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## Review of “The Dual State: A Contribution to the Theory of Dictatorship,” By Ernst Fraenkel

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Professor Carnahan has demonstrated a familiarity with life insurance problems not ordinarily found in one not connected with a life insurance company. In each subdivision of the book he has examined the cases involving these problems in the light of principles underlying Conflict of Laws. While the unrelated array of cases seem to announce a mass of inconsistent rules and principles, nevertheless the approach used by Professor Carnahan—of directing attention to the treatment of one phase of one section of the whole field of *conflict of laws*—shows that within these narrow limits substantial agreement among the courts may be found.

The complexities of the subject itself are such that at best it is difficult to keep clearly in mind what one is reading. Professor Carnahan has, however, rendered great assistance to the reader by pausing at convenient intervals to recapitulate in various subdivisions which are found near the close of each chapter.

The policies and contracts of more than a hundred life insurance companies were studied and analyzed by Professor Carnahan in connection with this book. Since the terminology he uses is that of the business itself, the volume should be greatly appreciated by those in the life insurance business. It is copiously annotated and contains a vast store of references to other books, and to cases, statutes and law review articles. This work should be of great value to lawyers and should be a welcome addition to the libraries of all those who are concerned with Conflict of Laws and related problems arising in connection with the life insurance business.

MAURICE E. BENSON.†

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THE DUAL STATE. A CONTRIBUTION TO THE THEORY OF DICTATORSHIP. By Ernst Fraenkel. Translated from the German by E. A. Shils, in collaboration with Edith Lowenstein and Klaus Knorr. Oxford University Press, New York. Pp. xvi, 208, with appendix and notes. \$3.00.

The author has made a most valuable contribution to the legal and political analysis of the Third Reich. The book covers the period from 1933 to 1938, when the author was still practicing law as an attorney at the Berlin Court of Appeals, and presents an excellent study of first-hand legal material for this period. However, since the material is limited to the first five years of National Socialism, the conclusions reached by the author are necessarily limited, so far as their present-day validity is concerned.

Within a system commonly considered the highest development of centralized government, the author distinguishes two "states" or rather spheres of government, the Normative and Prerogative States. The former is defined as "an administrative body endowed with elaborate powers for safeguarding the legal order as expressed in statutes, decisions of the courts, and activities of the administrative agencies." The Prerogative State is "that governmental system which exercises unlimited arbitrariness and violence unchecked by any legal guarantees." (P. xiii.) Both exist simul-

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taneously in Nazi Germany, and Fraenkel undertakes to prove that they are both essential to the Nazi pattern of government. Now the Normative State is by no means a rule of law (*Rechtsstaat* in the liberal sense) but "a necessary complement to the Prerogative State" and both "constitute an interdependent whole." (P. 71.)

In order to set forth his thesis, the author gives an excellent case history of the Prerogative State since 1933. For the reader who knows how to read legal cases and who realizes their economic and psychological background and the human suffering involved, it is an absorbing study of the decay of the German legal system, a system as comprehensive and as skillfully framed as any to be found in the world. The author begins with the ill-famed "Decree of the President of the Reich for the Protection of the People and the State" of February 28, 1933, which was issued after the Reichstag fire. (This decree, consisting of three short sections, is printed in the appendix.) He then describes the gradual retreat of the judges, who at first refused to apply the decree to others than Communists for whom it was meant, but later reluctantly yielded to political pressure and finally denied judicial review of all acts of the Gestapo, i. e., the instrument of the Prerogative State. The Prussian Supreme Administrative Court capitulated as late as 1936. (P. 27.) *Jus cogens* ceased to be binding on the police. Even so small a matter as the issuance of a birth certificate could be made a political affair; although the law requires it to be issued on request, it could be denied to an émigré if the Gestapo interfered (Reich Supreme Court, November, 1936). (P. 44.) Even the principle of *res judicata* was abandoned by the Berlin Court of Appeals, the Bavarian Supreme Court, and the People's Court (the first and last court in cases of high treason), although the Reich Supreme Court adhered to it as late as 1938. (P. 51.) In other words, the enemy of the state was outlawed, and the police (if not the party) decided who was an enemy of the state. Of course, the purpose underlying the refusal for political reasons of a peddler's license or midwife's certificate, for example, was the economic annihilation of the "enemy."

In its preamble the decree mentioned above unambiguously named the Communists as enemies of the state, but it was not long before political war began to be waged against the churches, against the socialists, the liberals, even the conservatives, and, of course, against the Jews. As long as the Jews were left a limited sphere in the economic system, they were given legal protection so far as their business was concerned. (Their personal status was greatly restricted by the Nuremberg laws of 1935.) With the resignation of Schacht as minister of economics and finance, their elimination from economic life was determined, and they became outcasts. The Reich Supreme Court declared them "legally dead" as early as 1936. (P. 96.) The Normative State protects only "constructive forces" from the Gestapo. (P. 62.) Non-Aryans can never be "constructive"; "whether or not any particular Aryan citizen is individually included in the 'constructive forces' of the nation is to be decided in each particular case." (P. 62.)

What, then, is the sphere of the Normative State? Its main task, according to Fraenkel, is the maintenance of economic life, i. e., the capital-

istic system. The author expatiates on the thesis that National Socialism protects all legal institutions essential to capitalism, such as private property, entrepreneurial freedom, sanctity of contracts, regulation of unfair competition, labor law, and non-tangible property. The economic estates (*Wirtschaftsstaende*) were set up to prevent interference on the part of the Prerogative State and to provide business, trade and industry with a kind of self-government, thus "depriving the state of its omnipotence." (P. 97.) The author even claims that this type of government cannot be called totalitarian because of the existence of the Normative State. (P. 61.) Here the reviewer cannot follow him.

It is true that laws concerning personal liberty and security of the individual (bill of rights, penal code, administrative law, labor law, etc.) have suffered more than those having to do with the economic system. This is the normal process of revolution; it is due to the more complicated nature of civil law. But the victims are to be found everywhere and cannot be assigned to economic classes. Furthermore, parts of the civil code (family law) and the trade code (corporation law) have already been changed, and a commission of lawyers is now working on a new civil code which is to break completely with the age-old tradition of Roman law which the Nazis hate from the bottom of their hearts. The estates may originally have been designed as a means of protection; they are now devices for wielding political power in business life. As the author points out, the labor front has never been an estate but was from the very beginning a political body. If this means that the workers are not protected by the Normative State, with which we agree, it also makes labor, whenever it happens to be supported by the Prerogative State, the strongest pressure group except the party. (War conditions have doubtless changed this picture.) Fraenkel, who was the legal adviser of one of the leading labor unions, is naturally inclined to see in this system the complete destruction of the free labor movement and to blame the mutilated remainders of capitalism for having defended themselves more successfully. It would seem, however, that Emil Lederer's recent sociological evaluation of the Nazi state comes closer to the truth.\*

National Socialism violently repudiates the unchanging and universal idea of Natural Law and substitutes for it the biological ideal of a racial community. In the second part of his book, therefore, Fraenkel traces the development of Natural Law from the ancient philosophers through the middle ages and up to modern times, and compares it with the legal theory of the Dual State. This chapter is, in the opinion of the reviewer, one of the best objective treatises on National Socialist political thought. Here only a few points can be considered. The compliant attitude of the Protestant Church in Germany is explained by the fact that Lutheranism has always submitted to the ruling power, accepting an unjust regime as God's punishment and putting emphasis on the saving of men's souls for the

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\* *State of the Masses, The Threat of the Classless Society.* W. W. Norton & Co., New York, 1940. Cf. *American Journal of Sociology*, September, 1941, pp. 227 et seq.

other world. The Catholic Church has resisted and still does resist strongly whenever essentials are touched. As Fraenkel points out, sectarianism, the standard-bearer of Natural Law, is rare in Germany, but wherever it exists, as in the group known as Jehovah's Witnesses, it is obstinately opposed to Nazism and has therefore been made illegal, its members becoming the martyrs of a modern religious war. The Confessional Church, Niemoeller's branch, and the only part of the Protestant Church which still deserves the name, limits its struggle to the defense of freedom of belief.

It is interesting to recall, as the author reminds us, that a no lesser authority than Luther admitted the necessity of "howling with the wolves" (p. 118), a dangerous principle which, incidentally, made for the almost incredible success of the Nazis in their *Gleichschaltung* during the first year of their regime. But Luther himself reserved freedom of conscience, which Carl Schmitt, an apostate Catholic and forerunner of National Socialist political thought, called a Jewish postulate invented by Spinoza. (P. 118, and note 345.)

This Christian camp of Natural Law is supported by a group of secular philosophers upholding Natural Law in German political theory from Hugo Grotius to Kant and Fichte. They, too, are repudiated by National Socialist legal thought. But, strangely enough, their opponents, the historic school (Burke, Savigny, and Gierke) are not acceptable either, since the Nazis despise tradition, especially the Roman tradition of Savigny, as also Gierke's attempt to revive German co-operative law (*Genossenschaftsrecht*). As to Hegel, the opinion of Nazi writers is divided; Huber and Larenz claim him for Nazism, whereas Koellreutter and Rosenberg disavow him. Fraenkel is inclined to link Hegel with National Socialism insofar as he emphasizes the preponderance of the political element over law, but he concedes that Hegel has nothing to do with any specific racial idea. (P. 126.) It seems to this reviewer that, at least in his *Philosophy of Right*, Hegel adheres to a government of law and thus is separated from National Socialism by a world-wide gap. His idolatry of the state, so frequently identified with Nazism in this country, is even incompatible with Hitler's statement in "Mein Kampf" (quoted by Fraenkel on pp. 136, 137), according to which the state is only a means to an end.

Who, then, are the forerunners of Nazi philosophy? Besides Machiavelli, it is Sorel who greatly influenced Mussolini as well as the political scientist already mentioned, Carl Schmitt. (P. 130.) The reviewer would like to add Hobbes, the seventeenth century author of *The Leviathan*. It cannot be denied, however, that Nazism made one important original contribution by building its legal theory on the deification of race. Even though its biological anti-Semitism can be traced to White Russian émigrés (p. 137 and note 396), National Socialist authors have developed the myth of the ethnic community (*Volksgemeinschaft*) and, at the same time, have scoffed at and derided the liberal conception of law as the protector of the individual. To condemn the doctrine of individual liberty and equality before the law, with its postulate, *nulla poena sine lege*, as Jewish normativism

and oppose to it the flexible "law" of the racial community, which is claimed to be the only source of law and outside of which no law can exist (p. 140)—this is certainly a modern achievement for which none of the three writers of the past can be given credit.

The third part of Fraenkel's book contains a brief but lucid history of administrative law and describes the development of the Dual State in Prussia and later in Germany. From the Great Elector, who established absolute monarchy in Brandenburg by subjecting the Estates to his control, and Frederick the Great who introduced the principle of the *Rechtsstaat* (rule of law) as early as 1747, we are led through periods of growing liberalism to the Bismarck era. Here the manifestation of independent administrative power is seen in the prerogative of the crown to declare martial law, based on its complete control of the army and of foreign affairs. Unfortunately the author omits the creation of administrative courts and the important rôle they played in the development of administrative law, so characteristic of western continental Europe at the end of the nineteenth century. His criticism of the Weimar Republic, with its "legal negation of any specific political power whatsoever" (p. 169), offers no solution, since the presidential dictatorship under Brüning can hardly be called a solution. Objection must also be raised to putting Hitler in a class with the Great Elector and Hardenberg, just because he restored conscription (and "aggrandized" the Reich, as the author could now add). Modern dictatorship, as Lederer has shown, is quite different from monarchical and bureaucratic absolutism.

After a brief review of the nature of the economic system of Nazi Germany, in which he reaffirms, although in a slightly modified way, his thesis of its being a capitalistic economy, the author in a final chapter investigates the sociological character of the Nazi system of government. He unveils the fallacy of the community theory of the nation. (P. 191.) On the basis of Max Weber's and Schmalenbach's studies he reaches the conclusion that all attempts to transfer the *Bund* ideology of the early SA (stormtroopers) to economic patterns, particularly the factory, have failed. They were bound to fail because of the unstable nature of the *Bund*, which disintegrates when it becomes institutionalized. Moreover, for the same reason the SA itself lost its *Bund* character. Since the totalitarian regime justifies itself by the threat of danger, it creates the "myth of a permanent emergency" (p. 200), incidentally a device as old as Plato's Republic. The personification of the potential enemy is the Jew, and here lies the fundamental importance of anti-Semitism for the regime. "If there are no enemies, they have to be created." (P. 200).

Today this is no longer a problem. Nazi Germany now has real enemies, and more than enough of them. The permanent creation of enemies has plunged the world into war. Fraenkel's book helps to analyze some of its causes.

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