



FRANZ NEUMANN

# The Rule of Law

*Political Theory  
and the Legal System  
in Modern Society*

*With a Foreword by*  
MARTIN JAY  
*and an Introduction by*  
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## The Rule of Law

## FOREWORD

# Neumann and the Frankfurt School

On 3 September 1954 the car in which Franz Neumann was riding on a country road in Switzerland spun out of control and crashed into a poplar tree. Neumann, then only fifty-four years old and at the height of his career, was killed, along with the driver, Manfred Altmann, and his wife Johanna. The following day, the funeral speech at the small cemetery in Vevey was delivered by Friedrich Pollock, Neumann's old colleague at the Institute of Social Research during its New York exile. Speaking of Neumann as a good friend, Pollock soberly noted that without a belief in a hereafter, the only life after death was that preserved in the memory of the living: 'And this we promise you,' he concluded, 'as long as one of us survives, you will not be forgotten. Good-bye Franz'.

That Franz Neumann has indeed not been forgotten may, in fact, be attributed in part to his association with the Institute, which he joined in 1936 and left in 1942 to work in Washington with the Board of Economic Warfare and the Office of Strategic Services. And yet, his relations with the Institute's central figures, its 'inner circle' around the director Max Horkheimer, which became known as the Frankfurt School, were by no means without certain serious complications. Ironically, the most explicit and public substantive dispute occurred with Pollock over the latter's model of state capitalism, which he introduced in 1939 to explain a new stage in global development, a stage which included liberal democratic, communist and fascist variations. Neumann, more beholden to a traditional Marxist approach during that period, remained convinced that monopoly capitalism had not really been superseded, especially in the Nazi regime he analysed in the work he completed shortly thereafter, *Behemoth: The Structure and Practice of National Socialism* (1st ed., 1942, 2nd. ed., 1944). The extent of the Institute's scepticism about his argument can be judged from the absence of Horkheimer's customary preface and his subsequent refusal to permit a German translation in the Institute's publication series after its return to

Frankfurt in the 1950s. Only, in fact, in 1977, after Horkheimer's death, did the book finally appear, and then in another series, to be followed shortly by several collections of Neumann's essays and a German edition of 'The Governance of the Rule of Law'. More deeply sensitive to the neutralisation of class antagonisms by psychological manipulation than was Neumann, the Institute's inner circle was also convinced that a more general technological, administrative domination was gaining the upper hand over straightforward economic exploitation. Their analysis culminated in the bleak ruminations over the entire course of Western civilisation that appeared in 1947 under the joint authorship of Horkheimer and Theodor Adorno as *Dialectic of Enlightenment*, a work very far removed in tone and inclination from anything in Franz Neumann's corpus.

The ultimate source of these differences is not very difficult to discern. Neumann was born into a lower-middle-class Jewish family in the eastern German town of Kattowicz in 1900, far from the gilded and more culturally sophisticated background of most members of the Frankfurt School. Less drawn than they to aesthetic and cultural issues, untouched by the romantic anti-capitalism that gave their Critical Theory its messianic and apocalyptic edge, resistant to the lure of psychoanalysis until near the end of his life, Neumann represented a very different kind of Weimar intellectual from Horkheimer, Pollock, Adorno, Herbert Marcuse, Walter Benjamin or Leo Lowenthal (even though the last of these had, in fact, been a friend from their student days). Whereas they remained defiantly distant from party politics, unabashed members of the Weimar 'homeless left', Neumann joined the moderate Social Democratic Party after a brief membership in 1918 in a Leipzig workers' and soldiers' council. He lent his considerable legal skills, honed under the direction of the distinguished jurist Hugo Sinzheimer at the University of Frankfurt, to the fight for the reform of the legal status of the German working class. Drawing on the gradualist arguments of the Austro-Marxist Karl Renner, he hoped to exert pressure on the legal system to bring about socialism without a violent collapse of the Weimar Republic. In 1927, Neumann opened a practice in Berlin with Ernst Fraenkel, later himself the author of an important analysis of Nazism, *The Dual State*. Together, they worked vigorously to defend the institutionalisation of trade union rights and in so doing to expand economic democracy. At the same time, Neumann also taught at the celebrated Deutsche Hochschule für Politik, which sought to advance the cause of responsible participation in Weimar politics and undo the traditional disdain of the 'unpolitical German'. Unlike his later colleague

at the Institute, Otto Kirchheimer, who was at that time on the left wing of the SPD, Neumann remained interested in more strictly legal and practical questions than in larger theoretical ones.

Thus, in 1933, when both Neumann and the Frankfurt Institute were forced to leave Germany, it would have seemed highly unlikely that their paths would cross only a few years later. 'The Governance of the Rule of Law' is interesting, among many other reasons, for the help it gives us to understand how the connection was made. It was written at the London School of Economics under the direction of Harold Laski, at that time the leading intellectual of the British Labour Party and increasingly attracted to a more explicitly Marxist position. Laski had been one of the supporters of the Institute's London office, which functioned from 1933 to 1936, and was able to exert his personal influence to recommend Neumann for an Institute post in New York, when it became clear that employment opportunities in Britain were extremely limited. But perhaps even more significantly, his training of Neumann had helped lift the latter's horizons from purely legal questions to more broadly theoretical ones, while at the same time moving him in a more radically leftward direction. Bitterly disappointed by the inefficacy of the SPD's reformist strategy, Neumann now kept his distance from emigre political organisations, such as the New Beginning, and applied himself instead to more long-term scholarly questions. Without the hope of a legal career in the Anglo-Saxon world, he set out to remake himself into an academic political theorist by expanding and rethinking the unpublished dissertation he had completed under Sinzheimer in 1923.

The Institute, at that time still pursuing an ambitiously interdisciplinary programme under the guidance of Critical Theory, had need of an expert in political theory. Neumann's political sympathies were congenial, especially now that he had abandoned his moderate pragmatism. Laski's endorsement of his achievement in his new dissertation was sufficient for Horkheimer and his colleagues to invite Neumann to New York. An added inducement seems to have been his practical legal skills, which the Institute quickly put to use in such causes as its unsuccessful effort to persuade the Nazi regime to release its library to the London School of Economics, where Neumann had worked with Laski.

The first scholarly achievement of the new collaboration was the publication of Neumann's essay on 'The Change in the Function of Law in Modern Society' in the *Zeitschrift für Sozialforschung* in 1937. Here a condensed version of many of the arguments of 'The Governance of the Rule of Law' appeared, after having been brought into line with the Institute's general approach through extensive edi-

torial meetings. Neumann's magisterial survey of the history of legal ideas was reduced to a few lines and the more baldly Marxist tone of some of the formulations was sacrificed to the Institute's caution about its emigre status in America. Some of the philosophical dimensions of the work also seem to have been modified or dropped, even though Neumann had drawn on Horkheimer's earlier *Zeitschrift* essay on 'The Rationalism Dispute in Contemporary Philosophy' when writing the English dissertation.

Still, what remained was a genuine Institute product, which reflected many of its most compelling concerns. Neumann's central preoccupation was with the conflict between the universal, formal, impersonal and, most importantly, rational impulse in the Western legal tradition and the countervailing impulse towards the absolute sovereignty of the state. In accord with the Institute's materialist ideology critique of the 1930s, Neumann saw the conflict as both reflecting social trends and in a certain sense transcending them. The rationalising impulse in law, he argued, had to be understood dialectically as the reflection of the bourgeoisie's flawed universalizing mission. Its ethical, transcendent moment derived from its imperative to extend legal equality to all groups in society; its ideological moment came from its mystifying claim to have already provided such formal equality in a society still riven with class divisions. The *Rechtstaat* was thus at once a minimal programme of equality that needed to be preserved rather than merely abandoned and an inadequate mockery of the real equality that only a socialist society could provide.

The second impulse in modern legal theory and practice, its anti-normative acknowledgement of state sovereignty, meant that legal decisions could be made on political rather than rational grounds. Neumann, like Otto Kirchheimer, came to appreciate the importance of this issue from the work of the conservative and later Nazi political theorist Carl Schmitt, who was soon to be a target of abuse in *Behemoth*. But unlike Schmitt, who turned his insight into the cynical conclusion that power could never be challenged by normative claims, Neumann held out hope for an ultimate convergence of the two in a different society, which would be unfactured by irreconcilable class antagonisms.

In the immediate future, however, a very different prospect seemed more likely to the disillusioned emigres in their New York exile. For what Neumann and his colleagues noted was a tendency apparent in Western society as a whole, which was most keenly obvious in Nazi Germany, towards a withering away of the universalist, rational, ethical moment in law. As a result, the decisionist moment had ominously grown, even if under the guise of a sup-



posedly concrete corporate 'institutionalism'. A turning point had been reached, moreover, which could not be reversed, for the social underpinnings of the *Rechtsstaat* had been progressively eroded with the passing of classical capitalism. No neo-Kantian legal formalism would be possible and, *a fortiori*, no simple extension of it to the working class would suffice to bring about socialism, as Neumann had naively hoped during the Weimar years. Like Marcuse in his 1934 *Zeitschrift* essay on 'The Struggle Against Liberalism in the Totalitarian View of the State', Neumann now emphasised the fatal lineage between bourgeois and fascist legal and political systems. Like Kirchheimer, whose radical analysis of the terminal crisis of the Republic, *Weimar — And What Then?*, he had once criticised, he came to accept the contention that Weimar could not have been salvaged by reformist means. And like Adorno in his later commentaries on the virtual end of ideology in post-liberal, administered society, he faced the sombre possibility that domination was shedding its legitimating rationalizations, which, for all their ideological untruth, could at least provide the leverage for an immanent critique of the system's inadequacies. It was, in fact, Neumann's appreciation of the disenchantment of the rationalising, normative moment in Nazi law that allowed him as well to question the regime's very status as a traditional state, for there had been a crucial link between reason and the Western state, which Hegel had correctly emphasized. Instead, as he later argued in justifying the title of his great book on Nazism, it had become more of a 'behemoth', a 'non-state, a chaos, a rule of lawlessness and anarchy'.

*Behemoth*, of course, contained another argument, which emphasised the dependency of that new monster, at least in large measure, on the elites of monopoly capitalism. As such, it contained a potentially explosive economic and social potential that meant internal collapse was still possible. Although after his Institute tenure, Neumann was to abandon his Marxist hopes and move towards a kind of uneasy liberalism, he never felt attracted to the almost meta-historical pessimism of the other Institute members expressed in *Dialectic of Enlightenment*. Like his closest friend at the Institute, Herbert Marcuse, he continued to look for cracks in the one-dimensional facade of modern society. As such, his work has correctly been linked with the most important second generation Frankfurt School theorist, Jürgen Habermas, whose writings on the unresolved crises of capitalism refuse to accept the complete suspension of its potential for radical change.

The later Horkheimer, to be sure, was far less sanguine, as demonstrated by his blockage of the German publication of *Behemoth* and the Institute's failure to bring out a collection of Neumann's

## *Foreword*

work, for which Adorno in fact wrote an unpublished preface. Still, there is sufficient evidence to show that despite this ambivalence, the Institute always considered Neumann one of its own. Thus, after the shock of his sudden death, Horkheimer immediately made Helge Pross, with whom Neumann was then in love, an Institute assistant. According to her own testimony, this gesture was an expression of his respect and gratitude for Neumann's contributions to the Institute. That Neumann himself always felt enormous loyalty and affection for the Institute is shown by the letter he sent Horkheimer in March 1946, when he was leaving government service to take up a position in the Columbia Political Science Department. 'Most of all', he wrote, 'I would like to return to the Institute, in order to work for myself once again.' What Neumann's return would have meant, both for his own work and the Institute's development, we can only speculate. But what is certain is that in his brief time in its ranks, he made a lasting contribution to the still potent legacy for which the Institute has gained international renown.

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STUDIES ON NEUMANN AND THE FRANKFURT  
SCHOOL

Rainer Erd (ed.), *Reform und Resignation: Gespräche über Franz L. Neumann*, Frankfurt, 1985

H. Stuart Hughes, *The Sea Change: The Migration of Social Thought 1930-1960*, New York, 1975

Martin Jay, *The Dialectical Imagination: A History of the Frankfurt School and the Institute of Social Research, 1923-1950*, Boston, 1973

Alfons Söllner, *Geschichte und Herrschaft; Studien zur materialistischen Sozialwissenschaft*, Frankfurt, 1979

—, *Neumann zur Einführung*, Hanover, 1982

See also the excellent introduction by Söllner to Franz L. Neumann, *Wirtschaft, Staat, Demokratie: Aufsätze 1930-1954* (Frankfurt, 1978), and his informative afterword to the German edition of this text, *Die Herrschaft des Gesetzes. Eine Untersuchung zum Verhältnis von politischer Theorie und Rechtssystem in der Konkurrenzgesellschaft* (Frankfurt, 1980).

## INTRODUCTION

# Post-Weimar Legal Theory in Exile\*

### I

Franz L. Neumann is probably best known to the British and American reader for his study of National Socialism, *Behemoth*.<sup>1</sup> Until recently, a German lawyer might have associated his name with the standard textbook on human rights, Bettermann/Neumann/Nipperdey; published in 1954.<sup>2</sup> When, however, a collection of Neumann's essays on *The Democratic and Authoritarian State*<sup>3</sup> was published in West Germany in 1967, a group of students and lecturers of law, political science and sociology eagerly took up some of his ideas, especially those expressed in 'The Change in the Function of Law in Modern Society', in their attempts to understand contemporary West Germany society, its legal system, and its history.

The importance of Neumann's article in (re-)establishing a broad critical legal studies movement in the Federal Republic of Germany can be compared only with the republication of Pashukanis's work in 1966.<sup>4</sup> In this process, those involved began to rediscover the

\*I am greatly indebted to Jackie Bennett-Ruete, Leigh Hancher and Robert Millar for comments on earlier drafts.

1. F. Neumann, *Behemoth*, Oxford, 1942; 2nd rev. ed., 1944; repr. 1963 (Octagon Books; pb. ed., Harper & Row, 1966).
2. F. L. Neumann, H. C. Nipperdey and U. Scheuner (eds.), *Die Grundrechte. Handbuch der Theorie und Praxis der Grundrechte*, Berlin, 1954 et seq.
3. F. Neumann, *Demokratischer und autoritärer Staat. Studien zur politischen Theorie*, Frankfurt/Vienna, 1967. American edition: H. Marcuse (ed.), *The Democratic and the Authoritarian State*, New York, 1957; pb. ed., New York/Toronto, 1964. The German edition has a separate introduction by Helge Pross, but leaves out the article on 'Types of Natural Law' contained in the American edition. Some of his Labour Law Texts in T. Ramm (ed.), *Arbeitsrecht und Politik. Quellentexte 1918-1933*, Neuwied, 1966.
4. Eugen Paschukanis, *Allgemeine Rechtslehre und Marxismus*, Vienna/Berlin, 1929; repr., Frankfurt, 1966; transl. as Evgeny Pashukanis, *Law and Marxism: a General Theory*, London, 1978.

critical (democratic) legal tradition of the Weimar Republic which was linked with such names as Otto Kirchheimer,<sup>5</sup> Ernst Fraenkel,<sup>6</sup> Otto Kahn-Freund,<sup>7</sup> Hermann Heller,<sup>8</sup> Hugo Sinzheimer,<sup>9</sup> the journal *Die Justiz-Zeitschrift des Republikanischen Richerbundes*,<sup>10</sup> and, of course, Franz Neumann himself.<sup>11</sup>

It would be foolish, however, to imply that Neumann was only of interest to lawyers; rather it was political scientists who were most active in making Neumann more accessible to German readers. In 1977 Gerd Schäfer translated, introduced and edited the first German version of *Behemoth*,<sup>12</sup> in 1978 Alfons Söllner edited and intro-

5. On Otto Kirchheimer, see K. Tribe, *Introduction to Kirchheimer, Economy and Society*, 66, 1983; M. Jay, *The Dialectical Imagination*, London, 1973, pp. 148ff.; J. H. Herz and E. Hula, 'Otto Kirchheimer: An Introduction to his Life and Work', in *Otto Kirchheimer, Politics, Law and Social Change*, F. S. Burin and K. L. Shell (eds.), Columbia, 1969. For K.'s work, see Ö. Kirchheimer, *Political Justice*, Princeton, 1961; idem, *Politik und Verfassung*, Frankfurt, 1964; idem, *Politische Herrschaft, Fünf Beiträge zur Lehre vom Staat*, Frankfurt, 1967; idem, *Funktionen des Staats und der Verfassung*, Frankfurt, 1972; idem, *Von der Weimarer Republik zum Faschismus: Die Auflösung der demokratischen Rechtsordnung*, Frankfurt, 1976.
6. Probably best known to the English reader through his analysis of the legal system of National Socialism, *The Dual State*, New York, 1941, repr. New York, 1969 — re-translated: *Der Doppelstaat*, Frankfurt; 1974, whereas Neumann relies heavily on Fraenkel's *Zur Soziologie der Klassenjustiz*, Berlin, 1927, repr. Darmstadt, 1968. In the reprint Fraenkel talks about his time in Berlin when he participated with Neumann, Kirchheimer and Kahn-Freund in producing the SPD journal *Die Gesellschaft*, (ibid., p. viii).
7. A good introduction in Lord Wedderburn, R. Lewis, J. Clark, *Labour Law and Industrial Relations: Building on Kahn-Freund*, Oxford, 1983.
8. Hermann Heller has so far received little attention in English-speaking countries. His collected works were recently republished: H. Heller, *Gesammelte Schriften*, 3 vols., Leiden, 1971. See also C. Müller and I. Staff (eds.), *Der soziale Rechtsstaat — Gedächtnisschrift für Hermann Heller 1891–1933*, Baden Baden, 1984.
9. Sinzheimer was the senior of the group and had taught, amongst others, Neumann and Kahn-Freund. O. Kahn-Freund and T. Ramm edited a collection of Sinzheimer's shorter works in 1976: *Hugo Sinzheimer, Arbeitsrecht und Rechtssoziologie*, 2 vols, Frankfurt/Cologne, 1976, which also contains a good introduction to Sinzheimer by Kahn-Freund (pp. 1–33).
10. *Die Justiz* existed from the autumn of 1925 to April 1933. A selection of legal analyses from *Die Justiz*, mainly by Sinzheimer and Fraenkel appeared in 1968: Sinzheimer and Fraenkel, *Die Justiz in der Weimarer Republik, Eine Chronik*, Ramm (ed.), Berlin/Neuwied, 1968.
11. Bibliographical details and further references in: Jay, *Dialectical Imagination*; A. Söllner, 'Franz L. Neumann — Skizzen zu einer intellektuellen und politischen Bibliographie', in F. L. Neumann, *Wirtschaft, Staat, Demokratie, Aufsätze 1930–1954*, 1978, pp. 7ff.; Marcuse (ed.), preface, *Democratic State*, pp. viiiff.; H. Pross, 'Einleitung', in Neumann, *Demokratischer Staat*, pp. 9ff.; K. Tribe, 'Introduction to Neumann: Law and Socialist Political Theory', *Economy and Society*, 10, 1981, p. 316; J. Perels (ed.), *Recht, Demokratie und Kapitalismus, Aktualität und Probleme der Theorie Franz L. Neumanns*, 1984; A. Söllner, 'Leftist Students of the Conservative Revolution: Neumann, Kirchheimer, & Marcuse', *Telos*, 61, 1984, p. 55; R. Erd (ed.), *Reform und Resignation, Gespräche über Franz L. Neumann*, Frankfurt, 1985.
12. F. L. Neumann, *Behemoth*, transl. G. Schäfer, Frankfurt; 1977.

duced a collection of Neumann's essays<sup>13</sup> and later translated his 1936 LSE thesis on 'The Governance of the Rule of Law'.<sup>14</sup> It was from this thesis that such important articles as 'The Change in the Function of Law'<sup>15</sup> and 'Types of Natural Law'<sup>16</sup> were drawn and on which many of the ideas in *Behemoth* relied. In the meantime, literature on Neumann has mushroomed in West Germany<sup>17</sup> and it seems only appropriate to make his thesis, which was after all written in English, available to a wider English-speaking audience. This seems especially appropriate in the centennial of the publication of Dicey's study on the rule of law<sup>18</sup> which has heralded a multitude of reassessments of the rule of law from a British perspective.<sup>19</sup> Neumann's thesis makes a not insubstantial contribution to that debate, albeit half a century late.

## II

'The Governance of the Rule of Law' has as its subtitle 'An Investigation into the Relationship between Political Theories, the Legal System and the Social Background', which more accurately describes the content of the book. In the first part Neumann briefly develops his main conceptual framework, which could be labelled as sociologically informed legal positivism.<sup>20</sup> He relies strongly on the notion of rational law and points to the contrast between state sovereignty and natural law as the key to an understanding of the rule of law. This is followed up in the second part, aptly named the 'disenchantment of the law', by an impressive and stimulating analysis of natural law theorists. The third part then inspects the rule of law in the nineteenth century and the drastic changes with the coming of the interventionist state.

13. F. L. Neumann, *Wirtschaft, Staat und Demokratie. Aufsätze 1930-1954*, A. Söllner (ed.), Frankfurt, 1978.
14. F. L. Neumann, *Die Herrschaft des Gesetzes. Eine Untersuchung zum Verhältnis von politischer Theorie und Rechtssystem in der Konkurrenzgesellschaft*, transl. A. Söllner, Frankfurt, 1980.
15. In German as 'Der Funktionswandel des Gesetzes im Recht der bürgerlichen Gesellschaft', in *6 Zeitschrift für Sozialforschung*, 1937, p. 542.
16. First publ. in *Studies in Philosophy and Social Science*, 8, 1939/40, p. 338.
17. For example, the references in n. 11, above.
18. A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 1885 et seq.
19. Cf. P. McAuslan and J. McEldowney, *Law, Legitimacy and the Constitution*, London, 1985 (forthcoming); N. Lewis, and I. J. Harden, *The Rule of Law and the British Constitution*, London, 1985 (forthcoming); J. Jowell (ed.) *Essays in Constitutional Law*, Oxford, 1985 (forthcoming).
20. It is interesting to note that Neumann, while refuting the insularity of Kelsen's positivism, in many ways depends quite strongly on this approach in order to show the 'natural law' bias of other theorists.

In developing his analysis Neumann relies on Karl Marx, Max Weber, Karl Renner,<sup>21</sup> Karl Mannheim and Harold Laski, who also supervised his thesis.<sup>22</sup> His main intellectual opponent in his book can be easily identified: Carl Schmitt, constitutional lawyer and outstanding conservative critic of the Weimar Republic,<sup>23</sup> who for a brief period was a staunch supporter of National Socialism and whose work has had a profound impact on modern West German constitutional law. He is probably the author most frequently referred to in the book and can be said to be responsible for its whole layout. When Neumann refutes his claim that the Weimar constitution allowed Parliament to enact only general laws he says of Schmitt: 'For proof of this assertion . . . he has recourse to the ideological history of the notion of law which we have followed up in the second part of our book. . . . We have attempted to prove that the postulate that the State may only rule through general laws is bound up with that of a certain social superstructure; and that it is indefensible to divorce the postulate of the generality of law from the postulated social order' (pp. 273-4).

This in essence is also the major thesis of Neumann's book. He postulates a correlation between the social system of competitive capitalism and its legal system. He describes the liberal legal system — mainly though its theorists — as an ideal-type (in the Weberian sense) which combines generality of legal rules and non-retroactivity of the law with independence of the judiciary. The protection of the (bourgeois) society against the constant threat of intervention by the state is claimed to be guaranteed through this combination. Neither law itself nor those who apply it can be directed to intervene in specific cases and retroactive intervention 'after the event' is equally banned. Neumann attributes three main functions to the generality of law. First, law serves both as an expression of and smoke-screen for the dominance of the bourgeoisie. This in many ways represents a reformulation of Marx's critique of the function of formal equality of law<sup>24</sup> which, as A. France has said, in its magnanimous equality forbids both the rich and poor to sleep under bridges. The second function takes up Max Weber's idea that the role of (general) laws is to provide calculability for the competitive economy. No enterprise

21. K. Renner, *The Institutions of Private Law and their Social Functions*, ed. O. Kahn-Freund, London, 1949.

22. Laski also wrote the preface to Neumann's *Trade Unionism, Democracy, Dictatorship*, London, 1934 and to idem, *European Trade Unionism and Politics*, New York, 1936.

23. On Carl Schmitt's importance for Neumann, see V. Neumann, 'Kompromiß oder Entscheidung? Zur Rezeption der Theorie Carl Schmitts in den Weimarer Arbeiten von Franz L. Neumann', in Perels (ed.), *Kapitalismus*.

24. A good summary in B. Fine, *Democracy and the Rule of Law*, London, 1984.

could function if it did not operate within the framework of predictable rules. The third and most innovating dimension of general laws identified by Neumann is an 'ethical function': 'The generality of the laws, the independence of judges and the doctrine of separation of powers, have . . . functions transcending the needs of competitive capitalism since they secure personal liberty and personal equality (p. 257).'<sup>25</sup>

Neumann traces a radical change in the legal system which parallels the transition from competitive to monopoly capitalism: both the structure and function of law are transformed. Generality of law is replaced by a combination of general clauses, vague legal standards and individualised legislation. In (Weimar) Germany, natural law is revived as a conservative weapon against parliamentary sovereignty, the *Freirechtsschule* (school of free discretion) triumphs over positivism, and in Britain, legal standards such as 'reasonableness' are on the increase. Judicial activity, no longer guided by general norms, turns increasingly into substantially administrative activity.

In order to develop this idea, Neumann presents us with an elaborate attempt to combine comparative and historical research with socio-legal study. He undertakes a *horizontal analysis* of a common law and a civil law system<sup>26</sup> which is sensitive to the historical development of these and is combined with a *vertical analysis* of law in (each) society. His starting point is the related but — as he explains (pp. 193–5) — not identical concepts of 'rule of law' and *Rechtsstaat*, which he links with the notion of a societal sphere protected against state intervention by (explicit or implicit) human rights and 'general norms'. Using methods of 'immanent' and 'transcendental critique'<sup>27</sup> he explores the relative weight given to notions of natural law and sovereignty by political thinkers from Aquinas to Hegel and links these to political movements.

### III

It is, however, the third part of the book which makes the most fascinating reading. Here Neumann draws on his theoretical expertise as a constitutional and labour lawyer. This was enlarged first by practical experience in the Weimar Republic as legal adviser to the builders' union and to the national executive of the SPD and then by

25. A similar argument is made by E. P. Thompson, *Whigs and Hunters*, Harmondsworth, 1977 and elsewhere. On Thompson see Fine, *Democracy*, pp. 169ff.

26. He concentrates mainly on the English and German legal systems, while also taking sideways looks at France and the United States.

27. Terminology derived from Karl Mannheim.



his encounter with a totally different legal tradition in Britain.

It was the more mechanistic aspect of his thesis which first seemed to offer the greatest attraction to German critical lawyers in the late 1960s and early 1970s. The irretrievably lost paradise of the legal system of competitive capitalism could be contrasted with the irrational use of law under conditions of monopoly capitalism. The use of general clauses, more purposive legislation and generous forms of statutory interpretation had in fact increased dramatically, judicial activism was greater than it had ever been before.<sup>28</sup> Soon, however, it was realised that an evolutionary perspective postulating and equating the decay of monopoly capitalism and its legal system was too far removed from reality to qualify even as an 'ideal type'.<sup>29</sup>

Neumann himself warned against mechanistic and especially reductionist assumptions and attempted to relate law not only to the economic 'sub-system' but also to political, religious, personal and ideological influences. His task, he said, was to 'indicate on the one hand the conditions under which law and state can develop relatively independently and on the other hand the forces which go to destroy this relative autonomy and subject . . . law and . . . state with full force to the stream of realities' (p. 16).

It may be said that he himself did not always measure up to this standard. This should, however, not make us blind to his great achievement which was that he took up and developed Max Weber's hint of the possibility of 'anti-formalist tendencies in modern legal development'<sup>30</sup> and related this to changes in society. Over forty years later this insight is the focus for a debate among legal scholars and sociologists who talk about 'repressive, autonomous and responsive' law (Nonet/Selznick),<sup>31</sup> about 'self-reflexive law' (Teubner),<sup>32</sup> about 'conditional' and 'goal-oriented' programmes (Luhmann),<sup>33</sup> about *Gesellschaft* and 'bureaucratic' types of law (Kamenka/Tay),<sup>34</sup>

28. Analyses can be found in the critical legal journals *Kritische Justiz* (since 1968) and *Demokratie und Recht* (since 1973).

29. One of the earliest criticisms of Neumann was developed by U.K. Preuß, 'Nachträge zur Theorie des Rechtsstaats', *Kritische Justiz*, 16, 1971; a more general critique: K. H. Ladeur, 'Vom Gesetzesvollzug zur Strategischen Rechtsfortbildung', *Leviathan*, 339, 1979; F. Hase and M. Ruete, 'Dekadenz der Rechtentwicklung?', *Leviathan*, 200, 1983; E. Blankenburg, 'The Poverty of Evolutionism', *Law & Society Review*, 18, 1984, p. 273.

30. M. Rheinstein, 'Max Weber on Law', in *Economy and Society*, Cambridge, Mass., 1954, pp. 303.

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