Darker Legacies, Schmitt's Shadow and Europe

By Kjell Engelbrekt[*]

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. Introduction[**]

What has European law in common with National Socialism and Fascism? Nothing at all, a number of decision makers, lawyers and political scientists might spontaneously respond. Possibly, some would add after a moment's reflection, the connection is that the experiences of Nazism and Fascism paved the way for European integration and therefore for European law. European law is in other words positioned in an antithetical relationship to totalitarian ideologies and the intellectual legacy that emanates from them. And beyond this negative relationship, many would conclude, there is no significant connection.

Such answers are unlikely to impress the editors of DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS. In what may be perceived as the project's program declaration Christian Joerges, professor of economic law at the European University Institute in Florence, and Navraj Singh Ghaleigh, lecturer of public law at Edinburgh University, state that our relationships to the past tend to be "deeper, more

[*] Senior Lecturer, National Defence College/Department of Political Science, Stockholm University. Email: Kjell.engelbrekt@statsvet.su.se.

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complex and more troubling" than we normally anticipate and are aware of.[1] It should be noted that the National Socialist heritage of German legal scholarship has been fairly well investigated in a number of studies, from those of Hubert Schorn and Fritz K. Ringer[2] to more recent work by Lothar Gruchmann, Joachim Rückert and Dietmar Willoweit and Norbert Frei.[3] But the corresponding traces of Fascism in Italy and Spain have not been systematically examined and regarding the rest of Europe the picture is even more obscure.

The 2003 edited volume has obviously emerged through several years of seminar activities at the European University Institute in Florence, Italy, in conjunction with a series of colloquia and conferences. In the introduction Joerges and Ghaleigh write that they over time increasingly realized the existence of generational and 'cultural' differences in views of the National Socialist/Fascist era in European history, as well as of contrasting opinions on the legal science conducted under the influence of these ideologies. The editors further inform us that the project as a whole, along with the seminar activities in Florence, was controversial from the very outset. Critics apparently questioned both the relevance and utility of probing into the connections between legal scholarship, the ongoing European integration and this dark age of the continent's recent history. Grant applications were rejected.

The project nevertheless had the advantage of a devoted publisher in Richard Hart, and in 2003 the edited volume DARKER LEGACIES OF LAW IN EUROPE was published. In this volume a diverse group of legal scientists, historians and social scientists perform a total of twenty-one analyses of primarily German, Austrian, Italian and Spanish jurisprudence and applications of law under periods of Nazi or Fascist political rule. In 2005 the results of the project were followed up by a special issue of the online GERMAN LAW JOURNAL[4], in which the relevance for European law in general, and an EU constitution in particular, was explored. To summarize this

[1] Preface to DARKER LEGACIES OF LAW IN EUROPE, ix (Christian Joerges/Navraj Singh Ghaleigh eds., 2003)

[2] HUBERT SCHORN, DER RICHTER IM DRITTEN REICH (1959); HUBERT SCHORN, DIE GESETZGEBUNG IM NATIONALSOZIALISMUS ALS MITTEL DER MACHTPOLITIK (1963); FRITZ K. RINGER, THE DECLINE OF GERMAN MANDARINS: THE GERMAN ACADEMIC COMMUNITY, 1890-1933 (1969)

[3] LOTHAR GRUCHMANN, JUSTIZ IM DRITTEN REICH 1933-1940: ANPASSUNG UND UNTERWERFUNG DER ÄRA GÜRTNER (1988); JOACHIM RÜCKERT AND DIETMAR WILLOWEIT, DIE DEUTSCHE RECHTSGESCHICHTE DER NS-ZEIT: IHRE VORGESCHICHTE UND IHRE NACHWIRKUNGEN (1995); NORBERT FREI, VERGANGENHEITSPOLITIK: DIE ANFÄNGE DER BUNDRESREPUBLIK UND DIE NS-VERGANGENHEIT (1996)

[4] *Confronting Memories: European "Bitter Experiences" and the Constitutionalization Process*, 6 GERMAN LAW JOURNAL 245-561 (2005)

colorful triptych encompassing two volumes is near impossible, and I will below therefore mainly dwell on three features of continuity to which the authors pay more than passing attention and which can be said to have an indirect bearing on European law. These features concern the continuity of personalities and of doctrinal legacy and, finally, the continued influence of one individual scholar, Carl Schmitt, on legal science.

B. Continuity of Personalities

There are today rich biographies regarding the majority of the most prominent representatives of German legal science during the 1930s and 40s. Carl Schmitt's special position before, during and even after the Second World War lacks an equivalent and will be discussed more thoroughly below. Otto Koellreutter and Ernst Rudolf Huber (constitutional law) were able to regain a certain standing in post-war Germany despite their pro-regime attitude under Nazi rule. More spectacular is the successful career of Reinhard Höhn (constitutional and administrative law) following 1945, as founder and director of the *Harburger Akademie für Führungskräfte* (Harburg Academy of Management). The informative chapter by Ingo Hueck, describing how Höhn by far surpassed Schmitt in his efforts to readjust legal science to suit the purposes of the Third Reich, portrays a skilful manipulator of people as well as a talented theoretician. The fact that Höhn, professor and former SS lawyer, until his retirement in the 1970s was responsible for the education of tens of thousands of business leaders is nonetheless a scandal that has received too little attention.[5]

The legal historian Michael Stolleis affirms the generally accepted view that almost all lawyers formerly in the service of the Third Reich were either reinstated in their earlier positions, in private law firms or in public institutions, or promoted to a higher level post-1945 Germany.[6] Just as in the case of many other professional communities, the *Stunde Null* (Zero Hour) thesis relieved lawyers from being closely investigated by the occupational authorities and established a 'clean slate' policy from a political and administrative perspective. This development was accentuated by the beginning of the cold war in the late 1940s and the successive winding down of the activities of allied administrations. In this context one should

[5] Ingo J. Hueck, *'Spheres of Influence' and 'Völkisch' Legal Thought: Reinhard Höhn's Notion of Europe*, in DARKER LEGACIES OF LAW IN EUROPE, 71, 73-74 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003)

[6] 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, 1, 3 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003)

also note the absence of a younger generation of qualified lawyers, resulting from the government's downsizing of the academies in the 1930s as well as from the war itself. The number of registered law faculty students fell from 22,000 in 1930, to 4,555 in 1939 and 3,000 in 1941.[7]

In many respects the situation outside Germany, for instance in France, was a different one as Nazi law would not have been imposed without Hitler's military might. Yet Vivian Grosswald Curran maintains that historical research in recent years has shown that French judges and lawyers by and large accepted the Vichy legislation, including the anti-Semitic *Statut de Juifs*, as if they were any other laws. Curran argues that French legal tradition in general fails to encourage independent assessments of individual pieces of legislation. But she still agrees with late political scientist Raymond Aron that it is extraordinary that, as the judiciary was setting aside rights and freedoms, the highest body (*le Conseil d'État*) failed to question such practices. She sees one explanation in the widespread French anti-Semitism of the early 1940s, albeit mainly directed at non-French Jews.[8] As a consequence, extremely few lawyers later had to justify their actions during the war.

Other chapters in the 2003 volume deal with Spain, among other countries, where totalitarian ideologies do not appear to have disseminated until rather late. According to Augustín José Menéndez the number of lawyers with Fascist sympathies was very low during the second half of the 1930s and into the 1940s, that is, during the Spanish civil war and the beginning of the Second World War. Menéndez observes that the majority of Spanish legal scientists were committed to republicanism before the outbreak of the civil war. Only later did Fascist lawyers start to emerge and replacement of republicans and socialists ensued. Parliamentary democracy was evidently rejected by a number of Spanish conservative and Fascist law professors, starting with Legaz y Lacambra and Francisco Javier Conde.[9] After the death of General Franco and the breakthrough of democracy in the 1970s, scholars gradually played down the ideological *franquismo* that for three decades had dominated legal studies, at the expense of liberal ideas. But this process of re-evaluation took place, according to Menéndez, without the influence of Fascism over court appointment policies or jurisprudence ever being made an issue. And criticism against the conduct of legal research and legal

[7] *Id*., 10-11

[8] Vivian Grosswald Curran, *Formalism and Anti-Formalism in French and German Juridical Methodology*, in DARKER LEGACIES OF LAW IN EUROPE, 205, 214-215 (Christian Joerges, Navraj Singh Ghaleigh eds., 2003)

[9] Agustìn José Menéndez, *From Republicanism to Fascist ideology under the Early Franquismo*, in DARKER LEGACIES OF LAW IN EUROPE, 337, 338-352 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003)

theorizing was, if possible, even milder than that occasionally directed at the application of law.

Two articles included in the 2005 special issue of *German Law Journal* deal with the situation in Central and Eastern Europe, most concretely with respect to Hungary. András Sajó writes that modern Hungary actually has never acknowledged a political, economic or moral responsibility for the fact that 600,000 of its Jews were murdered in the Holocaust. A counterpart to the Nuremberg laws were enacted in 1941, though Sajó points out that the Hungarian parliament—with a considerable majority—adopted the first anti-Semitic laws back in the 1920s.[10] There were some dismissals of wholehearted Nazi and Fascist sympathizers under the communist rule of the late 1940s. But systematic vetting never took place and another totalitarian ideology had soon replaced the previous one, precluding further steps in that direction.

However, it would appear that throughout Europe a more nuanced debate about law, enforcement and legal studies in the interwar period and the Second World War has arisen in recent years. This is presumably both linked to the increasingly critical approach adopted in Germany and Italy, as with the growing importance of the EU and therefore of common European political and intellectual traditions. In an elegant epilogue to the 2003 volume Joseph Weiler writes about the four generations of lawyers that have dealt with this moral-intellectual complex, and among which solely generation GG (Great Grand children) evidently has acquired the distance needed to critically examining it. In Weiler's analysis the preceding generations were simply too closely entangled with their 'parents' and 'grandparents' to fundamentally question—not just blindly condemn—their earlier activities.[11]

C. The Doctrinal Legacy

Several contributions to the 2003 edited volume illustrate the substantial advantage that German scholarship has attained when it comes to evaluating the intellectual and doctrinal legacy of National Socialism and Fascism. This is not least true concerning attempts at theoretically explaining political and social processes related to this legacy. For example, Oliver Lepsius is of the opinion that the Nazi

[10] András Sajó, *Legal Consequences of Past Collective Wrongdoing after Communism*, 6 GERMAN LAW JOURNAL, 425, 425-433 (2005)

[11] JHH Weiler, *Epilogue*, in DARKER LEGACIES OF LAW IN EUROPE, 403, 396-400 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003)

legal order generated a negative, destructive logic, which undermined the legitimacy of the Weimar order more effectively than it managed to produce an alternative structure.[12] More than one chapter similarly breathes skepticism as to whether the National Socialist regime qualifies as a 'legal order', considering that the *Führerprinzip* (leader principle) and the principles of *Bewegung* (movement) and *Ungebundenheit* (non-boundedness) – which seem antithetical to the very notion of law – attained a high status in that system. Moreover, there is a consensus that Hitler himself was directly hostile to law in general.

There is, at the same time, no denying that a system of legal rules was in force during the greater part of 1933-1945, and that it displayed a significant measure of coherence. The 'leadership principle' in concrete terms meant that Hitler's personal orders really superseded all other legal sources.[13] One can also note that the German parliament in 1933-1942 played a wholly subservient role as legislator and only adopted seven formal laws.[14] In his chapter Lepsius further speaks about a National Socialist 'method,' even an epistemology, for jurisprudential development that underpinned the assumption of an all-powerful executive. It was not least this political-ideological mission to create a new legal order, so Lepsius, which attracted many young and ambitious lawyers and led them to support this process at the level of legal scholarship.[15] Already in 1946 Gustav Radbruch famously charged legal positivism in the vein of Hans Kelsen with having made German lawyers "defenseless against laws with arbitrary and criminal content".[16] Matthias Mahlmann is skeptical about Radbruch's assertion but notes that a considerable number of prominent legal positivists after close scrutiny indeed do tend to support moral relativism.[17]

In her chapter on France Curran also finds a viable connection to legal positivism, while at the same time emphasizing that its modern version—in the spirit of Herbert L. A. Hart—suffers less from political naivety than its theoretical

[12] Oliver Lepsius, *The Problem of Perceptions of National Socialist Law or: Was there a Constitutional Theory of National Socialism?*, in DARKER LEGACIES OF LAW IN EUROPE, 19, 22-23 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003)

[13] *Id.*, 25

[14] *Id.*, 26

[15] *Id.*, 36

[16] Quoted in Matthias Mahlmann, *Judicial Methodology and Fascist and Nazi Law*, in DARKER LEGACIES OF LAW IN EUROPE, 229, 232, my translation (Christian Joerges/Navraj Singh Ghaleigh eds., 2003)

[17] *Id.*, 237

predecessor.[18] At an institutional level Curran explains that history, tradition and customs appear to have conspired to render France especially unsuitable to resist Vichy legislation.[19] The status of the judiciary in the political system has, according to Curran, ever since the revolution of 1789 been inferior to that of parliament and the government (and in the 1958 Constitution courts continue to be referred to as *authorité* as opposed to the other two *pouvoirs*). Another part of the explanation she finds in the legal theory of the day—what she calls 'judicial positivism' and 'formalism'—that is to have paved the way for the judiciary's sanctioning of large-scale Nazi abuse on French territory, including the deportation of 75,000 people, all in breach of rights that previously had appeared deeply embedded in society.[20]

Interestingly, on the last point Curran does not seem at all as certain in her subsequent contribution to the 2005 special issue of the *German Law Journal*. In the meantime she has evidently investigated the application of law in Germany during the National Socialist era and found that the formally wider scope for interpreting laws in this country was not used to counteract the policies of the regime, but rather to further subvert the rights of individuals. In addition, Curran has now reconsidered her view of the room for maneuver available to French judges. In the 2005 article she points out that also French judges must have been in a position to draw on *principes genereaux* to minimize the influence of the Vichy laws on French legal practice, had they felt so inclined.[21] Curran's own conclusion is anything but optimistic when it comes to the prospects of 'anchoring' democracy and the rule of law with legal means. Instead she says that we should not be expecting much in this regard quite irrespective of the formal status of the judiciary or the content of present doctrine. Curran ends her chapter by referring to Ernst Cassirer's legal philosophical concept—"the constitution as it is written in [their] heads"—as a more fruitful approach to the question of relations between democracy, the rule of law, legislation and application of law.[22]

Elsewhere in the 2003 volume it is observed that different legal areas and research disciplines were of course not all affected in the same way by the extreme ideologies of the 1920s, 30s and 40s. Hueck writes that international law remained a

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[18] CURRAN (note 8), 216, 217

[19] *Id.*, 218

[20] *Id.*, 220

[21] Vivian Grosswald Curran, *Law's Past and Europe's Future*, 6 GERMAN LAW JOURNAL 483, 511-512 (2005)

[22] *Id.*, 212

'normal' discipline in Germany until the outbreak of the Second World War.[23] By contrast, work began early on replacing what the regime considered as a liberal-capitalist *Bürgerliches Gesetzbuch* (civil code), allegedly pervaded by Anglo-American commercialism, with a 'truly German' *Volksgesetzbuch* (people's code). Because the project never was awarded high priority, this People's code was only partly completed, as we are told by Pier Giuseppe Monateri and Alessandro Somma.[24]

In another thought-provoking chapter James Whitman tries to render plausible that there is a historical connection between the concept of *Ehre* (honor) in National Socialist legislation, and the post-war term *Würde* (dignity) featured in, among others, the basic law of the Federal Republic. Whitman does not assert that 'honor' is derived exclusively from National Socialist thought, yet he argues that there is a more subtle link between the two in that a formerly class-based "right to take offence" was extended to other groups in society.[25] Terminologically we learn that *kollektive Beleidigung* (collective insult) was introduced in Nazi Germany to prohibit defamation of members of the SA and SS. But more importantly, in 1934 so called *Ehrengerichte* (honor courts) were created in labor law. The latter reinforced the authoritarian order within the workplace, but also provided more robust safeguards against arbitrary dismissal and new rights to maternity leave.[26]

Whitman thus claims that 'dignity' in some respects can be regarded as a modern successor to the concept of honor in the aforementioned legislation, both implying an egalitarian promise.[27] He further suggests that political inhibitions sometimes impede our discovery of significant legal innovations during this era, within labor law as well as in criminal law (for instance the Nazi regime being the first to systematically apply probation policy). However, on the question of labor law Gerald Neuman raises serious objections in an adjoining commentary, pointing out that German trade unions and the ILO had long struggled to enhance protection against arbitrary dismissal. The fact that Hitler's regime chose not to oppose these demands can neither be assessed as progressive nor an important service rendered

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[23] HUECK (note 5), 85

[24] Pier Giuseppe Monateri and Alessandro Somma, *The Fascist Theory of Contract*, in DARKER LEGACIES OF LAW IN EUROPE, 55, 58 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003)

[25] James Q Whitman, *On Nazi 'Honour' and the New European 'Dignity'*, in DARKER LEGACIES OF LAW IN EUROPE, 243, 250 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003)

[26] *Id.*, 251-252

[27] *Id.*, 245-251

to German workers, Neuman remarks, given that the regime later ordered the disbandment of those trade unions.[28]

In Catholic countries and southern Germany, meanwhile, part of the non-democratic ideologies appear to have been largely compatible with pre-existing legal theories and conservative philosophies pertaining to law and justice. In Austria, Alexander Somek argues, the process of adaptation had begun already prior to the 1938 *Anschluß*. In his chapter Somek then describes three responses to Nazism and Fascism which he believes are captured with the concepts of legal positivism, 'Catholic corporativism' and 'authoritarian constitutionalism.' The powerful influence of legal positivism is understood as having originated from Hans Kelsen's own teaching in Vienna, authoritarian constitutionalism from Carl Schmitt's influential texts and Catholic corporativism from a series of relevant theological publications within and outside Austria.[29]

In Italy and Spain conservatism associated with Catholicism appears to have, at least to a degree, prepared the ground for Fascist ideas in legal scholarship. Yet in Italy there was never any unambiguous link between ideology and legal theory. It may be that the devastating criticism of Benedetto Croce and others of the intellectual content of Fascism—most famously in the 1925 controversy over the 'Manifesto of intellectual Fascists'—helped stimulate a degree of healthy skepticism toward the regime among Italian academics, including lawyers. Massimo La Torre and Giacinto della Cananea agree that the most successful Italian legal theoretician in this period was Costantino Mortati, who among other things coined the term 'material constitution.' Cananea is of the opinion that Mortati's 'material constitution' cannot be seen as a Fascist concept even though it was formulated and primarily remained applicable under Fascism.[30] La Torre holds a similar view though adds that Mortati's critique of the legal positivist paradigm affected Italian legal science for most part of the post-war period.

In an attempt to place continental ideological and theoretical currents in a larger perspective Lawrence Lustgarten and David Fraser have produced one chapter each about illiberal tendencies in Western societies, mainly during the interwar

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[28] Gerald L Neuman, *On Fascist Honour and Human Dignity: A Sceptical Response*, in DARKER LEGACIES OF LAW IN EUROPE, 267, 269-272 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003)

[29] Alexander Somek, *Authoritarian Constitutionalism: Austrian Constitutional Doctrine 1933 to 1938 and ist Legacy*, in DARKER LEGACIES OF LAW IN EUROPE, 361, 369 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003)

[30] Giacinto Della Cananea, *Mortati and the Science of Public Law: A Comment on La Torre*, in DARKER LEGACIES OF LAW IN EUROPE, 321, 334 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003)

period. They argue that sterilization campaigns directed toward disabled and minorities, systematic ethnic discrimination policies and preventive crime fighting geared toward 'habitual criminals' clearly demonstrate that inhumane governmental programs and individual rights restrictions were not limited to National Socialist and Fascist law.[31] Similar programs and proposals were devised in a majority of Western states and widely implemented in some of them (in Sweden sterilization of the 'mentally weak' continued until 1975). Lustgarten and Fraser stress that it was rather the war itself and information subsequently disclosed about the character of oppression in, above all, Germany that prompted Western decision makers to comprehensively reject illiberal law.[32] For the same reason many countries only later limited the opportunities for governments to introduce emergency measures or martial law.

In another article in the *German Law Journal* special issue Fraser also makes a nuanced comparative analysis of constitutions and anti-Semitic legislation in two countries during the Second World War. While Belgium was occupied by Germany and consequently forced to introduce Nazi laws into its own legal system, Bulgaria was formally Germany's ally and mainly political pressure was brought to bear on the part of Berlin. At the end of the day all Jews on Bulgarian territory were saved through a combination of domestic protests, reluctance to deport Bulgarian citizens to a foreign power and a more moderate version of Germany's anti-Semitic legislation. At the same time all Jews living in Bulgarian-occupied northern Greece and today's Republic of Macedonia were handed over to German authorities. Meanwhile in Belgium, 54 per cent of the Jews survived as a consequence of civil resistance and sporadic implementation of the relevant laws by the Belgian state.[33] Fraser emphasizes that deportation, non-deportation and passivity were actions all justified with constitutional arguments, demonstrating the fragility of protection provided by constitutions and citizenship in Europe of the first half of the 1940s.

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[31] David Fraser, *'The outsider does not see all the game…': Perceptions of German Law in Anglo-American Legal Scholarship, 1923-1955*, 87, in DARKER LEGACIES OF LAW IN EUROPE, 87, 94-102 and Laurence Lustgarten, *'A Distorted Image of Ourselves': Nazism, 'Liberal' Societies and the Qualities of Difference*, 113, 114 both in DARKER LEGACIES OF LAW IN EUROPE (Christian Joerges/Navraj Singh Ghaleigh eds., 2003)

[32] *Id.*, 117-129

[33] David Fraser, *National Constitutions, Liberal State, Fascist State and the Holocaust in Belgium and Bulgaria*, 6 GERMAN LAW JOURNAL 291, 291-294 (2005).

D. The Schmitt Reception

The project has paid less attention to the political role played by Carl Schmitt and more to the intellectual heritage that he represents in the context of the period here examined. Schmitt's brief but illustrious career within the Nazi power apparatus, as Hitler's 'crown jurist' 1933-1936, is certainly a subject that has been closely examined elsewhere.[34] The various texts therefore only allude to the legal 'expertise' contributed by Schmitt to the regime's attempt to legally justify the murders of Ernst Röhm and some seventy SA staff in 1934, as well as to the Nuremberg laws which stripped German Jews of most citizens' rights. Nor is there any dispute that Schmitt during his three years inside the regime wrote and co-authored some of the most horrendous official documents produced by the regime until the outbreak of the Second World War.

Judgments are more mixed when it comes to the merits and contemporary relevance of Schmitt's academic texts. His comprehensive treatment of constitutional systems, especially the question of clauses on emergency measures and martial law, are expressly recognized by several authors as original contributions to German and Western legal scholarship. For instance, Ghaleigh considers Schmitt to be an eminently interesting though inconsistent author, who tends to regard each problem from a new angle. In overall terms he therefore characterizes the Schmitt heritage as heterogeneous.[35]

At a general level the majority of authors appear to have views that resemble that of Ghaleigh. Peter Burgess writes about the continued relevance of Schmitt in that he represents "our conduit to an understanding of the European present".[36] For his part Joseph Weiler describes Schmitt as "a mesmerizing intellect which was seductive and evidently transcended any moral qualms".[37] John McCormick appears in agreement with Weiler in talking about "the alluring and tantalizing

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[34] JOSEF W. BENDERSKY, CARL SCHMITT: THEORIST FOR THE REICH (1983); PAUL NOACK, CARL SCHMITT: EINE BIOGRAPHIE (1993); GOPAL ALAKRSHNAN, THE ENEMY: AN INTELLECTUAL PROTRAIT OF CARL SCHMITT (2000); DIRK BLASIUS, CARL SCHMITT: PREUSSISCHER STAATSRAT IN HITLER'S REICH (2001)

[35] Navraj Singh Ghaleigh, *Looking into the Brightly Lit Room: Braving Carl Schmitt in 'Europe'*, in DARKER LEGACIES OF LAW IN EUROPE, 43, 45 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003)

[36] Peter Burgess, *Culture and the Rationality of Law from Weimar to Maastricht*, in DARKER LEGACIES OF LAW IN EUROPE, 143, 144 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003)

[37] WEILER (note 11), 399

quality of his thought".[38] McCormick adds another dimension by recalling that Schmitt himself regarded liberalism as an ideology that embodies and promotes economic rationality, whereas Catholicism represents the values of humanity.[39]

Schmitt's influence over European legal science in general is attributed significant space in the 2003 volume, particularly in the contributions on Italian and Spanish doctrinal legacies. The special relationship between Schmitt and Spain, Menéndez suggests, cannot exclusively be explained by a conservative theoretician retaining his appeal in a bastion of Fascist thought. The reason is also that Schmitt chose the Spanish 19th Century philosopher José Donoso Cortés to sharpen his own criticism of parliamentary democracy. Among other things, Schmitt agreed with the radical conservative Donoso Cortés that deliberation and constant debate always risked undermining the foundations of government and the sense of responsibility among political leaders.[40]

The Schmitt reception in Italy is more complex, due to a variety of German-Italian political and academic bonds that extended beyond extreme ideologies. Schmitt's ideas were certainly well received in some circles, above all in the *Lo Stato* journal edited by Carlo Curcio and Carlo Costamagna.[41] But the incorporation of Schmitt's thinking was according to Lucia Nogler's chapter selective and the impact therefore limited in terms of the wider community of legal scholars. One should not forget that Schmitt himself had developed his ideas under the influence of Fascist thought in Italy itself, the ideology of power since 1922. In this context La Torre criticizes the legal philosopher Norberto Bobbio's characterization of Italian fascism as opportunistic, non-reflective and inconsistent.[42] La Torre goes on to say that not even legal theoreticians who sympathized with Fascism accepted Schmitt's ideas uncritically.[43] As one illustration he mentions that Mortati to a greater extent was inspired by the constitutional theory of Rudolf Smend than that of Schmitt.[44]

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[38] 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, 134 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003)

[39] *Id.*, 134, 135

[40] MENENDEZ (note 9), 353

[41] Luca Nogler, *Corporatist Doctrine and the 'New European Order'*, in DARKER LEGACIES OF LAW IN EUROPE, 275, 299 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003)

[42] Massimo La Torre, *The German Impact on Fascist Public Law Doctrine – Costantino Mortati's Material Constitution*, in DARKER LEGACIES OF LAW IN EUROPE, 305, 307

[43] *Id.*, 309-317

[44] *Id.*, 318

But a more immediate reason to reflect on the significance of Schmitt in connection with European law is his theory of a legal order over and beyond the nation-state, at an international-regional level, some authors believe. Schmitt presented his famous *Großraum*-theory in Kiel on 1 April 1939, that is, several months before the attack on Poland but after German troops had entered Austria and Czechoslovakia. It is obvious that the theory outlines a legal order based on German law in Central and Eastern Europe, although it is less clear with what means Schmitt expected that German influence in that region would expand. In some respects the lecture gives the impression that he 'merely' advocated a counterpart to the so-called Monroe doctrine of the United States in Latin America.[45] In his lecture Schmitt especially emphasized the time-specific character of his conception, and asserted that Germany was less war-prone than the United States and Britain.[46]

On this particular aspect the project participants relate to Schmitt's *Großraum*-theory in highly contrasting ways. For instance, McCormick expresses the view that the theory is wholly inapplicable to the EU for three reasons. The Union lacks a center; it is Western in its political orientation and lacks imperial ambitions in the east; and finally, it generally respects the desires of its members.[47] Neil Walker, to the contrary, feels that Schmitt's *Großraum*-theory is quite useful at the present juncture of European integration. In his understanding the *Großraum* represents a dystopia for the EU, both because of the associations it evokes and due to the power asymmetry—between nations that lead and those that follow—which it presupposes.[48]

Burgess, for his part, identifies what he feels are significant parallels between the crisis of the Weimar Republic of the 1920s and 30s and that of EU legitimacy today.[49] Burgess especially believes that Schmitt's thesis that each constitution has an ontological status, in his 1928 *Verfassungslehre* (Constitutional Theory), represents an important insight. The notion that the term constitution cannot be reduced to a 'relative concept' based on the relation between the different elements of a constitution and its overall form, but that it has an 'absolute' and metaphysical

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[45] McCORMICK (note 38), 138

[46] HUECK (note 5), 80-81 and Christian Joerges, *Europe as Großraum? Shifting Legal Conceptualisations of the Integration Project*, in DARKER LEGACIES OF LAW IN EUROPE, 167, 177 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003)

[47] McCORMICK (note 38), 140

[48] Neil Walker, *From Großraum to condominium – A Comment*, in DARKER LEGACIES OF LAW IN EUROPE, 193, 195-198

[49] BURGESS (note 36), 144

dimension, also has the potential to reconcile the legal and political study of constitutions.[50] Indeed, a contemporary observer may be led to speculate that it was this metaphysical dimension which induced French and Dutch voters, in the summer of 2005, to reject the proposed EU constitution.

Schmitt's 1928 *Constitutional Theory* also includes a distinct typology of intergovernmental relations in four variants, of which *Bündnis* (alliance) and *Bund* (union) constitute the two most demanding political formations. Post-Maastricht EU has according to Burgess shifted from alliance to union in Schmitt's sense, with substantial consequences.[51] It is in Schmitt's opinion only when a union is formed – a step which in principle is long-term or even irreversible – that the 'existential position' of its member states is challenged. Moreover, no union is according to Schmitt possible without its member states being prepared to enter war collectively. On the other hand, Schmitt acknowledges that an antinomy always is retained between the constituent parts and the collective in a union. And a viable equilibrium can be attained, in his view, through a unifying ingredient which may be either nationality, class, religion, civilization or some other centripetal force.[52]

Except for the *Großraum*-concept and the typology mentioned above it is on this last point that certain scholars have perceived Schmitt as relevant for the European problematic of today, in terms of the legacy of his thought on constitutional theory. Schmitt's potential influence over European law became a focal point of a heated debate through the criticism directed by Joseph Weiler at the so-called Brunner ruling of the German Constitutional Court in 1994. Weiler then suggested that the court's justification of a restrictive interpretation of Community law was based on a 'missing demos' thesis, a notion of an organic political community, with roots in a Schmittian figure of thought.

Such a figure certainly does exist in Schmittian texts from the interwar period, most prominently in the 1926 political theory treatise addressing the state of the Weimar Republic.[53] But on this particular point Weiler's claim is contradicted by Ghaleigh, who instead refers to Schmitt's magisterial constitutional theory from 1928. In *Verfassungslehre* not only is ethnic homogeneity never made a requirement for

[50] *Id.*, 151-152

[51] *Id.*, 158-159

[52] *Id.*, 160

[53] CARL SCHMITT, DIE GEISTESGESCHICHTLICHE LAGE DES HEUTIGE PARLAMENTARISMUS (1926)

political union, but Ghaleigh thinks Schmitt's discussion of pre-conditions of democratic rule ought to be acceptable to most liberal political theorists.[54]

Given that the two texts are written at almost the same time, this reviewer nevertheless considers it unreasonable to interpret Schmitt's thought without taking the 1926 treatise, including its concept of democracy based on an organic political community, into account. There Schmitt famously writes that democracy requires homogeneity and "if need arises, the elimination or eradication of heterogeneity."[55] He also exemplifies with the expulsion of Greeks from Turkey and Australia's (at the time) austere immigration laws, making it clear that ethnicity and nationality represent the 'substance of equality' that democracy needs as foundation.

Christian Joerges, who together with La Torre first initiated this project and its retrospective approach to law and legal science during the National Socialist and Fascist era, appears more interested in Schmitt as a backdrop and an antipode to what the EU might achieve in a European perspective. Whereas Schmitt insists on the primacy of politics and inevitability of social conflict in the *Großraum* lecture, Joerges turns to the ordo-liberal tradition in German scholarship, aiming to strike a balance between different values in the basic arrangements regulating society, constitutionally and otherwise.[56] Partly elaborated in a polemic against Schmitt's ideas already in the interwar period, the classical ordo-liberal scholars held that welfare, individual rights and social cohesion represent indispensable components of any well-functioning society.

Joerges notes that these scholars and their ideas played a major role in shaping West German legal approaches and policies, also with regard to Europe, in the post-war period. The authoritarian intimations inherent in a concept like the 'organized economy' were dissolved through the marriage with Social Democratic notions of a 'social market economy,' while the admixture sustained a bias toward regulated markets and paternalism.[57] In Joerges opinion, ordo-liberalism has (along with social science functionalism) served "the EEC's *Sonderweg*" well in providing a theoretical foundation for its (lack of) democratic legitimacy. By the turn of the 21st Century, however, this particular legitimacy basis may well have run its course. Economic globalization and the dramatically widened scope of EU activities seem to be rendering this option obsolete.

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[54] GHALEIGH (note 35), 49-50

[55] SCHMITT (note 53), 14

[56] JOERGES (note 46), 178-180

[57] *Id.*, 187-189

E. Concluding remarks

The Special issue of the *German Law Journal* contains contributions that directly relate to the 2005 debate on the proposed EU constitution and therefore supposedly are less significant for long-term research on European law and its historical roots. Among certain authors there are also political overtones that a (less 'EU-phoric') Scandinavian reader may find somewhat bizarre. That is the case with the direct appeal on the part of Mattias Kumm to scholars to participate in the construction of a European legal history and therefore in "proactive politics of memory".[58] In this context Kumm adds that he would find it natural that the EU Commission financially supported universities and other seats of higher learning for giving courses in European legal history at their law faculties.

Such an appeal is probably not even needed. The idea of establishing an *acquis historique communautaire* has been part of the European vision since the 1950s.[59] And more or less consciously a growing number of scholars appear to be hard at work providing European law with a genealogy, that is, an ideational and doctrinal lineage.[60] Considering that legal science, along with political science, for a couple of centuries has suffered from a 'national bias' it cannot be detrimental to broaden our intellectual horizon beyond our closest domain, quite regardless of the significance of the EU. Such a project can make us aware of a number of kinships, connections, and resemblances common to national legal systems long before Europeanization and globalization entered our terminology.

But what would be the appropriate starting point for this lineage? Do we begin with *Codex Justinianus* or with the Treaty of Rome? With legislative acts or with the political and historical conditions behind their emergence? And why is European law almost without exception presented as a 'success story?' Why not problematize this peculiar, theoretically challenging, legal order? Why not, for that purpose, use precisely the uncomfortable and politically controversial portions of legal history which form part of its foundation? And why not try and analyze the *communist* totalitarian legacy, which in the two volumes mentioned here only are discussed in passing? The latter should preferably take place in a manner that avoids—as in the

[58] Mattias Kumm, *Thick Constitutional Patriotism and Political Liberalism: On the Role and Structure of European Legal History*, 6 GERMAN LAW JOURNAL, 319, 355 (2005)

[59] Fabrice Larat, *Present-ing the Past: Political Narratives on European History and the Justification of EU Integration*, 6 GERMAN LAW JOURNAL, 273, 287-290 (2005)

[60] Alexander Somek, *Constitutional Erinnerungsarbeit: Ambivalence and Translation*, 6 GERMAN LAW JOURNAL, 357 (2005)

Federal Republic a number of years back—reinvigorating fruitless debates about moral equivalency.

The project reviewed here delivers few answers to these broader questions. After two volumes and several years of seminar and conference activities, one might even critically ask whether the *Darker legacies*-project has successfully established a theoretical connection between European law and the legacy from totalitarian ideologies with which our continent still grapples. But then again, this was never a traditional, tightly planned research project with a fixed agenda. It was at the same time backward- and forward-looking, and it paid attention to a large number of legal fields while constitutional issues remained at the core. Nor was there much unity concerning the use of a certain methodological approach.

Instead, the project has investigated what used to be largely unexamined problems and puzzles at the intersection between several sub-disciplines of the legal and social sciences. In the absence of a systematic plan the authors have utilized an exploratory approach in areas where there are few precedents to draw on. An interest in discipline transgressing research problems seems to have been an essential requirement for participation in the project, and several of the authors appear to have been inspired precisely by its heterogeneity. The majority of texts eventually published indicate the presence of a powerful intellectual curiosity regarding the status of European law in relation to national law, democratic forms of government, and knowledge acquired through methods of legal science. Some of the authors have clearly achieved more than mere exploration. Several contributions are of very high quality and will no doubt be frequently cited in further research.

As regards the three questions that I personally have wished to discuss in light of the aggregate results of this project, the answers may be summarized in a few sentences. The two volumes show that the issue of continuity of personalities is increasingly well publicized through ongoing research at the same time as contemporary scholars and practicing lawyers are more detached to the topic, something that helps depoliticize the area. By contrast, a comprehensive description of doctrinal legacy constitutes a much bigger challenge, because traces of this legacy only becomes visible after thorough analysis and disclosure of linkages beyond that between persons and institutions. Especially in countries where totalitarian ideologies indirectly affected society the phenomenon seems to have been suppressed, with the result that research never paid much attention either. In this respect a project relying on a systematic theoretical and methodological approach could probably achieve more.

And finally, there is the question of Carl Schmitt's influence in the past and in the present. Several project participants declared the view that Schmitt's impact on German legal science and, by extension, over the entire continental tradition, should not be overestimated. Many nevertheless agreed that it is nearly unthinkable to apply the terms constitution and legitimacy at a level 'above' that of the classical nation-state without Schmitt's work, in one way or another, being mentioned or critically assessed. If this is true it seems more fruitful to acknowledge, as have concluded the majority of participants in the *Darker legacies*-project, that particular influence and openly discuss its possible implications and relevance for legal science and European law of today.

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