

Final Words?

By *William E. Scheuerman**

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. BP 55/\$ 116.

A.**

This ambitious volume undertakes a number of distinct tasks. First, it seeks to provide English-language readers with a general introduction to debates about Nazi law and its most prominent practitioners. Thus, the book includes a number of specialized essays on jurists associated with the Nazi past. Navraj Singh Ghaleigh and John P. McCormick, for example, offer specialized surveys of Carl Schmitt's ideas. By no means surprising in light of his enormous influence, Schmitt makes numerous appearances in other essays as well. In the same mode, Ingo Hueck provides a useful learned discussion of the Nazi international lawyer –and nemesis of Schmitt– Reinhard Hoehn. More generally, Oliver Lepsius outlines core features of Nazi legal methodology; David Fraser examines the by no means consistently critical 1930s and 1940s Anglo-American reception of Nazi law; Michael Stolleis offers an overview of the main issues in recent scholarship on Nazi law and revisits the familiar theme of postwar German jurisprudential amnesia in the face of the Nazi past; James Whitman provides a provocative account of Nazi ideas about “honor” and their ambivalent place in the democratization of twentieth-century German law and society, while Gerald L. Neuman offers a thoughtful critical response to Whitman. Many other essays in the volume also flesh out the sordid details of the “dark legacy” of Nazi and fascist law.

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Unfortunately, this facet of the volume makes up its weakest link. Some of the essays overlap with previously published pieces, and their arguments will be familiar to students of German law and legal theory. A number of them are simply unsatisfactory. Ghaleigh, for example, occasionally reproduces many of the overly apologetic clichés still commonplace in Anglo-American scholarship about Schmitt without providing sufficient evidence for his assertions. German-language scholars, I assume, will be surprised to learn that Schmitt's ideas about *Artgleichheit* lacked ethnicist or racist connotations. Ghaleigh relies on the *Die Verfassungslehre* to make this claim while fundamentally ignoring Schmitt's prolific post-1933 Nazi writings. His tendency to underplay Schmitt's theoretically systematic and not simply personally opportunistic enthusiasm for Nazism is counteracted, fortunately, by the fact that many other essays in the volume pay appropriate attention to his significant role in debates among far right-wing scholars in the 1930s and 1940s both in Germany and in other far right-wing dictatorships. In addition, political theorists will be stunned to find out from Ghaleigh that Schmitt's ideas about homogeneity can be reasonably associated with republican political theory a la Philip Pettit or even Juergen Habermas' conception of *Verfassungspatriotismus* (constitutional patriotism).¹ Ghaleigh's essay fails to make necessary conceptual distinctions and thus unerringly trivializes the most problematic facets of Schmitt's theory. Accordingly, Bruce Ackerman's interesting democratic and eminently formalist ideas about the need for constitutionalized emergency power clauses not only suggest the existence of "parallels" to Schmitt's ideas, Ghaleigh posits, but also supposedly underscore Schmitt's great contemporary relevance.²

Ghaleigh is unfortunately right to see Schmitt as relevant to the post 9/11 political universe. Liberal democracies everywhere are indeed embracing authoritarian devices eerily reminiscent of Schmitt's ideas as part of the so-called "war against terrorism." However, he is not relevant to our contemporary situation because eminently sensible scholars like Ackerman or Habermas echo his ideas; they clearly do not. Nor is he relevant because his constructive or normative ideas are of much use.

In his provocative discussion of U.K. law, Laurence Lustgarten probably offers a sounder starting point for making sense of Schmitt's contemporary meaning by forcefully reminding us that present-day liberal democracies contain many deeply illiberal and authoritarian legal features. As long as we permit such elements to

¹ Navraj Singh Ghaleigh, *Looking into the Brightly Lit Room: Braving Carl Schmitt in 'Europe'*, in DARKER LEGACIES OF LAW IN EUROPE, 43, 54 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003).

² *Id.*, 48.

remain constitutive elements of our legal orders, Schmitt's ideas will always possess a certain resonance. We should probably take this resonance as evidence for the pressing necessity for political and legal reform, however, and not as proof of Schmitt's great theoretical acumen.

A certain amount of historical amnesia also plagues this facet of the volume. Although some of the pieces occasionally reproduce or at least echo classical debates about Nazi law, little mention is made of those debates. One finds, for example, a number of comments reminiscent of issues raised in the fascinating debate from the early 1940s between Franz Neumann and Ernst Fraenkel, but neither author makes much of an appearance here. This is both unfortunate and surprising in a volume which has as one of its main aims the attempt to tackle historical amnesia.

B.

A second aim of the volume is to place Nazi law in a broader comparative perspective. From the perspective of this reviewer, this is the most successful feature of the book. The volume does a fine job comparing and contrasting Nazi law with legal developments in Vichy France, Fascist Italy, Franco's Spain, and 1930s Austria. In particular, Vivian Grosswald Curran offers a rigorous comparative discussion of formalism and anti-formalism in Germany and Vichy France, provocatively arguing that many traditional jurisprudential positions about the broader relevance of Nazi law no longer hold water. *Pace* Radbruch and many others, it is by no means evident that positivism helped open the floodgates to fascism. Of course, this is a familiar argument especially to recent scholars of Nazi law. Yet Curran takes it a step further: she doubts that judicial methodology – positivist or otherwise – played much of a role in generating subservience to authoritarianism among jurists in either France or Germany.

Whether one agrees or not with her skepticism about the ultimate practical and political significance of methodology, this essay provides a superb model for future investigations. If I am not mistaken, too much scholarship on the nexus between jurisprudence and authoritarianism still focuses on single national cases, with scholars typically rushing to make general claims about the complicity (or, alternately, innocence) of a particular legal method (e.g., positivism). In the social sciences, this approach would be rightly criticized, but even the most impressive contemporary legal scholars (think, for example, of David Dyzenhaus' excellent work on South African apartheid) continue to pursue it. Curran's essay – as well as a number of other pieces here that are consciously comparative (including Mattias

Mahlmann's on legal method)—show how we might begin to overcome a widespread scholarly provincialism in legal studies about dictatorship.

In the same vein, Alexander Somek offers a fascinating discussion of what he calls "authoritarian constitutionalism" in 1930s Austria, and a number of Italian scholars offer systematic comparative discussions of Italian fascist law and Nazi German law (Pier Giuseppe Monateri, Alessandro Somma, and Luca Nogler). The enigmatic figure of Costantino Mortati – an ethnic Albanian who played a prominent role in trying to construct an identifiably fascist legal doctrine for Mussolini – is featured extensively in at least two helpful essays here (by Massimo La Torre and Giacinto Della Cananea). No less useful is Agustin Jose Menendez's analysis of legal doctrine in Franco's Spain. Here as well, Schmitt makes an appearance: fascist scholars in Spain were deeply influenced by him, and Schmitt's attempt to salvage the ideas of Catholic counterrevolutionaries like Donoso Cortes is described as composing a vital feature of the legal history of Franco's Spain.

My only quibble with this second facet of the volume is that the contributors are not always adequately sensitive to the broader theoretical significance of the issues they raise. Take again, for example, the longstanding debate about the (alleged) complicity of positivism or at least formalism in authoritarian government. Unfortunately, some of the essays here risk getting bogged down in the details of Nazi or fascist doctrine and ultimately fail to address the broader implications of their findings.

C.

A third aim of the volume is to underscore the potential relevance of Nazism and fascism for contemporary European legal thought in general and present-day debates about the European Union in particular. This is the volume's most creative and, unfortunately, incomplete undertaking, despite the fact that it includes pieces by prominent scholars like J.H. Weiler and Neil Walker. With the possible exception of J. Peter Burgess, whose idiosyncratic contribution uncritically reproduces traditional rightist critiques of the Weimar Constitution, the authors included here are legitimately skeptical of crude attempts to draw direct links between contemporary European legal trends and mid-century dictatorship. Yet they simultaneously worry about a certain historical amnesia which might lead us to ignore possible lessons from earlier historical experiences.

As part of this project, Christian Joerges offers an illuminating summary of Nazi-era ideas about a greater region or *Großraum* (sphere of influence), demonstrating persuasively that some important tendencies within the early European Union can be traced to ordo-liberalism and technocratic functionalism, both of which had

important roots in German authoritarian traditions. As Joerges notes, a real eye-opener is the career of Hans Peter Ipsen, who began his career as a Nazi jurist before becoming a highly influential German commentator on European legal development. Despite the dreary historical story he tells, Joerges resists relying on it in order to discredit recent European legal trends. For him it simply means that as Europe seeks to develop a viable legal and constitutional alternative to nation-state democracy, it cannot “content itself with inherited alternatives.”³

On an even more anxious note, Somek worries that the commonplace view of European legitimacy as resting “on the idea that certain economic objectives may be better achieved...by deregulating markets and...by withdrawing re-regulation from the democratic ballot and entrusting it to the judgment of expert bodies”⁴ reproduces salient traits of mid-century authoritarianism, and he goes even further than Joerges in questioning whether we should abandon traditional ideas about democratic sovereignty in favor of newfangled ideas about “multi-level governance” or “deliberative comitology”.⁵ His is a pointed response to scholars of European law who may be rushing prematurely to discard the traditional conceptual paraphernalia of political and legal theory in order to make sense of the special conditions of European law.

Too few scholars of the European Union are sufficiently familiar with mid-century legal development or authoritarian legal thinking (as Walker openly admits, and Weiler’s somewhat journalistic and ultimately disappointing contribution tends to demonstrate), while relatively few scholars of mid-century authoritarian legal theory and practice pay much attention to the European Union. The attempt to overcome this gap is, obviously, praiseworthy, even if the volume at hand cannot claim to have provided the final word on the topic. In any event, much can be learned from this book, and it is highly recommended to anyone interested in twentieth-century European legal thought.

³ Christian Joerges, *Europe a Großraum? Shifting Legal Conceptualisations of the Integration Project*, in DARKER LEGACIES OF LAW IN EUROPE 167, 191.

⁴ Alexander Somek, *Authoritarian Constitutionalism: Austrian Constitutional Doctrine 1933 to 1938 and its Legacy*, in DARKER LEGACIES OF LAW IN EUROPE, 361, 385 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003).

⁵ *Id.*, 383-388.