Provocation and Springboard

By Julian Rivers[*]

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 substantial collection of essays (nineteen altogether) arose out of a conference held at the European University Institute in September 2000 and from a seminar series in 2001-2002. As the editors acknowledge, the essays cover a "broad range of interdependent topics" addressing in various ways the nature and impact of National Socialist and Fascist ideology on law at the time and European legal traditions since. The essays are nicely bracketed by a prologue by Michael Stolleis and an epilogue by J.H.H. Weiler.

In his prologue Michael Stolleis sets out in a way particularly helpful to the reader unfamiliar with the structure of German higher education the conspiracy of silence and distancing from the recent past, which took place immediately after the Second World War. What is surprising is the extent of time for which the 'reluctance to glance in the mirror' survived. The explanation, he suggests, lies in the way in which older generations of scholars are able to co-opt the rising generation into the maintenance of taboo. Here we catch a glimpse of the implicit networks of dependency still present in German law faculties. But while the time is now ripe for reappraisal, Stolleis suggests that the project of "drawing up a comparative history of twentieth century European jurisprudence" is "dogged by insurmountable

[*] Senior Lecturer in Law, University of Bristol School of Law. Email: Julian.Rivers@bristol.ac.uk.

[**] Previously published in PUBLIC LAW 456 (2004).

difficulties"[1]. On that rather pessimistic note, the reader is introduced to a book that tries to do something rather like that. Whatever the difficulties, at the end, J.H.H. Weiler picks up on the themes of academic silence and the calls for closure to argue the need to take Europe – and the European Union's – "dark legacy of Schmitt & Co."[2] seriously.

B.

Here then was a potential agenda for the entire collection: the engagement with Carl Schmitt, the question of continuity with the past, the inspiration and nature of the European Union. Regrettably, however, the essays are simply too varied to admit of such a coherent focus. Although there is a core fulfilling this agenda, represented most notably by the matched pair of excellent essays by Christian Joerges and Neil Walker, other pieces fall at various points on a much broader historical – jurisprudential – didactic spectrum. Occasional attempts by individual authors to make the connections with European integration do not always work. For example, Vivian Grosswald Curran's otherwise helpful study of comparative judicial methodology in Nazi Germany and Vichy France is not helped by a brief final plea for the European Union to reject "unicity" and take value pluralism seriously.

The attempt to create order and purpose out of the material available therefore must have presented the editors with a significant challenge, and it is not clear that the section headings and sequence adopted are entirely successful. Part I (Continuity and Rupture) could well feature as a subtitle for nearly all the essays; Part II (The Era of National Socialism and Fascism) leads one to expect a more purely historical and analytical account of the workings of Nazi law, yet it includes one of the most powerful critiques of modern trends in criminal justice. It remains a mystery why Luca Nogler's piece *Corporatist Doctrine and the New European Order* on labor law should fall into Part III (Continuity and Reconfiguration) whereas the following essays by Massimo La Torre and Giacinto della Cananea on the constitutional theory of Costantino Mortati should fall into Part IV (Responses to National Socialism and Fascism in National Legal Cultures). All three are scholarly

[1] Michael Stolleis, *Prologue: Reluctance to Glance in the Mirror. The Changing Face of German Jurisprudence after 1933 and post-1945*, in DARKER LEGACIES OF LAW IN EUROPE, 1, 17 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003).

[2] JHH Weiler, *Epilogue*, in DARKER LEGACIES OF LAW IN EUROPE, 389, 401 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003).

accounts of aspects of Italian law in the 1930s, with no attempt to draw conclusions about continuities with the present or the European Union.

So for the purposes of this review it may help to hive off three groups of essays (historical, jurisprudential and didactic) which do not fall into the core theme as identified above.

C.

To start with the historical. As well as the three essays noted above, Pier Giuseppe Monateri and Alessandro Somma consider *The Fascist Theory of Contract* tracing the trends and modifications to contract law, along with differences between Italian and German approaches. They note the increasing subordination of individual interest to that of the collectivity, albeit more marked in scholarship than in practice. In a somewhat disjointed essay, Ingo Hueck sets out the role of Reinhard Höhn in relation to the development of *Großraum* (sphere-of-influence) theory. Towards the end of the collection, Agustín José Menéndez discusses fascist elements in the legal and political theory of *franquismo*.

The historical merges into the jurisprudential by way of a general consideration of the nature of Nazi law. Oliver Lepsius provides a straightforward account of the collapse of the idea of law under National Socialism under the influence of three key ideas: the *Volksgemeinschaft* (national community), the *Führerprinzip* (leader principle), and the dynamic principle of the unity of party and State. These ideas transcended existing conceptualizations, thus undermining any attempt to fix legal concepts and content. So it is not possible to restate a National Socialist constitutional theory as if it were one of a legal type. National Socialism was law-destroying in theory and increasingly so in practice. As mentioned already, Vivian Grosswald Curran challenges the widespread assumption that the weakness of Nazi law lay in its method. Radbruch famously argued that it was the formalism engendered by positivism which made lawyers willing servants of their Nazi masters; by contrast, recent scholarship tends towards an anti-Radbruch-thesis, which blames the absence of formalism instead. Curran shows the complexity of any judgment in this area, tracing different combinations of formalism and anti-formalism in both Germany and France. But rather surprisingly the moral she draws is that method doesn't matter very much; *not* that the subordination of method to ideology is problematic.

A number of essays can be typified as didactic. David Fraser considers the response of Anglo-American legal scholarship in the 1930s and 1940s to German developments. He shows that while aspects were considered not ideal, there was

considerable support for some of Hitler's racialist and eugenic policies. Certainly there was no question that Nazi law was 'not law'; the idea that Hitler's Germany was a criminal state is a post-1945 reconstruction. (One cavil here: the fact that an outsider to a system describes a set of practices as 'law' does not foreclose the possibility that for an insider it is not law.) If David Fraser's essay is designed to make us a little uncomfortable, Laurence Lustgarten sets up a powerful and disturbing critique of modern trends in criminal justice policy. The parallels between Nazi preventative detention and interpretative development in criminal law on one hand, and English common law and government policy on the other are remarkable. Of course, Lustgarten is careful not to overstate his case, and slippery slope arguments need supplementing ultimately by a discussion of distinctions. Finally, against the background of German debate about legal method, Matthias Mahlmann makes a brief, rather programmatic, argument for rational moral universalism and 'moderate positivism' (understood as a method that ties the judge to the democratic legislature). Questions of labels aside, this is precisely the lesson that Radbruch himself learned.

D.

This leaves us with 8 essays that do fit rather well into the core theme of European continuity with Nazism. John P. McCormick sketches in Carl Schmitt's evolving vision of European integration through four stages: neo-Christendom (1923), anti-Russia (1929), *Großraum* (1939) and as the origin of a now-threatened order of international law (1950). He notes some obvious distinctions between these models and the EU, but also notes that Schmitt's attempts to identify European distinctiveness "haunts the study of European integration".[3]

This leads naturally on to the debate between Christian Joerges and Neil Walker. In a very careful and thoughtful piece, Joerges unpicks the possible lines of continuity between Schmitt's *Großraum* theory and the post-war European integration project. The possibility of continuity is indicated above all by Schmitt's refusal to reject in their entirety traditional notions of state sovereignty in favor of an undifferentiated *Reich*. The *Großraum* – particularly as later articulated by Ernst Rudolf Huber – was a 'structure of graduated order' in which Germany had dominance. The internal structure of the *Großraum* (in terms of economics, technicity and administration) was left largely undeveloped by Schmitt, except that in the latter field Hans Peter

[3] John P McCormick, *Carl Schmitt's Europe: Cultural, Imperial and Spatial, Proposals for European Integration, 1923-1955*, in DARKER LEGACIES OF LAW IN EUROPE, 133, 141 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003).

Ipsen was able to build on notions of an external administrative competence of the Reich (in the light of his subsequent leading role in German European law, Ipsen gets an enormous biographical footnote.) Joerges accepts that the most immediate German contributions to European integration lie in the ideas of ordo-liberalism and Forsthoff's technocratic functionalism. Yet he argues that the conceptualization of Europe in public law terms enabled a linkage with Schmittian ideas.

Neil Walker affirms Joerges's project, and in general supports the emphasis he gives to German contributions to European integration, albeit playing down the significance of Forsthoff and Ipsen's functionalism. In particular Walker characterizes the *Großraum* as a "relevant dystopia for the European Union"[4]. Not simply does it warn against the primacy of the political; it highlights in its tension with economic and technical rationality (arguably over-dominant in the EU) the need to preserve a balance of core values of economic well-being, social cohesion and political freedom in the multi-level governance structures of the European Union.

If there is a balance to be struck between historical analysis and contemporary application, between critical engagement and scholarly detachment, then Alexander Somek's essay on Authoritarian Constitutionalism: Austrian Constitutional Doctrine 1933 to 1938 and its legacy is particularly successful. In trying to understand the regime in Austria after the 'self-elimination' of Parliament in 1934 and annexation in 1938, he creates an ideal-type of authoritarian constitutionalism. This is replicated at the level of the European Union, and indeed within its member states as a form of liberalism "*deeply* at odds with a functioning democracy".[5] Schmitt was thus right to observe that the de-politicization of the economy presupposes a very strong state, and Europe's democratic deficit is no mere temporary insufficiency. Somek's conclusion is that we might be better off conceptualizing European order with this 'traditional' term, rather than trying to find new words to capture supposed European distinctiveness.

Navraj Singh Ghaleigh's short essay is also keen to draw connections between Schmitt and the present day, and does so by making essentially two points: Carl Schmitt defended the use of emergency powers and the notion that political community must have some sort of cultural basis. It was a little disappointing that

---

[4] Neil Walker, *From Großraum to Condominium – A Comment*, in DARKER LEGACIES OF LAW IN EUROPE, 193, 195 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003).

[55] Alexander Somek, *Authoritarian Constitutionalism: Austrian Constitutional Doctrine 1933 to 1938 and its Legacy*, in DARKER LEGACIES OF LAW IN EUROPE, 361, 386 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003).

the author did not spend more time identifying what was distinctively problematic in Schmitt's conception of these ideas, which are after all both familiar elements of contemporary legal and political thought.

James Q Whitman and Gerald Neuman take issue with each other over continuities of a different sort. In what must be one of the most entertaining essays in the collection, James Whitman argues that that the tradition leading up to the European concept of 'dignity' as a human right was developed in no small part by the Nazi democratization of prior status-bound notions of 'honor'. He focuses in particular on the *Ehrengerichte* (courts of social honor) of Nazi labor law and their function in requiring employers to respect the honor of 'lower class' employees. As he recognizes, viewed 'close up' Nazi 'dignity' was horrendously abusive, but viewed from a distance it was a stage in pushing the boundaries of aristocratic status 'downwards', a process which contemporary jurisprudence continues. In a brief response Gerald Neuman suggests a range of reasons for not taking the role of older norms of social honor too seriously in the development of conceptions of 'dignity'. Touché.

Finally, one must draw attention (if only in the hope of improvements on another occasion) to the very large number of typographical errors marring the presentation of this work. Some of these are of the now-familiar type that cannot be picked up by spell-checkers, only by careful reading. But even a spell-checker could have made a significant contribution. Furthermore, although the standard of English of the non-native speaking contributors who had not made use of the translating services of Iain Fraser is enviable, it is not always idiomatic. A little more gentle editorial smoothing would not have gone amiss.

Does the book work? As has been indicated, the points at which dialogue seemed about to take off are not sufficiently sustained to draw the reader in. The variety of essays is simply too great to build up a coherent thesis. But as a resource, a springboard for further work, it certainly does. Some of the individual essays are highly instructive and thought-provoking. Not only does the collection define and defend an agenda, it also exemplifies a range of methods by which to approach the task.