I

THE LEGAL HISTORY OF THE DUAL STATE

1. THE DUAL STATE AND THE DUALISTIC STATE

IN present-day Germany, many people find the arbitrary rule of the Third Reich unbearable. These same people acknowledge, however, that the idea of 'community,' as there understood, is something truly great. Those who take up this ambivalent attitude towards National-Socialism suffer from the two principal misconceptions:

1. The present German ideology of *Gemeinschaft* ('community') is nothing but a mask hiding the still existing capitalistic structure of society.
2. This ideological mask (the 'community') equally hides the existence of the Prerogative State operating by arbitrary measures.

The replacement of the *Rechtsstaat* (Legal State) by the Dual State is but a symptom. The root of the evil lies at the exact point where the uncritical opponents of National-Socialism discover grounds for admiration, namely in the community ideology and in the militant capitalism which this very notion of the *Gemeinschaft* is supposed to hide. It is indeed for the maintenance of capitalism in Germany that the authoritarian Dual State is necessary.

Any critical examination which attempts to reveal the social structure of the National-Socialist state must discover whether or not the essential criteria of the Dual State have appeared in any earlier historical period. In contrast to similar 'dualistic' forms in previous epochs the organization of the National-Socialist Dual

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State is monistic. In the early 'dualistic state,' two independent powers (prince and peers, king and people) had to collaborate in order to produce a legal act of state; the Dual State, on the other hand, is characterized by the unity of its leadership. 'One Leader, one People, one Reich!' Despite its organizational unity, vast variety and contrast in the contents of the degrees and statutes issued by the state may well exist.

In the dualistic state every single act of legislation or fiscal policy expressing the will of the state is the result of a particular agreement. The constitutional history of the dualistic state is the history of perpetual compromises. The Dual State, however, is primarily characterized by the prevalence of one general and all-inclusive compromise. A Dual State may be said to exist whenever there is organizational unification of leadership, regardless of whether there is any internal differentiation in the substantive law. Viewed sociologically, the Dual State is characterized by the fact that the ruling class assents to the absolute integration of state power on the following conditions:

1. that those actions which are relevant to its economic situation be regulated in accordance with laws which they consider satisfactory,
2. that the subordinate classes, after having been deprived of the protection of the law, be economically disarmed.

Ferdinand Toennies and Werner Sombart saw the principal characteristic of the modern state in its dual nature (*'Zwieschlächtigkeit'*).[433] This is true not only of the dualistic but also of the monistic, absolutist state in which the two-sideness is disguised by organizational and juridical forms.

Only in England, a country which has never known the phenomenon of the Dual State, do these distinctions lose all significance. Hintze, one of the leading historians of modern German government, says that there is only one state in which one could say that the Rule of Law has existed: England. The militaristic, absolutistic and bureaucratic governments on the continent faced different problems. Here the question was not how to secure the supremacy of law but how the two antagonistic legal systems, the old common law and the new administrative law, could be bal-

anced and harmonized. Hintze considers this antagonism between these fundamentally different systems a decisive factor in the history of German law. 'I am inclined to assert,' he remarks, 'that at bottom it remained in Germany the essential problem of the state.'[434]

We lack space for a discussion of the basic reasons for the divergence between England and the Continent. Some importance must be attributed to the effect of the armed forces (the German army and the English navy) on the domestic politics of the respective countries. According to Hintze, 'the army is an organization which penetrates and shapes the structure of the state. The navy is only a mailed fist which extends into the outside world. It cannot be employed against the "internal enemies." '[435] This observation may serve as a starting point in our attempt to discover the reasons why England never has been a Dual State. Her insular condition and the overwhelming importance of her navy for defensive purposes have prevented the intermingling of the spheres of law and power. Michael Freund says that 'English political theory in the sixteenth and seventeenth centuries was able to elaborate a distinction between the spheres of law and power which was intended to apply not merely structurally but spatially as well…. Absolute on the high seas and in the colonies, the seat of the Empire was ruled by common law and the laws of the estates.'[436] When, in the course of the struggle over the ship-money writs, the threat of a Dual State really became acute in England, the central legal issues were formulated in a way which is still relevant to our analysis of contemporary Germany.

In the case *Rex* v. *Richard Chambers,* one of the judges, in characterizing the threatening change, said that 'there was a Rule of Law and a Rule of Government, and that many things which might not be done by the Rule of Law might be done by the Rule of Government.'[437] In England, however, the danger was recognized and overcome in time in a great struggle for the preservation of law. Three hundred years ago the principal participants of this struggle were aware of the fact that the partial elimination of law would necessarily bring about the destruction

of all values. D'Ewes, in his autobiography, had remarked that 'if this could be done lawfully, then by the same right … no man was, in conclusion, worth anything.'[438] This English aversion to the Dual State was brought to America by those emigrants who were driven out of England by Archbishop Laud.

When, some centuries later, during the Civil War, a Dual State seemed imminent, the Supreme Court halted the development. In *ex parte* Milligan, Justice Davis upheld the Rule of Law:

> No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great emergencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity … is false…. Martial Law cannot arise from a threatened invasion. The necessity must be actual and present…. Martial Law can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction.[439]

When this opinion is compared with the permanent state of martial law in Germany today, one sees the correctness of Morstein-Marx's[440] statement that the German and American constitutional situations represent opposite extremes. The more astonishing is that Reinhard Hoehn, who expounds National-Socialist political theory at the University of Berlin, has asserted that between the National-Socialist antipathy to legal norms and the Anglo-Saxon adherence to the Rule of Law 'there is not a real but only a verbal conflict.'[441] According to Dicey's classical definition 'the Rule of Law may be used as a formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the Courts.'[442] According to National-Socialism, rights of the individual in the sphere of public law are, at best, reflexes of the statutes of public law, whereas under the Rule of Law public law is nothing but a bundle of individual rights.[443] Hoehn's statements only further corroborate the contention that one cannot take seriously the study of political science and jurisprudence in National-Socialist Germany as intellectual disciplines. Since February 1933 an unbridgeable gap

between German and Anglo-Saxon thinking has become apparent.

At present the legal situation of the seventeenth century has been reincarnated. The tendency defeated in England in the seventeenth century gradually attained success in Germany. During that period a fateful decision took place. After having broken the political backbone of the estates, the monarchy supplemented the traditional law of the estates by a system of absolute power directed towards political goals.

A historical sketch of the changes in Brandenburg and Prussia after the establishment of absolutism by Friedrich Wilhelm, the Great Elector (1640-88), may show the 'dual nature' of the state with reference to the Dual State. This sketch will be confined to the territories dominated by the Hohenzollerns. Southern, western and north-western Germany (the free peasant country), developed somewhat differently.

2. THE HISTORY OF THE DUAL STATE IN PRUSSIA AND GERMANY

A. The Establishment of the Absolute Monarchy

With the destruction of the feudal power of the nobility by the absolute monarch during the seventeenth and eighteenth centuries, the 'dual nature' of the state did not by any means come to an end. At first the renunciation of political power by the estates could only be obtained in return for other social privileges. For example, the Diet of Berlin, in its resolution of August 5, 1653, expressly stated that 'the institution of serfdom will be preserved wherever it has been introduced or is customary.'[444] In addition, the Diet's decree precluded the possibility that the authority of the Electorate Treasury would interfere with the judicial jurisdiction of the courts of the nobility. In these courts the legal burden of proof was fixed in a manner which clearly reflects the realities of power: in all cases in which the *Junkers* laid claim to services the peasant had to provide the evidence that these services were *not* due. After the Law of 1681 concerning Farm-Hands had approved of migration from one village or estate to another, the new socio-political compromise was given full effect in an-

other Law concerning Farm-Hands (*Gesindeordnung*) which was decreed in 1722 and confirmed in 1769. Henceforth, local customs were sanctioned even to the extent of permitting the sale of serfs.[445]

Only in exchange for such important concessions would the landed nobility renounce its political power and allow the institution of the *miles perpetuus* to be established.[446] The result was an absolute but not totalitarian monarchy, since the well-nigh complete surrender of the peasants to the landed nobility placed restrictions on the power of the state in its relations to the economic position of the serfs. Thus the power of the Prussian state ended with the *Landrat*.[447]

But more significant than the concessions which were obtained by the *Junkers* was the fact that, apart from traditional law which was applied by the courts, there grew up an administrative order guided by the monarchical *raison d'état*. This new administrative practice was organizationally and functionally independent of the traditional substantive law and of the jurisdiction of the courts. This innovation was based on the principle that 'in political questions there is no right of appeal.' The absolute state was strong enough to suspend or abolish both the jurisdiction of the estates and the rule of the status oriented laws in any matter important to it. However, it was neither able nor willing to eliminate the rule of this substantive status law from those spheres which did not seem vital to its aims.[448] Thus the estates were able not only to preserve the integrity of the traditional law in all matters which were of importance to their economic privileges. They even succeeded in laying the foundations for a system of autonomy in economic matters. Not only did the *Ständisches Kreditwerk* (Agricultural Financing Institute for Mortgaging the Manors of the *Junkers*) remain intact (it was not terminated until 1820): in 1719 there was added a *Marsch-und Molestienkasse* providing (significantly enough) for the 'liturgical' defraying of military expenses by the individual members of the estates. Of even greater significance were the provincial loan societies (*Landschaften*) supervised by the nobility. The structure of these bodies is adequately portrayed in § 28 of the *Reglements* of the *Ritter-*

schaftliches Pfandbriefinstitut für die Kur-und Neumark. These units were exclusively ruled by the nobility and royal officials were explicitly excluded from participation.[449]

If one examines the legal position of the estates in the German principalities at the turn of the eighteenth century, one sees a reduction of their traditional privileges to a merely intermediate position. The power of the princes had been extended above them and the power of the feudal lords beneath them. The protection of the court was fully accorded only to the privileged landed nobility.[450] On the basis of the absolute power of the estates over the serfs, a state was erected which eliminated the dualism of powers which had previously existed. But its 'dual nature' persisted in a different form, in the sense that a legally regulated order functioned alongside of a politically regulated order. Max Weber characterized this situation when he spoke of the coexistence of both the indestructible power of traditions and the arbitrary power of the cabinet (as a substitute for the supremacy of rational rules.)[451]

B. Enlightened Despotism

During the second half of the eighteenth century the realm of law was extended into spheres which it had hitherto left untouched. The absolute monarch, Frederic the Great (1740-86), by way of introducing certain protective rules on behalf of the peasantry, placed certain legal restrictions on the power of the landed nobility. Guided by the Enlightenment, the strengthened monarchical absolutism tended to impose the doctrines of Natural Law on those spheres which had been regarded as the proper domain of the *raison d'état,* and which were, therefore, outside the legal order. Otto Hintze views these activities of the enlightened despotism as the beginning of the *Rechtsstaat* (Rule of Law State), the characteristic system of the nineteenth century.[452] Enlightened despotism, represented in its purest form by Joseph II of Austria (1765-90) and, to a lesser degree, by Frederic the Great of Prussia, involved an attempt to eliminate completely the two-sideness of the state. Its aim was the absolute supremacy of

the monarchy as the exclusive bearer of political authority and, concurrently, its subjection to Natural Law. The program of the absolute monarchy required not only the centralization of authority but a universally valid legal system as well.

Of course there was a considerable discrepancy between the program and its realization. Professor Hugo Preuss said: 'the *Preussisches Allgemeines Landrecht* [Prussian Code of Public and Private Law 1792] sounded as if the premises had been written by the philosopher of Sanssouci, while the practically more important conclusions had been written by the King of Prussia.'[453]

The Enlightenment did not alleviate the unnatural tyranny of the estates over the serfs or the despotic *raison d'état.* Frederic the Great thus described the tension between the ideology of Natural Law and the reality of the positive legal order: 'There are provinces in most of the states of Europe in which the peasants fixed to the soil are the serfs of their masters. This is the most miserable of all conditions and the most revolting to mankind. Such abuses are justly detested and it may be thought that it is only necessary to desire to abolish this barbarous custom in order for it to disappear. But this is not true. This custom rests on old contracts between the owners of the soil and the colonists. In attempting to abolish this abominable institution, the whole rural economy would be disrupted. It would be necessary to indemnify the nobility in part for the losses which their revenues would suffer.'[454] In the face of this deep-rooted skepticism as to 'what the economic system could bear,' it is incomprehensible why all attempts at reducing compulsory service from six to two or three days a week should have failed,[455] and why the Neumark Farm Labor Law remained in effect despite the existence of the *Allgemeinen Landrecht* guaranteeing civil freedom to the peasantry.[456]

The same failure can be observed in the state. The instructions for the General Directory which the Natural Law theorist Coceji (Secretary of Justice under Frederic the Great) wrote in 1747 contain the rule, 'all complaints and lawsuits must be handled by the ordinary courts even when they involve the state or the treasury.' But a new regulation of June 6, 1749, contradicts this. It upheld the abovementioned general principle, but it specified

numerous exceptions to the applicability of the law and it is of particular significance that all matters which concern the *status oeconomicus et politicus* fall under the jurisdiction of the political agencies, i.e., the Chambers and Boards (even if they are only slightly connected with the *status politicus*).[457] Thus, in spite of Natural Law, the absolute monarchy of Frederic the Great was ruled by the principle that all political questions are beyond the competence of the judiciary. The sphere of the *status politicus* remained isolated from the rule of positive law.

The two decades between the death of Frederic the Great and the temporary downfall of his state in the Napoleonic era are marked by the developments toward the *Rechtsstaat.* The Prussian *Allgemeine Landrecht* contains the famous definition of police functions. Under the influence of Natural Law, the tasks of the police are defined as protection from danger and maintenance of order. It is true that the *Allgemeine Landrecht* also contains a provision to the effect that the royal prerogative is not subject to legal control. Even this provision represents definite progress over the previous rules because the concept of royal prerogative is undoubtedly much narrower than the vague concept of *status politicus.* The decree of 1797 for the province of New East Prussia provided for far-reaching judicial control of administrative acts. A decree of the Cabinet in 1803 provided that the courts and not administrative boards should have jurisdiction in all cases of private and public law.[458]

After the catastrophe of 1806 this development towards the *Rechtsstaat,* instead of continuing and being perfected by the reforms of Stein and Hardenberg, actually suffered a serious reverse.

C. The Absolute Bureaucracy

The French Revolution and its consequences brought to an end the association of rational Natural Law and utilitarian *raison d'état* which had developed in the course of the eighteenth century. With the abolition of serfdom, the precarious basis on which enlightened despotism rested disintegrated. Simultaneously, as a result of the French Revolution, the politically dominant circles

discarded Natural Law because its potential dangers had become only too apparent. The partial restitution of bureaucratic for patrimonial methods of administration, which had become necessary after the liberation of the peasantry, was not confined to the rural areas. It permeated the whole state and transformed the despotism of the enlightened monarchy into the absolute domination of the state bureaucracy. It was this absolute bureaucracy which Hegel had in mind when he wrote about the state in his *Philosophy of Right*.

Georg Friedrich Knapp's pioneer investigations into the social consequences of the liberation of the peasantry render it unnecessary for us to dwell upon this particular point. The abolition of serfdom can only be understood in the light of the Regulatory Decree of September 14, 1811 and the Declaration of May 29, 1816.[459]

At the same time, the legal protection which the absolute monarchy had introduced for the prevention of the eviction or 'putting down' of peasants (*Bauernlegen*) failed. Consequently the economically weaker strata of the peasantry became agricultural day-laborers. Otto Hintze[460] calculated that of the 145,000 serfs in the old Prussian provinces (excluding Silesia) only about 45,000 became independent farmers after the abolition of serfdom. The rest were 'put down' by the *Junkers* and became part of the agricultural proletariat.[461]

The abolition of hereditary serfdom was accompanied by a strengthening of the tendencies towards a police state. The modification of the police-idea which had been effected under the influence of Natural Law during the age of enlightened despotism can be fully appraised only with reference to the social structure of the period. The overwhelming majority of the population had not even been touched by the new Natural Law oriented legislation since they were under the patrimonial jurisdiction of the *Junkers* and not of the agencies of the state. For the upper classes, enlightened despotism meant a lessening of the pressure of the police administration since the formerly autonomous estates were now socially and economically assimilated into the absolute monarchy. The more the large estates in eastern Germany were trans-

formed into agricultural capitalistic enterprises the better they were adapted to the rigorously organized Prussian state.[462]

This economic development had highly significant political repercussions. The younger sons of the Prussian *Junkers* were forced to gain their livelihood as officers in the Prussian army. Mercantilist policy was supported by the large landed estate system, and is itself the effect of the operation of the capitalistic system on the manor.[463]

The abolition of hereditary serfdom by the decree of October 9, 1807 presented new problems to the Prussian administration. The administrative domain of the Prussian state, which hitherto had not extended over the *Landrat,* now included the lowest strata of the population. The simultaneous introduction of freedom of movement, the termination of the compulsory guild system and other restrictions on industry liberated the urban population from the bonds which before had facilitated the state's control over the industrial and commercial population. Even before the decree of October 9, 1807 (which stipulated that after St. Martin's Day 1810 there should be only free persons in Prussia) had come into force, the police law had undergone a decisive change. By § 3 of the decree of December 26, 1808, the police legislation of the *Allgemeine Landrecht,* which had borne the imprint of Natural Law, was repealed. 'The negative as well as positive care for the welfare of our faithful subjects' was turned over to the police administration of the provincial governments. The elaboration of the police law begun by the enlightened despotism was cut short by the liberation of the peasantry and replaced by a grant of unrestrained police powers to the absolutist bureaucracy. Insofar as the exercise of the police power remained with the *Junkers,* the newly introduced police law compensated them for the power over the serfs which they had lost.

The new police law greatly diminished judicial control over police activities. Friese, the spiritual father of the decree of December 26, 1808, clearly recognized this change. If the police exercised not only negative and protective functions – as the *Allgemeine Landrecht* allowed – but also 'positive' ones (involving unlimited jurisdiction), and if it were admitted that 'a certain

degree of legislative power was inherent in police administration,' then the police were also entitled 'to intervene in lawful activities and to decree actions for which they had no specific legal jurisdiction.'[464] Correspondingly, § 38 of the decree reduced control over the police to a minimum. This meant that, in practice, the police (to the extent that the *Allgemeine Landrecht* did not otherwise specify explicitly) were able to erect an independent system of authority alongside the legal order of the state.

Thus, the events of 1653 were repeated under more complex conditions in the years 1808-1816. Just as in 1653, following the Thirty Years' War, a basis for the absolutism of the territorial princes was created after the politically dispossessed estates had been compensated by an extension of their social power, so the defeat in the Napoleonic wars provided the ground for a new compromise. 'The absolute monarch was able to strengthen himself vis-à-vis the nobility in return for a reinforcement of hereditary serfdom. The absolute bureaucracy sought to strengthen itself vis-à-vis the nobility by turning over to it peasantry in a modernized way: by the abolition of serfdom.'[465]

Does German history provide a corroboration of the hypothesis that military defeat promotes political absolutism? The military reorganization which followed the Treaty of Westphalia brought with it the *miles perpetuus,* while the Peace of Tilsit (1807) was followed by the introduction of universal military service. Both of these reforms which deeply affected the structure of the state were closely connected at least with the strengthening if not with the establishment of the absolute state. This process could be consummated only by a compromise with the dominant classes. The power position of the upper classes in Germany seems to have arisen partially from the consolidation of the power of the state in the absolutistic period, for this could only be realized with the collaboration of the dominant classes and at the cost of the lower classes.

However that may be, the political structure of the Prussian state in the period of post-Napoleonic reaction differs essentially from the monarchical absolutism of the period of enlightened despotism, despite the retention of a monistic form of state organ-

ization. The liberation of the peasantry meant that the landed nobility exchanged social privileges for economic power. The losses and gains of this change made it possible for the *Junkers,* adapting themselves to the pattern of economic development, to transform their patrimonial estates into capitalistic enterprises oriented towards export. This new type of enterprise was easily integrated into bourgeois legal order, which was being modernized by concurrent reforms of the legal regulation of industry and commerce. The interests of the dominant landed aristocracy were, to a large extent, in harmony with the economic aims of the commercial and industrial bourgeoisie, which had been freed from the shackles of mercantilism. For 'as long as industrial backwardness forces large-scale agriculturalists to export, the landed proprietor will be well disposed towards industry and trade.'[466] The free trade tendencies of German tariff policy were the expression of this attitude, which made possible the strengthening of the bourgeoisie, whose political weakening was the chief goal of the absolutistic bureaucracy. However, the subsequent development of industry reinforced the influence of the bourgeoisie and threatened the political power of the landed *Junkers.*

The domestic policy of the governing aristocratic bureaucracy[467] had as its mainspring the persecution of popular agitators and forerunners of national unity by the police. In other words, its domestic policy was essentially oriented towards defending itself against the revolutionary democratic movements (in this period identical with the national movements) which were surging over Europe subsequent to the formation of an industrial proletariat. At the same time the governing aristocratic bureaucracy, in its role as executive organ of the agrarian-capitalist *Junker* aristocracy, was moving towards a liberal free-trade policy and a rational system of private law. During the Restoration the dual nature of the monarchy manifested itself in the conflict between the judiciary and the administration.

The Restoration saw a revival of the study of law. Its most distinguished theorist, Savigny, denied the possibility of changing the historically developed law by means of legislation. Characteristically, his definition of law referred only to private law.

The same Savigny, as Minister of Justice, asserted that the state could declare its police organs independent of judicial control. This rejection of the Natural Law doctrine of the Enlightenment implied (in the sphere of private law) that law as it had historically developed, was inviolable, whereas in the sphere of state administration the rejection of Natural Law tended to be associated with the scrapping of whatever had been public law in favor of the legally unrestricted power of the police. Illustrative of this trend are the repeated attempts to obstruct the judicial control of punishments imposed by the police. Conditions reverted to what they had been in 1749. The rescript of April 17, 1812 assigned jurisdiction over the lesser criminal cases concerning domestic servants exclusively to the police, and specifically excluded the right of appeal. It is interesting to note that punishments of lower class persons by the police included corporal punishments and that in the rural areas the *Junker* nobility in most cases remained in possession of the patrimonial police authority. Thus, along with the law administered by the courts, there existed another body of law created and applied exclusively by the police. In the succeeding years, the police-state increasingly blocked the legal control of police measures, even in those cases in which the unrestricted power of the police could have been limited by legalistic interpretation of the decree of December 26, 1808.

The end of this evolution was foreshadowed by the first signs of the revolution of 1848. § 6 of the 'Law concerning Admissibility of Legal Appeal from Orders of the Police' of May 11, 1842 provided that a review of police cases by the courts is admissible only if the police order has been declared by a higher administrative body to be in conflict with law. The year 1847 witnessed the introduction of the *Konflikt* (see p. 29) which National-Socialist Germany has adopted from the Restoration — the darkest period of reaction in modern Prussian history.

If one takes into account that the police had also 'positive tasks,' that the control of the police by administrative courts did not exist and judicial control no longer existed, it can easily be seen why the concept of the Dual State emerged at that time. It was perceived that administrative matters were settled, not in

accordance with law, but according to considerations of political expediency and the conceptions of *raison d'état.*[468] When Franz Schnabel wrote that 'although the period of the reforms of Stein and Hardenberg sought to reduce the activities of the state and make the citizen self-reliant, it succeeded only in maintaining and renewing the old Police State,'[469] he approximated but did not completely grasp the significance of the period.

The conflict between the liberal individualistic economic legal order on the one hand, and the authoritarian absolute police state on the other, became all the more acute as the economic developments strengthened the bourgeoisie, since the chief aim of the police state of the Restoration was to prevent the political ascent of that very class. The Revolution of 1848 was an attempt to resolve this conflict. It was fought in the name of the Rule of Law under which the courts would reign supreme. The Frankfurter Constitution provided that all violations of law be dealt with by ordinary courts. The entire activity of the state was to be examined by the same types of judicial bodies and by the same legal methods which had been developed in the field of private law.

Would this attempt to permeate the entire legal system with the ideals of legal positivism be more successful than the previous attempt to permeate it with Natural Law? The Rule of Law for which the Revolution of 1848 strove represented another attempt to realize the ideal of the universality of law. But the effort was fruitless against the vitality of the feudal-bureaucratic groups which thought in political rather than in legal terms.

D. The Rechtsstaat

The vigour of these political forces was amply demonstrated by the resistance they offered to the liberal democratic forces after the delay of the feudal forces and the defeat of absolutism. It is especially revealing that, during the conflict between Bismarck and the liberal opposition in the 'sixties, the groups demanding the rule of law and parliamentary system of government never succeeded in dominating the entire structure of the state. By retaining unlimited control of the military, the crown pre-

served the nucleus of political power. Thus, in constitutional monarchy, the control of military and foreign affairs and the power to declare martial law remained 'Prerogatives of the Crown' independent of and separate from parliamentary constitutionalism and the Rule of Law.

While to the free trade liberals of the 'sixties the political prerogatives of the Crown appeared as vestiges of a bygone age, the protectionist National Liberals of the Wilhelmian era strove to strengthen the political and military power of the monarch.

At the beginning of the first world war Emil Lederer[470] already clearly saw that, within the dualistic Bismarckian state, the monarchical power was greater than that of the parliamentary Rule of Law. In discussing the martial law of the first years of the war, Lederer stated the proposition that the modern state has a dual nature. Lederer understood that the armed forces which were then in charge of the administration of martial law were not affected by the constitution and that for the modern power state (*Machtstaat*), the constitution does not exist. 'The last trace of Natural Law was erased.'[471] The military forces demonstrated their absolute independence of the civil government and emerged victorious whenever there was a conflict between the army command and the civil government. To our knowledge, Lederer's article was the first to depict the co-existence of the Normative State and the Prerogative State. Lederer's statement of 1915 to the effect that these conflicts were really clashes between two types of state was borne out in 1917, when the majority of the Reichstag crossed swords with the *Vaterlandspartei*. The foes of parliamentarism and democracy were represented both by monarchical aristocratic groups and by imperialistic sections of the upper bourgeoisie (Grand-Admiral Tirpitz was their most important leader.) Both groups wanted to bring the dual nature of the state to an end. Indeed, it seemed to have been definitely overcome when the Reich became a parliamentary republic after the revolution of November 1918. The independence of the military prerogative was abolished. The previous victory of the conservative forces seemed to have been reversed.

The Weimar Republic aimed at organizing and regulating the

totality of political activity within a framework of norms. Yet, one of the fatal illusions of the authors of the Weimar Constitution was the belief that the elimination of monarchical power meant the reduction to impotence of those groups which by propagating the idea of the *Machtstaat* (power state) sought only the aggrandizement of their own power. The case of the *Vaterlandspartei* should have furnished an adequate demonstration to the representatives of German democracy that the specifically political functions of the state were no longer an attribute of the Crown and that the Crown had become a façade hiding the real intentions of these power-oriented groups. The revolution of 1918 had permanently terminated the formal dual nature of the structure of the state, but the political influence of those imperialist, plutocratic, and protectionist circles which had been the proponents of *Machtpolitik* since Bismarck's time was not terminated.

The history of the Weimar Republic should serve as evidence that the constitutionally recognized political power of the monarchy was less dangerous to the existence of the Rule of Law than the legal negation of any specific political power whatsoever, as pronounced in the Weimar Constitution. The real political power, in its monarchical disguise, was legitimized by traditions which provided the justification of the monarchy itself. The traditional legitimation of the exercise of power limits not only the source of power but also its scope. When these traditionally legitimized bearers of power had been swept from the stage, groups which were primarily oriented towards power had to choose between the following alternatives: Either (a) to establish *praeter legem* a political power outside the legal order and to revise the constitution with the aim of establishing the authoritarian *Machtstaat,* or (b) to substitute *contra legem* a dictatorial state for the rational constitution of the *Rechtsstaat.* This dictatorship would have to be detached from the traditionalist limits of the monarchy and from the rational limits of the republic.

The attempt to make an authoritarian power-oriented revision of the Weimar Constitution was actually undertaken during Brüning's government. With the juxtaposition of the extraordin-

ary presidential powers (permitted under Art. 48 of the Constitution) and the maintenance of a considerable part of the Rule of Law, there reappeared for a time the familiar picture of the dualistic state but the failure of the Brüning experiment paved the way for the complete annulment of the decision of 1918.

It was no accident that the National-Socialist Party was formed originally from a section of the *Vaterlandspartei*[472] nor is it less significant that the Third Reich endeavors to link itself directly to the Bismarckian era while trying to expunge the intervening fourteen years (1919-33) from German history. In a deeper historical sense, the National-Socialist Party is the continuation of the *Vaterlandspartei*. The latter had been founded by the plutocratic proponents of the power state in order to supplement the military and the economic with political mobilization. The National-Socialist Party, as the agent of political mobilization, has undertaken an economic mobilization (Four Year Plan) which in its turn has served as the indispensable basis of military mobilization.

Hitler's prototypes in German history are Friedrich Wilhelm, the Great Elector, and Hardenberg. Adolf Hitler not only restored the achievement of the Great Elector (*miles perpetuus*) and that of Hardenberg (military conscription); Adolf Hitler's achievement is total mobilization. Like the Great Elector and Hardenberg, he is the creator of a new form of absolutism. Monarchical and bureaucratic absolutism are followed by dictatorial absolutism.

We have indicated the groups which made the compromises which resulted in monarchical and bureaucratic absolutism — in the *miles perpetuus* and in the revival of universal military service. It is now our task to determine which social groups are entered into the formation of the present-day German Dual State.