The unrelenting stare into the past and its justification

By David Dyzenhaus[*]

Christian Joerges and Navraj Singh Ghaleigh, eds., Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and Its Legal Traditions, Oxford, 2003, ISBN 1841133108, pp. 404, BP 55/$116.00[**]

The central theme of this collection of essays is wonderfully evoked by the photo on its cover of a sculpture – *Liberated Man*. The gaunt and shaven-headed figure huddles with his back turned towards the future, but his hands are firmly clasped over his face, obscuring his vision of the past. As Europeans wrestle with the problems of integration and engage in experiments with a constitutionalism that transcends national boundaries, do they need also to take account of the past of Nazism and fascism? The answer the book gives is "yes". Collectively the essays are supposed to make the point that one cannot construct a liberated legal future without paying serious attention to the past from which one hopes to be liberated.

With nineteen essays, plus a substantial and customarily insightful prologue by the foremost historian of Germany's legal order, Michael Stolleis, and a customarily feisty epilogue by the most distinguished constitutional theorist of Europe, Joseph Weiler, the book provides an opportunity for both an unrelenting stare into the past and a justification for that stare. The justification goes beyond a claim that the past is likely to repeat itself if it is not thoroughly confronted. It includes the thesis that the principal figures of fascist and Nazi legal thought posed a question, which no constitutional experiment can afford to ignore – the question of the basis upon which a political unity can successfully be founded. Is it sufficient, with Jürgen Habermas, to posit a constitutional patriotism, an allegiance to the values of liberal democracy? Or is something thicker needed – something which can ground the

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substantive homogeneity of the *Volk* (people), the Schmittian idea which occupies many of the authors?

The two parts of the justification combine at least in the thought that if the past is not properly confronted, *völkisch* (folkish) elements will play their role below the surface of liberal legalism. But more important for some of the contributors is the claim that the issue is not just about bringing those elements to the surface in order to eradicate their influence. Rather, one has to see that one cannot simply choose Habermas over Schmitt in reaction to Schmitt's repugnant views about homogeneity, because Schmitt was right that something beyond liberal democratic values is as a matter of fact constitutive of every successful political unity and so every successful legal order. If the European project of integration is to make any sense, it must make sense for reasons other than a commitment to the rule of law, human rights and so on, since all the countries involved in the project are already so committed, even if some of the countries that are seeking participation have only recently made such commitments and have still a long way to go in turning theory into practice. These ideas are thoroughly and perceptively canvassed by Weiler, Joerges, Neil Walker and John McCormick.

But perhaps one does not really need a detailed account of Europe's *legal* past to engage in this kind of debate. Weiler's passing remark in his Epilogue that he does not find the generation of German lawyers of the 1930s all that interesting might well apply to many even most of the French, Spanish and Italian figures discussed in the some of the essays. One's impression after reading accounts of their contributions to legal thought might well be that like most academics anywhere they allied themselves with the dominant currents of political and social thought of the day, so that the only reason they do not languish in complete and well earned obscurity is that they lived in a very interesting time. The fact that the contributors of this group of essays either find it difficult to construct a bridge between their inquiry and the present or even make no attempt to construct such a bridge rather underscores this point.

More illuminating, in my view, than the accounts of these figures is the account by David Fraser of the contemporaneous reception of their work in Anglo-American legal scholarship. Fraser shows that American and English academics found little extraordinary and indeed much in common with their own work in the books and articles published in Europe in the 1930s, which suggests that there was a significant overlap in legal and political culture at the time. In a somewhat related essay, Laurence Lustgarten engages with the theme of analogies between Nazi practice in the practice of the liberal democratic states of the time and indeed in contemporary liberal democratic practice. Yet I suspect that a proposal for a book about the Anglo-Americans' need to confront the legal past of the 1930s so that they

can go forward productively into a liberated future would not garner much support.

However, it does not seem to me that a proposal to study the role of law and lawyers in constructing legal and political culture in Europe and the Anglo-American world would fail to attract interest. The deterioration, and even disintegration of legality in Germany charted by Oliver Lepsius and the comparison of French and German judicial methodologies in Vivian Grosswald Curran's chapter invite reflections on the nature of law and adjudication which go well beyond the particular contexts and times they address. In addition, James Whitman's essay on the roots of the idea of dignity in current constitutional thinking in the Nazi populist take on the idea of honor is fascinating, though subject to a robust critique by Gerald Neuman.

The opportunity the book presented is, however, somewhat spoilt by the fact that the editors had rather too light a touch when it came to the thematic unity of the work and gave little attention to the quality of the English, elimination of typos and so on.