

How much of Nazi and Fascist Law survived in the new Europe?

*By Detlev F. Vagts**

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.**

Nazism and Fascism undoubtedly left shadows on the German and Italian legal systems. However, most of the contributions to this volume do more to record the state of German and Italian thinking before 1945 than they do to evidence links to the post-1945 Europe. This review will focus on some papers that do strive to show links. One is particularly glad to have Michael Stolleis' review of the ways in which successive cohorts of German law teachers have reacted to the Nazi background. That will be particularly true for readers who cannot make their way through his more comprehensive and detailed account contained in his large history of German public law. James Whitman of Yale has written a provocative account of Nazi concepts of "honor" and its relationship to later European concepts of human dignity - to which Gerald Neuman of Columbia has written a skeptical response. Neuman notes that some institutions prevalent in Germany before and after 1945 had their roots in the monarchy or in the Weimar republic and were not Nazi inventions. The fact that a given idea was once expressed by a Nazi does not mean that it was wrong; Hitler was ahead of Churchill, Roosevelt and Stalin in recognizing the evils of nicotine. As one with a background only in German legal history I found the chapters on Italian and Spanish law during the regimes of

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** The Review was previously published in 51 AMERICAN JOURNAL OF COMPARATIVE LAW 959 (2003).

Mussolini and Franco very new and enlightening, but saw little evidence of survival.

The biggest portion of the book and the most tantalizing is the part devoted to the question whether the Nazi order casts a shadow on the European Union. Basically seven of the nineteen chapters deal with this topic and it will be the focus of this review. Unfortunately none of them really squarely takes a position on this issue. Thus we have to analyze the question on our own. There are several possible ways in which that shadow might be generated. First, there is the simple fact that Hitler's *Großraum* (sphere of influence) occupied almost all of the geographical space as does the European Union. But various other orders have covered the same ground. The Romans were masters of all the original Treaty of Rome countries except a thin sliver between the Roman wall and the post-1945 division between the Germanies. Similarly the Holy Roman Empire and later Napoleon covered that territory. But spatial congruence is not enough; a building can in succession house an imperial government, a democratic parliament and a foreign viceroy in the same space without making them continuous.

Second, each of the pan-European systems cast a shadow on future legal systems but in very different ways and one must ask in each case just what that shadow was. For example, long after the legions left northern Europe Roman law was dominant in France and Germany. Napoleon's Code Civil still influences systems other than the French. Did ideas about the *Großraum* as found in the works of Carl Schmitt and Reinhard Höhn have a similar impact on the European Union? Several of the authors cite *THE TAINTED SOURCE: THE UNDEMOCRATIC ORIGINS OF THE EUROPEAN IDEA*, by John Laughland¹. He makes the point that leaders of the Nazi regime thought in terms of a Europe which would have no tariffs or other barriers to a single economy. One Nazi official wrote of "the European Economic Community" (with initial capitals) Laughland might have noted that German thinking in 1914 also ran to advocacy of a continent-wide economic framework.² Indeed one might refer to the German *Zollverein* (customs union) which anticipated the German empire. Laughland moves on to criticize the Union for its lack of democracy though he does not really trace a link between the Nazi-fascist past and that characteristic of the Community and the Union. He seems rather to attribute that quality-now known as the "democratic deficit" - to the influence of economist-

¹ JOHN LAUGHLAND, *THE TAINTED SOURCE: THE UNDEMOCRATIC ORIGINS OF THE EUROPEAN IDEA* 35 (1997).

² This argument is developed in NIALL FERGUSON, *THE PITY OF WAR* 171, 460 (1999), who even suggests that if Britain had not entered World War I "continental Europe could therefore have been transformed into something not wholly unlike the European Union we know today" 460.

technicians. One would have to consider on the other hand how much effort has been expended in Europe to make sure that no Nazi empire re-emerges. That is, after all, what the European Convention on the Protection of Human Rights and Fundamental Freedoms – not an institution Kaiser Wilhelm or Adolf Hitler would have found appealing – is all about. And the same is true of NATO, which was supposedly designed to keep the Americans in, the Russians out and the Germans down. As Joerges remarks “[t]he European unification efforts that started with the 1950 Schuman plan and led to the Treaty of Rome in 1957 meant a very deliberate overcoming of the racist imperialism of the Nazi regime.”³

Third, one can look at the personal carry over. As Joseph Weiler writes in the epilogue “sociologically, the Dark Legacy is said to have a human genealogy which extends far beyond the twelve years. Schmitt begat Ipsen and Ipsen begat...etc. right into the heart of the German European law professoriate.”⁴ Schmitt is of course the star of the book, the only exciting law professor of the Third Reich and Ipsen was a law professor and occupation functionary in Belgium under the Nazis who wrote in 1942 on the German administration of the non-German parts of Europe and later wrote the first great textbook in German on European law. But Ipsen was not a “father” of the Treaty of Rome in that he played no role in its drafting. It is said that a lecture of his may have influenced the judges of the Court of Justice in deciding the *Costa* case.⁵ A reading of that opinion fails to turn up anything particularly Nazi. It famously asserts that the EEC treaty has created its own legal system but emphasizes that the states have voluntarily – unlike 1939-45 – limited their sovereign rights.

Fourth, there is a more generalized emotional level. Weiler remarks that “[I]t is one of the more pernicious aspects of the Dark Legacy that nationalism and patriotism have been left to the likes of Haider and Le Pen and the pens at their service.”⁶ Or as McCormick says, “but Habermas has not answered what might definitively justify the very demarcation of a European *Großraum* from the rest of the world, and his plan for legal-democratic government in the EU is hardly operational at the present time. Until these questions and problems are addressed, Schmitt’s work and career,

³ Christian Joerges, *Europe as Großraum? Shifting Legal Conceptualisations of the Integration Project*, in DARKER LEGACIES OF LAW IN EUROPE, 167, 185 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003).

⁴ JHH Weiler, *Epilogue*, in DARKER LEGACIES OF LAW IN EUROPE, 389, 397 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003).

⁵ Joerges, *supra* note 3, at 183.

⁶ Weiler, *supra* note 4, at 401.

like a specter, haunts (sic) the study of European integration.⁷ This raises the issue whether Europe is at some psychic level a Christian community, with all the repercussions that has for Jewish and Muslim participation. This is an issue that only in part is attributable to the world of law as distinguished from the general racist and nationalist atmosphere generated by the Nazi regime. Hitler, Goebbels and Streicher have far more responsibility for this than does Schmitt. And it implicates the curious difficulty Europeans have in generating a European nationalism or patriotism over and above the traditional clan feelings.

One is left at the end with the impression, as before, that the German generation of the 1970s succeeded quite well, if belatedly, in cleaning German law and the German judiciary of traces of Nazism and that there was very little connection between Nazi ideas of *Großraum* and the European Community/Union. That is particularly true if one brushes aside the references to Carl Schmitt that sprinkle the book as well as a large body of other recent literature. His important ideas were largely pre-Nazi rather than Hitlerite although he tried opportunistically to take on a Nazi coloration. With uncharacteristic reserve Joseph Weiler rather apologetically describes him as a "rascal." I would apply to him the epithet that one nineteenth century American legislator hurled at another – both brilliant and corrupt he stinks and shines like a dead mackerel in the moonlight.⁸

⁷ 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, 141 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003).

⁸ For further defense of this position see Detlev F. Vagts, *Carl Schmitt in Context: Reflections on a Symposium*, 23 CARDOZO LAW REVIEW, 2157 (2002).