

Dark Legator: Where the state transcends its boundaries, Carl Schmitt awaits us

By Alexandra Kemmerer*

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. Fragmentations**

In his commentary on the first paragraph of Carl Schmitt's seminal essay "The Concept of the Political" (*Der Begriff des Politischen*), Christoph Schönberger, constitutional lawyer at the University of Freiburg, suggests it is the variety of "aspects of his writings that leave behind the concept of the state that inspire our interest in Carl Schmitt".¹ Schönberger comments on the book's now classic second edition, published in 1932, revised and substantially changed by the author subsequently to a lesser known first edition of 1927. Schmitt, he argues, discussing the *problématiques* of an international law based on humanitarian interventionism and of the challenges created by international terrorism, provides "in his *Bundeslehre* (federal theory) a theory of federal systems no longer confined to the

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¹ Christoph Schönberger, "Staatlich und Politisch" (20-26). *Der Begriff des Staates in Carl Schmitts BEGRIFF DES POLITISCHEN*, in CARL SCHMITT: DER BEGRIFF DES POLITISCHEN. EIN KOOPERATIVER KOMMENTAR 21, at 43 (R. Mehring, ed., 2003).

concept of the nation state, leaving behind the impractical dichotomy of *Staatenbund* (federation of states) and *Bundesstaat* (federal state)".²

Is it possible that in the writings of Schmitt there are hidden truths, which have eluded us, truths regarding the contemporary fragmentation of the nation state and its dissolution into the supranational, and consequently, truths on the political *gestalt* of Europe? Are scholars such as Christoph Schönberger correct in assuming that the works of the disputed legal theorist speak more about current problems and challenges than the very works explicitly claim? Do the writings of Schmitt provide insight on the complex European multi-level-system with its characteristic "sovereign power, transcending the nation state"?³

Maybe Schmitt's conceptualizations are as present in the legal and political structures of EU governance as they are in recent juridico-political discourses on globalization and Europeanization. Taking a bold and courageous approach, Christian Joerges, Professor of Law at the European University Institute, Florence, and at Bremen University, traces back the complex and sometimes obscurely intertwined lines of influence of Carl Schmitt's *Großraumtheorie* (theory of spheres of influence) on the post-war European integration-project.⁴

At a conference of the *Reichsgruppe Hochschullehrer des Nationalsozialistischen Rechtswahrerbundes* (Reich section of professors in the National Socialist Association of Lawyers), held in Kiel in early April 1939, only days after the German invasion of Prague, Schmitt, for the first time, introduced his new theory of international law, the "Großraum order in international law, with a ban on intervention for powers from outside the sphere" ("*echtes, Interventionen raumfremder Mächte abwehrendes Großraumprinzip*"). Against the backdrop of the establishment of the "Protektorat Böhmen und Mähren" and the instalment of the pseudo-sovereign Slovak state, Schmitt's theory garnered wide attention in the national and international press. Before the end of the same month as the conference, the paper appeared in print. Schmitt based his concept of spheres of influence on a rather unorthodox interpretation of the 1823 Monroe Doctrine. However, as Hasso Hofmann stressed in 1964 in his classic dissertation on Schmitt's political philosophy, at the core of Schmitt's argument is not the idea of greater spheres as implied by the Monroe

² *Id.*, at 43.

³ Horst Dreier, *Wirtschaftsraum – Großraum – Lebensraum. Facetten eines belasteten Begriffs*, in RAUM UND RECHT. FESTSCHRIFT 600 JAHRE WÜRZBURGER JURISTENFAKULTÄT 47, at 68 (Horst Dreier, Karl F. Kreuzer & Hans Forkel, eds., 2002).

⁴ 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).

Doctrine, but merely an attempt to link the “idea of geographical repartition with a progressive political concept”.⁵

B. From State to *Großraum*

Schmitt argued that international law’s classic paradigm of a co-ordination of equal and sovereign states is in a process of dissolution. There would be various *Großräume* (spheres of influence), where, at the centre of each, a *Reich* acts as the leading political power. Among Schmitt’s *völkisch*-radical contemporaries from the élite group of SS lawyers—some of whom brought his rapid rise to the top of the Third Reich’s politico-academic hierarchy to a sudden halt by the end of 1936—the idea of the concept of *Reich* as the core notion for a new system of international law elicited harsh criticism. Schmitt set out, as Reinhard Mehring emphasizes, “to reconceptualize power-dominated political realities as political order and system of legal relations”.⁶ For *völkisch* propagandists such as Reinhard Höhn or Werner Best, there was definitely too much *Staat* at the core of such a conceptualization. The relations emerging between *Großraum* and *Reich* could, suggested Best, not properly be labelled as “international law” – the *völkisch* order of the *Großraum* provided merely a framework for new power structures balancing *zwischenvölkische* (inter-people) relationships and interests. In Best’s theoretical approach which sought to legitimize the German policy of annihilation and expulsion, Schmitt’s *Großraum* underwent a profound transfiguration into *Lebensraum*, a sphere of “real” power politics falling outside all categories of international law.

Indeed, Schmitt’s reflections gained their suggestive plausibility only against the background of the Weimar era discourse on an emerging *Großraumwirtschaft* (*Großraum* economy), as Horst Dreier recently explained in a detailed analysis of the changing meanings and functions of spatial concepts.⁷ Yet, while Schmitt strikingly describes the dissolution of the post-Westphalian system, at the centre of his *Großraum* lurks an empty space. It was left to others to sketch new structures replacing the classical—in Schmitt’s view outdated—system of sovereign nation states. Hans-Peter Ipsen, the later doyen of European Law in Germany, figures prominently among these theorists, with what was his at first glance inconspicuous article on *Reichsaußenverwaltung* (External administration of the *Reich*), published in 1942.

⁵ HASSO HOFMANN, LEGITIMITÄT GEGEN LEGALITÄT. DER WEG DER POLITISCHEN PHILOSOPHIE CARL SCHMITTS 209 (2002).

⁶ Reinhard Mehring, *Macht im Recht. Carl Schmitts Rechtsbegriff in seiner Entwicklung* in 43 DER STAAT 1-22 (2004).

⁷ *Supra*, note 3, at 66-67.

C. Europe a *Zweckverband*?

Twenty years later, in the midst of the rapid development of the European integration project, which was intended as a response to the traumatic experience of Europeans under National Socialism and Fascism, Ipsen identified the three European Communities as “purposive associations of functional integration” (*Zweckverbände funktionaler Integration*). Based on Ernst Forsthoff’s theory of the industrial society, Ipsen thereby provided an influential model, a starting point for further analysis and conceptual development of the unprecedented construction of a supranational system of economic law, binding for sovereign nation states.

In his reflections on the “disquieting legacy” of National-Socialist legal thinking, Christian Joerges writes:

“The concept ‘purposive association’ opened up Community law to tasks that had no place in an *ordo*-liberal world – without exposing it, on that account, to democratic requirements.”⁸

Ordo-liberalism and functionalism promised answers to the legitimation dilemma of a new and unprecedented system of supranational governance. When taking a closer look at the limits of both positions, Joerges argues, the continuities with pre-democratic heritages of German legal culture become strikingly visible. Yet, Europe, in search of its constitutional structure, does not have to content itself with inherited alternatives.

Being a multi-level-system with multi-faceted levels and *fora* of political action, the actual EU is not a Schmittian *Großraum*. However – as John P. McCormick points out – it might be a worthwhile effort to take up the challenges provided by Carl Schmitt when reflecting upon the characteristics of European identity. In his contribution to the volume edited by Christian Joerges and Navraj Singh Ghaleigh, a collection of essays resulting from research conducted beginning in 1999 at the European University Institute on the continuities and ruptures of European jurisprudence in the twentieth century, McCormick traces Schmitt’s conceptions of Europe, from the splendid 1923 essay “Roman Catholicism and Political Form” (*Römischer Katholizismus und politische Form*) through the *Großraumtheorie* of 1939 to Schmitt’s 1950 *opus magnum* “The Nomos of the Earth in the International Law of

⁸ 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, *supra* note 4, at 190.

the *Jus Publicum Europaeum*" (*Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*).⁹

The latter, first published in English in 2003, rapidly made its way into current supra-, trans- and international legal discourse: Robert Howse, professor of international economic law at the University of Michigan Law School and a leading theorist of "federal visions", juxtaposes Schmitt's conceptualizations and the works of Alexandre Kojève.¹⁰ Yet, apart from the works of authors taking as subtle a contextual approach as Howse, the barriers of language often narrow scholarly perspectives to an eclectic and rather coincidental examination of single writings and constructions of the *Begriffskünstler* Schmitt, who was a skilful master in the legal universe of words and concepts. The complexity of his questions, which is the essence and reason for their continuing timeliness, remains in the dark.

A more differentiated approach is also needed when confronting European law's "darker legacy". An important and decisive step on this path could be, as Michael Stolleis proposes in his preface to Joerges' and Ghaleigh's edited volume, a comparative history of twentieth century European jurisprudence which takes a demanding double-perspective by focussing microscopically on individual figures while at the same time unveiling macroscopical structures.¹¹ Stolleis stresses that such a project requires scholarly courage that cannot to be shattered by collegial marginalizations.

⁹ John P. McCormick, *Carl Schmitt's Europe: Cultural, Imperial and Spatial Proposals for European Integration, 1923-1955*, in DARKER LEGACIES OF LAW IN EUROPE. THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS, *supra* note 4, at 133.

¹⁰ Robert Howse, *Europe and the New World Order: Lessons from Alexandre Kojève's Engagement with Schmitt's "Nomos der Erde"* in 19 LEIDEN JOURNAL OF INTERNATIONAL LAW (Special issue: International Theory of Carl Schmitt) (forthcoming 2006).

¹¹ Michael Stolleis, *Reluctance to Glimpse in the Mirror: The Changing Face of German Jurisprudence after 1933 and Post-1945*, in DARKER LEGACIES OF LAW IN EUROPE. THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS, *supra* note 4, at 1, 17–18.