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Two Concepts of the Rule of Law: by Gottfried Dietze. Liberty Fund, Inc. 1973. Pp. 108.

Reviewed by Francis E. McMahon*

This work, except for the introduction and conclusion, was published originally in German. Most of the references are to German scholars, specialists in jurisprudence or political philosophy. Against the background of modern German history, the author probes into the relation between liberty and authority, and between law and government. He evidently believes that the drama of modern Germany provides lessons—of a negative character mainly—for other peoples desirous of achieving or maintaining authentic freedom. Defense of individual freedom is the central theme of the work.

His point of departure is the distinction between two forms of the rule of law. It is the distinction, having its origin in German jurisprudence, between *Rechtsstaat* and *Staatsrecht*. Literally, they mean “Law State” and “State Law,” respectively. They can also be rendered as “Just State” and “State Justice.” The former basically denotes constitutionalism or constitutional government; the latter refers to the total legal framework of any given society. “State Law” (or “State Justice,” if you prefer) can either preserve and promote constitutionalism or weaken and destroy it. Such weakening may be in the direction of despotism or, conversely, in the direction of anarchy through a policy of undue permissiveness.

Of crucial importance is Dietze’s conception of constitutional government. Employing current American terminology, it is that of a thoroughly committed conservative: a government of strictly limited powers, whose basic function is to maximize individual initiative in an orderly manner. It is a government animated by the spirit of *laissez faire*. He professes to find in the *Federalist Papers* the essen-

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tial features of such a government. The accent is upon individualism. Adhering to nineteenth-century usage, Dietze describes such a regime as "liberal" and its defenders as "liberals." But there has been a curious inversion of terms over the decades. His position is aptly characterized today as "conservative."

Focusing on the German experience, the author finds the policies of Otto von Bismarck gave impetus to the erosion of constitutionalism in that country. Bismarck's expansive nationalism strengthened the central government at the expense of federalism, which is one of the bulwarks of a free society. The social legislation of the period was also a blow to freedom. Liberal rights (such as private ownership of property) are incompatible with social rights (presumably he means the rights concerning labor unions, old-age security, medical care, etc.). This is another way of saying that the Welfare State severely and unduly restricts individual initiative. The Just State—and this is what Bismarck overlooked—confines itself to enforcing liberal rights; it invites dissolution if it strives to promote social rights as well. The Weimar Republic intensified the drift away from constitutionalism. Its national-social programs fructified into the national-socialistic Third Reich of Adolph Hitler.

So much for the trend towards a dictatorship suppressive of all freedoms. But the Just State can be imperilled by an opposite force. Individualism, upon which the conservative puts so much emphasis, can be carried too far. The author freely acknowledges this. The latter part of the book is concerned with this threat to good government. The 1960's featured riots, demonstrations, as well as other challenges to public order. Impotent government is as much a threat to authentic freedom as omnipotent government. The Basic Law of the Bonn Republic of West Germany is certainly constitutional in some respects. In other respects it does not sufficiently guard against anarchism. And what is true of Germany is likewise true of other democratic governments today. Permissiveness, carried to extremes, can bring disaster.

The democratic tide in the developed, and in some of the underdeveloped, nations is particularly worrisome to the author. "Democracy," he says, "can be the best as well as the worst form of government." It can turn into the "tyranny of the majority." Just as easily, it can promote a spirit of lawlessness, in which every individual does "his own thing," without regard to the rights of others. Democratic excesses have contributed to the political turbulence afflicting many nations to-

day. Can constitutional government survive in such an atmosphere? The author's outlook for the immediate future tends to be pessimistic.

What judgment should be pronounced upon this book? Assessment will depend upon the presuppositions of the reader. Conservative thinkers will welcome it. Liberals will be inclined to dismiss it as just another defense of an outmoded ideology. This reviewer, with his presuppositions, neither praises unqualifiedly the work, nor condemns it wholesale. He finds himself in agreement with much, and finds much which is flawed. Only a limited number of the merits and the flaws will be discussed here.

It is gratifying to see the author's insistence that authority and liberty are so intertwined that a rejection of one involves the destruction of the other. Authority, in other words, is necessary to prevent freedom from degenerating into license; liberty, on the other hand, must be fostered lest authority turn into despotism. One wishes, however, that the author had probed more deeply into the nature of liberty and authority; so much depends upon defining their nature exactly, and exactly determining their relationship.

Another merit of the work is its emphasis upon a federal system and the tripartite division of power (executive, legislative, judicial) at each level of government. No sensible person wants a system in which the individual helplessly confronts an all-powerful dictatorship. Such a system could quickly result in the death of freedom. In any authentic philosophy of freedom, it is a fundamental principle that every function which can be taken care of at the lower level must be exercised at that level. There is much more perfection in a whole whose parts are full of life and initiative than in a whole whose parts passively respond to directives from above.

As to the defects of the work, one of the greatest is the absence of any clear recognition of a common good in a political society, a good which in some respects, though only in some respects, transcends the good of the individual. Conservatives tend to shy away from the idea of a common good, because they believe that espousal of it would endanger the rights of individuals. This reveals a serious misunderstanding of what a genuine common good is. To reject the notion of a common good is to dissolve political society itself, so intimately is the one associated with the other. Political societies are of an altogether different character than a multitude of brokers on the floor of a stock exchange, with each broker pursuing freely his own particular interest. They have unity and cohesion deriving precisely from an

orientation towards a common good. It is little wonder that some philosophers have stigmatized the conservative view of political society as disguised anarchism.

Contrary to the views of Dietze, government does not exist merely for the sake of removing obstacles to individual liberty. It has a much more positive role. Its function is defined by the imperatives of the common good: to promote the good life of human persons who form a more or less autonomous community. Such a life requires not only material goods, but also—and even more so—goods of an intellectual and moral nature.

Despite the author's claim that liberal and social rights are incompatible, these rights, properly understood, complement one another. The social right of old-age federal assistance, for example, has often helped senior citizens to continue to exercise their liberal right of property ownership. Governments fail in their duty unless they foster, in one way or another, both types of rights. Governments need not become overbearing and oppressive in discharging this task, so long as the principle of subsidiarity, referred to above, is respected: what the lower level in a hierarchic whole is able to do, it must do. The family, the local community, the state and the federal government have each a role to play. The major governmental organs perform no nobler task than assisting, where necessary, subordinate units to achieve appropriate autonomy and healthy initiative. Voluntary associations of a constructive nature should be given every possible encouragement.

It is impossible in a brief book review to substantiate all of one's critical remarks. But those familiar with the works of Jacques Maritain and of his distinguished colleague, Yves R. Simon, will know where the evidence is to be found.

Despite one's strictures against this book, one finishes it with a great deal of respect for its author. He is a serious and thoughtful scholar, and he has made a worthy contribution to the literature of conservatism.