

## The Political Order of the Volksgemeinschaft: Ernst Fraenkel's Dual State Revisited\*

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Referring to what is familiar when one approaches the unknown is by no means unusual. This truism might also be applied to the way many Germans viewed National Socialism, as it suddenly swelled to become a mass movement in 1930 and, despite declining voter support in November 1932, went on to an unexpected political victory only a few weeks later. "Horror. Never thought it would be possible," noted Klaus Mann on the evening of 30 January 1933 in his diary.<sup>1</sup> "Icy horror" is how Sebastian Hafner describes his feelings upon hearing that Hitler had become chancellor of the Reich; he went on: "Then I shook the sensation off, tried to smile, started to consider and found many reasons for reassurance. That evening I discussed the prospects of the new Government with my father. We agreed that it had a good chance of doing a lot of damage, but not much chance of surviving very long [...]."<sup>2</sup>

This expectation was a delusion. In the revolutionary phase of the spring of 1933 – a period frequently played down with the technical term *Gleichschaltung* – the National Socialists not only usurped the existing political structures, they also transformed them fundamentally: unions and worker's political parties were disbanded; a one-party system installed; professional, youth, and even leisure organizations united under the Nazi banner; the *Führerprinzip* and antisemitic bans for certain

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1 Klaus Mann, *Tagebücher 1931–1933*, eds: Joachim Heimannsberg, Peter Laemmle, and Wilfried Schoeller (Reinbek bei Hamburg: Rowohlt, 1995), p. 113.

2 Sebastian Hafner, *Defying Hitler: A Memoir* (London: Weidenfeld & Nicolson, 2002), p. 87.

professions introduced; concentration camps and the Gestapo established; the political opposition became the object of state terror.

How can one explain this Nazi regime? Labeling the new National Socialist order as a dictatorship or tyranny were possibilities that immediately suggested themselves. Marxists spoke of Bonapartism, alluding to Marx's analysis of Louis Bonaparte's *Coup d'état* in France in 1851. In his book *Behemoth*, published in the U.S. in 1942, Franz Neumann went one step further and declared the Nazi regime an *Unstaat*, a non-state,<sup>3</sup> whereas subsequent theories of totalitarianism occupied the opposite pole and described National Socialism as well as Soviet communism as total states.

All of these explanations have one thing in common: their points of reference are familiar theories of the state. The National Socialist hegemonic system is either categorized as a tyranny or oligarchy within the classic Greek doctrine of the transformation of political constitutions or characterized with the concept of dictatorship, as an extreme form of the authoritarian state, the rule of a single person – an understandable perspective in the light of Hitler's dominant role. Those who hoped to rescue the Marxist theory of class hegemony even for a state of exception sought to shore up their argument by referring to French history in the 1830s – or, in the case of the Communist International in 1935, attempted to shape reality to fit their favored ideological mold and announced that National Socialism was the monopolistic hegemony of financial capital. Even Neumann's non-state, as a total negation, remains within the horizon of the classic concept of the state delineated in the 18th and 19th centuries.

Ernst Fraenkel also maintains the focus on the state and yet his analysis opens a new perspective, to include the specific political order of National Socialism. Fraenkel's study, *The Dual State* – unappreciated in Germany for many years and long out of print until a new edition appeared, quite significantly, last year – has numerous insights to offer today's readers. Although formulated in the terms of the political and legal theory of the 1930s, Fraenkel's thoughts are, in contrast to more familiar explanations of the Nazi regime, useful in focusing on what was novel and unfamiliar about this political order.

### Collective Democracy

It is no doubt superfluous to emphasize here that persecution, expulsion, and annihilation of European Jews by the Nazis also meant a great loss for intellectual and academic life in Germany: Max Horkheimer, Theodor Adorno, Leo Löwenthal, Herbert Marcuse, Otto Kirchheimer, and Franz Neumann – just to name authors associated with what is referred to as the Frankfurt School – were the offspring of Jewish families, as was Ernst Fraenkel.

Fraenkel was born in Cologne in 1898 as the son of wealthy parents who died when he was quite young. Fraenkel was then raised by a maternal uncle in Frankfurt am Main, where he was deeply influenced by a German-Jewish world of thought which found its expression, as Fraenkel later wrote, in a "true cult of 'education'" oriented around the figure of Goethe and his literary works. In these circles, people believed in progress, were committed to a constitutional legal system and to tolerance, condemned autocratic Russia and its antisemitic pogroms as barbarian, and admired England as the model of a free country in Europe. Children were educated in the spirit of the Enlightenment and of assimilation and imparting a sense of Jewish religion and culture played at best a minor role. Fraenkel characterized this attitude towards Jewry, focusing as it did on a rejection of antisemitism, with Theodor Herzl's term *Trotzjudentum* (defiant Jewry).<sup>4</sup>

And yet, like Leo Löwenthal, Gershom Scholem, and many others of his generation, Fraenkel was conscious of the fact that he belonged to a minority, despite the level of emancipation attained by Jews in Germany. This realization by no means deterred most Jews in Germany from being deeply convinced that they were part of the German nation, and for Fraenkel as well, it was a natural patriotic duty to go to war for *Kaiser* and fatherland. Nevertheless, the perception of belonging to a minority, of belonging to a part rather than the whole, shaped, as Fraenkel noted in an autobiographical text written in the 1970s, what he termed his "political Ur-experience."<sup>5</sup>

Fraenkel was drafted in 1916 at the age of eighteen and fought on

3 Franz Neumann, *Behemoth: The Structure and Practice of National Socialism* (Toronto and New York: Oxford University Press, 1942), p. VII.

4 Ernst Fraenkel, *Anstalt einer Vorrede, in Reformismus und Pluralismus: Materialien zu einer ungeschriebenen politischen Autobiographie*, compiled and edited by Falk Esche and Frank Grube (Hamburg: Hoffmann & Campe, 1973), pp. 13–15.

5 *Ibid.*, p. 15.

the frontlines – a fact which meant that he later was exempted from the antisemitic professional prohibitions of the Nazi regime and allowed to continue practicing law for a time. When the war ended, Fraenkel was a member of a soldier's council in his Darmstadt garrison, but he was not a staunch revolutionary. After being discharged from the army, he decided to study history but then compromised with his uncle and majored in law, with history as his minor.

Together with Franz Neumann and Leo Löwenthal, with whom he became acquainted in Frankfurt, Fraenkel established a socialist student group in 1919. Neumann joined the *Sozialdemokratische Partei Deutschland* [SPD – Social Democratic Party Germany] in the same year. Fraenkel followed suit in 1921 and remained a reformist, although he saw himself as a member of the party's left wing. Hugo Sinzheimer, who held the first professorship for labor law in Germany, became the role model for these young Social Democratic lawyers. Antisemitic students with *völkisch* convictions abhorred Sinzheimer, as a Social Democrat and lawyer who had played a key role in formulating the Weimar constitution. His inaugural lecture was disrupted by rowdies; democratically minded students, among them Franz Neumann, had to force his way to the podium. Later, in 1933, he was one of the first professors in Frankfurt to be dismissed and forced to emigrate. His students included Fraenkel, Neumann, Otto Kahn-Freund, Hans Morgenthau, and Carlo Schmid; Schmid and Fraenkel completed their doctorates in 1923, with Sinzheimer as their doctoral adviser. Fraenkel then became Sinzheimer's assistant at the university, a position later held by Franz Neumann. Sinzheimer survived by going underground in the Netherlands, but due to the exertions of Nazi persecution and life in hiding, he died only a few weeks after liberation in 1945. In a very personal and moving speech held in 1958 in Frankfurt in memory of Sinzheimer, Fraenkel broke with the *Zeitgeist* of post-war Germany and spoke openly of the antisemitism, which had driven Sinzheimer out of the country.

While labor law might evoke images of uninspiring contract negotiations and legal proceedings in labor courts, these young left-wing lawyers were aware of the significant political dimensions of the field. In the German tradition, the juridical order was closely linked to the state and to laws; in Hegel's legal philosophy, these spheres were even seen as congruent. Law [*Recht*] was set down by the state and by no one else. After emigrating, Neumann continued to refer to this concept in replying to the question of whether the Nazi regime was indeed a state: "If a state

is characterized by the rule of law, our answer to this question will be negative, since we deny that law exists in Germany."<sup>6</sup>

Modern labor law opposed equating the state and the law in this way. It not only recognized the existence of unions, employer's associations and other such organizations within society. It also recognized that these collective organizations negotiated tariff contracts with each other and that such contracts established legal norms which members of the respective organizations could refer to in disputes brought to trial in labor courts, without any law having been passed by the legislature.

Ernst Fraenkel took up this new, social dimension sketched by Sinzheimer, pursued these thoughts further and published, as early as the 1920s, several essays devoted to the theoretical development of the concept of collective democracy. According to Fraenkel, collective democracy meant that "in forming the will of the state, no longer only single people or individuals are involved, but also organizations as such."<sup>7</sup> This did not mean that a sphere devoid of legal norms outside of or even in opposition to the state was to be established. The constitutional state and the constitution continued to form the sheltering roof of a collective democracy. Even in this early work, Fraenkel's aim was to outline a theory of social democracy as a complement to a form of democracy predominantly mediated through the state: later, after the war, he elaborated upon this work in his pluralism theory, which had a great influence on political science in the 1950s and 1960s. "Collective democracy (which is not merely an empty wish, but rather an effective component of the life of our state, and which will be expanded, in the sense formulated by Marx, not as a matter of realizing ideals, but in order to set into motion elements of freedom) will not represent an independent social constitution existing beside the state constitution, but will instead insert itself into the state constitution."<sup>8</sup>

Such considerations ensured that Fraenkel was immune to Carl Schmitt's arguments about the common identity of the governed and the governing and about the categorical homogeneity of the political order. Fraenkel not only asserted the existence of social inequality, he

6 Neumann, *Behemoth*, p. 467.

7 Ernst Fraenkel, *Die Gewerkschaften und das Arbeitsrechtsgesetz* (1927), in *Gesammelte Schriften*, vol. 1: *Recht und Politik in der Weimarer Republik*, ed. Hubertus Buchstein, ass. by Rainer Kühn (Baden-Baden: Nomos, 1999), p. 259.

8 Ernst Fraenkel, *Kollektive Demokratie* (1929), in *Gesammelte Schriften*, vol. 1, p. 355.

also upheld the reality of fissures within society and the necessity of dispute as an essential element in shaping compromise. In contrast to Franz Neumann, who – towards the end of the Weimar Republic – had read Carl Schmitt “from the left” and in doing so transferred the friend-enemy label to the opposition between capital and work and declared parliamentary democracies incapable of resolving this opposition,<sup>9</sup> Fraenkel avoided a similar rapprochement with Schmitt’s authoritarian theory of constitutions, thanks to his pluralism concept. After the war, he referred to Schmitt as the “most imaginative and most dangerous, because most instable German social scientist of our time” who rather than studying jurisprudence had only pursued “situative science.”<sup>10</sup>

That Fraenkel’s thoughts on “collective democracy” led him to the concept of the “dual state” is an explanation that suggests itself. By thinking the political not only in terms of the state and – in the positive conceptualization – by outlining a socially founded democracy which exists besides state-mediated democracy, Fraenkel was able – in his negative analysis of National Socialism – to not only grasp the Nazi state as a Führer state, as an all-embracing dictatorship or hermetic-totalitarian system, but also succeeded in studying the political as a phenomenon independent of the state order.

### Normative and Prerogative State

*The Dual State* took shape as a result of Fraenkel’s direct, participatory observation of the Nazi regime. Besides their work as lawyers for German unions at the end of the Weimar Republic, Fraenkel and Neumann were

9 Neumann wrote to Schmitt on 7 September 1932: “If one takes the standpoint that the fundamental political antagonism in German is economic, that the decisive friend-enemy grouping is the grouping work-property, then it is evident that parliamentary rule is no longer feasible in the face of such a political dichotomy.” The letter has been published in Rainer Erd (ed.), *Reform und Resignation: Gespräche über Franz L. Neumann* (Frankfurt am Main: Suhrkamp, 1985), pp. 79f.

10 Ernst Fraenkel, *Rezension von Peter Schneider, Ausnahmezustand und Norm: Eine Studie zur Rechtslehre von Carl Schmitt* (1957), in *Gesammelte Schriften*, vol. 2: *Nationalsozialismus und Widerstand*, ed. Alexander v. Brinneck (Baden-Baden: Nomos, 1999), p. 599; also, Michael Wildt, *Ernst Fraenkel und Carl Schmitt: Eine ungleiche Beziehung*, in Daniela Münkel and Jutta Schwarzkopf (eds.), *Geschichte als Experiment: Studien zu Politik, Kultur und Alltag im 19. und 20. Jahrhundert. Festschrift für Adelheid von Saldern* (Frankfurt am Main: Campus, 2004), pp. 35–48.

also legal counsel for the SPD and thus prime targets for the National Socialists. When, on 2 May 1933, the SA forced its way into union buildings throughout Germany, the law offices of Fraenkel and Neumann in the metal workers union building in Berlin were also assaulted. As the legal counsel of the SPD, Neumann felt especially threatened and fled Germany a few days later, immigrating to England. As a former frontline veteran, Fraenkel was at first exempted from the antisemitic professional prohibitions enacted by the Nazis in April 1934. He remained in Berlin and worked as a lawyer to aid those persecuted by the Nazis, wrote articles under a pseudonym for the Parisian journal of the resistance organization *Internationaler Sozialistischer Kampfbund* and collected material from newspapers, magazines, and court decisions for his analysis of National Socialism.

The *Urdoppelstaat* – the version of Fraenkel’s text smuggled out of Germany by an employee of the French embassy shortly before Fraenkel fled to the U.S. in September 1938 – was published for the first time in a recent German edition of collected writings by Ernst Fraenkel.<sup>11</sup> Fraenkel revised and expanded the manuscript for the American edition, published in 1941 as *The Dual State*, in order to, as he wrote in the preface to the later German edition, “explain the hegemonic structure of the Third Reich in scholarly categories familiar to American readers schooled in the social sciences.”<sup>12</sup> This American text was in turn the basis for the text re-translated into German and published in West Germany shortly before Fraenkel’s death in 1974.

The term “dual state” referred to the “co-existence of a ‘Normative State’ which generally respects its own laws and a ‘Prerogative State’ which violated those same laws”; in Fraenkel’s words: “By the Prerogative State we mean the 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 courts, and activities of the administrative agencies.”<sup>13</sup>

Fraenkel expressly emphasized that “we do not refer to the coexistence

11 Ernst Fraenkel, *Der Urdoppelstaat* (1938), in *Gesammelte Schriften*, vol. 2, pp. 267–473.

12 Ernst Fraenkel, *Der Doppelstaat* (1974), in *Gesammelte Schriften*, vol. 2, pp. 233–246.

13 Ernst Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship* (New York: Oxford University Press, 1941), p. XIII.

of the state bureaucracy and the party bureaucracy" but instead intend to scrutinize "the entire bureaucratic and public machine."<sup>14</sup> The institutions of the Nazi state, so Fraenkel's view, could be elements of both the Normative State and the Prerogative State. Thus, Fraenkel criticized any attempt to gloss over the facts by distinguishing a supposedly pure and innocent bureaucracy from a Nazi movement guilty of destroying the state and the juridical order. The SS and police apparatus was undoubtedly part of the Prerogative State; it was characterized precisely by the fact that it represented a combination of an official state police and a National Socialist organization. The regional tax offices, in contrast, were long considered to be institutions of the Normative State, until recent studies revealed their central, proactive role in persecuting German Jews and appropriating the property of Jewish citizens.<sup>15</sup> Fraenkel went beyond an analysis of the National Socialist *Machtergreifung* as a mere usurpation of state power by the Nazi party to illuminate how the Nazis transformed the state.

This transformation process began with the Decree of the President of the Reich for the Protection of People and State of 28 February 1933 [*Verordnung zum Schutz von Volk und Staat*, often referred to in German as the *Reichstagsbrandverordnung*]; in the following termed Emergency Decree], a document referred to by Fraenkel as the "constitutional charter of the Third Reich."<sup>16</sup> If history could be explained according to the question "Cui bono? Who benefits?" then the dispute about who set fire to the Reichstag presumably would have ended long ago. In view of the enormous political benefits reaped from the Reichstag fire by the National Socialists, it is perhaps difficult to accept that this was the deed of an individual – and to therefore also accept the contingency of history. Despite the on-going dispute among historians as to whether Marinus Van der Lubbe indeed started the fire, the fact that the Nazi leaders immediately and resolutely exploited the political opportunities it offered

14 Ibid., p. XV.

15 Cf. Martin Friedenberger, *Die Rolle der Finanzverwaltung bei der Vertreibung, Verfolgung und Vernichtung der deutschen Juden*, in Martin Friedenberger, Klaus-Dieter Gössel and Eberhard Schönknecht (eds.), *Die Reichsfinanzverwaltung im Nationalsozialismus* (Bremen: Edition Temmen, 2002), pp. 10–94; also, the results of session No. 59: "Holocaust and Finanzverwaltung: Neue Forschungen," German Studies Association, Annual Conference, San Diego, 3–6 October 2002, available at <http://h-net.msu.edu>.

16 Fraenkel, *Dual State*, p. 3.

is undisputed. Hitler, Göring, Goebbels, and Papen met that very night and agreed to formulate an emergency decree; the draft was presented to the Reich cabinet the very next morning. Late in the afternoon of 28 February 1933, Reich President Hindenburg signed the Emergency Decree. The decree followed the example set by similar emergency decrees from the Weimar Republic, including provisions suspending fundamental rights such as habeas corpus, sanctity of one's home, of the mails and telephone, freedom of speech and freedom of assembly, the right to organize, and property rights. Immediately after passage of the Weimar constitution in 1919, ministry bureaucrats drafted a model decree based on article 48 (state of emergency); the February 1933 decree was to a large extent identical with this 1919 text. Reich President Ebert, a Social Democrat, intervened with the measures outlined in paragraph 48 more than a dozen times in the unstable early years of the Weimar Republic, generally employing them to quell left-wing uprisings. Not only were fundamental civil rights suspended; the provisions also meant that executive power was delegated to regional military commanders.

The Emergency Decree was anything but a hastily thought-up or completely novel bureaucratic act. Nonetheless, it differed in two characteristic elements from preceding decrees.<sup>17</sup> First, the new version of § 2 provided that the Reich government could appropriate the powers of the authorities of a Land without the previously required explicit order of the Reich president. This paved the way for the National Socialists to usurp power in the German *Länder*: in an orchestrated campaign of street violence and state of emergency measures, the SA threatened the elected governments of the *Länder*, thus providing Hitler's national government with an excuse for replacing these governments with Nazi Reich commissars ostensibly appointed to restore public order. Second, the Emergency Decree consciously avoided a declaration of martial law. Instead of transferring executive powers to a military commander – the usual procedure during the Weimar period – the police force was to enforce the repressive measures defined in the decree. The decree thus strengthened the role of the police in the Nazi regime and was an indication of how little National Socialist leaders thought in terms of traditional categories of state emergencies or sieges. The aim here

17 Cf. on this question Thomas Rathel and Irene Strenge, "Die Reichstagsbrandverordnung: Grundlegung der Diktatur mit den Instrumenten des Weimarer Ausnahmezustandes," in *Vierteljahrshefte für Zeitgeschichte* 48 (2000), pp. 413–460.

was not "restoring public security and order," as stipulated in article 48 of the Weimar constitution, the article upon which all such previous decrees had been based. Nor was the goal "defense against Communistic, state-endangering acts of violence," although this was written into the preamble of the February 1933 decree. The decree was instead intended as a means of permanently codifying National Socialist hegemony, as a reign, which relied heavily on the police and the concentration camp system. Until the end of the Nazi regime, the Gestapo referred to the February 1933 Emergency Decree to justify its various measures, orders, and instructions.

The Emergency Decree was meant to provide the regime with complete freedom to act or, more generally, to remove the political from the sphere of the rule of law. As Fraenkel wrote in the *Dual State*: "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" (*Mafsnahmenstaat*)."<sup>18</sup>

### The State of Exception as Order

"Sovereign is he who decides on the exception."<sup>19</sup> Carl Schmitt begins his work *Political Theology*, which first appeared in 1922, with this often cited sentence. What is meant here with exception is not the extra-legal state of emergency, which aims to protect constitutional norms from attack. For Schmitt, the suspension of the rule is a border zone. "He [the sovereign] decides whether there is an extreme emergency as well as what must be done to eliminate it. Although he stands outside the normally valid legal system, he nevertheless belongs to it, for it is he

who must decide whether the constitution needs to be suspended in its entirety."<sup>20</sup>

Ernst Fraenkel, like Carl Schmitt, reacted to the bourgeois state's crisis of legitimacy and attempted to conceptualize the political outside of the state. Schmitt's determination of the political as a friend-enemy distinction, as a label for "the utmost degree of intensity of a union or separation, of an association or dissociation" in effect meant that the *People* was to constitute a homogenous and clearly delineated group, defined not as an gathering of equal citizens, but as a homogenous [*gleichartig*] – after 1933, the term became *artgleiche* – political entity and that the state was to be defined simply as a "specific condition of the *People*." For Fraenkel, in contrast, the separation of the political from the state was the opening maneuver of an analysis aimed at identifying the specific state order of National Socialism.<sup>21</sup>

Fraenkel thus implicitly subjected the concept of the state of exception to a radical critique, since the word semantically suggests that it is merely the exception to a rule, a rule which should be reinstated as soon as possible. The prerequisite for a state of exception is always the rule of law; it must always refer to a legal order, because the suspension of that order constitutes the exception. The Italian philosopher Giorgio Agamben recently labeled this paradox, implied in the work of Carl Schmitt, an "inclusive exclusion," since the state of exception does not represent the violation of a border, but instead unveils the juridico-political order itself; it is solely through this order that everything included in it, as well as what is excluded, gains meaning. It is not the exception which is beyond the realm of the rule; rather, the rule, by suspending itself, allows for the exception. Only because of its relationship to the exception does the rule establish itself as a rule. Thus, the state of exception represents the most extreme form of a relationship which includes by exclusion.<sup>22</sup>

This complex relationship of exception and rule, of the juridical order and its suspension, is maintained in Fraenkel's model of the dual state;

<sup>20</sup> *Ibid.*, p. 11.

<sup>21</sup> Carl Schmitt, *The Concept of the Political* (1932), (New Brunswick, NJ: Rutgers University Press, 1976), pp. 27, 20. Lutz Niehammer has pointed out the significant inversion of syllables from "artgleich" to "artgleich" in his book *Kollektive Identität: Heimliche Quellen einer unheimlichen Konjunktur* (Reinbek bei Hamburg: Rowohlt, 2000), pp. 101–105.

<sup>22</sup> Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford, CA: Stanford University Press, 1998), p. 21.

<sup>18</sup> Fraenkel, *Dual State*, p. 3.

<sup>19</sup> Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Cambridge, MA: MIT-Press, 1985), p. 5.

at the same time, it refutes one of Carl Schmitt's key thoughts. Schmitt's sovereign, who alone has the power to decide about the state of exception, suspends the legal order "in toto." Trapped in the assumptions about identity inherent in his political theory, Schmitt is unable to differentiate between society and politics and creates the image of an all-embracing constitutional order, such that, when suspended by the sovereign, all rights would disappear, as if the book of law were obliterated in one theoretical second.

The state of exception is, however, nothing more than a constitutional construction, which provided that the constitution is suspended and the sovereign is re-instated as the executive authority with the power to establish law. This does not invalidate the rule of law in bourgeois society, as Fraenkel clearly recognized. Even if fundamental constitutional rights, such as habeas corpus or freedom of speech and assembly are suspended, contract law and property rights are still in effect. Trams must still run, houses must be built, workers paid. Although a state of exception may suspend the constitution of a state ruled by law, it does not destroy bourgeois society. That, however, was the goal of the National Socialists. What was new about the National Socialist regime was that it was based on the people and race, rather than on the state and law, as principles of order. The *People*, rather than the state, were the centerpiece of Nazi thought. Hitler formulated this idea unequivocally in *Mein Kampf*: "In general it should not be forgotten that the highest aim of human existence is not the preservation of a state, let alone a government, but the preservation of the species. [...] We, as Aryans, can conceive of the state only as the living organism of a nationality, but by the development of its spiritual and ideal abilities leads it to the highest freedom."<sup>23</sup>

Under the Nazis, the basis for action was not a body of rules and regulations defined by a dictatorial state or bureaucracy – rules which would be binding even for the most repressive dictatorship. The National Socialist point of reference was the *Volksgemeinschaft* [the community of the people], the race, and it was only "natural" that the development of this community could not be regulated by any bureaucracy. This was the source of the widespread Nazi aversion to lawyers shared, for example, by Hitler, Himmler and Heydrich. Such attitudes resulted not so much from petit bourgeois prejudice but instead from a clear-cut

political rejection of demands for regulatory powers which were legally codified, and thus systematic, uniform, transparent, and characterized by their authoritatively and clearly defined validity.

This controversy is reflected in debates about constitutional law among supporters of the "Third Reich." Ernst Rudolf Huber or Otto Koellreuter, as representatives of static standpoints, were in favor of legitimating a *Führerstaat* oriented around Hitler's omnipotence, but maintained the state as a legal entity and employed constitutional elements to provide for specific structures. Reinhard Höhn, the young functionary of the *Sicherheitsdienst* and specialist for constitutional law from Berlin, based his argument entirely on the *Volksgemeinschaft*: "Another principle, the principle of the community has today replaced the individualistic principle. The juridical state as a person [*juristische Staatsperson*] is no longer the fundamental and corner stone of constitutional law; the *Volksgemeinschaft* is the new starting point."<sup>24</sup>

Referring to the state – in the sense of Hegel's classic philosophy of law – as the point of reference of political theory is always linked to a certain static entity, a stable, reliable political structure, a binding political theory; at the very least, this will involve the call for a congruent relationship between state authority, nation [*Staatsvolk*], and state territory. The people as a determining category, in the *völkisch* or racial sense of the term, encompass the political dynamic. Wherever the state is the reference point – even in a dictatorship – rules and legal norms are established which are applicable to all, including perpetrators; the *Volksgemeinschaft*, in contrast, implies the delimitation of political praxis as an inherent element.

I consider this dynamic, this delimitation of the concept of the state to be significant for an analysis of the National Socialist order. We find the concept of the "ideal state," as a goal which the existing state should strive to attain, in the works of the young Friedrich Schlegel, or the writings of Johann Gottlieb Fichte or Georg Forster. The idea of the Reich as a backward-looking utopia fascinated Ricarda Huch and the protagonists of the so-called "conservative revolution" and notion broke with mainstream dogmas about the constitutional state. The same might be said of the vision of salvation formulated by the young Free

23 Adolf Hitler, *Mein Kampf*, trans. by Ralph Manheim (Boston, MA: Houghton Mifflin, 1943), pp. 96, 394. Italics in the original.

24 As quoted in Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, vol. 3: *Staats- und Verwaltungsrechtswissenschaft in Republik und Diktatur 1914–1945* (Munich: C. H. Beck, 1999), p. 327.

Corps fighter Ernst von Salomon, who described Germany in 1929 not as a state or as something pre-existing, but rather as a future, emerging phenomenon, something that had to be fought for: "Germany was there where swords were unsheathed for her; she was there where armed bands were threatening her existence; she shone resplendent where those who were informed by her spirit wagered all they possessed for her sake. Germany was at her frontiers."<sup>25</sup>

The National Socialist demand that the borders of the German Reich be defined according to *völkisch* principles constituted a breach of all international agreements and of the state-oriented politics of power which had shaped Europe. Thus, Chamberlain's appeasement politics must be explained not only on the backdrop of his political shortsightedness, but also as a result of the structural inability of Anglo-Saxon politics, rooted as it was in the concept of citizenship, to comprehend politics based on the concepts of race and the people. It was not until Winston Churchill, with his background in British colonial politics, arrived on the scene – and those familiar with the relevant sections about racism and the British colonial bureaucracy in Hannah Arendt's *Elemente und Ursprünge totaler Herrschaft* can interpret this as a confirmation of Arendt's hypothesis – that an Anglo-Saxon comprehended what the Nazis wanted.

Forming the *Volksgemeinschaft* was, without a doubt, to a large extent a process of inclusion, of establishing a community through gratification, self-styling, and pressure to adapt. But where a community is formed, borders must also be drawn; inclusion is linked, by necessity, to exclusion. The antisemitic politics of the regime played a decisive role in this process. Transforming the German nation into a racist community, transforming the bourgeois civil society into an aggressive community of predators could not occur by definition or by establishing legal norms. This transformation was a political process, not only within the political class or the urban centers, but especially in rural areas, in villages and small towns; here, Nazis held leadership positions but had not yet taken over political power, let alone established the *Volksgemeinschaft*. Persecution of the German Jews as "enemies of the people" and "racial

opponents of the German people" was a political key instrument in destroying the nation.

For political practice on a local level, this meant creating social distance and stigmatizing those who expressed solidarity and compassion with the victims, in order to isolate the Jews and mark them too as outlaws without civil rights. Various studies have revealed the unremitting antisemitic political praxis of local Nazi party groups, especially in small towns, in the years before the war, and have also described the vehement and aggressive persecution of German-Jewish citizens and of non-Jewish Germans, who continued to buy from Jewish merchants or remained in contact with Jewish neighbors and were publicly denounced as "traitors to the people" for doing so. These studies demonstrate the concrete forms which the politics of transforming a nation into a *Volksgemeinschaft* took in everyday life: humiliations, indignities, deprivation, and, last but not least, threats to life and well-being.

#### Limits to the *Volksgemeinschaft*

If, as Fraenkel wrote, the Prerogative State tends in principle to dissolve the Normative State – that is, to completely transform the juridical order into politics – then is there also a danger that the *Volksgemeinschaft* itself will be destroyed in an arbitrary chaos of violence? How could one trust the loyalty of a *Volksgemeinschaft*, when – on the one hand – that community owed its existence to the stigmatization of "enemies of the people" who were excluded, expelled, annihilated and – on the other hand – this very program of racial persecution entailed the suspension of civil rights, so that, ultimately, the erosion and perversion of justice might also sweep away the persecutors themselves? The so-called Aryanization of Jewish property bears witness to just how much the Nazis worried about this contradiction. Aryanization was *de facto* the extortionate expropriation of Jewish property, entailed the breach of uncounted contracts and was thus a massive violation of the basic principles of civil legal norms. Under normal conditions in a constitutional state, where one could rely on the courts to punish offenders and sue for the return of appropriated property, such a process would have been unthinkable. In order to leave property rights, as a core element of bourgeois society, at least formally intact, the Nazi regime required contracts camouflaging these acts of robbery as sales

25 Ernst von Salomon, *The Outlaws* (Millwood, NY: Kraus Reprint, 1983), p. 58. On

Ernst von Salomon as a political writer see also the portrait in Ulrich Bielefeld, *Nation und Gesellschaft* (Hamburg: Hamburger Edition, 2003).



agreements. But this expedient could not distract from the fact that the Civil Code had been suspended and the foundation of bourgeois society eroded. If contract law could be broken in dealing with the Jews, if the universal validity of the law could be suspended, then who could be certain that they might not be the next victims of robbery and arbitrary treatment?

As early as 1934, no less a figure as Hermann Göring lectured on "The Principle of Legal Certainty as a Fundament of the *Volksgemeinschaft*." Hans Frank, President of the Academy for German Law [*Akademie für Deutsches Recht*] and, as the Governor General in Poland, one of those responsible for the murder of millions of Jews, denounced in July 1942 the "complete destruction of legal certainty" – referring, of course, only to German *Volksgeossen*. From the outset, the determination of limits and the establishment of a juridical order was an inherent and irresolvable problem for the Nazi regime. Werner Best, the deputy of Reich Security Main Office head Heydrich, formulated the problem by asserting that not "any political activity may be undertaken without regard to rules and according to the arbitrary decision of any individual political authority [*einzelne Träger der Gewalt*]. It is essential that many of the activities of the state should be carried out according to legal rules and that they should be calculable in advance, on order that the persons concerned may be able to orient themselves satisfactorily." This standardization is of course, in Best's own words, only indicated "with respect to all positive, constructive forces with the People."<sup>26</sup> They should be in a position, as far as possible, to foresee the actions of the Nazi state.

Fraenkel's theory of the dual state does not lose sight of this contradiction. In Fraenkel's analysis, however, the dynamic of the political system is primarily aimed at extending the Prerogative State, at the expense of the Normative State; in other words, the goal is extending the political at the expense of the law. This later prompted Fraenkel, in a review of Neumann's *Behemoth*, to characterize the findings of his own study as correct for the pre-war period and to identify Neumann's work as valid in describing the situation during the war. This reading continues to appear in the literature up to the present day. If, however, we place the *Volksgemeinschaft*, as a key element of National Socialist politics, at the center of the analysis, then a different dynamic comes into view.

The logic of the dual state is neither aimed solely and necessarily at

dissolving the norm and replacing it, per decree, with chaos, nor is it aimed at replacing the constitutional Normative State with the political Prerogative State. If we take Fraenkel's model seriously, then we can forecast a more complex development, in which new norms emerge and politics creates a new juridical order. Indeed, the possibility of such circumstances arising was already expressed by Carl Schmitt: "There is no norm applicable to chaos. For a legal order to make sense, a normal situation must exist and he is sovereign who definitively decides whether this normal state actually exists."<sup>27</sup>

Schmitt's attention again centers on the sovereign; whether a "normal" state reigns or not depends on his decision. Fraenkel's perspective, in contrast, focuses on the production of the new order; on the relationship between norm and politics, between law and violence; on the transformation of the bourgeois constitutional state into the *Volksgemeinschaft*. The Decree for the Protection of People and State from 28 February 1933 opened the way to a re-determination of the relationship between *People* and state.

Giorgio Agamben has termed the state of exception a border zone of indistinction between nature and right,<sup>28</sup> in which it is "a question not only, as Schmitt seems to suggest, of the irruption of the 'effective life' that, in the exception, 'breaks the crust of a mechanism grown rigid through repetition' but of something that concerns the most inner nature of the law," in other words, bare life itself.<sup>29</sup> According to Agamben, the state of exception instead appears as a "threshold in which life is both inside and outside the juridical order, and this threshold is the place of sovereignty."<sup>30</sup>

The state of exception does not erase the law but it does create a sphere where the law is no longer valid. And while the state of

<sup>27</sup> Schmitt, *Political Theology*, p. 13. Schmitt's definition of a sovereign dictatorship is similar: "It does not suspend an existing constitution through the power of law based therein and thus of constitutional nature but rather attempts to create a situation in order to realize a constitution which it regards as the true constitution. Thus, it does not invoke an existing constitution, but rather one which must be brought into effect." Carl Schmitt, *Die Diktatur: Von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf* (1921) (Berlin: Duncker & Humblot, 1994), p. 134.

<sup>28</sup> Agamben, *Homo Sacer*, p. 21.

<sup>29</sup> *Ibid.*, p. 26.

<sup>30</sup> *Ibid.*, p. 27.

exception remains inextricably linked to the rule, it also changes the rule, through the practice of the exception. The Prerogative State thus did not devour the Normative State, and then itself dissolve in self-destructive chaos. For those considered part of the "positive, constructive force of the *People*," a new political order was to be created, one which broke with the old Normative State but nonetheless afforded normative certainty for *Volksgenossen*. Viewed from this perspective of the politics of the *Volksgemeinschaft*, the dynamics of the Prerogative State and the Normative State neither leads to complete lawlessness, as Fraenkel assumed, nor to a "non-state," as Neumann asserted, but rather yielded a new, racist juridical order, an order which, in contrast to bourgeois society, attempted to codify inequality as its fundamental principle.

Reprint From

# On Germans and Jews under the Nazi Regime

Essays by Three Generations of Historians

*A Festschrift in Honor of Otto Dov Kulka*

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