

voting produces a unity, or at least a majority in government (even though at the expense of denial of representation to certain groups of political opinion), Professor Hermens concludes that P. R. is bad, and the present system of voting good. The principal weakness in his case however lies in the fact that the multiple-party systems existed in Germany, Italy and other European countries prior to the adoption of P. R. They likewise existed in France in the absence of P. R. It is therefore impossible to charge P. R. with producing them. Professor Hermens fails to mention and explain the fact that Ireland, which has the best form of P. R., is one of the few countries today which has recently had a single party in control of the government. One might draw a fair conclusion, from a cursory glance at both sides of the evidence, that P. R. will neither create nor destroy multiple-party systems, but will merely reflect the pre-existing division between two or more parties.

The prejudiced approach which Professor Hermens seems to bring to his study is readily apparent from the method by which he purports to demonstrate that P. R. is the downfall of democracy. He lists the countries which had P. R. where democracy failed, those countries which do not have it where democracy still obtains, and the small number of countries of the P. R. group which still have a democracy. The implied argument is that P. R. has been responsible for the downfall of democracy in the first group. Included in this group are such countries as Austria, Poland, Latvia, Lithuania, Estonia and Czechoslovakia. Inasmuch as Professor Hermens' pamphlet only goes up to September 1939, there must now also be transferred from his last group to the first, Belgium, Luxembourg, Holland, Norway and Denmark. The general impression has been that Mr. Hitler, or in three cases Mr. Stalin, was the sole, direct and complete agent in overthrowing all of these democracies. Attributing their downfall to P. R. is at least a novel interpretation.

If it is correct, as the writer has been informed, that Professor Hermens is a German refugee, there may be an explanation for the biased approach which he brings to the subject. Hitler did come into power while a list system of P. R. was in effect in Germany, and one who has had personal cause to hate Hitler may well come to an ill-considered conclusion of cause and effect between the two facts.

Inasmuch as this pamphlet is quite obviously an attempt to make a case against P. R., it is surprising that the author failed to make use of the material on the constitutionality of P. R. Such material is pertinent to any discussion of the subject, and is an objection which can be raised with authority if not reason in some American states. Although the upper courts of New York and Ohio have held it constitutional, it has been held unconstitutional in Michigan and California under essentially the same constitutional provisions. Some of the reasoning used to arrive at the latter result is of a character not unlike some which is used by Professor Hermens.

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The Dual State: A Contribution to the Theory of Dictatorship. By Ernst Fraenkel. New York: Oxford University Press, 1940. Pp. xvi, 248. \$3.00.

Calm and objective treatises on National Socialism do not constitute a sizeable portion of our current literature. Perhaps the very nature of the movement as the

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world's stormiest phenomenon does not admit of passive consideration; perhaps its irrational nature—readily conceded by its friends—does not invite rational speculation. In the present work, however, Ernst Fraenkel, practicing lawyer in Berlin until the latter part of 1938, and now living in Chicago, gives a scholarly analysis of National Socialism from the point of view of the student of law and political theory. The work is replete with references to German court decisions and works of contemporary German authorities in the fields of public law and political theory.

The author divides his study into three parts. Part I deals with the Prerogative State, and by this term he means the governmental system under the supreme jurisdiction of *Der Fuehrer* which exercises unlimited authority unchecked by any legal guarantees. With the Prerogative State he contrasts the Normative State or the "administrative body endowed with elaborate powers for safeguarding the legal order as expressed in statutes, decisions of the courts, and activities of administrative agencies." These two states existing side by side form the Dual State. In Part II the author examines the theoretical basis of the National Socialist political and legal order and considers at length the departure from the traditional political and legal theory of the West. Part III deals with the economic and sociological phases of National Socialism and shows "the relationship of contemporary German capitalism to the functioning of the Normative and of the Prerogative States."

Martial Law provides the constitution for present-day Germany, and in the political sphere legal rules do not hold and judges must remain silent. Put in the words of the legal adviser to the Gestapo: "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."

The undetermined limits of the political sphere, however, give to all judicial decisions an uncertainty and tentativeness which completely upset conservative notions of the rule of law. Yet by magnanimous acts of self-denial the Prerogative State has set limits to its arbitrary actions. From time to time the courts themselves with understandable timidity aid in setting some limits by declaring that it is by no means certain in every case that the will of *Der Fuehrer*, or the tenets of National Socialism, or the over-worked Decree of February 28, 1933, demand a setting aside of old traditions and precedents. If their guess is wrong, they soon learn about it. Aside from these restrictions, it seems to be established that most of the legal institutions essential to capitalism, such as freedom of enterprise, sanctity of contracts, private property, the right of the employer to control labor, regulation of unfair competition, and older laws governing patent rights, interest agreements and the like remain intact and enforceable in the courts—except where Jews are involved. These restrictions still hold despite the considerable amount of state interference and regulation in business affairs. Over all these exempted fields, however, hovers that mystic spectre of "the needs of the ethnic community" which may upset the well-reasoned judgment of any court in the land.

Because the state in Germany does not control every aspect of social and economic life, Mr. Fraenkel believes that it cannot be called totalitarian in "the broader sense." Has any state ever found it possible to control all social and economic life? Even in this bizarre, weird, and fantastic world of the present day there are still limits to state

control set by the natural law of physics if nothing else. No one expects public authority to control everything in a totalitarian state, but the ever-present power to control without limits most phases of life and the constant claim of state superiority over all things will satisfy most of us as touchstones of totalitarianism.

In his chapter on "Rational Natural Law" Fraenkel points out the grave consequences for modern Germany of the denial of the doctrine of natural law. Mr. Fraenkel's wisdom exceeds that of most modern political and legal theorists who reject not only the doctrine of natural law, but who also reject its noble qualifying adjective "rational." He quotes a gem from Leuner in the review *Jugend und Recht* to the effect that "there is no right residing in the stars; there is no equal right which is innate in the individual; there is no universal transethnic Natural Law. There is only one norm which is equally valid for all individuals, namely that they live in accordance with the imperatives of their race." Fraenkel goes on to show the complete repudiation among National Socialists of traditional and absolute values. He contends that the German political and legal theorists of the past century were the special offenders in propagating the general rejection of rational natural law and absolute values. Why should he limit the accusation in any degree to the Germans? The repudiation was and still is almost world-wide among Englishmen, Frenchmen, and Americans. The very suggestion of the acceptance of absolute, immutable, and universal values, and of natural law, by a few intrepid Aristotelians raises a storm today. Mr. Fraenkel does well to call attention to the excellent spade work unwittingly performed for the totalitarians by modern social scientists who generally misunderstood the doctrine of natural law and rejected it. The author well understands the difficulty of defending democratic theory without that rational doctrine.

In connection with his treatment of natural law and National Socialism he distinguishes between "relative natural law" and "absolute natural law"—a distinction taken from the able and scholarly Ernst Troeltsch. Relative natural law would seem to be a contradiction in terms in any case, but to ascribe such a doctrine to the writers of the Middle Ages, would, to say the least, be inaccurate and confusing.

In the concluding chapters of his work, Fraenkel considers the legal history of the Dual State with its economic and sociological background. The close association of capitalism and National Socialism has received considerable attention in other works; the value of its treatment here is in the succinct handling of material of recent nature. The consideration of the sociology of the Dual State shows breadth of comprehension and wide acquaintance with the ablest and foremost authorities.

The work merits careful reading by students of recent legal and political theory.

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Cases on Restitution. By Edward S. Thurston. St. Paul: West Publishing Co., 1940. Pp. xxviii, 964. \$6.00.

Professor Thurston in his preface cordially recognizes the "pioneer work" of Walter Wheeler Cook. The organization of the present casebook is a modification and simplification of the organization used by Mr. Cook in that portion of his *Cases on Equity* dealing with restitution. The rearrangement introduces the student at once to the rela-

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