Science, Not Politics

By Clemens Jabloner[*]

Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and its Legal Traditions. Edited by Christian Joerges and Navraj Singh Ghaleigh with a prologue by Michael Stolleis and an epilogue by JHH Weiler. Hart Publishing, 2003. ISBN 1-84113-310-8[**]

Legal institutions and legal thought survive political systems. But is this also true of the "darker legacies of National Socialism and Fascism" in contemporary Europe? The 23 authors of this edited volume, which is the result of a project at the European University Institute, Florence, have tried to find answers to that question.

The essays are structured under four main headings: Continuity and Rupture, The Era of National Socialism and Fascism, Continuity and Reconfiguration, Responses to National Socialism and Fascism in National Legal Cultures. However, in terms of orientation this structure only scratches the surface as interconnections (which are inevitable and even desired) exist between the individual essays. Stolleis' Prologue and Weiler's Epilogue frame the entire work, which will be discussed "*seriatim*".

Michael Stolleis shows that the resilient thesis, namely that positivism rendered German lawyers helpless against totalitarian impertinence, is not supported by historical or methodological evidence, although it did have the effect of depicting the main perpetrators as victims, thus absolving them of their moral responsibility. In particular, the predominantly anti-positivist German *Staatsrechtslehre* developed theories during the Weimar Republic, which were designed to debase positive democratic constitutional law with reference to the "actual" constitution, which in

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turn legitimated and anticipated the authoritarian seizure of power. The theory accordingly contributed to the efficiency of the Nazi state with seemingly juristic concepts that concealed their ideological currency: *konkret allgemeiner Begriff* (concrete general term), *justizloser Hoheitsakt* an act of state, not subject to judicial review, and so on. There is no shortage of methodological continuities regarding the post-war interpretation: the "constitution" beyond constitutional law continues in the spectrum of values that transcend the Basic Law.

Oliver Lepsius commences proceedings with the difficult task of analyzing National Socialist thought on the state. Its supporting elements *Volk* (the people), *Führer* (leader principle), and *Bewegung* (movement), were deliberately employed in a vague and contradictory manner, an idiosyncratic method that Lepsius characterizes as a concept formation that reconciles opposites. A constitutional theory of National Socialism exists, if at all, only in a negative sense, since its thought was geared to the textual and formal disintegration of law and legal thinking.

The *Bundesverfassungsgericht* (German Federal Constitutional Court) held in the *Maastricht* decision that a state ought to be founded on a relative homogeneous *Volk*, which can be interpreted as a continuation of Carl Schmitt's theory. However, in his *Verfassungslehre* (Constitutional Theory) Schmitt does not (yet) conceive the concept of homogeneity in ethnic terms, as seems to be the case with the Federal Constitutional Court. This leads Navraj Singh Ghaleigh to befriend Schmitt to us. However, in the opinion of the reviewer, political concepts must be analyzed in terms of the maximum political danger that they present. The author also underestimates Schmitt's anti-Semitism if he views it merely as opportunistic.[1]

The second part begins with a contribution by Pier Giuseppe Monateri and Alessandro Somma on fascist contract theory. The collectivist elements of someone like Karl Larenz, who viewed employment, for instance, not as a labour contract but as the integration of the entire personality in society, were hardly effective in Italian civil law, which retained its roots in Roman law.

Ingo I. Hueck turns his attention to a sinister figure in Himmler's circle, Reinhard Höhn. Hoehn's crude *Großraum* (sphere of influence) phantasies speak for themselves. What is astonishing, however, is his survival in the Federal Republic as the inventor of the "Harzburg Model" for *Führungskräfte* (chief executives).

[1] See RAPHAEL GROSS, CARL SCHMITT UND DIE JUDEN (2002).

David Fraser reports that contemporary Anglo-American legal opinion took Nazi law seriously, in other words, as "law". Expatriation and individual measures, such as eugenic sterilization, even had parallels in America. A similar point is made by Laurence Lustgarten, who focuses on examples in criminal law – for instance the treatment of habitual offenders, and the end of the *Analogieverbot* (prohibition on analogies) to fill lacunae in criminal law – in order to highlight parallels and continuities between the legal politics of the National Socialist regime. Certain contemporary developments appear ominous in light of this contribution, but, as Weiler notes in the Epilogue, the author overshoots the mark. The phenomena he mentions stem from the police state, and are not typical of National Socialism, even if it was typical of the Nazis to revert back to them.

The third part continues with Carl Schmitt. According to John P. MacCormick the European Union is "mercifully" not a *Großraum* in the sense of Schmitt's diverse concepts, although Schmitt did raise the current issue what exactly defined Europe's internal community and how it was different from the outside world.

In view of the widely alleged legitimacy crisis of the European Union, I. Peter Burgess draws parallels to the situation in Weimar and even resorts to Schmitt's dark "*Nomos* theory". Fascinated by *Raumordnung* (spatial order), a term which seems to pulse with meaning in the English text, the author ultimately gets lost in dialectic speculations which are impenetrable to the reviewer. In contrast, Christian Joerges draws attention to personal and ideational continuities in his abundant contribution. What is of initial interest is the biographical note on H.P. Ipsen, who began his academic career in the Third Reich before becoming one of the leading public lawyers of the Bonn Republic and a dogmatic Community lawyer, and who, according to Joerges, is anchored in the principle of priority of application. Joerges too is gripped by the legitimacy problem, but he keeps a healthy distance from the subject-matter. The author views two concepts that were developed in Germany in antithesis to National Socialism and "which do without parliamentary democratic affirmation" as responses to the European "legitimacy dilemma": "ordo-liberalism", according to which the state guarantees market development, and Ipsen's model of "purposive associations of functional organizations".[2] Neil Walker in his comment emphasizes that the European values – following Dahrendorf, prosperity, social solidarity, and political freedom – need to be continuously restated and equilibrated more precisely.

[2] Christian Joerges, *Europe as Großraum? Shifting Legal Conceptualisations of the Integration Project*, in DARKER LEGACIES OF LAW IN EUROPE, 167, 189-191 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003).

Vivian Grosswald Curran and Matthias Mahlmann deal with questions of legal methodology in the subsequent contributions. Curran inquires into the relevance of the different methods of legal interpretation for the assertion of the National Socialist will by examining the practice of German and French courts during the Nazi and the Vichy regime respectively. Even though the German judges tended towards the "objective" interpretation to the point of judicial legal development, with the French courts tending towards a literal "formalism", it was ultimately the political ideology of the judges, rather than their methodological position, that determined the extent to which they followed the moral concepts of the respective regime: "While the contrasts between the judicial approaches of Germany and France, coupled with grave injustice in substantive results in both countries, allow one to question whether causality linked the specific methodologies to the substantive nature of case results, the uncertain role of methodology in terms of substantive outcome may be most starkly visible by the example of Germany alone. The post-war about-face from initially criticizing judicial formalism to subsequently criticizing anti-formalism, when the view that German courts had been positivistic changed to a view that they had not been positivistic, signals starkly the strength of the impetus to blame the particular methodology that had been tainted by association with Nazism, and casts doubt on the validity of the conclusion that either methodology by nature mandates injustice in substantive result. In addition, the German judicial use of *Generalklauseln* yielded results as terrible in kind as France's judicial positivism, with its rejection of *principes généreaux*, France's version of general clauses. The accumulated evidence demonstrates that we will not be able to identify the responsible culprit for fascist-era judicial injustice in France or Germany in the methodological distinctions that separate positivism from anti-positivism, or formalism from anti-formalism. The driving force behind court decisions in both Germany and France was political ideology, and the particulars of judicial methodology were far less important to the outcomes of cases."[3]

Curren does not, however, write from a legal theoretical perspective. She does not inquire into the correctness of each method. Instead she views – from a political perspective – the plurality of legal methods as pivotal in order to prevent the assertion of objectionable ideologies. This may hold true for the constellation of "evil law and good judge". But a critically self-reflective lawyer needs to be aware of an interpretation that is scientifically correct. This is the point of Mahlmann's comment. He advocates a view of "moderate positivism", which the reviewer by and large endorses. To be sure, the author goes too far when he refers, for instance in relation to fundamental rights, to the existence of important extra-legal

[3] Vivian Grosswald Curran, *Formalism and Anti-Formalism: Judicial Methodology*, in DARKER LEGACIES OF LAW IN EUROPE, 205, 225 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003).

"influences" on legal interpretation. That is only true in the sense that positive legal norms may refer to values, which do not have their seeds in the law. But through positivisation even their material content becomes part of positive law, and it is the task of legal interpretation to assess what the law-maker intended. (Maybe the difference is only terminological, because Mahlmann also suggests that it is the task of legal theory to make these influences transparent, to open them up to criticism, and to develop rationality standards for the evaluation of these extra-legal considerations).

The following contribution by James Q. Whitman is very interesting and also slightly chilling. The author is concerned with a reconstruction of the National Socialist concept of honor. He argues that, from a sociological perspective, National Socialism generalized "honor" which had hitherto been the reserve of the higher estates, and that this development found expression in the erection and in the judicature of *Ehrengerichte* (courts of honor) as required by labor law. In any event, the suggestion is that a direct legal sociological link could be established between this – quasi democratized – honor and the fundamental right of "human dignity", which is common property today. Gerald L. Neuman's comment shows that this conclusion is not supported by evidence in legal history. Yet that does not diminish the value of Whitman's careful consideration. As a matter of fact, the National Socialist regime was not unfriendly towards those that it embraced. What Whitman elaborates on regarding relations covered by labor law has parallels in the economic-historical research by Götz, which engage us today. It reveals a certain modernity of the Nazi system and contributes to an understanding of the phenomenon why many people felt attached to this system. The topic "labor law" is concluded by Luca Nogler's comparative study on the influence of corporatist theory in Germany and Italy that is rich on detail.

The contributions in the final part of this volume deal with the legal cultures in Italy, Spain and Austria. They reveal that Carl Schmitt's thought lived on in various guises: in Italy they found expression in the theories of Constantino Mortati (as demonstrated by Massimo La Torre and Giacinto Della Cananea), in Spain by Legaz y Lacambra (Agustin José Menéndez), and by Eric Voegelin in the context of establishing the corporative state in Austria (Alexander Somek). Menéndez is particularly informative on the indirect effect that the nineteenth century conservative Spanish state theorist Donoso Cortes had in Spain, having been influential on Schmitt.

The contribution by Somek will, naturally, be read critically by an Austrian reviewer. The account of the role of the dominant public law scholars (after Kelsen's departure in the mid 1930s), Merkl and Adamovich, is not unsubstantiated, but is relayed with an undercurrent of psychological spin.

Somek's attempt to dismiss Kelsens' Pure Theory of Law in a footnote is questionable. He assumes that he has clarified that it is a "toothless instrument against the subversion of a constitutional order", because every seemingly unconstitutional act can be justified as having found a footing in a new legal order. According to the reviewer, Somek gets it wrong in a number of ways. First of all, the "subversion" of a valid constitution is not something negative in principle. After all, it could be the transformation from a dictatorial constitution to a democracy. The Pure Theory of Law, which focuses on the description and not on the justification of a legal order, remains neutral both in relation to the existing and in relation to the new constitutional order. To be sure, the Pure Theory can review the objective validity of an act that subjectively purports to be a legal act by referring it to mechanisms of constitutional interpretation. If a constitution contains a differentiated system of legal elimination through the explicit repeal of unconstitutional acts, for instance through a constitutional court, then the process of wrapping a cloak of legality around an unconstitutional act (by citing the "true" constitution to establish legitimacy) is made much more difficult. The constitutional breach is brought to light; a theory of law cannot hope to do more. Aside from this criticism, Somek's contribution does offer valuable insights when he criticizes Austro-Fascism's image of the state as a concept of democratically illegitimate rule of experts, which could be attractive for European Union elites.

The volume concludes with an Epilogue by Joseph H.H. Weiler. The underlying sense of the continuous commemoration of the Shoa can be found in the Jewish tradition of the "appointed Mourner", who is personally unaffected by the death of a person, but who has been appointed by the community to mourn. The death of a person should not go un-mourned. According to Weiler, Europe ought to be able to think of itself as a community of fate "in the sense that different peoples and different States committed in their internal organization to democracy, human rights and the rule of law have decided to face the challenges of the future together, to share a destiny and hence a responsibility (even redistributive) towards each other, to make one's fate dependent, co-dependent on the fate of Others".[4]

The advantage of this impressive piece of work lies in the variety of its topics and in the differentiated perspectives of the contributors. Neither can be adequately conveyed in the context of book review. The editors did not strive for consistency, and it did not come naturally either. The reviewer is most impressed by those contributions, which focus on the legal historical reconstruction and highlight questions of methodology. It becomes clearer, in the course of reading the

[4] JHH Weiler, *Epilogue* to DARKER LEGACIES OF LAW IN EUROPE, 389, 402 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003).

individual essays, that the "dark years" are discussed in light of the European crisis of legitimacy. Carl Schmitt undoubtedly raised the legitimacy question with particular incisiveness. It is, therefore, not surprising that more than half of the contributions deal with this thinker, partly with perceptible "lust for anxiety" (Angstlust), in psychoanalytical terms. It is unobjectionable to inquire into the legitimacy of a community, so long as this question is posed as a political one. The history of ideas suggests that the division of "legitimacy" and "legality" had an antidemocratic function. Schmitt might be an attractive option for a European situation in which the democratic legitimacy of the EU is (or appears to be) unattainable and in which one may want to make a virtue of necessity. From a methodological perspective the distinction between a theory of public law and political science should be made as precisely as possible (which does not prohibit the same authors from dealing with both areas so long as they disclose what they are doing). Some political science contributions to this edited volume are problematic if they fail to distinguish between description and prescription, which, according to the reviewer, is a necessary condition for scientific analysis. This objection aside, the volume at hand offers a fascinating fullness of insights and open questions. That the latter prevail is an advantage, since we are talking about science and not politics.