I

The Prerogative State

1. THE ORIGIN OF THE PREROGATIVE STATE

MARTIAL LAW provides the constitution of the Third Reich.

The constitutional charter of the Third Reich is the Emergency Decree of February 28, 1933.[1]

On the basis of this decree the political sphere[2] of German public life has been removed from the jurisdiction of the general law. Administrative and general courts aided in the achievement of this condition. The guiding basic principle of political administration is not justice; law is applied in the light of 'the circumstances of the individual case,' the purpose being achievement of a political aim.

The political sphere is a vacuum as far as law is concerned. Of course it contains a certain element of factual order and predictability but only in so far as there is a certain regularity and predictability in the behavior of officials. There is, however, no legal regulation of the official bodies. The political sphere in the Third Reich is governed neither by objective nor by subjective law, neither by legal guarantees nor jurisdictional qualifications. There are no legal rules governing the political sphere. It is regulated by arbitrary measures (*Massnahmen*), in which the dominant officials exercise their discretionary prerogatives. Hence the expression 'Prerogative State' (*Massnahmenstaat*).

In the following pages an attempt will be made to show in detail the systematic growth of the absolute dictatorship of National-Socialism which has arisen on the basis of the 'Emergency Decree for the Defense against Communism.' Supplementing this Emer-

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gency Decree against acts of violence endangering the state, the law of March 24, 1933 gave National-Socialism unlimited legislative power. The official legend which the Third Reich seeks to propagate maintains that the National-Socialist state is founded on valid laws, issued by the legally appointed Hitler Cabinet and passed by the legally elected Reichstag. It would be futile to deny the significance of this legislation in the transformation of the German legal order. A study of this legislation and its influence on the activity of the courts presents a clear picture of the existing German legal order in so far as it can be said to exist. But it should be remembered that on the statute books after February 28, 1933, can be found almost no legislation referring to the part of political and social life, which we have labelled 'political sphere,' now outside the sphere of ordinary law. Legislation regarding politics would be futile inasmuch as legal declarations in this field are not considered binding.

The National-Socialist legend of the 'legal revolution' is contradicted by the reality of the illegal *coup d'état*.[3] The events leading up to the Decree of February 28, 1933 are known generally and need not be repeated here. What is significant, however, is that the *coup d'état* consists neither in the Reichstag fire of February 27, 1933, nor in the Emergency Decree of February 28, 1933, but rather in the execution of this decree itself. Three acts of President Hindenburg between January 30 and March 24, 1933, helped National-Socialism into the saddle: the appointment of Hitler to the post of Reichs-Chancellor, the proclamation of civil siege by issuing the Reichstag Fire Decree and the signing of the Enabling Law of March 24, 1933. Two of these acts could scarcely have been avoided, but the third was entirely voluntary. The appointment of Hitler, the leader of the strongest party, to the post of Reichs-Chancellor was in conformity with the Weimar Constitution; historically, the proclamation of a state of 'civil' instead of military siege subsequent to the Reichstag fire was the decisive act of Hindenburg's career. It was the necessary consequence of the instigated *coup d'état* (based on the Reichstag Fire Decree), when Hindenburg signed the law of March 24, 1933, and thus sounded his own death knell.

Endowed with all the powers required by a state of siege, the National-Socialists were able to transform the constitutional and temporary dictatorship (intended to restore public order) into an unconstitutional and permanent dictatorship and to provide the framework of the National-Socialist state with unlimited powers. The National-Socialist *coup d'état* resulted from the arbitrary application of the Emergency Decree of February 28, 1933, which made a mandatory dictatorship absolute.[4] The extension and maintenance of this absolute dictatorship is the task of the Prerogative State.

In contrast to the earlier Prussian law which contained provisions only for military martial law, the Weimar Constitution conferred on the President the power to decide whether 'measures necessary for the re-establishment of public safety and order' were to be enforced by civil or military authorities. In conjunction with the tremendous power accorded to the 'executive authority' by the decree-issuing potentialities of Art. 48 of the Weimar Constitution, the decision whether the National-Socialist ministers or the conservative *Reichswehr* generals should be given the responsibility of restoring public order had most weighty implications. The failure of von Papen, Hugenberg and Blomberg to perceive the critical importance of this question was decisive in settling their political fates. Of course it is idle to speculate concerning unrealized possibilities; nevertheless one thing may be said with certainty: on February 28, 1933, the fighting power of the National-Socialist Storm Troopers was negligible in comparison with the power of the police and the *Reichswehr.* But when Hitler was enabled to add to the strength of Storm Troopers the decree power of martial law, the Reichstag fire became a sound political investment.

No doubt, the National-Socialist *coup d'état* of 1933 was, at least technically, facilitated by the executive and judicial practice of the Weimar Republic. Long before Hitler's dictatorship, the courts had held that questions as to the necessity and expediency of martial law were not subject to review by the courts.[5] The German law never recognized the principle of English law, expressed in the following decision:

> A somewhat startling argument was addressed to us by Mr. Serjeant Hanna, that it was not competent for this Court to decide whether a state of war existed or not and that we were bound to accept the statement of Sir Nevil Macready in this respect as binding upon the Court. This contention is absolutely opposed to our judgment in Allen's case (1921) … and is destitute of authority, and we desire to state, in the clearest possible language that this Court has the power and the duty to decide whether a state of war exists which justifies the application of martial law.[6]

The traditions of the monarchic period, when the declaration of martial law was the privilege of the government and was independent of the jurisdiction of the courts, carried over into the Weimar Republic. The German courts, possessing no guiding traditions in questions of constitutional law, never succeeded in establishing a claim to jurisdiction in these particularly crucial cases.

However, the National-Socialists would probably have been successful even had such constitutional-judicial safeguards existed. The absence of a legal tradition analogous to the Anglo-American tradition enabled them, however, to render lip service to the laws, a procedure found useful during the transitional period, when the army and the officialdom were not entirely dependable.

2. THE ALLOCATION AND DELIMITATION OF JURISDICTIONS

A. General Regulation of Jurisdiction

Absolute dictatorial power is exercised by the Leader and Chancellor either personally or through his subordinate authorities. His sole decision determines how this power shall be wielded. The steps taken by Hitler on June 30, 1934,[7] therefore needed no special justification. His powers were derived from the new German 'constitution' and analogous actions may be taken at any time. The measures taken on June 30, 1934, may differ in quantity but not in content from like measures taken on other occasions. The law passed by the government on July 2, 1934, expressly

legalizing the steps taken on June 30, is of declaratory significance only. To issue such laws now would be superfluous, since the developments of the past years have entirely clarified the 'constitutional' situation.

The sovereign power of the Leader and Chancellor to act unhampered by restrictions is now thoroughly legalized. With few exceptions the Leader and Chancellor exercises absolute dictatorial powers through political authorities. No delimitation of jurisdictions is provided for. Political officials may be instruments of the state or the party. The jurisdiction of party and state officials is not subjected to general regulations and in practice is flexible. According to the theory formulated by the outstanding National-Socialist constitutional lawyer Reinhard Hoehn, the party makes assignments to the Secret Police. One of the heads of the Prussian Secret State Police (*Gestapo*), Heydrich, advances the following theory: All Black Shirts (*SS*), whether civil servants or not, must cooperate. The results of their espionage activities will be utilized by those Black Shirts with civil service standing.[8] According to a view accepted by a considerable number of laymen as well as officials, the supreme task of the German Labor Front is to act as the agent of the Secret Police within industrial enterprises. Whenever jurisdiction between state and party is delimited it is by unofficial orders inaccessible to the outsider. They can be changed at any time by the Leader and Chancellor, as demonstrated at the Nürnberg Party Congress of 1935, where Hitler proclaimed that he would delegate the solution of the Jewish question, under certain conditions, exclusively to party authorities.

In order to justify the fact that in these pages no distinction is made between the state and the party as executive powers, we quote some decisions which may amply illustrate the impossibility of such a distinction.

I. A decision of the Court of Appeals of Karlsruhe dealt with the confiscation of trade union property by the Prosecuting Attorney of Berlin. When the Court questioned the Chief Prosecuting Attorney as to whether the confiscation was still in force he replied that he could answer this question only after consultation with the legal department of the German Labor Front.[9]

II. A Reich Press Leader was appointed by a party order of January 19, 1934. He was to exert 'every influence' and had authority to 'take all steps necessary for the fulfillment of his tasks.' Thus authorized by the party, the Reich Press Leader ousted the editor-in-chief of a newspaper, although this man was under irrevocable contract until 1940. An action by the editor for payment of his salary was dismissed. The Court held that the order of January 19, 1934, was an order of the Leader which, although not issued in the correct form provided by the Enabling Law of March 24, 1933, must be considered binding for all the state, party and private officials affected by the decree and that 'the objections made by the plaintiff against the validity of this order ignored the close, confidential relationship between the Leader and his followers, which is the basis for the unlimited power given to the government in the field of legislation.'[10] The Leader's order of January 19, 1934, was therefore considered to be within the scope of this power. Whether this obviously illogical argument by which the general power of the party leader is derived from the general power granted to the government of the state is deliberate, or whether it is a mere lack of understanding, is irrelevant. The result, however, is that, according to the court, 'even if the position of Press Leader is a party function … the decree of the Leader endowed him with certain governmental functions. There are no valid objections to the delegation of governmental functions to important party authorities….'[11]

The validity of the decisions of the Reich Press Leader was not questioned by the Hamburg Appellate Court, which decided that 'such decisions must be accepted by the Court even if they seem inequitable.'[12]

III. In contrast to this rather supine capitulation of the judiciary, we find an admirable frankness in a decision of the District Labor Court of Berlin. It concerns an order which had been signed by Hitler and which had never been officially published. According to this Court 'the Leader of the Movement is at the same time the Leader of the Nation. It is up to him to decide whether he is acting in one function or the other…. To us it is sufficient that the name Adolf Hitler is affixed to the order.'[13]