

Book Review: The Remnants of the Rechtsstaat: An Ethnography of Nazi Law by Jens Meierhenrich

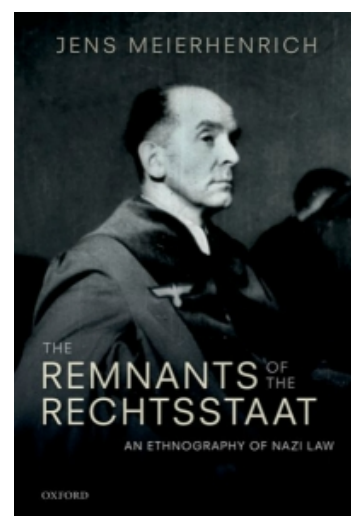
In The Remnants of the Rechtsstaat: An Ethnography of Nazi Law, Jens Meierhenrich challenges the perception of Nazism as an absence or perversion of legal oversight, instead outlining how jurists and practitioners mobilised and transformed key concepts within German law to support the actions of the Nazi regime. Focusing particularly on the figure of Ernst Fraenkel and his formative work The Dual State – a critical ethnography of negotiating and challenging the changing terrain of law under Nazism – this is a valuable conceptual history of the German Rechtsstaat and a testament to the courage of its guardians in the 1930s, finds Joshua Smeltzer.

The Remnants of the Rechtsstaat: An Ethnography of Nazi Law. Jens Meierhenrich. Oxford University Press. 2018.

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The term 'Nazi law' seems to contain within it a deep contradiction. Under the Nazi regime, arbitrary arrests were carried out under the veil of *Schutzhaft*, or 'protective custody'. The infamous *Volksgesichtshof*, or People's Court, was little more than a farce, doling out death sentences after show trials. The concentration camp system operated without any pretence of legal oversight. Indeed, the whole period of National Socialist tyranny appears as a perversion of law, the diametric opposite of the German *Rechtsstaat*, or state governed by law and legal procedures.

Jens Meierhenrich's *The Remnants of the Rechtsstaat: An Ethnography of Nazi Law* pushes back on precisely this characterisation of lawlessness. For Meierhenrich, Nazi law was an observable 'fact of everyday life', one complete with jurists and practitioners, with contested legal debates and codifications of new laws (3). To simply dismiss Nazi law as an oxymoron means foreclosing the possibility of understanding how National Socialism mobilised the key concepts of German law to support its actions and shift the standards of the profession.



The second chapter of the book, titled '*Behemoth* and Beyond', is devoted to dethroning the hegemonic position of German émigré Franz Neumann's *Behemoth: The Structure and Practice of National Socialism* in the historiography of National Socialist law. Published originally in 1942 with an expanded edition in 1944, the title of the book, *Behemoth*, already provides an argument about the state of law under National Socialism: just as Thomas Hobbes had borrowed the religious symbolism of the Behemoth to describe the lawlessness of the English Civil War, so too did Neumann insist that National Socialism was characterised by the same. As Meierhenrich argues, this was largely due to Neumann viewing 'the law of the *Rechtsstaat* [as] a *discrete variable*: it could only take on two values' (33). Either Nazi Germany was a *Rechtsstaat* or it was not, and Neumann came down squarely on the latter position. Against Neumann's interpretation, Meierhenrich urges a more complicated picture of Nazi law:

although in Nazi Germany the reign of the *Rechtsstaat* as such was over, some of the norms and institutions associated with it survived, if in heavily circumscribed form. They continued to matter, structuring politics and society on the margins of dictatorship (39).



Image Credit: Ruin of the 'Volksgerichtshofes' (People's Courts), Berlin ([Bundesarchiv, B 145 Bild-P054489/Carl Weinrother CC-BY-SA 3.0](#))

Enter Meierhenrich's protagonist, Ernst Fraenkel, a Jewish-German lawyer and social democrat who remained in Germany after Hitler's seizure of power until he was forced to flee in 1938. Formerly Neumann's law partner, Fraenkel began writing his account of Nazi law, published in English as *The Dual State*, while still working as a lawyer. As Meierhenrich points out, *The Dual State* was 'an ethnography of law crafted in the most forbidding of circumstances [...] the first comprehensive, institutional analysis of the rise and nature of National Socialism, and it was the only such analysis written from within Germany' (20). This contemporaneous account is the product of first-hand experiences of negotiating the changing terrain of law under National Socialism.

It is ultimately this first-hand experience that allows Fraenkel to see the outline of 'the dual state'. As Fraenkel explained in the introduction to his work:

based on the insights into the functioning of the Hitler regime that I gleaned from my legal practice, I believe to have found a key to understanding the National Socialist system of rule in the duality or concurrent existence of a "normative state" that generally respects its own laws, and a "prerogative state" that violates the very same laws (182).

The prerogative state exercised arbitrary power with little to no constraints through the Gestapo or the National Socialist party apparatus (183); at the same time, however, lower courts and administrative bureaucracies continued to follow their normal procedure. This leads to perhaps the most haunting and yet absurd anecdote of the book. As Fraenkel recounts:

[This is] a country in which it is possible that a concentration camp inmate can successfully file his tax complaints. The prerogative state incarcerated him, the technical, normative state reviews his tax complaint as if nothing had happened, as if we all still lived in a *Rechtsstaat* (189).

Two chapters of the book are devoted to constructing a rich conceptual history of the *Rechtsstaat* in German jurisprudence and form the intellectual background to Fraenkel's work. The first chapter covers its origin in the work of Johann Wilhelm Placidus in 1798, its popularisation through Robert von Mohl in the period before the revolutionary events of 1848, all the way through to debates on the nature of the *Rechtsstaat* in the Weimar Republic. This broad history emphasises both the pluralism of German legal thought and jurisprudence, but also underlines that the *Rechtsstaat* was an 'essentially contested concept', with each jurist attempting to imbue it with connotations from their own jurisprudence (92).

In the following chapter, Meierhenrich extends his conceptual history of the *Rechtsstaat* into the beginning of the National Socialist dictatorship. Between 1933 and 1936, Nazi jurists debated whether the *Rechtsstaat* could be assimilated into Nazi jurisprudence. On the one hand, jurists such as Otto Koellreutter argued for a racialised version of the *Rechtsstaat*, in which 'law's constitutive and constraining force derived from the völkisch idea of law and no longer from the "rigid forms of statutory rule"' (114). In the opposing camp, jurists such as Carl Schmitt argued that the concept of the *Rechtsstaat* had to be removed from the legal vocabulary of National Socialist jurisprudence, as 'it was a manifestation of degenerate law' (141): an inherently liberal and subversive concept to National Socialist tyranny. More than merely a turf war between competing academic camps, the debate over the *Rechtsstaat* 'points to a neglected social mechanism in the making of the Nazi dictatorship: the reconstitution of legal norms' (155). While these debates help to situate Fraenkel's *The Dual State* within its broader intellectual background, the chapters are equally valuable when taken on their own as conceptual histories of the German *Rechtsstaat*.

Ultimately, Meierhenrich's book is 'an effort to stem the tide of forgetting the guardians of the *Rechtsstaat* in the 1930s, these defenders of light in a dark time' (24). Ernst Fraenkel repeatedly risked his life for that end, from preparing the manuscript of *The Dual State* while still in Nazi Germany to publishing pseudonymous critiques of National Socialism in foreign newspapers (70-71). By excavating the intellectual context and publication history of *The Dual State*, Meierhenrich's monograph rescues Fraenkel from the shadow of his contemporaries. The sheer courage of academics such as Fraenkel is worth remembering, as are their scholarly contributions.

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Note: This review gives the views of the author, and not the position of the LSE Review of Books blog, or of the London School of Economics.