

Comparison and History

*By Christoph Möllers**

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**

A.

In the years between World War One and World War Two, the already established forms of democratic government failed in most European states. Their place was taken by totalitarian or authoritarian systems of right-wing origin. Besides the Weimar Republic, this concerned, for example, Greece, Austria, Spain, Portugal, and Poland. Until the time of the German occupation, democracy rarely survived, examples being in Britain and France, old democratic countries, and in the Netherlands and in Scandinavia. Not often enough, it seems, does one realize that there is a common European past of authoritarianism. A “darker legacy”, which is not restricted to the unequalled national socialist loss of civilization developed within Germany and was subsequently exported beyond. The volume at hand takes on this legacy with regards to European traditions of law. It is the result of a scientific project at the European University Institute in Fiesole/Florence. In the preface, its editors remark how unusual it is even for EU research funding to have this combination of research into Europeanization and into totalitarianism. The volume at hand shows how fruitful this combination can be.

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The fundamental problem, to formulate the issue of discussion in this volume, will be illustrated by two differentiations. Firstly, there is the question of to what extent the dark legacy of the authoritarian epoch should actually be treated as a common European phenomenon or to what extent the analysis goes into the singular relevance of German national socialism for this epoch. Secondly, one has to ask to what extent a common European past, if we assume such a thing to exist, as a cultural phenomenon does, in fact, relate to the concrete political project of European integration. In this context, it has to be considered what such a relationship implies for the present. Joseph Weiler aptly summarizes the problem in his Epilogue:

“The purpose is noble through and through, though the triple dangers of guilt by association, of trivializing the truly evil by facile analogy and of inadvertently becoming an apologist for that for which no apology is needed are not easy to escape.”

The volume does not opt for either. It opens the field into very different directions. This is legitimate in order to approach a new object of research. It is not necessarily unproblematic for readers who want to know to which questions this volume holds answers. The open field of research is joined – which is more welcome – by open answers, as some contributions are supplemented by critical commentaries.

B.

Speaking about right-wing totalitarianism means speaking about Germany. First of all, Michael Stolleis gives us once more a compelling survey of the post-war history of national socialism in the legal studies of West Germany. An originally national conservative professional guild became part of national socialism and was then quite seamlessly integrated into the Federal Republic of Germany. The legal guild continued what had to be continued. It avoided retrospection and still does so, if retrospection can be avoided, as many an obituary shows right up to the present day. Oliver Lepsius develops the idea that this smoothness could also originate from the constitutional emptiness of German national socialism. He does that by arguing the thesis that German national socialism had no constitutional theory of its own. Instead, it systematically de-legalized its own structures of authority in a de-formalizing manner. This can be juxtaposed from a comparative perspective with the contribution of Vivian Grosswald Curran. Comparing the legal orders of Germany and Vichy-France, her study supports the supposition that racist law in Vichy was different from German law in that it was based on a formalist understanding of methodology. A similar problem inspires the comparison of German and Italian contract law in the contribution of Pier Giuseppe Monateri and

Alessandro Somma. The remarkable analysis of the fundamental differences between national socialist and fascist labor law by Luca Nogler approaches Europe's darker legacy from a comparative perspective as well. Not every comparison achieves its objectives, however. David Fraser's analysis of the scientific reception of German racial laws in Britain and the United States comes to a noteworthy result: criticism was rare, and curious approval dominated the legal scientific scene. But can this relativize the differences between the Anglo-Saxon and the national socialist legal order – or would this be a precipitous equation of legal science and the legal system? In his contribution, Laurence Lustgarten expresses critique of the latter kind.

In many cases, only asymmetric comparisons work. For many reasons, German national socialism – the beast in the zoo of “normal” European fascism – can only be gripped in particular ways. In particular, if one traces the anti-democratic traditions of Europe, one has to neglect the special case of Germany from time to time. Instead, one should direct one's perspective to the legal orders of Italy, Spain or Austria before 1938. In this volume, such contributions are among the most interesting for German readers, particularly, if they are presented as discussions among researchers. One example of this is the controversy between Giacinto della Cananea and Massimo La Torre. Their argument concerns the classification of the Italian constitutional theorist Mortati. This, in turn, is a controversy on the function of the category of the material constitution for the preparation and enforcement of a fascist legal order. Another example of such a discussion is the dexterous depiction of the fascist turn in Spanish constitutional law after the Civil War by Augustin José Menéndez. The analysis of the end of Austrian democracy by Alexander Somek also falls into this category.

Writers on the law of national socialism often write about Carl Schmitt. In this volume, John P. McCormick contributes such an article. This is possibly too much of an honor, as much research on this topic has already been done. In particular, Schmitt's theses on the international law of the *Großraum* (sphere of influence) suggest an examination of the European project. But maybe it is not even necessary to swerve to Schmitt. Having performed such a detour, Ingo J. Hueck correctly relativizes the significance of Schmitt and focuses on other historical figures.

But is not all of this history? How does it relate to the process of Europeanization? The most precise attempt at an answer to this question is provided by one of the editors: in a subtle reconstruction, Christian Joerges links the theory of the national socialist *Großraum* with semantics from the days of early European integration: technocracy, market organization und the prominent role of administration are the lines that are transported from one order to another, for example, by ordoliberalism or by the tradition of German administrative and European law (Hans

Peter Ipsen). This analysis is desirably concrete, but could be continued and further examined on the institutional policies of the early EEC. According to Somek, however, it remains questionable as to what extent the authoritarian order of Austria in the 1930s can be turned to a reference magnitude for the present European Union. Continuities do not necessarily imply parallels.

C.

The common European past will not quickly wear away, quite to the contrary: the more forceful the longing for a European identity voices itself and the more it is institutionalized in the form of constitution-like legal texts, the more inevitable the search for elements of a common European political tradition will become. In particular for Germany, this is painful, as Germany has always liked to turn to Europe in order to turn away from its own past. It is also difficult for countries upon which no shadow is cast, for example, Great Britain or the Netherlands. But if European identity is not to be restricted to pure garment-dyeing, the long time resistance of many European nations with regard to an order of common liberty cannot be worded away by any kind of preamble. There are also more tangible reasons which speak for the coverage begun in this contribution, for example, the clash of European identity policy with European foreign policy. In the event of such a clash, Europe will have to answer the question of how it is going to deal with the Turkish genocide of Armenians – or with what right European intellectuals can begin to give moral lectures to the United States instead of exercising political criticism. With regard to growing anti-Semitism in Europe, the French philosopher Alain Finkielkraut states:

“L’Europe démocratique a eu raison du nazisme, mais le nazisme est européen. La mémoire rappelle sa vocation à l’Amérique, et à l’Europe sa fragilité.”¹

This statement implies such a link of past and present. The justification of such a link needs historical examination as well. On our way to Europe, our shadows will still haunt us for a long time to come. In fact, there is some evidence that they will have to come much closer in order for us to understand them, and for Europe to understand itself. The contribution at hand is a milestone on this painful path.

¹ ALAIN FINKIELKRAUT, AU NOM DE L’AUTRE, REFLEXIONS SUR L’ANTISEMITISME QUI VIENT 16 (2003).