

## Social Networks and Individual Misdemeanors, Epistemological Questions and Normative Orientations

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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. Ex Captivitate Salus\*\*

"I am the last, conscious advocate of the *jus publicum Europaeum* and, in an existentialist sense, I am its last teacher and researcher, and experience its ending like Benito Cereno experienced the journey of the pirate ship. Hence, silence is now appropriate and timely. It should not worry us. By keeping silent, we reflect upon ourselves and upon our divine origin."<sup>1</sup> Carl Schmitt's narrative in *EX CAPTIVITATE SALUS* portrays the journey of Benito Cereno, captain and commander of a slave ship. After a successful slave revolt, he can only rescue himself by keeping silent about the ship's true fate and by getting involved in an eerie spectacle. For Schmitt, Cereno figures as a symbol of relief, as a stylized man, whose fate resembles that of the intelligentsia in a mass-system, *i.e.* in National Socialism. For Schmitt, this

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<sup>1</sup> The original reads: "Ich bin der letzte, bewusste Vertreter des *jus publicum Europaeum*, sein letzter Lehrer und Forscher in einem existenziellen Sinne und erfahre sein Ende so, wie Benito Cereno die Fahrt des Piratenschiffs erfuhr. Da ist das Schweigen am Platz und an der Zeit. Wir brauchen uns nicht davor zu fürchten. Indem wir schweigen, besinnen wir uns auf uns selbst und auf unsere göttliche Herkunft." CARL SCHMITT, *EX CAPTIVITATE SALUS* 21 (1950).

captain from New England is thus historical innocence personified:<sup>2</sup> Schmitt describes Benito Cereno as a "hero"<sup>3</sup> and thereby describes himself.

It is rather well known that the life of Carl Schmitt lasted somewhat longer than the life of the aforementioned Benito Cereno, the protagonist in Herman Melville's story of the same title.<sup>4</sup> Whereas Cereno, who could never forget the shadow that *El Negro* had cast on him, entered a monastery shortly after his journey to put an end to his life,<sup>5</sup> no dark shadow of the past, neither *El Negro* nor *El Moreno*, did silence Carl Schmitt or ended his far-reaching influence in the early Federal Republic.<sup>6</sup> This might have a plethora of reasons, yet Schmitt was certainly not of a contemplative taciturnity.<sup>7</sup> Although others have, indeed, kept silent, in a European context, it is particularly striking that the Schmitt's lasting impact remains rather under-researched. It may well be the case that the enduring and dominant polarization of Schmitt's readership mirrors the antithetic character of his work, but the way of dealing with Carl Schmitt could also manifest a broader and urgent European problem, namely that the reflection upon the condition for the possibility and the organization of the European project comes with a fundamental uneasiness—the uneasiness of facing the darker legacies of this very project, as the glance into the

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<sup>2</sup> An instructive examination of Schmitt's self-description as taciturn captain ("At that time, I felt superior. I intended to give the term National Socialism a new meaning." ["Ich fühlte mich damals überlegen. Ich wollte dem Wort Nationalsozialismus von mir aus einen Sinn geben." CARL SCHMITT, CARL SCHMITT – ANTWORTEN IN NÜRNBERG 65 (Helmut Quaritsch ed., 2000)]) which contrasts sharply with Walter Benjamin, who felt like a "shipwrecked person drifting on a wreck by climbing on the top of the already shattered mast" ("Schiffbrüchiger, der auf einem Wrack treibt, in dem er auf die Spitze des Mastbaums klettert, der schon zermürbt ist", WALTER BENJAMIN: BRIEFE 1 UND 2 532 (Theodor Adorno ed., 1978)) can be found in SUSANNE HEIL, 'GEFÄHRLICHE BEZIEHUNGEN' – WALTER BENJAMIN UND CARL SCHMITT (1996); see also Richard Faber, 'Benito Cereno' oder die Entmythologisierung Euro-Amerikas: Zur Kritik Carl Schmitts und seiner Schule, in KULTURSOZIOLOGE – SYMPTOM DES ZEITGEISTES, 688 (Helmuth Berking/Richard Faber eds., 1989).

<sup>3</sup> SCHMITT (*supra*, note 1), 21.

<sup>4</sup> HERMANN MELVILLE, BENITO CERENO, in WORKS, VOL. 10 sec. 8 (Raymond Weaver ed., 2nd ed., 1963).

<sup>5</sup> *Id.*, "[...] you generalize, Don Benito; and mournfully enough. But the past is passed; why moralize upon it? Forget it. [...] You are saved; what has cast such a shadow upon you?—The Negro.—There was silence [...]."

<sup>6</sup> See DIRK VAN LAAK, GESPRÄCHE IN DER SICHERHEIT DES SCHWEIGENS: CARL SCHMITT IN DER POLITISCHEN GEISTESGESCHICHTE DER FRÜHEN BUNDESREPUBLIK (1993).

<sup>7</sup> SCHMITT (*supra*, note 2), 54-55: "Ich möchte betonen, den hochwissenschaftlichen Zusammenhang der Stelle zu beachten. Der Intention, der Methode und der Formulierung nach eine reine Diagnose [...] Alles, was ich gesagt habe, [...] ist nach Motiv und Intention wissenschaftlich gemeint, als wissenschaftliche These". ["I would like to stress the highly scientific context of this passage. According to its intention, method and formulation, it is pure diagnosis [...] All I have said [...] was, concerning its method and intention, meant scientifically, as a scientific argument."].

'European mirror' would at the same time involve the gaze into the common European abyss.

### B. Glance into the Mirror

A picture of Georg Kolbe's bronze sculpture 'the liberated' is shown on the cover of the hitherto only volume<sup>8</sup> which aims "to face our past in order to understand our present [...] in the interests of our future"<sup>9</sup> in the context of European legal history and theory<sup>10</sup>. For Kolbe, the crouched man keeping his face covered in his hands with his eyes shut was a symbol of the shock and shame the Germans felt after their liberation from National Socialism.

Christian Joerges and Navraj Singh Ghaleigh aptly chose this motive in order to launch a debate about the DARKER LEGACIES OF LAW IN EUROPE. As Michael Stolleis puts it, the book deals with the *reluctance to glance in the mirror*<sup>11</sup>, and Kolbe's 'liberated' as someone unwilling to see and unable to see is an accurate symbol for what Joerges and Ghaleigh repeatedly emphasize in their preface and contributions: their project – to confront European jurists with the dark side of their history, to bring out continuities and discontinuities, and to conceive of right-wing populist movements in numerous European countries as the emanation of an urgent and old challenge to the theoretical and normative orientation of the European legal order – finds hardly any sympathy; furthermore, they aver that at "various points during the gestation of this work, eyebrows were raised as to its relevance, political valency and even moral qualifications"<sup>12</sup>, that the question of "why deal with Europe from such perspectives?"<sup>13</sup> was ubiquitous and that also at

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<sup>8</sup> DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS (Christian Joerges/Navraj Singh Ghaleigh eds., 2003).

<sup>9</sup> Christian Joerges/Navraj Singh Ghaleigh, *Preface and Acknowledgements*, in DARKER LEGACIES OF LAW IN EUROPE, ix (Christian Joerges/Navraj Singh Ghaleigh eds., 2003).

<sup>10</sup> As an inquiry into this matter JOHN LAUGHLAND'S THE TAINTED SOURCE: THE UNDEMOCRATIC ORIGINS OF THE EUROPEAN IDEA (1997) can be mentioned here; yet his account offers an all too general and due to its polemical tone a rather problematic perspective. For a study into the nexus of European history and its significance for law, see FELIX HANSCHMANN, 'Geschichtsgemeinschaft': Ein problematischer Begriff und seine Verwendung im Staats- und Europarecht, 5 RECHTSGESCHICHTE 150 (2004).

<sup>11</sup> Michael Stolleis, *Reluctance to Glance in the Mirror*, in DARKER LEGACIES OF LAW IN EUROPE, 1 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003).

<sup>12</sup> Navraj Singh Ghaleigh, *Looking into the Brightly Lit Room: Braving Carl Schmitt in Europe*, in DARKER LEGACIES OF LAW IN EUROPE, 43 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003).

the European University Institute (EUI), where this project arose, a dignified silence *à la* Benito Cereno has been preferred. "The project of European integration is an *answer* to Germany's aggressive nationalism, which must not be suspected to have inherited elements of the past."<sup>14</sup>

Despite similar difficulties, Joerges and Ghaleigh's first step towards this edited volume dates back to 1999. Then, Massimo La Torre and Christian Joerges organized a seminar series at the EUI in order to prepare a conference in September 2000 dedicated to 'Perceptions of Europe and Perspectives on a European Order in Legal Scholarship - During the Era of Fascism and National Socialism'. This volume now makes the papers of this conference, of a seminar at the EUI and of a conference panel in Chicago in March 2002, organized by the Councils for European Studies, available to a European public. The editors applied themselves to their task with remarkable stamina: "one cannot, thus but have much admiration for that segment of German political culture of which this volume is part. It has repeatedly refused the many calls from within for closure and continues to carry the heavy custodial burden of the discomfiting memory. It is fitting and appropriate that those who had the courage to lift the mirror and unflinchingly gaze at themselves, have now found the courage to lift up a mirror to the European self of which they are part, a European mirror into which other Europeans are reluctant to glance or which they wish to disown."<sup>15</sup>

### C. "Schmitt begat Ipsen and Ipsen begat ..."

Joerges/Ghaleigh structure their volume in four major parts, framed by a prologue by Michael Stolleis (*Reluctance to Glance in the Mirror: The Changing Face of German Jurisprudence after 1933 and post-1945*) and an epilogue by Joseph Weiler (*Europe's Dark Legacy: Reclaiming Nationalism and Patriotism*). This set up not only provides the beginning and end of the volume, but the book's end strives to begin a debate about the European history of law – or, rather about the European histories of law – while the beginning puts an end to all purely national histories of law. This is a truly European task: to bring together national memories as European memories

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<sup>13</sup> Christian Joerges, *Europe a Großraum? Shifting Legal Conceptualisations of the Integration Project*, in DARKER LEGACIES OF LAW IN EUROPE, 167 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003).

<sup>14</sup> This is how Joerges and Ghaleigh summarize the reservations carried forward at the EUI, see JOERGES/GHALEIGH (*supra*, note 9), ix.

<sup>15</sup> Joseph HH Weiler, *Europe's Dark Legacy: Reclaiming Nationalism and Patriotism*, in DARKER LEGACIES OF LAW IN EUROPE, 389, 394 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003).

and to thereby not only make a political space<sup>16</sup> visible within a collective, describing itself as Europe, but to also remedy this collective's – "that seemed not to have a history"<sup>17</sup> – amnesia.<sup>18</sup>

Stolleis reminds us of the particular German "rogues' gallery of enthusiasts, apologists and sundry fellow travellers"<sup>19</sup>, of the fate of those honorable and sincere returned emigrants, who suddenly found themselves at 'National Socialist shadow faculties' where numerous Nazis had retained their positions, of "the meteoric success"<sup>20</sup> of jurists like Hermann von Mangoldt, Hans-Peter Ipsen, Hans-Carl Nipperdey and Theodor Maunz, of the almost conspiratorial correspondence of Carl Schmitt, Rudolf Smend, Walter Jellinek, Erich Kaufmann and Friedrich Giese, and especially of the ever unchanged patterns of communicative silence: "in short, the members of the new faculties gradually reached a mutual accommodation and took the pragmatic approach of letting sleeping dogs lie, especially since many colleagues kept their distance from the more sensitive issues and may even have made it clear in private that they had put their past behind them."<sup>21</sup>

Stolleis claims that the genuine surprise is not the communicative silence as such; it is more the fact that this technique of 'mastering the past' (*Vergangenheitsbewältigung*) has worked so well and for such a long time and he offers a sociological explanation: "small groups, such as the clergy, business managers or academics have a tendency to co-opt younger colleagues. In other words, they push their own disciples through the eye of a needle to make them part of the system. This makes the up and coming generation extremely dependent on the patronage and good will of the older generation. In such a situation, breaking the taboo of mentioning the past can be a risky business."<sup>22</sup>

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<sup>16</sup> For the notion of a space of visibilities and ascriptions as precondition for collectivity, see Armin Nassehi, *Politik des Staates oder Politik der Gesellschaft? Kollektivität als Problemformel des Politischen*, in NIKLAS LUHMANN'S POLITISCHE SOZIOLOGIE 38, 45-48 (Kai-Uwe Hellmann/Rainer Schmalz-Bruns eds., 2002).

<sup>17</sup> WEILER (*supra*, note 15), 389.

<sup>18</sup> Zur Politik des kollektiven Gedächtnisses: JAN ASSMANN, DAS KULTURELLE GEDÄCHTNIS 36 (2000).

<sup>19</sup> WEILER (*supra*, note 15), 386.

<sup>20</sup> STOLLEIS (*supra*, note 11), 6.

<sup>21</sup> *Id.*, at 7.

<sup>22</sup> *Id.*, at 16.

The volume's prologue therefore provides a comprehensive, knowledgeable and instructive survey of German studies conducted hitherto and at the same time goes beyond the German debate by including research from France, Italy, Poland, the Netherlands and accession countries: "these studies would have to focus microscopically on individual figures while at the same time drawing macroscopic structural outlines. What is more, they would have to be written with moral courage, without fear of the reactions of colleagues or their students, especially when the insignificant is to be deemed insignificant."<sup>23</sup>

Weiler's epilogue also emphasizes that a deconstruction of "resistance myths" is still to come in many European states and, hence, that Ditlev Tamms' study of Danish collaboration with the Nazi regime<sup>24</sup> still remains an unaccompanied endeavor. Yet, Weiler's epilogue can also be read as a prologue for a European legal history to come: his genealogical sketch, already hinted at by Stolleis, combined with his categorization of professorial generations leads to an intellectual genealogy of a European history of ideas and ideologies which is not only well worthwhile reading but also promises "that there is much fun still in store"<sup>25</sup>. Furthermore, it mainly avers one point:

The answers given by the European project in response to its own darker legacies – be they European constitutionalism, post-nationalism or supranationalism – cannot be discussed without reflecting on the condition of their possibility; they cannot be isolated from the agonizing question of which problems they had intended to solve and which Trojan horses have up until now remained influential in the networks of the European (legal) profession: "Schmitt begat Ipsen and Ipsen begat ... etc. right into the heart of the (German) European law profession."<sup>26</sup>

It might hardly be necessary to stress that Carl Schmitt, Europe's self-chosen Benito Cereno and self-appointed hero of silence has remained a key figure in the networks of the profession. Neither is it a new insight that the darker legacies in the law of world society can regularly be linked to Carl Schmitt and that a genealogical bond connects him even to the *realpolitical* legal nihilism of the falcons in Washington – via the figures of Leo Strauss and Hans Morgenthau.<sup>27</sup> Hence, it is

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<sup>23</sup> *Id.*, at 17.

<sup>24</sup> DITLEV TAMM, *RETSOPGÖRET EFTER BESAETTELSEN* (2nd ed., 1985).

<sup>25</sup> WEILER (*supra*, note 15), at 400.

<sup>26</sup> WEILER (*supra*, note 15), at 397; for Ipsen, see JOERGES (*Supra*, note 12), 182, footnote 92.

<sup>27</sup> For the relationship between Hans Morgenthau and Carl Schmitt, see Martti Koskenniemi, *Carl Schmitt, Hans Morgenthau, and the Image of Law in International Relations*, in *THE ROLE OF LAW IN INTERNATIONAL POLITICS* 17 (Michael Byers ed., 1999); MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF*

also hardly a surprise that references to Carl Schmitt are legion in the contributions to this tome.

Already in the first part 'Continuity and Rupture' following a chapter about legal theory in National Socialism by Oliver Lepsius, Navraj Singh Ghaleigh attends to Schmittian moments in the project of European integration. His argument is carefully balanced; it refers to the security architecture after 9/11, to both *constitutional* and *emergency moments*, and, in its core, focuses on how the question of homogeneity has been treated from Schmitt's (not always accurately portrayed) position to the decisions of the German constitutional court, from Dieter Grimm to Joseph Weiler. The volume's third part also centers around the pertinence of a normative orientation of European law *à la* Schmitt: John McCormick (*Carl Schmitt's Europe: Cultural, Imperial and Spatial, Proposals for European Integration, 1923-1955*), Peter Burgess (*Culture and the Rationality of Law from Weimar to Maastricht*) and especially Christian Joerges' contribution (*Europe a Großraum? Shifting Legal Conceptualisations of the Integration Project*), commented on by Neil Walker (*From Großraum to Condominium*), trace the roots of ordoliberal and functionalist attempts to legitimize the European legal domain in the history of ideas. Where these can be found, what kind of continuities exist and how they can be overcome is already alluded to in the title of Joerges' chapter: "here, the continuity with pre-democratic heritages of German legal culture is striking, but that, after all, is not very surprising. Ironically and fortunately, it is the successes of the European project that fundamentally challenge those traditions: Europe has developed in such a way that it needs a constitution that structures and legitimises its politics."<sup>28</sup>

This volume provides a thorough examination, avoiding a hasty end of reflection, an examination that does not retire to a supposedly incontestable, morally grounded polemic but that seeks a committed engagement. This is the leitmotiv of the entire volume, which indeed challenges its readership, as the quest for the uncomfortable includes the questioning even of the European concept of human dignity (James Whitman), of contractual theory (Guiseppe Monateri and

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NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960 465 (2002). As explicated in a review of WILHELM GREWE's THE EPOCHS OF INTERNATIONAL LAW (35 KRITISCHE JUSTIZ 277 (2002)), Koskenniemi too acknowledges the need for further inquiry. As Grewe's work and its treatment "demonstrates that even in this field, the work of *Vergangenheitsbewältigung* ('mastering the past') is far from having been fully accomplished" (*id.*, 281). For the mutual reception and nexus of Leo Strauss and Carl Schmitt, see HEINRICH MEIER's instructive study CARL SCHMITT, LEO STRAUSS UND 'DER BEGRIFF DES POLITISCHEN' (1988), which also makes available three letters of Strauss addressed to Schmitt and which sets Schmitt's revision of his concept of the political in direct connection to Strauss' criticism of Schmitt's original argument, published in the ARCHIV FÜR SOZIALWISSENSCHAFT UND SOZIALPOLITIK in 1932 (*id.*, 16; Strauss' article *Anmerkungen zu Carl Schmitt: Der Begriff des Politischen* can be found *id.*, 97).

<sup>28</sup> JOERGES (*supra*, note 13), 191.

Alessandro Somma) and of industrial law (Luca Nogler). These are sensitive topics of some current practical relevance, controversially discussed in the volume itself (Gerald Neumann comments on the contribution by Whitman) and usefully supplemented by more theoretical contributions on national (*völkisch*) legal thought (Ingo Hueck), on democratic theory (Laurence Lustgarten) and on legal methodology (Matthias Mahlmann, Vivian Grosswald Curran).

The edited volume's fourth part is then explicitly dedicated to national legal systems. The contributions by Massimo La Torre and Giacinto Della Cananeo on the Italian constitutional theorist Costantino Mortati, the study by Augustin José Menéndez on Spanish *Franquismo* and Alexander Somek's text on Austrian constitutional law between 1933 and 1938 are courageous violations of the communicative silence with a clear de-mythologizing ambition: "the story begins with a myth and ends with a folk tale. The myth is that of the so-called 'self-elimination' (*Selbstausschaltung*) of the Austrian Parliament on 4 April 1933. [...] The folk tale emerges in post-World War II Austria: with the *Anschluss* in 1938 Austria became the first 'victim' of the Third Reich."<sup>29</sup>

In all this, the volume chooses a rather innovative approach. Even if David Fraser, for example, affirms the legal quality of Nazi law, this does not imply that he has forgotten about Radbruch's formula, but indicates that he follows an interesting strain of thought touching upon the concept of law itself<sup>30</sup> as well as interferences and continuities across states: "when American legislators, doctors and lawyers were actively pursuing the eugenic sterilisation of their own citizens within the context of democracy and the rule of law, German doctors and lawyers were pursuing the same policies and practices within the context of a 'criminal state'. At this level, it was difficult then, as it appears to be now, to know where one began and the other ended. Eugenic sterilisation was not the only element of Nazi law to have found a counterpart in Anglo-American jurisdictions. Nor was it the only central element of Nazi legal ideology to have been contemplated and accepted by English-speaking jurists or by Anglophone learned journals."<sup>31</sup>

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<sup>29</sup> Alexander Somek, *Authoritarian Constitutionalism: Austrian Constitutional Doctrine 1933 to 1938 and its Legacy*, in DARKER LEGACIES OF LAW IN EUROPE, 361 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003).

<sup>30</sup> For a comprehensive account, see DAVID FRASER, LAW AFTER AUSCHWITZ: TOWARDS A JURISPRUDENCE OF THE HOLOCAUST (2005).

<sup>31</sup> David Fraser, 'The outsider does not see all the game...': Perceptions of German Law in Anglo-American Legal Scholarship, 1933-1940, in DARKER LEGACIES OF LAW IN EUROPE, 87, 110 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003).



#### D. Politics of Collective Memories

With this volume, Joerges/Ghaleigh succeed in combining a perspective of European legal legacies, which is European and national, individual-microscopic and social-macroscopic. They provide a volume which convincingly combines two convictions—as stated by Jacques Derrida: "the first concerns the undeniable link, on the one hand, between this thought of the political as political thinking, and, on the other, those entanglements of Schmitt, which led to his arrest and conviction after the war and which were often, in more than one respect, more weighty and more repulsive than Heidegger's [...] Yet, at the same time, and this is the second conviction, this should not hinder us neither from serious examination nor from taking such thinking and work into account—thinking which roots in numerous fruitful traditions of the theological, legal, philosophical and political culture of Europe, which belongs to a European law whose last defender this catholic thinker [...] thought of being himself."<sup>32</sup>

The book draws its relevance from stressing both, the level of social networks as well as its individual misdemeanors, and the conceptual level, its guiding epistemological questions and normative orientations. One can only hope that this volume is to bring European law to turn towards the narratives within its own history, that it is able to break the communicative silence, and that it allows to take the shaping of collective memories within European public spaces serious. One can only wish that such debates will rise to the high level of Joerges and Ghaleigh's tome.

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<sup>32</sup> JACQUES DERRIDA, POLITIK DER FREUNDSCHAFT 123-124, footnote 4 (2002).