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REVIEW ARTICLE

New Histories of Law and Rights in Twentieth-Century Germany

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Nadine Drönner, *Das Homosexuellen-Urteil des Bundesverfassungsgerichts aus rechtshistorischer Perspektive* (Tübingen: Mohr Siebeck, 2020), 289 pp., €99.00, ISBN 978-3-16-157571-6.

Sara Dehm, 'Contesting the Right to Leave in International Law: The Berlin Wall, the Third World Brain Drain and the Politics of Emigration in the 1960s', in Matthew Craven, Sundhya Pahuja and Gerry Simpson, eds., *International Law and the Cold War* (Cambridge: Cambridge University Press, 2020, pp. 159–188), 610 pp., €126.00, ISBN 978-1108499187.

Raphaela Etzold, *Gleichberechtigung in erster Instanz: Deutsche Scheidungsurteile der 1950er Jahre im Ost/West-Vergleich* (Tübingen: Mohr Siebeck, 2019), 213 pp., €94.00, ISBN 978-3-16-156710-0.

Francine Hirsch, *Soviet Judgement at Nuremberg: A New History of the International Military Tribunal after World War II* (Oxford: Oxford University Press, 2020), 556 pp., £25.00, ISBN 978-0199377930.

Inga Markovits, *Diener zweier Herren. DDR-Juristen zwischen Recht und Macht* (Berlin: Ch. Links, 2020), 240 pp., €20.00, ISBN 978-3962890858.

Douglas G. Morris, *Legal Sabotage: Ernst Fraenkel in Hitler's Germany* (Cambridge: Cambridge University Press, 2020), 303 pp., £22.99, ISBN 978-1108872324.

Ned Richardson-Little, *The Human Rights Dictatorship: Socialism, Global Solidarity and Revolution in East Germany* (Cambridge: Cambridge University Press, 2020), 288 pp. £21.00, ISBN 978-1108440783.

On 1 March 2022, German Foreign Minister Annalena Baerbock accused the Russian President Vladimir Putin's government of waging a war of aggression against Ukraine. Speaking at the General Assembly of the United Nations (UN), she drew explicit links to the Nazi war of aggression in order to legitimise sanctions against Russia as she stressed the UN's mission to work for peace enshrined in the UN charter. Twelve months earlier, in February 2021, the Higher Regional Court in Koblenz sentenced a forty-four-year-old Syrian citizen to four and a half years' imprisonment. Based on the 'shared values of humanity', the verdict made headlines as the court explicitly cited the universal jurisdiction principle enshrined in the *Völkerstrafgesetzbuch* (VStGB) that had been enacted in 2002 to bring German law into accordance with the Rome Statute of the International Criminal Court.[1] Since 2002, German courts have adopted these international law principles and legal norms in a series of legal actions against foreigners to prosecute crimes against humanity.

[1] For the court's official statement explaining the verdict, available at https://olgko.justiz.rlp.de/de/startseite/detail/news/News/detail/urteil-gegen-einen-mutmasslichen-mitarbeiter-des-syrischen-geheimdienstes-wegen-beihilfe-zu-einem-ver/ (last visited 27 Feb. 2023).

This turn of German politicians and courts to the international legal sphere and human rights norms in the twenty-first century points to the long road taken by the German state in carefully transposing international legal norms into domestic law through new legal codes such as the VStGB. At the same time, the unified Germany – as the Federal Republic of Germany (FRG) and the German Democratic Republic (GDR) before it – retains crucial elements of national legal sovereignty and German legal practice in applying such international norms. Baerbock's intervention and the Koblenz verdict highlight the importance of legal history in contextualising and explaining how the rights of Germans have evolved and laws have changed since the end of the Second World War. Recent work by legal scholars and historians on German legal history not only shows the transformation of German law both in East and West Germany after 1945, but also emphasises the persistence of institutional legal structures, legal practice and precedent. As such, they challenge us to rethink political, intellectual, social and cultural histories of rights and law. Closer examination of German legal history beyond the repeated political, cultural and economic breaks, and ideological new beginnings caused by war and genocide in the twentieth century reveals the perseverance of legal structures and the difficulty in undoing law. Legal and historical scholarship read together thus have the potential to illuminate the historical impact of legal institutions and the systemic logics of law – something legal scholars sometimes refer to as the autonomy of the law or *Eigengesetzlichkeit des Rechts* – beyond constitutional breaks and their lasting impact on German society.[2]

The publications reviewed in this article are part of a recent turn in the scholarship that has begun to question the sharp constitutional boundaries between the downfall of the Third Reich and the foundation of the two German states. Read together, they show how laws, legal doctrine and rights languages developed not just within national legal systems, but wider international entanglements. While personnel continuities from the judiciary of the Third Reich to the divided Germany have been decried in legal and historical scholarship for some time, scholars have only begun to uncover the imprint of Nazi laws and judicial practice on legal realities in the two Germanys.[3] The same is true for the influence of socialist legal doctrine and practice. In 1984, Fritz Loos and Hans Ludwig Schreiber argued in their entry for 'law, justice' in *Geschichtliche Grundbegriffe* that the socialist movement's significance for modern conceptions of law and justice was hardly to be overestimated.[4] Despite this statement, their entry included no discussion of socialist legal thought after Lenin. Since unification in 1990, the public and scholars have argued over the limits of comparison between the two German dictatorships. In the field of law and rights, controversies over comparisons between the Third Reich and East Germany's *Unrechtsstaat* captivated debates.[5] The history of West Germany

[2] See Matthias Jestaedt, 'Die Eigengesetzlichkeit des Rechts. Normativität, Kausalität und die Antwort der Verfassung', in Joachim Rückert andLutz Raphael, eds., *Autonomie des Rechts nach 1945* (Tübingen: Mohr Siebeck, 2020), 1–24. Frameworks to study such inherent structures of legal systems are often implicitly or explicitly in the tradition of Niklas Luhmann's idea of law as a macro-system. Such approaches are rooted in a deeper German intellectual tradition of the idea of *Eigengesetzlichkeit* reaching back to the work of theologian Ernst Troeltsch around 1900.

[3] For judicial elite continuities, see, e.g., Ingo Müller, *Furchtbare Juristen: Die unbewältigte Vergangenheit unserer Justiz* (Berlin: Kindler, 1987); Joachim Perels, *Das juristische Erbe des 'Dritten Reiches': Beschädigungen der demokratischen Rechtsordnung* (Frankfurt am Main: Campus, 1999); Marc von Miquel, *Ahnden oder amnestieren? Westdeutsche Justiz und Vergangenheitsbewältigung in den sechziger Jahren* (Göttingen: Wallstein, 2014); Jörg Friedrich, *Freisprurch für die Nazi-Justiz: Die Urteile gegen NS-Richter seit 1948* (Reinbek: Rowohlt, 1983); Hubert Rottleuthner, *Karrieren und Kontinuitäten deutscher Justizjuristen vor und nach 1945* (Berlin: Berliner Wissenschaftsverlag, 2010); Frieder Günther, 'Vom "Rising Star" zum Sündenbock: Ernst Rudolf Huber und die deutsche Staatsrechtslehre', in Ewald Grothe, ed., *Ernst Rudolf Huber: Staat – Verfassung – Geschichte* (Baden-Baden: Nomos, 2015), 101–18; Norbert Frei, *Vergangenheitspolitik. Die Anfänge der Bundesrepublik und die NS-Vergangenheit* (Munich: C. H. Beck, 1996); Norbert Frei, *Karrieren im Zwielicht: Hitlers Eliten nach 1945* (Frankfurt am Main: Campus, 2001); Michael Stolleis, *The Law under the Swastika: Studies on Legal History in Nazi Germany* (Chicago, IL: University of Chicago Press, 1998).

[4] Fritz Loos and Hans Ludwig Schreiber, 'Recht, Gerechtigkeit', in Otto Brunner, Werner Conze and Reinhard Koselleck, eds., *Geschichtliche Grundbegriffe: Historisches Lexikon zur politisch-sozialen Sprache in Deutschland*, vol. 5*: Pro-Soz* (Stuttgart: Klett-Cotta, 1984), 231–313, 296.

[5] For this debate, see, e.g., Ingo Müller, 'Die DDR – ein Unrechtsstaat?', *Neue Justiz*, 46 (1992), 281–3; Volkmar Schöneburg, 'Recht im nazifaschistischen und im "realsozialistischen" deutschen Staat – Diskontinuitäten und

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provided the counter example of a successful democratisation of the legal sphere in these controversies. These post-unification discussions strengthened the separation of these three legal contexts both in public debate and scholarship. Yet, Third Reich legacies left an imprint on both East and West Germany in many fields of law and rights. At the same time, East and West German law making often influenced each other directly or indirectly.[6] The publications under review here show how Third Reich law and administrative practices were carried over into the legal realities of the two Germanys, how competing ideologies of law shaped new legal cultures between 1949 and 1989 on the backdrop of Nazi legacies, and how the German legal spheres remained interconnected and entangled with wider international developments of law and human rights language. They help us to understand how law has been used to create or fend off pressure for social or political change when it comes to the rights of women or homosexuality and how German Cold War conflicts over mobility and freedom of movement formed part of global debates on human rights.

Legal scholars working on legal history and historians interested in law and rights histories routinely complain about the gulf between their disciplines.[7] The recent wave in studies published in both fields – for which the publications reviewed here stand as representatives – again emphasise the importance of studying the history of law and rights in divided Germany in conversation between legal and historical scholarship. Read together, both fields make an important contribution to better understanding an era marked by what the legal historian Bernhard Diestelkamp called a *Verrechtlichung von Politik*, in which law and rights languages have become an integral part of domestic and international politics.[8]

The Mid-Century Legal Juncture and Soviet Legal Doctrine

Immediately after the end of the war, occupied Germany became a central focus of Allied disagreements over the nature of international law, new legal norms of crimes against humanity and transitional justice. As Francine Hirsch's masterful book *Soviet Judgement at Nuremberg* shows, the concept of a war of aggression rested at the heart of Soviet demands for a tribunal to convict the Nazi leadership for their crimes. The book revises previous Western-centric histories of the International Military Tribunal (IMT) at Nuremberg. Soviet legal frameworks, especially Aron Trainin's concept of 'crimes against peace', formed the central part of the indictment putting the Nazi leadership on trial for a 'war of aggression'. In fact, as Hirsch explains, without Soviet insistence there might have been no tribunal at all (p. 8). *Soviet Judgement at Nuremberg* thus highlights that the very legal principle that Baerbock referenced in her indictment of Russian aggression in 2022 would not exist without the work of Soviet legal scholars in the mid-twentieth century.

Through the figure of Trainin and others, Hirsch contrasts a focus in previous scholarship on the IMT on the Jewish Polish-American lawyer Raphael Lemkin and the Jewish Polish-British legal scholar Hersch Lauterpacht, who played a crucial role in shaping other novel legal norms such as genocide and crimes against humanity. At the end of the war, Trainin was convinced that the Soviet government would play a major role in developing international law after Nuremberg. Hirsch explores the Soviet

Kontinuitäten', *Neue Justiz*, 2 (1992), 49–54; Horst Sendler, 'Die DDR – ein Unrechtsstaat – ja oder nein?', *Zeitschrift für Rechtspolitik*, 26 (1993), 1–5; Detlef Joseph, 'Der "DDR-Unrechtsstaat" und die Vergangenheitsbewältigung', in Gregor Gysi, Uwe-Jens Heuer and Michael Schumann, eds., *Zweigeteilt. Über den Umgang mit der SED-Vergangenheit* (Hamburg: VSA-Verlag, 1992), 95–119; Hubert Rottleuthner, 'Das Ende der Fassadenforschung: Recht in der DDR', *Zeitschrift für Rechtssoziologie*, 16 (1995), 30–64.

[6] Sebastian Gehrig, *Legal Entanglements: Law, Rights, and the Battle for Legitimacy in Divided Germany, 1945–1989* (New York, NY: Berghahn, 2021), 29–104, 142–82.

[7] For example, see 'Wie Sisyphos mit zwei Steinen. Zur Lage der Juristischen Zeitgeschichte zwischen Rechts- und Geschichtswissenschaft: Positionen und Perspektiven', *Zeithistorische Forschungen* 16, 2 (2019) (online), available at https://zeithistorische-forschungen.de/2-2019/5732 (last visited Feb. 2023).

[8] Diestelkamp has used this phrase in analysing the role of legal experts under Allied occupation. See Bernhard Diestelkamp, *Rechtsgeschichte als Zeitgeschichte: Beiträge zur Rechtsgeschichte des 20. Jahrhunderts* (Baden-Baden: Nomos, 2001), 49.

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engagement with legal universalism in setting up the Nuremberg tribunal and the leadership's disillusion with universal notions of law during the trial. The book traces in detail how the mistrust and ideological differences that came to the fore at Nuremberg had a crucial impact on the failure of the establishment of an international criminal court in the late 1940s. Hirsch also shows that many of Trainin's colleagues were less optimistic about the benefits of international law for Soviet policy. Evgeny Korovin, for example, foresaw the coming confrontation over ideologies of law early on. For him, international law was yet another battleground between 'what he called "progressive democratic" forces and "reactionary imperialistic" forces' (p. 397).

With tensions between the wartime Allies escalating in divided Germany, Europe and Asia in the late 1940s, the Soviet leadership turned away from its endorsement of international law as challenges to state sovereignty posed by the new legal principles of wars of aggression, crimes against humanity and genocide were turned against the government in Moscow. In 1947, Ukrainian émigrés in the United States appealed to the UN for assistance as they wanted to see the Soviet Union being prosecuted for the crime of genocide committed against Ukrainians in the 1930s. At the same time, Baltic groups warned of their 'enslavement and extermination' by Stalin (p. 402ff.). German expellee groups would later draw on similar legal arguments to advocate the return of former German Eastern territories at the UN. In a sharp turn away from universal principles of international law, the Soviet government and its legal experts now tried to restrict the 'Nuremberg principles' to the fight against Nazism. This disenchantment with international law at the Nuremberg and Tokyo trials led the Soviet leadership to organise separate Soviet war crime trials at Khabarovsk to prosecute Japanese plans for bacterial warfare in 1949.[9] This separation of transitional justice trials in the aftermath of Nuremberg and Tokyo, also visible in the separate twelve US military tribunals held at Nuremberg between 1946 and 1949, marked the breakdown of joint Allied efforts to ensure post-war justice. Hirsch's book thus adds the puzzle piece of Soviet involvement at Nuremberg to the larger history of the mid-century legal juncture that saw the foundation of the UN and the drafting of human rights declarations, but also the simultaneous struggle for hegemony in defining such new international law norms either as rooted in liberal traditions of law or state-centred notions of socialist legality and law.

Soviet Judgement at Nuremberg unfolds the ideological struggle over law and rights in the prosecution of German war crimes. Yet, the conflicts the book explores also foreshadow later German–German conflicts over the German legal tradition and the transformation of the German legal sphere into the West German *Rechtsstaat* and the GDR's socialist legal system. Hirsch writes the crucial role of Soviet lawyers back into the historical record and shows 'how Soviet lawyers and diplomats used the language of the law both to justify domestic show trials and to usher in an international movement for human rights' (p. 415). While Western scholarship has often dismissed any importance of socialist legal development during the Cold War as a mere façade of party-states, Hirsch reminds us of 'two awkward truths: illiberal authoritarian states have at times positively shaped international law, and international justice is an inherently political process' (p. 8). When read in the context of German–German post-war histories of law, Hirsch's conclusions prompt questions about the importance of East German legal developments for the history of West Germany and vice versa during the period of national division.

The breakdown of Allied cooperation and their ideological struggle in the legal field that Hirsch traces in the international law sphere provided German jurists with an opportunity to strengthen their own legal heritage. Despite calls by the legal philosopher Gustav Radbruch and others for an ethical evaluation of legal practice and the application of law in court as well as the rejection of positive law by legal practitioners if it violated justice by negating equal basic rights of all humans, many

[9] See Valentyna Polunina, 'From Tokyo to Khabarovsk: Soviet War Crimes Trials in Asia as Cold War Battlefields', in Kerstin von Lingen, ed., *War Crimes Trials in the Wake of Decolonization and Cold War in Asia, 1945–1956* (London: Palgrave Macmillan, 2016), 239–60.

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German jurists in both German states remained surprisingly stubborn in fending off Allied reform efforts.[10] Faced with transitional justice trials, domestic efforts to rebuild institutions and to reform legal doctrine as well as judicial practice, German legal experts first concentrated on the issue of what kind of German law and legal practice should be resurrected, not what kind of foreign legal tradition might be implemented in post-war Germany. These early clashes within the Allied occupation zones had a crucial impact on legal reconstruction before and after 1949. Beyond the removal of the most audacious Nazi laws by the Allied Control Council until 1947 when Allied cooperation broke down, German legal codes remained in use in all occupation zones.[11] After 1949, these German laws and regulations would guide everyday legal realities, court procedure and legal training in both German states for years to come. This meant that, despite Radbruch's call for scrutiny of German law and the drafting of two German constitutions, there was only slow legal change below the constitutional level. This systemic resistance against a turn to Western or Soviet legal traditions, often actively promoted by German legal experts, ensured the survival of German legal practice into the post-war era.

Legal Practitioners in Both German Dictatorships

Recent scholarship on the history of law and rights in divided Germany has begun to examine how the Cold War and national division transformed legal doctrines, court practice and rights languages until 1989. These studies open up new avenues into a better historical understanding of how the legal cultures in both German states influenced each other. They also show how German legal experts' practice in the tradition of the 1930s and 40s pushed back at new constitutional laws East and West of the German–German border. Major research projects funded by federal ministries and high courts – some still ongoing – have laid the groundwork for such in-depth studies of Third Reich legacies for the legal cultures of both German states. These works have traced the long-acknowledged continuities in legal and administrative careers of Nazi bureaucrats, judges and lawyers into the post-war era.[12] This new detailed biographical knowledge of not just high-level, but also mid- and low-level officials in government ministries provides historians of divided Germany with the opportunity to ask how these experts shaped the legal realities of Germans in both the West and the East by applying and reshaping laws in practice after 1949.

National Socialism not only cast a long shadow over the staffing of post-war legal institutions, but also debates on the nature of law, statehood and the rights of Germans. After 1945, debates on German law had to contend with the question of at what point law might have to be ignored if it was used in the name of dictatorship. Was law under a dictatorial regime even law? Or had some parts of the legal system remained intact under the Nazi dictatorship? Should judges only oppose 'unbearable unjust laws' to preserve justice as Radbruch posited in 1946? Or reject the validity of law under dictatorship for the post-war period more comprehensively? Such post-war debates about the nature of law after National Socialism throw up important questions for the study of law and dictatorship more broadly. Two new books, Douglas G. Morris's *Legal Sabotage* and Inga Markovits' *Diener zweier Herren,*

[10] See, e.g., Jörg Requate, *Der Kampf um die Demokratisierung der Justiz. Richter, Politik und Öffentlichkeit in der Bundesrepublik* (Frankfurt am Main: Campus, 2008).

[11] See Mathias Etzel, *Die Aufhebung von nationalsozialistischen Gesetzen durch den alliierten Kontrollrat (1945–1948)* (Tübingen: Mohr-Siebeck, 1992).

[12] Of particular importance here are the studies on the Federal Ministry of Justice and the East and West German Ministries of the Interior. See Manfred Görtemaker and Christoph Safferling, *Die Akte Rosenburg. Das Bundesministerium der Justiz und die NS-Zeit* (Munich: C. H. Beck, 2016); Frank Bösch andAndreas Wirsching, eds., *Hüter der Ordnung. Die Innenministerien in Bonn und Ost-Berlin nach dem Nationalsozialismus* (Göttingen: Wallstein, 2018). Michael Stolleis' important parallel history of the legal spheres developing in East and West Germany had already provided a first major study on the legal field during national division and its institutions. See Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland. Vierter Band: Staats- und Verwaltungswissenschaft in West und Ost 1945–1990* (Munich: C. H. Beck, 2012).

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explore the work of legal scholars and practitioners under the Nazi dictatorship and in the East German socialist legal system. Both books take the existence of a legal system under dictatorship seriously and are interested in the evolution of legal practice in Nazi Germany and East Germany. Morris focuses on the conundrum of how individuals, chiefly Ernst Fraenkel as his main protagonist, could resist an unlawful regime by engaging with its legal system. By tracing Fraenkel's work under the Nazi dictatorship from 1933–8, the book explores how Fraenkel developed his diagnosis of the Third Reich as a 'dual state' through his legal practice and how he finally advocated the violation of existing laws when faced with a brutal regime. Morris thus asks how 'seditious crimes' can be justified and based on 'higher legal principles' in situations such as the one Fraenkel found himself in before he emigrated (p. 3). The book traces Fraenkel's legal work in the Third Reich, on which he based his seminal study *The Dual State,* published in 1941. Fraenkel's diagnosis of how law functioned under Nazism would leave a lasting imprint on how legal scholars and historians have approached the history of law under dictatorship, first focused on the Third Reich, and later in a comparative perspective between National Socialism and the legal system of East Germany as well as in other historical contexts.

On the backdrop of his own work as a criminal lawyer, Morris is interested in 'the possibilities of liberal lawyering in a dictatorship' (p. 199). The book stresses the importance of linking the experience of practising law with the development of intellectual explanations of how law functioned under dictatorship. *Legal Sabotage* ultimately asks how resistance in a dictatorship as a subversive legal practice worked and how Fraenkel, a Jewish Social Democrat, was still able to survive, escape internment and emigrate in 1938. Morris provides a comprehensive study of Fraenkel's work in the years that he remained in Nazi Germany to connect studies of Fraenkel's biography during the Weimar years and his scholarly influence after the Second World War. At the same time, he deploys parts of Fraenkel's framework of the 'dual state', on the interplay of law and politics, to analyse the Nazi legal system itself. Morris frames Fraenkel's work in the experience of Jewish lawyers and the writings of Hermann Brill, Martin Gauger and Franz Neumann on justifications of resistance. By tracing Fraenkel's legal work meticulously during the years until his escape from Germany, Morris shows how Fraenkel overcame professional codes of the legal profession other Jewish colleagues clung to, such as not to prep their clients before trial or not to advise them to lie in court to match the regime's own perversion of the truth to keep trial procedures to the official storyline (p. 202). Morris gives an insight into how opponents of the system navigated what he calls the emerging 'triple state' of Nazi Germany in legal practice. He shows how the spaces for oppositional manoeuvres disappeared between the 'normative state' (the traditional judiciary), the 'prerogative state' (the extrajudicial terror of the Gestapo, SS and SA) and the system of new special tribunals and the People's Court during the 1930s. Ultimately, this tightening of the noose prompted Fraenkel to escape in 1938. The book provides extensive historical background to how Fraenkel's legal work until 1938 informed *The Dual State* as one of the most influential scholarly works on law under dictatorship in the decades after the war. Through Fraenkel's biography, Morris foreshadows what other legal scholars such as Radbruch would conclude at the end of the war: that certain laws had to be disobeyed if they violated human rights.[13]

Inga Markovits' *Diener zweier Herren* explores a similar area of interest to Morris, although from a different vantage point. In response to Bernd Rüthers' argument that German jurists as a professional group had been marked by a greater *Ideologieanfälligkeit* – being more susceptible to ideology – than other professions under dictatorship, Markovits asks how legal practitioners approached their everyday work in the East German legal system.[14] Her book addresses the nature of legal work in East Germany with frequent comparative references to the function of the law in the Third Reich. *Diener zweier Herren* traces the history of the law faculty at Humboldt University Berlin and its lawyers. It was the most prolific institution to train judges, lawyers and state prosecutors who later worked in the

[13] Gustav Radbruch, *Vorschule der Rechtsphilosophie*, 2nd edn (Göttingen: Vandenhoeck & Ruprecht, 1959), 34.
[14] Bernd Rüthers, *Ideologie und Recht im Systemwechsel. Ein Beitrag zur Ideologieanfälligkeit geistiger Berufe* (Munich: C. H. Beck, 1992).

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East German court system. Markovits argues that such a study of everyday legal practice in East Germany reveals much more than previous abstract systemic comparisons between the legal systems of East Germany, West Germany and the Third Reich to determine the nature of East German law (p. 14).[15]

Diener zweier Herren explores how lawyers responded to the demands of 'the law' on the one hand and 'the power' of the party-state on the other. Markovits begins by reminding us of the small size of the legal profession in East Germany. Only two in 10,000 East German citizens were trained in the law at university in the mid-1980s versus fifteen in 10,000 in the West. Alternative modes of conflict resolution, for example in neighbourhood committees, had moved many aspects of East German everyday legal experience away from a traditional court system.[16] To show the ambiguity of the experience of legal practitioners – and to question the idea of a particular danger for jurists to succumb to ideology – Markovits tells the story of Humboldt's law faculty from three angles: the voluntary subordination of jurists under the party-state's authority, the 'stubborn professional *Eigensinn*' of jurists and their obstruction of party directives by purposefully misunderstanding or disregarding them, and the slow ideological disillusionment of Humboldt's jurists with the socialist project (p. 20). In contrast to Morris's finding of a suffocation of the legal system by Nazism, Markovits stresses the 'lack of talent' and ignorance of East German lawyers when it came to interpreting Marxist–Leninist ideology for their practical work (p. 200). Yet, the book concludes, such behaviour nonetheless did not amount to resistance. She writes this history engagingly, but historians and legal scholars interested in picking up threads from the book for future research will be disappointed that it includes no extensive footnote apparatus and references to Markovits' sources.

Arguing with Fraenkel's dual state framework, Markovits posits that East Germany was a different political and legal state from the Third Reich. The leadership change from Walter Ulbricht to Erich Honecker, when law was elevated to be a central vehicle to develop the 'unity of social and economic policy', Markovits argues, made 'law' and 'rights' into central parts of state language. and thus judicial work became more important for the government.[17] Instead of the displacement of the 'normative state' by the 'prerogative state', the book concludes, the East German legal history suggests an increasing pressure of the normative state of socialist legality on the prerogative state of the party's power and control in the 1970s and 80s. This development did not turn East Germany into a democratic *Rechtsstaat*, Markovits stresses, but the law nonetheless gained more social and political influence over time in a process she terms *zunehmende Verrechtlichung* (pp. 202–4, 208–11).[18] From the 1970s onwards, the implementation of socialist legality demanded the legal education of East German citizens in the logics of party ideology. This state-sponsored everyday education should educate East Germans not so much in the law, Markovits argues, but prompt them to respect and maintain the party–state order. Yet, it also had involuntary consequences that weakened party rule and empowered citizens with a party-sanctioned language of law (p. 206). Some of these conclusions will prompt renewed debate, especially among scholars working on East German criminal law and the realities of the party's political justice system. Yet Markovits highlights how much work still needs to be done on the history of legal training, the biographies of East German jurists and the

[15] For previous examples of accounts of East German everyday legal history, see Inga Markovits, *Justice in Lüritz: Experiencing Socialist Law in East Germany* (Princeton, NJ: Princeton University Press, 2010); Paul Betts, 'Property, Peace and Honour: Neighbourhood Justice in Communist Berlin', *Past & Present*, 201 (2008), 215–54. See also Richard Millington, 'State Power and "Everyday Criminality" in the German Democratic Republic, 1961–1989', *German History*, 38, 3 (2020), 440–60.

[16] For neighbourhood committees and conflict resolution, see Betts, 'Property, Peace and Honour'.

[17] For the uneasy relationship between party leadership and legal scholars in the 1950s, see Peter C. Caldwell, *Dictatorship, State Planning, and Social Theory in the German Democratic Republic* (Cambridge: Cambridge University Press, 2003), 57–96; Stefan Güpping, *Die Bedeutung der 'Babelsberger Konferenz' von 1958 für die Verfassungs- und Wissenschafsgeschichte der DDR* (Berlin: A. Spitz, 1997). For the period from 1971 onwards, see Gehrig, *Legal Entanglements*, 221–58.

[18] See also Frieder Günther, 'Autonomie im Recht der DDR', in Rückert and Raphael, eds., *Autonomie des Rechts nach 1945*, 77–88.

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application of law and legal reform, especially on the period of large-scale changes triggered by the new East German constitution proclaimed in 1968 (amended in 1974) as well as the introduction of new legal codes in the same period. Markovits and Morris thus raise important wider questions about the impact of institutional structures on legal practice and the political nature of a legal system as a whole and the everyday culture it produces. Both advocate that we take law and the legal systems of the Third Reich and East Germany seriously to understand better how law and legal systems functioned and were transformed in both German states after 1949.

Law in Practice

The continuity in the application of German legal codes after 1945 and 1949 made the reform of legal institutions and everyday legal realities a long-term project. Two books on East and West German history trace such legacies in the legal practice of courts. Nadine Drönner's study of the Federal Constitutional Court's so-called 'homosexuals' verdict' of 10 May 1957 complicates a wide-spread narrative about the Karlsruhe court's leading role in democratising West German legal culture. The same senate that ruled on the famous Lüth case in 1958, providing the most-cited landmark verdict that paved the way for a democratisation of West German law,[19] was also responsible for the 'conservative–apodictic' verdict against homosexuals (p. 5). The book explores this seeming contradiction by placing the latter verdict into the wider landscape of West German jurisprudence in the 1950s that remained steeped in repressive policies to 'safeguard public morality' (p. 251). Drönner shows that the constitutional court actually prepared the grounds for later changes in the legal realities of everyday life in West Germany, but also reminds us that the court had to tread carefully and argues that the judges could not go against dominant social and political attitudes towards sexuality at the time.

With the German Bundesrat's motion in 2012 to rehabilitate homosexuals who had faced legal discrimination in both German states, the jurisprudence of leading courts has come under renewed scrutiny. Drönner traces how the verdict of 1957 was still marked by Third Reich legislation in violation of Article 1 of the West German Basic Law in upholding the criminalisation of homosexuality. Drönner argues that only legal histories that place high court verdicts in the contemporary social and political climate as well as the legal scholarly discourse provide fuller explanations of constitutional jurisprudence and its limits. Placing the decision into the wider horizon of verdicts handed down by lower courts and other federal high courts, Drönner shows how the verdict forms part of a wider history of criminal law in the 1950s that perpetuated the usage of laws, such as paragraph 175, which the Nazis had amended to make homosexuality a felony. Drönner argues that the constitutional court shied away from a confrontational verdict as neither political nor public support for such a move against standing legislation was present in West German society at the time (pp. 256–60). Simultaneously, however, the history of the verdict also shows how the court established scientific reviews from other disciplines as part of jurisprudence and went against older traditions that insisted on the primacy of legal scholarship in adjudicating cases. All this stresses the importance of writing the history of German high court jurisprudence more closely into wider post-war German history to show its crucial role in shaping citizens' everyday realities. Even more pressing perhaps is the fact, as Drönner reminds us, that the constitutional court's own regulations do not include mechanisms to declare verdicts of the court as void, even if they are found to violate basic rights principles (p. 2ff.). This fact highlights the difficulties of undoing legal precedent in West German high court jurisprudence beyond the book's topic. How the constitutional court actually changed course in its jurisprudence over time to rectify past decisions that had fallen out of step with social and political realities, and how these changes in direction mirrored or drove social change, are still under-researched aspects of the West German legal history and are often not integrated into wider histories of West Germany.

[19] See Thomas Henne and Arne Riedlinger, eds., *Das Lüth-Urteil aus (rechts-)historischer Sicht: Die Konflikte um Veit Harlan und die Grundrechtsjudikatur des Bundesverfassungsgerichts* (Berlin: Berliner Wissenschafsverlag, 2005).

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Drönner's book once again highlights the importance of high court competition for the development of West German law and rights. The Federal Court of Justice's push for a revival of natural law in the 1950s, driven by the court's president Hermann Weinkauff, provides a crucial context for understanding the constitutional court's 'homosexuals' verdict'.[20] Many constitutional court decisions that strengthened the importance of the basic right catalogue (i.e. the first section of the West German Basic Law guaranteeing *Grundrechte*) for the entire West German legal sphere over time were borne out of this intense institutional rivalry between the federal high courts in the 1950s. While previous scholarship has often argued that the 'homosexuals' verdict' was an awkward outlier in the constitutional court's history, Drönner shows convincingly that the verdict – though progressive for its time in many respects – formed part of a legal sphere of the early Federal Republic in which legal practices were still often marked by traditions and political attitudes of the 1930s and 40s.

In recent years, historians have begun to put approaches of writing comparative or entangled histories of divided Germany into practice. Raphaela Etzold's book *Gleichberechtigung in erster Instanz* epitomises this new strand in the legal history field. Her work shows the merits of a comparative history of law and rights in divided Germany. Similar to Markovits' book, Etzold asks how important party–state ideology actually was for everyday court decisions in East Germany. The book takes the equality clause, introduced in both German constitutions in 1949, as a starting point to explore how the same legal principle shaped everyday realities in local courts in ideologically opposed states. By focusing on divorce cases, Etzold opens up a history of local courts and their impact on the lives of ordinary Germans in divided Germany. Local judges had to decide cases following new constitutional principles at a time when legal reform in both Germanys had often not yet caught up with codifying these principles into the existing legal codes. While scholarship has produced comparative studies on Third Reich and East German jurisprudence, a perspective that also guides Markovits' book discussed above, Etzold makes a first foray into exploring local court practices in East and West Germany in a comparative framework, looking at the specific issue of how divorce cases were adjudicated.[21]

Her comparison of cases from Stuttgart and Leipzig shows that the East German court began to adopt the ideological rhetoric of the party in verdicts after 1953. This shift was partially grounded in personnel changes, but by no means fully permeated court practice at the time. The focus on practical solutions and the application of standing legal regulations endured in spite of party guidelines stipulating the new educational role that law should play (p. 185ff.). In contrast to these rhetorical shifts in East Germany that formed part of the government's attempts to transform the legal sphere after the building of socialism was officially declared in 1952, Etzold concludes that the Stuttgart court seemed utterly uninterested in 'the debate on the equality of women' in the early 1950s (p. 153). The court remained guided by the ideal of the *Hausfrauenehe*. Etzold argues that the West German judges pursued a 'matter of fact, objective treatment of divorces' in the language used in court (p. 157). This of course meant that gender equality was very much not on the agenda. Unsurprisingly, given the high continuity in judicial personnel after 1945, Stuttgart verdicts also at times directly revealed the legal language of the Third Reich. Etzold cites the example of the frequent use of the term *Volksdeutsche* here (pp. 150, 157ff.), a term that also continued to guide citizenship administration and legal scholarship on access to citizenship in the 1950s.[22] The book shows convincingly how lower courts stubbornly focused on the existing marriage law and its male-dominated norms. Judges seem to have systematically ignored civil law provisions concerning equality of partners, new scholarly literature and decisions of high courts that touched on equality issues in the period Etzold investigates. Legal reform emanating from the new constitution, high court jurisprudence, or the *Gleichberechtigungsgesetz* (equality law, passed by parliament in 1957) did not arrive in legal reality

[20] For the revival of natural law in the 1950s and high court competition, see Requate, *Der Kampf um die Demokratisierung der Justiz*, 36–56.

[21] Markovits and Rüthers have published on East–West comparisons during the period of national division. See Bernd Rüthers, *Arbeitsrecht und politisches System. BRD-DDR* (Frankfurt am Main: Athenäum, 1972); Inga Markovits, 'Socialist vs. Bourgeois Rights: An East-West Comparison', *University of Chicago Law Review*, 45, 3 (1978), 612–36.

[22] Gehrig, *Legal Entanglements*, 70–80.

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for couples who negotiated their divorce in the Stuttgart court in the 1950s. The book thus shows how constitutional change and local jurisprudence were out of step for a long time after 1949.

International Law, Human Rights and Divided Germany

Beyond such comparative perspectives on court practice, new scholarship has explored German–German legal history as part of wider Cold War conflicts over law. A new volume on international law during the Cold War, edited by Matthew Craven, Sundhya Pajuha and Gerry Simpson, argues against the prevailing assumption in Western scholarship that a hiatus persisted in the development of international law until 1989/91. *International Law and the Cold War* opens up important new avenues into the study of law and rights, taking socialist contributions to the evolution of law and rights seriously.[23] Sara Dehm's chapter titled 'Contesting the Right to Leave in International Law' showcases the potential of German–German legal history when studied in larger international contexts and entanglements. In reading the Berlin crisis of 1961 and the 'brain drain' from Third World states together from an international law perspective, Dehm investigates collective and individual interpretations of the right of self-determination enshrined in international law as a 'form of rhetorical practice that authorises state authority over mobile people within and beyond their territories' (p. 162). The chapter explores how the same international law and human rights norm, the right to leave, has been deployed very differently and to various political ends in the same time period. The building of the Berlin Wall gave rise to a Cold War dispute over East Germans' freedom of movement and their right to freely determine their national belonging. While the West insisted on East Germans' rights to move freely, the East German government, acting in concert with its Soviet patron, posited that the GDR people had the right to ensure its territorial sovereignty and collective self-determination against 'Western aggression'. At the same time, industrialised states East and West of Cold War borders established migration controls and hurdles for people who intended to migrate from newly decolonised states to developed countries. As UN Special Rapporteur José D. Ingles decried in 1963, this resulted in more people being 'effectively confined behind their national boundaries today than in any previous period in history' (p. 159). Dehm shows that the universal language of international law and human rights has very specific regional histories and more often than not has been unequally applied during the Cold War.

Such a perspective also guides Ned Richardson-Little's insightful book *The Human Rights Dictatorship*. Taking human rights language as an example, Richardson-Little explores how a seemingly universal rights language took on specific national and ideological meanings. His cultural history of East German human rights and how they 'acted to legitimise a socialist dictatorship, before playing a crucial role in its downfall' traces the many meanings of human rights within East Germany (p. 4). The book shows how human rights as a political language 'generated, publicised, instrumentalised and internalised' by East Germans within and outside the ruling party (p. 13) developed between 1949 and 1989. The first half of the book traces the party leadership's turn to human rights in the immediate post-war years, the foundation of state-sponsored human rights activist groups in the 1950s and the turn to Third World rhetoric of a human right of national self-determination in the 1960s. The book expands previous scholarship on East Germany's diplomatic and humanitarian global rivalry with West Germany into the human rights field, by showing how international rights languages impacted on East German human rights discourse at home.[24] Richardson-Little argues that this

[23] Other works stressing the wider importance of Soviet legal thought for Cold War history are: John Quigley, *Soviet Legal Innovation and the Law of the Western World* (Cambridge: Cambridge University Press, 2007); Scott Newton, *Law and the Making of the Soviet World* (London: Routledge, 2015).

[24] E.g. William Glenn Gray, *Germany's Cold War: The Global Campaign to Isolate East Germany, 1949–1969* (Chapel Hill: University of North Carolina Press, 2003); Mathias Stein, *Der Konflikt um Alleinvertretung und Anerkennung in der UNO. Die deutsch-deutschen Beziehungen zu den Vereinten Nationen von 1949 bis 1973* (Göttingen: V&R unipress, 2011); Young-sun Hong, *Cold War Germany, the Third World, and the Global Humanitarian Regime* (Cambridge: Cambridge University Press, 2015).

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state-led turn to human rights language first produced internal friction over different socialist interpretations of human rights. The latter half of the book examines how the state's own language of human rights began to undermine the government's legitimacy when Christian groups, peace activists and oppositional groups started to use the state-endorsed human rights discourse in their demands for the reform of socialism in the 1980s.

The Human Rights Dictatorship restores East Germany's role in the development of human rights discourse after 1949 and complements previous scholarship on human rights language in both West Germany and East Germany.[25] The book follows East German activists' work beyond 1989 into the unified Germany. It thus forms part of a new wave of scholarship that researches the impact of national division on unified Germany beyond the watershed of the peaceful revolution of 1989 and unification on 3 October 1990.[26] The book therefore points to the continued impact and importance of German–German legal politics and the development of law and rights in East and West Germany for contemporary German society. Future research will have to explore further to what extent unification produced a 'co-transformation' of Germany's legal culture and practice in the years following 1990 underneath the expansion of the West German constitutional system to East Germany and what role East German legal discourses and practices continue to play in contemporary Germany.[27]

Law and Rights in Germany's Twentieth Century

In 1946, the legal philosopher Gustav Radbruch set the tone for Western scholarship on law after Nazism for decades to come. In what would soon be called the *Radbruchsche Formel* (Radbruch formula), he wrote that 'where there is not even the attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely "flawed law", it lacks completely the very nature of law.'[28] Radbruch's intervention was necessary to pave the way for West German high courts to disabuse defendants from hiding behind the excuse of 'just having followed or applied' existing law.[29] The formula nonetheless was also used to justify continuity in German legal practice and law to secure *Rechtssicherheit* (legal stability) by upholding legal decisions and laws beyond the caesura of 1945 if they were deemed not violating basic rights. While former members of the Nazi regime faced Soviet and East German trials, arguments such as Radbruch's were redeployed in the West against communist adversaries in Cold War conflicts over the nature of law. Radbruch's popularity in US legal debates that increasingly omitted his references to still existing law under Nazism together with Franz Neumann's influential diagnosis of Nazism as a lawless

[25] Lora Wildenthal, *The Language of Human Rights in West Germany* (Philadelphia: University of Pennsylvania Press, 2012); Paul Betts, 'Socialism, Social Rights, Human Rights: The Case of East Germany', *Humanity*, 3, 3 (2011), 407–26. For the role of human rights language in the German–German battle to represent sovereignty, see Sebastian Gehrig, 'Reaching Out to the Third World: East Germany's Anti-Apartheid and Socialist Human Rights Campaign', *German History*, 36, 4 (2018), 574–97. For a broader perspective of socialist engagement with law and human rights between 1945 and 1989, see Paul Betts, 'Rights', in James Mark et al., eds., *Socialism Goes Global: The Soviet Union and Eastern Europe in the Age of Decolonization* (Oxford: Oxford University Press, 2022), 180–220.

[26] For debates on how to write German history beyond '1989', see Frank Biess andAstrid M. Eckart, 'Introduction: Why Do We Need New Narratives for the History of the Federal Republic?', *Central European History*, 52 (2019), 1–18; Frank Bösch, ed., *A History Shared and Divided: East and West Germany since the 1970s* (New York, NY: Berghahn Books, 2018).

[27] Such a perspective follows Philipp Ther's framework of a co-transformation of Europe after 1989. See: Philipp Ther, *Europe since 1989: A History* (Princeton: Princeton University Press, 2018), 259–87. For a first legal history employing such a framework, see Anja Schröter, *Ostdeutsche Ehen vor Gericht: Scheidungspraxis im Umbruch 1980–2000* (Berlin: Ch. Links, 2018).

[28] Orginally published as Gustav Radbruch, 'Gesetzliches Unrecht und übergesetzliches Recht', *Süddeutsche Juristen-Zeitung* vol. 1 (1946), 105–8. For an English translation, see Gustav Radbruch, 'Statutory Lawlessness and Supra-Statutory Law', *Oxford Journal of Legal Studies*, 26, 1 (2006), 1–11.

[29] Early cases against SS officers showed clearly that many judges endorsed defences based on defendants 'simply following' laws and orders; see, for example, the trial against Franz Schlegelberger in Irmtrud Wojak, *Fritz Bauer 1903–1968. Eine Biographie* (Munich: C. H. Beck, 2009), 359ff.

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society in *Behemoth* promoted arguments that could be used to dispute the existence of any legitimate law under socialism.[30]

The publications reviewed here return attention to the importance of studying the history of law and rights across the historical caesuras of twentieth-century German history. While it remains important not to confuse law with justice and to pay attention to the institutional differences of different German legal systems, a complete dismissal of any existence of law under Nazism and in East Germany would obscure the historical continuities between the Third Reich and divided Germany as well as the legal entanglements of the two German states until unification and beyond. Today, new works by legal scholars and historians allow a fresh look at the history of German division in providing new insights into how contemporaries argued over the very nature of law East and West of the German–German border, how legacies from the Nazi period and Weimar era affected post-war developments, and how legal institutions, legal doctrine and practice evolved in the application of law and had a crucial part to play in shaping East and West German history. Hirsch and Markovits' work highlights that a *Verrechtlichung von Politik* was not an exclusively Western story after 1945 – despite all the transgressions of party-states in abusing criminal law in particular for political justice purposes. Soviet legal theory and socialist legality shaped an alternative universalism of law that had to contend with Western notions of justice, but also had an impact on Western debates on the nature of law and legal practice. The history of law and rights in divided Germany provides fertile ground for studying how ideological frameworks of legal universalism clashed and transformed a formerly uniform legal sphere with its peculiar institutional and intellectual legal traditions through the ideological battle over law and rights. Such research will also help to contextualise social and cultural change, and the transformation of the rights of Germans during the twentieth century. What the publications under review here show is that legal realities for Germans changed in a constant push and pull between the pressures that domestic legal systems created, controversies over the development of legal doctrine, political demands for change formulated in new rights languages and wider international contexts of human rights language and international law making. There is still a lot of work to be done to explore further the long road that led leading German politicians such as Baerbock to embrace international law and human rights as well as courts such as the Koblenz Higher Regional Court to incorporate legal norms of international justice into their judicial practice. The studies discussed here provide a further step towards this goal.

[30] Franz Neumann, *Behemoth: The Structure and Practice of National Socialism, 1933–1944* (Oxford: Oxford University Press, 1944). In the field of international law, this even led to arguments of a hiatus of international law development caused by Soviet obstruction that recent scholarship has challenged. See Matthew Craven, Sundhya Pahuja and Gerry Simpson, 'Reading and Unreading the Historiography of Hiatus', in Craven et al., eds., *International Law and the Cold War*, 1–24.

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