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]

B. The State Police

Outstanding among the executive branches of the absolute dictatorship is the Secret State Police (*Gestapo*). This body has always been and still is organized in accordance with state law. In Prussia, the functions of the *Gestapo* are regulated by three statutes. The Office of the Secret Police was established in April 1933. The Secret State Police was transformed into a special police force in November 1933. The general powers of the *Gestapo* were finally defined by the Prussian statute of February 10, 1936, which revoked the earlier statutes.[14]

Section 7 of the law of February 10, 1936, besides correcting a printing error (which will be discussed below), and announcing some organizational regulations, contains a provision of substantive law concerning the examination by administrative courts of decrees in matters relating to the *Gestapo.*

Following the Prussian example, the other German states enacted statutes building up Secret State Police systems. In some German states, where the jurisdiction of the administrative courts is regulated by a general clause, every decree issued by an administrative authority was made subject to review by administrative courts. In other states, the courts review the act if the situation is enumerated in the statute regulating the jurisdiction of the administrative courts. Prussia, in the pre-Hitler-period, adhered to the latter method, but required review of police orders in so far as they were explicitly enumerated in the relevant statute. The extent to which changes have occurred in the principles governing the acts of the *Gestapo* in Prussia and other states will be examined below.[15]

3. THE ABOLITION OF THE RULE OF LAW

A. Historical Introduction

Since February 28, 1933, Germany has been under martial law. Martial law as such does not necessarily clash with the rule of civil law. Martial law, as it has developed in the constitutional his-

tory of the nineteenth and early twentieth centuries, supplements the Rule of Law. At times when the Rule of Law is endangered or disturbed, martial law is invoked to restore the constitutional order necessary for the existence of the Rule of Law. If we consider the situation which led to the proclamation of a state of martial law as a negation of the Rule of Law, it can be stated that a constitutional martial law situation is a 'negation of a negation,' whose purpose is the restoration of the (positive) rule of law.

The constitutional invocation of the martial law requires that (1) the civil rule of law be threatened or infringed; (2) martial law be declared with the intention of restoring the Rule of Law at the earliest possible date, and (3) martial law remain in force only until the Rule of Law is restored.

The National-Socialist *coup d'état* consisted in the fact that the National-Socialists, as the dominant party in the government, (1) did not prevent but rather caused the infringement of the Rule of Law, (2) abused the state of martial law which they had fraudulently promoted in order to abolish the Constitution, and (3) now maintain a state of martial law despite their assurances that Germany, in the midst of a world corrupt with inner strife, is an 'island of peace.' On the 'island of peace' there is a continuous state of martial law. This method was not invented by the Nazis; such tendencies have frequently appeared in modern history. More than thirty years ago, Figgis characterized such methods as Machiavellian:

> Every nation would allow that there are emergencies in which it is the right and the duty of a government to proclaim a state of siege and authorize the suppression of the common rules of remedy by the rapid methods of martial law. Now what Machiavelli did, or what his followers have been doing ever since, is to elevate this principle into the normal rule for statesmen's actions. When his books are made into a system they must result in a perpetual suspension of the Habeas Corpus Acts of the whole human race. It is not the removal of restraints under extraordinary emergencies that is the fallacy of Machiavelli, it is the erection of this removal into an ordinary and everyday rule of action.[16]

But not only in political theory but also in practical life these

methods were utilized. In 1633 (three hundred years before the Reichstag fire), Wallenstein realized that martial law was a particularly useful instrument for the suspension and also for the abolition of the existing legal order.

Carl Schmitt, not without approbation, quotes the following passage of a letter of Wallenstein: 'I hope with all my heart that the gentry will be difficult, since this would cause them the loss of all their privileges.'[17] As early as 1921 Carl Schmitt pointed out the parallel between the privileges of the gentry and the Bill of Rights enjoyed by citizens living under the civil Rule of Law.

It is interesting that in the early seventeenth century, contemporaneous with Wallenstein, an attempt was made in England to create the impression of an emergency in order to provide a legitimate excuse of absolute tyranny. While Parliament was suspended, Charles I tried to raise ship money by asserting that peace was threatened by 'certain thieves, pirates, and robbers of the sea, as well as Turks, enemies of the Christian name….' (First ship money writ, 1634[18])

His success, however, was short lived and the claim made by Charles I to override the law on a 'fancied emergency' was defeated in the revolution.[19] The Anglo-Saxon world has since then been wary of 'fancied emergencies.'[20]

The absence of a similar tradition in Germany has had the most weighty consequences for its constitutional history. For a short period, during the March Revolution of 1848 and the reaction following it, there was a certain wariness of the dangers connected with the abuse of martial law. Mittermaier, the most famous liberal German jurist of this period, said: 'A revolt, caused, favored, or provoked by a ruse of the government party itself may easily serve it as a pretext for suspension of the law. An exaggerated fear, which sees the threatening specter of anarchy everywhere, may induce the political party (possibly in good faith) to suppress the alleged rebellion by emergency decree.'[21]

Consequently, in view of this danger, he says that 'we must never use emergency laws as a pretext in order to continue violence beyond the immediate need of warding off a threatened attack.'[22] The experience of the unsuccessful revolution of 1848

caused Mittermaier to be apprehensive of the political dangers of martial law. A Bavarian legal scholar of this period, Ruthardt, painted a vivid picture of the condition characteristic of a state of martial law. He explains that 'war is regulated and restrained by war itself; but when it is over, when the *Te Deum laudamus* is mixed with *Vae victis,* when revenge and hatred are let loose, all laws are suspended or the victor uses them for his own purposes.'[23]

Attempts to use a temporary emergency as a stepping-stone to the establishment of an absolute dictatorship had been made in Germany long before 1933 and were foreseen by Max Weber even as early as in the Hohenzollern epoch.[24]

Even National-Socialists occasionally admit that the Reichstag fire came at an opportune time and that the ensuing temporary dictatorship was a welcome occasion for the abolition of the civil Rule of Law. The mouthpieces of National-Socialism themselves state that the threat of Communism was merely the excuse for the breaking of the old laws. Hamel, a Nazi expert in police law and Professor of Constitutional Law at the University of Cologne, says that 'the fight against Communism merely gave the National-Socialist state the opportunity to break down barriers which now must be regarded as senseless.'[25] The same attitude is expressed in Hamel's statement that protective custody is not merely incidental to the revolution, disappearing upon the return to normal conditions or being absorbed by the general penal law.[26] The fiction that protective custody is a necessary means of dealing with the enemies of the state long since has been abandoned. It is now recognized to be what it actually was in the beginning, a means of preserving the absolute power of the National-Socialist Party, i.e., of establishing an absolute dictatorship. As this author writes: 'If the education, the formation of a nationalistic point of view is the proper task of the state, the means of education and especially the most effective means, arrest, must be at the disposal of the police.'[27] Therefore it is not surprising for Hamel to assert that 'protective custody is a feature of a truly political state which is purged of all traces of liberalism.'[28] From such statements we may conclude that the concentration camp is not only an essen-

tial component in the functioning of the National-Socialist state, but also an indication of the enduring character of the sovereign National-Socialist dictatorship.

An even more frank expression is to be found in the decision of a special court in Hamburg. While discussing Art. 48 (the dictatorial article of the Weimar Constitution) which is found satisfactory to National-Socialism, the court pointed out that 'the destruction of this constitution has been one of the outstanding goals of National-Socialism for many years. It is only natural, that, when finally victorious, it has used its power to overthrow that constitution.'[29]

The ideal type of all *coups d'état* attempting to establish a Caesaristic, formal plebiscitarian dictatorship, is to be found in *The Eighteenth Brumaire of Louis Napoleon* (December 2, 1851). In this book Karl Marx made a classic formulation of the procedure used by this type of dictatorship when he said that Bonaparte, 'while seeming to identify his own person with the cause of order, rather identifies the cause of order with his own person.'[30]

The legend of the legal revolution is built around Adolf Hitler's identification of his person with public 'order'; the history of the illegal *coup d'état* is characterized by the identification of 'order' with Hitler's person. This attempt to veil the true character of the martial law dictatorship by legalistic tricks was brought about by the means of plebiscitary democracy. 'The cloak of plebiscitary democracy is, however, very broad and covers a great deal,'[31] as Carl Schmitt said in 1932. It covers the Prerogative State as well as the Normative State, and only intensive investigation can uncover the real forms which are hidden beneath it.[32]

The consequences in the Prerogative State of identifying 'order' with the person of Adolf Hitler will be studied from the official documents of the Third Reich. We shall take particular note of the German administrative, civil, and criminal court decisions bearing on problems of the Prerogative State. In the Third Reich there are no decisions on constitutional questions as such. The courts touch on them only in so far as their discussion is necessary, to enable them to deal with other problems. Nevertheless the deci-

sions furnish a fairly comprehensive picture of the 'constitutional law' of the Third Reich.

B. The Dissolution of the Rule of Law as Reflected in the Decisions of the Courts

1. The Abolition of Constitutional Restraints

During the first years of the National-Socialist regime, the decisions of the courts revealed many attempts to preserve at least theoretically the supremacy of law in the Third Reich. This is indicated, for instance, by the endeavor of the Supreme Court (*Reichsgericht*), to consider the Reichstag Fire Decree (*Brand-Verordnung*) as effective for only a limited time.

A decision of October 22, 1934, considered expropriation proceedings. This involved discussing whether the protection of property, as guaranteed by Art. 153 of the Weimar Constitution, was affected by the Decree of February 28, 1933. It was held that '§ 1 of the decree suspended the constitutional guarantee of property (Art. 153 of the Weimar Constitution) until further notice … since the relevant section of the decree clearly declares the suspension of Art. 153 with the limitation that the new regulation be valid only until further notice be given.'[33]

It was this emphasis on the temporary character of the decree that aroused the critical comment of Professor Huber, the occupant of the Chair of Constitutional Law at the University of Kiel. Professor Huber declares that 'contemporary legislation has used the formal procedures of the Weimar Constitution for reasons of public order and safety (legality), but this does not mean that this legislation is based on the substance of the Weimar Constitution or that it derives its legitimacy therefrom.'[34]

Of greater importance is the question whether the Reichstag Fire Decree, which is based on Art. 48 of the Weimar Constitution, suspends those basic rights which this very Constitution declares inviolable and not to be suspended by emergency measures under Art. 48.

This problem became rather acute in connection with the dissolution of the German branch of Jehovah's Witnesses, *Ernste Bibelforscher* as they are called in Germany. This dissolution was justified by the Decree of February 28, 1933. Jehovah's Witnesses based their claim on Art. 137 of the Weimar Constitution, which guaranteed freedom of worship and belief, and they pointed out that the right guaranteed in Art. 137 is one of the fundamental rights which could not be suspended under Art. 48 of the Weimar Constitution. Their contention was sustained, and they were acquitted by the Special Court of Darmstadt.[35] This decision, however, represents a rather isolated phenomenon. The courts have sought to circumvent this constitutional restriction by a great variety of arguments. In a decision of the District Court of Dresden, the court interpreted the decree of the Minister of the Interior, which dissolved the association of Jehovah's Witnesses, as a constitutional amendment voiding Art. 137 of the Constitution. According to the view of the court, 'the Constitution is amendable by administrative decrees and similar measures.'[36] Thus, in the decision of the Dresden Court, the prohibition of the Police Minister (based on the Emergency Decree) was interpreted as a legislative action based on the Enabling Law.

Although the *Reichsgericht,* in a decision of September 24, 1935, accepted the validity of Art. 137, it did not interpret it as including the unrestricted freedom of religious association. 'Granted the validity of Art. 137,' said the court, 'its correct application does not prevent the suppression of a religious association if the activities of that association are incompatible with public order.'[37] This decision puts even the so-called fundamental rights at the disposition of the police power. Religious freedom is thereby reduced to the category of rights dependent on the discretion of the authorities.

This decision of September 24, 1935 still has recognized certain fundamental rights. But in a later case, both the *Reichsgericht* and the Prussian Supreme Administrative Court(*Oberverwaltungsgericht*) went a step further in their curtailment of fundamental rights.[38] They abolished the right of the civil servant to examine his official records. The court held: 'Art. 129, section 3, sentence

3 of the Weimar Constitution entitles the civil servant to examine his official record. This provision is in contradiction to the National-Socialist conception of the relationship between civil servant and state, and, without special legislation, is therefore no longer in force. The leadership principle does not admit the questioning and criticism of the rulings of his superiors by the civil servant.'[39] Thus, we can safely state that constitutional restraints on the sovereign dictatorship have been disregarded.

2. *The Abolition of other Legal Restraints*

In their enforcement of the Decree of February 28, 1933, the police are neither bound by the provisions of the Constitution nor by any other law. The Prussian Supreme Court (*Kammergericht*) in a decision of May 31, 1935, held that 'the Prussian Executive Decree (*Durchführungsverordnung*) of March 3, 1933,[40] leaves no doubt that Par. 1 of the Decree of February 28, 1933, … removes all federal and state restraints on the power of the police to whatever extent is required for the execution of the aims promulgated in the decree. The question of appropriateness and necessity is not subject to appeal.'[41] We shall show that this decision of the Prussian Supreme Court (*Kammergericht*) foreshadowed the conclusion at which the majority of the courts arrived only after long and involved developments.

A reluctance to acknowledge a legally unrestrained police as a consequence of dictatorship was evinced by the Supreme Labor Court (*Reichsarbeitsgericht*). Creating the conception of 'self-defense of the state,' it dismissed the action of an employee of the Soviet Trade Delegation who had been discharged by a commissar appointed by the police. The court recognized the commissar's right to discharge employees with the following rationalization:

> It is doubtful whether the police power under normal condition entitles the Prussian Minister of the Interior to endow a State Commissar with such broad powers. However, even if the appointment could not be upheld under the Decree of February

> 28, 1933, it might be justified with reference to the necessities of the self-defense of the state…. In the first half of the year of 1933 the situation of the National-Socialist state could not be regarded as secure. As long as the Communist threat lasted, the state of insecurity continued and necessitated the extension of police powers beyond their regular limits.[42]

It is not accidental that the court uses the past tense in its justification of the law of the self-defense of the state. It seems to have desired to indicate that the emergency had ended by the time this decision was rendered, thus reopening the period of normal conditions. In like manner the decision of the *Reichsgericht* had opened the way for the re-establishment of the rule of the law (see p. 14).

This trend, however, did not persist. It had originated with the assumption of the preamble of the February 28, 1933, Decree, that the sole motive of the law was the overthrowing of Communism. Hamel declares this interpretation of the Decree of February 28, 1933, to be erroneous. 'It would be a mistake,' he writes, 'to assume that the authorities are freed of liberal fetters only in their fight against Communism. Liberal restraints are not just suspended by the laws for the fighting of Communism; they are abolished without reservation.'[43] This view has been followed by a great number of the higher courts. The Special Court of Hamburg (*Sondergericht*), in a decision regarding Jehovah's Witnesses, holds that the decree was issued after the Reichstag fire in a major emergency and with great haste and that it was 'directed against dangers threatening the state not only from Communist but from any other sources as well.'[44] The theory, however, that the special mention of the Communists is an editorial error cannot be reasonably upheld.

To justify its application to churches, sects, anti-vaccinationists and Boy Scouts, the Prussian Supreme Court (*Kammergericht*) created the theory of the indirect Communist danger. A decision of December 8, 1935, of the criminal division of the Prussian Supreme Court reversed a decision of the Municipal Court of Hagen (Westfalen) and acquitted the defendants who were members of a Catholic youth organization. The defendants had participated in hiking trips and athletic contests. The complaint stated

that by so doing they had violated an ordinance issued by the District President (*Regierungspräsident*) which was based on the Decree of February 28, 1933. The decision declared that the goal of National-Socialism was the realization of the ideal 'ethnic community' (*Volksgemeinschaft*) and the elimination of all conflicts and tensions. For that reason, manifestations of religious differences, aside from church activities in the narrowest sense, met with the disapproval of National-Socialism, or, in the words of the *Kammergericht*: 'This type of accentuation of existing cleavages bears in itself the germ of the disintegration of the German people. Such disruption will only aid the spread of Communist aims.'[45]

The fact that the defendants were directly opposed to 'Atheistic Communism' did not safeguard them from punishment for 'indirect Communist activities,' because according to the court 'the public expression of a private opinion will all too easily serve only to encourage persons who believe in or who sympathize with Communism or who are politically undecided. This encouragement will lead such persons to form and diffuse the opinion that the National-Socialist state is not supported by the entirety of the people.'[46] This theory of the indirect war on Communism permits the extirpation of any movement which in the slightest sense can be construed as supporting Communism.

In a decision of March 5, 1935, the Prussian Supreme Court (*Kammergericht*) reversed a decision of the lower court and condemned a minister of the Confessional Church for violating an ordinance (issued by the chief of police) prohibiting 'demagogic polemics in the church conflict' (the Confessional Church is the part of the Protestant Church which stands—at least in religious questions—in opposition to the regime). This ordinance was based on the Reichstag Fire Decree. The minister had distributed to the parents of his Sunday School students a letter criticizing the 'German Christians' (the section of the official Protestant Church which sympathizes with National-Socialism). In deciding this case, a connection between the church struggle existing inside the Church between both these groups and Communistic violence was established as follows:

> It is sufficient for the application of the decree that an indirect danger to the state is created by an expression of disaffection with the new order. Such disaffection provides fertile soil for the reemergence of Communist activities.[47]

The participation of National-Socialism in the church struggle and the abuse of the anti-Communist decree for the persecution of the Confessional Church was justified by the contention that 'such criticism naturally provokes dissatisfaction … especially since the inimical attitude of Communism towards the church might acquire new hope and strength from this situation.'[48]

It is not surprising that the theory of the indirect war on Communism has been used as the basis for a prohibition of the anti-vaccinationists, as was expressly recognized by a decision of the *Reichsgericht* of August 6, 1936.[49] Here again there is a historical parallel mentioned by Carl Schmitt in his discussion of Wallenstein's legal position: 'The right of expropriation is allowed only against rebels and enemies. But in every revolution it has been the rule to brand political opponents as enemies of the fatherland and so to justify completely depriving them of legal protection and property.'[50] The courts have since adopted this theory with little hesitation.

The Administrative Court of Württemberg, in a decision of September 9, 1936, dealing with the *Innere Mission* (Missionary Work of the Protestant Church), dropped all pretence of a connection between police actions (based on the Reichstag Fire Decree) and the anti-Communist campaign. It bluntly declared that 'the decree was not intended exclusively as a protection from the threat of Communism but from any danger to public safety and order regardless of its source.'[51] This decision emphasized a legal condition which had already been foreshadowed by the District Court of Berlin when, on November 1, 1933, this court declared in a decision, unique at that time, that 'all attacks upon public safety and order are to be regarded as Communistic in a broader sense.'[52]

No discrimination was made among the various opponents of National-Socialism. They were all labelled as Communists. Martial law was applied equally against all opponents of the present

regime. Through the application of martial law, the National-Socialists obtained a monopoly of power and have maintained it through continuous use.

3. *The Abolition of Restraints on the Police Power*

The wider application of the Decree of February 28, 1933, to include all non-National-Socialists can only be explained if it is assumed that 'the preamble of the decree expresses only its motive and not its substance.'[53] Whether the police authorities may act upon the decree only as a defensive measure or in all cases which they decide within its scope also depends upon the interpretation of the preamble.

The crucial question is whether the usual limitation of the police power should be observed in the application of the Reichstag Fire Decree.[54] At first the Prussian Supreme Administrative Court (*Oberverwaltungsgericht*) attempted to uphold these restraints on dictatorial power. In consistency with its past traditions, the court declared on January 10, 1935, that 'the Decree of February 28, 1933, did not extend the police power beyond its fundamental scope…. A police order exceeding these limits, unless based on an explicit law, violates § 1 of the Prussian Police Administrative Law (*Polizeiverwaltungsgesetz*) which has thus far been valid. Such a police order would therefore be void.'[55] Had this opinion been followed in later decisions the use of state terrorism to accomplish the *Gleichschaltung* of the whole of German society would have been impossible. Accordingly, it is not very surprising that on March 3, 1933, a Prussian ministerial order declared: 'The police are permitted to exceed the restrictions of their power specified in § 14 and § 41 of the Prussian Police Administrative Law.'[56] This was the beginning of a crucial conflict between the executive power and the judiciary.

Although the *Reichsgericht* supported the Supreme Administrative Court,[57] the *Gestapo* disregarded its decisions. A leading official of the *Gestapo, Ministerialrat* Eickhoff, characterized the

Gestapo as a 'general staff, responsible for the defense measures as well as the equally necessary offensive measures against all the enemies of the state.'[58]

Before showing how further developments in this matter culminated in a victory for the police, we must return to the decision of the Württemberg Administrative Court of September 9, 1936. A private association devoted to the care of children applied for a modification of its charter by a transfer of its property to the *Innere Mission*. The County Magistrate (*Landrat*) objected to this, arguing that the property should go to the National-Socialist Welfare Organization (NSV) which 'bestows its charities on all citizens equally'.[59] Objections were filed against this decision but they were overruled by the Ministry of the Interior in Württemberg on grounds drawn from § 1 of the Decree of February 28, 1933. The association then appealed to the Administrative Court, arguing that 'the proposed change in the charter cannot be considered a danger to the state nor can it be claimed that the application of the decree would constitute an action in self-defense of the state. The decision of the County Magistrate was motivated not by the intention to defend the state from a threatened attack but by the desire to expropriate the association.'[60] The complaint of the child welfare association was dismissed. The association was said to have erred in its interpretation of the law, having conceived the aim and scope of the Decree of February 28, 1933, too narrowly. The decision reads: 'The protection of public order and safety carries with it the preservation of the wealth of the ethnic community. If the decree had been framed with the intention of allowing not general but only specified infringements on the restraints which have been previously in effect, such would have been expressly stated in § 1 of the decree.'[61]

It was indeed unmistakably stated in the preamble. It would be wrong to suppose that the National-Socialist legal doctrine generally pays no attention to the preamble of statutes. Whether it heeds them depends on 'the nature of the individual case.' In interpreting the 'constitutional' document of the Third Reich (the Decree of February 28, 1933), the introductory phrases are ignored. Nevertheless when other governments use similar methods,

National-Socialist writers vehemently express their contempt.

Thus Swoboda, the National-Socialist Professor of Law at the German University of Prague, assails this method of interpretation but only with regard to the Czecho-Slovak Constitution. After he stated that during the 20 years of the Czecho-Slovakian Republic, the dominant attitude of pure positivism had prevailed and that during that time the preambles to statutes were considered mere rhetoric he emphasized: 'This, in the eyes of the National-Socialists, branded both the constitution and its interpretation as insincere and dishonest. National-Socialism, of course, is alien to so irresponsible a method.'[62]

But the National-Socialist authorities not only disregard the preamble of the Decree of February 28, 1933; they also interpret the decree directly opposed to its significance. The decision of the Administrative Court of Wurttemberg indicates that a fundamental shift in the setting of the problem has occurred. The Decree of February 28, 1933, broadly interpreted, took cognizance of the problems involved in the relationship between individual and state. With the increasing mingling of party and state functions, the conflict between individual liberty and state coercion yielded its pre-eminent position to the problem of the relationship between corporate competition and party monopoly. In order to obtain spoils for party organizations and party finances the National-Socialist Party has, through the use of the Prerogative State, managed to abolish competing organizations.

A decision of the Administrative Court of Baden shows that even the pretense of concealing this tendency has ceased. In a small town in Baden, a conflict had arisen between the Protestant women's organization and the local Red Cross organization, which was under National-Socialist leadership. Apparently, personal quarrels lay at the bottom of the feud. This quarrel became to a degree historically significant when the government tried to deprive the religious organization of its function of caring for the ill, a privilege regarded by the church as its own for almost two thousand years. The police solved the problem by banning the religious association on the basis of the Decree of February 28, 1933, and the court affirmed the action of the police.[63]

No attempt was made to establish a connection between the dissolution of the nursing association and the anti-Communist decree. The National-Socialist antagonism toward competing organizations is clearly evident in the decision. The court asserts that 'it is demonstrated that an association founded under the pretense of church interests was visibly injuring the local unit of the Red Cross.'[64] Therefore the court decided that this fact in itself was sufficient grounds for the prohibition.

'Since the Minister of the Interior declares that the admitted competition between the two organizations is a disadvantage to important concerns of the state … it is not within the domain of the court to refuse to acknowledge the decision of the political leadership.'[65] These decisions have, at least in the cases of Württemberg and Baden, abolished all traditional restrictions on the police power.

If free access to the courts had still been permitted in Germany, the child welfare and the nursing associations might have been able to appeal the decision on grounds of an arbitrary application of justice. If the legal literature on this question is indicative of judicial opinion, however, it is doubtful whether such a hearing could have been obtained.[66]

When the restrictions on the police power were abolished, the question of 'indispensability' fell into discard. The police need no longer show that any action undertaken by them is indispensable to the attainment of their purpose. Only when we view the discontinuance of the 'indispensability' clause as a consequence of the dissolution of the Police Law can we appreciate the significance of the decision of the Appellate Court (*Oberlandesgericht*) of Braunschweig of May 29, 1935. In that case the closing of a publishing house belonging to the *Wachtturm* Bible Tract Society was justified by the consideration that 'as a defense measure against Communist violence which endangers the state it may be expedient to prohibit associations the officers of which may even unintentionally provide shelter for Communist sympathizers.'[67] The decision states nothing as to whether the police should have first asked the officials of the sect for the expulsion of 'Communist sympathizers.' The police are accorded complete discretionary power

in all questions involving the harboring of Communists. Their actions are not subject to the control of the courts.

4. The Abolition of Judicial Review

a. Introductory Remarks.

Before we discuss the right of the courts to review the acts of the police, a few introductory remarks are pertinent. Legal review of acts of the police is possible only if legal norms exist which the police must respect. This is only true, however, as long as the normal legal order prevails. In the German legal system, as well as in the Anglo-American, the opposite is true under martial law. The derivation of the Prerogative State from martial law should facilitate an understanding of the co-existence of legal order and lawlessness to the Anglo-Saxon reader. The state of 'siege' is unknown to English law as a legal institution in it. Martial law is a type of self-defense of the state against disturbances of the public peace. In case of actual war (the existence of which has to be determined by the courts), the acts of martial law, which are to be regarded as self-defense, are outside the jurisdiction of the legal system. According to a statement of Chief Justice Cockburn, 'Martial law, when applied to the civilian, is no law at all, but a shadowy, uncertain, precarious something depending entirely on the conscience, or rather, on the despotic and arbitrary rule of those who administer it.'[68] The Prerogative State is thus defined as a continuous siege. Since martial law is a part of every constitution, the extent to which it is subject to control is decisive.

American law also emphasizes the proposition that the activity of the state under conditions of martial law is not legal activity in the proper sense, as Field said in *ex parte* Milligan:

> People imagine, when they hear the expression 'martial law', that there is a system of law known by that name, which can upon occasion be substituted for the ordinary system; and there is a prevalent notion that under certain circumstances a military commander may, by issuing a proclamation, displace one system, the civil law, and substitute another, the martial…. Let us call the thing by its right name; it is not martial law, but martial rule.[69]

In recognizing that a state of permanent martial rule obtains in

Germany today, it must also be appreciated that the opposite of the legal order of the rule of law is the lawlessness and arbitrariness of the Prerogative State.

Martial law, according to Carl Schmitt, 'is characterized by its practically unlimited authority, i.e., the suspension of the entire hitherto prevailing legal order. It is characterized by the fact that the state continues to exist while the legal order is inoperative. This situation cannot be branded as anarchy or chaos. An order in the juristic sense still exists even though it is not a legal order. This existence of the state is accorded priority over the continued application of legal norms. The decisions of the state are freed from normative restrictions. The state becomes absolute in the literal sense of the word. In an emergency situation the state suspends the existing legal system in response to the so-called "higher law of self-preservation"'.[70]

Schmitt's theory has been adopted by the *Gestapo*. Dr. Best, legal adviser to the *Gestapo* writes:

> The task of combatting all movements dangerous to the state implies the power of using all necessary means, provided they are not in conflict with the law. Such conflicts with the law, however, are no longer possible since all restrictions have been removed following the Decree of February 28, 1933, and the triumph of National-Socialist legal and political theory.[71]

These open statements of the most prominent authors of National-Socialist constitutional theory find their expression in the decisions of the courts only in connection with the problems of judicial review. Thus the question whether the decrees of the dictatorial power are subject to judicial review illustrates again how a question of substantive law may be concealed behind procedural issues.

b. Review by Administrative Courts.

The Prussian Supreme Administrative Court (*Oberverwaltungsgericht*) was at one time of the opinion that even in the Third Reich dictatorial measures were subject to judicial review. Thus, in a decision of October 25, 1934, this court claimed the unqualified right of judicial review on the ground that 'the fact that the decree was within

the sphere of authority of the so-called "political police," does not deprive the affected persons of the right of appeal."[72] But by May 2, 1935, the court retreated from this stand.[73] The second law regarding the jurisdiction of the *Gestapo* (*Gesetz über die Geheime Staatspolizei,* November 30, 1933)[74] offered an occasion to differentiate between acts of the state police and acts of the ordinary police. The court argued that the State Police (*Stapo*) and the *Gestapo* were a *special* police and that no particular law providing for the judicial review of its actions existed. For this reason, the Supreme Administrative Court (*Oberverwaltungsgericht*) on the basis of the principle of enumerated powers, denied the right of judicial review. Acts of the ordinary police, however, even when performed in the service of the *Gestapo,* remained subject to judicial review.[75]

On March 19, 1936, a case came before the Prussian Supreme Administrative Court (*Oberverwaltungsgericht*) concerning the legality of the expulsion of a missionary from a certain district. The expulsion order was issued by a district magistrate and was justified by a reference to the church conflict. This involved the general question whether the police were justified in compelling people to leave their residences. A short time previously, the Prussian Supreme Administrative Court (*Oberverwaltungsgericht*) had passed on the validity of the order of the District President of Sigmaringen to expel German subjects of foreign race (in this case gypsies) from a certain district. The court held that 'the police may not expel members of the German Reich from their permanent or temporary residence for reasons other than those specifically enumerated in the Law Regulating the Right of Movement (*Freizügigkeitsgesetz*).[76] The police order requiring the plaintiff to leave the municipality of St. is declared void.'[77]

According to general administrative law, the steps taken against the missionary would have been pronounced invalid. The police are not empowered to issue orders which are clearly forbidden by law. Nevertheless the missionary's appeal was dismissed on the grounds that the law of February 10, 1936, concerning the *Gestapo* (*Gesetz über die Geheime Staatspolizei*),[78] which had meanwhile been passed, prohibited a review. The Supreme Administra-

tive Court of Prussia (*Oberverwaltungsgericht*) refused to review the case because the magistrate had acted within 'the sphere of authority allotted to the Secret Police.'[79] § 7 of the Law of February 10, 1936, stated that orders *and* affairs within the jurisdiction of the *Gestapo* are not subject to the review of the Administrative Courts. A 'printer's error'[80] had turned the 'and' into an 'in.' Since the magistrate's order for the expulsion of the missionary was, in the opinion of the Supreme Administrative Court, an order which 'was obviously intended to contribute to the foreign and domestic security of the State,'[81] it treated the police measure of the magistrate as an order 'in' affairs within the jurisdiction of the *Gestapo.*

The *Völkische Beobachter* (March 1, 1936) had violently assaulted the 'reactionary' attitude of the Prussian Supreme Administrative Court and the latter finally capitulated on March 19, 1936, in the foregoing case of the missionary. The last vestige of the Rule of Law in Germany was abolished by exploiting a printer's error. This is typical of the cynical contempt for law which prevails among the power-intoxicated clique now dominating Germany. By refusing to dismiss an absolutely illegal police order, the Supreme Administrative Court gave the police a blank check for the performance of every type of illegal action.[82]

The Supreme Administrative Court left itself a loophole by saying that it was not of decisive importance whether the order was outside the sphere of the *Gestapo* or apparently within it, though not substantially so. In a decision of November 10, 1938, the Prussian Supreme Administrative Court (*Oberverwaltungsgericht*) clarified the principles of judicial review. The theory that orders of the *Gestapo* are not subject to review is interpreted in such a way that the following acts are exempt from state administrative review: (1) all direct acts of the *Gestapo;* (2) all acts of the ordinary police pursuant upon *special* orders of the *Gestapo*; (3) all acts of the ordinary police pursuant upon *general* orders of the *Gestapo;* (4) all acts of the ordinary police which fall within the jurisdiction of the *Gestapo.* Review is limited to those instances when, in cases 2 and 3, the ordinary police have transcended the orders of the *Gestapo,* and in case 4, when the

ordinary police took the prerogative of the *Gestapo*.[83] The significance of the decision cited above lies in the acknowledgment of the *Gestapo's* power to transfer entire spheres of life from the jurisdiction of the Normative State to the Prerogative State (case 3). If, as in the above decision, the *Gestapo* decide that the promoting of sharpshooting lies in the province of the 'German Defense Association,' the owner of a shooting gallery has no resort against the banning of a rifle match, even if the ban was the result of 'personal antagonism between him and the shooting association.'[84]

The use of the Decree of February 28, 1933, (which was intended to suppress political opposition) as a decree for dealing with competing organizations that threaten to infringe on monopolies is characteristic of recent developments. How this distinction between 'political' and 'non-political' cases works in practice may be illustrated by the fact that the courts cannot interfere with the confiscation of a papal encyclical, whereas the seizure of 'six dream books, two sets of fortune-teller cards and two copies of an astrological periodical entitled *Kosmisches Tagebuch der Gesellschaft für astrologische Propaganda* may give rise to administrative proceeding,'[85] because obviously these are not of political significance.

With the decision of March 19, 1936, when it refused to uphold its autonomy in political cases, the Prussian Administrative Court passed into the ranks of those who had previously denounced it.[86]

c. Review in Civil Procedure.

The law of February 10, 1936,[87] placed actions of the *Gestapo* outside the reviewing authority of the administrative courts. Does the law apply equally to ordinary courts? A certain attorney brought suit for damages caused by disbarment following unjustified suspicions that he had been engaged in Communist activities.[88] It was held that the *Reichsgericht* could not re-examine 'decisions which on account of their political character are not adapted to review by ordinary courts.'[89]

On the other hand, a later decision of the *Reichsgericht* held that the statute making the state liable for any damage caused by an unlawful act of its servants[90] is valid regardless of whether the

unlawful acts are political or non-political. Disregarding its previous decision, the court claimed that 'the mere facts that the act of state in question was of a more or less political significance does not necessitate a restriction.'[91] The phrasing of this decision indicates that the *Reichsgericht* intentionally dissented from the doctrine that political questions are outside the jurisdiction of the court. For 'even the legislation of the Third Reich … did not limit the application of Art. 131 of the Constitution to non-political acts of the state.'[92]

The contradiction between the two decisions dealing with almost identical cases might conceivably be interpreted as a return of the courts to the Rule of Law after having approached the very threshold of legal anarchy. In reality, however, the second decision does not involve a return to the Rule of Law. On the contrary, it directly leads toward the Dual State.

During the period elapsing between the two decisions, an important innovation was introduced in the form of § 147 of the Civil Servants' Law[93] which reintroduced the so-called *Konflikt* into the German legal system. *Konflikt* entitles the supreme administrative authority in actions for damages against the state to substitute the Supreme Administrative Court for the civil court which would ordinarily have jurisdiction. The Supreme Administrative Court, then, represents the court of last appeal as far as the claimant is concerned.[94] The consequence of this seemingly unimportant innovation is that the rule of the Supreme Administrative Court not to review actions of the *Gestapo* is extended to civil law cases concerning damage suits against the state. This preserves the integrity of the principle that political actions are not subject to review in so far as the administrative authorities through the application of § 147 of the Civil Servants' Law have withdrawn the case in question from the jurisdiction of the ordinary courts. It also leaves the way open for the courts to assert the rule of the Normative State (in substantive matters) within the jurisdiction allotted to them. In damage suits against the state the supreme administrative authority, by using its judicial discretion in applying the *Konflikt* procedure, decides whether legal norms or the refusal of judicial review will govern future litiga-

tion. The final word rests with the political authorities. *Konflikt* is the technical instrument which draws the line between government by law (the Normative State) and government by individual decree (the Prerogative State).

§ 147 of the Civil Servants' Law gave permanent form to a provision which had been in force as a special decree during the transition between democracy and dictatorship. During this period the Adjustment of the Civil Claims Law (issued December 13, 1934)[95] entitled the Minister of the Interior to interrupt judicial proceedings and refer the case to the administrative authority provided claims arising from the National-Socialist revolution were involved. The administrative authority was not bound by the legal code, but made its decisions according to 'equitable considerations.' This was held necessary in order to prevent the Normative State from cancelling the gains of the *coup d'état*. The way in which this statute works becomes clear in a decision of the *Reichsgericht* delivered on September 7, 1937, which reveals at the same time the true methods of the 'legal revolution.' At the outset of the National Socialist revolution, the mayor of Eutin was removed from office. Originally the authorities wished to institute proceedings against him for malfeasance in office under the legal provisions of the Normative State. But this plan was soon dropped, and they pursued the course prescribed by the Prerogative State. The mayor was placed under protective arrest on July 24, 1933. Negotiations between his counsel and the government representative resulted in a written statement (August 4, 1933) in which the mayor waived his salary—as well as all other claims—and obligated himself to pay 3,000 marks to the government for the damage he was alleged to have inflicted on the reputation of Eutin, although German law does not recognize restitution for moral damages in cases such as the foregoing. In this case, the state ordered protective custody and threatened internment in a concentration camp in order to prevail upon one of its citizens to waive his lawful claims against it. Furthermore it induced him to make payments for which there was not the slightest legal justification. (The legal term for such conduct of course is robbery and extortion.) The highest official in the county (*Regierungsprä-*

sident) and the newly appointed mayor of Eutin, once their booty was secured, became generous. The *Reichsgericht* records that 'the government and the mayor of the city of Eutin declare that the state and the city are now willing to regard the matter as closed. They have no intention of taking any actions which might cause difficulties for the plaintiff. The plaintiff is hereby dismissed from protective custody.'[96] This procedure, however, was apparently not entirely satisfactory to the National-Socialist officials, and to preclude any expression of doubt concerning their conduct they offered the following explanation: 'The plaintiff and his counsel declare that all their statements and agreements were made of their own free will and that no duress of any kind was exercised.'[97]

This decision has an epilogue. The plaintiff, after the first storm of the National-Socialist revolution had subsided, tried to withdraw his waiver on the ground of duress. Since the Minister of the Interior, on the basis of the Adjustment Law of December 13, 1934, declared that the case was within his jurisdiction, his appeal was not heard. The courts refused to hear the complaint and it was dismissed forthwith. The slightest legal control over its authoritarian decisions is viewed by the National-Socialist Prerogative State as a greater evil than the perpetuation of injustice.

d. Review in Penal Procedure.

Theoretically, political acts are still subject to judicial review in the sphere of penal law. In practice, however, this power of review is meaningless, as was demonstrated by a decision of the Bavarian Supreme Court (*Oberlandesgericht* München) of November 4, 1937. The Reichsminister of the Interior issued an order (based on the Reichstag Fire Decree) penalizing any minister announcing from the pulpit the names of those members of his congregation who had resigned from the Church. A minister who had been accused of violating this order argued that the decree was invalid.

The purpose of the Decree of February 28, 1933 was the defense of the state against Communist violence. Is it conceivable that the prohibition of the public announcement of the names of

persons who had withdrawn their church membership promoted rather than diminished Communist propaganda? And how does it represent 'positive Christianity' — according to Art. 24 of the Nazi platform one of the aims of the National-Socialist Party — to prevent a minister's fulfilling his ecclesiastical obligation of counteracting the anti-religious movement?

The declaration in favor of 'positive Christianity' in the National-Socialist Party program was merely a political maneuver. The more radical members of the party had long broken with the church and turned to Neo-Paganism. But since formal resignations from church membership might engender unrest among those sections of the population which are still attached to the church, a method of combining the furtherance of church resignations while still maintaining the pretense of 'positive Christianity' was found through the invocation of the Reichstag Fire Decree.

This decree was thus used to prohibit the announcement of resignations from church-membership, and the Supreme Court of Munich found a close relationship between the prevention of Communist violence and the prohibition of the announcement of church resignations: accordingly it declared valid the order of the Minister of the Interior. It then rationalized its decision by claiming that the preamble is not a legal part of the decree. It holds that the decree 'applies to all sorts of situations and hence any measure is admissible which is necessary for the restoration of public safety and order, no matter what the source of the threat.'[98] Nor did the court hesitate to invoke the Weimar Constitution in order to create a connection between a long-established practise of the church and a danger to public safety. The National-Socialist state, though it has boasted time and again that it has abolished the Weimar Constitution, and although it has suspended all the civil rights specified in the second part of this constitution, has none the less asserted, through one of the highest German courts, that 'announcement of church resignations from the pulpit, although not a legal threat to the freedom of worship and conscience as guaranteed by the constitution, is in practise a restriction of that freedom … It might also cause resentment and dissatisfaction with a state which permits such pressure on freedom

of religion in direct contradiction with the constitution, and might thereby easily endanger public safety and order.'[99]

A casual reading of this argument does not reveal its significance. According to this decision it is not the Third Reich which exerts pressure on the freedom of worship and conscience, nor is it the National-Socialist Party: it is rather the clergy itself. Hence, in order to protect the rights which the National-Socialist Party has destroyed, action is taken against the clergy. In order to justify these acts of the Prerogative State, the courts designate the police authorities as guardians of the Weimar Constitution with its civil liberties provisions. The exploitation of 'this forcibly extended interpretation of the concept of "defence against danger" bears within itself the essence of fictiousness,' a reproach against the judiciary made by none other than one of the highest leaders of the *Gestapo,* Dr. Best.[100] This decision indicates that the last vestige of judicial review, namely the right to review administrative acts, which was at least theoretically preserved in penal law, is reduced to a 'mere fiction' in the Prerogative State. Dr. Best suggests therefore that the right of judicial review be abolished in penal procedure as well. It is highly probable that the 'Law concerning the Secret State Police' will be extended to include penal cases. The 'Principles of a German Penal Code' formulated by Minister Hans Frank paved the way for their inclusion when he wrote: 'The extent to which this principle is to be extended in the future to the consideration of all crimes with a political motive or of political significance is a decision for the Leader alone to make.'[101]

5. *The Party as an Instrument of the Prerogative State*

Decisions of a political nature are made not only by state authorities but also by party authorities.

The District Labor Court (*Landesarbeitsgericht*) of Gleiwitz, in handling the complaint of an employee dismissed for alleged political unreliability, was confronted with the review of a political decision rendered by a party authority. The employer based the dismissal upon a memorandum of the District Leader of the

National-Socialist Party, but the employee was unsuccessful in his attempt to dispute the correctness of the memorandum. According to this court 'the evaluation of a person's political character is the exclusive prerogative of the District Leadership of the National-Socialist Party. The District Leadership alone is responsible for this task and the courts have neither the right nor the duty of review.'[102]

This view, in theory at least, has not been confirmed by the decision of the Supreme Labor Court (*Reichsarbeitsgericht*). In a parallel case of April 14, 1937, the Supreme Labor Court argued that the memorandum of the District Leader of the party did not relieve the court of its duty of independent consideration. On the other hand the court emphasized, however, that the question of the *legal* status of a decision of a party authority should be clearly distinguished from the question of the *actual* influence of the District Leader. The court recognized that 'unfounded charges and even an unjustified suspicion coming from influential quarters may carry enough weight to constitute a major cause for dismissal.'[103] It is superfluous to point out that in reality the opinion of the District Leader is decisive.[104]

The relationship between the National-Socialist Party and the courts can be clearly perceived in the Supreme Labor Court's (*Reichsarbeitsgericht*) decision of February 10, 1937. This involved the case of an employee of the Storm Troopers (SA) who had been dismissed from his position. The dismissed employee sued the SA for the salary to which he was entitled under the law providing for previous dismissal notice. Appealing to Adolf Hitler's Pronouncement at the Nürnberg Party Congress of 1935, that 'the Party controls the State,' the SA refused to acknowledge its subordination to the courts. The Supreme Labor Court thereupon had to decide whether the National-Socialist Party enjoyed immunities from the law of the land analogous to those of accredited diplomats representing foreign powers. To this contention the court gave a negative answer. It referred to an earlier decision of the Appellate Court of Stettin[105] and declared that 'although it has been pointed out that the Party as such is superior to the State, this does not exclude the principle that in its relations to

the individuals it is subject to the general rules of public life.' And therefore the court concluded that 'the application of legal principles to the party's relations with individuals is not affected by the position of the Party in the State.'[106]

This decision is basic to the propositions set forth in the present book. A *general* exemption of the National-Socialist Party from the jurisdiction of the courts would be a denial of the Normative State.

The ruling of the Supreme Labor Court that the party is subject to certain laws, however, does not prevent it from exercising the sovereign powers in the Prerogative State. From the principle that political acts of the party are acts of sovereignty, it follows that acts of party officials, in so far as they are within the scope of their political authority, are beyond the jurisdiction of the courts. This doctrine was at first developed by Carl Schmitt, who pointed out that 'disputes between individuals and party officials cannot be submitted to the courts, since these conflicts generally deal with questions which are to be settled outside the sphere of judicial authority.'[107]

The following case illustrates the practical consequences of these theories: an Aryan merchant of Wuppertal applied for an injunction against the son of one of his competitors who had damaged his business by spreading rumors to the effect that he was Jewish. The lower court decided for the plaintiff. The defendant then appealed the case, changing his defense by emphasizing that he was a leading officer in the National-Socialist Artisan Guild (*N.S.–Hago*). The Appellate Court of Düsseldorf (*Oberlandesgericht*) reversed the decision in favor of the defendant. The court decided that the defendant held public office (*N.S.–Hago*) and that he had to be dealt with as a public official and that the diffusion of the philosophy of the party (including anti-Semitic propaganda) was therefore strictly in his line of duty. Said the court: 'An official act is not changed by the fact that an error has been committed or that it constitutes an abuse of official orders. The legality or appropriateness of such political acts cannot be made to depend on the judgment of the courts.'[108] The complaint was dismissed on grounds based on claims which, by

virtue of their political character, are outside the jurisdiction of the courts.

This line of argument was also used in one of the decisions of the *Reichsgericht.* An injunction was demanded against a mayor who had spread false allegations as to the parentage of the plaintiff by asserting that he was an illegitimate child, actually the son of a Jewish horse-dealer who had employed the plaintiff's mother as a kitchen maid. In spite of the fact that the plaintiff could prove that the mayor had made the statements in the presence of both party officials and outsiders, the *Reichsgericht* overruled the lower courts and refused to grant an injunction, holding that 'the official position of the defendant and the contents of his allegation, which are of great concern to the party (i.e. non-Aryan descent), raise the presumption, in the absence of contrary evidence, that the defendant was acting in his official capacity.' The plaintiff's allegation that the defendant's motives were personal in character did not influence the decision. 'An official act,' said the court, 'does not fall within the jurisdiction of ordinary courts merely because it arose from unjustifiable motives.'[109]

A decision of the *Kompetenzgerichtshof* shows, however, that even National-Socialists doubt that the denial of the jurisdiction of the courts was justified in the case we have just discussed. At a meeting of the Winter Relief Organization a National-Socialist official charged that a certain business man had not given his contribution. The business man applied for an injunction. He was successful in the lower courts. But before the matter came before the Appellate Court of Königsberg the governor of the province of East Prussia applied *Konflikt,* (cf. p. 29) contending that this was a political question and therefore within the jurisdiction of the Leader. The Court in Charge of Questions of Jurisdiction (*Kompetenzgerichtshof*) denied its jurisdiction in this matter on technical grounds (June 27, 1936).[110] It cannot be denied, however, that the East Prussia president's claim that political questions may be decided only in the light of political considerations and only by political authorities is entirely consistent with the development. In the near future we may expect the establishment of a rule for party authorities on the same order as § 147 of the Law

concerning Civil Servants (*Deutsches Beamtengesetz*).[111] That is, while generally recognizing law, it will withdraw the political acts of the party from the jurisdiction of the Normative State and turn their regulation over to the Prerogative State.

6. *Politics as the Aim of the Prerogative State*

One of the major problems of the legal theory of dictatorship is that of determining the dividing line between political and non-political acts. The courts have tried to confine the Prerogative State to the purely political sphere, and in so doing have been faced with the necessity of giving a practicable form to this distinction.

It is a rather grotesque aspect of recent German legal developments that the general legal principles of the Normative State are applied in proceedings against gypsies, while in parallel cases access to the courts has been denied on the ground that 'political' considerations were involved. Thus several gypsies were once taken into protective custody by the police on the ground that their presence caused disturbances among the population. The Supreme Administrative Court of Prussia (*Oberverwaltungsgericht*) annulled the order, arguing that 'the fact that the population of St. considers the mere presence of gypsies a molestation potentially giving rise to aggressive defensive actions on the part of the populace does not mean that the gypsies constitute a menace to public order and safety.… The police were therefore not entitled to proceed against the gypsies.'[112]

These principles were of no avail, however, to Koeppen, Director of the *Reichsbank,* when he was taken into protective custody because of a popular demonstration against him. His crime consisted in executing an eviction order against a tenant who had failed to pay his rent. The *Angriff,* Dr. Goebbels' paper in Berlin, took up the case for lack of anything more sensational, and the representative Party District Leader of Berlin, Goerlitzer, thinking the case might provide good propaganda material, decided to lead the demonstration himself. The arrest of the Director of the *Reichsbank* was then declared to be necessary because of politi-

cal considerations, and he was denied the protection of the law.[113] The decisive factor here is that considerations operative in dealing with political cases are outside the domain in which they can be 'properly handled' by the judiciary.

The, attempt of the Prussian Supreme Administrative Court (*Oberverwaltungsgericht*) to compromise by permitting practically unlimited discretionary powers to the political authorities was not sufficient.[114] The National-Socialist state has insisted that law be eliminated from the sphere of politics and that the definition of the boundary lines between the two rests in the hands of the political authorities themselves. Minister Frick left nothing further to be said on this subject when he declared: 'It is self-evident that questions of political discretion should not be subject to review in the administrative courts.'[115] Not content with this, Frick went even further by stating that it would not be feasible for the administrative courts to review those matters which—regardless of their 'political' significance from a *general* viewpoint—were of *special* importance in furthering the interests of the state.

More than 300 years ago a similar demand was made in England. King James I, in his famous message to the Star Chamber (June 20, 1616),[115a] declared that in political questions the decision rested with the Crown and not with the Courts.

> Encroach not upon the prerogative of the Crown. If there fall out a question that concerns my prerogative or mystery of State, deal not with it till you consult with the King or his Council or both; for they are transcendent matters … As for the absolute prerogative of the Crown, that is no subject for the tongue of a lawyer, nor is it lawful to be disputed. It is atheism and blasphemy to dispute what God can do … so it is presumption and high contempt in a subject to dispute what a King can do, or say that a King cannot do this or that.[116]

The straightforwardness of this message has scarcely been surpassed by any spokesman of the Third Reich.

The important result of the co-existence of authorities bound by law and of others independent of law are these: when it is politically desirable, the decisions of the courts are corrected by

the police authorities who confine persons acquitted by the judiciary in concentration camps for indefinite periods (the Niemöller case), and who set aside judgments rendered in civil courts, and reverse the decisions of the 'Court of Social Honor' by the activity of the Labor Front. The co-existence of legal and arbitrary actions, most impressively demonstrated by the confinement in concentration camps of persons who have been acquitted by the courts, is a crucial development of the recent German constitutional status. Significantly enough, the National-Socialist state does not acknowledge this fact willingly. The Dual State lives by veiling its true nature.

This is clearly shown by a decision of the *Reichsgericht* rendered on September 22, 1938, in regard to a minister of the Confessional Church who had offered the following prayer at the end of the sermon: 'Now we shall pray for those brothers and sisters who are in prison. I shall read their names…. Social worker L., Berlin, in protective custody since February 2, 1937, although the court had decided in her favor….'[117] The *Reichsgericht* declared the minister guilty of committing a breach of the peace (affirming a decision of the lower court). The *Reichsgericht* stated that 'the minister's assertion about L. implied — by connecting the two sentences — the criticism that L. should have been freed and that the protective custody was unjustified'[118] and, according to the *Reichsgericht,* this endangered the public peace since the minister, 'in reading the list, might have led the congregation and others to the belief that the state was acting arbitrarily rather than in accordance with justice and law.'[119]

The fact that the *Reichsgericht,* highest authority of the Normative State, condemns as a disturbance of the peace the public announcement of an activity of the most important body of the Prerogative State speaks for itself. Although one key to the understanding of the National-Socialist state lies in its dual nature, none but a few high officials are permitted to allude to this fact.[120] One of them, Dr. Best, describes the activities of his agency in relationship to the activities of the court:

> If the administrative courts repeatedly grant peddler's licenses to Jews, to former members of the French Foreign Legion, or to

> other undesirables, the *Gestapo,* in executing its commission to protect the people and the state from the danger resident in such elements, will confiscate those licenses. If this entails a loss of prestige to someone, the *Gestapo* will not suffer the loss, since it always has the last word in such matters.[121]

This statement is one of the most outspoken repudiations of the Rule of Law which we have found in National-Socialist literature. The difference between a *Rechtsstaat* (Rule of Law state) and the Third Reich may be summed up as follows: in the *Rechtsstaat* the courts control the executive branch of the government in the interest of legality. In the Third Reich the police power controls the courts in the interest of political expediency.[122]

The claim that the decisions of the regular courts can be and are rendered ineffective by the political authorities is difficult to prove by official evidence since those measures, lacking a foundation in law, cannot be justified by legal arguments and naturally are not published. All the more interesting for this reason is an article by Dr. Thieme, of the University of Breslau, in which he takes for granted the use of this procedure in cases before the Courts of Social Honor (*Soziale Ehrengerichte*) in the manner set forth in the revised Penal Code. Thieme argues that 'anyone acquitted in a case which is punishable in the light of wholesome popular sentiment should be handled through publicity or protective custody.'[123] This circumlocution may well be interpreted as an indication of the control the political authorities exercise over the courts.

If the political authorities go beyond the jurisdiction of the law their measures need not be justified by the attribution of illegality to the actions of those against whom they are invoked. In an article in the *Reichsverwaltungsblatt,* which discussed whether a citizen may be forced by the police to hoist a swastika banner on festive occasions, the author concluded that though it is not a legal duty to hoist a flag, it is evidence of the citizen's devotion to the Leader. Moreover failure to display the flag might be taken to indicate that the citizen in question lacked a National-Socialist background. The author suggests that the deficiency may be remedied in a concentration camp.[124]

This relationship between law and politics is a consequence of conflicting value-orientations. Awareness of this value-conflict has been expressed by the former National-Socialist Minister Franzen in his book *Gesetz und Richter*

> The criterion or the value-standpoint in accordance with which conflicts are adjudicated is in the case of the vast majority of legal norms a certain conception of justice. There are many norms, however, which contain no element of justice but which are based on simple political principles and are politically legitimated. Things to which we may be politically opposed are not necessarily bad. A political attitude is one which opposes its enemies and seeks to maintain its own existence. This is the prevailing criterion in the Third Reich.[125]

With a typically National-Socialist cynicism Franzen emphasizes this point as an *arcanum imperii*. Since the broad masses of the population would not be able to appreciate this point of view it is necessary to deprecate the moral character of one's political enemy. According to Franzen, the political struggle must be so conducted that its followers will think of it as a moral and legal crusade.[126] The Prerogative State does not merely supplement and supersede the Normative State; it also uses it to disguise its political aims under the cloak of the Rule of Law.

In present day Germany, there is a double jurisdiction for all cases regarded as 'political.' The police execute administrative punishments in addition to or instead of the criminal punishments executed by the courts. This situation is illustrated by a decision of the Prussian Supreme Administrative Court (*Oberverwaltungsgericht*) regarding the refusal of a driver's license to an applicant who had spent six months in a concentration camp because of his attacks on the government.[127] Attacking the government is a crime within the jurisdiction of the courts.[128] The reason why this case did not come before the special court cannot be determined by an examination of the decision. Perhaps the facts were insufficient to provide grounds for an action. But in this case the applicant was deprived of any possibility of defense, subjected to heavier penalties and branded as an enemy of the state for the future without receiving 'due process of law.'

Not only does the Prerogative State replace the court but it also actively intervenes in pending proceedings.

A survey of legal developments in 1936 by an official of the Ministry of Justice in the course of a discussion of political crime and the conflict between the State and the Catholic Church has supplied us with a characteristic document on the relations between the courts and the political authorities of the Third Reich. In it we find the following statement:

> Among the more important political crimes are the ecclesiastical delinquencies, which can be classified into three groups: exchange manipulations, moral transgressions and malicious attacks on the state. Since August 1936, by order of the Leader, for political reasons none of these matters may be brought before the courts.[129]

Thus the defendants may be kept in jail for political reasons indefinitely awaiting trial. The courts, whose legal duty is to speed up trials in cases where the defendants are under arrest, must postpone the trial by order of the Leader and thereby deviate from the law.

This self-revelation of the policy underlying the National-Socialist administration of justice is of particular significance for its disclosure of the wide range of actions which are designated as 'political.' Offenses against exchange regulations may be classified as 'political' in contemporary Germany, and malicious attacks against the government are, of course, political crimes. Why the homosexual practices of two monks should be considered a political offense, however, is more difficult to explain. It is clear that there is no intrinsic connection between such actions and those falling under the category, the 'political,' which is defined by the Prussian Supreme Court (*Kammergericht*) as 'that which involves the domestic and foreign security of the state.'[130] Neither the offense as such nor the person of a completely inconsequential monk has even the slightest connection with politics. In the Third Reich, sodomy becomes a political offense whenever the political treatment of such offenses is regarded as desirable to the political authorities. The conclusion one must come to is that politics is that which political authorities choose to define as political.

The classification of an action as political or non-political determines whether it will be dealt with according to law or according to the arbitrary preferences of the political authorities.

The legal system of present day Germany is characterized by the fact that there are no matters safe from the intervention of the political authorities who, without any legal guarantees, are free to exercise discretion for political ends.

In the first phase of the Hitler regime in 1935, the *Reichsgericht* had tried to prevent an 'arbitrary interpretation' of the Reichstag Fire Decree, but significantly enough, even then, when the *Reichsgericht* sought something absolutely immune from political intervention and therefore beyond the jurisdiction of the *Gestapo,* it could think of nothing but traffic regulations.[131] Meanwhile, however, the courts have systematically extended the sphere of the 'political.' Thus the Court of Appeals (*Oberlandesgericht*) of Kiel decided that the prohibition of a newspaper which 'defamed the medical profession and damaged its reputation' was a political question.[132] The reason given was that the newspaper obstructed 'the policy and aims of the state with respect to the protection of public health.'[133] The Third Reich does not confine its political concerns to questions of sanitation but extends them to the ownership of taxicabs as well. Whoever disagrees with the Third Reich regarding taxis runs the risk of being considered an 'enemy of the state in the wider sense.' For political reasons he may then be expelled from the executive committee of the local taxi owner's association of which he is a member. It was in such terms that the Supreme Court of Bavaria (*Oberlandesgericht* München) acknowledged the legality of a police order of the Ministry of the Interior.[134]

The Supreme Administrative Court of Prussia (*Oberverwaltungsgericht*) finally took the revolutionary step of revealing the political character of traffic regulation. The above-mentioned decision in the driver's license case, although admitting that political considerations had hitherto been irrelevant to the granting of drivers' licenses, justified its change of attitude by pointing out that the multi-party-state had since been succeeded by the one-party-state. The decisive point is, according to the court, that 'in the

struggle for self-preservation which the German people are waging there are no longer any aspects of life which are non-political.'[135] In this way street traffic became a political question and an application for a driver's license may be rejected on the ground that the applicant spent six months in a concentration camp. For 'the community has a right to be protected from its enemies in every sphere of life.'[136] A decision of the Appellate Court of Stettin echoed this construction. It was held that an auto trip made by a Storm Trooper while in service must be considered a political act since 'all the activities of a Storm Trooper take place within the framework of the National-Socialist program and are therefore "political." '[137] No sphere of social or economic life is immune from the inroads of the Prerogative State.

A further illustration of this thesis is to be found in the litigation involving a request for the issuance of a birth certificate by a Jewish attorney who had emigrated after 1933.[138] One should first make clear that according to the German Law Regarding Vital Statistics (*Gesetz über die Beurkundung des Personenstands und der Eheschliessung*)[139] the registrar is required to issue birth certificates upon request. In this case the registrar submitted the application to the state police, who forbade its issuance. Accordingly the registrar refused to issue the certificate and upon the applicant's appeal to the Municipal Court, the court ordered that it be issued. The District Court reversed the decision and the reversal was affirmed by the *Reichsgericht.* The latter based its decision on the statement of the *Gestapo* that 'the issuance of a birth certificate to the applicant was out of the question…. The registrar is obliged to follow the instruction of the *Gestapo.* The court cannot review the grounds for the instruction. This is the necessary consequence of § 7 of the law of February 10, 1936…. But it was true even before this law was enacted…. since it exceeds the jurisdiction of the courts to examine whether certain executive orders are actually necessary for the preservation of public safety. It is unnecessary to state the reasons why the right of the individual to the issuance of a document prescribed in § 16 of the Law concerning Vital Statistics is being disregarded where the safety of the state is involved.'[140]

In a discussion of this decision an official in the Ministry of Justice, Dr. Massfeller, stated that further discussion was superfluous since any other decision 'would have been impossible.'[141] But for this very reason we think the decision worthy of discussion especially in three aspects: 1. The Supreme Court did not regard a *jus cogens* clause of the law as binding for the state police. It thereby recognized the theory that political authorities are not bound by legal norms. 2. The Supreme Court recognized the subordination of the courts to the political authorities although the law explicitly subordinates the registrar to the supervision of the courts. 3. The Supreme Court acknowledged the right of interference of the state police out of considerations of 'public safety' even though the area of intervention was entirely non-political in the narrower sense of the word.

If it be admitted that a certificate of birth may threaten the 'security of the state' we have conclusive evidence that nothing is immune from police intervention and therefore we may say that any activity whatsoever may be dealt with as a political activity in the Third Reich. Since our whole thesis turns on this point it is perhaps permissible to add another decision which contributes to its corroboration.

In the above-mentioned decision of the highest Bavarian court (*Oberlandesgericht* München), the court, after having declared that the Reichstag Fire Decree was applicable to non-Communists, stated that the name of a member of the executive committee of the taxi drivers' association could be struck from the register of that society if the police authority ordered it. The court said:

> It is irrelevant to discuss whether S. is an enemy of the state in the broader sense of the word. Those regulations which derived from the second sentence of the Decree of February 28, 1933, confer authority on the police. The hitherto prevailing legal guarantees are now suspended in favour of the police. It makes no difference whether the association in question is an economic one—such as a commercial enterprise or a joint stock company. Any previous laws concerning associations are now superseded by the relevant sections of the Decree of February 28, 1933.[142]

These words pronounced the death sentence on the Rule of Law.

The Rule of Law no longer exists. It has been supplanted by the Dual State, which is the joint product of the Prerogative State and of the Normative State.

4. THE PREROGATIVE STATE IN OPERATION

A. The Negation of Formal Rationality

The Normative and the Prerogative States are competitive and not complementary parts of the German Reich. To illuminate their relationship one might draw a parallel between temporal and ecclesiastical law on the one hand and between normative and prerogative forms of domination on the other.

But in what sense can we say that the Prerogative State resembles the church? More than 50 years ago Dostoevski, in *The Brothers Karamazov,* said that the state tends to become like the church, a comment which becomes especially significant when we interpret it in the light of a statement by Rudolf Sohm,[143] the greatest German authority in ecclesiastical law, to the effect that the state and the church differed in their leading structures; the church concerned itself with material truth, the state was more interested in formal issues. The essence of the Prerogative State is its refusal to accept legal restraint, i.e., any 'formal' bonds. The Prerogative State claims that it represents material justice and that it can therefore dispense with formal justice.[144] Professor Forsthoff of the University of Königsberg calls the formalistically oriented Rule of Law State (*Rechtsstaat*) 'a state bare of honor and dignity.'[145] National-Socialism seeks to supplant the ethically neutral administration of law with a system of ethics which abolishes law. In 1930 Hermann Heller called National-Socialism 'Catholicism without Christianity.'[146]

National-Socialism makes no attempt to hide its contempt for the legal regulation of the administration and for the strict control over all activities of public officials. 'Formal justice' has no intrinsic value for National-Socialism, as we can see in a quotation from an official document, the Program of the Central Office of the Na-

tional-Socialist Party for the Redrafting of the Penal Code: 'In the criminal law of the National-Socialist state there is no room for formal justice; we are concerned only with material or substantive justice.'[147] The first part of this quotation disregards formal justice in the German legal system. Whether formal justice has been replaced by a new type of material justice can be determined only by the examination of what National-Socialism calls 'material justice.' The second part of this treatise will amply demonstrate what kind of justice this new 'material justice' is. It will be shown that the Rule of Law has not given way to higher ideals of justice, but rather that it has been destroyed in accordance with National-Socialist doctrine for the purpose of strengthening the 'race.'

The practical significance of this point may be demonstrated by a decision of the Supreme Disciplinary Court (*Reichsdienststrafhof*). The question before the court was whether a public servant who refused to contribute to the Winter Relief Fund (*Winterhilfe*) was guilty of a misdemeanor in office. The accused, who for many decades had been a member of the nationalist movement, pointed out that he contributed a considerable share of his income to private charities and that his refusal to contribute to the Winter Relief Fund was without legal significance, since it always had been officially emphasized as entirely 'voluntary.' In a legal system adhering to principles of formal rationality it would be impossible to attach legal significance to the non-fulfillment of 'voluntary' obligations. The National-Socialist state ignores this 'merely' formal restriction. The Supreme Disciplinary Court dealt with the significance of the voluntary character of the contribution in the following argument:

> Even today the defendant's conception of liberty is of an extreme character.… For him liberty is the right to neglect all of his duties except where they are explicitly required by law. He has abstained from participation in community enterprises merely because he wanted to show that as a 'free' man he could not be coerced.[148]

Because he believed that he was free, the state itself having emphasized the fact, he is now blamed for 'a despicable abuse of the

liberty which the Leader had granted in full confidence that the German people would not abuse it.'[149] It was for this that he was punished. The wrongdoing of the public servant did not consist in his lack of charitable intentions. National-Socialism is not interested in charity as such. It is primarily interested in enlisting and co-ordinating everyone in the official National-Socialist charity organization. The 'despicable abuse of liberty' consisted in having contributed to private charity. The 'value' which National-Socialism attributes to activities in the welfare field is a function not of charitable interests but of the desire to add to the party's prestige.

Here again a parallel can be found with the period of personal government in England between 1629 and 1640 dominated by the regime of Archbishop Laud. Professor Tawney tells us that the ecclesiastical courts, when confronted by cases similar to that dealt with by the Supreme Disciplinary Court, imposed similar punishment. He explains that since the activity of the ecclesiastical courts had not ceased with the Reformation these courts tried to enforce the obligations of charity. They punished "the man who refused to 'pay to the poor men's box,' or who was 'detected for being an uncharitable person and for not giving to the poor and impotent.' "[150] Laud's theocracy was guided by principles of material justice and was therefore opposed to formal rationality.[151]

From this point of view, the great English revolutionary movement of the seventeenth century acquires a tremendous interest for those seeking to understand our present situation. The political movements of the twentieth century which have culminated in National-Socialism and Fascism are a reaction against the heritage of the English revolutionary movements of the seventeenth century. Despite this similarity, there is a marked difference between the 'eleven years of personal government' in England and the National-Socialist dictatorship. Although the National-Socialist state is by no means an agnostic state[152] it also lacks some of the central features of the theocratic state. If a paradox were permitted it might be said that the Third Reich is a theocracy without a god. The structure of the Third Reich approximates that of a church, although it is a church which is not devoted to a metaphysical idea. The National-Socialist state seeks only its own glorification. But as

a quasi-ecclesiastical institution, it views those who transgress against its rules not as criminals but as heretics.

B. The Persecution of the Heretics

National-Socialist theorists who first asserted that the repressive activities of the state were directed against political 'criminals' now see the state's activity as a crusade against heresy. Thus Professor Dahm of Kiel University has distinguished between 'crime' and 'treason.'[153] Acts constituting 'high treason,' according to Dahm, cannot be precisely defined; therefore it is necessary to provide a 'general clause' which will allow sufficient discretionary power to determine whether a breach of faith is treason.

Another National-Socialist theorist, Diener, criticizes the hitherto predominant definition of treasonable actions as those attempting to overthrow the constitutional order by violence. He regards the 'technical illegality of treason against the constitution' as far inferior to the National-Socialist concept of high treason for the reason that 'the National-Socialist revolution has created a conception of the state for which every hostile attitude is treasonable.'[154]

A decision of the Special Court (*Sondergericht*) of Hamburg of May 5, 1935, demonstrates practical consequences of this doctrine. The question before the court was whether, in case of violence during a treasonable enterprise, prosecution for a breach of the peace should be added to the charge of treason. Contrary to the ruling of the *Reichsgericht,* the Special Court ordered a penalty for breach of the peace in addition to punishment for treason. It offered no explanation for the fact that the Penal Code[155] explicitly mentions violence in the high treason paragraph (§ 80) but held that 'as applied to temporary Communism, preparations for treasonable actions include the organization and execution of large scale political murder. The Penal Code which was enacted in 1871 did not make violence a test of preparation for treason.'[156]

The Special Court of Hamburg seems to have forgotten that the

Penal Code of 1871 was prepared under the immediate influence of the Paris Commune. The political courts of Germany have applied the provision concerning treason in many cases for which the clause was not suitable. Frequently they have given maximum sentences for the preparation of treasonable actions although the acts themselves involved no violence whatever. When the facts of the case really demanded a verdict for treason, the use of violence having been definitely proved, the court interpreted the provisions for treason as not covering those facts and considered it necessary to supplement the charge with one dealing with a breach of peace committed by the accused.

Dr. Freissler, State Secretary of Justice, greeted Dahm's analysis as a theoretical achievement of revolutionary importance.[157] Its importance lies in the revelation that not only political authorities but courts also must handle political questions from a political instead of a legal point of view. As Professor Dahm says: 'We are faced with the general problem whether the substantive rules of law applicable to ordinary cases are also valid in the realm of politics…. Do not special standards obtain here just as they do in the procedural law of political trials?'[158] National-Socialism has no general 'standards.' A standard presupposes a scale of ethical values; but politics in Germany is entirely free from the controls imposed by ethical values. The treatment of political crimes in German 'courts' today is a fraud. The People's Tribunal and the other Special Courts are the creation of the Prerogative State. The term Special Court sums up the difference between the Rule of Law State (*Rechtsstaat*) and the Dual State: the Rule of Law refers political crimes to a *special* court despite the fact that they are questions of law; the Dual State refers political crimes to a special *court,* despite the fact that they are *political* questions.

That the political courts of Germany which function as agencies of the Prerogative State are courts in name only can be proved neither by the interpretation of the high treason statutes nor by pointing to the heavy sentences which they have imposed. Falsely reasoned decisions demonstrate nothing concerning the legal character of a judicial body. The situation is, however, quite different if we can prove that the 'courts,' unlike other judicial bodies, have

failed to apply fundamental legal principles when political questions were brought before them.

One of the central principles of criminal law in all civilized states is the principle *ne bis in idem,* i.e. the prohibition of double jeopardy. The *Reichsgericht* adhered to this principle even as recently as September 8, 1938, and October 27, 1938.[159] This makes it all the more significant that the People's Court (*Volksgericht*) as well as the Prussian Supreme Court (*Kammergericht*) and the Bavarian Supreme Court (*Oberlandesgericht* München) have suspended this principle in decisions dealing with treason. The highest Bavarian court sentenced a defendant for distributing illegal propaganda, an action which in Germany is considered 'high treason.' The defendant had already served his sentence when the court, in a second trial, discovered that the facts of the case were of a more important character than had originally been realized. Although the court stated especially that 'general juridical theory and practice do not permit new proceedings against R., because of the identity of the act with the one for which he has already been punished, and that the fundamental principle *ne bis in idem* forbids the further punishment of the defendant,'[160] the court condemned the man once again. The court tried to belittle this principle by pointing out that it is based only on the law of procedure.

This may have been correct from the judicial point of view, but when the court denied the principle by condemning the man for a second time it set itself in opposition to universal juridical experience and observation. The significance of procedural questions is by no means inferior to those of substantive law. The prohibition of extraordinary courts, the institution of the jury, judicial review of the actions of state agencies are evidence of this. There is no proposition in the substantive law which can be compared in fundamental importance with the principle of *res judicata.* The distinction between a judgment of court and an administrative order is that the decision, once rendered, stands, while the order may be changed. The Bavarian Court showed little appreciation of the nature of judicial procedure when it declared that the application of the principle of *res judicata* should not interfere with the substantive law. Thus the court degraded its

status to that of an instrument of the Prerogative State by laying down the following principle:

> In serious cases of high treason an adequate sentence has to be imposed in all circumstances regardless of all legal principles! The protection of state and people is more important than the adherence to formalistic rules of procedure which are senseless if applied without exception.[161]

Since other courts followed this decision[162] the opinion of the Bavarian court is not an isolated phenomenon. The principle of the inviolability of legal validity has yielded to political considerations and has been replaced by political reservations. Courts making their decisions only in the light of political considerations, i.e., courts which recognize their own decisions only with reservations, cease to be judicial organs and their decisions are no longer real decisions; they are measures (*Massnahmen*). This distinction was formulated by Carl Schmitt very clearly about 1924: 'The judicial decision has to be just, it must be ruled by the idea of law … the legal structure of the measure is characterized by the principle of the *clausula rebus sic stantibus*.'[163] A decision under reservation is controlled by the principle of *clausula rebus sic stantibus,* the principal element of martial law.

Although German and Anglo-American martial law differ in their presuppositions and legal content, the German political courts may nonetheless be compared to those military courts which, according to English law, are legal only in case of open insurrection. An English court held in 1866 that 'the courts-martial, as they are called, by which martial law … is administered, are not, properly speaking, courts-martial or courts at all. They are mere committees formed for the purpose of carrying into execution the discretionary power assumed by the Government.'[164]

Only when actual rebellion exists are they 'justified in doing, with any forms and in any manner, whatever is necessary to suppress insurrection, and to restore peace and the authority of the law.'[165]

In present-day Germany political courts are permanent institutions. Thus, what is permissible only in consequence of actual conflict in the Anglo-Saxon countries is 'normal law' in Germany.

'The existence of this system,' said the above-mentioned English opinion, 'in cases of foreign service or actual warfare, appears to have led to attempts on the parts of various sovereigns to introduce the same system in times of peace on emergencies, and especially for the punishment of breaches of the peace. This was declared to be illegal by the Petition of Rights.'[166]

What has been considered a nightmare in English law for more than 300 years has now become the law of the land in Germany.

It is, however, impossible to present a completely satisfactory account of the political judicature of the Third Reich since decisions in political criminal cases are generally not published.[167] A general impression of German political justice can, however, be gained from a study of the political decisions of civil and administrative courts. Of course, it must be kept in mind that those decisions merely deal with the economic existence and not with the life and liberty of the persons involved.

A woman sympathetic to the Jehovah's Witnesses applied for a peddler's permit. The request was denied by the Bavarian Administrative Court (*Verwaltungsgerichtshof*) which supported its refusal by the following argument:

> Although no proof has been offered that Maria S. is a member of the forbidden association … it has been shown that she is a warm sympathizer…. She has also refused to promise that she would not work on behalf of the association in the future…. This mode of thought and the diffusion of such thinking is dangerous to the state … since it defames both state and church, alienates people and state and renders aid to pacifism, which is an ideology irreconcilable with the heroic attitude characteristic of our nation today.[168]

The Supreme Administrative Court of Saxony (*Oberverwaltungsgericht*) refused to be outdone by this decision and denied a permit to a midwife because she was suspected of being a member of the Jehovah's Witnesses with the following argument:

> It is indeed true that until now Mrs. K. has not participated in any activities hostile to the people or the state. Nonetheless, her remarks leave no doubt that if a situation were to arise in which the orders of the state clashed with her interpretation of the Bible

> and with the commandments of 'Jehovah,' she would not hesitate to decide against the people and its leadership…. Although persons of the type of Mrs. K. individually can scarcely be said to constitute a danger to the state, their attitudes and opinions encourage those who actually are enemies of the state and promote their destructive activities.[169]

A similar tendency is revealed in a case involving the dismissal of a postal clerk who was a member of the Jehovah's Witnesses Association but who, following its prohibition, had not participated in its meetings. According to his religious conviction, the Bible commanded that no mortal being should be greeted with *'Heil'* since such a greeting was due only to God. Accordingly, when he greeted anyone he raised his right hand and said only *'Heil.'* His saying only *'Heil,'* and not *'Heil Hitler'* as was officially required, resulted in his dismissal as a postal clerk, a position which he otherwise would have held for life. In this struggle for his existence 'the accused was not allowed,' as the court said, 'to appeal to religious scruples.'[170]

The Third Reich does not merely persecute those who spread dangerous doctrines; it wages a perpetual warfare against all those dictates of conscience not in harmony with its teachings. A decision of the *Reichsgericht* of February 17, 1938, is ample evidence of this. In this case a sectarian family from Solingen was alleged to have conducted family worship at home. The charge was dismissed by the District Court, which argued that family worship did not infringe on the order prohibiting the sect. The *Reichsgericht* then reversed the decision and pronounced sentence on the grounds that 'services of this type are prohibited and punishable even if held within the family circle among the former members of the prohibited sect.'[171]

National-Socialism gives neither mercy nor justice to any German suspected of harboring ideas which are not in harmony with its own principles. This was quite clearly expressed by Alfred Rosenberg when he said that 'he who is not devoted to the interests of the people cannot claim their protection. He who is not devoted to the community needs no police protection.'[172] Three hundred years earlier Archbishop Laud enunciated the same idea

in other words: 'If any be so addicted to his private that he neglect the common state he is void of the sense of piety and wishes peace and happiness for himself in vain.'[173]

Having destroyed all voluntary associations and abridged the freedom of worship, National-Socialism next turned its attention to the destruction of the family. The saying of grace in a form required by the conscience of the members of a given family is prohibited by the state authorities. Interference with parents who are educating their children in a religion or philosophy not acceptable to National-Socialism is to be taken for granted. By a decision of the District Court (*Landgericht*) of Hamburg several members of the Jehovah's Witnesses Association were denied the custody of their children because 'their [the children's] spiritual welfare was endangered' by the fact that the parents wanted to bring them up in their own faith.[174]

Such dangers to minors are considered by the National-Socialist authorities more serious than moral dangers. Two decisions rendered simultaneously in Municipal Courts (*Amtsgericht*) provide a striking demonstration to the fact. Moreover they show that political and 'non-political' cases are not only differently handled in Germany but that the differentiation in treatment persists even when the facts in the case in question are practically identical. The Municipal Court (*Amtsgericht*) of Berlin-Lichterfelde held that 'exposing a child to Communist or atheistic influences is adequate reason for depriving the parent of the custody of the child.' [175]On the same day the Municipal Court of Hamburg declared that 'the fact that the mother of the child is a prostitute is not sufficient justification for the court to deny her the custody of her children who have been placed in unobjectionable foster homes.'[176]

The suspension of legal guarantees has affected the entire range of life in present-day Germany and has had disastrous consequences in the political sphere. No less disastrous have been the consequences of the outlawing of the parties in opposition to the regime. On April 15, 1935, the Municipal Court deprived certain persons of the custody of their children because they were Communists. On January 5, 1936, a similar decision was rendered but

on the grounds that the parents in question were Jehovah's Witnesses. In 1937, the Municipal Court of Frankfurt a.M.—Höchst deprived a mother of the custody of her child because she wished to educate her in a Catholic convent.[177] In 1938 the Municipal Court of Wilsen placed several children in a foster home because their father had not enrolled them in the Hitler Youth movement. 'In this case the father kept his children out of the Hitler Youth and thereby abused his right of custody of his children.'[178]

According to the National-Socialist view, children who are educated according to tenets at variance with those of the Hitler Youth movement are 'neglected' by their parents.[179]

The National-Socialist state demands control over the minds of the growing generation. A Catholic priest who, during confession, warned a mother against sending her child away for the *Landjahr* (the 'year in the country') because her child might 'lose his faith there' was sentenced to six months in jail for malicious attacks against the government.[180]

National-Socialism at first justified its extreme measures by saying that the struggle against Communism made them necessary. Many persons at that time gave their approval to this outlawing of the Communist Party. But since then many more have come to understand the truth of Shakespeare's words (*Merchant of Venice,* Act 4, Scene 1):

BASSIANO: 'To do a great right, do a little wrong,
And curb this cruel devil of his will.'

PORTIA: 'It must not be. There is no power in Venice
Can alter a decree established.
'Twill be recorded for a precedent;
And many an error by the same example
Will rush into the state. It cannot be.'