The Legacies of Law

This highly original book examines the function of legal norms and institutions in the transition to – and from – apartheid. It sheds light on the neglected relationship between path dependence and the law. The Legacies of Law demonstrates that legal norms and institutions, even illiberal ones, can have an important – and hitherto undertheorized – structuring effect on democratic transitions. Focusing on South Africa during the period 1652–2000, Jens Meierhenrich finds that under certain conditions, law reduces uncertainty in democratization by invoking common cultural backgrounds and experiences. Synthesizing insights from law, political science, economics, sociology, history, and philosophy, he offers an innovative “redescription” of both apartheid and apartheid’s endgame.

The Legacies of Law demonstrates that in instances in which interacting adversaries share qua law reasonably convergent mental models, transitions from authoritarian rule are less intractable. Meierhenrich’s careful longitudinal analysis of the evolution of law – and its effects – in South Africa, compared with a short study of Chile from 1830 to 1990, shows how, and when, legal norms and institutions serve as historical parameters to both democratic and undemocratic rule. By so doing, The Legacies of Law contributes new and unexpected insights – both theoretical and applied – to contemporary debates about democracy and the rule of law. Among other things, Meierhenrich significantly advances our understanding of “hybrid regimes” in the international system and generates important policy-relevant insights into the functioning of law and courts in authoritarian regimes.

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The Legacies of Law

Long-Run Consequences of Legal Development in South Africa, 1652–2000

JENS MEIERHENRICH

Harvard University
The legacies of law: long-run consequences of legal development in South Africa, 1652–2000

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I happened upon the subject matter of this book – the function of law in times of transition – about a decade ago. I was rereading at the time, for no particular reason at all, Ernst Fraenkel’s *The Dual State: A Contribution to the Theory of Dictatorship* (New York: Oxford University Press, 1941), a highly original yet largely forgotten study of the law of the “Third Reich.” Written by a German labor lawyer of Jewish faith, *The Dual State* remains one of the most absorbing books – drafted clandestinely in the mid-1930s – ever published in the public law tradition. It was this rereading of *The Dual State* that inspired my “redescription,” to borrow Ian Shapiro’s term, of apartheid and apartheid’s endgame.

I had first encountered Fraenkel – alongside Max Weber and Carl Schmitt – in the early 1990s, as a first-year student of law as well as political science and sociology in my native Germany. I was intrigued by the provocative argument contained in *The Dual State* and its lucid elaboration. I marveled at the effortless blend of insights from numerous disciplines and its deep grounding in the jurisprudence of Weimar Germany. At the time, however, I was preoccupied with comprehending the minutiae of constitutional law in the Federal Republic of Germany rather than the discredited legal theory and practice of the regimes – authoritarian and totalitarian – that had preceded it. It was not until several years later that I began to realize the significance of *The Dual State* for making sense not only of dictatorship then but also of democracy now. This realization had a great deal to do with South Africa, where I had just spent a considerable amount of time witnessing the country’s transition from apartheid.

I lived and loved in South Africa for the better part of two years and, as such, learned a fair amount about the country and its people. Johannesburg in particular held my attention. There I met Paul van Zyl, then at the Centre for the Study of Violence and Reconciliation (CSVR). He would go on to become the Executive Director of the Truth and Reconciliation Commission of South Africa (TRC) and is now with the International Center for Transitional Justice in New York. It was Paul who, in 1995, involved me not only in the Centre’s
work on the TRC (an institution that had not yet been created, let alone heralded and transplanted the world over), but also for allowing me to work, together with two other staff, over an extended period of time in Alexandra, then one of the most densely populated – and most violently contested – townships in South Africa, located on the northern fringe of Johannesburg. It was in Alexandra that I acquired a “feel” for the convoluted politics of South Africa, notably for the real – and imagined – cleavages that have driven it apart.

In May 1995, the National Peace Accord Trust had commissioned the CSVR to facilitate change in Alexandra. The project’s aim was to “empower” about twelve hundred families (including their violent members) and other “stakeholders” from different “constituencies” who had been displaced as a result of collective violence that had torn to shreds the social fabric of Alexandra in 1992. Ultimately, this demanded that the CSVR, and our three-person crew who acted on its behalf, play a central role in attempting to rebuild shattered relationships, facilitate a process of sustainable local-level “reconstruction” and “development,” and set into motion a process of “reconciliation.” I am not sure what, if any, our contribution was in Alexandra, but I remain truly grateful to the township’s hostel dwellers and inhabitants (especially those living in the “Beirut area”) for welcoming me into their midst, and for allowing me glimpses into their depleted lives.

A year later, I was fortunate to work with Richard Humphries and Thabo Rapoo as well as Khehla Shubane and Steven Friedman at the Centre for Policy Studies (CPS) in Johannesburg. Our focus was on the institutional dimensions of federalism in Gauteng Province. The countless interviews with policy makers, bureaucrats (incoming and outgoing), politicians, and so forth in Johannesburg and Pretoria that we conducted provided me with precious insights into the organizational structure of the postapartheid state, and the politics of institutional stasis – and change – in times of transition. Although research at CSVR and CPS has had no direct bearing on this book, my exposure – and hopefully attunedness – to various sites of contention in South Africa has invariably influenced my account of the role of legal norms and institutions in the transition to – and from – apartheid. Most important, it has sensitized me to the necessity of adopting a perspective from the longue durée, of taking seriously the long-run development of institutions, formal and otherwise, for understanding politics and society.

Then came the law, to me the most interesting of all institutions. Directly responsible for my turn to law, or so I discovered in retrospect, was Dennis Davis’s “Constitutional Talk,” which during the drafting of South Africa’s Interim Constitution aired weekly on television courtesy of the SABC, South Africa’s Broadcasting Corporation. The sophisticated manner in which representatives from different political groupings as well as scholars – united (for the most part) by a belief in the centrality of law – aired their disputes and preferences was astonishing. This commitment to law was rather surprising and early on persuaded me that there was something truly remarkable about
Preface and Acknowledgments

the country’s legal development that required further investigation. My investigation of legalization in South Africa began in earnest in 1998, when, as mentioned, I stumbled across *The Dual State*. Rereading Fraenkel, at this critical juncture, allowed me to lay the groundwork for an integrated, interdisciplinary analysis of legal origins and their path-dependent effects in the period 1650–2000. A few years later, my ideas fully percolated, I reconfigured Fraenkel for use in the theory of democracy. This book is the result. It also includes a tentative discussion – a plausibility probe – of my argument in the case of Chile, 1830–1990.

I could not have mustered the courage of my convictions and finished *The Legacies of Law* had it not been for those who offered wisdom while it was in the making. I am indebted to many scholars who generously read and commented on the manuscript in its entirety, namely, Edwin Cameron, Martin Chanock, Christopher Clapham, John Comaroff, Hugh Corder, John Dugard, David Dyzenhaus, Stephen Ellmann, Hermann Giliomee, Richard Goldstone, Donald Horowitz, Arend Lijphart, Michael Lobban, Frank Michelman, Dunbar Moodie, Laurence Whitehead, and Crawford Young. I shall remain forever grateful for the care that the aforementioned took in scrutinizing my argument and evidence, and for helping me mend the weaker parts. My gratitude also extends to Dikgang Moseneke and Albie Sachs, both sitting Judges of the Constitutional Court of South Africa, for their kind interest in my work. I would be remiss if I did not also acknowledge Lew Bateman, for his belief in the importance of this book, and the three anonymous reviewers for Cambridge University Press (one of whom persuaded me to provide this account of the gestation of the manuscript), whose generous praise and constructive criticism further improved the book. Laura Lawrie carefully copyedited the manuscript, Patrizia Kuriger expertly prepared the index, and Emily Spangler patiently facilitated the production. I am grateful to them all.

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Rupert was an always-available mentor and interlocutor in 1995 and 1996, when he tutored me – either at WITS, the University of the Witwatersrand, or, more likely, in a coffee shop nearby – in the vagaries of South African politics and society. Neil supported the project from the very beginning, kept me going with thoughtful advice in the middle, and with gentle pressure steered me...
toward completion of the dissertation that constitutes the nucleus of this book. Chuck was crucial in the middle and also toward the end of the dissertation phase. He pushed me to clarify what was murky, offered counsel when things got stuck, and made me part of the contentious politics crowd at Columbia University – which I left behind only reluctantly when I moved on to Harvard in the millennial year.

Aside from the attention of colleagues known to me, I benefited greatly from feedback that I received during talks at Columbia University, Harvard University, the University of Oxford, and the University of Stellenbosch as well as numerous conferences and workshops, notably the “Democracy and the Rule of Law” workshop convened by Stephen Elkin under the auspices of the Democracy Collaborative at the University of Maryland in 2004. I am grateful to Steve for extending an invitation and his steadfast support of my career ever since, and to Karol Soltan and Rogers Smith for incisive comments on the occasion. Needless to say, none of the aforementioned is responsible for any errors of fact or judgment on my part.

The Rhodes Trust, Oxford, made much of the field research in South Africa possible. The Trust awarded generous funds for this and a related project, and I am especially grateful to Sir Anthony Kenny, former Warden of Rhodes House, for his support. I also received ample funding from the Centre for International Studies (CIS) at the University of Oxford. Additional funds came from the Graduate Studies Committee and St Antony’s College, Oxford. Marga Lyall, Secretary at CIS, and Sally Colgan, former accountant at Rhodes House, aided gently in the administration of life. Nancy and Alfred Stepan provided shelter when a landlord struck. Funding for early field research in South Africa came from the Deutscher Akademischer Austauschdienst (DAAD) in Germany as well as CSVR, CPS, and the South African Institute of International Affairs at Jan Smuts House, Johannesburg. I thank Steven Friedman, Greg Mills, and Graeme Simpson, respectively.

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I had the good fortune to write and rewrite several chapters while a Fellow at the Institute for Social and Economic Research and Policy (ISERP) at Columbia University’s Paul F. Lazarsfeld Center for the Social Sciences. There, Peter Bearman had established, and I was lucky to join, in 1999 a vibrant and diverse intellectual community in pursuit of scholarly excellence, above all in the area of comparative historical analysis. Peter’s belief in my project, and my intellectual abilities more generally, gave me confidence at a time when I had little. His example and innovative scholarship have been an inspiration ever since. Similarly inspiring, in the final stages of the project, was the scholarship and mentorship of John Hagan at Northwestern University and the American Bar Foundation (ABF). Alongside John Comaroff and Terence Halliday, John made my sabbatical at the ABF, in 2006, truly memorable as well as enjoyable and productive.

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The Legacies of Law