

## Lawyers and the Vital Relationship between the Past and the Present

By *Pietro Costa*\*

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\*\*

*Darker Legacies of Law in Europe*, edited by Christian Joerges and Navraj Singh Ghaleigh, is composed of numerous interesting essays (21 essays in total) and, in the time at my disposal, I shall not be able to expound on them with the care and attention that they merit. Consequently, I shall be able to mention only some of the relevant topics that this book addresses.

My general impression is that we have before us an important, original, and complicated book. It is a book that does not run the risk of mingling in the mass of the works devoted to the past, the present, and the future of Europe. It is a book centered on an original and, in some ways, disturbing hypothesis: the hypothesis that the relationship between the twentieth century totalitarian regimes and the liberal and democratic traditions may be different from a mere antithesis, as our common sense tends to suppose.

This book has no antiquarian approach: it tries to grasp the vital relationship between the past and the present, and we can, on this ground, say that it takes historiography seriously. Yet the book has not been written by historians: if I am not mistaken, most of the essays have been written by jurists or by legal

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philosophers such as Massimo La Torre,<sup>1</sup> even if the prologue has been assigned to a prominent historian, Michael Stolleis.<sup>2</sup> Maybe this happened by chance, but, if there is an underlying strategy, its probable grounds are the need to stress the relationship between the present and the past, and the conviction that memory (or history) is a necessary component of the intellectual adventure of the jurist. It is this shared attitude towards the past that encouraged the authors to confront the pivotal dilemma of every historical research: that is, the relationship between continuity and discontinuity; a relationship that only the ideologues can suppose to describe by determining clear-cut and definite gaps, while the historians, and the jurists as historians of themselves, are aware that continuity and discontinuity, dramatic cleavages, and disguised legacies usually co-exist. Both the keyword and the challenge of this book coincide with the attempt to grasp the rhythm of history, the plot of the continuities, and the discontinuities in the eventful context of twentieth century Europe.

Two major gaps emerge on the scene: first, the crisis of liberal civilization and the coming of the totalitarian regimes in the 1920s and 1930s; and, second, the collapse of fascism and national socialism and the beginning of constitutional democracies. It is a complicated process and a further difficulty stems from the fact that the object of the analysis is not strictly homogeneous: fascist Italy, national socialistic Germany, Franco's Spain, and Dollfuss' Austria are different regimes, notwithstanding their family feeling. How does the book accomplish its engaging task? By focusing on specific but revealing subjects. Let us refer to the first major gap described by this book: the relationship between liberal civilization and the national socialist regime. In order to highlight this relationship, a particularly interesting topic—one of many—is mentioned, mainly in the essays of David Fraser<sup>3</sup> and Laurence Lustgarten<sup>4</sup>: criminology and eugenics.

The call to save the social body from the plague of inveterate criminals, madmen, and incurables is not a distinctive feature of national socialism. Indeed, it was a program that took root in late nineteenth century civilization, when several authors

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<sup>1</sup> Massimo La Torre, *The German Impact on Fascist Public Law Doctrine – Costantino Mortati's Material Constitution*, in DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS, 305 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003).

<sup>2</sup> Michael Stolleis, *Prologue: Reluctance to Glance the Mirror: The Changing Face of German Jurisprudence after 1933 and post-1945*, in DARKER LEGACIES OF LAW IN EUROPE, *id.*, 1.

<sup>3</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, *id.*, 87.

<sup>4</sup> Laurence Lustgarten, *'A Distorted Image of Ourselves': Nazism, 'Liberal' Societies and the Qualities of Difference*, in DARKER LEGACIES OF LAW IN EUROPE, *id.*, 113.

began to stress the primacy of collective entities (the state, the nation, or society) and the normalizing and disciplinary power of society over individuals. Eugenics began in England and developed in Germany, France, Italy, and America at the end of the nineteenth century; not only did it urge the provision of public health and of municipal building, but also suggested interventions of obligatory sterilization and euthanasia. The title of a famous book of Karl Binding and Alfred Hoche, published in 1920, is revealing: the *Vernichtung lebensunwerten Lebens* (the extermination of life unworthy of living).<sup>5</sup>

Nineteenth century civilization had a dark side, which emerged when concern for security prevailed against liberty and rights. A good example is offered by the notion of emergency law: an ancient idea (not an invention of Schmitt) that was repeatedly invoked during the liberal era and now seems to have greatly recovered topical interest after 11 September 2001. As Fraser's essay points out, totalitarian cultures were at ease with the dark side of liberal tradition, and on this ground alone many American lawyers during the 1930s were able to consider national socialism not as a juridical monster, but as a respectable, albeit debatable, experiment. There were undeniable continuities between pre-totalitarian and totalitarian cultures, but, at the same time, we cannot neglect some relevant differences between them; we cannot forget that some key words, for instance, the unlimited manipulation of the individual, the notion of emergency law, and the liquidation of *lebensunwerten Lebens* (unworthy life), were restrained in some fringe areas of liberal civilization, while they became the pivot of totalitarian ideology and practice.

I come now to the second major gap described by *Darker Legacies of Law in Europe*: the relationship between totalitarian regimes and post-war democracies.

A promising field of research is the analysis of intellectual elites. Continuity has to do not only with institutions, norms, and ideologies, but also with human beings, with human fears, needs, mentality, and so on. Stolleis' prologue and Weiler's epilogue<sup>6</sup> highlight the reluctance of several generations of jurists "to glance in the mirror." The case of Reinhard Höhn, according to Ingo Hueck's essay,<sup>7</sup> is exemplary: Höhn, who had been an extremist theoretician of SS power, became the director of an important management school in the post-war years and received a

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<sup>5</sup> KARL BINDING/ALFRED HOCHÉ, *DIE FREIGABE DER VERNICHTUNG LEBENSUNWERTEN LEBENS: IHR MAß UND IHRE FORM* (1920).

<sup>6</sup> J.H.H. Weiler, *Epilogue*, in *DARKER LEGACIES OF LAW IN EUROPE* (note 1), 389.

<sup>7</sup> Ingo Hueck, '*Sphere of Influence*' and '*Völkisch*' Legal Thought: Reinhard Höhn's Notion of Europe, in *DARKER LEGACIES OF LAW IN EUROPE*, *id.*, 72.

laudatory obituary by the *Frankfurter Allgemeine Zeitung* three years ago. The sociology of intellectual elites is an interesting approach, but does not exhaust the content of this book. Two major problems come under consideration: the relationship between totalitarian regimes and constitutional democracies, and the relationship between totalitarianism and Europeanism.

The first problem emerges, for instance, in the essays that Massimo La Torre and Giacinto della Cananea<sup>8</sup> have devoted to the Italian jurist Costantino Mortati. I probably should not have chosen Mortati as the classical representative of fascist jurists, but Mortati is a perfect case study if we are concerned with the problem of continuities and legacies; and the legacy, in this case, is the constitutional role of a political party. In the post-war years, the constitutional frame dramatically changed and free competition among different parties took the place of the fascist mono-party regime. According to Mortati, however, the party (the single party in the fascist regime and the system of parties in the post-war democracy) remained the indispensable medium between the individual and the political community.

The second problem is the relationship between the totalitarian ideologies and the new European order. The hypothesis of a dark legacy may appear bizarre, in so much as the Europeanist project took its roots in the anti-totalitarian writings and actions of English federalists, of Rossi and of Spinelli, and the focus of this project was the criticism of the absolute sovereignty of the nation-state (and of its totalitarian climax) and the praise of individual autonomy. The rejection of totalitarianism is also the foundational symbol of the new European order.

Notwithstanding this well known and obvious data, the problem of the dark legacies may be posed with good grounds, as several essays in this book demonstrate.

From one point of view, we must not forget that totalitarianism advanced a precise idea of Europe: a totalitarian Europeanism, a fascist and national socialist notion of a European order, actually existed. This is the first legacy that we must take into account, as many essays, and Luca Nogler's essay in particular,<sup>9</sup> point out. This topic is not only an important (and too often neglected) piece of the totalitarian ideological patchwork; it also has a more general value: it is a good antidote against a hackneyed Europeanist rhetoric, according to which the very name of Europe

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<sup>8</sup> Giacinto della Cannanea, *Mortati and the Science of Public Law During the Fascist Period*, in DARKER LEGACIES OF LAW IN EUROPE, *id.*, 321.

<sup>9</sup> Luca Nogler, *Corporatist Doctrine and the 'new' European Order*, in DARKER LEGACIES OF LAW IN EUROPE, *id.*, 275.

seems enough to announce the triumph of democracy and the glorious destiny of humanity. In this sense, the totalitarian legacy, the memory of a totalitarian idea of Europe, could be considered not as a shadow, but as a useful warning.

From a second point of view, the differences between totalitarianism and democracies cannot exclude some underlying continuities. The most explicit contribution to this perspective is James Whitman's essay,<sup>10</sup> which is discussed by Gerald Neuman.<sup>11</sup> Whitman's thesis is provoking because, in his opinion, the alleged continuity involves not some peripheral area of post-war constitutional culture, but its core: the absolute value of the individual, the idea of the equal "dignity" of every human being; an idea that Pufendorf had expressed two centuries before with this colorful phrase: "*utique non canis sum; sed aequae homo, atque tu.*" In fact, Whitman clears and limits his assumption: he does not refer to discourses but to social practices, he does not consider the philosophical side but the social dynamics of the several regimes. From this point of view, national socialism, according to Whitman, is a stage of a long historical process: a stage distinguished by "a systematic effort to include low-status Germans in a world of high-status 'honor'." The thesis may sound provocative, but it is a matter of fact that totalitarian regimes promoted a mass-oriented policy, introducing family allowances and paid holidays, organizing the worker's free-time activities, and so on. The continuity thesis may be provocative, but it does, at least, have some authoritative forerunners: Hayek, who wrote his *Road to Serfdom* in 1944,<sup>12</sup> described a road that coincided with state interventionism, which, according to him, had begun in the Weimar Republic, had continued during the national socialist regime, and now was being rashly introduced into the British realm of liberty and rule of law by Beveridge.

We can also take it for granted that, in the long history of the so-called welfare state, there is a bright legacy, from Weimar to national socialism, and a dark legacy, from national socialism to post-war democratic Germany. At the same time, however, we must grasp the specific features of several contexts, as Weiler reminds us in his epilogue. We cannot therefore neglect that the social interventionism of totalitarian regimes is an instrument to their major goals: economic and military expansionism, the general mobilization of the masses, and the unrestrained manipulation of the individual.

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<sup>10</sup> James Whitman, *On Nazi 'Honour and the New European 'Dignity'*, in DARKER LEGACIES OF LAW IN EUROPE, *id.*, 243.

<sup>11</sup> Gerald Neumann, *Judicial Methodology and Fascist and Nazi-Law – A Sceptical Response*, in DARKER LEGACIES OF LAW IN EUROPE, *id.*, 267.

<sup>12</sup> FRIEDRICH A. VON HAYEK, *THE ROAD TO SERFDOM* (1944).

Another alleged dark legacy is connected with Carl Schmitt's notion of the *Großraum* (sphere of influence), analyzed by authors such as Hueck, Joerges,<sup>13</sup> Walker,<sup>14</sup> Nogler, and McCormick.<sup>15</sup> Continuities and discontinuities again take place. On the one hand, Schmitt's idea of the *Großraum*, the idea of a space rooted "essentially not in the state but in the technical, industrial and economic sphere," seems impressively up-to-date; however, on the other hand, as McCormick points out, Schmitt's *Großraum* has little in common with the post-war European order, which has no centre, has no imperialistic tendency, and requires equality among peoples. Probably the most intriguing part of Schmitt's legacy emerges when we try to confront the problem of Europe's identity. We know Habermas' solution: identity coincides with fundamental rights and constitutional democracy. Is this a sufficient answer? According to McCormick, Schmitt "prompts us to question what specifically characterizes Europe's ... distinction from the outside world today"; and Koselleck has written,<sup>16</sup> in more general terms, that the identity of a social group depends on concepts that allow it to define, determine, and differentiate itself from other groups. In my opinion, Koselleck is posing a real problem, whose importance for the new European order should not be undervalued.

In short, I must come to a conclusion and lay my cards on the table: Koselleck is deeply impressed by Schmitt, and I am deeply impressed by Koselleck. I also cannot exclude that the dark shadow of totalitarianism has reached, via Koselleck, yours truly, who can, therefore, only rely on your charitable interpretation.

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<sup>13</sup> Christian Joerges, *Europe a Großraum? Rupture, Legal Conceptualisations of the Integration Project*, in DARKER LEGACIES OF LAW IN EUROPE (note 1), 167.

<sup>14</sup> Neil Walker, *From Großraum to Condominium – A Comment*, in DARKER LEGACIES OF LAW IN EUROPE, *id.*, 193.

<sup>15</sup> John McCormick, *Carl Schmitt's Europe: Cultural, Spatial, and Imperial Proposals for European Integration, 1923-1955*, in DARKER LEGACIES OF LAW IN EUROPE, *id.*, 133.

<sup>16</sup> Reinhart Koselleck, *Per una semantica storico-politica di alcuni concetti antitetici asimmetrici*, in FUTURO PASSATO: PER UNA SEMANTICA DEI TEMPI STORICI (1986).