

# The Dual State

## A Contribution to the Theory of Dictatorship

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Ernst Fraenkel

With an Introduction by Jens Meierhenrich

OXFORD

# THE DUAL STATE

## *A CONTRIBUTION TO THE THEORY OF DICTATORSHIP*

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With an Introduction by  
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## THE DUAL STATE

## *Preface to the 1941 Edition*

THE CONDITIONS under which this book was conceived and written deserve a brief comment. The book is the product of the paradoxical isolation enforced upon those who lived and carried on their work in the Germany of National-Socialism although they were opposed to this regime. The purpose of the author was to describe the basic principles of the legal and constitutional developments of the Third Reich. His activity as a practising attorney in Berlin from 1933-38 provided the close and continuous contact with the legal system of National-Socialism necessary to check and recheck his generalizations by confronting them with the reality of practice.

In writing this book the author had at his disposal all the National-Socialist sources pertinent to his subject, including all the significant decisions published in the different German law reviews. Unfortunately it was impossible for him to take account of material unavailable in Germany, such as the writings of the German emigrés and many other publications outside Germany. Essentially the manuscript was completed before the author left Germany.

The course of this work was fraught with many difficulties. Its publication would have been impossible without the generous assistance of a number of friends.

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The author is especially grateful to Dr. Gerhard Meyer of the University of Chicago, for his kind permission to use his unpublished manuscript on the economic system of the Third Reich.

I wish to express my gratitude to Mr. E. A. Shils of the University of Chicago who so generously made his time and skill available for the onerous task at hand.

Mr. J. Bryan Allin checked the whole manuscript for points needing clarification for the American reader unfamiliar with the German legal tradition. Mr. Allin, with Messrs. A. Bell and I. Pool, very kindly helped the author to adapt the book for this purpose, each with one of the chapters. Mr. Bell also assisted the author in including certain sections added to take account of later developments. The author would like here to express his gratitude for this assistance.

In order that the nature of the book should remain unchanged, it was decided to take account only of the National-Socialist publications and decisions concerned. It should be understood that the book treats of the legal and constitutional development only to the outbreak of the present war.

I should like to thank Mr. George Rothschild, graduate student of the Law School of the University of Chicago, for helping to prepare the manuscript for publication.

The author is grateful to the following publishers for permission to quote from copyright works:

G. P. Putnam's Sons: A. J. Carlyle, *A History of Medieval Political Theory in the West*, Vol. I; D. Appleton Century Company: Raymond Gettell, *History of American Political Thought*; The Macmillan Company: Charles H. McIlwain, *The*

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It is unfortunate that I am forced to omit acknowledgment here of a most important help received in the production of this book. The conceptions contained here were greatly influenced by the author's discussions with a number of his friends who are at present residing in Germany and must consequently remain unnamed.

Chicago, June 15, 1940

## *Preface to the 1974 German Edition*<sup>1</sup>

More than a quarter of a century has passed since I completed, on June 15, 1940, the English edition of this book, entitled *The Dual State*. *The Dual State* was a translation of the first version of *Der Doppelstaat*, which had been illegally written in and later smuggled out of Nazi Germany. It was published after a thorough revision of the manuscript following my emigration from Germany in the fall of 1938. The revision was necessary in order to remove a number of misunderstandings and imprecisions that are easily explained by the unusual circumstances under which the manuscript was written. The necessary changes concerned mostly details. The structure and conclusions in the original version, the *Urdoppelstaat*, and the final manuscript of *The Dual State* are the same. This is all the more true since both are based on the same sources.

At the time of writing, I never thought that the book, though originally drafted in German, would ever be published in German. That might explain why I kept the first draft of the German language version, which held emotional value (*"Affektionswert"*) for me, but not the final German manuscript. Therefore, the frequently suggested publication of a German edition was possible only if the English version would be translated back into German. This has since been done. This book is that retranslation.

While a retranslation is generally more difficult [than publishing a book in the language in which it was originally written], this is especially true of a legal-political text—that is, when that text pursues not just academic, but political aims. In the drafting of the manuscript and its translation into English, special emphasis was placed on explaining the Third Reich's system of rule (*"Herrschaftsstruktur"*) in academic categories that are familiar to the social-scientifically trained American reader—paraphrasing them, if necessary, to render them comprehensible. I need only point to such foundational terms as *"Ausnahmestand"* [which most accurately translates as state of exception] and "Martial Law." A translation of the German

<sup>1</sup> Source: "Vorwort zu deutschen Ausgabe," in Ernst Fraenkel, *Der Doppelstaat*, translated by Manuela Schöps (Frankfurt: Europäische Verlagsanstalt, 1974), 11–18.



text into English made sense only if it also involved a transposition (“*Transponierung*”) of concepts from the National Socialist into the American system of government (“*Regierungssystem*”).

When it came to the retranslation, it was therefore unavoidable to reverse that transposition. This, however, meant that it was necessary, on more than one occasion, to reconstruct—at the cost of achieving a less literal translation—the original German text by relying on the cited sources. Especially in select sections in the first part of the book was it imperative to do so, whereas such difficulties only arose sporadically in the non-legal parts of the manuscript.

Thus, the section concerning the judicial review of police orders (“*polizeilicher Verfügungen*”) had to be largely rewritten, while the section on the separation of powers was omitted seeing that the German separation-of-powers doctrine derives primarily from Montesquieu, whereas in the American separation-of-powers doctrine the influence of Locke is dominant.

This work could not have been completed without the support of *Studienrat* [an academic title conferred to higher ranking civil servants in Germany, mostly teachers in grammar schools] Mrs. Manuela Schöps. She undertook the tremendously difficult task of retranslating the English text and bringing it in line with the language used in the (still extant) parts of the original German manuscript in order to produce a [new] German version that corresponds to the English edition [as well as to the so-called *Urdoppelstaat*].<sup>2</sup> This retranslation required her to familiarize herself with trains of thought from disciplines as diverse as jurisprudence, sociology, political science, and macroeconomics (not to mention history). It is only thanks to her comprehensive general education and methodological training that she was able to master this task. I express my heartfelt gratitude to her.

The book only deals with developments that occurred prior to my emigration. (The one exception is that I also took account of *Kristallnacht*, which occurred in the weeks following my emigration.) This explains why the book merely analyzes the Third Reich of the pre-war years.

*The Dual State* was published by Oxford University Press in New York around the end of 1940 and the beginning of 1941. The

<sup>2</sup> For a discussion of the original German version, the *Urdoppelstaat*, its gestation and relation to all other editions of *The Dual State*, see Jens Meierhenrich, “An Ethnography of Nazi Law: The Intellectual Foundations of Ernst Fraenkel’s Theory of Dictatorship,” in this volume.

book was reviewed in numerous American and English scholarly journals. A list of reviews, albeit incomplete, can be found in *Book Review Digest* 1941, p. 318. About ten years later, the book went out of print. In 1969, an unrevised reprint of *The Dual State* was published, with the consent of Oxford University Press, by Octagon Press (New York).

The book is the result of internal emigration ("*innere Emigration*"). Its first version, which is also the foundation for this German edition, was written in an atmosphere of lawlessness and terror. It was based on sources that I collected in National Socialist Berlin, and on impressions that were forced upon me day in, day out ("*die sich mir tagtäglich aufgedrängt haben*"). It was conceived out of the need to make sense of these experiences theoretically in order to be able to cope with them. They stem mostly, though not exclusively, from my work as a practising lawyer in Berlin in the years 1933–1938.

Despite being Jewish, I was permitted, due to my military service during the [First World] War, to practice at the bar even after 1933. The ambivalence of my bourgeois existence caused me to be particularly attuned to the contradictoriness ("*Widersprüchlichkeit*") of the Hitler regime. Though, legally speaking, an equal member of the bar, wherever I went, I was nonetheless subject to harassments, discriminations, and humiliations that emanated exclusively from the *staatstragende Partei* [literally: state-sustaining political party, i.e., the ruling Nazi party]. Anyone who did not shut his or her eyes to the reality of the Hitler dictatorship's administrative and judicial practices, must have been affected by the frivolous cynicism with which the state and the [Nazi] party called into question, for entire spheres of life, the validity of the legal order while, at the same time, applying, with bureaucratic exactness ("*mit bürokratischer Exaktheit*"), exactly the same legal provisions in situations that were said to be different ("*anders bewerteten Situationen*").

Based on the insights into the functioning of the Hitler regime that I gleaned from my legal practice, I believed to have found a key to understanding the National Socialist system of rule ("*der nationalsozialistischen Herrschaftsordnung*") in the duality or concurrent existence ("*Nebeneinander*") of a "normative state" ("*Normenstaat*") that generally respects its own laws, and a "prerogative state" ("*Maßnahmenstaat*") that violates the very same laws.

From the moment I began to collect and review materials to find out whether this working hypothesis could lead to an improved

understanding of the anatomy and physiology of the Hitler regime, I was fully aware that in a terror-based totalitarian dictatorship, only apologists of such a system of rule would be able to make use—unperturbed—of traditional strategies of academic inquiry when daring to research a highly sensitive topic. Any attempt by supposed enemies of National Socialism to uncover the logic (“*Bewegungsgesetze*”) of the Third Reich’s constitutional reality (“*Verfassungswirklichkeit des Dritten Reichs*”) was suspected of the crime of “preparation for high treason” (“*Vorbereitung zum Hochverrat*”). Not only were all Jews said to be opponents of the Third Reich, but also those “Aryans” who, during the “*Kampfzeit*” [a Nazi term referring to the years of “struggle”, i.e., the period 1925–1933, when the NSDAP—the National Socialist German Workers Party—was an insurgent movement that opposed and resisted the ostensibly bankrupt political “system” of the Weimar Republic] had emerged as “opponents of the movement” (“*Gegner der Bewegung*”). According to Nazi doctrine, they were, due to their descent or political past, predestined to arrive in their theoretical studies of the state (“*staats-theoretischer Studien*”) at conclusions that invariably were hostile to the interests of the state (“*staatsfeindlichen Ergebnissen*”).

The idea to use empirical research methods to address my research question had to be abandoned right from the start. It would have been impossible to keep such an undertaking secret from the Secret State Police [*Geheime Staatspolizei*, usually referred to by the contraction *Gestapo*]. However, to rely primarily on an analysis of legal proceedings in which I was involved as a lawyer would not have been possible either. Aside from the fact that doing so would have produced too narrow an evidence base from which to derive useful conclusions, such a research design might also have endangered my former clients; for this reason alone, it was not an option.

More than a few readers of the English-language edition have expressed regret that I, for the aforementioned reasons, refrained from demonstrating in at least one or two cases, how the dual character of the Nazi political order (“*der nationalsozialistischen Herrschaftsordnung*”) manifested itself in the administration of justice. I thought it best to respond to this suggestion by presenting in an “appendix” the case histories of one labor law proceeding and one criminal law proceeding. The labor law case, which was heard twice by the *Reichsarbeitsgericht* (Federal Labor Court), prompted me to theorize the phenomenon of the “dual state”; the criminal law

case provided an opportunity to assess the practical utility of my theses.<sup>3</sup>

It did not seem too far-fetched to also scan hard-to-find judgments that had been published in official law reports and learned journals to see whether they offered insights into *societal* (“*gesellschaftliche*”) processes in the Third Reich, which, in turn, would allow for the drawing of inferences about the everyday practices of the statist (“*staatlichen*”) organs of the National Socialist executive and judiciary. In other words, the question arises whether and to what extent court judgments (“*Gerichtsurteile*”) can be relied upon as sources in the study of the constitutional reality of the Third Reich.

The obvious objection that censorship prevented the publication of judgments that could have been unpleasant (“*unliebsam*”) for the regime is generally valid for judgments of the *Volksgericht* (“People’s Court”) and for other judgments handed down by the politicized criminal courts (“*der politischen Strafgerichtsbarkeit*”), but not for the decisions of other courts. In fact, law journals regularly published judgments that regime loyalists critiqued very sharply in lengthy case notes. Limited though the insights into the functioning of a dictatorial regime may be that can be gained from studying published case law, it may prove helpful nonetheless in order to correct (“*korrigieren*”) the schematically constructed image of the Nazi political order with the help of a multitude of snapshots (“*einer Vielzahl von Momentaufnahmen*”). The latter are as authentic (“*realitätsnah*”) as they possibly can be in a regime whose defining attribute it is to disguise its true character.

I concluded the preface to the English edition in 1940 by stating my regret about being unable, for obvious reasons, to thank by name for their help in the conception and preparation of this book those friends of mine who had remained in Germany. A general expression of gratitude had to do. They helped chiefly by expressing a critical interest in my research question, my theses, and the underlying theoretical approach. It was invaluable to me to be able to develop, amend, and correct all of the above in conversation with them—and before I attempted to formulate it. Even though these conversations could only take place among close friends and colleagues (“*im engsten Kreise*”), they were of vital importance to our lives (“*ein*

<sup>3</sup> For a translation of these case histories, see Appendix I and II to the 1974 German Edition, in this volume. They were not heretofore available in English.

*Lebensbedürfnis*”). They saved us from suffocating—intellectually and emotionally (“*geistig und seelisch*”)—amidst the loneliness of our internal emigration. The help that my like-minded comrades (“*Gesinnungsgenossen*”) extended to me included their willingness to safeguard and hide research materials, excerpts, and manuscripts, and to assist in their “dispatch” (“*Verschickung*”) abroad [an euphemism for the smuggling of these documents, including the *Urdoppelstaat*, i.e., the original German version of *The Dual State* which made its way abroad in the luggage of a French embassy official].

It would be an empty gesture to acknowledge by name now the like-minded friends (“*Gesinnungsfreunde*”) who I was unable to thank then. All too many have passed away since, others have gone with the wind, and to yet others I feel no longer connected. I thus want to limit myself to mentioning, first and foremost, with gratitude the name Fritz Eberhardt, and, wistfully, the name Martin Gauger.

This book could not have been completed without the encouragement and continuous support of the *Internationaler Sozialistischer Kampfbund* (ISK, International Socialist Militant League), which was very active and exemplarily disciplined in the illegal underground movement. For years, I worked very closely with their Head of Domestic Affairs (“*Inlandsleiter*”) Dr. Hellmut von Rauschenplat (Dr. Fritz Eberhardt), who was responsible for coordinating the movement’s local resistance groups as well as for liaising with the Emigration Directorate (“*Emigrationsleitung*”), which was based in Paris. During long walks, we exchanged ideas about the meaning and purpose of illegal work (“*illegaler Arbeit*”) and sought to gain greater clarity about the phenomenon of National Socialism. In the wake of such exchanges, I repeatedly dictated the conclusions we had reached in the form of short essays to Fritz Eberhardt who took stenographic notes (“*in das Stenogramm diktiert*”). They were intended for publication in the ISK journal *Sozialistische Werte*, which was published in Paris and subsequently distributed in Germany in the form of illegal flyers (“*illegale Flugblätter*”). Some of these essays were recently republished in my book *Reformismus und Pluralismus* [*Reformism and Pluralism*]. One of these articles contains the original version (“*Urfassung*”) of *The Dual State*. It appeared under the pseudonym Conrad Jürgens.

Fritz Eberhardt was in touch with an official at the French embassy, who agreed to transport an anti-Nazi manuscript from Berlin to Paris in his diplomatic luggage. It was thus that the first draft (“*die*

*erste Fassung*") of *The Dual State* found its way to freedom ("in die Freiheit").

In the final phase of my legal practice, I frequently described my work to friends as that of a switchman ("Weichensteller"). That is, I regarded it an essential part of my efforts to ensure that a given case was dealt with under the auspices of the "normative state," and not end up in the "prerogative state." Colleagues with whom I was on friendly terms confirmed that they, too, had repeatedly worked toward making sure that their clients were punished in a court of law ("daß ihre Mandanten gerichtlich bestraft würden") [rather than risking their arbitrary punishment in the prerogative state].

I first met Martin Gauger—the legal counsel of the Lutheran Council, who was murdered in Buchenwald in 1941—in 1934 or 1935. We were introduced by Harold Pölchau, the prison chaplain in Tegel [a suburb in the north of Berlin, the seat of one of Germany's oldest and largest prisons]. Back then, any and all organizations and associations that belonged to or were otherwise connected with the so-called *Bekennende Kirche* [literally: "Confessing Church," a break-away movement of the Protestant Church led by, among others, Martin Niemöller, Karl Barth, and Dietrich Bonhoeffer, that opposed the Nazi government's attempts to "nazify" the Protestant Church in Germany, i.e., to turn it into an institution of racial dictatorship] were subjected to the same persecution and harassment as the Social Democratic and unionized workers' movement several years prior. Because I had repeatedly given legal advice to the latter, I was able to speak from experience. The case of *Delatowsky und Genossen* in the appendix [a case history of which is reproduced below as Appendix I] may illustrate what could happen in such a proceeding.

My exchanges with Martin Gauger initially revolved around technical questions of law, not least because such questions had, ever since the intensification of the church struggle ("*Zuspitzung des Kirchenkampfes*") [i.e., the increasingly contentious politics about the question of the relationship between the Nazi state and the country's churches], begun to take up a great deal of his time. But our talks were not limited to discussing concrete legal problems. It was inevitable that our conversations, many of which lasted until late into the night, would also touch upon the jurisprudential, philosophical, and sociological aspects of the phenomenon of the "dual state." It was not without astonishment that we both realized how grotesquely distorted the image was that each of us had had of the type of human

being (*"Menschentyp"*) to which the other had belonged prior to the transition (*"Umbruch"*) [to Nazi dictatorship]. It was thus that early one morning we founded the "United Front of Natural Lawyers" (*"Einheitsfront der Naturrechtler"*)—an event that informed the jurisprudential chapter of this book.

I will never forget the evening when Martin Gauger—whose "humour and skill in dealing with people" Annedore Leber emphasized (in her book *Das Gewissen steht auf* [*The Conscience Arises*])—recounted a discussion with Dr. Werner Best, the legal counsel of the *Gestapo*. When, after many failed attempts, Gauger finally managed to arrange for a meeting with Best to demand the return of confiscated funds belonging to the Confessing Church, he seized the opportunity to casually explain to Best the theory of the dual state. We came to view it as a macabre confirmation of our theoretical efforts when Best, in a contribution to the *Jahrbuch der Akademie für Deutsches Recht* (Yearbook of the Academy for German Law) developed an argument that largely rehearsed ideas that Gauger had shared with him.<sup>4</sup>

The more unbearable the terror became following the *"Anschluss"* [the occupation and annexation of Austria in 1938], and the faster the "Greater German Reich" (*"Großdeutsche Reich"*) approached war, the more dire became the basis of my existence.

In the end phase of my legal practice, I regarded the true value of my membership of the bar to be in possession of an identity card that gave me access to the reference collections of the libraries of the *Kammergericht* [the provincial high court and court of appeal for the state of Berlin] and of the *Staatsbibliothek*. In the "oasis" of the Berlin State Library there met—entirely coincidentally, of course—such "reliable enemies of the state" (*"zuverlässige Staatsfeinde"*) as Theodor Heuss, Otto Suhr, Ernst von Harnack, Heinrich Acker, and others. Going for walks up and down the rotunda, we exchanged ideas.

It was in these libraries that I compiled the excerpts that I needed for the drafting of *The Dual State*. There, I also wrote a considerable part of the *Urdoppelstaat* [the very first incarnation of *The Dual State*].

The plan to deepen and expand what initially were mere sketches about the dual state and to turn them into a systematic, political science analysis of the phenomenon first arose in the course of deep discussions, during vacations abroad, with my friends Franz Neumann

<sup>4</sup> The publication in question is Werner Best, "Neubegründung des Polizeirechts," *Jahrbuch der Akademie für Deutsches Recht*, vol. 4 (1937), 132–52.

and Otto Kahn-Freund, both of whom had already emigrated previously.

The publication of the German edition was suggested by Alexander von Brünneck, lecturer (*wissenschaftlicher Assistent*) of political science at the Technical University of Hannover. He was unstinting in his commitment to making possible the book's retranslation and its publication by the Europäische Verlagsanstalt [a German publishing house of mostly intellectual non-fiction and left-leaning titles whose postwar founders had been members of the ISK, the socialist resistance group with which Fraenkel was closely affiliated in the 1930s]. His efforts are even more significant because, on account of severe, recurring illnesses, I was unable to support the project with as much vigor as I would have liked. I owe deep gratitude to him for his extraordinary commitment, his interest, and his understanding.

I also thank the Europäische Verlagsanstalt, which took on, supported, and brought off the book's publication in an exemplary manner.

*Gerichtsreferendarin* [law clerk] Mrs. Hela Rischmüller-Pörtner and Mrs. stud. jur. [law student] Christiane Terveen assisted with the verification of bibliographic information, thereby making a worthy contribution to the book's completion.

Translated by Jens Meierhenrich



## *Introduction to the 1941 Edition*

‘TOTALITARIAN’ is a word of many meanings too often inadequately defined. In this treatise we have tried to isolate one important characteristic of the totalitarian state in Germany, and by studying this fundamental aspect of the National-Socialist regime we hope to make clearer the legal reality of the Third Reich.

We have not attempted an exhaustive picture of the whole of the emerging legal system; rather we have sought to analyze the two states, the ‘Prerogative State’ and the ‘Normative State,’ as we shall call them, which co-exist in National-Socialist Germany. By the Prerogative State we mean that governmental system which exercises unlimited arbitrariness and violence unchecked by any legal guarantees, and by the Normative State an administrative body endowed with elaborate powers for safeguarding the legal order as expressed in statutes, decisions of the courts, and activities of the administrative agencies. We shall try to find the meaning of these simultaneous states through an analysis of the decisions of the German administrative, civil and criminal courts, at the same time attempting to indicate the line of division between the two. Since this problem has not yet been considered by theorists it will be necessary to quote the original sources themselves *in extenso*. In studying the development of judicial practice as it is embodied in decisions, we learn that there is a constant friction between the traditional judicial bodies which represent the Normative State and the instruments of dictatorship, the agents of the Prerogative State. By the beginning of 1936 the resistance of the traditional law-enforcing bodies was weakened; thus the decisions of the courts are an impressive illustration of the progress of political radicalism in Germany.

The first part of this book is exclusively devoted to a description of the existing legal order. A second theoretical part attempts to prove that because of the parallel functioning of the traditional procedure and of a method of making decisions by considering only the peculiar circumstances of the individual case, the legal