ON THE CONCEPTS "STATE" AND "STATE ORGANS" IN CONSTITUTIONAL LAW

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1. THE ANALYSIS OF CONCEPTS MUST BE BASED ON A DEFINITE USAGE

THE CENTRAL QUESTION of political theory has of old been the problem of the character or nature of the State.[1] "What *is* the State?" is the usual question, as if—in accordance with Plato's theory of ideas and Aristotle's system of definitions—it were the task of science to grasp and to reveal in definitions the hidden nature or essence of things.[2]

Questions of the type "What *is* . . .?" do not belong to the field of logical analysis. They may be appropriate for a detailed description of a subject referred to by a word whose meaning is beyond doubt. We may ask, e.g., "What is water?" or "What is gunpowder?" when it is clear what we *mean* by "water" and "gunpowder". The answer to these questions has the character not of a definition, but of descriptive statements. But questions of this type are not apt when the aim is precisely to establish the sense of an expression, i.e. the sense in which the expression is actually used or which logically can be ascribed to it even if it is only vaguely apprehensible in actual usage.

This is a matter of course as soon as we have realized that our concepts are not innate ideas, reflections of the "essence" of things, but tools shaped by ourselves for describing reality. Science is performing a proper function of its own when it takes concepts from our everyday language and clarifies and defines them in such a way that they become suitable instruments of research.[3]

It follows that the analysis of a concept must always be based on a definite usage. So, it is not fruitful to ask quite generally what the word "State" means. This word is used in so many different contexts, in common usage as well as in a number of sciences, that it is *a priori* unlikely that it should have one and only one function which can be defined unequivocally. The question must be posed independently within each of the particular sciences—jurisprudence, sociology, political science, history, etc.—

[1] See, e.g., Georg Jellinek, *Allgemeine Staatslehre*, Ch. VI.

[2] Alf Ross, *On Law and Justice*, 1958, p. 238; K. R. Popper, *The Open Society and its Enemies*, 1945, Vol. I, pp. 25 f.

[3] Alf Ross, *International Law*, 1947, § 5.

that deal with "the State" from one view point or another. And even within a given science it may be necessary to distinguish between a number of different senses in which the word is used. For a student of jurisprudence, finally, the task is to find out whether the different concepts of "State" that are employed have a kernel in common.

2. THE CONCEPTS "STATE" AND "ORGAN OF THE STATE" DO NOT APPEAR IN THE DOCTRINES OF CONSTITUTIONAL LAW, BUT IN THE DEFINITION OF THAT BRANCH OF LAW. THE QUESTION IS: IN WHAT CIRCUMSTANCES DO WE ATTRIBUTE AN ACT TO "THE STATE"?

The foregoing methodological observations have been made in order to establish that if there is to be any justification for the customary discussion of the concept "State" as an introduction to a treatise on constitutional law, it must be the fact that the term "State" is a central concept used in this branch of law. If this were not the case, or if the discussion of the concept "State" did not contemplate precisely the use of the concept as found in constitutional law, the introductory analysis must seem superfluous and devoid of principle.

A definition of the concept "State" is undoubtedly required in *international law,* because the rules of international law have reference (in the first resort) precisely to "States". It is their legal relationships that are treated, and it is therefore indispensable to know what is meant in international law by "State".

This is not the case in constitutional law. The word "State" hardly occurs in expositions of this branch of law. So, a rule of constitutional law may have the following contents: "The legislative power is vested in the King and Parliament jointly." In order to understand this rule it is necessary to know what is meant by "the legislative power", "the King", and "Parliament"—but not, on the other hand, what is meant by "the State". In the same way other rules of constitutional law regulate the legal relations and functions of the ministers and courts of law. When occasionally the word "State" occurs, e.g. when the Danish constitution speaks of "the grant by the State to the King", the expression does not

give rise to any doubt; it means simply a certain fund of money, the public treasury.

However, we have a need for the concept "State" in constitutional law for the reason that the concept is implicit in the definition of this branch of law, in other words it is needed for its delimitation from other fields of law. The law of the constitution is said to deal with the legal relations and functions of (the highest) organs of the State. It deals with matters such as Parliament, the King, the ministers and the courts, but not, e.g., with the political parties, trade unions, economic organizations, or private individuals (though each of these in its way plays a certain role in the life of the "State"), because only the former are regarded as "organs of the State".

An "organ" means a "tool", an "instrument". From a purely linguistic point of view there lies in the expression "organ of the State" the notion that the individual (or group) is a tool or instrument of something called "the State". This is also in accordance with common usage. When the legislative organ has enacted a statute we do not attribute this act to the physical persons—the King and the members of Parliament—who have contributed to the enactment, but regard the legislative act as a State act performed through the action of the legislative organ. In the same way we say that the State, with the King as its instrument or organ, enters into treaties with foreign powers, or that it delivers judgments through its judges, or constructs railways, builds hospitals, and runs schools through its ministers.

The common feature in this usage is that certain *acts that are in reality performed by definite individuals*—and who else could perform an act?—*are spoken of as being performed not by the physical person in question but by a subject called "the State"*. The act, one can also say, is *attributed* to "the State".

Proceeding from this usage, we are faced with two problems that have to be answered at the outset of any introduction to constitutional law:

(a) In what circumstances is an individual or a group considered an "organ of the State", i.e. in what circumstances is a certain act attributed not to the subject actually acting but to "the State"?

(b) What is the meaning of "the State" as a name for the subject to which the act is attributed?

3. ACTS-IN-LAW (*ACTES JURIDIQUES*) ARE ATTRIBUTED TO "THE STATE" WHEN THEY ARE EXPRESSIONS OF A QUALIFIED POWER REFERRED TO AS "PUBLIC AUTHORITY" AS OPPOSED TO "PRIVATE AUTONOMY"

The acts that are attributed to "the State"—and whose immediate performer is consequently regarded as an "organ of the State"—may be either acts-in-law (*actes juridiques*) or factual acts. The former category will be considered in this section.

An act-in-law is a linguistic pronouncement which as a rule—i.e. unless particular vitiating grounds are present—results in legal consequences in accordance with its contents. As examples may be mentioned: a promise, a will, a judgment, an administrative act.[4]

Every act-in-law is an exercise of a power granted to the actor through a rule of competence.[5] Such rules of competence determine the conditions that the pronouncement must fulfil in order to produce the intended legal consequences. One may distinguish between three typical kinds of conditions: conditions concerning (1) the acting subject (the personal competence), (2) the procedure and other conditions concerning the genesis of the act (the formal competence), and (3) the contents of the act (the material competence). Concerning a promise, for example, we can accordingly distinguish between voidability due to personal incompetence (minority, immaturity, or lack of judgment), voidability due to circumstances at the time of the act (duress, fraud, etc.), and voidability due to the contents of the promise (contrary to law or propriety, the right of third parties, etc.).

When the requirements of competence are fulfilled the act is valid, i.e. it engenders consequences in accordance with its contents. It is another matter that there may exist a duty for the person endowed with competence not to exert his power in certain circumstances, or to exert it only in a certain specified way. If he acts in violation of such a duty, he incurs a personal liability, but the validity of the act is not affected by the violation. Such a situation exists where, for example, the mandate of an agent is narrower than his authority.[6]

[4] On the conception of act-in-law, see Alf Ross, *On Law and Justice*, 1958, p. 216; cf. pp. 166 ff. where, however, the term "legal act" is used.

[5] Ross, *op. cit.*, p. 166, cf. 177 and 203.

[6] Ross, *op. cit.*, pp. 167, 203.

Every rule of competence endows the competent person with a power to create intended legal consequences.

Now, when we survey the present state of the law, it is noteworthy that the rules of competence can be divided into two fundamentally different types, differing according to their contents as well as the social purpose which they fulfil in the life of the community.

On the one hand there are those rules of competence which create the power that we call *private autonomy*. They are characterized by the following traits. In the personal sphere they create a power for every normal adult individual. This power is in all important respects[7] limited to an ability for the individual to incur liabilities and dispose over his own rights. When the dispositions of two or more individuals are coordinated they are enabled to "legislate" by contract as far as their mutual relationships are concerned. The power is not tied up with a duty to exercise it, or to exercise it in a certain way only. The individual is free to decide whether, and how, he will make use of his autonomy. The social function of private autonomy is that of enabling the individual to shape his own legal relationships in accordance with his own interests within the framework of the legal order.[8] The power itself in relation to a certain object is no "right" but is a part of a transferable right. With the transference of the right the power is lost in favour of the successor.[9] The power that we are here considering can therefore be characterized by the following words: *unqualified* (it is everyone's due), *autonomous* (it aims at binding the competent person himself), *discretionary* (it is exercised freely), *self-interested* (it serves the competent person's own interests), and *transferable* (in connection with a transfer of a right).

On the other hand there are such rules of competence as create what we call a *public authority*. They are characterized by the following traits:

In the personal sphere they create a power not for everyone but only for certain qualified persons. The qualification lies in a designation in accordance with certain rules of law: the ministers in Denmark have their power because of their nomination according to Article 14 of the Constitution, the members of Parliament

[7] Charges, i.e. dispositions that bind others, are normally founded in a previous authorization by the other persons. Ross, *op. cit.*, p. 224, cf. p. 167.

[8] Ross, *op. cit.*, p. 177.

[9] *Ibid.*

because of their election according to the Polling Act, the King because of his hereditary right to the throne according to the Act of Succession. This power is materially a capacity to create rules that bind others (statutory enactments, judgments, administrative acts). The power is not granted with a view to its being used freely by the competent person at his convenience. Its exercise is a duty, a public office in the widest sense, and when exercised it is a duty to use the power, in an unprejudiced and impartial manner, for the furtherance of certain social purposes. These duties are more than merely moral duties—they are hedged about by sanctions and controls of different kinds. The social function of the power is to serve the interests of the community, what is called "the common weal". Public authority is never a part of a right and is therefore never transferable. At most the exercise of the power may be delegated to other persons, leaving untouched the holder's own power.[1] The competence which we are here considering can thus be characterized by the terms: *qualified, heteronomous, in the public interest,* and *non-transferable.*

It should now be easy to understand that this difference in legal position—enhanced by centuries of practice—between individuals as holders of private autonomy and certain qualified persons (who of course also possess a capacity as individuals) possessing public authority, has given rise to the idea that the power which has the character of public authority and the acts in which it finds expression cannot "properly" be ascribed to the acting individual as *his* power and *his* acts but must be ascribed to a being which is on a higher plane and is more powerful than man, a being called the "State". And, further, that the acting individual is considered to have acted "on behalf of the State", or as an organ of "the State".

This is so, for instance, when Judge X has pronounced a judgment. He has then exerted a power over another person, a power which he does not possess in his quality of the individual, plain Mr. X, but which he does possess in his quality of judge in the jurisdictional district of Y. He does not exercise this power freely or in his own interest, but is bound by his official duty to serve the interests of the community. Whence does he derive this qualified, peculiar power? It cannot stem from himself as an individual among others. We say that his power is the power of "the State" and that he himself is an "organ" of "the State".

Evidently there is an element of mysticism in this conception.

[1] Ross, *Statsretlige studier,* 1959, p. 140.

Public authority is simply a function of the legal order, and this is true, too, in exactly the same way of the private autonomy; this "stems" as little from the vitality of the individual as does public authority from any source of energy in the "State". Still there is a reality behind the expression, and this reality is precisely that which has given rise to it, namely, the peculiar legal character of public authority.

There are many holders of public authority. The fact that they are all regarded as organs of one and the same subject, "the State", shows that the particular authorities are not isolated, but co-ordinated mutually into a systematic unity. To the systematic unity of the legal order, established in the constitution, the concept of "the State" is the corresponding unity.

The realities which have given rise to the idea that the holder of public authority is an organ of "the State"—and that the legal acts he performs are consequently the acts of "the State"—may be summed up as follows:

(a) The authority does not become vested in the individual in his capacity of private individual, but in his capacity of present holder of a certain "office";

(b) The authority, according to its contents, involves the giving of orders to others;

(c) The authority is not exercised freely in the holder's own interest, but it is a duty-bound "office" for the furtherance of the interests of community;

(d) The holder of the authority cannot divest himself of it by transfer. At the most its exercise may be delegated for the time being to another person;

(e) Each authority is a part of a systematic unity of authorities.

These are the true realities behind the metaphor that the holder acts as an "organ" of "the State".

4. FACTUAL ACTS ARE ATTRIBUTED TO "THE STATE" WHEN THEY ARE MANIFESTATIONS OF A PRIVILEGE TO PERFORM ACTS OF PHYSICAL FORCE

Factual acts, also, may be attributed to the State. In some cases this can be explained in the same way as was done in relation to acts-in-law.

Just as there are certain persons who possess a qualified power with respect to acts-in-law, there are also some who possess a qualified freedom of action with respect to factual acts—they are *privileged* to perform certain acts which are forbidden for people in general.

These acts consist in the exercise of physical force against persons. When the police use their batons to quell a riot or make an arrest; when the sheriff with the assistance of the police evicts a person or seizes his property in execution of a judgment for debt; or when prison authorities with the help of their warders keep a person in custody while he is serving a term of imprisonment—in all these cases acts are performed which, if required, assume the character of an exercise of force. I say "if required", because in most cases the mere knowledge that resistance will be met by overwhelming force will be enough to cause the resistance to cease. The power of physical force is effective to a large extent by the mere fact of its existence. It is only seldom that it is necessary to send out a hundred or more policemen in order to carry out an eviction.[2]

It is no coincidence that the privilege to act concerns the use of force. The systems of law that we call "national" systems—e.g. Danish, Norwegian and Swedish law as opposed to either the law of nations or the law of private associations—are characterized by being based on a monopolization of force, placed in the hands of a qualified group of persons, in the first hand a specially trained professional corps, the police.[3]

The resort to force to which these persons are entitled is not in a strict sense a freedom of action, i.e. a permission which the person in question can use or refrain from using as he pleases.[4] The exercise of force is also a duty, an office in the widest sense of the word. The privilege is not given to the holder of the office for his own sake, but for the purpose of maintaining law and order. It is true that the police have a considerable discretion to decide when they will intervene, but the exercise of the discretion is always a function of the office and is dictated by considerations of the public interest. When force is used, it must serve the maintenance of law and order, whether it is the exercise of an *executive* power for the implementation of judicial and administrative acts, or of a *preventive* power for the maintenance of peace and order.

[2] Such was the case in Denmark during the disturbances in the Faroes in May, 1955.

[3] Alf Ross, *On Law and Justice*, 1958, § 12.

[4] Ross, *op. cit.*, pp. 163 f.

In these cases, too, the same reasons as have been described in the preceding section cause us to speak of the persons who are authorized to exert force as organs of "the State". The privileged power they have at their disposal—this time by "power" I mean a physical power of compulsion and not a competence—does not seem to be derived from themselves in their capacity of individuals, but is attributed to "the State".

It is noteworthy that the organs privileged to use force are regarded as organs of the same subject, the same "State", as those possessing public authority to prescribe norms. This is so because the force is used precisely for the maintenance of the norms that are prescribed by the competent organs. They are concerted factors belonging to the same systematic unity.

5. WHEN OTHER FACTUAL ACTS ARE ATTRIBUTED TO "THE STATE" BECAUSE THEIR PERFORMANCE WAS PAID FOR OUT OF PUBLIC FUNDS, WE ARE IN REALITY CONCERNED WITH THE UNDERLYING DISPOSITIONS (ACTS-IN-LAW) ON BEHALF OF THE "PUBLIC TREASURY"

Factual acts which do not aim at the use of force are also attributed to "the State". Thus we say that the State builds hospitals and roads, runs railways, delivers letters, makes broadcasts, etc. There are limits to what "the State" can do—it cannot enter into marriage, for instance—but in the economic sphere "the State" seems to be able to undertake anything we mortals can.

In the first instance these modes of expression must be interpreted in accordance with common usage. When I say, for example, that a man has built himself a house, I do not mean to say that he himself has laid stone upon stone, but only that he is the one who has contracted with the architect and the workmen about the erection of the house—that the work is performed in accordance with his wishes and directions, but on the other hand is also paid for by him. The actions that I attribute to the man are therefore not in reality the physical actions that enter into the building of a house stone by stone, but certain *acts-in-law,* the undertakings by which others have assumed the duty of building the house according to

his wishes, and he himself has assumed the duty of paying for the work.

So, to say that a man has built a house, or that he runs a business enterprise, and similar statements, mean that by paying for it he induces other persons to act in accordance with his wishes and that in this way he achieves the desired results. This is possible, not because the man possesses any power to give orders to others, but it is a result of the private autonomy in the economic sphere which enables him to bind himself and others through contracts.

The position is rather similar when we say that "the State" performs some particular activity. The real position is that certain persons have authority to conclude contracts for which a certain fund, called "the public treasury", is liable, and this enables them to pay others for the performance of certain tasks. In principle this position is not affected by the special character of the civil service and the special legal regulation of this kind of employment as compared with other kinds of employments; in principle the employee is still *not ordered, but paid* to act in a particular way. In this respect there is no difference between a charwoman who does the cleaning at a government department and the Permanent Secretary of the same department who performs factual acts of administration.

To this extent the "public treasury" is an economic subject on an equal footing with others, especially such whose property cannot be attributed to a single individual but to a corporation, e.g. joint-stock companies.

How can it be explained that this fund is still attributed to "the State" and that an enterprise which is paid from it is not regarded as one among other corporate undertakings but as a State enterprise? The explanation must be sought in the fact that the persons who are competent to dispose over this fund belong to the group which also has competence as public authorities (according to Danish constitutional law, the ministers after authorization by Parliament); and that the regulations that govern the creation, purpose and management of these enterprises are also issued by public authorities (legislation, appropriations, service instructions); and also, finally, that the funds of the "public treasury" are obtained in the same way (through tax legislation etc.). The "public treasury" is managed, in short, by persons who in another respect have the character of "State organs" or "public authorities". For this reason this fund is regarded as belonging to "the State".

Therefore, when we say that the State has built a school it is not the work of designing or the manual labour that we ascribe to the State—this work is performed by architects and building workers who are paid to do it—but the underlying legal dispositions. These dispositions do not have the character of an exercise of public authority but of dispositions of private law which impose liabilities upon the "public treasury", and this is the reason why they are attributed to "the State". This also explains why it is difficult, as regards such factual actions as we now have in mind, to discern special corresponding "State organs", different from the organs earlier mentioned, that exercise a public authority or possess a public power of coercion. Naturally there is no cause to regard the employees, whether they have the rank of civil servants or not, as "State organs". It is, as we have seen, not the factual administrative acts, but the underlying dispositions that are attributed to "the State". According to this manner of speaking anyone is a "State organ" who is competent to make dispositions on behalf of the "public treasury". But it is normally such persons as the ministers who have this authority, i.e. persons who are already in other respects regarded as "State organs".

6. THE QUESTION OF WHAT "THE STATE" STANDS FOR AS AN ACTING SUBJECT IS WITHOUT MEANING. THIS TERM CANNOT BE DEFINED BY SUBSTITUTION, BUT ONLY BY NAMING THE CONDITIONS UNDER WHICH STATEMENTS REGARDING "THE STATE" AS AN ACTING SUBJECT ARE HELD TO BE TRUE

It would seem that we have now found the answer to the first of the two questions that were posed above under section 2, namely, under what conditions a certain act is attributed to "the State", as being performed by a "State organ". We have seen that such an attribution occurs under two different sets of circumstances.

First, when the act represents an exercise of public authority or official coercive power, in both cases by virtue of a legal order whose systematic unity coordinates these actions into a corresponding systematic and functional complex.

Secondly, when the act is the performance of a certain piece of work which is paid for by the "public treasury". In these cases it is, however, not the performance of the work itself, but the underlying legal dispositions rendering the "public treasury" liable, which are attributed to "the State".

We can now turn our attention to the other question that was posed, what "the State" means as a name for the subject to which the act is attributed.

This question, in reality, is without meaning. When it has been stated under what conditions a statement of the type "the State has enacted a law", "the State has made a treaty", "the State has sentenced a person", "the State has imposed a revenue duty", "the State has constructed a railway", etc.— all statements in which "the State" figures as acting subject—is properly used, then all has been said that can be said. The meaning of these *statements* has now been indicated—because this meaning is precisely the conditions that must be fulfilled, or the factual circumstances that must be present, in order to make it possible to hold the statement to be true. It is not possible to extract a single *word,* the word "State", in these sentences and ask what it means or stands for. It is not possible to replace the word "State" by other words, so that a certain substance, occurrence, activity, quality or anything else is designated, which "is" "the State". There is no concept such as "the State"—no concept contained in the usage which is here analysed—that can be defined in accordance with the formula: "the State is . . ." or "by the State we understand . . .". The concept, if it is at all possible to speak of a concept, can only be defined by implication in the manner indicated.

There is nothing surprising or remarkable in this. On the contrary the same is true of a large number of legal concepts.[5] In an earlier paper I have argued at length that it is true of the concepts of legal rights, e.g. of that of "ownership".[6] I said then that such concepts are meaningless. This mode of expression is unsuitable. The statements in which the word occurs have manifest sense, and to this extent the word also makes sense. It is more correct to say that the word does not "stand for anything" in the sense that its meaning can be defined by the substitution method.

[5] This is demonstrated in an excellent manner by H. L. A. Hart, *Definition and Theory in Jurisprudence,* 1953, pp. 12 ff. See also Ross, "Definition in Legal Language", *Logique et analyse* 1958, pp. 139 ff., 142 ff.

[6] Alf Ross, "Tû-tû", *Scandinavian Studies in Law* 1957, pp. 139 ff. Cf. *On Law and Justice,* 1958, § 35.

It is important to stress what has here been demonstrated—that the logical structure of sentences in which "the State" occurs as an acting subject is different from their grammatical structure. Grammatically "the State" is the subject, and the grammatical subject normally also corresponds to the subject in the logical analysis. When we say "Peter has built a house", "Peter" is the acting subject for the logical analysis also. But the same is not true when we say that "the State has built a house".

This divergence between the grammatical and logical structure of the sentence is attributable largely to the fact that with the word "State" we associate various unrealistic (metaphysical) ideas of an invisible force, energy, or entity, conceived more or less in analogy with man, as an acting subject. Whether the grammatical structure is produced by metaphysical conceptions, or conversely, is a question to which the answer may be left open. Probably there has been a reciprocal influence.

However this may be, the important thing is that the scientific theory should be kept clear of all substantial-metaphysical conceptions of "the State" which are only apt to lead to mistakes and fictitious problems.[7] The much discussed problem how it is possible for the State to incur liabilities is an example. The question whether the State is a reality (organism), a fiction, or a sum of psychological processes is also a fictitious problem—in any case in relation to the usage that we are here considering. The State "is" nothing, because statements of the structure "the State is . . ." cannot properly be made.

7. DISCUSSION: JELLINEK, CARRÉ DE MALBERG AND KELSEN

The idea that it is legal rules that determine the character of certain actions as attributable to "the State" and that the acting person is to be regarded as a "State organ" is by no means new. On the other hand, I do not know of any analysis like the one here attempted which, proceeding from a common usage, exposes the conditions under which the attribution takes place. Without involving myself in a general scrutiny of the literature on the

[7] On similar problems when the concept of rights is conceived substantially, see *On Law and Justice*, 1958, § 37.

subject, I will mention the position of some of the best-known authors.

"Ein Individuum", says *Georg Jellinek,* "dessen Wille als Verbandswille gilt, ist, soweit diese Beziehungen auf den Verband reichen, als Willenswerkzeug des Verbandes, als Verbandsorgan zu betrachten."[8]

But under what conditions does the will of an individual "represent" the will of the group (State)? After having shown how, during early stages of culture, the idea of an organ of a community was conceived in terms of something purely factual, the author proceeds:

> "Bei entwickelter Kultur wird allerdings, die erwähnten Ausnahmefälle abgerechnet, regelmässig der tatsächliche Vorgang der Organisation unlöslich mit Rechtsnormen verknüpft sein, derart, dass die Berufung des einzelnen zur Organstellung nur auf Grund einer rechtlichen Berufungsordnung erfolgen kann. Ferner werden auch die Zuständigkeit der Organe und der Weg, auf dem ihr Wille sich äussert, die Bedingungen, unter denen er Rechtsgültigkeit beanspruchen kann, durch Rechtssätze festgestellt werden müssen."[9]

The status of an organ, then, depends exclusively on a certain legal qualification. But nothing is said of the kind of qualification required for the status of an organ. The idea that the quality of being an organ means nothing but certain peculiar legal powers bestowed upon a person is manifestly foreign to Jellinek's way of thinking. He seems to mean that the organ acquires its status as an organ directly through its "appointment" (*Berufung*) to it by the legal order. To the act of appointment there are further tied certain legal rules in which the authority (power) of the organ is established. It is obvious that Jellinek is unreflectingly thinking in the organ-terms of common usage without seeing the problems to which they give rise.

[8] "An individual whose will is accepted as the will of the group is to be regarded, as far as this connection with the group extends, as the instrument of the will of the group, as an organ of the group." *Allgemeine Staatslehre,* Ch. 16, 2nd ed. 1905, p. 526.

[9] "It is true that in a developed state of civilization, apart from the exceptions that have been mentioned, the actual procedure of the organization is as a rule tied to legal rules in such a way that the appointment to the status of an organ can take place only on the ground of a legal regulation to that effect. Further, the authority of the organ, and the way in which its will is expressed, the conditions under which its acts can claim legal validity, must also be laid down by legal rules." *Op. cit.,* p. 529.

The same is on the whole true of *Carré de Malberg,* whose definition of the concept of an organ is almost literally the same as Jellinek's. The individual is an organ whose will passes (*vaut*) as the will of the group because the legal order authorizes him to will on behalf of the group.[1] This explanation is meaningless. There are no rules to this effect in the legal order. The question is in what circumstances we *interpret* certain peculiar rules of authority by ascribing to the State the acts by which the power is exercised.

Hans Kelsen, on the other hand, states clearly that the problem is under what *conditions* we attribute an action to the State.[2] Moreover, there can hardly be any doubt that the attribution referred to is the attribution as it takes place in colloquial usage, in common usage as well as legal usage.[3] But Kelsen does not stick to this point of departure. In reality his concept of an organ is cut to the measure of certain salient ideas in his system, especially the idea of the identity of State and legal order. In this way his analysis results in views which are definitely in conflict with normal usage and almost extinguish the difference between State organs and private individuals.[4]

This is apparent from the fact that the position of an organ is defined by purely formal criteria. By this I mean that, according to Kelsen, what qualifies a person as an organ is not a peculiar, qualified function performed by this person, but the simple fact that a legal function—*of whatever kind*—is performed by him.

"Whoever fulfils a function determined by the legal order is an organ. These functions, be they of a norm-creating or of a norm-applying character, are all ultimately aimed at the execution of a legal sanction. The Parliament that enacts the penal code, and the citizens who elect the Parliament, are organs of the State, as are also the judge who sentences the criminal and the individual who actually executes the sentence."[5]

[1] "Finalement donc, il faut entendre par organes les hommes qui, soit individuellement, soit en corps, sont habilités par la Constitution à vouloir pour la collectivité et dont la volonté vaut, de par cette habilitation statutaire, comme volonté légale de la collectivité."

[2] "Under what conditions do we attribute a human action to the State? ... What is the criterion of this imputation?" Hans Kelsen, *General Theory of Law and State,* 1946, p. 191.

[3] "An analysis shows that we impute a human action to the State ...", *op. cit.,* p. 192.

[4] The exposition in *General Theory of Law and State,* 1946, should be compared with that in *Allgemeine Staatslehre,* 1925, pp. 262 ff.

[5] *General Theory of Law and State,* 1946, p. 192.

The conception of "function determined by the legal order" is unclear. It follows from what has been cited that such functions comprise "norm-creating acts" as well as "norm-applying acts". Since according to Kelsen any "norm-creating act" is also a "norm-applying act"[6], this latter category is of independent importance only in so far as the acts concern those "norm-applications" which are not also "norm-creations" but consist in certain factual actions. As an example Kelsen mentions the factual acts that enter into the execution of a penal sentence. In what sense, now, can such executive acts be said to be the fulfilment of a legal function? The only possible answer seems to be that they are so qualified because such acts are required by the law, are the fulfilment of a legal duty. The result, then, is that an action is the action of an organ—i.e. it is attributed to the State—when it consists either (1) in the exercise of a competence, a disposition; or (2) in the fulfilment of a legal duty.

Clearly this result cannot be accepted as a description of the meaning that is implied in common usage, i.e. as an indication of the conditions under which "we impute a human action to the State". Kelsen himself is emphatic that private contracting parties are State organs as well as the judge—they, too, fulfil a legal function in performing a disposition.[7] And in the same way it must, according to Kelsen, be assumed that everyone who pays his debts or in other ways fulfils his legal duties is functioning as a State organ just as much as a person who is a State organ because he fulfils a legal duty by executing a penal sentence.

Viewed in relation to common usage this result is of course absurd. The function of the idea of a person acting as an organ is precisely that of qualifying his actions (within his authority) as "actions of the State" or "public acts" so as to distinguish them from actions of private individuals. This distinction, the *raison d'être* of the concept of "organ", disappears completely when "act of an organ" is defined purely formally as an exercise of a legal "function".

Kelsen himself seems to have felt this and aimed at another concept which harmonizes better with common usage. The judge, he says, is an organ of the State in a sense different from and narrower than that in which private contracting parties are organs of the State.[8] It ist true, we may comment, that the judge holds a par-

[6] *Op. cit.*, p. 134.
[7] *Op. cit.*, p. 193.
[8] *Ibid.*

ticular position, and as we have seen this position is due to h having a qualified, heteronomous, duty-bound competence as social function. But this is not Kelsen's object in proposing hi second and narrower concept of "organ". He means that th peculiar position of the judge is due to the fact that he is a official, employed to perform a certain professional functio against payment from the public treasury. This is not to the point What matters is that "judges"—as well as "legislators" and "ad ministrative authorities"—are qualified as State organs by virtu of the qualified competence, known as "public authority", which they possess—and this is independent of their being also employees who receive their remuneration from the public treasury. Although in our day most wielders of public authority are also employees, the rule is not without exceptions (lay judges, jury members, members of Parliament—members of the House of Lords in Britain received until recently no payment at all, even for expenses, but whether employees or not they are still regarded as State organs.

Evidently Kelsen confuses the position of a State employee with the quality of a State organ. One who is employed by the State is a State employee, but he is not for that reason a State organ. Just as a State organ, as has been mentioned, does not need to be a State employee or a panel of State employees, it is also true, conversely, that the position of a State employee does not in itself have the consequence that the employee—e.g. a locomotive engineer or a charwoman—is regarded as a State organ. This also tallies well with what has been demonstrated above under section 5 to the extent that an activity is regarded as the activity of the State because it is pursued on behalf of the "public treasury": it is not the paid acts of state officials (e.g. the driving of a locomotive) but the dispositions on behalf of the State treasury and the managerial instructions (e.g. the management of the railways) which are attributed to the State. It is true that we say that the State runs the railways, but we do not say that it is the State that drives the locomotives or scrubs the floors in the waiting-rooms.

It would thus appear that Kelsen's "functional" concept of a State organ is as unsuitable as his "formal" concept.