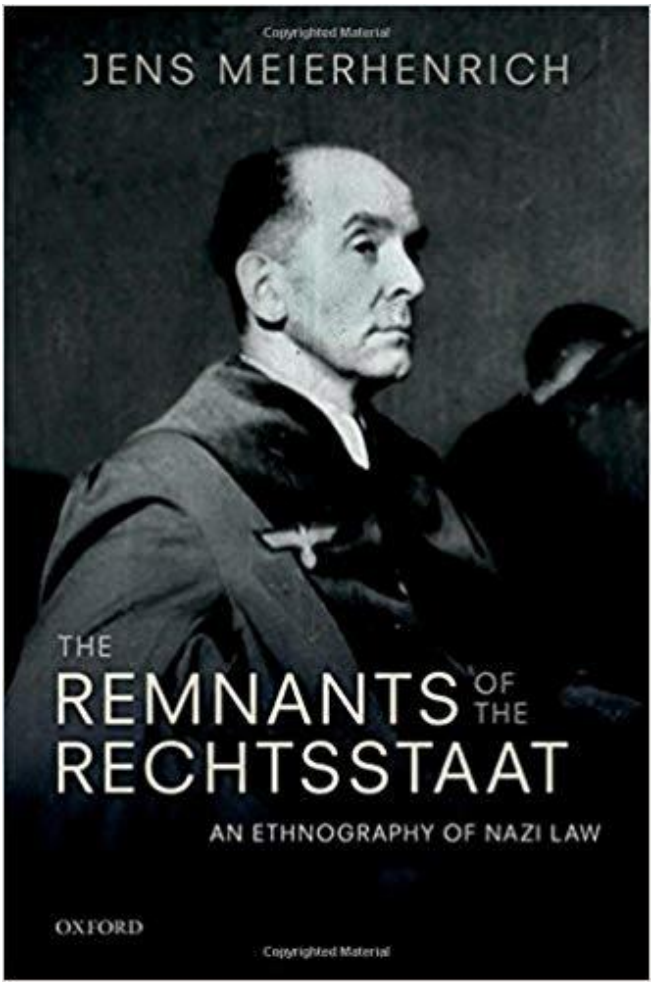
Ian Mitchell's Law-related BOOK RECOMMENDATIONS

25 – Remnants of the Rechtsstaat



THE REMANANTS OF THE RECHTSSTAAT – an Ethnography of Nazi Law

Author: Jens Meierhenrich

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Descriptor: Story of the Jewish émigré lawyer who described Nazi Germany as a "dual state"—half legal regime and half "prerogative" state—and not a uniform, totalitarian one as Western propaganda then required.

Reviewer: Ian Mitchell, 21 November 2018

Reason to read: Shows how the Germans under Hitler replaced Weimar-style justice with a twin-track approach which freed the state from any legal responsibility for its actions. Between one citizen and another, a complicated but effective system of law prevailed for practical, economic reasons. But between the citizen and the state, there was not only no equality of arms but there was not even any legal pretence of disinterested justice.[1]

This book is the story of the reception of another book, called *The Dual State*, by Ernst Fraenkel, who is described as "the first ethnographer of the authoritarian rule of law". (p. 244) He was a Jewish lawyer who worked for clients like trade unions, until 1938 when the ban on all Jewish lawyers—including those who, like Fraenkel, had fought in WWI—came into effect, and he decided to emigrate. His book was published in the United States in 1941. But his theory, which is now accepted as substantially correct, was buried beneath other works, none by those who had experienced Nazism in the courts. They portrayed Germany as a uniformly totalitarian state. This view became popular after the fall of France in political circles, partly as a means of rallying the American people round a crusade against it. Fraenkel's more nuanced description was buried so comprehensively that his book was not even translated into German until 1974. Political correctness over-rode historical reality for thirty years.

[1] This is an aspect of internal empire. Britain is no stranger to this approach when important interests are at stake. I have written about a real case in recent times in which this principle was clearly illustrated—see: The Cost of a Reputation.

Main talking points:

1. Rechtsstaat: This is essentially rule *by* law, law which the state observes itself, but which it imposes on its subjects without any organisational or political reciprocity. It is a concept which originated in Germany and became the ruling legal approach in Bismarckian times. The Weimar Republic continued it, though in mitigated form, while the Nazis distorted it by not being clear about what the law actually was. They had to do this as it could never be predicted. It was essentially the will of the "volk" as divined by the occult intuition of the Fuhrer, then promulgated by those who, in turn, could divine his thoughts and who had authority to act in his name. This is well described in pp. 75-84. The essence of the problem is that there was an unacknowledged *idea* that informed public law and government, not a concrete, published programme or an established tradition subject to challenges in the courts if certain accepted rights were infringed. The EU has a similar problem—at least it is seen to have by those who take democracy seriously. The implications are profound. The Rechtsstaat was originally "the intellectual product of concerted resistance by reactionary forces in all the states of the German Empire to the idea of the rule of law, as practiced in the kingdoms of England and Scotland." (p. 80)
2. There is an excellent section on modern Russian law as a manifestation of the "dual state". (pp. 243-5) Meierhenrich quotes an Oxford-based Armenian academic, Marina Kurkchiyan, who argues that Russia has neither rule *by* law nor the rule *of* law—so far so conventional—but who then makes an important implied criticism of those in the West who claim to have a solution to the Russian riddle-mystery-enigma. They are involved in "the multibillion-dollar industry that has grown up around the rule of law, which includes doling out aid based on countries' progress towards this elusive goal and the proliferation of indexes that purport to measure it." (p. 244)

Thought(s) provoked:

1. Ostentatious public moralism can be as dangerous as undebated ideas: "It is at once enlightening and utterly disturbing to think that policies which culminated in the destruction of European Jews could have started out as moral sentiments… And yet they did… 'The Final Solution did not develop as evil incarnate but rather as the dark side of ethnic righteousness… Germans [were] caught up in a simulacrum of high moral purpose…'" (p. 148) One thinks here of political correctness today: the more virtuous the state, the more prescriptive it has to be.
2. "Fraenkel was pessimistic about the prospects for democracy in a liberated [post-war] Germany. 'The broad masses,' he opined, would not be able to absorb the democratic ideals the Americans sought to instil in them, as they were 'too deeply poisoned by nationalistic feelings'." (p. 213) One thinks here of Scotland today, or the stalled Assembly at Stormont. Identity politics depends on undebated ideas, which are anathema to government by informed consent.
3. "*The Dual State* is immediately relevant for making sense of twenty-first century authoritarianism. For contrary to the hopes of rule-of-law advocates in the international community, authoritarian rule is pervasive and durable." (p. 228) One thinks here of all the states ruled by supreme authorities which are not elected and not removable, yet which claim to operate on behalf of a principle which the masses of the people support. It is perfectly possible, as Fraenkel emphasised, for government to be seen to operate by consent, while actually being government

by "prerogative". Today's "prerogators" (if I may call them that) are no longer kings and their courts, nor Nazis and their ilk, but those on the inside track of a larger project or idea of which they are the guardians, and which they consider to be more important than procedural correctness.

4. Meierhenrich quotes E.P. Thompson's classic, *Whigs and Hunters*: "If the law is evidently partial and unjust, then it will mask nothing, legitimise nothing, contribute nothing to any class's hegemony. The essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seems to be just." (quoted p. 228) Ignoring the "class" issue, there is truth in that. The rule of law requires an element of play-acting—like wigs and gowns—if it is to be depersonalised enough that people generally are to be convinced that the *personal* approaches of different judges to the *personal* situations of different criminals conform to the image of disinterested, *impersonal* justice, without the appearance of which no society can be governed other than by force. How legal consistency emerges from that diversity is the fundamental miracle of a well-ordered judicial system.

Incidental interest: I thought of both de Valera's Ireland and N. Sturgeon's Scotland when I read that a "*Staatsvolk*" is "a unified people bound by culture and history [which] generates a 'social consciousness'." (p. 87) The phrase "social consciousness" is, in that context, a synonym for "unwritten idea". The difference between that and an "unwritten constitution" is chasmal—but this is not the place to explore it, sadly.

Style: Distancing, in the pseudo-aristocratic way of modern academia: "… build the microfoundations for the metatheoretical arguments that I critique…" (p. 22) What does that mean to the ordinarily educated reader—or are we too unimportant to count in the esteemed Professor's world? "Their major difference is ontological: rational-choice theorists are beholden to methodological individualism, critical theorists … are wedded to methodological structuralism." (p. 29) This is not even good English. To be "beholden" to something means to have an obligation towards it, when I suspect the learned Professor wanted to say that rational choice theorists "prefer" individual approaches to the problems they choose to try to solve. That sort of exclusionary language is itself an illustration of the *de haute en bas* approach of the Rechtsstaat. The result is that Professor Meierhenrich's interesting story is often buried beneath the ruins of his attempt to tell it. Since this book is about law, it is perhaps appropriate to contrast the personalised Opinions of individual British judges, who usually write for themselves alone, with the plotlost mumbo-jumbo of the committees (the Russian word is "soviets") which draft the unsigned and often unreadable Opinions of the European Court of Justice—a pre-eminently Rechtsstaat-ish organisation.

Publishing quality: More footnotes than you could shake a stick at, but many of them are interesting, not mere references. Good index too, but the book overall has the feel of a print-on-demand artefact. There is no picture of Fraenkel; weirdly, the cover features his *bête noir*, Roland Freisler. He was the high priest of Nazi "justice", the man who tried the Stauffenberg plotters so abusively. And, of course, the "contrarian Irishman", Edmund Burke, did not make any comment on anything in "1874" (p. 245) as he had by then been dead for 77 years.

Smile(s): I am afraid that this is one of those books which fit Robert Graves's description of the Bible: not a smile from Genesis to Apocalypse.

Author: Jens Meierhenrich is an Associate Professor of International Relations at the London School of Economics and Political Science. He taught for a decade at Harvard University, where he was an Assistant Professor in the Department of Government. He received his doctorate and M.Phil. from the University of Oxford, as a Rhodes Scholar (from Germany) at St. Antony's College.

Link(s): You can see an interesting lecture by Prof. Meierhenrich on "reconciliation", at the start of which he makes the paradoxical but probably correct point that the durability of *apartheid* in South Africa helped establish democracy there after its passing by having provided stability and predictability for long enough that the state could get itself established on a sounder footing than in countries with a shorter experience of institutional construction: https://www.youtube.com/watch?v=lDZ-zxzvxJg.

Overall recommendation level: FAIRLY HIGH (if you can tolerate "bureaucademic" prose).

About the reviewer: Ian Mitchell is the author of four books, including *Isles of the West* and *The Justice Factory*. He is writing a comparative study of Russian and Western constitutional history to be called *Russia and the Rule of Law*. He lives in Campbeltown and can be contacted at ianbookrec@gmail.com.
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