

Sleeping Dogs: A Blemish on the Clean Slate of Western Liberalism

By Hauke Brunkhorst*

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, \$116.00.**

What does the European Union (EU), the guardian of peace and human rights that was founded against war and fascism, have to do with the Nazis? Initially, Europe's union, that is, the creation of a "*Großraum*" (sphere of influence) dominated by Germany, was the only reasonably realistic ambition during the war that the fascist and neo-conservative elites of the continent could reach a consensus with the Nazis. However, right from the beginning, the new post-war community opposed any form of unilateral rule, particularly by the Germans. Yet, if Angela Merkel (the current German chancellor) had her way, we would soon see a Christian-dominated *Großraum* with privileged Turks; their privilege being that they are not an equal member of the EU.

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As Christian Joerges¹ and Michael Stolleis² show in their articles in *Darker Legacies of Europe*, Europe's new legal community accommodated many an old Nazi, at least in Germany. Thus, Nazi-lawyer Hans Peter Ipsen managed to transform himself into the leading liberal European Community legal scholar, much like Ernst Forsthoff or Helmut Schelsky in their respective field. Since their juvenile attraction with the Nazis and their ethnic *Volk* had not worked out, they felt compelled to affirm the inevitable rise of technical-liberal civilisation: Europe as a technocratically-steered, ordo-liberal *Großraum* with a purely functional constitution. This offered enough scope to skilful elites whose rule was unruffled by any democratic impositions. Their elitist aloofness from democracy conferred a European blessing on the continuity of their own life stories.

The notion that liberalism was blemished by the Nazi regime is also illustrated by the other contributions to the important volume, *Darker Legacies of Europe*. Inspired by Michel Foucault and Giorgio Agamben, David Fraser and Lawrence Lustgarten³ compare Nazi law-making and jurisprudence with that of the Anglo-Saxon liberalist tradition; a comparison that is by no means flattering.

The similarities between Nazi Germany and its western neighbours are discomfiting. They range from debates on euthanasia, eugenics, race law, and doctrines of prevention through elimination in 1930s criminal law to the British anti-terror laws of the late 1960s. The few immigrant voices that were opposed to these viewpoints were not loud enough to make themselves heard.

The post-modern critique of liberalism rubs salt into Anglo-Saxon liberalism's wound, even if it is itself one-eyed. The comparison of the official legislative programmes simply ignores that the Nazi state was a "dual state"⁴ of public law and extra-legal measures that, from the very first day, had its centre in the system of concentration camps.

¹ Christian Joerges, *Europe, a Großraum? Shifting Legal Conceptualisations of the Integration Project*, in DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS, 167 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003), available at: <http://www.iue.it/PUB/law02-2.pdf>.

² 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.

³ 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; and Laurence Lustgarten, 'A Distorted Image of Ourselves': Nazism, 'Liberal' Societies and the Qualities of Difference, in DARKER LEGACIES OF LAW IN EUROPE, *id.*, 113.

⁴ ERNST FRAENKEL, THE DUAL STATE (1941).

But not even the liberal, formalistic procedures of legal positivism, which remain deeply culturally embedded to this day, could prevent French judges from repeatedly implementing the anti-Jewish decrees of the Vichy regime. France was, of course, occupied territory at the time, and the loss of its republican core had already severely demolished legal formalism.

It is also surprising that in Spain—as Agustín José Menéndez shows⁵—the most important constitutional lawyers of the Franco regime had been flawless liberals in the republican era. Could there be a grain of truth to Herbert Marcuse’s old thesis that the defencelessness of liberalism in the age of fascism has internal explanations?

The moral of the silenced pre-history of the EU is that liberalism without egalitarian democracy, as nowadays practiced by the EU and its organs, is worth nothing and is liable to fall at the first hurdle. Even if Alexander Somek’s accurate description of the “snobbish reference to ‘non-majoritarian’ institutions” and “authoritarian liberalism”⁶ is pompously glorified as “deliberative democracy,” democracy cannot exist without egalitarian procedures of decision-making, and contemporary Europe does not have sufficient egalitarian procedures of decision making. But the European elitist discourse will suppress this lesson from the past with the same pigheadedness as the TV journalists in the world of politics.

⁵ Agustín José Menéndez, *From Republicanism to Fascist ideology under the Early Franquismo*, in DARKER LEGACIES OF LAW IN EUROPE (note 2), 337.

⁶ Alexander Somek, *Authoritarian Constitutionalism: Austrian Constitutional Doctrine 1933 to 1938 and its Legacy*, in DARKER LEGACIES OF LAW IN EUROPE, *id.*, 361.