

STATE AND SOVEREIGNTY IN MODERN GERMANY

BY

RUPERT EMERSON

DIVISION OF HISTORY, GOVERNMENT, AND ECONOMICS
HARVARD UNIVERSITY



NEW HAVEN • YALE UNIVERSITY PRESS
LONDON • HUMPHREY MILFORD • OXFORD UNIVERSITY PRESS
MDCCCXXVIII

COPYRIGHT, 1928, BY YALE UNIVERSITY PRESS
PRINTED IN THE UNITED STATES OF AMERICA

**STATE AND SOVEREIGNTY
IN
MODERN GERMANY**

TO
MY BROTHER
1894-1918

PREFACE

THE half-century from 1871 to 1921 with which this study is chiefly concerned was one of unparalleled activity in Germany, and, even though that activity was primarily in other fields than the intellectual, still much was being written and thought which is worthy of greater recognition than it has yet received. There can be no doubt that the classic period of German thought around the beginning of the last century was vastly more significant than the era here dealt with, but this period has been exhaustively examined and discussed both within Germany and without. The fifty years more particularly under review here can indeed boast no names which might rank with those of Kant, Fichte, Schelling, and Hegel, to name only the greatest; but it is impossible to ignore the work of the thinkers who succeeded them.

These five decades marked extraordinary changes in Germany; and these changes were clearly reflected in German political thought. To speak only of the political aspects, they begin with the founding of the Empire, which meant the achievement of German unity and the vindication of the monarchical principle as against the democratic tendencies of 1848, and end with the Revolution, which rebuilt Germany on the most thoroughgoing democratic foundation and advanced a stage further the federalism which Bismarck had bought with blood and iron.

One name would perhaps sum up all that is popularly known of this period, that of Heinrich von Treitschke, acquaintance with which was due rather to the war than to the intrinsic merit of his thought. To the war likewise is due the popular knowledge of General von Bernhardi and other apostles of war. In more technical circles, Otto von Gierke has come to a large measure of recognition, but, if one may judge from the fact that only a small fragment of his work has found its way into translation, even here it is probable that

there is slight acquaintance with his original research and speculation. Maitland's brilliant introduction to a not particularly significant excerpt from Gierke's chief work is undoubtedly the principal source of knowledge of Gierke in English-speaking countries. The writings of Rudolf von Ihering, Georg Jellinek, Josef Kohler, and Rudolf Stammeler are also to some extent known. With these few exceptions, however, it may be said that the work of the juristic and political thinkers in Germany since the founding of the Reich (and, indeed, since Hegel) has been largely neglected. In part to be sure the blame for this must fall upon the German writers themselves since their thought has on the whole been curiously unrelated in form, temper, and substance to that of their foreign contemporaries.

The present study is an attempt to give some indication of the lines along which that thought has been proceeding.

In Germany the sphere of the jurist is far wider and his importance considerably greater than in any of the Anglo-Saxon countries. The jurist in high place must be at once philosopher and political theorist, as well as student of law and laws. Traditionally the relation between law and political thought in Germany is very intimate, the reason being perhaps that dangerous political doctrines were less suspect in the guise of jurisprudence than under their own proper name. Althusius, Pufendorf, Stahl, Ihering, Stammler, Kohler, were all jurists, and even the philosophers such as Kant and Hegel tended to embody their political philosophy in the form of treatises on law or right. In the nineteenth century this tradition was strengthened by the introduction of the *Gesellschaftswissenschaft* as a discipline distinct from that of the *Rechts-* and *Staatswissenschaften*. Hegel himself opened the doors to this distinction, and the separation was carried further by Karl Marx and Lorenz von Stein. With the development of sociology, which gained a foothold in Germany rather later than elsewhere, the breach was complete. The formal and normative aspects of political thought were severed from the social and economic. In effect the spheres of jurisprudence and political thought were more

sharply defined to the formal exclusion of extra-normative considerations. The elements which might have assisted in the development of a body of political thought distinct from jurisprudence were relegated to other spheres.

In consequence, if one would seek works on *allgemeine Staatslehre* in Germany one must look primarily to the jurists. Naturally the *Staatslehre* thus takes on a juristic tone which makes it almost indistinguishable from the *Staatsrechtslehre*. Georg Jellinek's *Allgemeine Staatslehre*, for example, the outstanding work of this order in the period under discussion, is obviously the work of a jurist dealing essentially from the juristic standpoint with political problems. The concepts, forms, and varieties of political organization—and especially in the upper ranges where sovereignty appears—are regarded as belonging to the province of the jurist far more than to anyone else.

The one important work in political theory proper, as distinguished from jurisprudence on one hand and social and economic theory on the other, in this period is the *Politik* of Treitschke. But even here there is little that is not of more interest and significance from a purely historical or antiquarian standpoint than as part of the equipment of the modern political thinker. Treitschke was, if one may be allowed the ever dangerous and facile generalization, the unphilosophic and dogmatic expression of one phase of the Hegelian thought, and at once the intellectual counterpart to, if not the mouthpiece for, the Bismarckian action. Whatever his fame as a historian, as a teacher, as a political counsellor in trying times, it is difficult to see why his political thought, taken by itself, should entitle him to a place in history.

The State was for Treitschke the beginning and end of all things: States in his view were the individuals of history, and no lesser entity might claim to defend its rights before the needs of the State. Ernest Barker has said of the *Politik*: "Its central tenet and cardinal principle may be summarized in four words: 'The State is power.' And if we should attempt to descry in advance the bearing of these words, it may be seen in another pithy phrase: 'War is politics *par*

excellence.' " When Treitschke lays it down that "it is of the essence of the State that it should be able to enforce its will by physical force," the words are to be taken quite literally as giving the heart of his doctrine. Sovereignty is the mark of the supreme majesty of the State, of its inalienable and unique self-completeness, and of its command over the army. Power, he wrote, is the principle of the State as faith is of the church; and the small powerless State is a self-contradictory absurdity.

It is surely not in views of this sort that a theory of State and sovereignty fitted to the modern world is to be sought, yet such was the reigning political theory, as apart from jurisprudence, in Germany up to the end of the World War. Opposed to this order of theory was the whole body of Socialist speculation, but this, springing directly from Marx, was little concerned with the State and political organization in general. As Marx had been content to damn the existing State, to predict its "dying off," and to leave the future to itself, so the German Socialist theorists on the whole turned their full attention to the reordering of economic and social affairs without troubling greatly about the future of the State. The problem of sovereignty in particular was one which the whole tenor of their thought allowed them easily to escape.

There is little need to comment upon the difficulty—and, occasionally, the impossibility—of translating the German juristic and philosophic terminology into English at once intelligible and adequate. To anyone acquainted with German jurisprudence it will be obvious that much of the flavor, if not the sense as well, of the original is inevitably lost in translation. Even where the words have a literal equivalent in English, they must often lose a significant shade of meaning when translated. In the present work the awkwardness of many of the renderings from the German is only to be justified on the grounds that in that way it seemed possible to secure a closer adherence to the sense of the original. Where no technical questions are under discussion, the translations have been considerably freer. Usually where the English

rendering is only an approximate equivalent, the German term has been placed after it in brackets. A discussion of the usage of certain terms will be found in the footnotes.

The substance of the present work in somewhat different form was submitted in the University of London for the degree of Doctor of Philosophy.

I should like to express here my indebtedness to Dr. C. J. Friedrich, of Harvard University, who offered a number of valuable suggestions and criticisms, and my deep gratitude to Professor H. J. Laski, of the London School of Economics and Political Science, both for his unfailing readiness to act as guide through the mazes of German jurisprudence and for the privilege of working with him.

R. E.

Cambridge, Massachusetts

June, 1928.

CONTENTS

CHAPTER	PAGE
I. HISTORICAL INTRODUCTION	1
II. THE GERMAN EMPIRE AND ITS JURISTS	47
III. FEDERALISM	92
IV. THE SCHOOL OF THE GENOSSENSCHAFT	126
V. THE PHILOSOPHICAL JURISTS	155
I. THE NEO-KANTIAN	159
II. THE NEO-HEGELIAN	186
III. OTHER PHILOSOPHICAL THEORIES	200
VI. THE NATIONAL ASSEMBLY AND THE WEIMAR CONSTITUTION	209
I. THE REVOLUTION AND THE STATE	211
II. THE NEW FEDERALISM	236
VII. CONCLUSION—STATE AND SOVEREIGNTY	254
INDEX	275

STATE AND SOVEREIGNTY IN MODERN GERMANY

CHAPTER I HISTORICAL INTRODUCTION

THE attempt to set a precise date to mark the beginning, in a political sense, of modern Germany is quite as futile as the effort to lay down exact temporal boundaries for any great historical era or movement. The modern world has its roots too deeply in the past to make possible any radical separation of one period from another. Any date that one may set must, from the very nature of the historical process, be in greater or less degree arbitrary.

In the case of Germany there are, to be sure, great outstanding political events each of which, at first sight, gives the appearance of being a radical breach with the past, but the further each is analyzed the less does it lend itself to any clear-cut separation from all those that preceded it. On the narrowest interpretation "modern" Germany might be said to date from the Revolution of 1918, but, to look only at the political aspects of the situation, the present Constitution can scarcely be understood without reference to the Imperial Constitution laid down in 1871. The change from the monarchical to the republican principle is the most significant of the transformations that took place in 1918-1919, but this change had been amply foreshadowed by the past. Certainly the particularist feeling was little weakened by the War and the Revolution, even though from a formal standpoint the power of the central government was much increased by the Weimar Constitution.

Nor does 1871 itself offer a more satisfactory starting point. The federal unity achieved by Bismarck then was the result of a struggle which had been carried on for considerably over half a century—a struggle which was itself in large part one of the many and curious fruits of the hard-dying Holy Roman Empire. The ghost of the Empire lin-

gered on to plague any who attempted to build anew, as the settlements in Vienna at the close of the Napoleonic Wars indicated clearly enough.

If one must pick an arbitrary date for the birth of modern Germany probably none has better claims than the opening of the reign of Frederick the Great. With Frederick was born the force which was to take the principal part in the disruption of the old system and the construction of the new. That is not to say that Frederick did not build on the foundations which had been laid for him by the Great Elector and his successors or that Prussia under his rule could have attained the same greatness without those foundations, but merely that in the use which Frederick made of his power and the view that he took of it, he pointed the way to the future more clearly than did his predecessors. Prussia became the center and the driving force of the new Empire, and it was, in a sense, Frederick the Great who created the Prussia of modern times.

There would be none to dispute Frederick's claim to greatness in the field of political action, and it would be justifiable on that score alone to take his reign as a starting point for a survey of modern German political thought. But it is almost an axiom of German political thought that Frederick was not only the first exponent in Germany of modern political principles but that he also contributed profoundly to the development of political philosophy. And contemporaneous with him—although his chief political works were written after Frederick's death—was Kant, whose somewhat hesitating political theories so clearly mark the transition from the old to the new.

Frederick the Great, wrote Bluntschli, "is in truth not only the founder of a new State, but the first and most distinguished representative of the modern idea of the State";¹ a view in defense of which much can be said. In his celebrated claim to be the first servant of the State—in marked con-

¹ J. K. Bluntschli, *Geschichte der neueren Staatswissenschaft*, 1881, p. 261; Otto von Gierke, *Johannes Althusius*, 3d ed., 1913, p. 358; O. Bähr, *Der Rechtsstaat*, 1864, p. 47; Ernst Krieck, *Die deutsche Staatsidee*, 1917, pp. 61 f.; Kurt Wolzendorff, *Vom deutschen Staat und seinem Recht*, 1917, pp. 34 ff.

trast to Louis' "L'État c'est moi"—is seen the essence of the distinction, to which Hegel later gave philosophic form, between the State on one hand and the monarch, the people, or a sum of the two on the other. The old principle of absolutism by divine right is shattered by Frederick. Absolutism indeed remains, but it is an absolutism always tempered by the duties which are imposed on the king by the needs of the State whose servant he is. In a word, absolutism in Frederick's hands becomes benevolent despotism. The sovereign is not yet limited by a constitution or checked by other organs of the State² but the moral obligation upon him is held to constitute a check no whit less formidable than any possible external obligation. Justice must be the main object of the prince, and the welfare of his people must be preferred to any personal inclination. At the time of his accession to the throne Frederick announced to his ministers that it was his will that if his particular interest and the general good of his country should ever seem to run counter to each other, then the latter should always be preferred. But it must be noted that it is in the last analysis the business of the prince himself to decide what constitutes the good of his country. *Raison d'état* becomes a justification for all things, and it is at the same time the only justification that the prince can plead. The will of the king, in Frederick's doctrines, is law, but it must be a will directed to the good of the State. As Lévy-Bruhl puts it, the king "is not responsible to anyone, and he must consider himself as responsible to all."³

Whatever may be the moral judgment concerning Frederick's actions in foreign affairs, there can be little question that in his relations with his subjects he fulfilled scrupulously the demands which his theories and his State made upon him, as the famous case of the miller of Sans Souci bears witness. It must pass unquestioned that he was deeply and actively conscious of a greater whole, a tradition, an

² In his *Anti-Machiavel*, however, Frederick points to the government of England as a model of wisdom, since there the Parliament is arbitrator between king and people, and the king has power to do as much good as he pleases, but not evil; commentary on chap. XIX of *The Prince*.

³ L. Lévy-Bruhl, *L'Allemagne depuis Leibniz*, 1890, p. 95.

idea, of which he felt himself in fact only the servant. He spoke of himself often as being in a position similar to that of the father of a family: the power was his, but it must be exercised in such a way as always to maintain the tradition of the family and to further its present and future good. The relation of Frederick to his State has been well put by Erich Marcks: "he lifted up his eyes to his State and subjected himself wholly to it, he was this State and felt himself to be so, and still felt himself to be its servant. . . . There is no more stirring interpenetration of ambition and duty, of possession and possessor, of stark subjectivism and unconditional devotion."⁴

But the practical application of this principle of benevolent despotism hung ultimately entirely upon the character of the despot. It required the personal genius of a Frederick the Great to ensure that his unlimited powers should not be turned to other ends than those dictated by unflinching devotion to the State. Nearly another century of growth was necessary for Prussia before the principle of limited constitutional monarchy could take institutional form to guarantee that in fact the will of the king should not have as content merely arbitrary personal desire.

When Frederick's successor, the weak Frederick William II, came to the throne in 1786, many of the age-old cobwebs had been torn away, a new life was stirring in German veins, and the romantic enthusiasm of the *Sturm und Drang* was already settling down into more stable channels.

REASON AND REVOLUTION

With the appearance of Kant the tide of German thought began to set away from the doctrines of absolutism to which the Cameralists with Justi as their chief spokesman in the eighteenth century had given literary expression and which Frederick had so gloriously embodied. Kant was indeed not the first to suggest the virtues of constitutionalism—others

⁴ "Die Nachwirkung Friedrichs des Grossen" in *Die neue Rundschau*, 23 Bd., 1912, p. 171; Friedrich Meinecke, *Die Idee der Staatsräson*, 1924, 5tes. Kap., gives an interesting picture of Frederick "als Diener der Staatsräson."

before him had pointed out the dangers of despotism and indicated means of curbing it⁵—but the authority of his great name and the time at which he wrote combined to give weight to his theories.

It must be conceded at the outset, however, that it is impossible to claim for Kant the same fundamental importance in political theory as in other fields of human thought. All that the master touched was transformed, but the transformation is far more hesitating and less complete in political thought than elsewhere. It is essential to an understanding of his political philosophy to remember that his chief work in this field—*The Metaphysical Elements of Law*—was first published in 1797, midway between Revolution and Restoration. Deeply affected by the teachings of Rousseau and by the practical application of those teachings across the Rhine, Kant was also conscious of the stirrings of a new school of thought which was to orient itself in a direction fundamentally different from that of the eighteenth century. In which of these directions he was to go, Kant never appeared quite certain: it might be said that he was at once a disciple of Rousseau and a prophet of the reaction. "Kant, the last and, in the realm of pure thought, most significant of the revolutionaries, is in practice already a counter-revolutionary."⁶

In consequence the theory of sovereignty is for him twofold—a duality which, with Bluntschli, we must confess neither logically nor morally defensible.⁷ Kant clung rigidly to Montesquieu's doctrine of the threefold separation of powers, and insisted upon the subordination of the judicial and executive powers to the legislative. The latter, which he explicitly stated to be the *Herrschergewalt* or sovereign power, according to him, "can only fall to the united will of the people." The argument on which this is based is, that

⁵ For a brief discussion, see G. P. Gooch, *Germany and the French Revolution*, 1920, pp. 22 ff.

⁶ Adolf Dock, *Revolution und Restauration über die Souveränität*, 1900, p. 67.; C. E. Vaughan, *Studies in the History of Political Philosophy*, II, 1925, in his chapter on Kant ably shows the "oscillation" and self-contradictoriness of Kant's ideas. See especially, pp. 80 ff.

⁷ "This combination of a doctrinaire popular sovereignty with a practical self-prostration before despotism appears to us neither logical nor moral," Bluntschli, *op. cit.*, p. 386.

since all law (*Recht*) proceeds from the legislative power, it must be impossible for the latter to be unjust. Injustice may arise where one person makes laws for another, but there can be none when a person makes his own laws for himself ("since *volenti non fit iniuria*"). "Hence," he concluded, "only the concurring and united will of all, in so far as each decides for all and all decide for each exactly the same thing—consequently only the general united popular will—can be legislative." Furthermore, since only a legislative power thus constituted can be just, the citizens of the State cannot be obliged to obey another law than that to which they have given their consent.⁸ The Kantian ideal is the republic in which law rules by itself, securing the obedience of the rational individuals who have unanimously formulated it because of their recognition that it is the embodiment of Reason.⁹

All of this, it will be seen, is very closely related to the thought of Rousseau; in fact, it is difficult to say exactly where Kant departs in principle from Rousseau because of the confusion of tendencies in the former's political philosophy. As far as the social contract is concerned, Kant's acceptance of it as a regulative idea is certainly far more hypothetical and tentative than his predecessor's. More important is it that Kant tends to supersede the "naïve" view of the empirical will of the conscious individual, postulating in its place a "real will" which is at once universal and the inevitable expression of the rationality of the individual. Certainly the principle of sovereignty is as rigidly stated by Kant as by Rousseau.¹⁰

In the preference for the republic constituted according to the laws of freedom there speaks the secluded philosopher of Königsberg. But in direct opposition to him rises the

⁸ Cf. *Metaphysische Anfangsgründe der Rechtslehre*, §46.

⁹ *Op. cit.*, §52.

¹⁰ "Der Herrscher im Staat hat gegen den Untertan lauter Rechte und keine (Zwangs-) Pflichten. . . . Ja, es kann auch selbst in der Konstitution kein Artikel enthalten sein, der es einer Gewalt im Staat möglich machte, sich im Fall der Übertretung der Konstitutionsgesetze durch den obersten Befehlshaber ihm zu widersetzen, mithin ihn einzuschränken," Allgemeine Anmerkung A to the *Staatsrecht*, *op. cit.*

good German monarchist, horror-struck at the thought that his comfortable little world, wrapped in tradition, might come tumbling down upon his head in Gallic fashion. The united rational will of all should indeed be sovereign, but if it is not—then it is not, and little more can be done about it. In the civil State what is right is what is law; the sovereign is the source of law; therefore, *ex hypothesi*, the sovereign is right. And it follows that revolt against the sovereign is wrong: even to question the legitimacy of his title and authority is to risk civil damnation. The doctrine that all authority is instituted by God is accepted by Kant not as a historical fact, but as a “principle of practical reason,” which expresses the truth that one should obey the existing legislative power, be its origin what it may. To attack the sovereign who is the author of all law is to cut oneself off from law absolutely; yet if a revolution proves successful, then the newly arisen sovereign is as absolute, as right, and as potentially eternal as his unfortunate predecessor.¹¹

No discussion of Kant's political thought can, however, do him justice if it limits itself to his formal statement of the philosophy of law and the State. Probably it is not here but in his conception of eternal peace that Kant is most significant for the present. We have moved on beyond the day of the social contract; constitutionalism and limited monarchy are accomplished facts; but we seem nearly as far removed from a realization of Kant's dream of Eternal Peace as was the age in which he lived. Yet Kant sees it as a condition which must come: man in his continuous advance toward the good life must of necessity find some means to put an end to war. Just as the reign of universal violence forced men to band together under the coercive force of law in civil society, he suggests, so continual wars will drive States either into a cosmopolitan constitution, or, if a world State be held to threaten freedom with a world despotism, into a federation under an agreed international law.¹²

¹¹ Cf. Allgemeine Anmerkung A to the *Staatsrecht*.

¹² Cf. *Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis*, 1793, Part III; *Zum ewigen Frieden*, 1795, Zweiter Definitivartikel; *Rechtslehre*, §61.