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BOOK REVIEWS

The Remnants of the Rechtsstaat: An Ethnography of Nazi Law. By JENS MEIERHENRICH. [Oxford University Press, 2018. xi + 437 pp. Hardback £44.99. ISBN 978-01-98814-41-2.]

Ernst Fraenkel, born in Cologne in 1898, was a German Jewish lawyer who belonged to the intellectual circle around Otto Sinzheimer, the pioneer of German labour law, and Franz Neumann, the author of an influential early analysis of the National Socialist system of government (Neuman, *Behemoth: The Structure and Practice of National Socialism 1933–1944* (1944)). During the Weimar years, Fraenkel, a member of the Social Democratic Party, worked as a labour lawyer for the German Metalworker's Union. Not long after the rise to power of the Nazis, Jews were banned from practising law. Due to the fact that he had fought with distinction in the Great War, Fraenkel managed to obtain an exemption from that ban, and was therefore able to continue to work as a lawyer in Nazi Germany throughout the better part of the 1930s. He eventually emigrated to the US in 1938, where he obtained a J.D. from the University of Chicago, but he was unable to gain a foothold in American legal academia. Fraenkel returned to Germany in 1951, to be appointed as a professor of political science at the Freie Universität Berlin in 1953.

In 1941 Oxford University Press published Fraenkel's monographic account of the workings of the National Socialist legal system that was based on his experience as a practising lawyer in Nazi Germany (*The Dual State: A Contribution to the Theory of Dictatorship*, ed. Meierhenrich and trans. Shils (2017)). Fraenkel had completed a first, German version of *The Dual State* (which he revised for publication in English after his arrival in the US) while he was still practising law in Germany and therefore found himself in the position of a quasi-ethnographic "participant observer of Nazi legal practices" (p. 16). The title of Fraenkel's book encapsulates its main thesis. According to Fraenkel, National Socialist governance relied heavily on the regular and dependable operation of the legal system that the dictatorship had inherited from the Weimar Republic. A "normative state", to use Fraenkel's terminology, survived to a considerable extent in the context of National Socialist dictatorship. Protections afforded to subjects of the law by this residue of properly functioning legality, however, did not only erode progressively over time, they were also subject, from the beginning, to incursions of what Fraenkel called the "prerogative state". The regime was at liberty to act outside of the restraints of the rule of law if it considered it had political reason to do so. The overall structure of National Socialist rule in the 1930s, Fraenkel argued, was thus characterised by an uneasy combination of a normative and a prerogative state. The latter, if push came to shove, took precedence over the former. But while the National Socialist regime was unwilling to be restricted by a principled commitment to the rule of law, it was equally hesitant to abandon legality as a tool of efficient governance and a resource of legitimation. A proper understanding of National Socialist governance, Fraenkel concluded, would thus have to be attentive to the interaction of legality and legally unbridled prerogative power.

Jens Meierhenrich's *Remnants of the Rechtsstaat* is a study of *The Dual State*, but one that reaches far beyond a mere exegetical presentation of Fraenkel's thought. The book offers an intellectual biography of Fraenkel as well as a history of the scholarly reception of *The Dual State* (chs. 3, 6 and 8). These are intertwined

with a valuable overview of the development of theories of the *Rechtsstaat* in later nineteenth– and early twentieth–century German public law doctrine (ch. 4). The latter culminates in a fascinating chapter on debates about the proper understanding and role of the rule of law that took place in Germany in the early years of National Socialist rule (ch. 5).

Fraenkel's theory of the dual state, Meierhenrich is concerned to stress, is of more than mere historical interest. It raises important questions about the relation between law and politics that tie in with a number of key discussions in contemporary legal and political theory. Debates on the proper interpretation of Nazi law loom large, needless to say, in jurisprudential debate about natural law and legal positivism. Scholars in comparative politics and comparative constitutional law, moreover, have recently become more and more interested in understanding the role that the law and legal institutions play in authoritarian regimes. Meierhenrich shows that Fraenkel's *The Dual State* offers a much more nuanced analysis of the role of legality in Nazi governance than Neumann's better-known and more widely read *Behemoth*, one that can still inform contemporary discussions about authoritarian legality. The concluding chapter of the book (ch. 9) aims to establish, in this vein, that Fraenkel's conception of a dual state does not merely offer an accurate description of the material constitution of Nazi Germany. In Meierhenrich's view, the notion of a dual state provides a useful general category for the comparative classification of a certain type of authoritarian regime that has important contemporary instantiations.

On the whole, Meierhenrich's attempt to rehabilitate Fraenkel as a systematic thinker about the rule of law and its relation to politics is remarkably successful. The framing of the discussion of Fraenkel's ideas and their relevance, however, is not always as helpful as it could be. *Remnants of the Rechtsstaat* begins with an attack on Gustav Radbruch's and Lon Fuller's interpretations of Nazi law (pp. 3–13, 36–45). In Meierhenrich's somewhat simplistic presentation, Radbruch and Fuller are both made out to have claimed that there was no law in Nazi Germany, either because the rules in question were too substantively unjust (Radbruch) or because they violated principles of legality to such a degree as to fail to attain legal quality (Fuller). Echoing Kelsen, Meierhenrich criticises such a view as descriptively inaccurate: There was law, in a descriptive sense, in Nazi Germany; that is, there were rules publicly enacted by recognised legislative authority and enforced by courts, in a way that made legal outcomes reasonably predictable, at least as long as the agents of the prerogative state saw fit not to intervene. Though the regime was not committed to anything like Fuller's principle of congruence of official act and law, the operation of the legal system did play an important function in Nazi governance. Or as Meierhenrich puts it: "The law of the Third Reich mattered" (p. 41).

It will hardly be denied that legal rules mattered in Nazi Germany. The crucial question, clearly, is how they mattered. Given that Meierhenrich frames his analysis in terms of the jurisprudential debates between Radbruch and Fuller on the one hand and their positivist critics on the other, one would be interested to hear whether the remnants of the *Rechtsstaat* that existed in Nazi Germany facilitated or impeded National Socialist domination of German society. One might suspect that a normative state was permitted to survive in Nazi Germany only because and to the extent that efficient governance, in a complex modern society, requires a certain degree of legal organisation. But one might also have the hope that wherever law survives, it will have at least some inhibiting effect on the pursuit, on the part of an authoritarian regime, of morally unjustifiable aims. In other words, one might expect a properly nuanced analysis of the role of legality in Nazi Germany to shed light on the

question whether legality is nothing but a morally neutral instrument for the guidance of subjects' behaviour, equally capable to serve good ends or bad, or whether respect for legal form has some intrinsic moral value, in making it more difficult for an unjust regime to achieve its oppressive ends.

Meierhenrich frequently refers to the jurisprudential debate on this question, but it is not quite clear which of the two sides in this dispute his analysis of the role of legality in Nazi Germany is meant to support. At first glance, he appears to associate himself very explicitly with a positivist approach, in emphasising that idealising conceptions of law are unsuitable for the purpose of empirical social-scientific explanation. He also suggests, repeatedly, that to permit a limited survival of the normative state might simply have been the most efficient means for the National Socialist regime to establish and maintain its dictatorship (pp. 127, 181, 188). There are other passages, though, that do seem a lot more friendly to an aspirational understanding of legality. We hear that one can learn from Fraenkel that "law is never just an instrument, never just a weapon of the strong" (p. 228). In a discussion of Hermann Heller's critique of Kelsen, Meierhenrich gives a sympathetic portrayal of the view that Nazi rule was facilitated by the separation of law and morality in positivist legal theory (pp. 85–86). He also suggests that the survival of the normative state opened avenues of contestation of Nazi rule that would not otherwise have existed and that made it more difficult for the regime to realise oppressive aims (pp. 40, 103, 128).

To be sure, these suggestions are not incompatible with the claim that the regime's reasons for allowing the normative state to survive were purely tactical. Perhaps the Nazis deliberately traded off the gains in legitimacy resulting from the continuing existence of legal governance against restraints imposed by the survival of the normative state (pp. 190, 200). It would not be rational, however, for subjects to accept the offer implicit in this trade-off unless it was true that respect for legal form, even if qualified and limited, has an oppression-inhibiting effect. Acceptance of this latter view would put Meierhenrich into the camp of (Fullerian) natural law theory, which he elsewhere (p. 37) emphatically rejects for its inability to make descriptive sense of the phenomenon of Nazi law. The reader is left with the impression, at times, that Meierhenrich does not fully grasp the complexities of jurisprudential debates about the rule of law. He professes allegiance to Nigel Simmonds's view that law is a moral ideal (p. 10), but later sides with Joseph Raz's critique of the "ideal concepts of law" espoused by Fuller and Radbruch (pp. 228–30). It is hard to see how one could coherently endorse both Simmonds's and Raz's view on the value of the rule of law.

It might be argued that it does not matter very much where one positions oneself in jurisprudential debates about the value of legality if one's main interest is to develop an empirically informed understanding of the role that law plays in authoritarian regimes. This reply overlooks that we are interested in an empirically informed understanding, in large part, because we would like to be able to assess the moral consequences of faith in and support for legality – whether we are subjects of an authoritarian state or outsiders who have to decide how to engage with it. This reader, at any rate, would have hoped to receive a clearer and more coherent answer to the question of how the empirical example of National Socialist legality, understood with the nuance provided by Fraenkel, bears on the question of the value of the rule of law.

Remnants of the Rechtsstaat is nevertheless an exceptionally rich and intellectually stimulating book that is to be highly recommended to legal philosophers, legal historians and scholars of comparative constitutional law with an interest in authoritarian regimes. It does offer a successful rehabilitation of Ernst Fraenkel's

thought on authoritarian law that is long overdue. Meierhenrich's discussion manages to integrate several different disciplinary perspectives in a genuinely productive way that makes this book into something more than the sum of its parts. Even those who, like this reviewer, find themselves ever so mildly dissatisfied with the inconclusiveness of some of the arguments offered here, are likely to learn and to come to see some well-worn themes in a novel and sometimes surprising light.

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William Molyneux, The Case of Ireland's Being Bound by Acts of Parliament in England, Stated. Edited by Patrick Hyde Kelly. [Dublin: Four Courts Press/Irish Legal History Society, 2018. xi + 321 pp. Hardback €49.50. ISBN 978-18-46827-41-9.]

As Patrick Kelly reminds us, William Molyneux's *The Case of Ireland's Being Bound by Acts of Parliament in England, Stated* (Dublin, 1698) has strong reasons to be regarded as the most important political pamphlet published in Ireland before the Act of Union between England and Ireland of 1801. Challenging the claims of the English Parliament to legislate for Ireland (without the consent of the Irish Parliament), it also denied the claims of the English House of Lords to be the final court of appeal in Irish cases. *The Case* passed through nine subsequent editions in the course of the eighteenth century (mostly coinciding with events that raised questions about the relationship between the Irish and British parliaments), and there were a further six printings in the nineteenth and twentieth centuries. Kelly provides lists and details of all these later editions (pp. 49–52, 79–86). The topicality of the work for scholars is suggested by the fact that an article by Ian McBride, entitled "*The Case of Ireland* (1698) in Context: William Molyneux and His Critics" was published in the *Proceedings of the Royal Irish Academy* (vol. 118C (2018), pp. 201–30), at more or less the same time as the edition under review appeared.

Given the acknowledged importance of *The Case*, it is not surprising to find that Molyneux has attracted a good deal of attention from scholars. Not, admittedly, as much as Jonathan Swift – but certainly as much as or more than others with whom his name is often associated, Charles Lucas and Henry Grattan (see "person as subject" at www.irishhistoryonline.ie). In what ways, then, does Patrick Kelly's edition break new ground? From the outset of his "General introduction", the editor emphasises the structure of *The Case* as "a legal case as submitted to a court" (p. 1). Later, this point is further developed, where (taking the cue from the title of the work), it is contended that it was the author's intention "to put forward his arguments in a form analogous to the presentation of a civil case in a court of law" (p. 28). Such a format was typified by marshalling evidence for one point, then moving on to a completely new one. The value of this insight – which would not necessarily be apparent to historians without legal training – is that without it, the reader is inclined to think that Molyneux's arguments can be marred by unexplained contradictions and shifts of position. One of the most obvious of these apparent contradictions arises where Molyneux first argues that the voluntary submission of the Irish to Henry II indicated that Ireland was not conquered, then later doubles back and contends that rights acquired by conquest were not sufficient to give Henry II a title to Ireland. Kelly notes that the legal structure of *The Case* was not only common for such