkeit, der Zünftlerei und einer engherzigen Kirchturmpolitik. Jede Stadt, jeder Marktflecken hatte Monopolrechte für Gewerbe und Handel in seinem Gebiet. Das Merkantilsystem mit seinem internationalen Zug, seinem Verlangen nach großem Verkehr und freiem Spiel der Kräfte, war deshalb eine wirtschaftliche Erlösung. Die Entwicklung in unserem Maschinenzeitalter, die durch mancherlei gesellschaftliche und technische Gründe das Unternehmertum auf eine kleine Zahl Menschen konzentrierte, diese zu Herren von tausenden Arbeitern und Millionen Geldes macht und dadurch bei gewissen Verträgen die ungebundene Freiheit verhängnisvoll werden läßt: verkümmert nicht das Verdienst der naturrechtlichen Gesetzgebung, welche die Ketten brach, die Vor-

recht und Vorurteil um Arbeit, Unternehmungskraft und Verkehr geschlungen hatten.

Im ABGB. sind aus dieser doppelten Grundlage, dem Befreiungsgedanken und dem Merkantilsystem, zwei Grundsätze hervorgegangen:

a) der Grundsatz der wirtschaftlichen Freiheit,

b) der Grundsatz des geschützten Verkehrs . . . [3])

Neben dem Verkehrsschutz beginnt im ABGB. auch der Schutz der *Arbeit*. Freilich nur rudimentär. Der redliche Besitzer erhält pro cultura et cura die Früchte schon mit der Absonderung oder Fälligkeit (§ 330); ebenso der Fruchtnießer (§ 519). Bei der Verarbeitung (§ 415) wird die Arbeit dem Stoff als Wertträger gleichgestellt (vgl. Zeiller, Komm., Nr. 4: „Vereinigung der Materie und Form"), bei dem Bau berücksichtigt (§ 418, Schlußsatz). Wer aus Irrtum eine nicht schuldige Handlung geleistet hat, kann einen angemessenen Lohn verlangen (§ 1431). Das gleiche gilt für die Verwendung einer „Sache" zum Nutzen des anderen (§ 1041—1042). Die Sache kann körperlich oder unkörperlich, sie kann auch Arbeit sein. Zeiller nennt als Beispiele ärztliche Hilfe und Fortsetzung eines angefangenen Baues. Eine Anerkennung der bürgerlichen, d. h. entgeltlichen Arbeit liegt darin, daß das Erfordernis der Unentgeltlichkeit bei Mandat und Deposit aufgelassen ist (vgl. Cicero, de off. I, 42: merces auctoramentum servitutis). Die Rechtsgedanken, die aus dem modernen Industrie- und Welthandelssystem fließen, sind allerdings dem ABGB. noch fremd. Es lebt noch in der Epoche des Kleingewerbes und Kleinhandels. Doch reichen Verlags- und Versicherungsvertrag, welche das ABGB. regelt, schon in die neue Zeit hinein.

Die naturrechtliche Auffassung hat im Gesetze noch mancherlei anderes, Positives und Negatives bewirkt. Der Vorzug, der dem entgeltlichen Erwerb vor dem unentgeltlichen gegeben wird (§ 373), ist bürgerlich. Im Schadenersatzrecht herrscht (gegenüber Anfängen des Kausalprinzips in den Vorentwürfen) das Verschuldensprinzip, es ist aber in § 1310 zugunsten einer neuen Idee, der wirtschaftlichen Ausgleichung, durchbrochen. Der Unterschied zwischen mehr und minder mächtigem Gläubiger bei der Zession ist beseitigt. Der Verjährung werden mit Ausnahme der regalia majora auch Rechte aus

[3]) Hier sind einige Abschnitte weggelassen. (A. d. H.)

öffentlichen Verhältnissen, z. B. jährliche Abgaben (§ 1480), unterworfen u. a. m. Aber um den sozialen Charakter des Gesetzes festzustellen, ist ein weiteres Detail nicht nötig. Die Eigenart eines Gesetzes ist nicht aus der Masse seiner Verfügungen zu entnehmen, die Masse wird durch die Tradition und Theorie der Zeit bestimmt. Es war selbstverständlich, daß das ABGB. sie dem Pandektenrecht in der Art, wie es zu seiner Zeit aufgefaßt wurde, entnahm. Immer sind es nur einzelne große Züge, neue Gesichtspunkte und Prinzipien, an denen man das Gesetz als Individuum messen kann. Auch von diesen konnte ich für das ABGB. nur die wichtigsten herausgreifen. Aber sie geben doch schon ein Bild, wie das Gesetz sich zu den gesellschaftlichen Strömungen seiner Zeit verhielt. Es steht inmitten der großzügigen theresianisch-josefinischen Epoche und der beginnenden Reaktion gegen sie und gegen das Naturrecht. Es neigt bereits der Reaktion zu, behält aber doch im Wesen noch die josefinischen Ideen bei. *Es ist abgeschwächter, in seinen letzten Folgerungen zurückgebildeter Josefinismus.*

In dieser Zwischenstellung berührt sich das Gesetz mit den fast gleichzeitig auftretenden Begründern der dem Naturrecht abgewandten historischen Rechtsschule, die doch selbst in ihren Hauptwerken Naturrechtler sind: Savigny in seiner Lehre von der Entstehung des Rechtes, in seiner Lehre vom Besitz, die längst als unrömisch erkannt ist, und vom internationalen Recht; Puchta in seiner Lehre vom Gewohnheitsrecht als Ausdruck der Volksüberzeugung.

Das ABGB. hat mit diesen Männern noch eine andere Ähnlichkeit. Savigny und Puchta hatten den Blick des Juristen von abstrakten Begriffen auf das pulsierende Volksleben gewiesen, eine Idee, welche, richtig erfaßt und weitergeführt, im besten Sinne modern ist. Die reaktionäre Epoche, die ihnen folgte, hat aus ihren Jüngern antikisierende Historiker gemacht. Das ABGB. hatte ein noch schlimmeres Geschick. Nach ihm kam ein völliger Stillstand des öffentlichen und mit ihm des juristischen Lebens in Österreich. Während es selbst von großen reformatorischen Ideen getragen war und für deren Ausbau auf den Verstand und die natürlichen Rechtsgrundsätze der Richter zählte, wurde es durch eine geistlose Buchstabenauslegung ein halbes Jahrhundert lang zu einem unfruchtbaren Paragraphenhaufen herabgedrückt. Erst das verjüngte Rechtsdenken der neuen Zeit hat ihm seine Ehre wiedergebracht.

JOSEF UNGER

Geboren am 21. Juli 1828 in Wien, † am 30. April 1913 in Wien

Ein reicher und starker Geist ist geschieden. Unger war ein Jurist ersten Ranges. Er war Politiker, Minister, Präsident des Reichsgerichtes, in allen diesen Stellungen angesehen und tüchtig. Er war ein begabter Musiker, in der Literatur belesen und ein gesuchter Mann der Gesellschaft. Aber er war mehr als all das, er war eine Persönlichkeit. Seine feinste Gabe bestand darin, einem Gedanken den schärfsten Ausdruck zu geben. Seine Worte waren berühmt, sie gingen leicht und rasch von seinen Lippen und trafen stets, ihre spitzen Stacheln drangen ins Fleisch. „Österreich ist ein Rätsel", sagte er einmal, „wer löst es auf? Seine Regierung!" — „Früh krümmt sich, wer ein Kriecher werden will." — „Er geht wie Cincinnatus auf das Land", erzählte er von einem Minister, der wegging, „aber *vor* den Pflug."

Sein Witz war ihm aber niemals Zweck; er sollte nur den Gedanken scharf ausdrücken und schuf ihm prächtige Worte. „Es gibt keine trockene Wissenschaft, es gibt nur trockene Gelehrsamkeit." — „Ich bin 1828 geboren", erzählt er biographisch, „das Licht der Welt habe ich 1848 erblickt."

Das Jahr 1848 gab ihm die Weihe für sein ganzes Leben. Er war kein Stürmer und Dränger, dazu war seine geistige Konstitution zu fein geartet. Als seine ersten Arbeiten erschienen — er war wenig über 20 Jahre alt —, vermutete man hinter ihnen einen gereiften Mann. Aber die Wärme des Jahres 1848 war in ihm und ihr dankte er es wohl, daß sich sein von Anfang an so gereiftes Denken bis ins höchste Alter jung, frisch und empfänglich erhielt.

Seine Lorbeeren pflückte Unger auf dem Gebiete des Rechtes. Hier ist er unsterblich, ein repräsentativer Mann. Man ist bei dem Auftreten eines großen Menschen immer wieder geneigt, der Frage nachzugehen, wie sich Zeit und Person, Masse und Individuum zueinander verhalten. Unnütze Frage! Gewiß, der große Mensch muß in seiner Zeit ein Echo finden, sonst geht er verloren, und erst

spätere Zeiten mögen sein Gedenken ausgraben. Ebenso sicher wecken sozial erregte Zeiten die Geisteskräfte. Es ist, als wenn in Frühlingswochen die Luft sonnendurchglüht ist; alles blüht und treibt in seiner Art, aber alles heißer, voller, kräftiger. In allem treibt Sonne und Sonnenglut. Auch beim Menschen ist es so. Die Renaissance weckte große Männer in Philosophie und Kunst, in Religion und Recht, in Astronomie und Physik. Die Revolutionszeit gebar neben Voltaire und Rousseau, neben großen Fürsten und Gesetzgebern auch Kant, auch Meister in Mathematik und Musik, auch erste Dichter und Juristen. Aber ist der Geruch der Rose weniger fein, weil neben ihr auch andere Blumen duften? Und ist dieser Duft eine Erklärung für den ihrigen oder gar ein Grund, über ihn abzusprechen? Unger war das Wahrzeichen der österreichischen Privat-Rechtswissenschaft ein halbes Jahrhundert lang. Österreich, das hieß in der Jurisprudenz Unger. Wie kam das? Was tat die Zeit, was tat der Mann dazu?

Nach dem Sturz der Französischen Revolution und ihres großen gewaltigen Sohnes trat in ganz Europa und besonders in Österreich eine schwere Reaktion ein: alles freiere Denken war geächtet. Das Bürgerliche Gesetzbuch hatte noch ein Stück josefinischen Geistes gerettet, aber seine Lehre verdorrte und wurde leeres Buchstabenwesen, Wortdeutelei. Auch die deutsche Jurisprudenz war zurückgewichen, erklärte das Naturrecht für ein phantastisches Spiel, führte das Recht auf Tradition zurück und vertiefte sich ins Studium alter vergilbter Papiere. Bis in unsere Zeit reicht dieser Antiquarismus, neben welchem die Richter Buchstabendienst trieben. Aber die Männer, welche die historische Schule geschaffen hatten, waren in der Schule Kants großgezogen worden, und ihre Lehre vom nationalen Recht enthielt Zukunftskeime in sich, die nur belebt werden mußten. Das wirtschaftliche Leben erblühte und schuf sich über die gelehrten Herren hinweg sein modernes Recht. In der Mitte des 19. Jahrhunderts ersteht auch politisch allenthalben ein freiheitliches Denken, auch in Österreich entsteht schon 1842 der Juridisch-Politische Leseverein. Die neue Zeit kam ins Recht, das Historische nahm die Gegenwart auf, eine junghistorische Schule bildete sich, und in Österreich war Unger der erste, der sie aufgriff, der sie vom Anfang an bis zuletzt gegen die alte und sich immer wieder erhebende Schule der Gesetzesdeutelei siegreich führte. Jhering und Glaser

waren die Gefährten, Randa und Exner die begabtesten Jünger. Der Sieg der Ungerschen Schule war nicht bloß ein Sieg über ideenarme Buchstabenauslegung, sie war auch der Sieg modernen Geistes über die reaktionäre Richtung in der österreichischen Jurisprudenz, der Sieg freier wissenschaftlicher Forschung über den Gehorsamssinn juristischer Beamten.

„Im Jahre 1848 habe ich das Licht der Welt erblickt." Dieses feine Wort Ungers ist zugleich eine scharfsichtige Erkenntnis seiner Kraft und seines Ruhmes. Unger war der Repräsentant der neuen Zeit im österreichischen Recht und blieb es weiterhin. Er hatte die Lehre des Jahres 1848 in sich aufgenommen, die Lehre der Relativität aller Erkenntnis und allen Rechtes. Deshalb war es ihm nicht schwer, die Einseitigkeit romanistischer Auffassung zuzugestehen, manche seiner Ansichten völlig zu revidieren, dem Bürgerlichen Gesetzbuche die ihm früher versagte Ehre zu geben, die sozialen Ideen der Neuzeit mit warmer Empfänglichkeit aufzunehmen und die in seiner juristischen Erziehung nicht bestandene Sozialisierung des Rechtes, den Schutz des Schwachen gegen den Starken, als notwendige Reformidee anzuerkennen.

Eine Großtat, die ihm den Dank aller Rechtssuchenden in Österreich sichert, war die Errichtung des Verwaltungsgerichtshofes. Es ist müßig, zu streiten, welcher Anteil ihm, welcher Anteil Lemayer dabei zukommt. Seine letzte Tat, der Antrag, den Staat für das Verschulden seiner Beamten haftbar zu erklären, entsprach der gleichen Idee des Rechtsstaates. Es ist ein eigenes, fast tragisches Geschick, daß der Mann, der sich zuerst von allen Themen die Entwicklung des Eherechtes gewählt hatte, für die Erneuerung des Bürgerlichen Gesetzbuches die Mosaikarbeit vorschlagen zu müssen glaubte, weil namentlich die Reform des Eherechtes nicht erreichbar sei. Er hat damit nur eine Tatsache festzustellen geglaubt; er sah im Herrenhause, im Reichsgerichte und in der politischen Gesellschaft um sich, und sein Blick wurde dunkel.

Unger hinterläßt auch als Politiker ein reines Angedenken. Er war der Sprechminister des zweiten Bürgerministeriums und vertrat die Regierung in allen großen politischen Fragen vor dem Parlament. Manche seiner damaligen Reden haben ihm Gegnerschaft zugezogen. Ich erinnere an seine Vertretung des Wahlrechtes der geistlichen Nutznießer in Oberösterreich, wobei er in Gegensatz zum Reichs-

gerichte trat, und an seine Verteidigung der Kronrechte für den Berliner Vertrag. Aber niemand zweifelte, daß er damit keine Utilitäts-Politik trieb, daß er das, was er sagte, glaubte.

Unger war ein vortrefflicher Redner. Ohne eigentliches Pathos, sprach er warm und gab seiner feingeschliffenen, logisch gefesteten, durch eingestreute geistreiche Hiebe und Spitzen gewürzten Rede einen leisen Herzenston. Diese Wärme hatte er auch als Gesellschafter. Sie und seine Reinheit verschafften ihm als Menschen zahlreiche Freunde und bewahrten ihn vor scharfer persönlicher Feindschaft, obwohl er auch für die Klerikalen eine repräsentative Gestalt war: der Mann, der erklärte, zwischen Schwarz und Rot dürfe man sich nicht besinnen, Rot zu wählen, der Mann, den der jetzige Bürgermeister von Wien deshalb mit einem unflätigen Wort bezeichnete und dem die Gemeinde Wien keinen Nachruf hielt. Er war der letzte politische Mann, der das Jahr 1848 bewußt miterlebt und seine großen Ideen bewahrt hat. Für die österreichischen Juristen war er ein Held und Führer, wohl der letzte, den sie ungeteilt anerkannten.

III. ZUR REFORM DES STRAFRECHTES UND DES STRAFVOLLZUGES

KNABEN ALS VERBRECHER

1894

Die jungen Leute, die im Omladina-Prozeß angeklagt und verurteilt wurden, stehen mit wenigen Ausnahmen im Alter von sechzehn bis zwanzig Jahren. Bald nach ihnen wurde in Prag ein fünfzehnjähriger Knabe, der Lehrling Seemann, wegen Hochverrats zu drei Jahren schweren Kerkers verurteilt, weil er sich an einem Geheimbund Neděle beteiligt hatte; und in Triest wurde ein vierzehneinhalbjähriger Schüler Ercolessi, von seinem Katecheten und dem Schuldirektor wegen Majestätsbeleidigung angezeigt, angeklagt und zu zwei Monaten schweren Kerkers verurteilt.

Welch ein klägliches und widriges Schauspiel! Sechzehn, fünfzehn, vierzehneinhalb Jahre! Die Vorschriften des österreichischen Gesetzes über Altersmündigkeit sind von einem witzigen Kopfe dahin beschrieben worden: in Österreich sei man mit vierzehn Jahren reif, über seinen Glauben zu entscheiden, mit achtzehn über sein Vermögen zu verfügen, mit zwanzig zum Tode verurteilt zu werden und mit vierundzwanzig sich fünf Gulden auszuleihen. Die Vergleichung müßte dahin ergänzt werden, daß man mit vierzehn Jahren auch reif ist, jedes Verbrechen zu begehen, selbst ein politisches, ein Verbrechen durch Wort, Schrift oder Vereinstätigkeit, bei welchem der Zweck der unmittelbaren Empfindung entrückt ist und daher zur Erkenntnis seiner Tragweite ein durch Erfahrung und Nachdenken gereiftes Urteil verlangt. Das Scherzwort enthält aber in launiger Form eine scharfe Satire. Die Vorschriften des Gesetzes bieten das Gegenteil dessen, was der gesunde Menschenverstand erwarten würde und verlangt. Je wichtiger und verantwortlicher die Tat, desto später muß die genügende Reife angenommen werden. Solange die Volksschule währt, ist der Mensch noch Kind; so lange er der Mittelschule gehört (oder gehören kann), ist er ein halbwüchsiger Knabe. Das Alter von 24 Jahren, welches unser Gesetz für die Vollreife annimmt, ist vielleicht zu hoch genommen; die meisten modernen Gesetzgebungen entscheiden sich für das einund-

zwanzigste Jahr. Als natürliche Stufen der Altersreife wären dann im allgemeinen vierzehn und einundzwanzig Jahre zu nehmen. Mit vierzehn Jahren mag man im Zivilrecht gestatten, was zur unmittelbaren Anschauung und Empfindung spricht, oder was nicht allzutief in die Existenz eingreift (Bagatellsachen). Wichtige Entscheidungen dürften erst nach Vollreife, d. h. mit einundzwanzig Jahren getroffen werden.

Die gleiche Scheidung muß für Objekt und Maß der strafrechtlichen Verantwortlichkeit gelten. Was unmittelbar als unrecht empfunden wird — Angriffe auf Person oder Gut anderer —, kann schon bei geringerer Reife geahndet werden. Nur ist das, was beim Mann Verbrechen ist, beim Knaben Übertretung und verlangt statt Gefängnis eine Erziehungsanstalt. Delikte, deren Erkenntnis größere Reife verlangt — und dies gilt vorzugsweise für politische Delikte —, dürfen vor der Vollreife gar nicht den Deliktscharakter haben. Sie sind bei dem Knaben lediglich Ausfluß der Flegeljahre. Zeigt sich in seiner Denkweise, daß die Eltern über ihn nicht genügend gewacht, dem flügge werdenden Geist nicht die rechte Bahn gewiesen haben, so mag auch hier die Erziehung durch gut geleitete Anstalten für vernachlässigte Jugend nachgetragen werden. Aber das Wort „Strafe" dürfte überhaupt nicht angewendet werden.

Gerade der Omladina-Prozeß hat gezeigt, welches Unrecht man an dem Knaben begeht, wenn man ihn für politische Delikte straft. Die Jugend wollen wir nicht altklug. Wir wollen ihr Empfinden nicht allzufrüh durch den Reif kalten Verstandes abtöten lassen. Sie soll Märchenluft atmen, sie soll den Triumph des Guten auf Erden träumen und heiß und herzhaft für Ideale einstehen. Sie soll jung sein, das ist ihre Natur und darum ihr Recht. Die Schuld, wenn ihre Empfindung ein falsches Objekt erhält, wenn sie für gut hält, was schlecht ist, darf ihr nicht aufgebürdet werden. Sie trifft ihre Leiter. Die Jugend bringt als ihren Anteil die Begeisterung und Kraft; die Richtung muß ihr gewiesen werden.

Der chinesische Weise Laotse hat gelehrt, der Mensch solle sein wie ein Schütze; wenn der Pfeil das Ziel verfehlt, dann denke der Schütze nach, was *er* versehen habe. Das gilt bei politischen Dingen insbesondere für die Regierung. Wenn das Denken der Kinder falsche Richtung erhalten hat, dann muß die Regierung nachdenken, was sie versehen hat. Die Erklärung ist leicht genug. Wenn die Regierung

um des divide et impera willen den inneren Hader gewähren läßt, wenn sie bei Lehrern im Unterricht nationalen und konfessionellen Fanatismus duldet, wie sollen die Kinder nicht die Richtung verlieren und national oder konfessionell engherzig werden? Das Entsetzlichste bietet der Triester Fall. Ein Katechet und ein Schuldirektor, die den ihrer Obhut anvertrauten Knaben zur Schlachtbank führen! Die Herren haben offenbar ihren Beruf verfehlt; man sollte sie von der Pädagogik, die sie nicht verstehen, abberufen und zur geheimen Polizei versetzen.

Man hört manchmal den Vorwurf, unsere Jugend sei alt, sie habe keine Ideale mehr. Das ist ein Irrtum. Der Idealismus unserer Jugend ist nicht geringer als früher. Er erhält nur falsche Ziele. Der Omladina-Prozeß ruft unmittelbar die Erinnerung an das Jahr 1848 wach. Auch damals waren viele halbflügge Jünglinge mit in den Kampf gerissen worden, und wenn das Ziel schöner und besser war, so war dies nicht ihr Verdienst, sondern der Ruhm der Zeit. Unsere Zeit ist rückläufig; unsere *Männer* taugen nichts.

Wie hart haben die Vorsprecher der liberalen Partei jederzeit über das Blutgericht, das man damals an den Opfern idealen Sinns geübt hat, abgeurteilt — mit Recht abgeurteilt — und jetzt tun sie das gleiche. Hat man so bald an das eigene Martyrium vergessen? Welcher Unterschied gegen den Liberalismus vor fünfundzwanzig Jahren! Damals hat man den Kindern die Schule geöffnet, heute öffnet man ihnen den Kerker.

GESETZ UND PERSÖNLICHE KRIMINALITÄT

Vortrag, gehalten in der Wiener Juristischen Gesellschaft am 1. März 1903

Geehrte Herren! Auf dem Deutschen Juristentage hatte man eine lebhafte und eingehende Debatte über die Revision des Strafgesetzes erwartet.

Auf das Programm war die Frage gestellt worden, nach welchen Grundsätzen die Revision des Strafgesetzbuches in Aussicht zu nehmen sei, und zwei Gutachter hatten — jeder von seinem Standpunkte aus — die Frage gründlich untersucht: Franz Liszt, der hervorragende Vertreter der kriminalpolitischen, und Professor Calcker aus Straßburg, ein ausgezeichneter Vertreter der klassischen Schule.

Leider hat es der Referent, Herr Professor Kahl, für angemessen befunden, den Streit der Grundsätze zurückzustellen und zum Gegenstand seines Referates lediglich die Darstellung des Revisionsobjektes, der verschiedenen Teile des Gesetzes, die sich als revisionsbedürftig zeigen, genommen. Dadurch war der Debatte jeder Boden entzogen; man stritt, ob die Revision dringend oder auch „drängend" sei, ob die Revision des Strafgesetzes oder der Strafprozeßordnung vorher in Angriff genommen werden solle u. a. m. Aber eine sachliche Diskussion kam überhaupt nicht zustande.

Der Streit der beiden Schulen ist in seinem Wesen bekannt, und ich will denselben nur soweit skizzieren, als es zur Darlegung des Problems, das ich behandeln will, notwendig ist.

Die logische (klassische, objektive) Schule nimmt die verbrecherische Tat allein zum Ausgangspunkt, zum Objekt und zum Maßstab der Strafe. Nur die allgemeine Zurechnungsfähigkeit des Täters ist festzustellen. Sonst sind seine Eigenschaften, seine Verhältnisse und Affekte bloß Momente der Tat, erschwerende oder mildernde Umstände bei ihrer Beurteilung. Der Täter als solcher bleibt außer Betracht. Das hat außer einer rücksichtslosen Untersuchung und Untersuchungshaft, außer einer abstrakten Buchstabenauslegung, die z. B. vor kurzer Zeit einen Raub annehmen und zu drei Jahren Kerkers verurteilen ließ, weil ein sechzehnjähriges Gassenmädel einem Kinde einen Kuchen weggerissen hatte, insbesondere zur Folge, daß das Strafrecht seine Aufgabe vollendet sieht, wenn das Urteil gefällt und die Strafe ausgesprochen ist. Was mit dem Täter in der Strafanstalt geschieht, gehört nicht mehr ins Strafrecht. Damit steht es aber im seltsamen Widerspruch, daß das Gericht die Zeit bestimmt, während welcher der Täter in der Anstalt festzuhalten sei. Man denke an einen Arzt, der einen Kranken in eine Anstalt verweist, sich nicht darum kümmert, wie er dort behandelt wird, trotzdem aber feststellt, die Kur habe so und so viele Monate oder Jahre zu dauern.

Die Lücken, welche die logische Auffassung nicht bloß wie bei

der Haft oder Gesetzesauslegung in den praktischen Folgen des einzelnen Falles, sondern grundsätzlich durch ihre Vernachlässigung des subjektiven Momentes darbietet, betreffen die Probleme der *Zurechnungsfähigkeit* und des *Strafvollzuges*.

Der Psychiater kann, wie es jüngst wieder bei der Enquete über die Voruntersuchung von gewiegten Fachmännern bestätigt wurde, auf die Frage nach der Zurechnungsfähigkeit oft kein absolutes „Ja" oder „Nein" zur Antwort geben. Zwischen der vollen Zurechnungs- und Nichtzurechnungsfähigkeit ist ein weites Gebiet ohne jede scharfe Grenze, so daß das „Ja" oder „Nein" häufig ein Akt gewisser Willkür ist. Die verminderte Zurechnungsfähigkeit ist aber kein bloßer Milderungsumstand. Sie verändert den Charakter der Tat und verlangt deshalb auch eine Folge anderen Charakters. Das gilt nicht bloß von Geistesgeschwächten, sondern namentlich auch von Jugendlichen, deren Handlungen sich trotz äußerlicher Gleichartigkeit von den Handlungen Erwachsener im Charakter unterscheiden. Ihr Verband zu sogenanntem hochverräterischen Zweck ist z. B. kein Hochverrat, sondern ein Bubenstreich. Sie lassen häufig nichts anderes vermissen als eine ihr Temperament zügelnde Erziehung, und ihre Verirrung müßte dann nicht ihre, sondern die Bestrafung ihrer Eltern oder Vormünder zur Folge haben. Der Strafvollzug wird von der logischen Schule ganz vernachlässigt. Aber er ist es doch, der an dem Verbrecher die soziale Heilung vornehmen soll! Einem Urteil, das ihn nicht im Auge hat, fehlt der Boden. Unsere Strafrichter aber werden nicht theoretisch, nicht praktisch über den Strafvollzug unterrichtet, und ihre Entscheidung, der Verbrecher werde zu sechs Monaten, zu einem Jahr, zu fünf Jahren Kerkers verurteilt, hat manche Ähnlichkeit mit einem Würfelspiel.

Von diesen beiden Lücken aus entstand in neuer Zeit eine Gegenbewegung mit *psychologischem* Grundgedanken. Die Ärzte — ich brauche nur den Namen Lombroso zu nennen — gehen zunächst von dem Problem der Zurechnungsfähigkeit aus, die Rechtspolitiker vom Problem des Strafvollzugs. Beide verlangen eine psychologische Auffassung des Verbrechens und der Strafe. Beide verlangen, daß die verbrecherische Tat lediglich als Ausdruck, als Symptom der Anlage des Verbrechers zu behandeln sei, und daß diese, daß der Verbrecher, nicht die Tat Objekt der Strafe sein müsse. Die Opposition ist gerechtfertigt, und es ist außer Zweifel, daß ihr die Zukunft der Straf-

jurisprudenz gehört. Denn die Tat ist vollbracht, und keine Strafe kann sie ungeschehen machen. Die Strafe enthält auch keine Genugtuung für den Verletzten, dessen Auge nicht heil wird, wenn der Schädiger gleichfalls das Auge verliert. Sie kann nur in *Form* der Repression gegen das in der Tat ausgedrückte böse Sinnen sozialer Pädagogik dienen. Ich kann darauf hinweisen, daß ich schon 1880 in einem Streit mit Grafen Lamezan über Willensfreiheit und Recht (Induktive Methode, S. 13) das Verlangen eines sozialen Charakterminimums als Grundlage der Strafjustiz erklärt habe. Aber die subjektiven Schulen, die anthropologische und kriminalpolitische, berühren sich in einigen Punkten, welche die gute Sache gefährden. Sie gehen vom Verbrechen nach *positivem* Recht, d. h. von der Verletzung der bestehenden Rechtsordnung, des bestehenden Gesetzes als Grundlage ihrer wissenschaftlichen Untersuchung aus und ziehen daraus allgemeine Folgen. Sie nehmen ferner beide ihren Ausgangspunkt von dem gewohnheits- oder gewerbsmäßigen Verbrecher. Lombroso konstruiert einen atavistischen Verbrechertypus; die kriminalistische Vereinigung in Deutschland erklärt als Dogma die Unterscheidung zwischen Gewohnheits- und Gelegenheitsverbrecher und konzentriert ihre Aufmerksamkeit auf den ersteren, gegen den die gegenwärtige Strafjustiz nicht helfe. Beide erhalten dadurch einen gefährlichen Hang zur Strenge. Man wird an Anselm v. Feuerbach erinnert, den Reformator der Strafrechtsdoktrin im Anfang des neunzehnten Jahrhunderts, der als Theoretiker das psychologische Gleichgewicht zwischen Verbrechen und Strafe lehrte, als Praktiker dagegen ein Terrorist war. Die Furcht vor dem Verbrechen ist das leitende Motiv. Die neue Idee wird im alten Geist ausgeführt.

Insbesondere ist es das Gutachten von Franz Liszt für den deutschen Juristentag, in welchem dieser Gedanke Form und Ausdruck erhält, in welchem Liszt einen Begriff der „*verbrecherischen* oder *antisozialen* Gesinnung" von jedem anderen grundsätzlich unterscheidet und die ganze Strenge des Gesetzes gegen solche verbrecherische Gesinnung verlangt. Er bildet, wie ich es nennen möchte, einen *soziologischen Verbrechertypus*.

Um Sie zu überzeugen, wie aktuell und praktisch wichtig das Problem ist, weise ich darauf hin, daß z. B. Franz Liszt aus den Strafformen die Festungshaft ausscheidet; daß er das gewerbsmäßige Verbrechen auf alle Verbrechensarten ausdehnt; daß er verlangt,

einen gewerbsmäßigen Verbrecher auch manchmal bei der ersten Tat anzunehmen; daß er gegen einen solchen Zuchthaus nicht unter fünf oder nicht unter zehn Jahren fordert. Von seiner Strenge mag es zeugen, daß er bei Verbrechen von Jugendlichen Gefängnis von zwei bis fünf Jahren als Besserungsstrafe verlangt, auch wenn der Erwachsene für dieselbe Tat eine geringere Strafe erhalten hätte.

Die Art, in welcher Liszt seinen Begriff der antisozialen Gesinnung faßt, wird am besten erkannt werden, wenn ich aus seinem Gutachten einige Sätze anführe. Liszt bekämpft die Ansicht, verbrecherische und ehrlose Gesinnung in Beziehung zu bringen und sagt (Verhandlungen I, S. 283): „Der Begriff der ‚ehrlosen' Gesinnung ist nicht nur unklar; er ist als Grundlage für das Strafensystem direkt falsch. Für das Strafrecht kann es sich immer nur darum handeln, wie sich der Verbrecher zu der Rechtsordnung stellt. Die verbrecherische Gesinnung ist die rechtswidrige oder, was dasselbe sagen will, die antisoziale Gesinnung. Wer aus tiefster religiöser oder nationaler, politischer oder sozialer Überzeugung heraus zum erbittertsten Feind der bestehenden Rechtsordnung geworden ist, handelt durchaus nicht unehrenhaft, wenn er diese Überzeugung durch seine Handlungen betätigt. Die Rechtsordnung aber würde sich selbst preisgeben, wenn sie diesen ‚Ehrenmann' als etwas anderes ansehen und behandeln wollte als ihren Todfeind . . ." „Das deutsche Strafgesetzbuch der Zukunft muß sich auf den *sozialethischen* Standpunkt stellen, wenn es unser heutiges Rechtsbewußtsein befriedigen soll. Nach seinem Unwert für die Gesellschaftsordnung, d. h. für die Rechtsordnung, ist das Verbrechen zu beurteilen. Nicht die Ehrlosigkeit, sondern die antisoziale Richtung, die Richtung gegen die Lebensgüter der Gesellschaft, kennzeichnet objektiv das Verbrechen; nicht die Unehrenhaftigkeit, sondern die antisoziale Gesinnung kennzeichnet subjektiv den Verbrecher. Es kann einer ein verächtlicher Schuft sein, ohne daß er zum Verbrecher wird, und auch das Gegenteil ist möglich . . ." „Die wiederholte Begehung strafbarer Handlungen ist weder notwendig ein Beweis besonders ehrloser Gesinnung, noch hat sie notwendig einen besonders schweren äußeren Erfolg zur Wirkung. Ist der überzeugte Impfgegner, ist der opferwillige Vorkämpfer einer oppositionellen Partei darum ein ehrloser Schuft, weil er trotz wiederholter Bestrafung seine Überzeugung immer wieder aufs neue betätigt?"

Hier, meine Herren, erkennen Sie klar den Begriff, welchen Franz Liszt aufstellen will. Die antisoziale Gesinnung ist ihm der Wille, einen Kampf gegen die *bestehende* Rechtsordnung zu führen. Wenn er schließen würde, die Hüter der bestehenden Ordnung seien befugt, gegen den ihr gefährlichen Menschen Schutzmaßregeln zu treffen, so wäre dies konsequent. Aber Liszt geht weiter. Ohne sonstige Untersuchung und Scheidung entwickelt er hieraus einen allgemeinen *sozialethischen* Begriff des Verbrechens. Eine solche Formulierung aber ist eine außerordentliche Gefahr für die Entwicklung des Strafrechtes. Sie ist wissenschaftlich nicht haltbar, ethisch verwerflich.

Nach der üblichen logischen Methode könnte ich zur Widerlegung einen Syllogismus anwenden. Das Verbrechen ist nach Liszt ein Kampf gegen die bestehende Rechtsordnung. Die bestehende Ordnung entspricht dem bestehenden Gesetz. Die Wirksamkeit des Gesetzes ist aber begrenzt nach Raum und Zeit, daher relativ. Aus einer relativen Prämisse kann kein allgemeiner wissenschaftlicher Begriff geschlossen werden. Man kann mit derselben Gesinnung nicht in Österreich ein antisozialer, sobald man jedoch die deutsche Grenze überschritten hat, ein sozialer (= sozial zulässiger) Mensch sein. Allerdings kann es vorkommen, daß der österreichische Gesetzgeber eine gewisse Handlungsweise verbietet und mit Strafe verfolgt, welche der deutsche Gesetzgeber frei läßt; wenn aber der Mann der Wissenschaft, der als solcher weder Deutscher noch Österreicher ist, zu urteilen hat, so kann er unmöglich dieselbe Gesinnung, wenn er sie das eine Mal von Wien, das andere Mal von Berlin aus beurteilt, dort als antisozial, hier als sozial diagnostizieren.

Zur Erkenntnis dieser Relativität führt insbesondere das internationale Strafrecht. Einem österreichischen Richter werden zwei Personen vorgeführt, welche miteinander eine Tat im Ausland verübt haben. Er muß den einen, weil er Österreicher ist und das österreichiche Gesetz die Tat verpönt, schuldig sprechen, den anderen nichtschuldig, weil das Gesetz des Tatortes keine Strafe verfügt. Das ist Folge der bestehenden Rechtsordnung in den beiden Staaten. Nach Liszt aber würde auch wissenschaftlich trotz gleicher Tat in gleicher Absicht bei dem einen Täter eine antisoziale, bei dem anderen eine soziale Gesinnung bestehen.

Psychologisch ist darauf hinzuweisen, daß auch der Gesetzgeber

ein Mensch oder eine Anzahl von Menschen ist, daher wie andere den Fehlern und Leidenschaften des Menschen unterworfen. Der Gesetzgeber kann gut oder böse sein, ein Trajan oder Domitian. Er kann selbständig oder von servilen oder egoistischen Ratgebern abhängig sein. Er kann — und das gilt, wie vom Fürsten, ebenso von der Majorität einer Körperschaft — aus persönlichem oder Gruppenegoismus handeln. Das Gesetz kann auch klug oder unklug gemacht sein, es kann Verwirrung lösen, aber auch neue Verwirrung stiften. Die Erfahrung gibt uns hiefür bis in die jüngste Zeit der Beispiele genug. Kurz, das Gesetz ist Menschenwerk, und nie darf eine Wissenschaft solch schwankende Grundlage haben.

Aber Liszt spricht von „antisozial", und so werden wir darauf gewiesen, die Frage vom *sozialen* Gesichtspunkt aufzufassen. Zunächst sozialhistorisch.

Die Entwicklungsgeschichte des Verbrechens steht in einem innigen Zusammenhang mit der Geschichte der *Klassenkämpfe*. Nach Gumplowicz ist der Staat prinzipiell ein Nebeneinander von Stämmen, welche stets zum Kampfe bereit, stets im Kampf begriffen, in leidlichem Gleichgewicht miteinander leben. Die Theorie ist etwas einseitig. Neben und über ihr steht die Ansicht von Marx, daß die Grundlage aller Schichtungen und Ordnungen der Menschen, aller Klassenbildungen und Klassenkämpfe die Wirtschaftsweise und deren Veränderung ist. Aber tatsächlich finden wir allerdings, daß die Sudras und Parias in Indien, die Heloten in Sparta, die Dedititii und Plebejer in Rom, die Sklaven der ganzen alten Welt, die Lassiten des Mittelalters besiegte Stämme sind, und wenn wir die Rechtsstellung derselben vergleichen, überzeugen wir uns, in welch brutaler Weise die Angehörigen des unterjochten Stammes — oder der unterjochten Klasse — in der „bestehenden Rechtsordnung" behandelt werden. Entweder wird ihnen alles Recht genommen, sie hören als Sklaven auf, rechtlich Menschen zu sein und werden den Sachen gleichgestellt; oder sie erhalten doch nur ein ganz geringfügiges Zugeständnis persönlichen Lebens, persönlicher Freiheit und Ehre. Sobald der Kampf entschieden ist, richtet der Sieger eben *seine* Rechtsordnung auf. Er ist Gesetzgeber und Richter, der Unterdrückte aber ist *der geborene Verbrecher*. Für die Griechen ist Prometheus das Vorbild: Erlöser für die Menschen, für die Götter Verbrecher. In Äschylos' gewaltigem Werk ruft der Chor Prometheus zu: „Neue

Herren walten am Steuer im Olymp und der Kronide herrscht gemäß *neuem* Gesetz *gesetzlos*. Das früher Gewaltige stürzt er nieder." Das Klassenverbrechen ist nicht gleichbedeutend mit dem politischen. Der Gedanke des politischen Verbrechens, bei dem man dem Gegner, auch wenn man ihn bekämpft, die Ehrenhaftigkeit zugesteht, ist überhaupt erst neuesten Ursprunges. Mit dem Verbrechen gegen den Staat war bisher stets die Ehrlosigkeit verbunden. Der Römer, der sich der perduellio schuldig machte, verlor ipso jure alles Bürgerrecht. Aber auch in seiner neuesten Gestalt ist das politische Verbrechen sehr eingeengt. Es bezieht sich lediglich auf Taten, welche unmittelbar die Erringung öffentlicher Macht anstreben und setzt die Zuerkennung einer gewissen *Ebenbürtigkeit* voraus.

Um den ebenbürtigen Gegner auszulesen, hat man ein Mittel in der Form gefunden. Man erklärt, das politische Verbrechen dürfe nicht in ein gemeines ausarten. Gemein aber wird es entweder durch Roheit oder dadurch, daß es sich gegen unpolitisches Recht, insbesondere Besitz und Eigentum richtet. Nun zeigt die Erfahrung, daß die Angehörigen der unteren Klassen in ihren Formen immer gröber sind; sie zeigt auch, daß sie, die Hungrigen, wenn es zu einer Revolte kommt, sich einmal gehörig sattessen und satttrinken wollen. Ausschreitungen gegen Bäcker und Wirte sind geradezu ständige Begleiter jedes Auflaufes. Die feinen Unterscheidungen der Theorie führen also dazu, daß die Angehörigen der oberen Klassen in die Festung, die der unteren ins Zuchthaus kommen.

Die politischen Delikte sind aber auch, wie ich schon bemerkte, eng begrenzt. Im österreichischen Gesetze umfassen sie z. B. nicht die §§ 63 und 64, obwohl der letztere sich im Strafgesetz von 1803 noch gar nicht, der erstere in einem weit beschränkteren Umfang („Lästerungen, aus welchen unverkennbare Abneigung gegen denselben entstehen kann") als Unterart der Störung der öffentlichen Ruhe befindet, obwohl beide im Jahre 1852 direkt zu politischem Zweck aufgestellt wurden. Sie umfassen auch nicht den § 122, obwohl niemand zweifeln wird, daß religiöse Klassenbildungen stattgefunden haben und noch immer stattfinden; ebenso sind die Delikte der §§ 303 und 304 nicht den Geschworenen zugewiesen. Aber auch eine viel weiter gezogene Grenze des politischen Delikts würde das Problem nicht lösen.

Ich habe schon erklärt: der Sieger bildet sich *seine Rechtsordnung*

und vor allem seine Besitz- und Erwerbsordnung. Wenn im Altertum oder Mittelalter eine Nation, eine politische oder religiöse Partei andere unterworfen hat, so nimmt sie in der Regel den besten Teil ihrer Besitzungen an sich. Auch der große Besitz unseres Adels datiert zumeist aus den Religionskriegen des siebzehnten Jahrhunderts. Das Eigentums- und Erbrecht sorgt dann dafür, daß der Besitz sich in den Familien erhält. Die Erwerbsverhältnisse werden so eingerichtet, daß die Sieger die leichten und lohnenden Beschäftigungen für sich vorbehalten. Die Besiegten, wenn sie nicht direkt als Sklaven zur Arbeit für die anderen gezwungen sind, werden in solche wirtschaftliche Lage versetzt, daß die Not sie dazu zwingt. Die Zeiten und Völker unterscheiden sich in der Art und Strenge des Zwanges, jedoch nicht im Wesen. Die ganze Rechtsordnung aber ist immer zuletzt mit dem *Strafrecht* umgürtet. Das alte Weib, das dürre Zweige sammelt, das Kind, das Erdbeeren liest, wird gestraft. Ein Mann, dem ein anderer ein Zuckerwerk um zwei Heller genommen hatte und der bei Gericht aussagte, ihm habe nichts gefehlt, wurde kürzlich wegen falschen Zeugnisses zu drei Monaten Kerkers verurteilt. So heilig ist unserem Gericht jeder Kreuzer Eigentums.

Einige auffällige Beispiele!

Im Mittelalter haben es die Patrimonialherren, die zugleich Obrigkeit waren, verstanden, das Freigut der Bauern zu lassitischem Eigentum herabzudrücken. Das letztere wurde dann von ihren Juristen romanisiert und als vererblicher Nutzgenuß erklärt, der dem Eigentum des Herrn, als dem stärkeren Recht, in dringenden Fällen weichen müsse. Nach dieser Theorie wurden die Bauern „gelegt", d. h. aus ihrem Eigentum hinausgeworfen. Ähnlich ging man mit dem Gemeindegut vor, Wald und Weide. Der Herr ließ sie durch seine Beamten in Besitz nehmen und absperren. Die Bauern getrauten sich in der Zeit, da der Herr zugleich Obrigkeit war, nicht, ihr Recht zu wahren. Als endlich eine bessere Zeit eingetreten war und die Bauern sich zum Prozeß entschlossen, wurden sie wegen Verjährung abgewiesen. So war es auch einer Gemeinde in Galizien ergangen. Die Bauern hatten seit unvordenklicher Zeit in dem von der Herrschaft annektierten Teiche gefischt. Sie waren vertrieben worden, führten Prozeß und wurden abgewiesen. Sie wollten sich dies aber nicht gefallen lassen, fischten weiter und wurden nun 1890 wegen gemeinen Diebstahls verurteilt. Im Jahre 1894 kam ein ähn-

licher Streit in Bayern vor. Die Bauern stritten um das Holz- und Laubleserecht und verloren in allen Instanzen. Aber sie erhoben sich zu einer Revolte, es kam im Landtag zu erregten Debatten, und die Regierung legte sich ins Mittel, so daß die Herrschaft, trotzdem sie gesiegt hatte, den Bauern im Vergleichswege ein gewisses Recht zugestand.

Auch in Nordböhmen gibt es noch ähnliche Verhältnisse. Erst vor wenigen Wochen hatte ich die Bauern in Krausebauden (bei Hohenelbe) gegen ihre Herrschaft zu vertreten, die das Erbzinsrecht der Bauern in ein Pachtrecht umzudeuten suchte. Die Herrschaft hatte wieder in allen drei Instanzen gesiegt; erst der Verwaltungsgerichtshof ging tiefer in das Rechtsverhältnis ein und hob die Entscheidung des Ministeriums auf.

Ein anderes Beispiel aus dem *Miet- und Pachtrecht*, das noch bei uns gilt! Der Mieter bezieht eine verwahrloste Wohnung. Der Vermieter erklärt ihm, er könne sich verlassen, daß nicht gekündigt und nicht gesteigert werde. Der Mieter wendet daraufhin einen größeren Betrag zur Herrichtung auf und erhält im nächsten halben Jahr die Kündigung. Er will sich wehren. Aber der Jurist erklärt ihm, es sei ihm nach geltendem Gesetz nicht zu helfen, eine derartige allgemeine Zusicherung sei ohne Wert. Der Mieter muß die „Rechtsordnung" büßen. Wenn er aber in begreiflicher Entrüstung eine der Tapeten, die auf seine Kosten angebracht waren, abreißt, so ist er ein Verbrecher, und wenn er *seine* Verbesserung des Zimmers um mehr als 25 Gulden verringert hat, erhält er Kerkerstrafe. Denn alles, was er für sein Geld herrichten ließ, ist in demselben Momente Eigentum des Vermieters geworden, an das er nicht rühren darf. Sind nicht auch viele von Ihnen, meine Herren, der Ansicht, daß der Eigentumsbegriff keine andere Folge zuläßt? Und doch ist es nur Siegerrecht, dasselbe Recht, das in England, Irland, Sizilien Hunderte von Mietern und Pächtern ohne Vergütung ihrer Meliorationen hinauswerfen ließ. Der letzte irische Aufstand hatte hauptsächlich diesen Grund.

Bei Kreditverhältnissen ist es die drohende oder im Zuge befindliche Exekution, die den Schuldner oft aus Sorge für seine Familie zum Verbrecher macht. Ich erinnere mich an einen Fall, der vor ungefähr zehn Jahren vorfiel. Der Amtsdiener wollte einem Familienvater seinen letzten Tisch und sein letztes Bett wegnehmen. In begreiflichem Schmerz und Zorn widersetzte sich dieser. Seit der neuen Prozeßordnung sind die notwendigen Einrichtungsstücke der Exekution entzogen. Damals war dies noch nicht; aber auch heute dürfte der Exekut sich nicht wehren. Der Mann war Verbrecher und erhielt Kerkerstrafe.

Die Lohnarbeiter haben derzeit den Kampf um bessere Lebensbedingungen aufgenommen. Kaum einer ihrer Führer, der nicht monate-, selbst jahrelang im Gefängnis gesessen ist. Die Verurteilungen werden getragen wie Wunden im Kampf, und der Vergleich kann gelten. Es ist Klassenkampf. Nur die Form hat gewechselt, an die Stelle des Kriegers ist der Jurist getreten: der Gesetzgeber, der Staatsanwalt, der Richter.

Die Lisztsche Theorie von der antisozialen Gesinnung jedes, der Verbrecher nach positivem Recht ist, wird insbesondere in Übergangszeiten unmöglich. Wenn durch die Veränderung der tatsächlichen Zustände eine Gesellschaftsordnung sich überlebt hat und Vorrechte, die bisher durch Funktionen gedeckt waren, nunmehr als reine Unterdrückung hervortreten, sind es gerade die freien, edlen und großen Geister, die sich an die Spitze der Gegenbewegung stellen. Friedrich Nietzsche hat dafür einen sprachgewaltigen Ausdruck gefunden: „Der die Tafeln der Werte bricht, der Brecher, der *Verbrecher!*"

Und gewiß, wer die Tafeln der Werte, d. h. die bestehende Moral- und Rechtsordnung brechen will, ist ein Verbrecher nach bestehendem Gesetz. Es ist bemerkenswert, daß sich das Wortspiel im Französischen genau wieder findet: Celui qui rompt, celui qui corrompt. Corrompre = verderben ist die Verstärkung von rompre und heißt wörtlich: *ver*brechen.

Wenn aber der Brecher der Werte den Kampf siegreich geführt hat, wenn seine Lehre von dem Unrecht der bisherigen Ordnung zum Durchbruch gekommen ist, erscheint er als Vorbild der Moral und des Rechtes; er wird dann als Befreier und Erlöser der Menschheit gepriesen! Die gewaltigen Menschen, zu denen wir emporschauen, weil sie sich nicht gescheut haben, sich dem Unrecht entgegenzustemmen, trotzdem es die legale Macht war, sich als Verbrecher behandeln, sich einkerkern, verbannen, töten zu lassen um ihrer Überzeugung willen: sie sind alle nach Franz Liszt antisozialer Gesinnung!

Gehen wir zu einem anderen, zum *sozialpolitischen* Gesichtspunkt über und betrachten wir das Verhältnis von Staat und Individuum! Die erste und stetige Ursache des menschlichen Handelns ist der Drang zu leben. Wenn das Individuum diesem Drange folgt, so handelt es nicht antisozial, sondern bloß natürlich. Jede Rechtsordnung muß mit ihm rechnen. Ist er doch so stark, daß er bis zum Wahnsinn treiben kann! Not kennt kein Gebot — ist ein Spruch, den auch das Strafrecht im „Notstand" anerkennen mußte. Aber es gibt keine Rechtsordnung, die nicht Individuen in Lebensnot beläßt oder versetzt. Keine Rechtsordnung, wenn sie noch so gut ist, sorgt für alle und hat nicht einzelne, sei es ihrer Gruppe nach, sei es in dem Verhältnisse, in dem sie sich eben befinden, vernachlässigt oder vergessen. Auch die beste! Aber wie weit sind wir von der besten entfernt! Jede Wirtschaftsweise wirft ganze Massen von Menschen aufs Pflaster. Betrachten wir als Beispiel die Bettler und Vagabunden, welche man gemeinhin als die Auswürflinge der Gesellschaft hinstellt.

Die Vagabunden des Mittelalters waren die Bauern und Häusler, welchen man ihren Grund zerstampft, ihre Häuschen angezündet, sie mit Frau und Kindern obdach- und erwerbslos hinausgestoßen hatte; oder es waren Soldaten, welche man nicht mehr brauchte und entließ, ohne sich weiter um sie zu kümmern. Wenn sie nicht wußten, wo aus, wo ein, keinen Besitz, keinen Erwerb, keinen Unterschlupf hatten, erklärte man sie in Anordnungen emphatisch als „Vagabunden und frevelhafte Herumzieher".

In der heutigen Wirtschaftsweise macht in ähnlicher Art jede Krise, aber auch jede Erfindung, welche Menschen durch Maschinen ersetzt — mindestens für eine Übergangszeit —, eine Menge Menschen arbeitslos und nach unseren Gesetzen zu Vagabunden. Die Armee der Arbeitslosen vermehrt sich von Tag zu Tag. Aber noch mehr! Unser leider noch immer bestehendes Schubsystem schafft geradezu Verbrecher! Ich erlaube mir Ihnen einen Fall zu erzählen, der auf mich einen unauslöschlichen Eindruck machte.

Ich wurde zum Ex-offo-Vertreter eines Einbrechers bestellt. Die Tat war zweifellos. Der Mann war geradezu hirnlos am Sonntag mittags in einer nicht unbelebten Gasse in Wien bei schönem Wetter ins Fenster eingestiegen. Der Fall war also juristisch nicht interessant. Aber ich fand, daß der Täter ein einziges Mal als sechzehn-

jähriger Bursche wegen eines Diebstahls an versperrten Sachen verurteilt worden war und dann durch sechs bis sieben Jahre wegen nichts anderem als wegen unbefugter Reversion: zwei Tage, vier Tage, acht Tage, vierzehn Tage, drei Wochen, drei Monate, sechs Monate usw. Ich sah die Akten nach. Der Diebstahl an versperrten Sachen bestand darin, daß der junge Mensch einen Geldbrief seines Meisters auf die Post getragen und, von einem Gesellen verführt, spoliiert hatte. Die Behandlung der Tat als Einbruchsdiebstahl ist eine bekannte Spezialität der österreichischen Rechtsprechung. Der Junge benahm sich im Gefängnis musterhaft. Der Verein zur Fürsorge entlassener Sträflinge in Krems nahm sich seiner aufs lebhafteste an. Sein Herr erklärte, ihn zurücknehmen zu wollen, weil er wisse, daß er ein ordentlicher Mensch und lediglich verführt worden sei. Aber er war nicht nach Wien zuständig, obwohl er in Wien geboren war, sondern nach einem böhmischen Örtchen, wo kein Mensch Deutsch konnte, wo er auch niemanden und niemand ihn kannte. Die Wiener Polizeidirektion hatte ihn abgeschafft und war trotz aller Mühen des Kremser Vereines nicht zu bewegen, die Reversion zu gestatten. Der Mann wurde daher abgeschoben und kehrte immer wieder zurück, lediglich um zu arbeiten. Er konnte aber keine feste Stellung annehmen, weil er sich nicht melden durfte. Sobald er meldungspflichtig wurde, mußte er immer wieder zur Überraschung seiner Meister, die mit ihm zufrieden waren, den Dienst aufgeben. Nach einigen Wochen oder Monaten wurde er erkannt, arretiert, abgestraft und wieder abgeschoben. So ging es jahrelang mit ihm bergab, bis er endlich nirgends mehr Aufnahme fand und aus Not Einbrecher wurde.

Wenn wir den Fall sozial betrachten, wer war an dem Verbrechen mehr schuld, der im Elend verkommene Mensch oder die Wiener Polizeidirektion als Organ des Schubgesetzes, die einen fast normalen Menschen zum Verbrecher machte? So unbarmherzig wie die Behörde ist aber auch die Bevölkerung gegen den einmal Gefallenen. Beide züchten Gewohnheitsverbrecher. Die satte Tugend ist mit der Verurteilung eines Menschen schnell fertig, auch wenn sie an gleicher Stelle noch schlimmer gehandelt hätte. Betrachten wir doch, wie regelmäßig Gewohnheitsverbrecher entstehen! Ein Mensch hat sich gegen das Gesetz vergangen, aus Not, aus Leichtsinn, durch Verführung u. a. Er büßt seine Strafe ab und wird aus dem Straf-

hause entlassen. Wenn er das Glück hat, einen Posten zu finden — ich kenne einen solchen Fall, wo der Verein für entlassene Sträflinge jemand bei einem Bauer untergebracht hatte —, so kommt nach vierzehn Tagen ein Gendarm mit aufgepflanztem Bajonett ins Dorf und fragt bei dem Gemeindevorsteher nach, wie sich der Mann verhalte. Das geht wie ein Lauffeuer durch das Dorf. Niemand will mehr mit dem Mann zusammen dienen, der Herr muß ihn gegen seinen Willen entlassen. Die Gesellschaft macht ihn arbeitslos. Was soll er tun, wenn ihm das Geld ausgeht und er hungert? Er wird Verbrecher, wobei ihn die Erinnerung an seine frühere Tat zu gleichartiger Tat bestimmt. Ähnliche Folge hat es, wenn der Entlassene ziellos in dieselbe Umgebung zurückkommt, welche ihn verleitet hatte; ist es wunderlich, daß sie wieder in derselben Weise auf ihn einwirkt, und daß er nur ein schwacher, kein schlechter Charakter sein muß, um wieder zu fallen? Man darf also nicht dogmatisch zwischen Gelegenheits- und Gewohnheitsverbrecher scheiden, so wenig wie zwischen Zurechnungs- und Unzurechnungsfähigem. Es ist nicht richtig, aus wiederholten, selbst gleichartigen Verbrechen sofort auf eine verderbte Anlage, einen Gewohnheitsverbrecher im kriminalpolitischen Sinn zu schließen. Es ist keine bloße Redensart, wenn man die Gesellschaft und ihre Ordnung für die Verbrechen, die in ihr vorkommen, verantwortlich macht. Die *sozialethische* Untersuchung des Verhältnisses zwischen Gesellschaft und Individuum muß dazu führen, das Individuum, sein menschenwürdiges Leben, seine Entwicklung und Fortbildung zu immer größerer Menschlichkeit als Zweck aller gesellschaftlichen Ordnung, alles Rechtes zu erkennen. Das Leben schafft das Recht. Wenn die Statistik beweist, daß z. B. in Österreich von den eingelieferten Sträflingen 25·5% weder lesen noch schreiben, 8·4% nur lesen, 62·7% lesen und schreiben können und bloß 3·4% weitergehende Kenntnisse haben; daß gegen 30% von trunksüchtigen, gegen 40% von verbrecherischen Eltern herstammen; daß die Unehelichen doppelt so hoch mit Verbrechen belastet sind als die Ehelichen: wer will den Einfluß der Gesellschaft, ihres Bildungswesens und ihrer Einrichtungen auf das Verbrechen leugnen?

Aber betrachten wir die Frage vom *sozialpolitischen* Standpunkt. Wir haben den Gedanken des Naturrechtes verlassen, daß die Menschen sich als einzelne mit einzelnen verbinden und so die

Gesellschaft bilden. Das ist nur ein Zweckgedanke, er weist der Gesellschaft ihre Aufgabe zu. Der Mensch ist ein soziales Geschöpf, er wird in der Gesellschaft geboren, er wächst in der Gesellschaft auf. Aus seinem Milieu entwickelt sich bei ihm auch jene soziale Empfindung, von der aus er seine eigenen Handlungen beurteilt, mit ihnen zufrieden oder unzufrieden ist: die Empfindung, die wir *Gewissen* nennen. Bei jedem Menschen hat die soziale Empfindung ein besonderes individualisiertes Gepräge. Sie entströmt einerseits aus seiner Anlage, anderseits aus dem Milieu, in dem er emporgewachsen ist, aus den suggestiven Momenten, die seiner Erziehung, Beschäftigung, Umgebung, seinen Autoritäten innewohnen. Wenn die bestehende Gesellschaft will, daß das Gewissen des einzelnen für ihre Ordnung spreche, so muß sie es dazu heranbilden, muß sie dafür sorgen, daß sein natürliches Empfinden, sein Lebensdrang, seine Erziehung und sein Milieu zu einem solchen Gewissen führen.

Betrachten wir nun, in welcher Art unsere Gesellschaft für das Gewissen in den armen Klassen sorgt! Das Wohnungselend führt dazu, daß das Kind im frühesten Alter Dinge hört und sieht, welche es nicht hören und sehen darf, daß es in früher Zeit sexuell und alkoholisch verdorben wird. Die Eltern sind von morgens bis in die Nacht in Arbeit. Das Kind läuft herum, völlig verwahrlost. Niemand kümmert sich; es kennt die Mutterliebe nicht; sie verdorrt in der Tretmühle des Lebens. Ist es gar ein lästiges Kind, so kriegt es Schläge statt Brot. Wenn es in die Schule gehen muß, hungert es dort, hat keine Kleidung und keine Lehrmittel. Finden Sie ein Gelüste bei ihm auffällig, den Kuchen wegzunehmen, den neben ihm das Kind reicher Leute verächtlich zerbröckelt und der ihm ein unerreichbarer Luxus ist? Vor kurzer Zeit hatte ein Schulmädchen einem anderen jüngeren einen solchen Kuchen weggenommen; ich habe den Fall schon erwähnt. Es wurde wegen Raubes angeklagt und zu drei Jahren Kerkers verurteilt, welche im Gnadenwege auf drei Monate ermäßigt wurden. Drei Monate Kerkers! Wie viele Schulden kann ein Kavalier oder ein Kaufmann machen, um wegen Krida zu ebensolanger Arreststrafe verurteilt zu werden? In einem zweiten, ganz gleichen Fall waren die Geschworenen menschlich genug, um das Mädchen freizusprechen.

Lassen wir ein solches Kind erwachsen werden und denken. Können wir erwarten, daß aus ihm ein Mensch mit Gewissen für

die bestehende Rechtsordnung entsteht? Muß es bösartig sein, wenn es diese Gesellschaft, diese Ordnung als seinen Feind betrachtet?

Aber führen wir den Gedanken weiter aus und betrachten wir uns das Gewissen in der Gesellschaft, welche *nicht* Verbrechen verübt! Brauche ich Beispiele für die verschiedenartigen Formen sozialer Minderwertigkeit zu nennen, die in ihr vertreten sind? Die kriminalpolitische Schule, welche die verbrecherische Tat nur als Symptom der Anlage auffaßt, kann die Tat ohnehin nicht als feste Grenze annehmen. An Stelle des einen Symptoms kann auch ein anderes treten. Das bestimmt auch ihre Stellung gegenüber dem untauglichen Versuch. Die Scheidewand zwischen dem Menschen, der ein Verbrechen begangen hat und dem, der es begehen will, ist prinzipiell geschwunden. Wir gelangen zu einem viel weiteren Gebiete der Forschung. Die Untersuchung darf sich fürderhin nicht auf Verbrecher beschränken. Sie muß die ganze Gesellschaft umfassen, den Gesetzgeber inbegriffen. Von diesem Standpunkte erst kann sie die Eigenschaften und Zustände ergründen, welche Frieden und Eintracht der Menschen stören, kann sie Schuld oder Nichtschuld im sozialwissenschaftlichen Sinn bestimmen.

Auch von da aus gelangen wir zum Schluß: das Verbrechen nach positivem Recht als eine durch Anordnung einzelner Menschen gekennzeichnete Handlungsweise kann nicht die Grundlage einer wissenschaftlichen Charakterstruktur sein und kann deshalb auch nicht Anlaß geben, eine allgemeine und uniforme „verbrecherische Gesinnung" zu konstruieren, wie es Franz Liszt tut. Die positivrechtliche Strafe ist eine Wehr der bestehenden Gesellschaft, eine Wehr, welche begreiflich, aber doch nur eine praktische Maßregel ist, ein *Machtakt*. Die Wissenschaft kann bei Bestimmung dieses Machtaktes nach seinen Voraussetzungen, seiner Art und Höhe als Beraterin eintreten, um ihn auf das notwendige Maß zu beschränken und jene anderen Vorkehrungen anzuregen, die friedlicher und wirksamer sind als die Strafe. Wenn ein verbrecherischer Akt als Voraussetzung der Strafe angenommen wird, so ist dies ein wichtiger Schutz des Individuums gegen die Staatsgewalt und die kriminalpolitische Doktrin wäre gefährlich, wenn sie auch für das bestehende Gesetz die feste Grenze zwischen sozialer Prävention *nach* vorhergegangener Tat und ohne eine solche verwischen wollte. Aber *wissenschaftlich*, möge es sich um einen Einzelfall oder um eine allgemeine Formel

handeln, ist nur die Untersuchung des sozialen Gesamtbestandes. Man wird dann stets finden, daß die Verantwortung zu geringstem Teil auf die ursprüngliche Anlage des einzelnen Täters fällt. Wohl gibt es Menschen friedensstörerischer Art, grausame, hinterlistige, rücksichtslose, gemeine Naturen, aber nicht immer und nicht bloß bei jenen, die eine verpönte Handlung begangen haben. Was die Maßregeln gegen sie betrifft, so beweist alle Erfahrung, daß die Strafe, soweit sie auf den Charakter wirken soll, wenig nützt. Wirksam ist lediglich die soziale Prophylaxe, die Sozialpädagogik insbesondere, wenn sie bei Jugendlichen einsetzt, wo noch das Empfinden und Denken zu regeln ist.

Wenn man aber die einzelne verbrecherische Tat ins Auge faßt, so kommt man bei einem tieferen Einblick zur Überzeugung, daß in jedem Menschen böse, friedensstörerische Gedanken liegen. Keiner, auch nicht der Rechtschaffenste ist davor geschützt, daß, wenn in einem unglücklichen Moment heiße Begierde und Gelegenheit zusammentreffen, wenn Leidenschaft oder Not auf ihn einstürmt, er eine verbrecherische Handlung verüben kann; verbrecherisch auch dann, wenn man aus dem Begriff die politischen Vergehungen ausschließt. Wenn wir in uns Einschau nehmen, so müssen wir alle still und andächtig die evangelischen Worte sprechen: „Führe uns nicht in Versuchung!"

REVERSION [1])

1915, veröffentlicht 1922

Wer aus einem Kronland oder aus einem bestimmten Ort von dem Strafgericht *oder aus was immer für Gründen* durch die Staats-

[1]) Dieser Artikel wurde — unglaublicherweise — im Jahre 1915 von der Staatsanwaltschaft zum Abdrucke nicht zugelassen. (Diese Bemerkung stammt

oder Gemeindebehörde auf immer oder auf gewisse Zeit abgeschafft worden, begeht, wenn er im ersten Falle jemals, im zweiten Falle vor Verlauf der gesetzlichen Frist wiederkehrt, eine Übertretung und ist mit Arrest von einem bis zu drei Monaten, bei wiederholter Bestrafung mit ebenso langem strengen Arrest zu bestrafen (§ 324 StG.). Auch wenn die Wiederkehr nur im Durchreisen besteht oder bloß auf Fahrlässigkeit beruht (Plenarentscheidung des Kassationshofes vom 13. Mai 1896).

Die Bestimmung ebenso wie die Abschiebung selbst wurde schon oft genug angegriffen. Sie hatte Sinn zu einer Zeit, als Heimats-, Wohn- und Arbeitsort zusammenfielen, als auch der Sicherheitsdienst noch primitiv war. Seitdem aber die Großindustrie entstanden ist und die Arbeitsgelegenheit in den Städten und Industrieorten konzentriert hat, seitdem auch gerade in diesen eine gut organisierte Sicherheitswache besteht, zuverlässiger als in den entlegenen Orten, aus denen die Menschen auswandern, und in die man sie aus Sicherheitsgründen zurückschickt: seitdem hat das Schubwesen nicht genützt und nur Existenzen zerstört.

Vor Jahren erlebte ich einen solchen Fall, der mich jetzt noch schauern macht. Ich war zum Armenvertreter für einen Einbrecher bestellt worden. Ich war gewohnt, solche Vertretungen selbst zu führen, teils weil ich mich von der geringen Zuverlässigkeit der damaligen ständigen, mit einer kleinen Summe bezahlten Armenvertreter überzeugt hatte, teils weil auch juristisch unergiebige Fälle oft mein soziales Interesse erregten. So war es auch damals. Der Fall war juristisch ganz einfach. Der Mann, gegen 30 Jahre alt, war am lichten Tag in der Nähe einer belebten Straße in Wien in ein Fenster gestiegen und auf frischer Tat ertappt worden. Er leugnete dennoch. War es Verstocktheit oder Scham? Die Akten wiesen eine Unmasse von Vorstrafen auf, aber wenn man näher zusah, immer nur Strafen wegen Reversion. Ich wurde aufmerksam, studierte den Vorakt — und stand vor einem ergreifenden Lebensbild. Der Mann stammte aus einer armen, ehrenhaften Handwerkerfamilie, war auch gut erzogen. Als Lehrling hatte er auf Verlangen eines Gesellen, vor dem er sich fürchtete, und für diesen, ohne eigenen Nutzen, einen Geldbrief seines Meisters auf dem Wege zur Post

wohl vom Verfasser, denn sie findet sich ohne weiteren Zusatz unter dem Text der Juristischen Blätter. Anm. d. H.)

unterschlagen. Das ist nach österreichischem Recht Einbruchsdiebstahl, weil der Täter zwar den Brief in Händen hat, aber, um zum Gelde zu kommen, das Siegel erbrechen muß. Ein theoretisch längst aufgegebener, aber von den Gerichten festgehaltener Standpunkt! Der Junge wurde zu einem Jahre Kerker verurteilt. Er benahm sich musterhaft. Die Gefängnisverwaltung setzte sich lebhaft für ihn ein, ebenso der Kremser Fürsorgeverein. Der frühere Meister — der Bestohlene — erklärte sich bereit, ihn wieder aufzunehmen, weil er ein anständiger und nur verführter Bursche sei. Aber die Polizeidirektion von Wien war nicht zu bewegen, den von ihr erlassenen Abschaffungsbefehl zu widerrufen. Der Junge war wohl in Wien geboren und nie aus Wien gekommen. Aber von den Großeltern her war er nach einem tschechischen Dorf zuständig. Er kannte dort niemanden, konnte auch kein Wort tschechisch. Dennoch schob man ihn dorthin ab. Und nun folgten mehrere Jahre Kampfes, den er mit der Wiener Polizei führte. Er kehrte immer wieder zurück, arbeitete ehrlich und fleißig, wurde aber nach einiger Zeit, die in der Folge immer kürzer wurde, entdeckt, bestraft und wieder mit Schub in die sogenannte Heimat gebracht. 24 Stunden, 48 Stunden, 3 Tage, 8 Tage, 14 Tage, einen Monat — so folgten einander die Strafen. Er büßte sie ab — und kam wieder. Aber er konnte sich nicht melden lassen, verließ stets nach kurzer Zeit den Dienst, und die Arbeitgeber, die nicht wußten, daß er den Dienst aufgeben mußte, weil ein Polizeimann ihn erkannt hatte, nahmen ihn als einen Läufer nicht mehr auf. So kam die Not — der Hunger — und endlich aus plötzlichem Entschluß der Einbruch. Ich erklärte dem Gerichtshof damals offen: die Seele dieses Menschen habe die Wiener Polizei auf dem Gewissen.

Vor wenigen Tagen hatte ich einen ähnlichen Fall. Wieder war ich Armenvertreter [1]). Eine Frau, ungefähr 40 Jahre alt, hatte ihre Bettfrau bestohlen. Sie machte keinen schlechten Eindruck, obwohl die Polizei sie als arbeitsscheu bezeichnete. Sie gestand die Tat unumwunden zu, und ihre Erzählung war so einfach und offen, daß der Gerichtshof in den Punkten, wo ihre Aussage von der der Bettfrau abwich, ihr Glauben schenkte. Sie hatte nahezu 50 Vorstrafen,

[1]) Als solcher hielt Ofner bei der Hauptverhandlung (der der Herausgeber als Schriftführer beiwohnte) ein erschütterndes Plaidoyer, das eine fulminante Anklage gegen die Judikatur in Reversionsfällen bildete. (A. d. H.)

aber außer dreien, alle wegen Reversion und der sie begleitenden Falschmeldung. Wieder hatte der Schub einen Verbrecher gemacht! Sie war das Kind armer Eltern aus einem Dorf in Niederösterreich. Nach dem Tode des Vaters ging sie, 20 Jahre alt, 1890 nach Wien, um einen Dienst zu suchen und, unbekannt, ohne Anhalt und Schutz, geriet sie in leichtsinnige Gesellschaft. Wahrscheinlich wegen Prostitution ohne Buch — der Strafakt gab hierüber keinen Aufschluß — wurde sie von der Polizei abgeschoben: in ihr Dorf, wo sie jeder kannte, wo sie sich vor jedem schämte! Die Mutter nahm sie nicht auf, sie ging zurück nach Wien. Und nun folgen, wie bei dem Lehrling, viele Jahre ohne andere Strafe als wegen Reversion. Einmal (1899) hat sie einen Streit mit der Polizei — § 81, 6 Monate Kerker. Aber erst 1907, dann wieder 1910 wird sie wegen kleiner Diebereien zu 7 und 10 Tagen Arrest verurteilt. Von 1890 bis 1907 hatte sie wegen Geldwertes keinen Anstand.

Der Gerichtshof verurteilte sie zu 8 Monaten Kerker. Nunmehr wird sie wahrscheinlich verloren sein. Unser Kerker verdirbt. Man muß Charakter haben, um den Willen, sich wieder ehrlich sein Brot zu verdienen, unter seinem Einfluß nicht zu verlieren. Die Gesellschaft tut das Ihrige, um den Rest dieses Willens zu zerstören. Aber das 20jährige Mädchen 1890 war zu retten, wenn man Aufsicht der Bequemlichkeit vorzog.

EIN TODESURTEIL

1916

Vor wenigen Tagen hat der Kassationshof ein Todesurteil gefällt. In einem galizischen Ort, der damals von den Russen besetzt war, hatte eine Taglöhnerin, Komar, ihr Kind vier Tage nach der Geburt in den Bach geworfen, aus dem es nach einigen Stunden tot gezogen wurde.

Wir leben derzeit im Ausnahmszustand. Neben anderen verfassungsmäßigen Einrichtungen und Gesetzen ist auch das Geschworenengericht suspendiert und wird durch ein Ausnahmsgericht ersetzt.

Die Komar gab die Tat zu. Sie erklärte, daß sie das Kind vor den Qualen des Hungertodes retten wollte, weil für sie und das Kind keine Nahrung zu finden war. Sie sei in verzweifelter Notlage gewesen, habe sich auch selbst töten wollen, wozu ihr aber dann der Mut fehlte. Der Gemeindevorsteher bestätigte, daß die Angeklagte damals weder Erwerb noch Nahrung finden konnte.

Das Ausnahmsgericht sprach sie *frei*. Es nahm an, daß sie in einem Zustand unwiderstehlichen Zwanges gehandelt habe, durch den Gedanken, daß das Kind den Hungertod erleiden müsse. Die Staatsanwaltschaft erhob die Nichtigkeitsbeschwerde, der Kassationshof gab ihr statt und verurteilte die Angeklagte zum Tode. Er erklärte, daß ein unwiderstehlicher Zwang nicht vorgelegen sei. Ein solcher Zwang sei nur vorhanden, wenn dem Täter selbst ein Übel droht. Das Leben der Mutter sei aber nicht bedroht gewesen. Sie wäre vielleicht durch ihre eigene Not entschuldigt gewesen, wenn sie das Kind weggelegt hätte. Aber einen Zwang für die Mutter, ihr Kind zu töten, gäbe es nicht. Die Lage der Angeklagten sei ein Milderungsgrund, aber keine strafausschließende Notlage.

Das Todesurteil als solches braucht nicht weiter besprochen zu werden. Der Kassationshof — berichten die Blätter — zog sich nach Verkündigung des Urteiles zurück, um über die Frage der Begnadigung zu beraten. Sie ist zweifellos beschlossen worden und ebenso zweifellos wird ihr stattgegeben werden. Der Gerichtshof war zu dem Todesurteil gezwungen, sobald er Mord annahm; unser altes und veraltetes Gesetz läßt ihm von Rechts wegen keine Wahl. Dennoch ist das Urteil höchst bedenklich. Ob unwiderstehlicher Zwang im Sinne des österreichischen Gesetzes anzunehmen sei, ist zweifelhaft. Aber darum handelt es sich doch nicht, sondern ob die Tat als strafbar zugerechnet werden kann. Schon vor fünfunddreißig Jahren habe ich hierüber erklärt und kann es heute nur wiederholen:

„Der Rechtsstaat verlangt als zur Erhaltung des Friedens und zur Erreichung der gesellschaftlichen Zwecke notwendig von jedermann einen gewissen Grad von Einsicht, Aufmerksamkeit, Redlichkeit und Charakterstärke. Ich nenne dies das *soziale Charkterminimum*.

Wenn jemandem das Charakterminimum mangelt und der Mangel einen Schaden verursacht, tritt Staatszwang ein, Strafe. Soll aber aus einer Tat der Mangel des Charakterminimums erkannt werden, so muß dasselbe *wirken* können. Die Freiheit des Willens als Voraussetzung der Zurechnung bezeichnet den Mangel der Hindernisse für diese Wirksamkeit. Sie begreift deshalb die geistige Gesundheit sowie den Mangel eines Motivs zur Tat, welches erfahrungsgemäß derart übermächtig wirkt, daß bei dessen Eintritt auch das vorhandene Charakterminimum die Tat nicht zu hindern vermag." (Zur induktiven Methode im Recht, S. 21.)

Die beiden Gründe, geistige Krankhaftigkeit und ein übermächtiges äußeres Motiv, wirken selbstverständlich oft nebeneinander und verstärken sich gegenseitig. Ob man den abnormalen Zustand, den sie im Wollen des Individuums auslösen, als unwiderstehlichen Zwang oder als Sinnesverwirrung zu bezeichnen hat, ist Frage juristischer Technik muß aber für das Urteil selbst gleichgültig sein. Der Kassationshof hat zweifellos zu wenig mit dem Umstand gerechnet, daß es sich um ein neugeborenes Kind handelt, um eine Tat vier Tage nach der Geburt. Das österreichische Gesetz nimmt Kindesmord, der geringer bestraft wird, wohl nur an, wenn eine Mutter ihr Kind *bei* der Geburt tötet. Aber die krankhafte Veranlagung der jungen Mutter ist nach vier Tagen noch nicht geschwunden, und wenn nun die Nahrungslosigkeit dazu kam, das Bewußtsein, das Kind nicht stillen zu können, selbst kein Brot zu haben und keine Hoffnung, Brot zu bekommen, dazu die Aufregung, die der Einfall der Russen allgemein hervorrief, so konnten diese Umstände in ihrem Zusammentreffen wohl derart übermächtig wirken, daß das von einer galizischen Taglöhnerin zu verlangende Charakterminimum nicht standhielt. Wenn das Ausnahmsgericht klare Vernunft annahm, so nur deshalb, weil es den Begriff des unwiderstehlichen Zwanges als anwendbar fand. Wenn der Kassationshof aber den letzteren ausschloß, mußte er sich die Frage stellen, ob nicht Sinnesverwirrung zur Zeit der Tat bestand und sie nicht als vorsätzliche Übeltat beurteilen ließ, sondern allenfalls (§ 335 StG.) als eine Handlung, von welcher der Handelnde nach ihren natürlichen Folgen einzusehen vermochte, daß sie eine Gefahr für das Leben von Menschen herbeizuführen geeignet war.

Aber nicht diese Frage will ich hier besprechen, sondern eine

andere, die bestimmend mit eingegriffen hat. Der Kassationshof kam nur dadurch zu seinem Urteil, weil nicht ein *Schwurgericht*, sondern ein Ausnahmsgericht geurteilt hatte. Die Geschworenen hätten die Gründe, warum sie unwiderstehlichen Zwang annahmen, nicht auseinanderzusetzen Gelegenheit gehabt und der Kassationshof daher auch nicht Gelegenheit, diese Gründe zu überprüfen.

Ich erinnere mich an einen Fall aus meinen jungen Verteidigerjahren, in welchem ich den Gegensatz zwischen gelehrtem und Laienurteil zum erstenmal spürte. Ein ähnlicher Gegensatz wie hier zwischen dem Urteil des Kassationshofes und dem wahrscheinlichen Verdikt eines Geschworenengerichtes, bestand damals zwischen dem Verdikt und dem Gutachten von Psychiatern. Eine Mutter hatte sich mit ihrem Kinde ins Wasser geworfen, aus Not und wegen steter Zwistigkeiten mit ihrem Mann, die sie in unnatürliche Aufregung versetzt hatten. Beide waren gerettet worden und die Frau wurde nun des Mordes an ihrem Kinde angeklagt. Die Gerichtssachverständigen verneinten die Frage der Sinnesverwirrung. Sie erklärten, daß die Frau nach ihrer eigenen Darstellung die Tat überlegt habe; bei den niederen Klassen sei die Kindesliebe als Motiv weniger entwickelt. Noch jetzt, nach vierzig Jahren, fühle ich die Empörung, welche das Gutachten bei mir auslöste, in der Erinnerung nach. Ohne daß ich rhetorische Gaben besaß, werde ich damals gewiß gut gesprochen haben. Die Geschworenen verneinten einstimmig die Schuldfrage.

Das Problem der Geschworenen ist gewiß noch nicht ausgegoren. Namentlich in politischen Streitigkeiten haben sie sich nicht immer bewährt. In Böhmen [1]) hat der nationale Gegner, in Wien hat der Jude selten ein unbefangenes Urteil zu erwarten. Aber wenn die Regierung in Frage kommt, ist der amtliche Richter ebenso befangen, und bekanntlich waren es gerade die politischen Delikte, wegen deren die liberale Zeit zuerst das Geschworenengericht verlangte und durchsetzte. Man stellt derzeit den Geschworenengerichten die Schöffengerichte gegenüber und erwartet von der Zusammenarbeit amtlicher und Laienrichter einen gegenseitigen wohltätigen Einfluß. In Deutschland war im Reichstag kurz vor dem Krieg eine scharfe Debatte über die Gerichtsverfassung, aber die Geschworenengerichte hielten

[1]) Es muß hier daran erinnert werden, daß der Artikel vor dem Umsturz geschrieben war. (A. d. H.)

damals allen Angriffen stand. Gewiß werden sie mehr als amtliche Richter von anderen Vorstellungen geleitet als von den Begriffen des Gesetzes, sind anderen als den vom Gesetz als statthaft erklärten Einflüssen, persönlicher Zu- oder Abneigung, Mitleidsgefühl und Vorurteil mehr zugänglich. Auf dem Lande z. B. sind die Geschworenen bei Eigentumsdelikten, namentlich bei Brandstiftungen, geneigt, auf geringe Verdachtsmomente hin zu verurteilen, während sie wegen Körperverletzung oder Kindestötung leicht freisprechen. In der Großstadt werden wiederum Beamte, die schlecht gezahlt sind und aus Not veruntreuen, leicht freigesprochen, und andere, wenn die angedrohte Strafe außer Verhältnis zur Schuld steht. Das enthält sicherlich eine Gefahr der Zersplitterung, des ungleichen Rechtes, der Zufallsentscheidung. Aber anderseits liegt in dieser Auffassung des Rechtes als eines Bestandteiles des gesamten sozialen Lebens, in dieser Ablehnung des Buchstabenurteils ein fruchtbares Moment, das dem Gesetzgeber seine Sterblichkeit, eine Grenze seiner Macht zeigt, das ihn zwingt, mit der Zeit zu gehen und seiner Aufgabe gerecht zu werden, die im Gesetz ein Bild geben soll von der Rechtsauffassung der lebenden anständigen und verständigen Menschen. Auch gelehrte Richter irren, und der Unterschied zwischen ihrer Irrung und der von Geschworenen ist zumeist, daß sie unser Gefühl verletzen, obwohl wir uns ihrer Logik beugen müssen, während das Verdikt der Geschworenen das Gesetz verletzt, wir aber im Herzen mit ihm zufrieden sind. Der gelehrte Richter vertritt bei solchem Gegensatz das geltende, die Geschworenen das gewünschte Gesetz. Wie sich bei Schöffengerichten Laien und amtliche Richter zueinander verhalten werden, ist noch nicht zu übersehen. Es kann auch das Gegenteil dessen eintreten, was man hofft. Die Mitarbeit der Berufsrichter kann die Laienrichter irremachen, wo ihr Mitleid und einfacher Rechtssinn spricht, während sie dort, wo Leidenschaft, Vorurteil oder Parteilichkeit sie leitet, sich nicht beeinflussen lassen.

Der Fall der Mutter, die nach vier Tagen ihr Kind tötet, drängt eine zweite Frage auf. Für das Seelenleben der werdenden oder gewordenen Mutter hat jede feinfühlige Mutter ein besseres Verständnis als ein gelehrter Psychiater. Denn sie hat es in höherem oder minderem Grade selbst gehabt, und echtes Mitfühlen setzt das eigene der Situation voraus. Das gilt aber für mancherlei Zustände der Frau und auch des Kindes, des Jugendlichen. Und so drängt sich aus dem

Falle die allgemeine Frage auf, warum *die Frauen als Geschworene* (oder Schöffen) ausgeschlossen sein sollen. Derzeit ist der Ausschluß ein Bestandteil des allgemeinen Systems, das wir aber allerorten zu durchbrechen im Begriffe sind. Für uns kann daher nur die Frage aufgeworfen werden, ob nicht gerade die richterliche Tätigkeit ihrer Natur nach den Frauen mehr entzogen ist als den Männern. Nun waltet bei der Frau im allgemeinen vielleicht die Eigenschaft des Geschworenen in seinem Gegensatz zum amtlichen Richter noch stärker vor als beim Manne. Die Frau ist vielleicht Empfindungen außerhalb des Gesetzes noch zugänglicher, und vielleicht wäre ein Gericht, das lediglich aus Frauen bestünde, den Gefahren des Geschworenengerichtes noch mehr ausgesetzt als ein Gericht aus Männern. Den Gefahren, denen aber die Vorteile gegenüberstehen. Doch braucht diese Frage nicht erörtert zu werden. Die Frauen werden immer nur einen Bestandteil des Gerichtes bilden, einen Einschlag geben, und dieser wird gewiß wohltätig wirken. Wir haben uns bei jeder Außentätigkeit, die wir der Frau zugestanden haben, mühsam dem Vorurteil entrungen, und wenn der Versuch gemacht wurde, ist er geglückt. Auch der Versuch mit dem Richtertum ist in den Vereinigten Staaten seit langem gemacht und man ist mit ihm durchaus zufrieden. Die Vergleichung spricht für ihn, und die furchtbare Mahd des Krieges unter den Männern wird ihn nötig machen, um die Geschworenengerichte wieder einführen zu können. Diese Einführung ist aber wichtig und nötig, um der Verfassung, um des Selbständigkeitsgefühles unseres Volkes willen. Aber auch um solche Urteile, wie es das besprochene Todesurteil ist, zu vermeiden. Denn Geschworenengerichte hätten zwischen unwiderstehlichem Zwang und Sinnesverwirrung zur Zeit der Tat nicht jene sublime Unterscheidung gemacht wie der Kassationshof, derart, daß, wenn sie den einen Begriff als nicht zutreffend erkannten, sie sich mit dem anderen nicht beschäftigt hätten. Dem Geschworenen tritt der konkrete Fall entgegen, während der Berufsrichter leider zu oft geneigt ist, die Begriffe zu spalten und, wie der Kassationshof in dem vorliegenden Fall, sich damit zu beruhigen, daß nur der unwiderstehliche Zwang, aber nicht die Sinnesverwirrung zur Grundlage des ersten Urteils angenommen wurde. Derart gelehrte Logik mag eine Doktorfrage entscheiden, aber nicht die Tat eines lebendigen Menschen.

DAS WIENER JUGENDGERICHT

1920

Am 25. Oktober wurde es eröffnet. Ohne Sang und Klang. In einem Zimmer der Räumlichkeiten, die ihm angewiesen sind, versammelte sich eine kleine Zahl von Personen, die unmittelbar an der Institution gearbeitet hatten oder arbeiten. Kein fremder Gast war geladen, kein Berichterstatter. Der enge Kreis, der mit allem Geschehenen vertraut war, wirkte auf die Reden, die gehalten wurden. Sie waren ernst, warm, aber ohne äußeren Schwung, asketisch einfach. Nur der Gestorbenen wurde gedacht, sonst gemahnt, gewarnt, versprochen, gemeinsame Arbeit geplant. Keine Zeitung berichtete über die kaum so zu nennende Feier. Mit Recht rügte eine Rednerin dieses Zuviel an Bescheidenheit und wies darauf hin, wie in anderen Ländern die ganze Öffentlichkeit an der Entstehung einer so neuartigen und hoffnungsreichen Einrichtung interessiert worden wäre. Es liegt in der Psychologie der Masse, daß die Achtung der anderen durch die Achtung, die man für sich selbst hat, beeinflußt wird; und aus dem Buche der Weisheit, das gewiß der Hoffart und Prunksucht nicht dient, mag man lernen, daß man sein Licht nicht unter den Scheffel stellen soll. Wir Österreicher haben darin viel gesündigt und büßen es.

Das Jugendgericht ist der allgemeinen Aufmerksamkeit, Schätzung und Unterstützung wert. In seiner besonderen Form ist es auf dem Kontinent eine ganz originelle Schöpfung und seine Geburt hatte viele Hindernisse zu bestehen. Das Gesetz vom 25. Jänner 1919 (StGBl. Nr. 46) trägt auch in seinem Anfangsparagraphen das Merkzeichen der Zangengeburt. „Bis zur Erlassung gesetzlicher Bestimmungen über die Jugendfürsorge und das Jugendstrafrecht" — heißt es dort — „ist der Staatssekretär für Justiz ermächtigt, durch Vollzugsanweisung Jugendgerichte zu errichten." Ein Provisorium nach zwölf Jahren — seit dem Ersten österreichischen Kinderschutzkongreß 1907 — geschlossenen Kampfes um die Reform! Die Gegnerschaft, die überwunden werden mußte, war aber auch stark genug. Da war zunächst die *Schablone* der gerichtlichen Organisation. Sie ist darauf eingerichtet, daß die Zuständigkeit nach der Art der Tätigkeit bestimmt ist. Insbesondere ist Zivil- und Strafgerichtsbarkeit voneinander strenge getrennt; ähnlich streng wie Verwaltung und Justiz. Von diesem Gesichtspunkt aber bietet die Agende des Jugendgerichtes ein krauses Gemisch. Es ist manchmal reines Pflegschaftsgericht, manchmal Pflegschafts- und Strafgericht und in einer Gruppe von Fällen sogar Strafgericht über Nichtjugendliche. Das einigende Moment, welches dem Jugendgericht Farbe und Charakter gibt, ist bei ihm nicht die Art der Tätigkeit, sondern ihr *Zweck*. Es ist das Gericht *zum Schutze der Jugend*. Diesem Schutz dient die Pflegschaft, dient die Bestrafung des Jugendlichen, wenn sie als notwendig und zweckmäßig zu seiner Erziehung erscheint, und dem gleichen Zwecke dient die Bestrafung von Personen, welche Jugendliche schädigen oder gefährden. Der Anschluß dieser letzteren Agende hat lange Zeit auch Freunde des Jugendgerichtes befremdet. Man hat darauf verwiesen, daß das Gericht eben deshalb, weil es den Geschädigten vertritt, nicht objektiv genug sein könne. Aber auch das ist altes System, das den Zweck verkennt, und ein berufener Beurteiler, Ben B. Lindsey, Jugendrichter in Denver (Colorado), der bekannte Vorkämpfer des Jugendgerichtes, bringt hiefür in seinem Buche „The problem of the children" [1]) überzeugende Beispiele. „Wir haben Männer und Frauen ins Gefängnis geschickt", endigt das betreffende Kapitel, „weil sie Zigaretten und alkoholische Getränke an Jugendliche verkauft haben. Wir haben hohe Geldstrafen über viele Erwachsene verhängt. In den meisten Fällen haben wir die Eltern und Bürgen unter Bewährung gestellt ebenso wie die Kinder. Sie haben uns berichten müssen und *sind dabei Freunde und Mitarbeiter des Jugendgerichtes geworden.*"

Der zweite und weit mächtigere Feind, der besiegt werden mußte, war das Dogma der *Vergeltung*, die Auffassung, daß das Delikt nach religiös-ethischer Logik eine gleich schwere Sühne verlange, die persönliche Eigenschaften mildern, aber das Verhältnis nicht ändern können. Eine Auffassung, die zugleich den Schuldhaften als Sünder zu einem Verstoßenen der Gesellschaft macht, ihm für sein Leben lang einen Makel anheftet. Noch der Berichterstatter des Herrenhauses über das Jugendstrafrecht (1911) stellt diese harte, unbarmherzige Grundlage des österreichischen Strafrechtes fest. Jeder einzelne Reformvorschlag, der ihr gegenüber die Strafe als soziale Er-

[1]) Unter dem Titel „Die Aufgaben des Jugendgerichtes" ins Deutsche übersetzt von Dr. Paul, Verlag Salzer, Heilbronn.

ziehungsmaßregel erfaßte, stieß auf scharfen Widerstand. So die Tilgung der Verurteilung, deren wichtigste Folge erst im Hause selbst gegen Regierung und Justizausschuß durchgerungen werden konnte. So die Umwandlung der Kerkerstrafe in Arrest, die Grauen erweckte, weil Arrest die Strafe für Vergehen oder Übertretung sei, Verbrechen und Arrest in keine Proportion gebracht werden können. So die bedingte Verurteilung, die unter dem Drucke der Polizisten im Recht wirklich nur als bedingter Strafnachlaß durchging, wobei wieder erst in der Nationalversammlung gegen Theoretiker, Regierung und Justizausschuß ein grundlegender Gedanke, der Nachlaß der Rechtsfolgen aus dem Urteil, beschlossen wurde. Immer und immer wieder erklang das alte Lied, die Justiz dürfe nicht in schwächliche Humanität ausarten, was niemand will, wobei aber Schwäche nicht mit psychologischer Einsicht verwechselt werden darf. Der Gedankengang des alten Dogmas störte auch die Gesetzgebungsarbeit über Jugendstrafrecht und Fürsorgeerziehung. Ich erinnere mich lebhaft daran, daß noch in § 4 des letzten Entwurfes eines Jugendstrafgesetzes die Endigung des Strafverfahrens durch eine Ermahnung an den Jugendlichen nur dann gestattet war, wenn die Tat nicht bloß nach den Umständen geringfügig, sondern zugleich nur mit einer Geldstrafe oder mit einer drei Monate nicht überschreitenden Freiheitsstrafe *bedroht* war. So daß also die kleinste Unredlichkeit (auch die jetzige Entwendung bestand damals noch nicht), die Wegnahme eines Spielzeugs oder Kuchens nicht mehr unter § 4 fallen konnte. Vergeblicher Versuch, Regierung oder Berichterstatter davon zu überzeugen, daß nur die in der Tat selbst zum Ausdruck gelangte Gesinnung maßgebend sein könne, nicht die Schablone, die bei einer Gruppe von Straftaten mit drei oder sechs Monaten als Höchststrafe abschließen kann, je nach größerer oder geringerer Abstufung. Auch das Gesetz über Fürsorgeerziehung fand Hindernisse aller Art und so mußten wir dem Schicksale danken, daß, als der neue Staat seine Tätigkeit begann, an der Spitze des Justizamtes ein Mann stand, der als Richter und Politiker der theoretischen Disputation ferner stand und mit dessen Hilfe wir das provisorische Gesetz vom 25. Jänner 1919 als erste Abschlagszahlung auf das uns vorschwebende große Reformwerk erlangten. Mit dem Gesetz allein war es aber noch nicht getan. Es kam erst die Frage der Unterkunft. Das Wiener Jugendgericht (an das zunächst allein gedacht werden konnte)

hatte kein Obdach. Eine Anzahl von Unterbringungsplänen scheiterte. Anderthalb Jahre dauerte es noch, bis endlich die bisherigen Räumlichkeiten des Bezirksgerichtes Landstraße sowie die noch nicht fertiggestellten Baulichkeiten in Kaiser-Ebersdorf dem Jugendgerichte zugewiesen wurden und zugleich die Vollzugsanweisung vom 23. September 1920 (StGBl. Nr. 439) erschien, um dem Gesetze vom 25. Jänner 1919 zu wirklichem Leben zu verhelfen.

Die Vollzugsanweisung ist nüchtern gefaßt, allzu nüchtern. In dem Stück 132 des StGBl., welches sie enthält, ist voran eine zweite Vollzugsanweisung angeführt, deren § 1 ich im ersten Moment als zu ihr gehörig auffaßte. Da heißt es: „Nicht der Schutz der Gesellschaft gegen den Verurteilten, sondern der Schutz des bedingt Verurteilten gegen die Gefahr des Rückfalles ist der unmittelbare Zweck der Schutzaufsicht." Es wäre mir ein Labsal gewesen, wenn eine ähnlich warme Äußerung auch die Vollzugsanweisung für die Errichtung von Jugendgerichten eingeleitet hätte. Indessen, das Wichtigste ist die Vollzugsanweisung selbst, sind die Bestimmungen, die dem Jugendgerichte nunmehr die Möglichkeit geben, zu arbeiten. Daß zunächst seine Zuständigkeit auf Übertretungen eingeschränkt ist, während § 4 des Gesetzes vom 25. Jänner 1919 erlaubt, ihm auch das vereinfachte Verfahren in Verbrechen- und Vergehenssachen Jugendlicher zu übertragen, mag als Übergangsbestimmung für kurze Zeit hingenommen werden, für die Zeit, in der das Jugendgericht sich einrichtet, sich an seine schon jetzt umfassende Arbeit gewöhnt hat. Dann ist es aber allerdings nötig, den § 4 gleichfalls ins Leben zu führen. Denn als Ausgangspunkt aller Rechtspflege über Jugendliche muß gelten: Es gibt bei Jugendlichen keine Verbrechen und Vergehen im Sinne des allgemeinen Strafgesetzes! Immer sind die Taten entweder Jugendstreiche oder der Ausdruck einer mangelnden oder mangelhaften Erziehung, einer Verwahrlosung, an der zumeist nicht der Jugendliche die Schuld trägt, sondern jene, denen seine Erziehung anvertraut ist. Immer bedarf es nicht einer Sühne, sondern der Erziehung und auch die im einzelnen Fall verfügte Strafe ist nur eines der Erziehungsmittel.

Die Vollzugsanweisung im einzelnen zu besprechen, betrachte ich nicht als Aufgabe. Die Vollzugsanweisung ist erlassen, das Jugendgericht kann arbeiten. Das Wiener Jugendgericht! Denn das ist das einzige, das Neues, Gutes unabhängig von dem Alten leisten kann. Wo der

Jugendrichter in die alte Organisation eingepfercht ist, wird er überall gehemmt und gehindert sein. Das darf ihn nicht entmutigen. Aber ich meine, nur das freie Jugendgericht kann *voll* arbeiten. Das Arbeitsgebiet ist groß genug. Das Jugendgericht hatte seinem unmittelbaren Zweckgedanken zufolge die Gerichtsbarkeit über Jugendliche, die sich gegen das Strafgesetz verfehlt hatten. Seine Zuständigkeit ist aber nach doppelter Richtung hin erweitert worden. Es hat die Pflegschaft über *alle* unmündigen und jugendlichen Personen, bei denen unzulängliche Fürsorge angenommen wird (auch in Fällen der §§ 142, 169, 178 u. a. des ABGB.). Es kann auch die Geschwister der Jugendlichen, die es in Pflegschaft hat, einbeziehen. Es hat insbesondere die Pflegschaft über strafbare Jugendliche, aber auch über Jugendliche, die durch strafbare Handlungen anderer verletzt oder gefährdet sind. Es hat endlich das Strafverfahren wegen Übertretungen von Jugendlichen, aber auch — und das ist die größte Erweiterung — wegen Übertretungen, durch welche Jugendliche verletzt oder gefährdet werden. Um das leisten zu können, was nunmehr seine Aufgabe ist, muß der Jugendrichter ein Mensch sein, der Verstand, Gemüt und Energie vereinigt, der gewinnt und zugleich imponiert. Um die ihm anvertraute Schutzfürsorge zu leisten und insbesondere gerade jetzt die große Schutzfürsorge und Erziehungsarbeit, welche die Kinder und Jugendlichen bei uns verlangen, da wir Jahre hinter uns haben, in denen sie in beispielloser Weise vernachlässigt und verwahrlost wurden, braucht er aber auch einen Stab von tüchtigen, gewissenhaften, eifrigen Gehilfen, Pflegern und Pflegerinnen, die einen besoldet, die anderen entgeltlos, je nach ihrer Tätigkeit. Frauen insbesondere an Bord! Sie wirken ihrer Anlage nach auf Kinder und Mütter leichter, weicher, unmittelbarer. Die Tätigkeit der Pfleger hauptsächlich ist die Aufgabe der Zukunft, sie sind die Stütze, ihr bienenartig sorgsamer Fleiß ist die Voraussetzung für die Bedeutung des Jugendgerichtes. Aber nicht die Vollzugsanweisung des Staatsamtes ist die Anweisung, die sie zum Vollzuge bringen sollen, sondern das Büchlein von Ben B. Lindsey, welches ich bereits angeführt habe und das ich in Tausenden von Exemplaren bei den Gerichten, bei den Behörden, in den Schulen, in den Gemeindeämtern und allerwärts im Publikum verbreitet sehen möchte. Hier spricht ein Mann von Kopf und Herz und vieljähriger Erfahrung, aus einem Lande, in dem allein diese große Einrichtung

gedeihen konnte, weil es keine Schlösser hat und keine Basalte. In diesem Lande sind aber auch die Temperamente, ist der Drang nach Erwerb stark ausgebildet und schwächliche Humanität hätte keine Erfolge gehabt. Man kann sich aus dem Buche Lindseys überzeugen, daß es oft schwere Jungen waren, mit denen er zu tun hatte, die Einbrüche verübt, Autos und Pferde gestohlen, Banden gebildet hatten, die er aber doch bezwang durch Geduld und Vertrauen auf die guten Grundlagen der Menschennatur. „Sein Leitstern", sagt er vom Jugendrichter, „muß Liebe, verbunden mit Gerechtigkeit sein. Liebe ohne Gerechtigkeit wird leicht zu schwächlicher Gefühlsduselei, *aber es gibt auch keine wahre Gerechtigkeit ohne Liebe.*

Zwei Gefahren drohen dem Jugendgericht. Die eine ist der Bürokratismus, der bei uns ungewöhnlich stark entwickelt ist und sicher bald seine Fangarme um das Jugendgericht zu legen bemüht sein wird. Er ist deshalb so gefährlich, weil er formelle Ordnung bringt; in dieser Ordnung aber tötet er das Leben. Die zweite Gefahr besteht in gefühlsmäßigem Überschwang, in allzu großen Erwartungen von den Erfolgen des Gerichtes, denen dann leicht Enttäuschung und Disziplinlosigkeit folgen. Die Erfolge des Gerichtes und der Pfleger verlangen Mitarbeit der Eltern und der Umgebung des Jugendlichen, der vom Pfleger bewacht und geleitet werden soll. Aber Eltern und Umgebung werden diesem gar oft entgegenarbeiten. Sie werden ihm Mißtrauen, Selbstsucht, oft selbst Bosheit entgegenstellen. Auch der Jugendliche, besonders wenn er schon in höherem Alter steht, wird oft mißtrauisch und trotzig sein. Namentlich wenn er schon die Luft des Gefangenhauses geatmet hat. Es bedarf daher vieler Geduld, *vieler Geduld.* Man darf den Mut nicht verlieren, auch wenn Hoffnungen, die man mit Grund zu haben glaubte, immer wieder täuschen. Gottes Mühlen mahlen langsam. Als Wegweiser und Tröster mag wieder Lindsey empfohlen werden. „Selbst wenn einmal die praktische Arbeit des Jugendgerichtes nicht so ist, wie sie sein sollte" — sagt er —, „so ist es doch besser, Jugendgesetze zu haben als nicht, auch wenn dann ihre einzige Wirkung wäre, daß sie eine Handhabe zur Besserung der Kinder liefern, ohne sie an der Schwelle ihres Lebens als Verbrecher zu brandmarken." Und welche Freude mag sich mit der messen, einem Menschen, der sich und anderen verloren schien, sein Leben und sein Vertrauen zu sich wieder gewonnen zu haben. — Die Herzen hoch!

DER SCHUB

1923

Wir sind aus dem Polizeisystem ins Fürsorgesystem getreten. Mindestens rufen wir das allenthalben aus. Alles widerhallt von Fürsorgeanstalten, Fürsorgevereinen, Fürsorgekongressen und sonstigem Fürsorgeapparat. Daneben führt aber der alte bureaukratische Polizeistaat sein Regiment weiter, und während wir den Menschen nicht mehr als bloßes Material des Staates, das dieser nach seinem Interesse dulden oder ausstoßen mag, sondern als Eigenwert und den Staat als Mittel zu seinem Schutze aufgefaßt wünschen, blüht das menschenverachtende *Mittel* des Polizeistaates weiter — der *Schub* — in mancherlei Gestaltung, als Ausweisung, als Abschiebung oder Abschaffung.

Ich will hier nicht von Ausländern sprechen, obwohl wir durch die Verengung der allgemeinen Menschenrechte im Staatsbürgerrecht einen argen Rückschritt gemacht haben; aber die Staaten sind einander jetzt mehr als je feindlich gesinnt, behandeln Staat und Staatsvolk mehr als je als gleichbedeutend, und der Kampf gegen das Recht der Ausweisung lästiger Ausländer muß noch seine Zeit abwarten. Ich spreche also nur von Ausweisung oder Abschaffung von Staatsbürgern, die entweder in ihre Heimatsgemeinde oder an die Grenze des Polizeigebietes gebracht und dort ihrem Schicksal überlassen werden.

Ich hatte als Armenvertreter einen 22jährigen Burschen zu verteidigen. Er war an einem Feiertag mittags in einer belebten Gasse ins Fenster eingestiegen und selbstverständlich sofort ertappt worden. Der Fall war also juristisch nicht interessant. Seine Strafkarte war aber seltsam. Ein Jahr schweren Kerkers, dann zwanzig bis fünfundzwanzig Abstrafungen wegen unbefugter Rückkehr, dazwischen wenige kleine Diebstähle, offenbar aus Not. Was war geschehen? Der Junge war in Wien geboren und hatte stets hier gelebt. Ebenso seine Eltern. Vom Großvater oder Urahne her war er nach einem tschechischen Dorf zuständig, ohne die Sprache oder dort irgend jemand zu kennen. Er war Lehrling und hatte sich von dem Gesellen verleiten lassen, dem Meister einen Geldbrief, den er auf die Post bringen sollte, zu stehlen und dem Gesellen zu geben. Er selbst hatte

für sich nichts genommen. Diebstahl mit zweifacher Qualifikation, er wurde zu einem Jahr Kerker verurteilt. Er benahm sich in der Strafanstalt mustergültig und wurde von ihr dringend zur Fürsorge empfohlen. Ebenso verwendete sich der Kremser Verein warm für ihn, und der Meister, dem er das Geld gestohlen hatte, erklärte sich bereit, ihn wiederzunehmen, weil er ein anständiger und lediglich verführter Junge gewesen sei. Der Gedanke scheiterte aber an der Wiener Polizei, die nicht zu bewegen war, auf den Schub zu verzichten. So wurde der arme Junge in das tschechische Dorf gebracht, wo er nicht leben konnte, und die folgenden Jahre waren ausgefüllt durch seine Rückkehr nach Wien, Ertappen durch die Polizei, Abstrafung wegen verbotener Rückkehr, neuerliche Abschiebung und so fort, bis er durch Elend und vielleicht durch Ekel vor weiterem solchen Leben zum Einbruch bei hellem Tag in belebter Gasse veranlaßt wurde. Er verteidigte sich gar nicht.

Ich berichtete den Vorfall in den Juristischen Blättern und schloß mit den Worten: „Die Seele dieses jungen Menschen hat die Wiener Polizeidirektion auf ihrem Gewissen." Der Artikel wurde von der politischen Zensur gestrichen.

Das war 1915—1916. Aber im Dezember 1923 spielten vor dem Verfassungsgerichtshof zwei ähnliche Fälle, und wieder war es die Wiener Polizeidirektion, die die Zukunft zweier junger Geschöpfe bedrohte. Es war ein Mädchen und ein Bursche, beide in Wien geboren und hier lebend, aus anständigen Familien. Beide waren in schlechte Gesellschaft geraten und wegen Diebstahls bestraft — das Mädchen zu drei Wochen Arrest, der Bursche wegen Kofferdiebstahles zu sechs Monaten Kerker. Die Eltern hatten sie wieder ins Haus genommen, und die seitherigen Berichte lauteten nicht ungünstig. Aber beide waren Optanten, Bundesbürger, jedoch noch der Gemeinde nicht zugewiesen, und die Lücke des noch fehlenden Durchführungsgesetzes wollte die Wiener Polizeidirektion gebrauchen — man darf wohl sagen: mißbrauchen —, um die beiden jungen Menschen von ihrer Familie weg aus dem Wiener Polizeigebiet abzuschaffen.

Was hätten sie in der Fremde werden sollen ohne Erwerb, Besitz und Bekannte? Das Mädchen wahrscheinlich eine Dirne und der Bursche ein Vagabund.

Das ganze Schubwesen ist in unserer Zeit sinnlos. Einst war die

Heimatgemeinde wirkliche Heimat, der Wohnsitz von Eltern und Bekannten, Ort des Jugendlebens und der Erziehung, Wahrscheinlichkeit von Beschäftigung und Erwerb. Wenn der anderwärts sozial Ausgeglittene in die Heimat gebracht wurde, so war Hoffnung, daß er sich wieder aufraffe. In der Zeit der Fabriken, der Großstädte, der Eisenbahnen hat sich das völlig verändert. Heimat und Erwerbsort fallen auseinander. Im Deutschen Reich, außer Bayern, ist seit langem das Heimatsystem ganz fallen gelassen. Die Heimat ist Fremde geworden, und die Verwaltung, die aus Verwahrlosten und Ausgeglittenen wieder Menschen züchten will, mit denen man leben kann, muß sich den neuen Verhältnissen anpassen. Sie muß für sie Erwerbsgelegenheit suchen und schaffen, sie beaufsichtigen, um neue Entgleisung zu verhüten, ohne sie jedoch als Zwänglinge zu behandeln. Der Zweck muß Fürsorge sein, nicht Abtuung nach dem Grundsatz des Erlasses, den man dem Polizeiamt eines deutschen Duodezländchens nachsagte: Der wütige Hund solle erschlagen oder über die Grenze gejagt werden, damit er fürderhin keinen Schaden mehr anrichte!

Bei meiner Achtung vor dem jetzigen Polizeipräsidenten hat es mich geradezu gewundert, daß die betreffenden Beschlüsse unter ihm gefaßt werden konnten.

Für Gesetzgebung und Verwaltung erwächst aus dem Fürsorgegedanken für die Behandlung Entgleister eine ernste Aufgabe.

STRAFVOLLZUG [1])

1924

In dreifachem Teilsystem übt der Staat seine Straftätigkeit aus: durch Strafgesetz, Prozeß und Vollzug. Alle drei Teile sind, wie

[1]) Dieser — hier etwas gekürzt wiedergegebene — Artikel wurde laut einer Anmerkung der Redaktion von Ofner »aus seinem Krankenzimmer, das sein Sterbezimmer werden sollte«, dem »Morgen« eingeschickt. (A. d. H.)

wir wissen, bei uns veraltet; aber die Kritik der Bevölkerung beschränkt sich auf Gesetz und Prozeß. Ist der Mann zu drei Jahren Kerker verurteilt, so ist die Sache auch für das Publikum erledigt, obwohl doch die eine Tat nicht den Menschen ausmacht und dieser Mensch nach Ende des Strafvollzuges auch leben will und muß. Der konkrete Grund hiefür besteht darin, daß der Strafvollzug der Staatsanwaltschaft untergeordnet ist, während dies doch einen Widerspruch enthält. Der Mann, der als Ankläger in dem Angeklagten alles Schlechte findet, der in dem Verbrecher einen Auswürfling sieht, welcher nicht mehr das Recht hat, mit den ehrlichen Menschen zusammenzuleben, ist gewiß der Letzte, der unbefangen das Gedankenleben der Verurteilten zu sichten versteht. Einmal hatte ein Minister das Verständnis für diesen Zustand: das war Anton von Hye, der den Strafvollzug von der Staatsanwaltschaft loslöste, einen Generalinspektor schuf und, als er abtrat, selbst dieses Amt annahm.

Im Heere der österreichischen Monarchie bedurfte der Offizier, der heiraten wollte, wenn er nicht mindestens Hauptmann war, einer Kaution. So mußte eine größere Anzahl von Oberleutnants aus dem aktiven Dienst treten und aus diesen entnahm Hye die Gefängnisbeamten, weil nach seinem richtigen Urteil der Offizier die ungeschlachten, erziehbaren Rekruten im Auge hat und diese Auffassung auch auf den Verbrecher überträgt. Nach seinem Tode hatte die Staatsanwaltschaft wieder die Oberhand; das Amt des Generalinspektors wurde nicht mehr besetzt, die alte Wirtschaft fortgesetzt. Ich habe als Abgeordneter mehrere Sessionen hindurch die Reform verlangt.

Ich wende mich neuerlich an die Öffentlichkeit mit der Aufforderung, hier einzugreifen. Der Grund der allgemeinen Indifferenz besteht darin, daß die Strafe als Vergeltung, der Sträfling als unverbesserlich betrachtet wird. Die Kriegsjahre haben gezeigt, wie fehlerhaft diese Auffassung ist, daß wir es fast immer mit Verwahrlosten, zumeist ohne eigene Schuld Verwahrlosten zu tun haben. Staat, Presse, die gesamte Bevölkerung müssen zusammenwirken in der Erkenntnis, daß die verurteilten Menschen Menschen geblieben sind, zumeist geeignet, sich wieder ehrenhaft ihr Brot zu schaffen und anständige Mitglieder der Gesellschaft zu werden. Strafe ist nicht Vergeltung, sondern soziale Erziehung.

IV. ZUR SOZIALWISSENSCHAFT UND ETHIK

DAS JAHR 1848 IM LICHTE DER ETHIK

Vortrag, gehalten am 11. März 1898 in der Ethischen Gesellschaft in Wien

Das Jahr 1848 kann aus verschiedenen Gesichtspunkten aufgefaßt und beurteilt werden, vom historischen, vom politischen und vom sozialen Gesichtspunkte. Der soziale Forscher, welcher erkannt hat, daß die Geschicke der Menschen ebenso an ewige und unvergängliche Gesetze geknüpft sind wie Ruhe und Bewegung, er weiß, daß soziale Eruptionen, wenn sie auch als völlig unvermittelt und plötzlich erscheinen, doch nichts anderes als letzte Momente einer stetigen und ursprünglich langsamen Bewegung sind. Es ist ein Verlauf wie bei einer Lawine, wo ein kleines Stück Schnee sich von seinem Untergrund ablöst, durch die schräge Gestalt der Fläche sich fortbewegt, mit neuen und immer größeren Schneemassen sich verbindet, bis endlich, durch die Masse, wie durch die Größe des Falles, eine so gewaltige Kraft entstanden ist, daß sie die bekannten furchtbaren Wirkungen üben kann.

Und ebenso weiß es der ruhige Beobachter, wie in dem Falle, wenn ein System den tatsächlichen sozialen Verhältnissen nicht mehr entspricht und in den verschiedenen Klassen der Bevölkerung verletzt, wie sich allenthalben Unmut und Erregung ansammelt, wie der eine murrt und der andere seufzt, wie Presse, Versammlungsreden und Vorträge diesen Unmut entfachen und verbreiten, bis endlich, wenn nichts von oben geschieht, und die Erregung sich immer mehr verstärkt und verdichtet hat, durch irgendeinen Anlaß, durch einen Putsch oder eine Anregung von außen her, ein Ausbruch erfolgt, wie ihn auch das Jahr 1848 bot.

Wir wollen das Jahr vom ethischen Gesichtspunkt aus betrachten. Daß die Ethik mit der sozialen Lage, insbesondere mit der Not in inniger Verbindung steht, ist bekannt und ergibt sich aus ihrem Begriff. Ethik ist, wie wir es alle auffassen, der Inbegriff der Grundsätze für das einträchtige Zusammenleben und -wirken der Menschen.

Wie soll aber Eintracht bestehen, wenn ein großer Teil der Menschen in Not und Elend sich befindet, daß er kaum leben kann,

geschweige denn auch nur in geringstem Maß zufrieden, geschweige denn derart, daß er Reichtum und Wohlsein des anderen betrachten kann, ohne Schmerz und Neid und Groll zu empfinden?

Für das Jahr 1848 erlaube ich mir hiefür nur ein einziges Beispiel anzuführen, eine Stelle aus Ernst Violands Schrift: „Die soziale Geschichte der Revolution in Österreich". Er zeichnet den Druck, der auf den Wiener Fabriksarbeitern lag. Es war kurz vorher die neue Arbeitsweise der Fabrikation entstanden und hatte viele Tausende von Arbeitern nach Wien gelockt, welche aber dann, teils durch die Krisen des Jahres 1847 und durch Mißernten, teils durch Einführung neuer Maschinen, die Arbeiter entbehrlich machten, in schreckliches Elend geraten waren. Violand setzt nun fort: „Die Folge der furchtbaren Zustände der abhängigen Arbeiterklasse war, wenigstens in Wien, wie ich aus eigener Anschauung weiß, grenzenlose Immoralität und sittliche Verwilderung. Ganze Vorstädte, wie Thury, Liechtental, Altlerchenfeld, Strozzischer Grund, Margareten, Hundsturm, neue Wieden, Fünf- und Sechshaus wimmelten von ausgehungerten, zerlumpten Arbeitern, und abends erfüllten die ungücklichen Mädchen der Fabriken in dem jugendlichsten, selbst Kindesalter die Glacis und den Stadtgraben, um für einige Groschen jedem dienstbar zu sein. Im Jahre 1845 oder 1846 zogen sie sogar mit jungen Fabriksarbeitern, den sogenannten Kappelbuben, welche auf die Annäherung der Polizei zu achten hatten, in den Straßen der inneren Stadt herum und scheuten sich nicht, zur größeren Bequemlichkeit ihres horizontalen Nebengewerbes Bänke und Polster mit sich zu nehmen. Auch nächtliche Raubanfälle kamen fast täglich vor. Der Regierungsrat Baron Buffa soll zu jener Zeit bei sehr empfindlicher Kälte am Minoritenplatz ganz nackt ausgezogen worden sein. Das schauderhafte Elend dieser Fabrikssklaven, namentlich im Winter, ging in das Unglaubliche, und doch waren sie überglücklich, wenn sie nur nicht ihren Verdienst verloren; dann blieb ihnen nichts übrig, als zu verhungern oder zu stehlen." Welch furchtbares Gemälde, und doch nur nackte Wahrheit! Es mag Ihnen einen Begriff von der Not geben, welche, sobald eine Eruption eintrat, sie zur Revolution steigern mußte.

Doch ich will heute die konkreten sozialen Bilder des Jahres 1848 nicht vor Ihnen entrollen. Die Erinnerung an die damalige Bewegung der Geister bringt uns eine andere aus früherer Zeit ins Gedächtnis,

mit welcher ich sie vergleichen möchte. Es sind nun 1900 Jahre her, da war in Judäa eine gewaltige soziale Erhebung. Das Volk, das von den Römern unterdrückt war, das nach seiner Freiheit lechzte, das noch in seinem Gedächtnisse den siegreichen Kampf der Makkabäer hatte, deren letzte Nachkommen noch unter ihm lebten, sehnte sich nach einem nationalen Messias. Da trat ein Held der Ethik auf, welcher durch sein tiefes Gemüt, durch seine Übereinstimmung mit den Wünschen des Volkes, durch seine feurige Beredsamkeit das Volk aufregte, die Massen um sich sammelte, endlich zum König ausgerufen wurde, in Jerusalem einzog, den Tempel säuberte und seine reine Lehre predigte. Aber das damalige Bürgertum zog den Druck des Römers einem Zustand vor, welchen es, so wie heute, Herrschaft des Pöbels nannte. Die ungeordneten Massen seiner Anhänger waren bald zerstreut, er selbst wurde getötet. Seit jener Zeit sind die Pharisäer der ewigen Verachtung der Geschichte überantwortet worden. Und mehr als 1800 Jahre nachher, 1848, erleben wir ein ähnliches Ereignis. Wohl trat kein solcher Held an die Spitze, aber die Männer der Erhebung waren edle, uneigennützige Männer.

Wird doch die Bewegung von den Studenten eingeleitet! Das bedeutet, daß es sich um eine ethische, keine politische Sache handelt. Der Student wird nicht vom Egoismus, sondern von Begeisterung geleitet. Sein Ideal kann falsch sein, seine Stimmung ist es nicht. Den Studenten in erster Linie ist der 12. und 13. März zu verdanken. Die akademische Legion erhält auch späterhin die Führung, und es ist zu bewundern, was diese jungen, kaum dem Knabenalter entwachsenen Leute leisteten, welche Einsicht und Kraft sie bewährten, wie willig die bärtigen Männer ihnen folgten, weil ihr guter Wille außer Zweifel stand. Erst als das Bürgertum anfing zu grollen, daß man den Arbeitern bei den öffentlichen Notarbeiten, Normallohn und Normalzeit geben wollte — allerdings zu jener Zeit ein ideologischer Versuch — erst dann begann der innere Kampf, und das Bürgertum rief gegen die Arbeiter nach dem siegreichen Soldaten. Die Erhebung wurde unterdrückt, die Häupter getötet, eine Masse der edelsten jungen Männer starb und verdarb im Kerker. Die Bürgerschaft Wiens aber richtete an den Fürsten Windischgrätz eine Adresse folgenden Inhaltes: „Mit innigster Verehrung erscheinen wir vor Euerer Durchlaucht, um Hochdemselben unseren tiefgefühlten Dank für die Herstellung der gesetzlichen Ordnung und Ruhe darzubringen,

wodurch des Bürgers Sicherheit an Person und Eigentum allein gewährleistet wird. Diese unschätzbaren Güter, deren höchsten Wert besonders wir in unserem geschäftlichen Wirken ihrem ganzen Umfange nach zu würdigen vermögen, diese hohen Güter und ihre Wiedererlangung verdanken wir Ihnen, durchlauchtigster Fürst, dem Befreier aller Gutgesinnten aus der Nacht der Anarchie, aus den Fesseln der Schreckensherrschaft einer Partei, welche allen guten Bürgern Verderben zugeschworen. Nicht wir allein, unsere Familien und Angehörigen sind von gleichen Gefühlen des Dankes beseelt; sie alle segnen mit uns den Tag, an welchem Eure Durchlaucht mit Ihren siegreichen Truppen einzogen. Mit Bewältigung dieser Stadt aber haben Euere fürstliche Durchlaucht die österreichische Monarchie vor Zerfall gerettet und ihren Bestand gesichert. Die Geschichte wird den gefeierten Namen eines Feldherrn der späteren Nachwelt bewahren, der in seinem Walten ebenso gerecht als im Siege großmütig war." Fünfzig Jahre nachher weigert sich der Gemeinderat derselben Stadt, den Opfern des 13. März das geringste Zeichen der Anerkennung zu weihen.

Wir sehen, der Kampf zwischen dem Idealisten und der kleinlichen Masse, welche niemals das Ideal zu erkennen vermag, ist immer derselbe. Wer die Geschichte der Revolution von 1848 kennt, muß sich hüten, den Pharisäern vor 1900 Jahren wegen ihrer Tat eine größere Schmach anzurechnen, als den Wienern des Jahres 1848.

Aber das ist es nicht, wozu mich die Vergleichung beider Bewegungen führt. Der Ethiker stellt sich die bange Frage: 1900 Jahre sind verstrichen von dem einen Ereignis bis zu dem anderen, und genau dieselbe Erscheinung sehen wir wieder. Ist also die Ethik gar nicht weitergekommen, ist die Menschheit 1900 Jahre auf ganz demselben Fleck stehengeblieben? Ist vielleicht in der Ethik überhaupt jeder Fortschritt ausgeschlossen, und müssen wir mutlos den Anker hinwerfen, wenn wir von Entwicklung der Menschheit im ethischen Sinne reden? Die Geschichte des Mittelalters gibt eine traurige Antwort. Wir finden dort dieselbe Grausamkeit wie früher, Hexen- und Ketzerprozesse, Bekehrung mit dem Schwert oder mit Feuer und Brand, wir finden die furchtbarsten Folterqualen, Todesarten, vor denen uns Entsetzen packt. Wir finden den Bauernstand fast sklavenmäßig, durch Robot und Zehent so belastet, daß er kaum zu leben vermag, auch von der Kultur vollständig abgetrennt. Und

auch das 19. Jahrhundert erzählt uns von Arbeitersklaverei, von politischer und sozialer Unterdrückung brutalster Art.

Dennoch müssen wir mit unserem allzu pessimistischen Urteil zurückhalten; wir müssen die Geschichte in ihrem ganzen Zusammenhange klären, bevor wir aus unserer Vergleichung die Folge ziehen.

Nicht die zeitliche Entfernung ist maßgebend, sondern die örtliche und kulturelle. Das Ereignis vor 1900 Jahren war in Judäa. Drei Völker, jedes mit einer großen vielhundertjährigen Kultur, waren aneinander gestoßen: Judäa mit seiner Religions-, Griechenland mit seiner Kunst- und Rom mit seiner Rechtskultur. Rom hatte die beiden anderen Völker unterjocht, aber ihr Geist war lebendig geblieben. Insbesondere hatte sich Judäas Religionskultur im letzten und höchsten Stadium ihrer Entwicklung verdichtet, sublimiert in dem Gedanken, daß alle Religion in der allgemeinen Menschenliebe enthalten sei. Und wenn auch dieser Gedanke im Moment an der Mittelmäßigkeit untergegangen war, so sehen wir doch, daß er nach kurzer Frist alles überwindet und sich in Europa, freilich mit arg verweltlichten Formen, Bahn bricht. Das heutige Europa war aber damals noch vollständig in Barbarei, es hat sein Kulturleben erst begonnen, als die des Altertums sich schon sublimiert hatte. Hier wird nun wiederum der Kampf aufgenommen und führt nach 1900 Jahren wieder zu einem Zusammenstoß zwischen einem großen Gedanken und dessen Anhängern und zwischen der gemeinen Halbkultur, welche jedem großen Gedanken widerstrebt. Vielleicht wird in anderen Erdteilen, wo heute noch Barbarei ist, z. B. im südlichen Amerika, in Afrika, Australien in einigen tausend Jahren wieder derselbe Kampf ausbrechen. Sowie die Kultur das barbarische Element eine Zeitlang durchdrungen hat, entsteht dieser Kampf, in welchem das Ideal mit seinem vollen Gehalt, gleichsam personifiziert auftritt.

Aber zwischen dem Gedanken, welcher vor 1900 Jahren aufgestellt wurde, und dem unserer Zeit ist auch ein objektiver Unterschied. An die Menschenliebe knüpfte man damals an, und das Reich, welches die Menschenliebe verwirklicht, setzte man in eine andere Welt. Die europäische Welt hat ein anderes Ideal. Sie hat ihr moralisches Denken an die Rechtsidee geknüpft, und das Recht steht auf dem Erdboden, es verlangt das Ideal auf der Erde, wenn auch erst in später Zeit und nach langem Kampf. Das Menschenrecht ist stär-

ker als der Appell an die Menschenliebe, es verlangt von den gesellschaftlich Begünstigten und von ihrer Gesamtheit, dem Staat, ein anderes Gefühl; ein Gefühl, das nicht glaubt, dem anderen eine Wohltat zu geben, sondern was ihm gebührt, es verlangt Gerechtigkeit und eine ihr dienende, sofort in Wirksamkeit tretende Tatkraft. Deshalb bedeutet der Moralgedanke, der 1848 sein Antlitz gezeigt hat, auch objektiv einen Fortschritt; er zeigt den Enterbten der Gesellschaft das Ideal, wenn auch nicht nahe, so doch erreichbar und nicht bloß in einer unsichtbaren Welt.

Wenn die Kämpfer des Ideals zusammenstehen, so wird es doch wohl möglich sein, die rauhen Sitten, welche der Egoismus in den Menschen zeitigt, zu mildern und zu dem zu führen, was man Genossenschaft der Menschen nennen kann. Wir mögen diese Hoffnung um so kräftiger hegen, als das Ideal heute durch die Arbeiter getragen wird, welche allerdings auch durch einen Klassenegoismus geführt werden, der aber nicht Privilegien verlangt, sondern nur gleiches Recht mit den jetzt Privilegierten. Das war vor 1900 Jahren nicht der Fall, daß sich eine Millionenklasse organisierte und organisieren konnte, mit dem klaren Bewußtsein ihres Zieles, mit der offen ausgesprochenen Absicht, gleiches Recht mit allen zu haben, und daß diese Organisation mindestens in manchen Staaten bereits zur Mitherrschaft aufgenommen wurde an den Schicksalen des Landes.

Wir haben indessen nicht darüber nachzudenken, ob wir im Kampf um die Ideale siegen oder unterliegen werden. Wir kämpfen um das, was den Menschen zum Menschen macht; so wie die Lerche singt, weil ihre Natur es will, so ist der gute Mensch gut, weil es seiner Natur entspricht. Aber die Guten, die stark genug sind, auch dem Schmerz und der Gefahr zu trotzen, sind selten. Wir sind den Männern, welche sich in den Märztagen 1848 mit klarem Bewußtsein für Freiheit und Menschentum eingesetzt haben, welche im Bewußtsein, einen ihrer Existenz gefährlichen Weg zu gehen, diesen Weg doch nicht scheuten, welche die Fahne des Menschenrechtes hoch getragen, für sie gekämpft und geblutet haben, wenn auch gewiß kein Bedauern, denn sie sind einen schönen Tod gestorben, wir sind ihnen aber Weihe und Dankbarkeit schuldig. Darum glaube ich in Übereinstimmung mit Ihnen allen zu sein, wenn ich sage: Wir wollen am 13. März hinaus wallen zu ihrem Grab; wir wollen uns dort das Gelübde geben, ihr Andenken nicht zu vergessen, die Empfindungen

für das Wahre und Gute, mit denen sie erfüllt waren, in uns zu bewahren und zu kräftigen, den Zielen, für die sie gelebt haben und gestorben sind, all unsere Kraft zu widmen und unbekümmert um Lob und Tadel der Menschen, unbekümmert auch, ob wir siegen oder besiegt werden, den Kampf um Volksrecht und Menschentum aufzunehmen und zu führen bis zum Ende.

SCHILLER ALS VORGÄNGER DES WISSENSCHAFTLICHEN SOZIALISMUS

Vortrag, gehalten am 8. März 1906 in der Philosophischen Gesellschaft an der Universität zu Wien

Von den beiden großen Dichtern und Freunden hat jeder seine besonderen Verehrer. Das ist tief in ihrem Wesen begründet. Goethe war eine plastische Künstlernatur. Er schaute und lebte, dachte und genoß, und was er so empfand, ward in ihm wie ungewollt zur Dichtung. Deshalb ist er naiv, tendenzlos, „klar und doch unbegreiflich, wie die Natur“ — Worte Schillers. Deshalb ist er auch in sich geschlossen, selbst ein Ganzes und nicht geneigt, an ein weiteres Ganze sich anzuschließen.

Anders Schiller. Ein großer Dichter, war er doch nicht Dichter in erster Linie. Sein ursprüngliches Wesen ist ethisch. Er war ein Apostel der Freiheit und des Menschentums, dem das Geschick es

vergönnte, seine glühenden Ideen in Poesie auszuströmen. Er steht immer auf hoher Warte und zieht zu ihr hinauf. Seine Dichtung ist deshalb pathetisch, voll innerer Leidenschaft, leuchtet nicht bloß, sondern wärmt und zündet.

Das machte ihn zum Liebling des Volkes, wurde aber sein literarisches Verhängnis. Den Gelehrten der Ästhetik war er nicht rein genug. Sein Pathos störte sie in ihrer Ruhe, im behaglichen Genuß des Kunstwerkes. Die Freiheitsidee gehörte ihnen nicht ins Fach. Und da sie die öffentliche Meinung, die Schule und den Markt beherrschten, so wurde es Mode, Schiller neben Goethe herabzusetzen. Er litt darunter nicht bloß als Dichter, sondern auch als Denker.

Wir wissen alle, daß Goethe ein ernster Naturforscher war, ein Vorgänger der biologischen Entwicklungslehre Darwins. Wer spricht aber davon, daß Schiller eine ähnliche Stellung zur sozialen Entwicklungslehre einnimmt, die wir mit dem Namen Marx verbinden?

Charles Darwin und Karl Marx waren verschiedene Charaktere und ihr Denken hat verschiedenen Ausgangspunkt. Darwin ist reiner Forscher und hat nur Erkenntnisdrang, wissenschaftliche Neugier. Marx hat die Doppelnatur Schillers. Er ist Vorkämpfer des Proletariats, will ihm zur Macht verhelfen und sucht hiefür die wissenschaftliche Unterlage. Aber die beiden Männer begegnen sich in ihren Theorien und ihrer Bedeutung. Beide gründen auf Malthus und schaffen Kampftheorien in seinem Ideengang. Darwin verallgemeinert die Malthussche Lehre zur Theorie der natürlichen Zuchtwahl bei allen lebenden Wesen im Kampf ums Dasein; Marx gewinnt aus ihr seine Theorie der gesellschaftlichen Entwicklung im ökonomischen Klassenkampf, die sogenannte materialistische Geschichtsauffassung, die Spezialtheorie des wissenschaftlichen Sozialismus. Seine Lehre vom Mehrwert und der darin enthaltenen Ausbeutung, vom inneren Gegensatz zwischen Unternehmer und Arbeiter in der kapitalistischen Gesellschaft gibt das Beispiel aus der Gegenwart, in dem sich das allgemeine Klassengesetz spiegelt.

Beide Männer haben aber für die Wissenschaft eine noch größere Bedeutung. Sie nehmen die *Entwicklungsidee* auf, welche zwar schon vor ihnen von einzelnen Forschern gelehrt worden war — für die Biologie namentlich von Lamarck, für die Soziologie von der historischen Schule und August Comte —, die aber vereinzelt ohne nachhaltige Wirkung auf das Gemeinwissen geblieben waren.

Da traten Darwin und Marx auf, und durch sie, durch ihren Schwung, ihre induktive Beweisführung aus der Gegenwart, durch die Massenhaftigkeit des Materials, das sie brachten, unterstützt von dem wissenschaftlich und politisch revolutionären Zug der Zeit wurde die Entwicklungslehre wissenschaftliches Gemeingut und führend für das weitere Forschen.

Das ist ihr bleibender Ruhm: auch für Marx selbständig bedeutend neben seinem Ruhm als Organisator des arbeitenden Proletariats. Deshalb wird die Entwicklungslehre als solche mit ihrem Namen bezeichnet, und stört es ihre Größe nicht, wenn die spätere Forschung ihre Sondertheorie als teilweise irrig und jedenfalls als nicht derart ausschließlich gültig erkennt, wie sie selbst und mehr noch ihre orthodoxen Anhänger es behaupten. Darwins Ruhm wird durch die sich an ihn anschließende Migrations- und Mutationstheorie, durch die keimphysiologischen Hypothesen Weismanns und seine Gegner, durch die Neu-Lamarcksche Schule u. a. nur erhöht. Das gleiche gilt für Marx von allen neueren sozialtheoretischen Versuchen, mögen sie in der Revision einzelner Sätze der Marxistischen Lehre bestehen, im Ersatz seiner dialektischen Methode durch eine induktive und dynamische; möge Gumplowicz den Kampf auf ethnischen Boden verlegen, Kropotkin das Gesetz der gegenseitigen Hilfe aufstellen, andere mit Comte und Spencer nichtwirtschaftlichen Faktoren einen größeren Einfluß zugestehen als Marx wollte. Die biologische Entwicklungstheorie heißt Darwinismus, die soziale knüpft trotz Spencer, dem es am nötigen Gegenwartsgefühl und Temperament fehlte, an Marx an, und alle, welche den Entwicklungsgedanken erkannt und aufgenommen haben, heißen Vorgänger dieser Männer und ihrer Lehre. Goethe wußte nichts von Zuchtwahl, war auch nicht Lamarckist. Seine Annahme einer Ur-Pflanze oder eines Ur-Tieres, welche sich in jeder einzelnen Pflanze, in jedem einzelnen Tier ausdrücke und allmählich entfalte, war, wie Schiller sofort erkannte, ein *Idee*, eine von der platonischen nur durch ihre Immanenz, aber allerdings durch ihre Immanenz unterschiedene Abstraktion, die er irrig als Erfahrung betrachtete. Doch diesen fruchtbringenden Irrtum in dem leitenden Gedanken teilte er — wie Mach bewiesen hat — mit Galilei und anderen wissenschaftlichen Forschern ersten Ranges. Genug daran, daß er den Gedanken festhielt, sich durch ihn in seiner Beobachtung leiten ließ,

daß er durch ihn für die Pflanzenblüte, für den Zwischenkieferknochen des Menschen und sonst noch wertvolle entwicklungsgeschichtliche Entdeckungen gemacht hat.

Ähnlich haben wir uns die Stellung Schillers zu denken. Schiller lehrte nicht den Klassenkampf, dachte die Entwicklung nicht national wie die historische Schule und war ebensowenig Positivist. Was er aber erkannte, war die Tatsache, daß der Mensch und sein Denken sich allmählich unter dem Einfluß des gemeinsamen Lebens und Lebenserwerbs entwickelt, daß in solcher Art insbesondere auch das scheinbar dem Leben fremde Idealdenken entsteht und reift.

Es ist höchst anziehend zu beobachten, mit welchem nüchternen, konkreten Ernst dieser ideale Mensch über Wesen und Werden des Idealdenkens forschte.

Schiller hatte in seiner Jugend englische Philosophen kennengelernt; als reifer Denker ging er aus Kant hervor. Kant hatte das Problem der Philosophie in die Untersuchung der Erkenntnis verlegt und diese — zunächst zur Kritik der metaphysischen Behauptungen — auf zwei konstitutive Faktoren zurückgeführt, die er apriorisch nannte: die reine Vernunft und die Dinge an sich, unerkennbare Eindrücke, aus denen durch Einfluß der Vernunftformen Erscheinungen werden (das primum scientiae) und Erfahrung entsteht. Die Lebensarbeit des großen Weisen bestand nun darin, das *Inventar der Vernunft* zu sammeln, zu erforschen, was im Denken des Menschen auf sie zurückzuführen ist; wobei er wohl das Hypothetische seiner Schlüsse nicht klar durchschaute. Das Merkzeichen glaubt er in der Eigenschaft der Allgemeinheit und Notwendigkeit zu finden. Denn da die Vernunft allen vernünftigen Wesen gemeinsam ist, muß das, was aus ihr fließt, bei ihnen allgemein gelten, und als notwendig muß es erscheinen, weil das vernünftige Wesen aus der Vernunft, als gleichsam seiner seelischen Haut, nicht heraus kann.

Von diesem Gesichtspunkt aus untersucht er das Denken, wobei er die überkommene Dreiteilung der geistigen Vermögen (Erkenntnis-, Gefühls-, Begehrungsvermögen) hinnimmt und nicht weiter prüft. Die apriorischen Denkformen, die er für das Erkenntnisvermögen aufstellt (Raum, Zeit, Urteilsformen) werden von Schiller manchmal verwertet, wirken aber auf ihn nicht unmittelbar schöpferisch ein. Dagegen wird er mächtig von dem angeregt, was Kant in der Kritik der Urteilskraft und der praktischen Vernunft

über das Verhältnis des ästhetischen zum ethischen Denken lehrte.

Nach Kant ist beides völlig verschieden, steht sogar im Gegensatz. Die Empfindung des Schönen beruht auf uninteressierter Lust. Lust aber ist der Ausdruck der Lebenskraft und daher wesentlich individuell. Hat jemand ein besonders geartetes Lebens- und Lustgefühl, einen eigenen Geschmack, so kann ihm der andere den seinigen nicht durch Argumente beibringen. Es gibt keinen Beweis für das, was schön ist. Wenn wir trotzdem in einem gewissen allgemeinen ästhetischen Urteil übereinstimmen, so läßt sich das nur auf eine Gemütsstimmung zurückführen, die mit der Vernunft, unserem gemeinsamen Organ, in irgendwelchem, uns unerkennbaren Zusammenhang steht.

Dagegen ist das Sittengesetz — nach Kant — ein unmittelbarer Ausdruck der Vernunft, der einzige, in dem wir sie positiv erkennen. Es hat auch schon nach außen den Charakter des Allgemeinen und Notwendigen, denn es lautet: „Handle so, daß die Maxime deines Handelns als Prinzip einer allgemeinen Gesetzgebung gelten kann." Gesetz ist hier begrifflich das Notwendige. Zufolge dieses seines Ursprunges kann es sich aber auf Lust nicht stützen. Denn Lust ist individuell und das Individuelle widerstrebt dem Allgemeinen, das unbedingte Geltung verlangt. Wir können dem Sittengesetz daher nur das Gefühl der *Achtung* entgegenbringen, dasselbe, das uns auch das Erhabene einflößt. „Ein Gefühl der Unlust" — so zeichnet es Kant — „aus der Unangemessenheit der Einbildungskraft in der ästhetischen Größenschätzung zu der Schätzung durch die Vernunft, und eine dabei zugleich erweckte Lust aus der Übereinstimmung eben dieses Urteils, der Unangemessenheit des größten sinnlichen Vermögens, mit Vernunftideen, sofern die Bestrebungen zu denselben doch für uns Gesetz ist." (Kritik der Urteilskraft, § 27.)

Diese großartige, aber schroffe Sittenlehre, die — wie ich sie nennen möchte — in Philosophie verwandelte altpreußische Disziplin, hat unseren Dichter tief empört. Er weiß es von sich, daß er nicht nachzudenken hatte, ob seine Maxime sich verallgemeinern lasse. Tyrannei und Bedrückung hatten ihn unmittelbar, instinktiv mit Abscheu erfüllt. Aus seinem freien Empfinden erwuchsen ihm der Zorn und Enthusiasmus, die seine Werke schufen. Er selbst war sich der lebendige Zeuge für die innere Einheit von rechtem Schönheits- und Sittlichkeitsgefühl. Er nennt Kant bei aller Verehrung, die er

für ihn hat, „den Drako seiner Zeit, weil sie ihm eines Solon noch nicht wert und empfänglich schien". „Womit aber" — fügt er bei — „haben es die Kinder des Hauses verschuldet, daß er nur für Knechte sorgte?" („Über Anmut und Würde.") Und in den Xenien schreibt er als Gewissensskrupel:

„Gern dien' ich den Freunden, doch tu ich es leider mit Neigung;
Und so wurmt es mir oft, daß ich nicht tugendhaft bin."

Mit der grimmen Antwort:

„Da ist kein anderer Rat, du mußt suchen sie zu verachten,
Und mit Abscheu alsdann tun, wie die Pflicht dir gebeut."

Schiller stellt der logisch-kritischen Theorie Kants eine positiv-psychologische entgegen, die einen deutlich erkennbaren *genetischen* Zug hat, wenn derselbe auch in seinen philosophischen Schriften durch die dialektische Form, die sich der Dichter von Kant angeeignet hat, teilweise verdeckt wird. Nicht als ob er durch Kant erst zur Idee angeregt worden wäre; wir finden sie schon in einer früheren Schaffensperiode. Aber durch Kant lernt er erst planmäßig denken, die Idee zur Theorie entwickeln, während sein Gegensatz zu Kants ästhetisch-ethischer Auffassung zugleich ihren Inhalt ausreift. Ich folge in der weiteren Darlegung vorzugsweise, wenn auch nicht ausschließlich, den „Briefen über die ästhetische Erziehung des Menschen".

Schiller erkennt, daß Wirksamkeit ein Wirkendes voraussetzt und gestaltet deshalb aus dem Sittengesetz, damit es wirken könne, einen sittlichen Trieb. „Wenn die Wahrheit im Streit mit Kräften den Sieg erhalten soll, *so muß sie selbst erst zur Kraft werden* und zu ihrem Sachführer im Reich der Erscheinungen einen Trieb aufstellen" (8. Brief). Diesen stellt er dem physischen Trieb entgegen und läßt den Willen frei sein, weil er weder durch die physische noch durch die sittliche Notwendigkeit bestimmt sei. An Stelle eines logischen Gegensatzes tritt also bei Schiller ein dynamischer auf, eine Gegenwirkung zweier Kräfte, zu denen als dritte in der Empfindung der Wille tritt. Wir wollen mit dem Dichter nicht rechten, daß er diese Empfindung für eine selbständige Kraft hält. Der Irrtum ist noch heute nicht überwunden.

Dazu kommt ein zweites Moment. „Wir wissen" — sagt Schiller — „daß der Mensch anfängt mit bloßem Leben, um zu endigen mit Form, daß er früher Individuum als Person ist. *Der sinnliche Trieb kommt also früher als der vernünftige zur Wirkung,*

und in dieser Priorität des sinnlichen Triebes finden wir den Aufschluß zu der ganzen Geschichte der menschlichen Freiheit" (20. Brief).

Man sollte diese Worte unter ein Monument setzen, das dem Denker Schiller gewidmet ist. In ihnen ist der sozialgenetische Gedanke klar ausgesprochen. Sie werden im 25. Briefe durch die Worte ergänzt: „Ein solcher Sprung ist nicht in der menschlichen Natur"; die bewußte Anwendung des Gesetzes der allmählichen Entwicklung auf das menschliche Denken.

Schiller nimmt eine einheitliche Denktätigkeit an, die mit dem sinnlichen Denken beginnt und sich durch Zwischenstufen allmählich zum idealen, sittlichen, vernünftigen Denken entwickelt. Diese Bezeichnungen sind für ihn gleichbedeutend.

Der Mensch ist im Anfang nur ein Teil der Natur. Sein Denken wird vom Naturtrieb beherrscht, d. h. „von der Naturnotwendigkeit durch das Medium der Empfindung" (Über Anmut und Würde). „Alles hat nur Existenz für ihn, insofern es ihm Existenz verschafft; was ihm weder gibt noch nimmt, ist ihm gar nicht vorhanden" (24. ästhetischer Brief). Als die beiden herrschenden Triebe nennt der Dichter mit genialem Blick „Hunger und Liebe", den Trieb nach Erhaltung des Individuums und der Gattung.

Schiller mag die Herrschaft der Natur nicht schelten. Sie versteht besser Ordnung zu halten als Philosophie:

„Einstweilen, bis den Bau der Welt
Philosophie zusammenhält,
Erhält sie (die Natur) das Getriebe
Durch Hunger und durch Liebe."

Er rät in seinen Xenien einem Weltverbesserer:

„Nur für Regen und Tau und fürs Wohl der Menschengeschlechter
Laß du den Himmel, Freund, sorgen, wie gestern so heut."

Tadelt den philosophischen Egoisten:

„Und da lästerst die große Natur, die, bald Kind und bald Mutter,
Jetzt empfänget, jetzt gibt, *nur durch Bedürfnis* besteht?"

Bei dem Menschen ist aber die ihm eigentümliche Kraft, das Denken, in diesem ersten Zustande dienstbar. Die Begierde beherrscht uneingeschränkt den Willen. „Der natürliche Charakter des Menschen zielt selbstsüchtig und gewalttätig viel mehr auf Zerstörung als auf Erhaltung der Gesellschaft" (3. Brief). Das Bedürfnis schafft das

Reich des *Lebens oder der Sinnlichkeit:* das Reich der Interessen und Zwecke, der Mühsal und des sinnlichen Genusses, der gesellschaftlichen Kämpfe, der Standesunterschiede, der Unterschiede von reich und arm, vornehm und niedrig; ein Reich, das die meisten Menschen ihr Leben lang im Banne hält, ihre Talente und Kraft verbraucht. Schiller begreift dies, solange das Bedürfnis drückt:

„Nichts mehr davon, ich bitt' euch; zu essen gebt ihm, zu wohnen;
Habt ihr die Blöße bedeckt, gibt sich die Würde von selbst."

Anders wird sein Urteil, wenn der Druck gewichen ist, wenn nicht Not, sondern Selbstsucht den Menschen gefangen hält:

„Der zahlreichere Teil der Menschen wird durch den Kampf mit der Not viel zu sehr ermüdet und abgespannt, als daß er sich zu einem neuen und härteren Kampf mit dem Irrtum aufraffen sollte. Wenn diese unglücklichen Menschen unser Mitleiden verdienen, so trifft unsere gerechte Verachtung die anderen, die ein besseres Los von dem Joch der Bedürfnisse freimacht, aber eigene Wahl darunter beugt" (8. Brief).

Das Denken des Menschen kann sich aus diesem Bann befreien. Wenn es genügend erstarkt ist, kann es das Joch abschütteln und wird dann frei — *ideal.* Denn ideales Denken ist kein anderes als freies, als Denken, das nicht eine ihm von andersher aufgenötigte Richtung geht, sondern sich durch den eigenen Schwung, durch die ihm aufsteigenden Ideen in ihrer inneren Ausgestaltung und Verzweigung bewegen läßt. Daß diese Ideen dem Schönen, Guten, Wahren nachstreben, liegt *in der Natur* des menschlichen Denkens. „Jeder individuelle Mensch, kann man sagen, trägt der Anlage und Bestimmung nach einen reinen idealischen Menschen in sich" (4. Brief).

Wie *wird* aber das Denken frei?

Auf die sozial-wirtschaftliche Voraussetzung kommen wir in der Folge zurück. Schiller forscht zunächst psychologisch. Der Gegensatz zwischen Sinnlichem und Vernünftigem erscheint unüberbrückbar. Wie wird er dennoch überwunden? Der Akt erfüllt den Dichter mit tiefem Staunen. Er enthält ihm das Geheimnis der Menschwerdung. In seinem Nachlasse findet sich der Satz: „Das Wohlgefallen an der reinen Form, am Schönen ist ein unbegreiflicher Schritt, den der Mensch tut; in keiner Geschichte der Menschheit habe ich diesen Übergang nachgewiesen gefunden."

Er ist ihm „etwas Unendliches", „die höchste aller Schenkungen", ein Wunder, geschichtlich und persönlich:

„Nur ein Wunder kann dich tragen
In das schöne Wunderland."

Schiller sucht mit echt wissenschaftlichem Drang psychologische Bindeglieder. Er findet sie in der *Freude* und im *Spiel.* Die Befreiung braucht Energie. Für den einzelnen Menschen im einzelnen Moment erfolgt sie regelmäßig durch eine starke lustvolle Erregung, durch *Freude:* Freude als solche oder Freude an einer Person oder Sache, Liebe, Begeisterung. Schiller findet nicht Worte genug, um die Freude zu preisen. Sie ist der psychische Ausdruck aller Energie: „Freude heißt die starke Feder in der ewigen Natur." Freude eint die Menschen. Freude macht gut, macht stark und mutig, stolz vor Königsthronen. Sie weckt das Selbstgefühl; „jeder freut sich seiner Stelle".

Der Dichter stellt das Motiv der Freude als Grundlage aller freien Sittlichkeit auf. Im Anschluß an die schon angeführte Unterscheidung zwischen den Knechten und den Söhnen des Hauses nennt er Furcht die Triebfeder des Sklaven;

„Freude, führe du mich immer an rosichtem Band" (Die Triebfedern).

Den tiefen Zusammenhang zwischen der Schillerschen Freude und Sittlichkeit hat Rosenkrantz schön gezeichnet. (Über „Schillers Lied an die Freude".)

Die sozial entscheidende Auslösungsform für zwangloses Denken erkennt der Dichter im *Spiel.* „ So weit wir auch die Geschichte befragen, es ist dasselbe bei allen Völkerstämmen, welche der Sklaverei des tierischen Standes entsprungen sind, die Freude am Schein, die Neigung zum Putz und zum Spiel" (26. Brief). Denn das Spiel ist eine Tätigkeit ohne Zwang des Lebens, mindestens des augenblicklichen Bedarfes. Es entspringt einer überschüssigen, einer vorhandenen und nicht gebrauchten Kraft. „Das überflüssige Leben stachelt sich selbst zur Tätigkeit. Von dem Zwang des Bedürfnisses nimmt die Natur durch den Zwang des Überflusses oder das physische Spiel den Übergang zum ästhetischen Spiele" (26. Brief).

Das Spiel enthält also die äußerliche Freiheit. Es bedarf nur noch des Reizes, den auf das menschliche Denken kraft seiner Natur die Schönheit übt — „der Mensch soll mit der Schönheit nur spielen und er soll nur mit der Schönheit spielen" — und das auch innerlich freie, das künstlerische Denken ist erwacht:

„Lebendig regt sich des Wirkens süße Lust."

Das Idealdenken beginnt ästhetisch. Denn das Ideale ist Form (im Sinne Kants) und steht der Sinnlichkeit fremd gegenüber. Nur die Schönheit gehört schon zur Welt der Ideen, ohne doch die sinnliche Welt zu verlassen. Sie ist „Freiheit in der Erscheinung". Deshalb ist auch der Kunsttrieb das spezifisch Menschliche. „Die Kunst, o Mensch, hast du allein."

„Es gibt keinen anderen Weg" — erklärt der Dichter —, „den sinnlichen Menschen vernünftig zu machen, als daß man denselben zuvor ästhetisch macht." Die ästhetische Epoche ist ihm daher die zweite in der Entwicklung der Menschheit, sie steht zwischen der sinnlichen und der sittlichen (25. Brief, Anmerkung). *Sie* wird durch jene wunderbare Umgestaltung des menschlichen Seins eingeleitet. Im ästhetischen Sinn (wie ihn Schiller auffaßt), in der „edeln Seele" ist alles Ideale im Keim enthalten. Gleichmaß, Formsinn, Bildkraft, Ordnung, Liebe ohne Leidenschaft, Geist, Sittlichkeit, Wahrheit: all das entwickelt sich aus ihm durch das innere Gesetz des Denkens. „Eine Gemütsstimmung, welche das Ganze der Menschheit in sich begreift, *muß* auch jede einzelne Äußerung derselben dem Vermögen nach in sich schließen" (22. Brief).

Gegenüber der genialen Entfaltung des künstlerischen Sinnes achtet Schiller das schematische Denken gering. „Wie der Scheidekünstler, so findet auch der Philosoph nur durch Auflösung die Verbindung und nur durch die Marter der Kunst das Werk der freiwilligen Natur. Um die flüchtige Erscheinung zu haschen, muß er sie in die Fesseln der Regel schlagen, ihren schönen Körper in Begriffe zerfleischen und in einem dürftigen Wortgerippe ihren lebendigen Geist aufbewahren. Ist es ein Wunder, wenn sich das natürliche Gefühl in einem solchen Abbild nicht wiederfindet?" (1. Brief). Schiller preist deshalb auch die Griechen, die universell waren und empfindet es schmerzlich, daß unsere Erkenntnis ihre Idealgestalten zerstört hat (Die Götter Griechenlands). Doch erkennt er die Teilung als für die Kultur notwendig an. „Einseitigkeit und Übung der Kräfte führt zwar das Individuum zum Irrtum, aber die Gattung zur Wahrheit" (6. Brief).

Ebenso betrachtet er das Wollen aus Grundsatz als kümmerlichen Ersatz des freien Empfindens:

„Kannst du nicht schön empfinden, dir bleibt doch vernünftig zu wollen."

Mit dem ästhetischen Zustand ist der entscheidende Schritt der Entwicklung getan. „Es ist nicht bloß poetisch erlaubt, sondern auch philosophisch richtig, wenn man die Schönheit unsere zweite Schöpferin nennt." „Der Schritt von dem ästhetischen Zustand zu dem logischen und moralischen (von der Schönheit zur Wahrheit und zur Pflicht) ist unendlich leichter, als der Schritt von dem physischen Zustand zu dem ästhetischen war." „Der ästhetisch gestimmte Mensch wird allgemein gültig urteilen und allgemein gültig handeln, sobald er es wollen wird" (23. Brief). Dasselbe freie Denken, dieselbe Ideen ahnende und fortbauende Phantasie, die den Künstler beseelt, lehrt den Menschen seine Pflicht tun, läßt den Forscher „der Natur entlegenere Säulen stellen". Die Dichtung ist die keimende Wahrheit:

„So führt ihn in verborgnem Lauf
Durch immer rein're Formen, rein're Töne,
Durch immer höh're Höh'n und immer schönre Schöne
Der Dichtung Blumenleiter still hinauf —
Zuletzt am reifen Ziel der Zeiten
Noch eine glückliche Begeisterung,
Des jüngsten Menschenalters *Dichterschwung*,
Und — in der *Wahrheit* Arme wird er gleiten."
(Die Künstler.)

In dieser Verbindung von Künstlersinn und Forschung, in der Erkenntnis, daß auch, was wir wahr nennen, eine subjektive Unterlage hat, geht der Dichter seiner Zeit weit voraus. Wir haben heute erkannt, daß die Urteilstafel Kants seinem eigenen Grundgedanken nicht entspricht. Die Urteilsformen können mit den Grundsätzen der Mathematik in Parallele gesetzt werden, aber nicht mit Raum und Zeit als den leitenden Ausgangspunkten der Anschauung. Ihnen können im Gebiete der Logik auch wieder nur leitende Ausgangspunkte entsprechen. Das aber sind nicht die Urteilsformen, sondern *Begriff* und *Gesetz*. Sie haben dieselbe Zwitternatur wie Zeit und Raum, man streitet ebenso über ihre Objektivität (Realisten, Nominalisten), und auf ihnen, auf begrifflicher und gesetzlicher Auffassungsweise beruht alle Logik. Wenn wir von Gesetzen der Natur sprechen, so liegt diese Gesetzlichkeit, die Fassung der Naturer-

scheinungen in allgemeine Formeln, nicht in der Natur, sondern *in uns*. Das Naturgesetz ist nichts anderes als der Ausdruck unseres Ordnungssinns, „Ökonomie des Denkens", wie Ernst Mach nüchterner als Schiller, aber gleichartig im Gedanken erklärt.

Auch sonst hat der Dichter wahre Triumphe seiner Theorie gefeiert, obwohl man ihn selten dabei nennt. Das Spiel als Vorgänger der Kunst (Jerusalem, Wesen und Ziele der Ästhetik) und seine erzieherische Kraft ist seither anerkannt, ebenso wie überschüssige Kraft als sein Ursprung (Groos). Die Entwicklungsidee des Dichters ist von der Wissenschaft legitimiert worden. Pauly leitet alles Zweckdenken aus dem Bedürfnisherd ab, der im Befriedigungsherd eine Reaktion findet. Meynert hat nachgewiesen, daß das primäre Denken des Menschen egoistisch und erst das sekundäre altruistisch ist. Die biologische Psychologie leitet das ideale Denken aus dem naturalen in ähnlicher Weise ab wie Schiller, und erkennt, wie er, eine einheitliche Denktätigkeit an, die vom Empfinden und Begehren durch die Phantasie zum Erkennen aufsteigt. Aug. Comte, der Schöpfer der Soziologie, geht von einem ähnlichen Gesetz der drei Stufen im Denken aus, die regulierend das soziale Leben bestimmen. (Prospectus des travaux scientifiques nécessaires pour réorganiser la société). Denn auch für Schiller ist das ideale Denken keine Träumerei, das zeigen namentlich die ästhetischen Briefe und ihre Adresse. Wenn er das Ideal auch dem Leben entgegenstellt (Das Ideal und das Leben): er erwartet vom freien Denken eine glücklichere Zeit. Es tritt immer wieder als Kraft anregend, weisend, helfend ins Leben ein und wird zum Demiurg der Zukunft. „Gib der Welt, auf die du wirkst, die Richtung zum Guten, so wird der ruhige Rhythmus der Zeit die Entwicklung bringen" (9. Brief). —

Der Dichter hat schon in den ästhetischen Briefen die Entwicklung als *geschichtlich* erfaßt. Nicht der einzelne, die Menschheit entwickelt sich. Die drei Epochen des Fortschrittes durchläuft der einzelne nach dem Gesetz der Gattung (24. Brief). Die Ontogenese ist auch hier eine verkürzte Wiederholung der Phylogenese. Schiller erkennt klar die gesellschaftliche Natur des Menschen. „Er kommt zu sich aus seinem sinnlichen Schlummer, erkennt sich als Mensch, blickt um sich her und findet sich — in dem Staate. *Der Zwang der Bedürfnisse warf ihn hinein, ehe er in seiner Freiheit diesen Stand wählen konnte*" (3. Brief).

Im „Spaziergang" und im „Eleusischen Fest", auch in manchen kleineren Aufsätzen („Etwas über die erste Menschengesellschaft") in Xenien und zerstreuten Bemerkungen versucht sich Schiller die wirkliche Entwicklung des Menschengeschlechtes vorzustellen, wobei er die drei Epochen der ästhetischen Briefe, die er schon dort als nur in der Idee voneinander geschieden bezeichnet, durch eine konkrete historische Folge ersetzt.

Der Mensch ist zuerst Troglodyte, lebt für sich allein, ist abhängig von jedem Zufall, scheu und wild. Dann wird er Jäger und Hirte. Dann Ackerbauer. Hier beginnt (für Schiller, der auch hierin Nachfolger hat, welche ihn nicht nennen) die Kultur, die sich im einsamen und im nomadisch zerstreuten Wesen nicht auslösen konnte (26. Brief). Der Ackerbau schafft ständigen Wohnsitz, ständiges Zusammenleben und damit auch Sitte, Ordnung, die Voraussetzungen der Kultur. Der Fortschritt ist zunächst *wirtschaftlich*. An den Ackerbau knüpfen sich Obst- und Ölbau, Rind und Pferd erscheinen, allerhand Gewerbe schließen sich an: Bau des Pfluges, des Hauses, des Schiffes. Der Bergmann kommt hinzu, der Kaufmann. Die Gesellschaft erweitert sich, es entsteht die Stadt. „Näher gerückt ist der Mensch an den Menschen."

Ein reges geschäftiges Leben erwacht; Technik und Forschung stellen sich in seinen Dienst. „Großes wirket ihr Streit, Größeres wirket ihr Bund."

An die wirtschaftliche Kultur schließt sich die geistige an. Sie erwächst dem *Wohlstand*. Sind die Mittel, durch welche der Mensch das Leben gewinnt, durch die Mitarbeit gewachsen, und läßt ihm das Bedürfnis Muße, dann

„windet sich vom Sinnenschlafe die freie schöne Seele los".

Im Wohlstand erkennt der Dichter mit nüchternem Ernst die soziale Voraussetzung, damit durch Spieltrieb und Freude der ideale Sinn erwachen kann:

„Der Mensch ist noch sehr wenig, wenn er warm wohnt und sich satt gegessen hat, *aber er muß warm wohnen und satt zu essen* haben, wenn sich die bessere Natur in ihm regen soll."

Das Gewerbe hat die Technik entwickelt, sie wird nunmehr zur Kunst. „Von der Freiheit gesäugt, wachsen die Künste der Lust."

Das Nachdenken war in den Dienst des Lebens gestellt, es wird nunmehr freie Wissenschaft:

„Im stillen Gemach entwirft bedeutende Zirkel sinnend der Weise,
Sucht den ruhenden Pol in der Erscheinungen Flucht."

Am innigsten mit Zusammenleben und sozialer Kultur verwachsen sind Recht und Sitte.

„Doch der Mensch in ihrer Mitte
Muß sich an den Menschen reihn
Und allein durch seine Sitte
Kann er frei und mächtig sein."

Die erste Göttin, welche Ceres zu Hilfe kommt, ist Themis mit dem Gott der Grenzen: „Freundliche Schrift des Gesetzes, des menschenerhaltenden Gottes."

Alte Sitte und enges Recht genügen aber nur, so lange die Verhältnisse enge sind. Wenn sich die Gesellschaft weitet, wird auch ein anderer Geist. Klassen entstehen und Klassenkämpfe, Stände bilden sich und sondern sich voneinander; „Regel wird alles und alles Bedeutung". Aus der Stadt ergießen sich „Pflanzer der Menschheit". Der Wohlstand wächst. Das Wissen, das „redende Blatt" befreit den Geist, „es zerrinnt der Nebel des Wahns". Aber mit dem Wohlstand und freiem Denken verbindet sich — das zeigt die Geschichte immer wieder (10. Brief) — in den herrschenden Kreisen die Zügellosigkeit, mit dem Wahn des Glaubens verschwinden Scham und Sitte:

„Des Gesetzes Gespenst steht an der Könige Thron."

Wohl dem Staat, in dem der Meister dann „zur rechten Zeit die Form zerbricht", in dem er nicht wartet, bis

„Aufsteht mit des Verbrechens Wut und des Elends die Menschheit,
Und in der Asche der Stadt sucht die verlorne Natur."

Man hat Schiller aus dem düstern Bild, das er von der Selbstbefreiung des Volkes gibt („Weh denen, die dem ewig Blinden . . ."), oft einen Vorwurf gemacht. Aber ist es nicht wahr, daß jede Revolution Ströme Blutes kostet, daß sie eine in Elend verkommene, in der Wut rücksichtslose und bildungsfeindliche Menge auf die Straße bringt, daß sie bei aller Notwendigkeit, wenn die Freiheit nicht anders errungen werden kann, ein schweres Übel bleibt?

Auch Schiller will nur mit dieser Schranke die Freiheit im Frieden. Er läßt die Eidgenossen schwören: „Lieber den Tod, als in der Knechtschaft leben." Und er spricht die großen Worte, die seither ein Glaubensbekenntnis der Freiheit geworden sind, und austönen:

„Der alte Urstand der Natur kehrt wieder,
Wo Mensch dem Menschen gegenübersteht — — —
Zum letzten Mittel, wenn kein anderes mehr
Verfangen will, ist ihm das Schwert gegeben."

Nicht anders denkt späterhin Lassalle:

„Sie (die Revolution) wird entweder eintreten in voller Gesetzlichkeit und mit allen Segnungen des Friedens, wenn man die Weisheit hat, sich zu ihrer Einführung zu entschließen, beizeiten und von oben herab oder aber sie wird innerhalb irgendeines Zeitraumes hereinbrechen unter allen Konvulsionen der Gewalt, mit wildwehendem Lockenhaar, erzene Sandalen an ihren Sohlen." (Die indirekte Steuer und die Lage der arbeitenden Klassen.)

Liegt in dieser Gegenüberstellung, in dem Vorzug, den Lassalle der Weisheit von oben gibt, eine freiheitsfeindliche Stimmung?

Eigenartig zeichnet der Dichter im „Spaziergang" die weitere Entwicklung des Lebens. Das Getümmel des Marktes stößt den Menschen ab, er flüchtet zur verlassenen Flur, zum Gebirg, wohin „keines Windes Gefieder trägt den verlorenen Schall menschlicher Mühen und Lust". Von dort „nimmt er den fröhlichen Mut hoffender Jugend zurück". Erfüllt nicht schon unsere Zeit der Drang, den der Dichter hundert Jahre vorausgesehen hat? Für ihn ist er allerdings Symbol. Er will den Charakter des Menschen zur Natur zurückführen (7. Brief) und ist hierin Jünger Rousseaus, „der aus Christen Menschen wirbt" (Rousseau).

Den Weg zur friedlichen Entwicklung findet Schiller in der *ästhetischen* Erziehung — ästhetisch in seinem Sinne. — „In der Ausbildung des Empfindungsvermögens als notwendiger Bedingung, unter welcher allein wir zu einer Einsicht und zu einer Gesinnung gelangen können" (23. Brief), in Erweckung des Gefühls für Schönheit, Ordnung und Gesetz. („Ästhetische Heautonomie.") Wenn das freie, durch Schönheit zu Pflicht und Wahrheit gediehene Denken die herrschende soziale Kraft der Führer des Volkes geworden ist, wenn sich das Volk frei den selbst gegebenen Gesetzen fügt, dann wird „aus dem Reich der Natur das der Vernunft" (8. Brief). Die ästhetische Erziehung ist deshalb für Schiller zugleich die politische und soziale. In seinen Ästhetischen Briefen stellt er sich direkt ein politisches Problem. Er will dem Herzog von Augustenburg „die

Grundsätze in Erinnerung bringen, durch welche sich die Vernunft bei einer politischen Gesetzgebung leitet" (2. Brief).

Werfen wir einen kurzen Rückblick auf seinen Gedankengang. Das soziale und evolutionistische Moment tritt scharf hervor. Der Mensch entwickelt sich im Kampf ums Leben (Hunger und Liebe). Seine Denktätigkeit ist zunächst nur Mittel in diesem Kampf, dienstbar dem Bedürfnis und der Begierde. Aber seine Natur führt ihn zur Gesellschaft und sein Denken hat in sich den idealen Keim. Die Kultur ist zunächst wirtschaftlich; die wirtschaftliche bedingt alle anderen. Erst wenn der leichtere Erwerb Muße gibt und Denkkraft freiläßt, erwacht durch nachahmenden Spieltrieb, durch Freude an sich und an der Tat, der Schönheitssinn und mit ihm die ideale Welt. Kunst, Sittlichkeit, Wissenschaft wirken ihrerseits befreiend auf das Leben zurück, und so entwickelt sich allmählich, aber unaufhaltsam aus dem Naturmenschen der sittliche, aus dem Staat der Not der Staat der Freiheit. Diese allmähliche Veredlung der Menschen aufzuweisen, ist Aufgabe der Geschichte.

Das ist der Kern von Schillers Soziallehre. Er legt wie Comte auf die Entwicklung vom Denken aus das Gewicht, betont aber wie Marx den Primat des wirtschaftlichen Fortschrittes und die stets verbleibende Triebkraft des Bedürfnisses, der Not, „der der Mensch nie ganz entfliehen soll". (Wie stud. man Univ.-Geschichte?)

Wir würden das Verhältnis Schillers zum wissenschaftlichen Sozialismus nicht voll erkennen, wenn wir hier endigen würden. Dieser ist keine bloße Forschungsdoktrin; er unterscheidet sich von seiner kühleren, rein wissenschaftlichen Schwester, der Soziologie, dadurch, daß er *Sozialismus* ist, sozialer Befreiungskampf. Er enthält ein Zweckmoment. Er forscht, aber er will auf Grundlage der Forschung helfen. Er gräbt nach den Gesetzen, wie die Menschheit sich entwickelt, will aber das Ergebnis zugunsten der Unterdrückten nutzen. Ja, wie ich schon bei der Charakteristik von Marx hervorhob: der Wille zur Tat geht der Forschung voraus. Der wissenschaftliche Sozialist teilt mit dem utopischen die Empfindung und das Streben; er trennt sich von ihm nur in der Methode. Wenn der Gang der Ereignisse zur Freiheit führt, will er, daß die Menschen frei werden; wenn ihr Gang das Proletariat auf den Plan bringt, will er dies den Proletariern zum Bewußtsein bringen. Aber sein Nachdenken sucht nur das zeitliche Moment. Sind die Ergebnisse für den

Befreiungskampf noch nicht reif, so soll abgewartet, soll das Volk gelehrt, erzogen, in sein Interesse eingeweiht, abgerichtet, zur Reife vorbereitet werden. Sein Ziel wird durch die Ereignisse nicht bestimmt. Wenn auch eine Periode zur Reaktion führte, der wissenschaftliche Sozialismus würde stets auf Seite der Bedrückten bleiben, träte stets für sie und ihre Rechte ein. Er hat daher ein ethisches Gepräge, trotzdem daß Marx, weil er den wechselnden, durch Erziehung, Umgebung, Interesse bestimmten Inhalt aller Moral erkennt; aber auch, weil er an Stelle moralisierender Ideologie ein nüchternes, auf eigene Kraft berechnetes politisches Denken setzen will, die Moral sehr geringschätzig behandelt. Er ist wesentlich aktiv, obwohl Marx in seinem Alter Bedenken hat, inwieweit sich das unveränderliche Naturgesetz der Evolution mit einer aussichtsvollen bewußten Tätigkeit wissenschaftlich verträgt. Für das kämpfende Proletariat ist denn auch der junge revolutionäre Marx, der die Proletarier aller Länder aufruft, sich zu vereinigen, verständlicher und wirksamer.

Auch in diesem aktiven Moment des wissenschaftlichen Sozialismus, in dem Eifer für den Bedrückten, „der nirgends Recht kann finden", ist Schiller sein Vorgänger. Er ist als Mensch noch größer denn als Dichter, Goethe nennt ihn eine Christusnatur, die alles veredle, was sie ergreift. Er ist von dem Gedanken der menschlichen Freiheit durchtränkt. „Der Mensch ist frei geschaffen, ist frei und wär' er in Ketten geboren." Sein erstes Werk ist in tyrannos geschrieben, sein letztes gilt dem Befreiungskampf eines Volkes. Der Gedanke begleitet ihn ohne Unterlaß, auch in seinen Geschichtsstudien.

So heißt es in der Einleitung zur Geschichte des Abfalls der Niederlande: „Groß und beruhigend ist der Gedanke, daß gegen die trotzigen Anmaßungen der Fürstengewalt endlich noch eine Hilfe vorhanden ist, daß ihre berechnetsten Pläne an der menschlichen Freiheit zuschanden werden, daß ein herzhafter Widerstand auch den gestreckten Arm eines Despoten beugen, heldenmütige Beharrung seine schrecklichen Hilfsquellen erschöpfen kann." „*Und darum* achtete ich es des Versuchs nicht unwert, dieses schöne Denkmal bürgerlicher Stärke vor der Welt aufzustellen, in der Brust meines Lesers ein fröhliches Gefühl seiner selbst zu erwecken und ein neues unverwerfliches Beispiel zu geben, was Menschen wagen dürfen für *die gute Sache* und ausrichten mögen *durch Vereinigung*."

Ebenso leitet er seine Geschichte des Dreißigjährigen Krieges mit

den Worten ein: „Schrecklich zwar und verderblich war die erste Wirkung, durch welche diese allgemeine politische Sympathie sich verkündigte . . . Aber Europa ging *ununterdrückt und frei* aus diesem fürchterlichen Krieg. Die Hand des Fleißes hat unvermerkt alle verderblichen Spuren dieses Krieges wieder ausgelöscht, aber die wohltätigen Folgen, von denen er begleitet war, sind geblieben . . . So wie die Flamme der Verwüstung aus dem Innern Böhmens, Mährens und Österreichs einen Weg fand, Deutschland, Frankreich, das halbe Europa zu entzünden, so wird die Fackel der Kultur von diesen Staaten aus einen Weg sich öffnen, jene Länder zu erleuchten."

Schiller hat ein hohes Gefühl für die Würde des Menschen. Würde und Sittlichkeit sind bei ihm vereint, darin ist er Jünger Kants. Weitab liegt ihm der Gedanke einer Wohltätigkeit, welche den Armen verkümmern läßt und dem Zermürbten von der reichen Tafel herab ein erniedrigendes Almosen reicht. Er will den Menschen, der sich seiner Arbeit freut, dem Verächter Trutz bietet, geeint mit seinesgleichen zu einem Volk von Brüdern. Erhobenen Hauptes, will er, daß der Mensch durchs Leben wandle, durch Freiheit und Schönheitssinn sittlich und weise.

Doch ich vermeide es, bei dem idealen Grundzug seines Wesens länger zu verweilen. Ich verlange seine *wissenschaftliche* Anerkennung. Wenn man die Männer nennt, die als erste eine Geschichtsauffassung vertreten haben, nach welcher der Mensch sich allmählich sozial und zunächst ökonomisch entwickelt, nach welcher auf Grund dieses gleichsam naturgesetzlichen Werdens und mit ihm sein Denken sich kräftigt, schult, befreit, zu höherem Menschentum vordringt, während aber die Lebensbedingungen immer wieder ihren beherrschenden Einfluß ausüben, der Mensch immer im Banne von Hunger und Liebe verbleibt, kurz, wenn man die Vorgänger der sozialen Entwicklungslehre nennt: so darf der Name Friedrich Schiller unter ihnen nicht weiterhin fehlen.

KARMA

1900

Im Mittelpunkt alles religiösen und philosophisch-ethischen Nachdenkens steht das Problem, wie Schicksal und Handlungsweise des Menschen (Moral) sich zueinander verhalten.

Von den Religionssystemen, welche die Kulturvölker in ihrer Masse beherrschen, beantwortet das westasiatische (jüdisch-christlich-mohammedanische) System die Frage mit dem Hinweis auf einen unwahrnehmbaren persönlichen Weltenherrn, dessen Wille zugleich die Handlungsweise des Menschen und sein Schicksal bestimmt. Die Einheit dieses Willens verbürgt den Zuammenhang, auch wenn wir ihn nicht begreifen. Die Antwort ist einfach und anschaulich. Aber Wirklichkeit ohne Wahrnehmbarkeit ist für uns nicht zu fassen. Der Wille eines Unwahrnehmbaren ist auch nicht erkennbar; wer vermag also zu sagen, welche Handlungsweise ihm entspricht? In der Tat wurde mit Hinweis auf diesen Willen das Entgegengesetzte verlangt: man hat ihn allgütig gepriesen, der seine Sonne leuchten lasse über Gute und Böse, und man hat unter dem Rufe, Gott wolle es, Mord, Raub und Brand gepredigt.

Positiver in der Begründung der Ethik ist das zweite, Millionen beherrschende Religionssystem, das indische, das im Buddhismus seine klarste Fassung gefunden hat. Es eint, wie der Geist der Sprache, Leid und Leidenschaft; Quell alles Lasters ist ihm der individualistische, lustgierige Lebenstrieb. Dieser weckt Leidenschaft und Egoismus, ist aber zugleich Quell alles Leides; denn das Leben ist Leid und enttäuscht jeden, der in ihm Lust sucht. Ziel des Strebens kann nur Leidlosigkeit sein, die in der Überwindung des Lebenstriebes besteht und durch den achtfachen Weg der Tugend erreicht wird. Gegenüber dem großen Lebensleid verschwindet jeder Unterschied der äußeren Lage. Maßgebend bleibt nur die Kraft des Lebenstriebes, welche der einzelne in seinem Leben und durch dasselbe verstärken und abschwächen, in seltenen Fällen (als Ahahat) vernichten kann, welche ihm aber zunächst angeboren ist. Das *Selbst* des Menschen ist sein Schicksal, sein Karma. Aber warum ist dieses

verschieden? Kann der einzelne dafür, daß er mit starkem Lebenstrieb geboren ist? Hier greift die metaphysische Lehre des Systems ein. In der Loslösung einer individualisierenden Kraft, des Lebenstriebes, vom Weltganzen liegt der Ursprung alles Übels. Diese Kraft bildet ein Individuum, und wird sie in dessen Leben nicht zerstört, so bildet sie nach seinem Tod in der Stärke, die sie zu dieser Zeit hat, ein zweites Individuum usw., bis sie durch ein fortgesetztes heiliges Leben sich wieder mit dem Weltganzen vereinigt. Die Individuen, welche sie nacheinander bildet, sind von einander wohl sonst verschieden; was man Seele nennt, Denken und Bewußtsein, ist nach buddhistischer Lehre vergänglich. Aber durch den sie schaffenden Lebenstrieb sind sie verbunden und eins. Das Karma jedes einzelnen unter ihnen wird durch das Leben des Vorhergehenden bestimmt und sein Leben ist mitbestimmend für das Karma der Folgenden. Das ist die sogenannte Seelenwanderung im Buddhismus, die richtiger als Wanderung (Übergang) der Lebenskraft bezeichnet werden könnte.

Mit der modernen Wissenschaft ist auch diese Lehre nicht vereinbar. Wohl glauben wir an eine unveränderte Menge der Energie, aber bei veränderter Form, und die Form der Zelle, der Zellengruppe, des lebenden Organismus ist uns eine Form wie jede andere. Wenn die sie charakterisierende Tätigkeit, sei es durch äußeren Eingriff oder inneren Verfall, zerstört wird, so bleibt wohl dieselbe Menge der Energie, aber in anderer Form; die Individualität stirbt. Eine Lebenskraft als unlösbare, nach dem Tode unverändert verbleibende und einen neuen Organismus gleicher Art schaffende Energieform erkennen wir nicht an. Die Erfahrung gibt uns hiefür keinen Anhaltspunkt.

Aber die Änderung, welche die buddhistische Lehre durch die Erfahrung erhält, ist doch nur gering; die Grundlagen der Karmalehre werden durch sie nicht berührt. Auch wir erkennen an, daß das Selbst des Menschen sein Schicksal ist. Seine äußeren Verhältnisse sind nicht ohne Bedeutung; sie besteht aber insbesondere wieder in ihrem Einfluß auf die Entwicklung des Selbst. Nietzsche preist um dessentwillen „die kleine Armut", die Armut, welche nicht erdrückt und doch spornt, welche Tatkraft verlangt und gewährt. Das Selbst des Menschen aber ist angeboren. Wenn Erziehung und Leben die Entwicklung fördern sollen, muß die Ent-

wicklungsfähigkeit vorhanden sein. Lehren und Appelle können nur vorhandene Energie auslösen und verstärken. Nicht die Freiheit des menschlichen Willens ist die Grundlage für Erziehung, Lohn und Strafe, sowie für die Lehre von der Verantwortlichkeit des Menschen, sondern deren Gegenteil, die Bestimmbarkeit dieses Wollens durch Motive und Anreiz. Wo diese Bestimmbarkeit fehlt, ist alle sogenannte Strafe nur Schutz der anderen, so wie diese auch gegen Elementarereignisse oder wilde Tiere geschützt werden.

Aber auch die den Organismus schaffende und von ihm aus weiterschaffende individualistische Lebenskraft ist vorhanden. Sie ist im Samenkörper des Mannes, im Eikörper des Weibes. Ihre Verbindung erzeugt eine neue Individualität mit kausal bestimmter Eigenart. Für ihr Karma sind insbesondere drei Ursachenreihen maßgebend, alle drei sozialer Natur. Jeder Mensch ist bedingt durch seine leibliche Ahnenkette, seine soziale (geistige) Ahnenkette und seine Umgebung.

Der Einfluß, welchen die ursprüngliche Beschaffenheit und Lebensweise der Eltern auf das Wesen des Kindes übt, ist unbestreibar, möge man auch noch uneinig sein, in welcher Art und bis zu welchem Umfang sich Eigenschaften des Menschen dem Keimkörper, der in ihm entsteht, mitteilen. Es ist eine harte Wahrheit, daß die Schuld der Eltern — das Wort nicht theologisch oder juristisch gefaßt, sondern als Tat mit schädlichen Folgen — sich an dem Kinde straft; daß Krankheiten sich vererben, daß ungesunde Nahrung, ungenügende Ruhe, feuchte Wohnung den Keim erkranken machen. Andere Beispiele sind bekannt, weitere Ausführung wäre unnütz. Aber jeder Elternteil ist in gleicher Weise wieder von seinen Eltern abhängig und so dehnt sich eine lange, für die Beschaffenheit des Menschen kausale Kette leiblicher Ahnen in die Vergangenheit fort, im Prinzip bis zu jenem Punkt verfolgbar, wo der Ahne nicht mehr auf den Namen Mensch Anspruch hat und noch weiter hinaus. Die Erkenntnis von dem Einfluß der Ahnen auf das Wissen und Können der Sprossen ist namentlich in China anerkannt und hat dort eine schöne Pietät, wenn auch mit mancherlei Übertreibung erzeugt, wie sie im Laufe der Zeiten überall entsteht, wo eine Lehre ins Volk gedrungen ist. Das Verdienst eines tüchtigen Menschen wird dort nicht, wie in Europa, durch Ehrung seiner Kinder, sondern seiner Eltern, auch nach ihrem Tode, belohnt — ein folgerichtiger und

erziehlich trefflicher Gedanke. Europa macht aus den Kindern tüchtiger Menschen, indem es sie ohne eigenes Verdienst reich und vornehm werden läßt, Müßiggänger; China regt Eltern- und Kinderliebe zu deren guter Erziehung an.

Die leibliche Ahnenreihe bildet die eine soziale Kausalkette. Jeder Mensch ist bedingt durch seine Ahnen und bedingt wiederum das Schicksal seiner Nachkommen. Liebe und Verantwortlichkeitsgefühl drängen ihn zu einer Handlungsweise, die *ihrem* Schicksal frommt.

Neben der leiblichen aber wirkt noch eine andere, die geistige oder soziale Ahnenkette.

Man hat durch einige Zeit angenommen, daß das Hirn des Menschen wachse, und die Kulturentwicklung darin ihren Ausdruck und ihre Ursache finde. Man hat seither erkannt, daß die Hirnmasse seit der historischen Zeit gleichgeblieben ist. Dennoch hat die Kultur Fortschritte gemacht; der Mensch des 20. Jahrhunderts ist in seinen Kenntnissen und in der Möglichkeit, sein Leben menschenwürdig zu gestalten, dem des zehnten, der Europäer dem Neger, weit voraus. Ursache aber ist nicht sein individuell stärkeres Denkvermögen; das beweist insbesondere die Vergleichung der großen Geister verschiedener Zeiten und Länder, die in Kraft des Denkens einander gleichstehen, sondern seine größere geistige Ahnenkette, d. h. die größere Menge von Menschen, deren Denken, von einer Generation der anderen überliefert, von dieser berichtigt, erweitert und weitergegeben, eine Fülle geistiger Kraft zu der seinigen gefügt hat. Er verhält sich zum Menschen des 10. Jahrhunderts oder eines Landes ohne Kultur wie der Arbeiter, der mit einer leistungskräftigen Maschine arbeitet, zum Handarbeiter.

Man kann die Übertragung der geistigen Energie im einzelnen verfolgen. Am leichtesten beim Lehrer und Erzieher, der ja oft der zweite Vater des Kindes genannt wird. Der Gedanke wird zum Wort, das gesprochene Wort zum gehörten und dieses wieder zum Gedanken. Die Denk-Energie des Lehrers wird in Denk-Energie des Schülers umgewandelt, ähnlich wie die Bewegung der stoßenden Kugel in die der gestoßenen.

Am anschaulichsten kann man den Prozeß bei einer feurigen Rede beobachten, die oft weniger durch ihren Inhalt wirkt, als durch die Erregung des Redners, die sich den Hörern mitteilt, d. h. durch das Medium der Rede in ihre Erregung umwandelt.

Die Dynamik kennt Zustände und Formen, welche Energie enthalten und auslösen; z. B. die Entfernung vom Erdmittelpunkt oder die durch das Sprechen entstehenden Eindrücke in der Masse des Phonographen usw. Auch die gesprochene oder geschriebene Wortverbindung, in welcher sich der Gedanke des Gelehrten, die Empfindung des Dichters, die Leidenschaft des Redners ausdrückt, ist ein derartiger Energiezustand. Wenn sie beim empfänglichen Hörer oder Leser eine gleichartige Energie auslöst, wenn das Wort Geist wird, so sind die Gedanken, die ausgelöst wurden, nicht bloß bildlich Kinder der auslösenden. So entsteht ein zweites geistiges Eltern- und Kindestum unter den Menschen. Die großen Geister, deren Denken befruchtend auf Generationen wirkt, können mit gutem Fug von ihnen als ihre Ahnen gefeiert werden — Ursprung, wenn auch nicht ihres Lebens, doch ihres Menschentums. Aber nicht bloß die Großen der Vergangenheit sind es, auf denen die Kultur der Gegenwart und Zukunft ruht, sondern alle, die mitgearbeitet haben an den geistigen und materiellen Schätzen, welche die Nachwelt zu nutzen vermag. Nicht der Feldherr, sondern die Armee gewinnt die Schlacht. Das Verdienst des Großen und Kleinen ist nur im Ausmaß verschieden. Die Masse der Ungekannten und Ungenannten der Jahrhunderte hat die Kultur geschaffen — so wie aus Infusorien Berge entstanden sind.

Für die Entwicklung der menschlichen Verhältnisse ist diese Ahnenreihe die bedeutsamste im Guten wie im Schlimmen. Sie bestimmt das Maß der Kultur im Lande, sie bestimmt auch Recht und Sitte, politische und soziale Lage, Verteilung von Arbeit und Genuß. Auch Recht und Sitte und soziale Lage sind Energiezustände, in denen sich die Tätigkeit früherer Generationen aufgespeichert hat. Sie weisen dem Menschen bei seiner Geburt einen Platz in der Gesellschaft an, weich und bequem für den einen, hart und unwirtlich für den anderen; und auf diesem Platz ist der einzelne zumeist sein lebelang festgehalten. Der Wille der Lebenden wird gar oft erdrückt durch den im Recht verkörperten Willen der Toten.

Die Wirksamkeit der Vorwelt wird durch den dritten Faktor, die Mitwelt, ergänzt. Lebenslage, Erziehung und Umgebung sind die starken, äußeren Motoren für die Entwicklung des Menschen. Schon für den Keimkörper ist es maßgebend, ob er genügend ernährt wird, ob ihm Muße gegeben ist, sich ruhig und kräftig auszubilden. Ist

das Kind geboren, so setzt sich die Abhängigkeit von den Lebensbedingungen fort. Das Kind des Arbeiters, der mit seinem Weibe den Tag über fern vom Hause arbeiten muß, verkommt, ungepflegt, unerzogen, durch schlechte Gesellschaft verdorben. Wie viele herrliche Geschöpfe gehen auf solche Art elend zugrunde! Auf das Schicksal des einzelnen Menschen haben wohl auch noch Ursachen, die der außermenschlichen Natur angehören, Einfluß; guter und böser Zufall, wie wir es nennen. Ein Sturz kann den Menschen töten, er kann ihn auch verkrüppeln oder geistig umnachten. Aber das Gebiet des Zufalls kann durch soziale Arbeit verringert werden. Zufall ist nur ein relativer Begriff; was zu einer Zeit noch als Zufall gilt, ist in einer späteren vorherzusehen und zu vermeiden. Sein Einfluß ist gering gegenüber der dreifachen sozialen Ursachenreihe, die das Selbst des Menschen und mit ihm sein Schicksal bestimmt. So mögen wir das Karma des Menschen *sozial* nennen. Jeder Mensch ist ein Glied in der großen Kette, die sich durch die Menschenmasse der Zeiten und Völker zieht und sie kausal verknüpft. Seine menschliche Energie ist entstanden durch die der Vergangenheit und bildet wiederum menschliche Energie der Zukunft. Nicht mit einem einzelnen Wesen ist er durch sein Karma eins, sondern mit der ganzen Menschheit vor ihm und nach ihm. In der zukünftigen Menschheit lebt er fort, in ihr ist er unsterblich.

Die Moral, die hieraus fließt, ist kräftiger, lebenbejahender als die des Inders. Die Selbstbeherrschung, der Gleichmut gegen äußere Glücksgüter, die Abhärtung gegenüber Schmerz, die Überwindung der Leidenschaftlichkeit sind notwendige Mittel; sie schaffen die Hindernisse aus dem Weg für heilsame soziale Tätigkeit, die der einsame Denker ebenso zu leisten vermag, wie der Mann, der unmittelbar für das Leben schafft. Aber nicht die Abtötung des Selbst ist das Ziel, sondern die Entwicklung edlen Menschentums in sich und anderen.

Das ist die unserer Wissenschaft entsprechende Lehre vom Karma.

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Eine Reihe der hier veröffentlichten Aufsätze enthalten mehr oder weniger bedeutende Änderungen oder Zusätze Ofners, die sich in seinen Handexemplaren vorfanden. Die Titel dieser Aufsätze wurden in diesem Verzeichnis mit einem Stern (*) bezeichnet. Ein Doppelstern (**) bedeutet, daß der betreffende Artikel vom Herausgeber gekürzt wurde. Gelegentlich mußten auch in anderen Aufsätzen kleinere Richtigstellungen oder Änderungen vorgenommen werden, auf die hier nicht besonders verwiesen wurde.

Druckfehlerberichtigung

Seite 48, Zeile 22, lies Beschäftigung statt Bechäftigung.
Seite 68, Zeile 7, lies Censor statt Zensor.
Seite 216, Zeile 4 von unten, lies Untertanen statt Untertaneen.
Seite 225, Zeile 14, lies öffentlichrechtlich statt öffentlich-rechtlich.
Seite 227, Zeile 1, lies schwererer statt schwerer.

AR 7262 14/7

JMF FILED. RATIFICATION OF GENEVA CONVENTION 1958.

(SUPPLEMENT AU D/510)

TEXTES des réserves exprimées ou confirmées
lors de la ratification ou de l'adhésion
aux Conventions de Genève de 1949
(par ordre chronologique)

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AUSTRALIE - Ratification, 14 octobre 1958

In ratifying the Geneva Convention relative to the Protection of Civilian Persons in Time of War, the Government of the Commonwealth of Australia RESERVES the right to impose the death penalty in accordance with the provisions of paragraph 2 of Article 68 of the said Convention without regard to whether the offences referred to therein are punishable by death under the law of the occupied territory at the time the occupation begins and DECLARES that it interprets the term "military installations" in paragraph 2 of Article 68 of the said Convention as meaning installations having an essential military interest for an Occupying Power.

. . . . . .

NOUVELLE-ZELANDE - Ratification, 2 mai 1959

Her Majesty's Government in New Zealand have requested me to notify you that in ratifying the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, they do not desire to maintain the reservation to Article 70, paragraph 1, of that Convention, made by the Government of New Zealand at the time of signature.

Her Majesty's Government in New Zealand desire, however, to maintain the reservation recorded at the time of signature in respect of Article 68, paragraph 2, of the same Convention, and have included a statement to this effect in the relevant instrument of ratification.

. . . . . .

PORTUGAL - Ratification, 14 mars 1961

A l'occasion du dépôt auprès du Conseil fédéral suisse de l'instrument de ratification des Conventions de Genève pour la protection des victimes de la guerre, du 12 août 1949, le soussigné, Ruy Teixeira Guerra, Ambassadeur de Portugal en Suisse, déclare que son Gouvernement a décidé de retirer les réserves qu'il avait faites au moment de la signature de ces actes, en ce qui concerne l'article 3 commun aux quatre Conventions, les articles 13 de la Convention I, et 4 de la Convention III et l'article 60 de la Convention III.

Par contre, le Gouvernement portugais n'accepte la doctrine de l'article 10 des Conventions I, II et III et de l'article 11 de la Convention IV, que sous réserve que les demandes adressées par la Puissance détentrice à un Etat neutre ou à un organisme humanitaire pour qu'ils assument les fonctions dévolues normalement aux Puissances protectrices aient l'assentiment ou l'accord du Gouvernement du pays duquel sont originaires les personnes à protéger (Puissance d'origine).

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TEXTES des réserves exprimées ou confirmées lors de la ratification ou de l'adhésion aux Conventions de Genève de 1949 (par ordre chronologique)

YOUGOSLAVIE - Ratification, 31 mars 1950

1) En signant la Convention de Genève pour l'amélioration du sort des blessés et des malades dans les forces armées en campagne, je déclare que le Gouvernement de la République Fédérative Populaire de Yougoslavie adhère à ladite Convention, sous réserve de son article 10.

Le Gouvernement de la République Fédérative Populaire de Yougoslavie ne considérera pas comme légale une demande de la Puissance détentrice tendant à ce qu 'un Etat neutre ou un organisme international ou un organisme humanitaire assume les fonctions dévolues par la présente Convention aux Puissances protectrices envers les blessés et malades ou les membres du personnel sanitaire et religieux, si le Gouvernement dont ils sont ressortissants ny donne pas son consentement.

2) En signant la Convention de Genève pour l'amélioration du sort des blessés, des malades et des naufragés des forces armées sur mer, je déclare que le Gouvernement de la République Fédérative Populaire de Yougoslavie adhère à ladite Convention, sous réserve de son article 10.

Le Gouvernement de la République Fédérative Populaire de Yougoslavie ne considérera pas comme légale une demande la Puissance détentrice tendant à ce qu'un Etat neutre ou un organisme international ou un organisme humanitaire assume les fonctions dévolues par la présente Convention aux Puissances protectrices envers les blessés, malades et naufragés, ou les membres du personnel sanitaire et religieux, si le Gouvernement dont ils sont ressortissants n'y donne pas son consentement.

3) En signant la Convention de Genève relative au traitement des prisonniers de guerre, je déclare que le Gouvernement de la République Fédérative Populaire de Yougoslavie adhère à ladite Convention, sous réserve de ses articles 10 et 12.

En ce qui concerne l'article 10, le Gouvernement de la République Fédérative Populaire de Yougoslavie ne considérera pas comme légale une demande de la Puissance détentrice tendant à ce qu'un Etat neutre ou un organisme international ou un organisme humanitaire assume les fonctions par la présente Convention aux Puissances protectrices envers les prisonniers de guerre, si le Gouvernement dont ils sont ressortissants n'y donne pas son consentement.

En ce qui concerne l'article 12, le Gouvernement de la République Fédérative Populaire de Yougoslavie ne considérera pas que la Puissance qui a effectué le transfert de prisonniers de guerre est libérée de sa responsabilité de l'application de cette Convention pour tout le temps pendant lequel ces prisonniers de guerre se trouveront chez la Puissance qui a accepté de les accueillir.

4) En signant la Convention de Genève relative à la protection des personnes civiles en temps de guerre, je déclare que le Gouvernement de la République Fédérative Populaire de Yougoslavie adhère à ladite Convention, sous réserve de ses articles 11 et 45.

En ce qui concerne l'article 11, le Gouvernement de la République Fédérative Populaire de Yougoslavie ne considérera pas comme légale une demande de la Puissance détentrice tendant à ce qu'un Etat neutre ou un organisme international ou un organisme humanitaire assume les fonctions dévolues par la présente Convention aux Puissances protectrices envers les personnes protégées, si le Gouvernement dont elles sont ressortissantes n'y donne pas son consentement.

En ce qui concerne l'article 45, le Gouvernement de la République Fédérative Populaire de Yougoslavie ne considérera pas comme légal qu'une Puissance effectuant un transfert de personnes protégées à une autre Puissance soit libérée de sa responsabilité d'appliquer la Convention pour tout le temps pendant lequel ces personnes protégées se trouveront chez la Puissance qui a accepté de les accueillir.

TCHECOSLOVAQUIE - Ratification, 19 décembre 1950

1) En procédant à la signature de la Convention de Genève pour l'amélioration du sort des blessés et des malades dans les forces armées en campagne, je déclare que le Gouvernement de la République tchécoslovaque adhère à ladite Convention, sous réserve de son article 10.

Le Gouvernement de la République tchécoslovaque ne considérera pas comme légale une demande de la Puissance détentrice tendant à ce qu'un Etat neutre ou un organisme international ou un organisme humanitaire assume les fonctions dévolues par la présente Convention aux Puissances protectrices envers les blessés et malades ou les membres du personnel sanitaire et religieux, si le Gouvernement dont ils sont ressortissants n'y donne pas son consentement.

2) En procédant à la signature de la Convention de Genève pour l'amélioration du sort des blessés, des malades et des naufragés des forces armées sur mer, je déclare que le Gouvernement de la République tchécoslovaque adhère à ladite Convention, sous réserve de son article 10.

Le Gouvernement de la République tchécoslovaque ne considérera pas comme légale une demande de la Puissance détentrice tendant à ce qu'un Etat neutre ou un organisme international ou un organisme humanitaire assume les fonctions dévolues par la présente Convention aux Puissances protectrices envers les blessés, malades et naufragés, ou les membres du personnel sanitaire et religieux, si le Gouvernement dont ils sont ressortissants n'y donne pas son consentement.

3) En procédant à la signature de la Convention de Genève relative au traitement des prisonniers de guerre, je déclare que le Gouvernement de la République tchécoslovaque adhère à ladite Convention, sous réserve de ses articles 10, 12 et 85.

En ce qui concerne l'article 10, le Gouvernement de la République tchécoslovaque ne considérera pas comme légale une demande de la Puissance détentrice tendant à ce qu'un Etat neutre ou un organisme international ou un organisme humanitaire assume les fonctions dévolues par la présente Convention aux Puissances protectrices envers les prisonniers de guerre, si le Gouvernement dont ils sont ressortissants n'y donne pas son consentement.

En ce qui concerne l'article 12, le Gouvernement de la République tchécoslovaque ne considérera pas comme légal qu'une Puissance effectuant un transfert de prisonniers de guerre soit libérée de sa responsabilité de l'application de la Convention, même pour le temps pendant lequel ces prisonniers de guerre seront confiés à la Puissance qui a accepté de les accueillir.

En ce qui concerne l'article 85, le Gouvernement de la République tchécoslovaque ne considérera pas comme légal que les prisonniers de guerre, condamnés pour des crimes de guerre et des crimes contre l'humanité au sens des principes appliqués au procès de Nuremberg, restent au bénéfice de la présente Convention, étant donné que les prisonniers de guerre condamnés pour ces crimes doivent être soumis au régime sur l'exécution des peines en vigueur dans l'Etat où ils ont été condamnés.

4) En procédant à la signature de la Convention de Genève relative à la protection des personnes civiles en temps de guerre, je déclare que le Gouvernement de la République tchécoslovaque adhère à ladite Convention, sous réserve de ses articles 11 et 45.

En ce qui concerne l'article 11, le Gouvernement de la République tchécoslovaque ne considérera pas comme légale une demande de la Puissance détentrice tendant à ce qu'un Etat neutre ou un organisme international ou un organisme humanitaire assume les fonctions dévolues par la présente Convention aux Puissances protectrices envers les personnes protégées, si le Gouvernement dont elles sont ressortissantes n'y donne pas son consentement.

En ce qui concerne l'article 45, le Gouvernement de la République tchécoslovaque ne considérera pas comme légal qu'une Puissance effectuant un transfert de personnes protégées, soit libérée de sa responsabilité de l'application de la Convention, même pour le temps pendant lequel ces personnes protégées seront confiées à la Puissance qui a accepté de les accueillir.

PAKISTAN - Ratification, 12 juin 1951

Every protected person who is national de jure of an enemy State, against whom action is taken or sought to be taken under Article 41 by assignment of residence or internment, or in accordance with any law, on the ground of his being an enemy alien, shall be entitled to submit proofs to the Detaining Power, or as the case may be, to any appropriate Court or administrative board which may review his case, that he does not enjoy the protection of any enemy State, and full weight shall be given to this circumstance, if it is established whether with or without further enquiry by the Detaining Power, in deciding appropriate action, by way of an initial order or, as the case may be, by amendment thereof.

The Government of Pakistan associate themselves with the reservation made by the United Kingdom of Great Britain and Northern Ireland and reserve the right to impose the death penalty in accordance with the provision of Article 68, paragraph 2, without regard to whether the offences referred to therein are punishable by death under the law of the occupied territory at the time the occupation begins.

ISRAEL - Ratification, 6 juillet 1951

1) Convention de Genève pour l'amélioration du sort des blessés et des malades dans les forces armées en campagne.

Sous la réserve que, tout en respectant l'inviolabilité des emblèmes et signes distinctifs de la Convention, Israël se servira du Bouclier Rouge de David comme emblème et signe distinctif du service sanitaire de ses forces armées.

2) Convention de Genève pour l'amélioration du sort des blessés, des malades et des naufragés des forces armées sur mer.

Sous la réserve que, tout en respectant l'inviolabilité des emblèmes et signes distinctifs de la Convention, Israël se servira du Bouclier Rouge de David sur les drapeaux, les brassards, ainsi que tout le matériel (y compris les navires-hôpitaux) se rattachant au service sanitaire.

3) Convention de Genève relative à la protection des personnes civiles en temps de guerre.

Sous la réserve que, tout en respectant l'inviolabilité des emblèmes et signes distinctifs prévus dans l'article 38 de la Convention de Genève pour l'amélioration du sort des blessés et des malades dans les forces armées en campagne du 12 août 1949, Israël se servira du Bouclier Rouge de David comme emblème et signe distinctif prévu dans cette Convention.

ESPAGNE - Ratification, 4 août 1952

Convention de Genève relative au traitement des prisonniers de guerre.

Par "droit international en vigueur" (article 99), l'Espagne entend n'accepter que celui de source conventionnelle ou celui qui aurait été élaboré au préalable par des organismes auxquels elle prend part.

URSS - Ratification, 10 mai 1954

1) En signant la Convention pour l'amélioration du sort des blessés et des malades dans les forces armées en campagne, le Gouvernement de l'Union des Républiques Socialistes Soviétiques formule la réserve suivante :

Ad article 10 : L'Union des Républiques Socialistes Soviétiques ne reconnaîtra pas valides les demandes adressées par la Puissance détentrice à un Etat neutre ou à un organisme humanitaire, d'assumer les tâches dévolues aux Puissances protectrices, au cas où le consentement respectif du Gouvernement du pays dont les personnes protégées sont ressortissantes n'aura pas été acquis.

2) En signant la Convention pour l'amélioration du sort des blessés, des malades et des naufragés des forces armées sur mer, le Gouvernement de l'Union des Républiques Socialistes Soviétiques formule la réserve suivante :

Ad article 10 : L'Union des Républiques Socialistes Soviétiques ne reconnaîtra pas valides les demandes adressées par la Puissance détentrice à un Etat neutre ou à un organisme humanitaire, d'assumer les tâches dévolues aux Puissances protectrices, au cas où le consentement respectif du Gouvernement du pays dont les personnes protégées sont ressortissantes n'aura pas été acquis.

3) En signant la Convention relative au traitement des prisonniers de guerre, le Gouvernement de l'Union des Républiques Socialistes Soviétiques formule les réserves suivantes :

Ad article 10 : L'Union des Républiques Socialistes Soviétiques ne reconnaîtra pas valides les demandes adressées par la Puissance détentrice à un Etat neutre ou à un organisme humanitaire, d'assumer les tâches dévolues aux Puissances protectrices, au cas où le consentement respectif du Gouvernement du pays dont les prisonniers de guerre sont ressortissants n'aura pas été acquis,

Ad article 12 : L'Union des Républiques Socialistes Soviétiques ne considérera pas valide la libération de la Puissance détentrice qui a transféré à une autre Puissance des prisonniers de guerre, de la responsabilité de l'application de la Convention à ces prisonniers de guerre pendant le temps que ceux-ci seraient confiés à la Puissance qui a accepté de les accueillir.

Ad article 85 : L'Union des Républiques Socialistes Soviétiques ne se considère pas tenue par l'obligation, qui résulte de l'article 85, d'étendre l'application de la Convention aux prisonniers de guerre, condamnés en vertu de la législation de la Puissance détentrice conformément aux principes du procès de Nuremberg, pour avoir commis des crimes de guerre et des crimes contre l'humanité, étant donné que les personnes condamnées pour ces crimes doivent être soumises au régime établi dans le pays en question pour les personnes qui subissent leur peine.

4) En signant la Convention relative à la protection des personnes civiles en temps de guerre, le Gouvernement de l'Union des Républiques Socialistes Soviétiques croit devoir déclarer ce qui suit :

Bien que la présente Convention ne s'étende pas à la population civile qui se trouve au-delà du territoire occupé par l'ennemi et de ce fait ne réponde pas entièrement aux exigences humanitaires, la délégation de l'Union des Républiques Socialistes Soviétiques, reconnaissant que ladite Convention va au-devant des intérêts ayant trait à la protection de la population civile en territoire occupé, et dans certains autres cas, déclare qu'elle est autorisée par le Gouvernement de l'Union des Républiques Socialistes Soviétiques de signer la présente Convention en formulant les réserves suivantes :

Ad article 11: L'Union des Républiques Socialistes Soviétiques ne reconnaîtra pas valides les demandes adressées par la Puissance détentrice à un Etat neutre ou à un organisme humanitaire, d'assumer les tâches dévolues aux Puissances protectrices, au cas où le consentement respectif du Gouvernement du pays dont les personnes protégées sont ressortissantes n'aura pas été acquis.

Ad article 45 : L'Union des Républiques Socialistes Soviétiques ne considérera pas valide la libération de la Puissance détentrice qui a transféré à une autre Puissance des personnes protégées, de la responsabilité de l'application de la Convention aux personnes transférées pendant le temps que celles-ci seraient confiées à la Puissance qui a accepté de les accueillir.

Interrogé à la demande de plusieurs Etats par le Conseil fédéral suisse, sur le sens exact de l'une de ses réserves, le Gouvernement de l'URSS a répondu :

Ainsi que cela ressort de son texte, la réserve de l'Union Soviétique au sujet de l'article 85 de la Convention de Genève relative au traitement des prisonniers de guerre, de 1949, signifie que les prisonniers de guerre qui, selon les lois de l'URSS, ont été condamnés pour crimes de guerre ou crimes contre l'humanité doivent être soumis au régime applicable, en URSS, à toutes les autres personnes qui purgent leur peine, en exécution de jugements des tribunaux. En conséquence, cette catégorie de personnes ne bénéficie pas de la protection de la Convention, après que le jugement est devenu légalement exécutoire.

En ce qui concerne les personnes condamnées à des peines privatives de liberté, la protection de la Convention ne peut s'exercer de nouveau qu'après l'exécution de la peine; dès lors, celle-ci une fois purgée, ces personnes ont le droit d'être rapatriées, aux conditions fixées par la Convention.

Au surplus, il y a lieu de tenir compte du fait que le régime applicable à toutes les personnes qui purgent leur peine en application de la législation de l'URSS répond à toutes les exigences de l'humanité et de l'hygiène et que les punitions corporelles sont rigoureusement interdites par la loi. En outre, les Autorités des prisons ont l'obligation, conformément aux dispositions en vigueur, de transmettre immédiatement aux organes soviétiques compétents, pour enquête, les plaintes des condamnés qui se rapportent aux jugements ou les requêtes tendant à la revision de leur cas, de même que toutes autres plaintes. Moscou, le 26 mai 1955.

ROUMANIE - Ratification, 1er juin 1954

1) En signant la Convention pour l'amélioration du sort des blessés et des malades dans les forces armées en campagne, le Gouvernement de la République Populaire Roumaine formule la réserve suivante :

Ad article 10 : La République Populaire Roumaine ne reconnaîtra pas valides les demandes adressées par la Puissance détentrice à un Etat neutre ou à un organisme humanitaire d'assumer les tâches dévolues aux Puissances protectrices, au cas où le consentement respectif du Gouvernement du pays dont les personnes protégées sont ressortissantes n'aura pas été acquis.

2) En signant la Convention pour l'amélioration du sort des blessés, des malades et des naufragés des forces armées sur mer, le Gouvernement de la République Populaire Roumaine formule la réserve suivante:

Ad article 10 : La République Populaire Roumaine ne reconnaîtra pas valides les demandes adressées par la Puissance détentrice à un Etat neutre ou à un organisme humanitaire d'assumer les tâches dévolues aux Puissances protectrices, au cas où le consentement respectif du Gouvernement du pays, dont les personnes protégées sont ressortissantes, n'aura pas été acquis.

3) En signant la Convention relative au traitement des prisonniers de guerre, le Gouvernement de la République Populaire Roumaine formule les réserves suivantes :

Ad article 10: La République Populaire Roumaine ne reconnaîtra pas valides les demandes adressées par la Puissance détentrice à un Etat neutre ou à un organisme humanitaire d'assumer les tâches dévolues aux Puissances protectrices au cas où le consentement respectif du Gouvernement du pays dont les prisonniers de guerre sont ressortissants n'aura pas été acquis.

Ad article 12 : La République Populaire Roumaine ne considérera pas valide la libération de la Puissance détentrice, qui a transféré à une autre Puissance des prisonniers de guerre, de la responsabilité de l'application de la Convention à ces prisonniers de guerre, pendant le temps où ceux-ci se trouvent sous la protection de la Puissance qui a accepté de les accueillir.

Ad article 85: La République Populaire Roumaine ne se considère pas tenue par l'obligation qui résulte de l'article 85, d'étendre l'application de la Convention aux prisonniers de guerre, condamnés en vertu de la législation de la Puissance détentrice, conformément aux principes du procès de Nuremberg, pour avoir commis des crimes de guerre et des crimes contre l'humanité, étant donné que les personnes

condamnées pour ces crimes doivent être soumises au régime établi, dans le pays en question, pour les personnes qui subissent leur peine.

4) En signant la Convention relative à la protection des personnes civiles en temps de guerre, je suis autorisé à déclarer ce qui suit :

Le Gouvernement de la République Populaire Roumaine considère que cette Convention, du fait qu'elle ne s'applique à la population civile qui se trouve en dehors du territoire occupé par l'ennemi, ne correspond pas entièrement aux exigences humanitaires.

Malgré cela, prenant en considération le fait que la Convention se propose de défendre les intérêts de la population civile qui se trouve en territoire occupé, je suis autorisé par le Gouvernement de la République Populaire Roumaine à signer ladite Convention avec les réserves suivantes :

Ad article 11: La République Populaire Roumaine ne reconnaîtra pas valides les demandes adressées par la Puissance détentrice à un Etat neutre ou à un organisme humanitaire d'assumer les tâches dévolues aux Puissances protectrices, au cas où le consentement respectif du Gouvernement du pays dont les personnes protégées sont ressortissantes n'aura pas été acquis.

Ad article 45: La République Populaire Roumaine ne considérera pas valide la libération de la Puissance détentrice, qui a transféré à une autre Puissance des personnes protégées, de la responsabilité de l'application de la Convention aux personnes transférées pendant le temps où celles-ci se trouvent sous la protection de la Puissance qui a accepté de les accueillir.

BULGARIE - Ratification, 22 juillet 1954

1) Convention de Genève relative à la protection des personnes civiles en temps de guerre du 12 août 1949.

En signant la présente Convention, le Gouvernement de la République Populaire de Bulgarie formule les réserves suivantes, réserves qui constituent partie intégrante de la Convention :

Concernant l'article 11: La République Populaire de Bulgarie ne reconnaîtra pas comme valide le fait qu'une Puissance détentrice de personnes civiles en temps de guerre s'adresse à une Puissance neutre ou à un organisme humanitaire pour lui en confier la protection sans le consentement du Gouvernement du pays dont elles sont ressortissantes.

Concernant l'article 45: La République Populaire de Bulgarie ne considérera pas la Puissance détentrice de personnes civiles en temps de guerre qui a transféré ces personnes à une autre Puissance qui a accepté de les accueillir comme libérée de la responsabilité d'appliquer à ces personnes les règles de la Convention pour le temps pendant lequel elles sont détenues par cette autre Puissance.

2) Convention de Genève pour l'amélioration du sort des blessés, des malades et des naufragés des forces armées sur mer du 12 août 1949.

En signant la présente Convention, le Gouvernement de la République Populaire de Bulgarie formule la réserve suivante, réserve qui constitue partie intégrante de la Convention :

Concernant l'article 10: La République Populaire de Bulgarie ne reconnaîtra pas comme valide le fait qu'une Puissance détentrice de blessés, de malades et de naufragés ou de personnel sanitaire des forces armées sur mer s'adresse à une Puissance neutre ou à un organisme humanitaire pour lui en confier la protection sans le consentement du Gouvernement du pays dont ils sont ressortissants.

3) Convention de Genève relative au traitement des prisonniers de guerre du 12 août 1949.

En signant la présente Convention, le Gouvernement de la République Populaire de Bulgarie formule les réserves suivantes, réserves qui constituent partie intégrante de la Convention :

Concernant l'article 10: La République Populaire de Bulgarie ne reconnaîtra pas comme valide le fait qu'une Puissance détentrice de prisonniers de guerre s'adresse à une Puissance neutre ou à un organisme humanitaire pour lui en confier la protection sans le consentement du Gouvernement du pays dont ils sont ressortissants.

Concernant l'article 12: La République Populaire de Bulgarie ne considérera pas la Puissance détentrice de prisonniers de guerre qui a transféré ces personnes à une autre Puissance qui a accepté de les accueillir comme libérée de la responsabilité d'appliquer à ces personnes les règles de la Convention pour le temps pendant lequel elles sont détenues par cette autre Puissance.

Concernant l'article 85 : La République Populaire de Bulgarie ne s'estime pas tenue de remplir, par extension, les dispositions découlant de l'article 85 à l'égard de prisonniers de guerre condamnés, en vertu de la légilsation de la Puissance détentrice et conformément aux principes du procès de Nuremberg, pour crimes de guerre ou crimes antihumanitaires que ces personnes ont commis avant d'avoir été faites prisonniers, parce que ces condamnés doivent se soumettre au régime du pays institué pour purger la peine.

4) Convention de Genève pour l'amélioration du sort des blessés et des malades dans les forces armées en campagne du 12 août 1949.

En signant la présente Convention, le Gouvernement de la République Populaire de Bulgarie formule la réserve suivante, réserve qui constitue partie intégrante de la Convention :

Concernant l'article 10 : La République Populaire de Bulgarie ne reconnaîtra pas comme valide le fait qu'une Puissance détentrice de blessés, de malades ou de personnel sanitaire dans les forces armées en campagne s'adresse à une Puissance neutre ou à un organisme humanitaire pour lui en confier la protection sans le consentement du Gouvernement du pays dont ces personnes sont ressortissantes.

UKRAINE - Ratification, 3 août 1954

1) En signant la Convention pour l'amélioration du sort des blessés et des malades dans les forces armées en campagne, le Gouvernement de la République Socialiste Soviétique d'Ukraine formule la réserve suivante :

Ad article 10: La République Socialiste Soviétique d'Ukraine ne reconnaîtra pas valides les demandes adressées par la Puissance détentrice à un Etat neutre ou à un organisme humanitaire, d'assumer les tâches dévolues aux Puissances protectrices, au cas où le consentement respectif du Gouvernement du pays dont les personnes protégées sont ressortissantes n'aura pas été acquis.

2) En signant la Convention pour l'amélioration du sort des blessés, des malades et des naufragés des forces armées sur mer, le Gouvernement de la République Socialiste Soviétique d'Ukraine formule la réserve suivante:

Ad article 10 : La République Socialiste Soviétique d'Ukraine ne reconnaîtra pas valides les demandes adressées par la Puissance détentrice à un Etat neutre ou à un organisme humanitaire d'assumer les tâches dévolues aux Puissances protectrices, au cas où le consentement respectif du Gouvernement du pays dont les personnes protégées sont ressortissantes n'aura pas été acquis.

3) En signant la Convention relative au traitement des prisonniers de guerre, le Gouvernement de la République Socialiste Soviétique d'Ukraine formule les réserves suivantes :

Ad article 10: La République Socialiste Soviétique d'Ukraine ne reconnaîtra pas valides les demandes adressées par la Puissance détentrice à un Etat neutre ou à un organisme humanitaire d'assumer les tâches dévolues aux Puissances protectrices, au cas où le consentement respectif du Gouvernement du pays dont les prisonniers de guerre sont ressortissants n'aura pas été acquis.

Ad article 12 : La République Socialiste Soviétique d'Ukraine ne considérera pas valide la libération de la Puissance détentrice qui a transféré à une autre Puissance des prisonniers de guerre, de la responsabilité de l'application de la Convention à ces prisonniers de guerre pendant le temps que ceux-ci seraient confiés à la Puissance qui a accepté de les accueillir.

Ad article 85: La République Socialiste Soviétique d'Ukraine ne se considère pas tenue par l'obligation, qui résulte de l'article 85, d'étendre l'application de la Convention aux prisonniers de guerre, condamnés en vertu de la législation de la Puissance détentrice conformément aux principes du procès de Nuremberg, pour avoir commis des crimes de guerre et des crimes contre l'humanité, étant donné que les personnes condamnées pour ces crimes doivent être soumises au régime établi dans le pays en question pour les personnes qui subissent leur peine.

4) En signant la Convention relative à la protection des personnes civiles en temps de guerre, le Gouvernement de la République Socialiste Soviétique d'Ukraine croit devoir déclarer ce qui suit :

Bien que la présente Convention ne s'étende pas à la population civile qui se trouve au-delà du territoire occupé par l'ennemi et de ce fait ne réponde pas entièrement aux exigences humanitaires, la délégation de la République Socialiste Soviétique d'Ukraine, reconnaissant que ladite Convention va au-devant des intérêts ayant trait à la protection de la population civile en territoire occupé, et dans certains autres cas, déclare qu'elle est autorisée par le Gouvernement de la République Socialiste Soviétique d'Ukraine de signer la présente Convention en formulant les réserves suivantes :

Ad article 11 : La République Socialiste Soviétique d'Ukraine ne reconnaîtra pas valides les demandes adressées par la Puissance détentrice à un Etat neutre ou à un organisme humanitaire, d'assumer les tâches dévolues aux Puissances protectrices, au cas où le consentement respectif du Gouvernement du pays dont les personnes protégées sont ressortissantes n'aura pas été acquis.

Ad article 45 : La République Socialiste Soviétique d'Ukraine ne considérera pas valide la libération de la Puissance détentrice qui a transféré à une autre Puissance des personnes protégées, de la responsabilité de l'application de la Convention aux personnes transférées pendant le temps que celles-ci seraient confiées à la Puissance qui a accepté de les accueillir.

BIELORUSSIE - Ratification, 3 août 1954

1) En signant la Convention pour l'amélioration du sort des blessés et des malades dans les forces armées en campagne, le Gouvernement de la République Socialiste Soviétique de Biélorussie formule la réserve suivante :

Ad article 10 : La République Socialiste Soviétique de Biélorussie ne reconnaîtra pas valides les demandes adressées par la Puissance détentrice à un Etat neutre ou à un organisme humanitaire,d'assumer les tâches dévolues aux Puissances protectrices, au cas où le consentement respectif du Gouvernement du pays dont les personnes protégées sont ressortissantes n'aura pas été acquis.

2) En signant la Convention pour l'amélioration du sort des blessés, des malades et des naufragés des forces armées sur mer, le Gouvernement de la République Socialiste Soviétique de Biélorrusie formule la réserve suivante :

Ad article 10 : La République Socialiste Soviétique de Biélorussie ne reconnaît pas les demandes adressées par la Puissance détentrice à un Etat neutre ou à un organisme humanitaire d'assumer les tâches dévolues aux Puissances protectrices, au cas où le consentement respectif du Gouvernement du pays dont les personnes protégées sont ressortissantes n'aura pas été acquis.

3) En signant la Convention relative au traitement des prisonniers de guerre, le Gouvernement de la République Socialiste Soviétique de Biélorussie formule les réserves suivantes :

Ad article 10 : La République Socialiste Soviétique de Biélorussie ne reconnaîtra pas valides les demandes adressées par la Puissance détentrice à un Etat neutre ou à un organisme humanitaire d'assumer les tâches dévolues aux Puissances protectrices, au cas où le consentement respectif du Gouvernement du pays dont les prisonniers de guerre sont ressortissants n'aura pas été acquis.

Ad article 12 : La République Socialiste Soviétique de Biélorussie ne considérera pas valide la libération de la Puissance détentrice qui a transféré à une autre Puissance des prisonniers de guerre, de la responsabilité de l'application de la Convention à ces prisonniers de guerre pendant le temps que ceux-ci seraient confiés à la Puissance qui a accepté de les accueillir.

Ad article 85 : La République Socialiste Soviétique de Biélorussie ne se considère pas tenue par l'obligation, qui résulte de l'article 85, d'étendre l'application de la Convention aux prisonniers de guerre, condamnés en vertu de la législation de la Puissance détentrice conformément aux principes du procès de Nuremberg, pour avoir commis des crimes de guerre et des crimes contre l'humanité,

étant donné que les personnes condamnées pour ces crimes doivent être soumises au régime établi dans le pays en question pour les personnes qui subissent leur peine.

4) En signant la Convention relative à la protection des personnes civiles en temps de guerre, le Gouvernement de la République Socialiste Soviétique de Biélorussie croit devoir déclarer ce qui suit :

Bien que la présente Convention ne s'étende pas à la population civile qui se trouve au-delà du territoire occupé par l'ennemi et de ce fait ne réponde pas entièrement aux exigences humanitaires, la délégation de la République Socialiste Soviétique de Biélorussie, reconnaissant que ladite Convention va au-devant des intérêts ayant trait à la protection de la population civile en territoire occupé, et dans certains autres cas, déclare qu'elle est autorisée par le Gouvernement de la République Socialiste Soviétique de Biélorussie de signer la présente Convention en formulant les réserves suivantes :

Ad article 11 : La République Socialiste Soviétique de Biélorussie ne reconnaîtra pas valides les demandes adressées par la Puissance détentrice à un Etat neutre ou à un organisme humanitaire, d'assumer les tâches dévolues aux Puissances protectrices, au cas où le consentement respectif du Gouvernement du pays dont les personnes protégées sont ressortissants n'aura pas été acquis.

Ad article 45 : La République Socialiste Soviétique de Biélorussie ne considérera pas valide la libération de la Puissance détentrice qui a transféré à une autre Puissance des personnes protégées, de la responsabilité de l'application de la Convention aux personnes transférées pendant le temps que celles-ci seraient confiées à la Puissance qui a accepté de les accueillir.

PAYS-BAS - Ratification, 3 août 1954

Le Royaume des Pays-Bas se réserve le droit d'appliquer la peine de mort selon les dispositions de l'article 68, paragraphe deux, sans égard à la question de savoir si les délits qui y sont mentionnés sont punissables ou non par la peine de mort selon la loi du territoire occupé à l'époque où commence l'occupation.

HONGRIE - Ratification, 3 août 1954

Les réserves expresses du Gouvernement de la République Populaire Hongroise par rapport à la signature des Conventions sont les suivantes:

1) Selon l'avis du Gouvernement de la République Populaire Hongroise les dispositions de l'article 10 des Conventions "blessés et malades", "maritime" et "prisonniers de guerre", ainsi que l'article 11 de la Convention relative à la protection des personnes civiles, concernant la substitution de la Puissance protectrice, ne peuvent être appliquées que dans le cas où le Gouvernement de l'Etat, dont les personnes protégées sont les rssortissants, n'existe plus.

2) Le Gouvernement de la République Populaire Hongroise ne peut pas approuver les dispositions de l'article 11 des Conventions "blessés et malades", "maritime" et "prisonniers de guerre", respectivement de l'article 12 de la Convention relative à la protection des personnes civiles, selon lesquelles la compétence de la Puissance protectrice s'étend à l'interprétation des Conventions.

3) Par rapport à l'article 12 de la Convention relative au traitement des prisonniers de guerre, le Gouvernement de la République Populaire Hongroise maintient son point de vue, selon lequel, en cas de transfert de prisonniers de guerre d'une Puissance à une autre, la responsabilité pour l'application des dispositions des Conventions doit incomber à ces deux Puissances.

4) La délégation de la République Populaire Hongroise répète sa protestation élevée au cours des séances relatives à l'article 85 de la Convention des prisonniers de guerre jugés pour des crimes de guerre et pour des crimes contre l'humanité conformément aux principes de Nuremberg, doivent être soumis au même traitement que les criminels condamnés pour d'autres crimes.

5) Le Gouvernement de la République Populaire Hongroise maintient finalement son point de vue exprimé, concernant l'article 45 de la Convention relative à la protection des personnes civiles, selon lequel en cas de transfert de personnes protégées d'une Puissance à une autre, la responsabilité pour l'application de la Convention doit incomber à ces deux Puissances.

POLOGNE - Ratification, 26 novembre 1954.

1) En signant la Convention de Genève pour l'amélioration du sort des blessés et des malades dans les forces armées en campagne, je déclare que le Gouvernement de la République polonaise adhère à ladite Convention, sous réserve de son article 10.

Le Gouvernement de la République polonaise ne considérera pas comme légale une demande de la Puissance détentrice tendant à ce qu'un Etat neutre ou un organisme international ou un organisme humanitaire assume les fonctions dévolues par la présente Convention aux Puissances protectrices envers les blessés et malades ou les membres du personnel sanitaire et religieux, si le Gouvernement dont ils sont ressortissants n'y donne pas son consentement.

2) En signant la Convention de Genève pour l'amélioration du sort des blessés, des malades et des naufragés des forces armées sur mer, je déclare que le Gouvernement de la République polonaise adhère à ladite Convention, sous réserve de son article 10.

Le Gouvernement de la République polonaise ne considérera pas comme légale une demande de la Puissance détentrice tendant à ce qu'un Etat neutre ou un organisme international ou un organisme humanitaire assume les fonctions dévolues par la présente Convention aux Puissances protectrices envers les blessés, malades et naufragés, ou les membres du personnel sanitaire et religieux, si le Gouvernement dont ils sont ressortissants n'y donne pas son consentement.

3) En signant la Convention de Genève relative au traitement des prisonniers de guerre, je déclare que le Gouvernement de la République polonaise adhère à ladite Convention, sous réserve de ses articles 10, 12 et 85.

En ce qui concerne l'article 10, le Gouvernement de la République polonaise ne considérera pas comme légale une demande de la Puissance détentrice tendant à ce qu'un Etat neutre ou un organisme international ou un organisme humanitaire assume les fonctions dévolues par la présente Convention aux Puissances protectrices envers les prisonniers de guerre, si le Gouvernement dont ils sont ressortissants n'y donne pas son consentement.

En ce qui concerne l'article 12, le Gouvernement de la République polonaise ne considérera pas comme légal qu'une Puissance effectuant un transfert de prisonniers de guerre, soit libérée de sa responsabilité d'appliquer la Convention, même pour le temps pendant lequel ces prisonniers de guerre seront confiés à la Puissance qui a accepté de les accueillir.

En ce qui concerne l'article 85, le Gouvernement de la République polonaise ne considérera pas comme légal que les prisonniers

de guerre, condamnés pour des crimes de guerre et des crimes contre l'humanité au sens des principes énoncés lors des jugements de Nuremberg, restent au bénéfice de la présente Convention, étant donné que les prisonniers de guerre condamnés pour ces crimes doivent être soumis aux prescriptions sur l'exécution des peines en vigueur dans l'Etat intéressé.

4) En signant la Convention de Genève relative à la protection des personnes civiles en temps de guerre, je déclare que le Gouvernement de la République polonaise adhère à ladite Convention, sous réserve de ses articles 11 et 45.

En ce qui concerne l'article 11, le Gouvernement de la République polonaise ne considérera pas comme légale une demande de la Puissance détentrice tendant à ce qu'un Etat neutre ou un organisme international ou un organisme humanitaire assume les fonctions dévolues par la présente Convention aux Puissances protectrices envers les personnes protégées, si le Gouvernement dont elles sont ressortissantes n'y donne pas son consentement.

En ce qui concerne l'article 45, le Gouvernement de la République polonaise ne considérera pas comme légal qu'une Puissance effectuant un transfert de personnes protégées, soit libérée de sa responsabilité d'appliquer la Convention, même pour le temps pendant lequel ces personnes protégées seront confiées à la Puissance qui a accepté de les accueillir.

ETATS-UNIS D'AMERIQUE - Ratification, 2 août 1955

1) Instrument portant ratification de la convention pour l'amélioration du sort des blessés et des malades dans les forces armées en campagne:

"The United States in ratifiying the Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field does so with the reservation that irrespective of any provision or provisions in said convention to the contrary, nothing contained therein shall make unlawful, or obligate the United States of America to make unlawful, any use or right of use within the United States of America and its territories and possessions of the Red Cross emblem, sign, insignia, or words as was lawful by reason of domestic law and a use begun prior to January 5, 1905, provided such use by pro-1905 users does not extend to the placing of the Red Cross emblem, sign, or insignia upon aircraft, vessels, vehicles, buildings or other structures, or upon the ground".

"Rejecting the reservations which States have made with respect to the Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field, the United States accepts treaty relations with all parties to that Convention, except as to the changes proposed by such reservations".

2) Instrument portant ratification de la Convention pour l'amélioration du sort des blessés, des malades et des naufragés des forces armées sur mer :

"Rejecting the reservations which States have made with respect to the Geneva Convention for the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea, the United States accepts treaty relations with all parties to that Convention, except as to the changes proposed by such reservations".

3) Instrument portant ratification de la Convention relative au traitement des prisonniers de guerre:

"Rejecting the reservations which States have made with respect to the Geneva Convention relative to the treatment of prisoners of war, the United States accepts treaty relations with all parties to that Convention, except as to the changes proposed by such reservations".

4) Instrument portant ratification de la Convention relative à la protection des personnes civiles en temps de guerre:

"The United States reserves the right to impose the death penalty in accordance with the provisions of Article 68, paragraph 2, without regard to whether the offenses referred to therein are punishable by death under the law of the occupied territory at the time the occupation begins".

(Réserve formulée par le représentant des Etats-Unis d'Amérique lors de la signature).

"Rejecting the reservations - other than to Article 68, paragraph 2 - which States have made with respect to the Geneva Convention relative to the protection of civilian persons in time of war, the United States accepts treaty relations with all parties to that Convention, except as to the changes proposed by such reservations".

REPUBLIQUE DEMOCRATIQUE ALLEMANDE - Adhésion, 30 novembre 1956

1) Genfer Abkommen vom 12. August 1949 zur Verbesserung des Loses der Verwundeten und Kranken der Streitkräfte im Felde:

Zu Art. 10 : Das Ersuchen des Gewahrsamstaates an einen neutralen Staat, an eine internationale oder humanitäre Organisation um Uebernahme der Funktionen, die die Schutzmächte nach den Bestimmungen der Konvention auszuüben haben, wird von der Deutschen Demokratischen Republik nur dann als rechtsmässig anerkannt werden, wenn die Regierung des Landes, dessen Staatsbürgerschaft die geschützten Personen besitzen, diesem zugestimmt hat.

2) Genfer Abkommen vom 12. August 1949 zur Verbesserung des Loses der Verwundeten, Kranken und Schiffbrüchigen der Streitkräfte zur See :

Zu Art. 10: Das Ersuchen des Gewahrsamstaates an einen neutralen Staat, an eine internationale oder humanitäre Organisation um Uebernahme der Funktionen, die die Schutzmächte nach den Bestimmungen der Konvention auszuüben haben, wird von der Deutschen Demokratischen Republik nur dann als rechtsmässig anerkannt werden, wenn die Regierung des Landes, dessen Staatsbürgerschaft die geschützten Personen besitzen, diesem zugestimmt hat.

3) Genfer Abkommen vom 12. August 1949 über die Behandlung der Kriegsgefangenen:

Zu Art. 10: Das Ersuchen des Gewahrsamstaates an einen neutralen Staat, an eine internationale oder humanitäre Organisation um Uebernahme der Funktionen, die die Schutzmächte nach den Bestimmungen der Konvention auszuüben haben, wird von der Deutschen Demokratischen Republik nur dann als rechtsmässig anerkannt werden, wenn die Regierung des Landes, dessen Staatsbürgerschaft die geschützten Personen besitzen, diesem zugestimmt hat.

Zu Art. 12 : Die Regierung der DDR erklärt, dass durch die Uebergabe von Kriegsgefangenen an eine andere Macht, die dem Abkommen beigetreten ist, der Gewahrsamstaat seiner Verantwortlichkeit für die Einhaltung der Bestimmungen der Konvention gegenüber den Kriegsgefangenen nicht enthoben wird.

Zu Art. 85 : Die DDR wird die aus Art. 85 resultierenden Vergünstigungen solcher Kriegsgefangenen nicht anerkennen, die wegen Kriegsverbrechen oder Verbrechen gegen die Menschlichkeit gemäss den Prinzipien des Nürenberger Gerichtshofes rechtskräftig verurteil worden sind.

4) Genfer Abkommen vom 12. August 1949 zum Schutze von Zivilpersonen in Kriegszeiten :

Zu Art. 11 : Das Ersuchen des Gewahrsamstaates an einen neutralen Staat, an eine internationale oder humanitäre Organisation um Uebernahme der Funktionen, die die Schutzmächte nach den Bestimmungen der Konvention auszuüben haben, wird von der Deutschen Demokratischen Republik nur dann als rechtsmässig anerkannt werden, wenn die Regierung des Landes, dessen Staatsbürgerschaft die geschützten Personen besitzen, diesem zugestimmt hat.

Zu Art. 45 : Die Regierung der DDR erklärt, dass durch die Uebergabe von geschützten Personen an eine andere Macht, die dem Abkommen beigetreten ist, der Gewahrsamstaat seiner Verantwortlichkeit für die Einhaltung der Bestimmungen der Konvention gegenüber den geschützten Personen nicht enthoben wird.

REPUBLIQUE POPULAIRE DE CHINE - Ratification, 28 décembre 1956

1) Regarding Article 10 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, the People's Republic of China will not recognize as valid a request by the Detaining Power of the wounded and sick, or medical personnel and chaplains to a neutral State or to a humanitarian organization, to undertake the functions which should be performed by a Protecting Power, unless the consent has been obtained of the government of the State of which the protected persons are nationals.

2) Regarding Article 10 of the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, the People's Republic of China will not recognize as valid a request by the Detaining Power of the wounded, sick and shipwrecked, or medical personnel and chaplains to a neutral State or to a humanitarian organization, to undertake the functions which should be performed by a Protecting Power, unless the consent has been obtained of the government of the State of which the protected persons are nationals.

3) Regarding Article 10 of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, the People's Republic of China will not recognize as valid a request by the Detaining Power of prisoners of war to a neutral State or to a humanitarian organization, to undertake the functions which should be performed by a Protecting Power, unless the consent has been obtained of the government of the State of which the prisoners of war are nationals. Regarding Article 12, the People's Republic of China holds that the

original Detaining Power which has transferred prisoners of war to another Contracting Power, is not for that reason freed from its responsibility for the application of the Convention while such prisoners of war are in the custody of the Power accepting them. Regarding Article 85, the People's Republic of China is not bound by Article 85 in respect of the treatment of prisoners of war convicted under the laws of the Detaining Power in accordance with the principles laid down in the trials of war crimes or crimes against humanity by the Nuremberg and the Tokyo International Military Tribunals.

4) Although the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 does not apply to civilian persons outside enemy-occupied areas and consequently does not completely meet humanitarian requirements, it is found to be in accord with the interest of protecting civilian persons in occupied territory and in certain other cases, hence it is ratified with the following reservations:

Regarding Article 11, the People's Republic of China will not recognize as valid a request by the Detaining Power of protected persons to a neutral State or to a humanitarian organization, to undertake the functions which should be performed by a Protecting Power, unless the consent has been obtained of the government of the State of which the protected persons are nationals. Regarding Article 45, the People's Republic of China holds that the original Detaining Power which has transferred protected persons to another Contracting Power, is not for that reason freed from its responsibility for the application of the Convention while such protected persons are in the custody to the Power accepting them.

ALBANIE - Ratification, 27 mai 1957

1) Convention pour l'amélioration du sort des blessés et des malades dans les forces armées en campagne.

Ad article 10: La République populaire d'Albanie ne reconnaftra comme étant régulière une demande à un organisme humanitaire ou à un Etat neutre de remplacer la Puissance protectrice, qui émanerait d'une Puissance détentrice, que dans le cas du consentement de la Puissance dont les personnes protégées sont ressortissantes.

2) Convention pour l'amélioration du sort des blessés, des malades et des naufragés des forces armées sur mer.

Ad article 10: La République populaire d'Albanie ne reconnaîtra comme étant régulière une demande à un organisme humanitaire ou à un Etat neutre de remplacer la Puissance protectrice, qui

émanerait d'une Puissance détentrice, que dans le cas du consentement de la Puissance dont les personnes protégées sont ressortissantes.

3) Convention relative au traitement des prisonniers de guerre.

Ad article 10: La République populaire d'Albanie ne reconnaîtra comme étant régulière une demande à un organisme humanitaire ou à un Etat neutre de remplacer la Puissance protectrice, qui émanerait d'une Puissance détentrice, que dans le cas du consentement de la Puissance dont les prisonniers de guerre sont ressortissants.

Ad article 12: La République populaire d'Albanie considère que, au cas où les prisonniers de guerre seraient transférés à une autre Puissance par la Puissance détentrice, la responsabilité de l'application de la Convention à ces prisonniers de guerre continuera toujours à incomber à la Puissance qui les a capturés.

Ad article 85: La République populaire d'Albanie considère que les personnes condamnées conformément à la législation de la Puissance détentrice d'après les principes du procès de Nuremberg pour des crimes de guerre et des crimes contre l'humanité doivent subir le même régime que des personnes condamnées dans le pays en question. Par conséquent, l'Albanie ne se voit pas liée par l'article 85 en ce qui concerne la catégorie des personnes mentionnées dans la présente réserve.

4) Convention relative à la protection des personnes civiles en temps de guerre.

Ad article 11: La République populaire d'Albanie ne reconnaîtra comme étant régulière une demande à un organisme humanitaire ou à un Etat neutre de remplacer la Puissance protectrice, qui émanerait d'une Puissance détentrice, que dans le cas du consentement de la Puissance dont les personnes protégées sont ressortissantes.

Ad article 45: La République populaire d'Albanie considère que, au cas où les personnes protégées seraient transférées à une autre Puissance par la Puissance détentrice, la responsabilité de l'application de la Convention à ces personnes protégées continuera toujours à incomber à la Puissance détentrice.

REPUBLIQUE DEMOCRATIQUE DU VIETNAM - Adhésion, 28 juin 1957

1) Pour la Convention de Genève relative à l'amélioration du sort des blessés et malades des forces armées en campagne, en date du 12 août 1949.

A l'article 10 : La demande de la Puissance détentrice, soit à un Etat neutre, soit à un organisme présentant toutes garanties d'impartialité et d'efficacité, d'assumer les fonctions dévolues aux Puissances protectrices par la Convention, ne sera reconnue comme légale par la République Démocratique du Viet Nam que dans le cas où l'Etat dont relèvent les blessés et malades des forces armées en campagne aurait approuvé cette demande.

2) Pour la Convention de Genève relative à l'amélioration du sort des blessés, malades et naufragés des forces maritimes, en date du 12 août 1949.

A l'article 10 : La demande de la Puissance détentrice, soit à un Etat neutre, soit à un organisme présentant toutes garanties d'impartialité ou d'efficacité, d'assumer les fonctions dévolues aux Puissances protectrices par la Convention ne sera reconnue comme légale par la République Démocratique du Viet Nam que dans le cas où l'Etat dont relèvent les blessés, malades et naufragés des forces maritimes aurait approuvé cette demande.

3) Pour la Convention de Genève relative au traitement des prisonniers de guerre, en date du 12 août 1949.

A l'article 10 : La demande de la Puissance détentrice, soit à un Etat neutre, soit à un organisme présentant toutes garanties d'impartialité ou d'efficacité, d'assumer les fonctions dévolues aux Puissances protectrices par la Convention, ne sera reconnue légale par la République Démocratique du Viet Nam que dans le cas où l'Etat dont relèvent les prisonniers de guerre aurait approuvé cette demande.

A l'article 12 : La République Démocratique du Viet Nam déclare que la remise des prisonniers de guerre, par la Puissance détentrice, à une Puissance partie à la Convention, ne délie pas la Puissance détentrice de sa responsabilité de l'application des dispositions de la Convention envers les prisonniers.

A l'article 85 : La République Démocratique du Viet Nam déclare que les prisonniers de guerre poursuivis et condamnés pour des crimes de guerre ou pour des crimes contre l'humanité, conformément aux principes posés par la Cour de Justice de Nuremberg, ne bénéficieront pas des dispositions de la présente Convention ainsi que l'a spécifié l'article 85.

4) Pour la Convention de Genève relative à la protection des personnes civiles en temps de guerre en date du 12 août 1949.

A l'article 11 : La demande de la Puissance détentrice, soit à un Etat neutre, soit à un organisme présentant toutes garanties d'impartialité ou d'efficacité, d'assumer les fonctions dévolues aux Puissances protectrices par la Convention, ne sera reconnue comme légale par la République Démocratique du Viet Nam que dans le cas où l'Etat dont relèvent les dites personnes civiles aurait approuvé cette demande.

A l'article 45 : La République Démocratique du Viet Nam déclare que la remise de personnes civiles protégées par la présente Convention par la Puissance détentrice, à une Puissance partie à la Convention, ne délie pas la Puissance détentrice de sa responsabilité relative à l'application des dispositions de la Convention à l'égard des personnes civiles en temps de guerre.

REPUBLIQUE DEMOCRATIQUE DE COREE - Adhésion, 27 août 1957

1) On article 10 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949

In the event of a Power detaining wounded and sick, or medical personnel, requesting a neutral State, or a humanitarian organization, to undertake the functions incumbent on a Protecting Power, the Government of the Democratic People's Republic of Korea will not consider it a legal request unless an approval is obtained from the Government of the State on which the protected persons concerned depend.

2) On Article 10 of the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Ship wrecked Members of Armed Forces at Sea of August 12, 1949

In the event of a Power detaining wounded, sick and ship-wrecked, or medical personnel, requesting a neutral State, or a humanitarian organization, to undertake the functions incumbent on a Protecting Power, the Government of the Democratic People's Republic of Korea will not consider it a legal request unless an approval is obtained from the Government of the State on which the protected persons concerned depend.

3) On Article 10 of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949

In the event of a Power detaining prisoners of war requesting a neutral State, or a humanitarian organization, to undertake the functions incumbent on a Protecting Power, the Government of the Democratic People's Republic of Korea will not consider it a legal request unless an approval is obtained from the Government of the State on which the prisoners of war concerned depend.

On Article 12 of the same Convention

The Government of the Democratic People's Republic of Korea considers that, even during the period in which the Power detaining prisoners of war have transferred the prisoners of war to other Powers which are parties to the present Convention to be in their custody, responsibility as an original Detaining Power for the application of the present Convention towards the prisoners of war concerned will not be released.

On Article 85 of the same Convention

The Government of the Democratic People's Republic of Korea will not be bound by Article 85, in regard to the treatment of the prisoners of war convicted under the laws of the Detaining Power of prisoners of war for having committed war crimes or inhumane offences, based on the principles of Nuremberg and the Tokyo Far East International Military Tribunal.

4) On the Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949

The Government of the Democratic People's Republic of Korea considers that the present Convention cannot fully meet humanitarian requirements, inasmuch as it does not apply to the civilian persons outside the territory occupied by the enemy.

But, considering that the present Convention has a positive aspect of protecting the interests of civilian persons in the territory of occupation and in a series of other cases, the Government of the Democratic People's Republic of Korea accedes to it with reservations on the following articles.

On Article 11 of the same Convention

In the event of a Power detaining protected persons requesting a neutral State, or a humanitarian organization, to undertake the functions incumbent on a Protecting Power, the Government of the Democratic People's Republic of Korea will not consider it a legal request unless an approval is obtained from the Government of the State on which the protected persons concerned depend.

On Article 45 of the same Convention

The Government of the Democratic People's Republic of Korea considers that, even during the period in which the Power detaining protected persons have transferred the protected persons to other Powers which are parties to the present Convention to be in their custody, responsibility as an original Detaining Power for the application of the present Convention towards the protected persons concerned will not be released.

ROYAUME-UNI - Ratification, 23 septembre 1957

Le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord se réserve le droit d'appliquer la peine de mort selon les dispositions de l'article 68, paragraphe deux, sans égard à la question de savoir si les délits qui y sont mentionnés sont punissables ou non par la peine de mort selon la loi du territoire occupé àl'époque où commence l'occupation.

The United Kingdom of Great Britain and Northern Ireland will apply each of the above-mentioned Conventions in the British Protected States of Bahrain, Kuwait, Qatar and the Trucial States to the extent of Her Majesty's powers in relation to those territories.

I am also instructed by Her Majesty's Government in the United Kingdom to state that the reservation to the second paragraph of Article 68 of the Convention relative to the Protection of Civilian Persons in Time of War which was made by the United Kingdom on signature of that Convention is maintained.

I am further instructed by Her Majesty's Government in the United Kingdom to refer to the reservations made to Article 85 of the Convention relative to the Treatment of Prisoners of War by the following States:

> the People's Republic of Albania, the Byelorussian Soviet Socialist Republic, the Bulgarian People's Republic, the People's Republic of China, the Czechoslovak Republic, the Polish Republic, the Roumanian People's Republic, the Ukrainian Soviet Socialist Republic, the Union of Soviet Socialist Republics

and to the reservations to Article 12 of the Convention relative to the Treatment of Prisoners of War and to Article 45 of the Convention relative to the Treatment of Civilian Persons in Time of War made by all the above-mentioned States and by the Federal People's Republic of Yugoslavia.

I am instructed by Her Majesty's Government to state that whilst they regard all the above-mentioned States as being parties to the above-mentioned Conventions, they do not regard the above-mentioned reservations thereto made by those States as valid, and will therefore regard any application of any of those reservations as constituting a breach of the Convention to which the reservation relates.

Berne, 7 octobre 1957

Her Britannic Majesty's Embassy present their compliments to the Federal Political Department and have the honour to refer to the Declaration made by Her Britannic Majesty's Chargé d'Affaires on the 23rd of September, 1957 at the moment of the depositing of the instrument of ratification by the United Kingdom of Great Britain and Northern Ireland of the four Geneva Conventions of 1949, a copy of which was handed over by Mr. Walsh on that occasion, and to inform the Department that, owing to a clerical error, the name of the Hungarian People's Republic was inadvertently omitted from the list of countries whose reservations to Article 12 of the Convention relative to the Treatment of Prisoners of War and to Article 45 of the Convention relative to the Protection of Civilian Prisoners in time of War are not regarded as valid by Her Majesty's Government.

Her Majesty's Embassy have to request the Federal Political Department to be so good as to amend the original copy of the Declaration by adding the words "the Hungarian People's Republic" between "the Czechoslovak Republik" and "the Polish Republic", and to inform the other parties to the Conventions and any other organisations to whom the Department may have sent official copies of Her Majesty's Government's Declaration and to request them to take similar action.

Her Majesty's Embassy avail themselves of this opportunity to renew to the Federal Political Department the assurance of their highest consideration.

Berne, June 10, 1958
