

Summer 2010

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Recommended Citation

Hugh Corder, *An Extraordinary Tale*, 45 *Tulsa L. Rev.* 763 (2013).

Available at: <http://digitalcommons.law.utulsa.edu/tlr/vol45/iss4/18>

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AN EXTRAORDINARY TALE

Hugh Corder*

Jens Meierhenrich, *The Legacies of Law: Long-Run Consequences of Legal Development in South Africa, 1652-2000* (Cambridge U. Press 2008). Pp. 408. \$34.99.

This is a most remarkable book. The author sets himself the task of seeking answers to the question of how a society whose constitutional governance was for centuries (at least two) regarded as “wicked”¹ can somehow retain sufficient belief in the potential of the law for limiting abuse of power (despite overwhelming indications to the contrary) that it opts for a model which privileges a supreme constitution and the rule of law as the chief means of government. This seems counterintuitive, as Meierhenrich acknowledges throughout, and the more so in the light of any number of studies published over the past forty years which spell out in great detail the cynical use of the “law” to achieve race-based injustice by successive white regimes and the relative complicity of the leadership of the judiciary in this blatant abuse of the legal form to deny, rob, and suppress the rights of most South African citizens.² Yet, despite the number of such studies, a reviewer of two of the earlier treatments of the record of the appellate judiciary³ was constrained to observe that while “these . . . have helped significantly to improve understanding of the South African judiciary, neither work provides a clearly defined theoretical framework on which further analytical examination can proceed.”⁴ The chief counter to this justified criticism is Dyzenhaus’s subsequent magisterial analysis of judicial conduct seen through a Dworkinian lens,⁵ but his work too does not expressly address the question tackled in the book under review.

A confession is due at the outset: this is the book that I have long wanted to write. Since the entirely unforeseen transition to a constitutional democracy occurred in the pe-

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1. Famously styled as such in David Dyzenhaus, *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (Clarendon Press 1991), and now widely accepted as a descriptor.

2. Starting slowly in the 1960s and 1970s, the appearance of such studies gathered pace during the next two decades. Among the most significant pioneers in this area are John Dugard, *Human Rights and the South African Legal Order* (Princeton U. Press 1978); Dyzenhaus, *supra* n. 1; Stephen Ellmann, *In a Time of Trouble: Law and Liberty in South Africa’s State of Emergency* (Clarendon Press 1992); Anthony S. Mathews, *Law, Order and Liberty in South Africa* (U. Cal. Press 1972).

3. Hugh Corder, *Judges at Work: The Role and Attitudes of the South African Appellate Judiciary 1910-1950* (Juta & Co. 1984); C.F. Forsyth, *In Danger for Their Talents: A Study of the Record of the Appellate Division of the Supreme Court of South Africa from 1950-1980* (Juta & Co. 1985).

4. D.M. Davies, *Competing Conceptions: Pro-executive or Pro-democratic - Judges Choose*, 3 S. Afr. J. on Hum. Rights 96, 96 (1987).

5. David Dyzenhaus, *Hard Cases in Wicked Legal Systems: Pathologies of Legality* (2d ed., Oxford U. Press 2010).

riod from 1990 to 1996, and given my abiding interest in South African judicial politics of the twentieth century set in a jurisprudential context, I have been pondering the question at the heart of *The Legacies of Law*⁶ (“*Legacies*”). Many mostly good intrusions caused the constant postponement of this undertaking, and now I am relieved of the burden of expressing my own fascination, for Jens Meierhenrich has done what was required and much more. Let me spell out my gratitude and admiration in what follows.

Meierhenrich frames the task he sets for himself at the outset:

[This] book constructs the foundations for a theory of democracy that revolves around *rules of law* This book is built around an attempt to answer two central questions: How do legal norms and institutions evolve in response to individual incentives, strategies, and choices; and how, once established, do they influence the responses of individuals to large processes, especially democratization?⁷

He devotes the rest of a brief first chapter to outlining how he proposes to argue his way to the answers to these questions, and then spends some time in setting out the theoretical framework in which his arguments unfold in an intriguing part one.⁸ He first describes a “typology of law, which is indispensable for understanding the social function of law in ordinary times, and reflects on the strategy of conflict in democratization, which is necessary for understanding the social function of law *in times of transition*.”⁹ Meierhenrich takes law to be “a set of norms held by citizens, encapsulated in institutions, and enforced by officials,”¹⁰ and he proceeds to rely on a Weberian model based on qualities of formality and substantiveness on the one hand, and rationality and irrationality on the other.¹¹ He furthermore explains the importance for his model of drawing a distinction between legality and legitimacy and explores certain elements key to his ensuing arguments about strategies to end conflict, such as endgames (involving power, wealth, and security), and dilemmas attendant upon choice among strategies (such as information failures, commitment problems, security problems, and so on).¹²

With this typology in mind, Meierhenrich proceeds to outline the work of his main theoretical lodestar, Ernst Fraenkel, a German labor lawyer and social democrat who fled Nazism for exile in the United States and whose book, *The Dual State: A Contribution to the Theory of Dictatorship*,¹³ was published in 1941.¹⁴ Meierhenrich “introduces the dual state as a conceptual variable [and] builds a path-dependent argument around the forgotten concept, thereby completing the theoretical framework of [his] book.”¹⁵ The

6. Jens Meierhenrich, *The Legacies of Law: Long-Run Consequences of Legal Development in South Africa, 1652-2000*, at 1-2 (Cambridge U. Press 2008).

7. *Id.* at 1-2.

8. *Id.* at 15-79 (chs. two and three).

9. *Id.* at 15 (emphasis in original).

10. *Id.*

11. Meierhenrich, *supra* n. 6, at 16-23 (describing Max Weber’s conceptual jurisprudence).

12. *Id.* at 23-42.

13. Ernst Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship* (E.A. Shils, Edith Loewenstein & Klaus Knorr trans., Oxford U. Press 1941).

14. Meierhenrich, *supra* n. 6, at 42-79 (ch. three).

15. *Id.* at 44.

dual state is characterized by the presence of both the prerogative state as well as the normative state,¹⁶ which are in tension with each other. The author proposes that a dual state stands a better chance of becoming a democracy than those with few or no traces of the normative state, for the “survival of normative state fragments creates reassurance in transition games.”¹⁷ He describes this as a “path-dependent” argument, in that “the binding quality of choices at one point in time matters for choices at another.”¹⁸ So, “[a] habit of legality strengthens the credibility, and thereby the viability, of democratic commitments.”¹⁹ There is much more to be gained by way of absorbing the discussion and analysis with which Meierhenrich builds his theory,²⁰ but this is not the place to go into any greater detail, for it is in the application of his theory to the process of democratization in South Africa that his major focus lies.

So we move to part two of the book, beginning with two chapters outlining critically the history of “apartheid law” in South Africa. In fact, while apartheid is usually associated with formalized racism as the basis of government policy from 1948, this story of the development of a legal culture dates from the first European settlement in 1652, and it does so in an “episodic” manner, identifying seven stages of the formation of the South African state before its “endgame” in the 1990s.²¹ At each stage of its development, however, Meierhenrich emphasizes those actions and events that contributed to the strengthening of either the normative state or the prerogative state as they coexisted within the dual state which was (and almost certainly still is) South Africa. He demonstrates clearly that, while these two strands were present in appreciable form throughout the administration of the colonies which came to make up the country of South Africa exactly one hundred years ago,²² and while elements of the normative state enjoyed moments of prominence from time to time thereafter,²³ in reality the prerogative state came to dominate governmental practice increasingly rapidly from the 1950s forward. This culminated in the almost total submergence of the normative state in the “rule by emergency powers” mode that characterized the last decade of the apartheid regime.²⁴

Having thus described in some detail the formation of the dual state in South Africa, Meierhenrich goes on to catalogue its effects on the systems of both governance and the law.²⁵ His discussion of the baleful influence of the prerogative state is organized appropriately around the themes of discrimination, fear, destruction, and death,²⁶ while

16. *Id.* at 62. The “hallmark of the prerogative state . . . [is] government by decree.” *Id.* at 63. That of the normative state is “government by law.” *Id.* at 65.

17. Meierhenrich, *supra* n. 6, at 45.

18. *Id.*

19. *Id.* at 62.

20. See e.g. *id.* at 56 (his “cognitive manifesto” as a result of which he assumes that law is “a manifestation of three interlocking elements: (1) interests, (2) institutions, and (3) ideologies”); *id.* at 67-76 (the centrality to Fraenkel’s normative state of the notions of economic liberty, *pacta sunt servanda*, private property, and fair competition); Meierhenrich, *supra* n. 6, at 73-76 (his integration of the Hart-Fuller debate into the concept of “fair competition”).

21. *Id.* at 83. For the seven stages, see *id.* at 88 tbl. 4.1.

22. See *id.* at 88-96.

23. For example, “it was civil servants and *not* military planners, who orchestrated the formation and transformation of the apartheid state.” *Id.* at 108.

24. Meierhenrich, *supra* n. 6, at 109-111 (describing the Garrison State).

25. See *id.* at 112-174 (ch. five, “Apartheid and the Law II”).

26. *Id.* at 113-129.

the normative state's development is seen through the lens of a number of court cases that elicited extraordinary judgments affirming fidelity to a higher-order view of law with justice.²⁷ The author then pays particular attention to instances of the law "supplement[ing] resistance as an instrument to fight apartheid,"²⁸ such as the cases that ultimately led to the demise of the pass laws,²⁹ as well as analyzing in great detail the effects on the relative fortunes of the prerogative and normative states of many trials and appeals of prominent political figures that raised particularly important points of political principle during apartheid.³⁰ This full and interesting treatment of a wide selection of cases culminates in Meierhenrich proposing a graphic description of apartheid law, in which the "white oligarchy" is governed through "formally rational law," while the "disfranchised black majority" is ruled by "substantively irrational law."³¹

The author then moves to the application of his theoretical model to apartheid's "endgame" during the process of political transition from 1990 and the first few years of the democratic South Africa.³² It is perhaps best to allow him to describe his aims in his own words:

The apartheid state - *qua* law - provided the possibility of, and potential for, the kind of action that could move interacting adversaries away from confrontation, toward cooperation. [T]he dual state served apartheid, but it served democracy as well [T]hese legal norms and institutions facilitated - in crucial and unexpected ways - the resolution of apartheid's endgame.³³

Meierhenrich points to a range of devices (such as opinion surveys), key external events (such as the end of the Cold War), individual personalities, and analytic narratives (such as electoral and constitutional design) to substantiate his thesis.³⁴ He highlights in this respect the efforts of anti-apartheid lawyers, especially those in the "public interest law" sector, whose work helped to establish "law as common knowledge."³⁵

Equally if not more significant, in his view, was the role of law as tradition in South Africa, "a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught."³⁶ Meierhenrich bases the plausibility of his argument here on survey results over many years showing that, despite all the injustices perpetrated

27. *Id.* at 129-140.

28. *Id.* at 140.

29. Meierhenrich, *supra* n. 6, at 140-145. See also *Rikhoto v E. Rand Administration Bd. & Mun. Lab. Officer*, *Germiston* 1983 (4) SA 278 (W); *Komani v Bantu Affairs Administration Bd., Peninsula Area* 1979 (1) SA 508 (C).

30. Meierhenrich, *supra* n. 6, at 145-170.

31. *Id.* at 171 fig. 5.1.

32. *Id.* at 175-291 (chs. six and seven).

33. *Id.* at 175.

34. *Id.* at 187-207.

35. Meierhenrich, *supra* n. 6, at 208. For Meierhenrich's general discussion, see *id.* at 208-217.

36. *Id.* at 219 (quoting John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* 2 (2d ed., Stan. U. Press 2007)).

through the law under apartheid, there yet remained a substantial, or at least meaningful level, of confidence in the legal system.³⁷ He also emphasizes the role as lawyers of leading politicians in the African National Congress (“ANC”) (which has governed the country since freedom in 1994), such as Oliver Tambo and Nelson Mandela; the relatively high level of acquittal on or withdrawal of charges in political trials from the mid-1980s; and the vitally important religious foundations (in the Calvinist, Anglican, and vernacular traditions) which influenced legal traditions in the country.³⁸ The author then shifts focus to the establishment of the legitimacy of the constitutional compact which formed the basis of the transfer of political power in 1994,³⁹ arguing that the attempt at national reconciliation and truth finding, which happened through the work of the Truth and Reconciliation Commission from 1995 to 1998, was a critical element in earning respect for the idea of limited government under law in post-apartheid society.⁴⁰

The final part of this book consists of a fascinating but brief (he styles it a “plausibility probe”⁴¹) comparative exercise, in which the author applies his theoretical approach to events in Chile over the past two centuries or so. He reaches the tentative conclusion that “post-apartheid South Africa and post-authoritarian Chile have achieved similar levels of democratic development, at least in the perception of their citizens. In order to comprehend these outcomes fully, we must take seriously the legacies of law.”⁴² The final chapter then summarizes the case Meierhenrich has made in this book. The chapter is headed by an excerpt from the authoritative text in this area of the law, in my view, by the great social historian E.P. Thompson, which bears express repetition:

The rhetoric and the rules of a society are something a great deal more than sham. In the same moment they may modify, in profound ways, the behaviour of the powerful, and mystify the powerless. They may disguise the true realities of power, but, at the same time, they may curb that power and check its intrusions. And it is often from within that very rhetoric that a radical critique of the practice of the society is developed.⁴³

I make no apologies for having set out quite a full summary of *Legacies*, for Meierhenrich makes a complex set of claims that are, in my view, both powerful and justified, yet controversial, as he himself acknowledges.⁴⁴ It is precisely because of the contested nature of the terrain, and the relative novelty of his arguments, that I regard this as

37. *Id.* at 220-225.

38. *Id.* at 226-264.

39. The compact was in the form of the transitional or interim constitution, Constitution of the Republic of South Africa Act 200 of 1993.

40. Meierhenrich, *supra* n. 6, at 264-291. He also discusses in some length the leading roles of lawyers (such as Mandela and F.W. de Klerk) and religious leaders (such as Archbishop Desmond Tutu) in the process of political change and reconciliation.

41. *Id.* at 295. By definition, he writes, such probes are “insufficient for establishing the generality of a theoretical model.” *Id.*

42. *Id.* at 313.

43. *Id.* at 314 (quoting E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* 265 (Pantheon Bks. 1975)).

44. For example, he acknowledges that he makes some less than “modest” statements about the general ability and independence of the administration of justice in South Africa, even and especially under apartheid. Meierhenrich, *supra* n. 6, at 317.

a very important book, which no scholar or student of the South African judiciary can afford to ignore. The book bears testimony to a quite breathtakingly wide selection of reading: the full and varied bibliography indicates this—it runs to thirty-nine pages with most of the authorities referred to being monographs.⁴⁵ He uses graphic illustrations not only to strengthen, but also simplify, his arguments, in a series of figures and tables which enliven one's reading of the text. The style and language used (subject to some points which I make below) make for absorbing and at times entertaining reading: this is not a text that needlessly complicates its arguments or submerges them beneath a welter of abstraction. There were one or two points at which I felt that issues rather tangential to the central argument were being canvassed,⁴⁶ but this did not distract unduly from the exercise at hand. A good index assists in finding one's way around the text.

What of Meierhenrich's thesis? Let me say that, in general, I am more than persuaded by it as a concept, while not necessarily agreeing with every aspect of it.⁴⁷ I am persuaded to this view by the fact that he has assembled a deeply impressive, wide-ranging (both in terms of time and across the disciplines of law, philosophy, history, sociology, and so on), and authoritative body of evidence, which it would be difficult to gainsay. He has also reasoned his way logically through a series of interrelated steps, from proposition to a conclusion that is much more than a bland, question-begging assertion that it will be less difficult to establish structures of democratic governance where traces of justice through law coexist with overwhelming forces of tyranny through "law" than when they do not.

I say this too because it accords in its fundamental tenets with my knowledge and experience of the law, legal education, and legal process as they have played themselves out over the past twenty-five years in this country, as Meierhenrich so clearly and repeatedly demonstrates by reference to historical fact, the views of individual players and the public at large, and the many jurisprudential instances he cites in support of his theory. So, as a retrospective explanation of apartheid's endgame, a topic which has occupied the attention of many observers from many vantage points inside and without the law, it seems to me that Meierhenrich has got it just about right. I am less sure about whether his argument has attained the status of "theory," universally applicable in like circumstances and with a predictive value, although his plausibility probe of the Chilean situation seems persuasive. For the present, however, I am content to know that much of what one wondered at in the South African transition stands justified, in terms of the explanations offered in this book. No scholar in this area of the law in any legal system will be able in the future to fail to confront these arguments if they wish to make a contrary set of claims.

Having expressed my strong admiration for and endorsement of much of what ap-

45. *Id.* at 329-367.

46. *See e.g. id.* at 217-218 ("An Excursus on Taxes").

47. For example, I think that he stretches his point when he cites the fact that the Azanian People's Organization ("AZAPO") resorted to court process to challenge the scope of the National Unity and Reconciliation Act, authorizing the Truth and Reconciliation Commission, as an example of the legitimacy of law in post-apartheid South Africa. *Id.* at 269. *See generally Azanian People's Org. & Others v the Pres. of the Republic of South Africa & Others* 1996 (4) SA 671 (CC). In fact, it seems to me, AZAPO's political weakness (as borne out by its minimal electoral appeal in 1994 and since) left it no option realistically but to pursue the route of litigation, rather than political contestation.

pears in *Legacies*, without going into unnecessary detail, I must confess to several areas of criticism, mostly of a technical nature. Excellent though the bibliography is, some works appear not to have been included, and one appears consistently throughout the text and in the bibliography under a misspelled title.⁴⁸ A more complete and better-presented list of cases⁴⁹ would have assisted, as would a more consistent use of one approach to quoting from other sources, either in the text or by indenting and single-spacing - there seems to be no single system of doing this. I found many typographical errors and even mistakes of fact, more than one would expect in such a work from the publisher concerned, some of which were quite intrusive.⁵⁰ Indeed, there was one part of the book in which the proofreader appeared to have nodded off.⁵¹ I was also troubled by the occasional use of the personal pronoun "I" in a slightly grandiose way.⁵² As to substance, the only points of mild criticism that I would offer are that insufficient notice is taken of the pathbreaking and meticulous work of Martin Chanock⁵³ on the origins of the legal order in colonial times, while there is perhaps too much reliance on a single - though excellent - article by Stephen Ellmann⁵⁴ in the discussion of the legitimacy of the law over the past thirty years.

None of this detracts from the wonderful achievement that is Meierhenrich's marvellous book, a pioneering and commanding treatment of a very complex subject. As I stated at the outset, this is a theme that I would have liked to tackle myself, and one that is hugely important not only to understanding how we in South Africa came to be where we are, but also to predict with some measure of confidence the fate of our constitutional democracy in the future. Jens Meierhenrich has done the work, as far as I am concerned, and I for one am greatly in his debt. I suspect that most of my colleagues would find themselves expressing similar sentiments.

48. Kenneth S. Broun, *Black Lawyers, White Courts: The Soul of South African Law* (Ohio U. Press 2000) (appearing in numerous footnotes and in the bibliography as *Black Layers and White Courts*).

49. Meierhenrich, *supra* n. 6, at ix-xi.

50. It is unnecessary to spell these out, but one bears mention: there is a quotation attributed to Marx (Karl?) in the *text* of page 269 but the *citation* of the quote in note 183 cites volume one of the Truth and Reconciliation Commission Report. *Id.* at 269-270. I have checked this, because it seemed so unlikely, and my suspicion that it was misattributed was correct.

51. *Id.* at 133-139.

52. See *e.g. id.* at 272 ("Ignatieff, like I . . ."); *id.* at 280 ("[L]ike Sachs and I . . .").

53. Martin Chanock, *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice* (Cambridge U. Press 2001).

54. Stephen Ellmann, *Law and Legitimacy in South Africa*, 20 L. & Soc. Inquiry 407 (1995).
