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Christian Hilger. *Rechtsstaatsbegriffe im Dritten Reich: Eine Strukturanalyse.* Beiträge zur Rechtsgeschichte des 20. Jahrhunderts. Tübingen: Mohr Siebeck, 2003. xiv + 249 pp. EUR 49.00 (cloth), ISBN 978-3-16-148057-7.

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The Law of the Jungle

"What is right may be learned not only from the law but also from the concept of justice which lies behind the law and may not have found perfect expression in the law. The law certainly continues to be the most important source for the determination of right and wrong because the leaders of the nation express their will in the law. But the legislator is aware of the fact that he cannot give exhaustive regulations covering all the situations which may occur in life; he therefore entrusts the judge with filling in the gaps."

Franz Gürtner (1935)

"I am totally indifferent as to whether a legal clause opposes our actions … during the months when it was about the life or death of the German nation, it was entirely irrelevant whether other people whined about breaking the law.... They called it lawless because it did not conform with their notions of the law. In truth, through our labors we laid the foundations of a new law, the right to live of the German nation."

Heinrich Himmler (1936)[1]

In the nearly two centuries since its formulation by the legal philosopher Robert von Mohl, the concept of the German *Rechtsstaat* has meant different things to different people. The putative father of German conservatism, Friedrich Julius Stahl, believed the principles of the *Rechtsstaat* could be reconciled with a corporate, monarchical state. Two generations later Hugo Preuß, author of the Weimar constitution, argued to the contrary that *rechtsstaatlich* principles of justice, individual liberty, and equality before the law could only be realized in a democracy.[2] While the relative prerogatives of the state vis-à-vis the individual may have changed over the years, however, most legal historians accept that there was a consistent respect for equality before the law, the rights of the individual, and the impartial administration of justice running from Freiherr vom Stein's Prussia, through the *Kaiserreich*, and into the Weimar Republic. At its most abstract, this tradition affirmed that neither the government nor the administration might infringe upon the liberty of individual citizens unless so prescribed by law and deemed constitutional by independent judicial oversight. No matter how powerful the state might become, its monopoly on violence was ostensibly restrained by an overwhelming respect for law (*Gesetz*) and justice (*Recht*).[3] In this traditional narrative, Germany's long tradition of *Rechtsstaatlichkeit* was only interrupted by the Third Reich, in which individual rights were subordinated to the interests of the collective and where citizens enjoyed varied legal status based on "subjective" attributes such as race and political affiliation.

According to Christian Hilger, however, legal historians have failed to differentiate sufficiently among the varied legal-philosophical approaches extant in the Third Reich. Even National Socialist legal theorists had trouble escaping the long shadow of the *Rechtsstaat*. For as much as they dismissed the *Rechtsstaat* as an outmoded, bourgeois liberal tradition, Nazi-era legal scholars likewise appropriated much of their predecessors' language and assumptions. Hence this book seeks "die Eigenheiten, Gemeinsamkeiten und abweichungen der zum Rechtsstaat vertretenen Positionen in schärferer Kontur herauszuarbeiten als dies bisher in der rechstgeschichtlichen Forschung zum Nationalsozialismus geschehen ist" (p. 5). The author concedes that this primarily "deskriptiven Ansatz" fails to address "der gesamtpolitische, sondern auch der akademische Kontext der hier untersuchten Texte," but insists that a hermeneutical approach is necessary in order to illustrate "die rechtsdogmatischen und rechtspolitischen Fraktionen innerhalb der Juristenschaft … und verspricht insofern Fortschritte für Analyse des NS-systems" (pp. 9-10). The resulting exegesis is fascinating, though one comes away more convinced by the former assertion

than the latter.

Chapter 1 begins by establishing the general attributes of the so-called bourgeois liberal *Rechtsstaatsbegriff* from the unique perspective of its opponents. According to these, this positivist conception of the *Rechtsstaat* made no distinction between justice and law, thereby ignoring important subjective elements of ethics (*Moral*) and culture (*Sittlichkeit*). It likewise privileged the interests of the individual over those of state and society. The end result of this bourgeois liberal conception was the Weimar party system, in which the state became completely subordinated to the divergent interests of various social groups. Indeed, according to Nazi-era legal theorists, the Weimar system failed even to protect the rights of the individual against the state. It devolved rather into a vehicle by which "die gesellschaftlichen Machtgruppen ihre Sonderinteressen durchzutreten versucht hätten" to the detriment of the individual (p. 20).

While most of Hilger's protagonists share this general understanding of the liberal *Rechtsstaat*, they differ widely in the nature and degree of their critique. Günther Krauss, for example, rejected the concept in any form, dispensing even the soundly conservative *Rechtsstaatsbegriff* of Stahl as redolent of Jewish positivism (p. 25). This race-based rejection of bourgeois liberal freedom and equality was shared to varying degrees by Hans Frank, Roland Freisler, and Carl Schmitt. On the other hand, Otto Koellreutter endorsed the incorporation of "'ethische' Anforderungen und 'politische Notwendigkeiten"' into legal decision-making (p. 49), but was still unwilling to dispense with the concept of a normative law independent of race or politics. Having already argued in *Der nationale Rechstaat* (1932) that the Weimar constitution rightly allowed for the subordination of "subjektiver Rechte unter die Interessen der Allgemeinheit," Koellreutter transposed the same juridical deference to ethical and political exigencies in order to justify the National Socialist *Rechtsstaat* (p. 68). This ambivalence was equally apparent in the work of Edgar Tatarin-Tarnheyden and Kurt Groß-Fengels, who argued that the state had to protect the interests of the individual as well as the collective for economic as well as philosophical reasons.

Having introduced the various gradations of antipathy to the bourgeois liberal *Rechtsstaat*, the author focuses in chapter 2 on those individuals who most clearly repudiated legal positivism. Theorists such as Frank and Schmitt replace the normative idea that all individuals are equal with the idea of racial hierarchy. The author nevertheless contends that even among those individuals who seemed to reject all elements of liberal legal theory, a considerable diversity of opinion prevailed as to what to replace it with. Thus Julius Binder, who agreed that National Socialism should not be beholden to the Weimar constitution, remained uncomfortable with the idea of race as a legal principle. He also disliked the concept of an *Öbrigkeitstaat*, which he felt was pejorative and failed to incorporate the popular aspects of fascism. Instead Binder chose the term "Autoritärer Staat", which was meant to suggest that Adolf Hitler's subjective will was not a law unto itself, but that law could only be "realized" through the *Führer*'s perception of the will of the people. In practice, of course, this "Einheit von besonderem und allgemeinen Willen" was especially difficult to differentiate from Hitler's often arbitrary and changeable demands (p. 118). Another more subtle repudiation of the bourgeois liberal *Rechtsstaat* can be found in the work of Otto von Schweinichen. Although not particularly enamored of the amorphous concept of race as a basis for legal decision-making, Schweinichen felt that the traditional *Rechtsstaat* fatally confused the concept of justice with a particular set of laws. In order for justice to be maintained over time, laws had to be reinterpreted or even ignored based on the "Primat der praktischen Vernunft," by which the politician (Hitler) reacts "'spontan, instinktiv' nach Normen, die er sich nicht ausdrücklich zu vergegenwärtigen brauche" (p. 130). These subtle legal differences between Frank and Binder are intellectually noteworthy, but it is important to emphasize that both theories allowed Hitler and his henchmen to get away with murder.

The third chapter focuses on Nazi-era legal theorists who were more clearly indebted to the ideological moorings of the bourgeois liberal *Rechtsstaat*. The infamous Freisler, for example, maintained the value of the concept, even while he replaced its normative assumptions with the "Inhalte und Funktionen von den dominierenden politischen Ansichten der jeweiligen geschichtlichen Epoche" (p. 134). Following Schweinichen in some respects, Heinrich Lange tacked much closer than Freisler to the bourgeois liberal emphasis on individual freedom. Lange characterized the formalistic Weimar constitution as merely a *Gesetzesstaat*, while the Third Reich was a true *Rechtsstaat* in its perpetual attempt to express the living "Volksgeist" (p. 137). Yet Lange's concept of "Volksgeist" was just as clearly indebted to G. W. F. Hegel and the positivist Historical School of the nineteenth century as it was to the race-obsessed *Zeitgeist* of the 1930s. Both Bodo von Dennewitz and Hans Helfritz also tried to unite some of the normative assumptions of

the bourgeois liberal *Rechtsstaat* with the expressly political considerations about preserving the racial *Volksgemeinschaft*.

The most interesting figures in this chapter are Tatarin-Tarnheydens and Groß-Fengel. Indeed, if not for the lip service they paid to the *Führerstaat*, one might place both theorists squarely within the bourgeois liberal tradition. This heritage is apparent in Tatarin-Tarnheydens "positivist" insistence on "der Schutz der Individualsphäre als ein rechtsstaatliches Erfordernis," even if he favored, like virtually all Nazi-era legal theorists, the role of the prevailing "Ethos" (race) and political context in determining law and justice (pp. 168-170). According to Hilger, Groß-Fengel's *Rechtsstaatsbegriff* came closest to the bourgeois liberal tradition. Like his colleagues he repudiated the Weimar Republic as a mere *Gesetzesstaat* that privileged the interests of the individual parties over the collective well-being of the whole. Unlike his fellow theorists, however, he refused to relinquish the nineteenth-century traditions of "Deutschliberalismus," which not only defended the freedom of the individual against the absolutist state but likewise incorporated the values of "Vaterland, Wehrhaftigkeit und Ehre" (p. 186). This liberal *rechtsstaatlich* tradition could be reconciled with National Socialism, Groß-Fengels explained, insofar as the civil rights of the individual were viewed not as a product of the French Revolution or Weimar constitution, but as "der Garantie volkhafter Persönlichkiten ... älteres deustches Rechtsgut zu erblicken" (p. 193). It also was not necessary to subordinate the judiciary to politics so long as jurists recognized their role was to judge the constitutionality of law and not to legislate.

Chapter 4 applies five overarching criteria in order to parse out the similarities and differences across the "spectrum" of the above-mentioned legal theories: differences and independence; the validity and recognition of values; the meaning of legal dogma for law; the relationship between people and state; and fulfillable functions. After some intricate and intermittently convoluted analysis, Hilger manages to establish a "spectrum" of four to six gradations, depending on which of the five criteria one chooses to emphasize. Not surprisingly, he finds that passionately pro-Nazi legal theorists such as Frank, Helmut Nicolai, Krauss, and Schmitt departed most clearly from the assumptions of the bourgeois liberal model. For them, law was never independent of politics, namely the perpetuation of the state and the racial *Volksgemeinschaft* it was meant to order. With some variation, Freisler, Binder, Schweinichen, and Dennewitz tend to form a second group of theorists who owe some debt to the bourgeois liberal model, yet still depart from it in radical ways. A third group with some degree of overlap with the second includes Helfritz, Koellreutter, Lange, and Martin Wittig. All four seem to have retained some faith in the need for legal norms independent of political context. In this regard their views were treated with greater skepticism by the regime, which saw such legal conservatism as suggestive of liberal positivist values. Finally we have Tatarin-Tarnheyden and Groß-Fengels, the latter of whom remained the least distinct from the bourgeois liberal model. Hilger concludes that while all theorists made some attempt to justify the actions of the parties in political power, certain divergences in the spectrum of these terms can be found in respect to the question of the extent to which "die Begriffe einen willkürlichen Dezisionismus der politischern Machthaber ... legitimieren" (p. 230). Of this last claim, there can be little doubt, at least in a theoretical sense.

The weakness of this book, as the author indirectly concedes in the introduction, lies in its overwhelming emphasis on legal theory over historical context. Many of the same political-juridical trends were fully developed and competing in the Weimar Republic, which might suggest a different kind of continuity than the one the author presents.[4] No historical actor, moreover, is independent of his or her social reality. All these individuals had personal, political, and professional reasons, to which the author only intermittently alludes, to modify their views after 1933. Here one wishes for a greater sense of periodization. Hilger hardly remarks, for example, on the fact that virtually every work he surveys appeared during the first three years of the regime; of course most were probably conceived and written a year or two earlier. Was this a function of the greater intellectual freedom prior to *Gleichschaltung*? Did legal theorists suffer from increasing censorship or professional pressures after 1935? What role did Heinrich Himmler's consolidation of police power play in the seeming dearth of theoretical divergences after 1936? Indeed, after repeatedly noting the degree to which legal theorists privileged subjective political, historical, and ideological contexts over normative laws, the author fails himself to look into the "subjective" context of political and professional motivations experienced by his protagonists.

Hilger's work remains important in suggesting that legal theory in Nazi Germany was closer to the partial *Rechtsstaatlichkeit* articulated by Gürtner above than the Darwinistic "law of the jungle" suggested by Himmler. One likewise appreciates the careful attention to theoretical nuance that goes into the author's delineation of these theorists' varying degrees of *Rechtsstaatlichkeit*. Still, one also wishes the argument were more cog-

nizant of the law's everyday application and embedded in contemporary political and juridical praxis, the consequences of which, as we well know, resulted in the tragic deaths of millions.

Notes

[1]. Franz Gürtner and Heinrich Himmler, as quoted in Michael Burleigh, *The Third Reich: A New History* (New York: Hill & Wang, 2000), 164, 190.

[2]. Julius Stahl, *Die Staatslehre und die Prinzipien des Staatsrechts*, 3rd ed. (Heidelberg, 1856); Hugo Preuß, *Staat, Recht und Freiheit* (Saarbrücken: Vdm Verlag Dr. Müller, 2007); Edin Sarcevic, *Begriff und Theorie des Rechtsstaats (in der deutschen Staats-und Rechtsphilosophie) vom aufgeklärten Liberalismus bis zum Nationalsozialismus* (Saarbrücken, PhD diss., 1991); Paolo Prodi, *Eine Geschichte der Gerechtigkeit: Vom Recht Gottes zum modernen Rechtsstaat* (Munich: C. H. Beck, 2003); Michael Stolleis, *Geschichte des offentlichen Rechts in Deutschland* (Munich: C. H. Beck, 2002); and Michael Stolleis, *Staatsrechtslehre und Verwaltungswissenschaft, 1800-1914* (Munich: C. H. Beck, 1988-1992).

[3]. See Ernst Benda, "Rechtsstaat-Rechtspolitik," in *Handwörterbuch des politischen Systems der Bundesrepublik*, at Bundeszentrale für politische Bildung, URL: http://www.bpb.de/wissen/060046802583307482565316731605 9,0,0,Rechtss

[4]. See, among others, Michael Stolleis, *The Law under the Swastika: Studies on Legal History in Nazi Germany* (Chicago: University of Chicago Press, 1998); Michael Stolleis, *Geschichte des öffentlichen Rechts;* and Duncan S. Kelly, *The State of the Political: Conceptions of Politics and the State in the Thought of Max Weber*, ed. Carl Schmitt and Franz Neumann (Oxford: Oxford University Press, 2003).

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