

## THE IDEAL LEGAL ORDER FOR AN OCCUPIED NATION: POLISH COMMENTARY ON MITCHELL FRANKLIN\*

JOHN J. CZYZAK†

### I.

During his service in the Armed Forces of the United States, Professor Mitchell Franklin wrote his now famous essay dealing with the subject of the legal system of Occupied Germany.<sup>1</sup> The work appears to have received the attention of the bar of Poland, and was paraphrased by Ig. Andrejew, in an issue of a Polish legal periodical<sup>2</sup> devoted entirely to the problem of re-establishing the rule of law in Germany. Because of the continuing crisis in world politics, it seems worthwhile to examine once more the pattern of practices indulged in by German National Socialism.

### II.

In order to facilitate the reading of the translation and to furnish a background for Andrejew's remarks on the Franklin thesis, the following clarifying statements are submitted:

In civil law, including German law, the primary and predominant source of law is the code.<sup>3</sup> It represents the civilian method of thought which aims at systematization, and consists of provisions most of which state precepts or norms of varying generality; the degree of generality depends upon whether they can be identified as rules, concepts, principles or standards.<sup>4</sup>

\* W. R. Irby Professor of Law, Tulane University.

† Assistant Professor of Law, Washington University.

1. FRANKLIN, *THE LEGAL SYSTEM OF OCCUPIED GERMANY*, INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES 262-282 (Sayre ed. 1947).

2. *PANSTWO I PRAWO* (January 1949) 100-102.

3. Whenever the word "code" is used, it shall also mean other legislative enactments.

4. Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 641, 645 (1923). He says: "... legal precepts are not all of one kind. For example: In our law a promise made by one person to another is not enforceable unless put in the prescribed form of a sealed instrument or made in exchange for some promise or other act which the law pronounces "consideration." That is, the law attaches definite legal consequences to the definite detailed facts of promise in a writing sealed, signed, and delivered, or of a promise in exchange for a promise or other act to which the promisor therein was not theretofore bound. This type of legal precept may be called a rule or a rule of law. Again, as a general proposition in modern law, there is no legal liability to repair a loss suffered by another unless the person held liable has been at fault. Here no definite detailed legal result is attached to a definite detailed state of facts. Instead the legal system lays down a

The civilian method would therefore appear to be deductive rather than inductive, the reasoning proceeding from general premises to specific instances.

For a long time the code was viewed as a self-sufficient whole which, because of the generality of its text, contained its own method of development. As a result the judge, charged with the duty of administering the law and working within the framework of the code, has acquired considerable freedom of action. Thus, as the exigencies demand it, a particular text of the code may be extended in its meaning, or restricted. In the absence of a controlling text recourse is had to the device of "analogy," a method of interpretation derived from Roman law. If, for example, a case cannot be decided either according to the literal text or plain meaning, reference is made to provisions concerning similar cases. It should be noted of this method of interpretation that it is valid only if the omission is accidental, but it may have been deliberate on the part of the law maker. The omission is accidental if at the time a particular situation of fact was not envisaged by the legislator, although it now requires regulation, and it is deliberate if such fact-situation was known to him. Obviously in the latter case the legislator had no inten-

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sweeping generalization as an authoritative premise for judicial and juristic reasoning where rules of law are wanting or inapplicable or inconvenient. This type of legal precept may be called a principle. Again, at common law a bailment is a delivery of a chattel to some person for some special purpose which defines the duties of the parties with respect thereto. Here there is much more than a single definite legal result or a set of definite results attaching to a narrowly defined set of facts. A generalized type of situation of fact is defined and established. Particular states of fact are to be referred to this type. If they come within the defined limits, a series of rules or even of standards become applicable. If the facts of a given controversy do not come wholly within the limits of the established type, a basis is afforded for deducing a rule from its logical presuppositions. In such cases the legal precept is dependent upon a legal conception. Again, one who is engaged in a course of conduct is bound to act with due care under the circumstances of his acting, and must make reparation for any damage that results from his failure to adhere to that standard. But no definite, detailed set of facts will inevitably entail such liability. Within certain limits the trier of fact must determine with reference to the circumstances surrounding each action whether that particular bit of action was carried on with "due care." And he is to do so not from any legal knowledge, but from his sense of what is fair and reasonable, derived from his experience of the conduct and the opinions of ordinary prudent men in the community. In such cases the legal precept in its application is dependent upon a legal standard. Thus it will be seen that the legal precept itself is not a simple institution."

The general clause in the civil code is essentially equivalent to Pound's standard.

tion of regulating the fact-situation; accordingly the *argumentum a contrario* rule applies, i.e. in such a situation the analogical method is foreclosed.

The principle of analogy was not employed in criminal law. However, National Socialism introduced it in Germany under the law of June 28, 1935, which read:

Any person who commits an act which the law declares to be punishable, or which is deserving of penalty according to the fundamental conceptions of penal law and healthy popular sentiment, shall be punished. *If there is no penal law directly covering an act it shall be punished under the law of which the fundamental conception applies most nearly to the said act.*<sup>5</sup> (Italics supplied).

If neither the texts of the code nor their projection by use of analogy yields a solution, recourse is had to sources provided for in the code. In such event, the French Code, for example, authorizes the judge to consider such subsidiary sources as natural equity, Roman law, customs, customs of the place, and so on.<sup>6</sup> The Austrian Code requires the judge to decide cases according to the principles of natural justice.<sup>7</sup> Similar formulations can also be found in the German Code.<sup>8</sup>

It must now be conceded that the code is not legally self-sufficient. The Swiss Code openly acknowledges that fact in

5. Campbell, *Fascism and Legality*, 62 L. Q. REV. 141, 149-150 (1946). Cf. art. 16 of the Soviet Criminal Code of 1926.

Professor Campbell notes one English case which he suggests in effect created one new common law crime and the possibility of others by holding that any conduct "tending to public mischief" might be indictable. *R. v. Manley* [1933] 1 K. B. 529.

6. See Articles 565, 593, 663, 671, 674, 1159, 1648, 1736, 1745, 1754 and 1777 of the French Civil Code.

7. Sec. 7 of the Austrian Code reads as follows: "Where a case cannot be decided either according to the literal text or the plain meaning of a statute, regard shall be had to the statutory provisions concerning similar cases and to the principles which underlie other laws regarding similar matters. If the case is still doubtful, it shall be decided according to the principles of *natural justice*, after careful research and consideration of all the individual circumstances." (Italics mine.) This translation of the Austrian Code appears in LENHOFF, COMMENTS, CASES AND MATERIALS ON LEGISLATION (1949) at p. 599.

8. The German Civil Code abounds in "general clauses." For example, to name a few, §138 thereof provides: "A jural act which is *contra bonos mores* is void . . ."; § 326 reads: "One who intentionally injures another in a manner violating the moral precepts, is liable to the other for the damages resulting from such injury"; or § 242 which directs that obligations of any kind are to be performed in such manner as good faith requires with due regard to the custom of the trade. (Translations are by Prof. Rudolf B. Schlesinger and appear in his COMPARATIVE LAW CASES AND MATERIALS [1950].)

Article 1 thereof when it requires the judge to decide cases not covered by the text of the code upon the basis of customary law, or where no such rule exists, in accordance with the rule which he would have established as a legislator.<sup>9</sup>

The foregoing would seem to point to the conclusion that in civil law countries absence of a codal or other legislative rule will not prevent the court from deciding a case. As a matter of fact, the French Civil Code expressly forbids judges to refuse to decide a case upon the ground that the text is silent or insufficient with respect to the situation before the court.<sup>10</sup> On the other hand decision is not the source of law.<sup>11</sup> This is certainly consistent with the idea that general rules are stated in the code and cannot be evolved out of cases, which is another way of saying that a particular cannot produce a universal. If the effect of this is to prevent extension of the rule to other cases, it follows that judicial precedent cannot play a very important role in civil law, and it does not, in spite of protestations.<sup>12</sup>

The notion that the code was sufficient unto itself carried with it another notion that the code was the source of all law and that as formulated in the code the law consisted of abstract conceptions devoid of any social content.<sup>13</sup> The emphasis was on con-

9. Art. 1 of the Swiss Civil Code reads as follows: "The Civil Code applies to all cases as to which it contains provisions either according to its letter or its spirit. In default of an applicable provision, the judge shall decide according to customary law, and in default of a custom, according to such rules as he would enact if he were the legislator. He may inspire his decision by solutions sanctioned by doctrine and by the course of judicial decision."

This translation appears in LENHOFF, *op. cit. supra* note 7, at 600.

10. Art. 4 of the French Civil Code provides: "Judges who refuse to decide a case on the pretext that the law is silent, obscure, or does not cover the case, are liable to be prosecuted for a denial of justice." See WRIGHT, *THE FRENCH CIVIL CODE* 4 (1908).

11. For example according to art. 5 of the French Civil Code "Judges are forbidden, when giving judgment in the cases which are brought before them, to lay down general rules of conduct or decide a case by holding it was governed by a previous decision." See WRIGHT, *op. cit. supra* note 10, at 4.

12. See Deak, *The Place of the "Case" in the Common and the Civil Law*, 8 *TULANE L. REV.* 337 (1934), supporting the position that cases are at least as good as other sources, and Ireland, *The Use of Decisions by United States Students of Civil Law*, 8 *TULANE L. REV.* 358 (1934) taking the opposite view.

However, an established course of decisions permits drawing the inference of the existence of a custom. The expression "jurisprudence constante" is used in French law to explain the extent to which authority of decisions may be carried.

13. See SAVIGNY, *SYSTEM OF THE MODERN ROMAN LAW* 263, 273, 290 (1840).

ceptualism as though words standing alone and in the abstract could regulate human behavior. Since the code was deemed to be the one and only frame of reference, all that was necessary was to select the applicable text of the code, the abstract conception, for a major premise under which a factual situation would be subsumed, resulting in a conclusion which could not be impeached for syllogistic inaccuracy. Pound, among others, gave the lie to this formalistic approach to social phenomena when he explained that law has at least three basic and different aspects.<sup>14</sup> His idea of law included legal precepts,<sup>15</sup> in civil law system the texts of the code. This would be the place where the legal conceptualists would stop. They would certainly not go beyond his second element which according to Pound consists of method, that is, "a body of traditional ideas as to how legal precepts should be interpreted and applied and causes decided."<sup>16</sup> But to Pound law is also

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14. Pound, *supra* note 4, at 645-6.

15. *Id.* at 645. These abstract technical legal concepts are frequently referred to as "norms" and are regarded as rules for the orderly behavior of people in a human community.

16. *Id.* at 646. Pound records the following examples:

"... In our legal system we have a good example in the doctrine as to the force of judicial decisions as affecting judicial decision of subsequent cases. It is almost impossible for the common-law lawyer and the civilian to understand each other in this connection. In fact our practice and the practice of the Roman-law world are not so far apart as legal theory makes them seem to be. We by no means attach as much force to a single decision as we purport to do in theory. Even the House of Lords, which purports never to overrule its decisions, on occasion deals with them so astutely as to deprive them of practical efficacy as a form of law. On the other hand, in Continental Europe a judicial decision tends to become the starting point of a settled course of decision, which in some countries is recognized as customary law having the force of a form of law, and in other countries is acquiring that effect in practice. But if the results are coming in their broader features to be much alike, the modes of thought are wholly unlike, and these modes of thought have decisive effect upon the administration of justice.

Another example may be seen in the attitude of legal systems toward specific and substituted redress. With us, substituted redress is the normal type; specific redress is exceptional and reserved for cases for which the former is not adequate. To the civilian, specific redress is the normal type; substituted redress is to be used only in cases in which specific redress is not practicable or would operate inequitably. Again, to us these two types of remedy are so distinct that we think of them commonly as calling for distinct types of proceeding. But the civilian conceives of the proceeding in terms of the right asserted, not of the remedy sought, and so thinks only of what is the practical means of giving effect to that right. In other words, we think procedurally in terms of the remedy; the civilian thinks in terms of the asserted right.

A third example may be seen in the difference between civil-law and common-law thinking as to statutes. According to the orthodox view of our

A body of philosophical, political, and ethical ideas as to the end of law, and as to what legal precepts should be in view thereof, held consciously or subconsciously, with reference to which legal precepts and traditional ideas of application and decision and the traditional technique are continually reshaped and given new content or new application.<sup>17</sup>

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law a statute is something exceptional, something introduced into the general body of the common law without any necessary or systematic relation thereto, in order to meet some special situation, and hence governing that situation only. With us a statute, unless declaratory of the common law, gives only a rule. Hence statutes in derogation of the common law are to be construed strictly. Hence Lord Campbell's Act is applied as if it were something anomalous and exceptional, although it is as universal in common-law jurisdictions as any legal institution can be. With the civilians, on the other hand, a statute is regarded as an expression of a principle, to go into the body of the law along with other legal precepts which also express principles. Hence the civilian reasons by analogy from a statutory provision the same as from any other legal rule. Thus it is as easy for him to administer justice by a code as it is difficult—I had almost said impossible—for us. To him a series of code sections involves the same problems that a series of decisions involves for us. He fails to understand how we can treat the latter as giving a series of legal rules. We fail to see how he can administer justice by means of the former in the multitude of cases that do not come within the four corners of the text."

17. *Id.* at 651. Pound says concerning this element of law:

"Turning now to the third element that goes to make up what we call 'the law,' we may find an example in the criterion of applicability to American political and social conditions by which our courts judged English legal rules and institutions and doctrines in the formative period of American law in order to determine whether they were received as common law in the new world, and, in case they were not 'applicable' and were not received, to determine what should obtain in their place. Other examples may be seen in the conception of conformity to 'the nature of free government' or to 'the nature of American institutions,' by which courts tried novel legislation and new means of securing newly pressing interests in the nineteenth century, and in the idea of liberty as a maximum of abstract individual free self-assertion by which decisions as to due process of law have been governed within a decade. How was the applicability of English legal precepts to American conditions to be determined? There were no rules defining it. That English legal precepts were in force with us so far as they were applicable, and only so far as applicable, was not a principle with any such historically-given definiteness of content as the principle that harm intentionally caused is actionable unless justified, through which courts and jurists have been writing a new chapter in our law of torts in the last generation. Nor was there any traditional technique of receiving the law of one country as the law of another which the courts could lay hold of and utilize in the making of American law. In fact they determined what was applicable and what was not applicable to America by reference to an idealized picture of pioneer, rural, agricultural America of the fore part of the nineteenth century, and this picture became part of the law.

Again, when our courts were called upon to perform the novel task of interpreting written constitutions and judging of legislative acts with reference to constitutional texts—something which they could not but feel was distinct in kind from the interpretation of statutes—they had no traditional technique at hand. The earlier cases in which judicial power over unconstitutional legislation was established were cases of attempted exercise of legislative power in contravention of express precepts. But presently the

It is this last element which is most important and which gives meaning to the abstract formulations of the first by locating them in the total social process. As so explained, the third element of law pertains "to the received or accepted ideals as to the

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'spirit' of constitutional texts or the 'spirit' of constitutions began to be invoked, and it became necessary to give a content to abstract constitutional formulas exactly as the civilian has had to give a content for modern purposes to abstract oracular texts of the Roman books. Our traditional art of deciding had not been devised for such problems. Except for Coke's exposition of Magna Carta and of the legislation of Edward I, there had been little to do in the way of building a system of legal precepts upon a foundation of authoritative texts. Moreover Coke's Second Institute was in great part a political tract in the contest of the common-law lawyers with the Stuarts. The influence of Coke's exposition of Magna Carta upon judicial application of our bills of rights is obvious. The most significant legal provisions of the bills of rights were taken from the Second Institute and represent an attempt to give to the natural rights of men a concrete content of the immemorial common-law rights of Englishmen, as set forth by Coke and Blackstone. Yet this historico-philosophical content, derived from seventeenth-century England and eighteenth-century France, could not be used, as it came to us, for a measure of American legislative power. Hence the courts fell back upon an idea of 'the nature of free government' or the 'nature of American government' or the 'nature of American institutions'—an idealized picture of the legal and political institutions of pioneer America.

Sometimes a caricature will bring out significant features more truly than a photograph. In 1863 the Supreme Court of Georgia had before it a case involving the constitutionality of a Confederate conscription statute with reference to the Confederate constitution. In deciding this question the court assumed the political doctrine of States' Rights as something fundamental, to which all legislation must needs conform, irrespective of constitutional texts. It was something running back of all texts which texts at most could but recognize and declare. A picture of the polity for which Southern statesmen had been contending in the bitter sectional political contests of the immediate past, put in terms of conformity to the nature of free government, was the basis of the court's reasoning, and it was assumed that this picture stood for the spirit of the constitution, and obviated all need of searching for any special text. Compare with this the reasoning of the judges of the Court of Appeals in *People v. Coler*. In that case the judicial discussion on a question of due process of law, as applicable to social legislation for twentieth-century metropolitan New York, begins with the proposition that the state governs best that governs least. A picture of a pioneer, rural, agricultural society, needing little social control and nothing of what we have come to call social legislation, was a controlling factor in the result.

Again, when in the last quarter of the nineteenth century our courts were called upon with increasing frequency to pass on the validity of social legislation, in the transition from pioneer, rural, agricultural America to the urban, industrial America of today, they turned to an idealized picture of the economic order with which they were familiar, the principles of which had been set forth by the classical political economists. They pictured an ideal society in which there was a maximum of abstract individual self-assertion. This was 'liberty' as secured in the Fourteenth Amendment. Hence all limitation upon abstract, free self-assertion, all derogation from a maximum of free self-assertion, was presumably arbitrary. Such legislation sought vainly to turn back the current of legal progress in its steady flow from status to contract, and hence was not due process of law. With

aims or purposes of the legal order."<sup>18</sup> Stripped of the third element, law, codal law in the civil law system, is only the undifferentiated source of law, an automatic, abstract, syntactical system complete in its reference, logical within its framework, but devoid of meaning until differentiated and identified with the social phenomenon. The judge cannot satisfactorily deal with the needs of life by mere logical construction.

Now, according to Franklin, it is the third element of Pound's definition of law that was so important to National Socialist legal theory.<sup>19</sup> For if the code—Franklin refers to Weimar legislation—is nothing but an undifferentiated source of law, a mere conceptualistic referent, all principles formulated therein can be given National Socialist content, even though it originated in an entirely different milieu. This was actually done within the framework of the code, as the broad generalities of the texts made it possible to locate it in a political context exclusively totalitarian. The abstract was filled with the particular, in accordance with National Socialist theory. In applying the law the judge considered not the words contained in the code, but the purpose that justified the law, which then resulted in placing an over-emphasis on the dominant philosophy—Pound's third element in or aspect of the law—and a corresponding de-emphasis of the first and the second.

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such a picture of the social order and the end of law before it as the basis of its conclusion, more than one court declaimed against legislation forbidding the payment of wages in orders on a company store as subversive of the abstract liberty of the workman, reducing him to the position of the infant, the lunatic, and the felon, and arbitrarily setting up a status of laborer in a world which had moved to a regime of contract.

To take an example that is no longer controversial, note how such pictures of the social and political order and reference of legal questions thereto, dictated the divergent conclusions of the judges in the *Dred Scott* case. For we deceive ourselves grossly when we devise theories of law or theories of judicial decisions that exclude such things from 'the law.' When such ideal pictures have acquired a certain fixity in the judicial and professional tradition they are part of 'the law' quite as much as legal precepts. Indeed, they give the latter their living content and in all difficult cases are the ultimate basis of choosing, shaping, and applying legal materials in the decision of controversies. When we seek to exclude them from our formal conception of law we not only attempt to exclude phenomena of the highest significance for the understanding of the actual functioning of judicial justice, but, as things are, we do the courts much wrong by laying them open to the charge of deciding lawlessly when they do what they must do, and what courts have always been compelled to do, in administering justice according to law."

18. FRANKLIN, *op. cit. supra* note 1, at 266.

19. *Ibid.*

This permitted an interpretation of the law in accordance with the National Socialist Weltanschauung. Franklin says:

National Socialist legal theory represents . . . a distortion of relations. One vocation of National Socialism was the destruction of the Weimar legal system. Consequently certain Weimar legislation was obliterated. Nonetheless, anti-Romanist German fascism was forced very reluctantly to retain certain Weimar legislation, such as the great German codes<sup>20</sup> and yet seek to overcome those texts. In order to subordinate this legislation to fascism, National Socialist jurists distorted the relations among the various elements of law.<sup>21</sup>

As the hated Weimar texts represented the normative or precept elements of law, they were overcome by exaggerating the other elements in law.<sup>22</sup> . . . National Socialism employed its ideas as to the aims and purposes of law to distort the historic texts of the civil code of 1900, and thus to make it an instrument of National Socialist policy.<sup>23</sup>

In this National Socialism was aided by the professional and philosophic elements of German society.

Franklin asserts that there is little doubt that the German bar actively supported National Socialism. His position can be documented. As early as 1933, well-known legal theorists condoned the excesses by which German totalitarianism has been identified. It is sufficient to name such persons as Carl Schmitt, Larenz, Gerber, Binder, among others.<sup>24</sup> Heck, who together with Dean Rumelin, founded the school of sociological jurisprudence, declared that henceforth judges would be guided by proclamations of the Fuhrer in filling gaps in the law.<sup>25</sup> This peculiar adherence of legal scholars to a movement that did not conceal its intentions of rejecting and destroying the law is to be explained by the fact that German jurists and theorists had been conditioned to a sympathetic reception of National Socialism by the nineteenth century German philosophical movement.

From the beginning of the nineteenth century German legal thought championed the supremacy of the state and defined law

20. The reference is not only to the civil code, but the commercial code, penal code and the procedural codes, as well.

21. FRANKLIN, *op. cit. supra* note 1, at 266.

22. *Ibid.*

23. *Id.* at 267.

24. See FRIEDMANN, *LEGAL THEORY* c. 21 (2d ed. 1949).

25. See Bourthoumieux, *Prawnicy Niemieccy Wobec Hitlerizmu*, *PANSTWO I PRAWO* (January 1949) 84.

as the will of the state. Besides this concept of the State there developed at the same time the concept of the people, the Volk, which Savigny, a powerful influence in Germany during the first half of the nineteenth century, initially articulated and which was thenceforward developed by the so-called Historical School. Savigny denied the right of the legislator to formulate the law, which he envisaged as the reflection of the spirit of the people, the Volksgeist, and claimed that only jurists and historians could properly define and describe the same.<sup>26</sup> Thus arose the notion that "the ultimate basis and justification for the validity of any law should be found in its concordance with the spirit of the People whose law it is."<sup>27</sup> It is necessary to emphasize the importance of this movement as a social and political phenomenon, particularly as it attempted to fill in gaps in the codal law.

The passion for the abstract reflects a German habit of resolving concrete problems by intellectualization. This passion finds its principle in the idealism of Hegel, whose opposition to materialism was the guiding spirit of the National Socialist movement.

The linking of this idealism with the principle of leadership was clearly expressed after the First World War in the writings of Binder.<sup>28</sup> Binder asserts that only the Fuhrer is capable of expressing objectively the collective idea and justifies National Socialism by granting the individual reality only in so far as he acts and thinks the universal.<sup>29</sup> It is, therefore, not difficult to imagine the response of the Germans to such pressure. Understandably they saw in the theory the mystical Volksgeist. The cardinal sin which the German jurists committed was that from beginning to the end of National Socialist dictatorship, they constantly supported it.

They supported it when in 1933 Hitler demanded and was given dictatorial powers. Carl Schmitt immediately explained that the Fuhrer personified the people, that the state, the people and National Socialism converged in the person of the Fuhrer. From that moment on the written text was only an imperfect guaranty in relation to that kind of will, which could neither be

26. FRIEDMANN, *op. cit. supra* note 24 at 127-131.

27. Campbell, *supra* note 5, at 145.

28. BINDER, *RECHTSPHILOSOPHIE* (1925); BINDER, *RECHTSPHILOSOPHIE* (1935-1937).

29. As summarized in FRIEDMANN, *op. cit. supra* note 24, at 104-105.

evaded nor avoided. Backed by such an attitude, Hitler was able to suppress any kind of authority. Although he maintained that he respected the Weimar constitution, he never intended to abide by the Weimar institutions. As a matter of fact, shortly after Hitler took oath in Potsdam, Carl Schmitt cried out, "The Weimar Constitution is dead, long live the Potsdam Constitution!"<sup>30</sup> Of course the Potsdam Constitution was never written.

How the living law was substituted for the written texts is clearly shown in the following words of Heydrich, the Gestapo chief:

I have from the beginning taken the view that it is a matter of complete indifference to me whether any paragraph of law is in opposition to our work. For the fulfillment of my task I do fundamentally that for which I can answer to my conscience in my work for the Fuhrer and Nation. I am completely indifferent whether others gabble about breaking the law.<sup>31</sup>

In a comment to the Police Code, the police were instructed to seek guidance from specified authorities, but the first and foremost of the latter were the text of *Mein Kampf* and the proclamations of Hitler.<sup>32</sup>

The Reichstag was retained. However, it was an assembly in name only, and played no creative role in the making of laws, since they emanated from the Fuhrer and could not be formalized. The decrees could even be kept secret from the people, and communicated only to those officials who were to apply them. Thus the pronouncements in 1939 calling for euthanasia were known only to the doctors engaged in this practice.<sup>33</sup>

Although the criminal code and the code of criminal procedure were still in existence they served merely as books of abstract definitions.<sup>34</sup>

The 1935 law already referred to empowered the judges to apply analogically any provision of the code in the absence of law directly covering an act, if it was believed that *healthy popular sentiment* demanded it.<sup>35</sup> According to the commentators the conscience of the people (Volk) was expressed in the words of

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30. Bourthoumieux, *supra* note 25, at 86.

31. Campbell, *supra* note 5, at 147.

32. *Ibid.*

33. Bourthoumieux, *supra* note 25, at 86.

34. *Ibid.*

35. Campbell, *supra* note 5, at 149.

the Fuhrer, and the judges as emissaries of the Fuhrer were to be able to get along without recourse to other law, since the will of the Fuhrer was the source of all law.<sup>36</sup>

It is in this context that Franklin proposed his thesis of intellectually controlling the German jurists. He stated that:

the task of occupation will not be fulfilled merely by introducing the military legislation of the occupants and by suspending National Socialist legislation, thus restoring to full vigor the legal texts of Weimar Germany, subject to administration by German jurists, many of them National Socialists, according to the ideas of the *Rechtsstaat* and of judicial independence.<sup>37</sup>

The translation follows.

### III.<sup>38</sup>

The problem of the future legal order of Occupied Germany concerned American lawyers even during the war. It was realized that it would be necessary to counter National Socialist lawlessness with law, the rule by law, but in this oversimplification—an over-simplification which closes the eyes to the substance of social relations—many difficulties were concealed. The American theory of law, developed out of precedent, was not a suitable vehicle for German judges and lawyers brought up in other traditions. On the other hand, adoption of German legislation by repealing National Socialist laws and restoring former enactments of the Weimar Republic would at least be equal to sanctioning a dogmatical approach completely alien to American jurists and therefore impossible to control; under such conditions it would be difficult to ascertain whether the Germans were really on the road to rule by law. Perhaps this could be done with the help of the French who are closer to the Germans by reason of common kinship to Roman law—except that it is difficult to consider this idea seriously. On the other hand it is not likely that a legal order can be created out of a military occupation, which at best can only define the perimeter of law, but cannot provide the inner substance of the law itself.

Some indication of the scope of this problem (we emphasize that the event is taking place during the war) was established

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36. Campbell, *supra* note 5, at 146.

37. FRANKLIN, *op. cit. supra* note 1, at 264.

38. All footnotes in the translation supplied by the translator.

in the thesis of Fraenkel regarding the dualism of the Nazi state.<sup>39</sup> In 1941 this author published a work under the title of the *Dual State*, in which he asserts that in National Socialist Germany two systems were working: one rational, subordinated to law, the other one operating according to personal and party caprice.<sup>40</sup> There was then the dual state in which co-existed the prerogative state, capable of exercising unlimited self-will and violence not hampered by any legal guarantees, and the normative state governed according to law. This concept was developed by Friedrich<sup>41</sup> who claimed that Germany possesses the idea of the rule of law (Rechtsstaat) expressed in the principle of equality before the law as voiced in the Weimar Constitution. If, says Friedrich, that observation that these two systems co-exist is sound, it follows that the destruction of the Nazi sector (acting according to personal or party whims) will automatically revive the other, giving the latter (acting in accordance with faithful adherence to the law) opportunity to fill the vacuum created by the disappearance of the party. In other words, according to Friedrich, in Nazi Germany life was regulated in part according to acceptable legal principles, so that the only concern is to exclude National Socialist legal theory, whereupon law will embrace the entire social process. Germany will again be ruled by law, and after all, law is "at the very core of what we are fighting for."<sup>42</sup>

On the same subject Mitchell Franklin wrote his work,—also during the war. It is worthy of consideration in some detail since it throws a curious light upon National Socialist legal theory which contradicts absolutely the first mentioned writers. The work of Professor Franklin is also worthy of attention by reason of the fact that it appeared in 1947 (although as indicated in the text, written during the war) and was included among thirty-seven treatises by such eminent legal scholars and sociologists as Goodhart, Kelsen, Kocourek, Sorokin, Lord Wright, del Vecchio, etc., in a large and impressive volume published on the occasion of Roscoe Pound's seventy-fifth birth-

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39. FRAENKEL, *THE DUAL STATE* (1941).

40. *Id.* at 3-103; see also FRAENKEL, *MILITARY OCCUPATION AND THE RULE OF LAW* (1944).

41. Friedrich, *Military Government as a Step Toward Self-Rule*, 7 *THE PUBLIC OPINION QUARTERLY* 527 (1943).

42. *Id.* at 537.

day.<sup>43</sup> One more detail provokes interest in M. Franklin's treatise. It is supplied with a note by the editor that "the ideas developed in this essay state the personal theory of the writer, and in no way reflect official thinking."<sup>44</sup> Let us see what is in Professor Franklin's work that might not reflect official thinking.

Peace may be the continuation of war by other means. The military defeat of National Socialist armies, says Franklin, may not mean that German fascism, Prussian reaction, or German nationalism will cease their struggle. National Socialism should be expected to fight for National Socialist ideology even after German weapons have been surrendered, provided that German surrender can thus be converted into a National Socialist weapon. Certainly, National Socialist legal theory is flexible and dynamic enough to adapt itself to new conditions. Indeed, because certain National Socialist legal theory purported to negate the German state, this ideology may remain a force even after the German state is occupied.<sup>45</sup> According to Frank, Hoehn, Schmitt and other National Socialist theorists, the German state gives way to the Volksgemeinschaft.

One of the slogans of National Socialism was the destruction of the Weimar legal system. Nevertheless a considerable portion thereof was necessarily retained. Would this mean that the criminal code and the civil code were not National Socialist even if we omit changes introduced into this legal system? Without even changing the text of the statutes, National Socialism was able to turn their meaning with the help of theory, by the (traditional) methods of applying the law, interpretation and the (usual techniques for) closing of gaps.<sup>46</sup>

The text of the adopted statute, said Hoehn, is merely the undifferentiated source of law.<sup>47</sup> The foundation of the interpretation of law is the National Socialist Weltanschauung expressed in the party program and in the utterances of the Fuhrer. National Socialist theorists have distinguished between

43. FRANKLIN, *op. cit. supra* note 1.

44. *Id.* at 262. Mr. Andrejew is laboring under a misconception by attaching more importance to the note than it merits. It is a matter of common knowledge that personal views of government employees never receive the official imprimatur.

45. *Id.* at 262-263.

46. The words in brackets seem to be clearly implied by Andrejew's text, although not expressed. J.C.

47. HOEHN u.a. LEITSAETZE UEBER STELLUNG UND AUFGABEN DES RICHTERS (1936). See also FRANKLIN, *op. cit. supra* note 1, at 268-269.

new texts (decisions of the Fuhrer expressed in the form of legislation or of decrees), which the judges had no power to examine, and the Weimar legislation which was subordinated to National Socialist Weltanschauung for "the healthy feeling" and the purpose of the law. According to National Socialists, interpretation should be guided not by the norm, but by the purpose of the law. (Formulated)<sup>48</sup> law could only authorize, but not rule. The groundwork for the legal system of National Socialism was laid by the German legal theorists who preceded it. Slogans of Interessensjurisprudenz, refuge in general clauses (Flucht in die Generalklauseln), schools of free-law and others—these are the points of contact between National Socialism and German Nationalism in the realm of law.

There are no Weimar texts, says Franklin, but merely the show of Weimar texts. There are no Weimar codes, but only sources of codes. The Weimar legal precepts, which the occupants regard as the law, are in truth subordinated to the received ideals of National Socialism. These precepts have a content which the Anglo-American jurist does not appreciate.<sup>49</sup> The conclusions are formulated in the author's words:

The military occupation of Germany should be an absolute occupation. The legal system must be occupied. The rule of law and the theory of the independence of the German jurist must be rejected. There must be 'intellectual' or ideological control of the German jurist. National Socialist legal theory must be extinguished. The theory of 'automatic' German return to legality must be abandoned. The occupying armies must bend hostile jurists to their will, or bend to the will of hostile jurists. There is a science of veering the skill of the enemy technician against the enemy, and it should be mastered. The occupants should enjoy French skill in Roman law, and Soviet skill in sensing fascist ideological movement and development. The session of this school for Germany should endure until Germany understands and accepts Hegel's instruction: 'What German patriotism aims at should be reasonable.'<sup>50</sup>

Franklin's thesis has a polemic character. This relieves him to a certain extent of spelling out what the occupation authorities will teach in "this school for Germany," what kind of German

48. Here again the word seems clearly to be implied by Andrejew's text.

49. These are substantially the words which Franklin uses in his essay. See FRANKLIN, *op. cit. supra* note 1, at 274.

50. *Id.* at 278-279.

socio-political framework might be "reasonable." The entire argument of the author comes down to this, that the Weimar legal system cannot be restored because of the universal ideology of German jurists which negates the traditional rule by law. He reproaches Fraenkel and Friedrich for their unhistorical and mechanistic conception of the law. In spite of Franklin's historical profundity and genuineness the author is guilty of non-recognition of a significant factor. He omits any consideration of the immutable nature of the impact of National Socialism, which may create the impression that it is simple collective madness.<sup>51</sup> But it isn't here that the reason for the appended editor's note is to be found.<sup>52</sup> [Here the translation ends.]

#### IV.

Difficulties of exact translation in a field of abstract conceptions always appear.

The next to the last sentence in the above essay by Andrejew translated literally reads as follows:

He omits entirely the accelerated power of National Socialism which may create the impression that National Socialism is sheer collective madness.

Therefore he seems to feel that Franklin's solution is impractical because the latter fails to take into account an assumed continuing conviction on the part of German jurists that the philosophy of National Socialism is a dynamic force which cannot be extrapolated from the total German social process.

If the translator has interpreted Andrejew's criticism of Franklin correctly, it seems that Andrejew has fallen into error by assuming the omission of that which is the very root of Franklin's thesis, namely, the persistence of National Socialist philosophy despite military defeat.

It is unfortunate that the entire criticism of the Franklin essay is concentrated in one sentence from which possibly different inferences may be drawn. The one suggested by the translator seems to him to be the most reasonable in the light of the words actually used in the text.

In view of the fact that Andrejew believes that the Franklin solution does not take into account the assumed continuing vigor

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51. (But which is something a good deal more than that. Translator's interpolation.)

52. Andrejew is facetious in searching for a motif. See note 44 *supra*.

of the National Socialist ideology, it is interesting to speculate about the kind of solution which Andrejew himself might suggest. Perhaps he would regard the solution worked out in East Germany as the ideal one.

In the meantime it would not be amiss to examine, but not within the four corners of this article, the policies pursued in this respect by the Occupation Administration of West Germany.<sup>53</sup> Only the passage of a great deal of time can determine the validity of any of the theses suggested.

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53. It would appear, however, that only the Fraenkel and Friedrich proposals have been followed. See notes 39 and 41 *supra*.