

## Historical-Legal Knowledge - And What To Do With It

By *W.T. Eijsbouts*\*

**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.

What's a man to do knowing that Hans Peter Ipsen, first and long time doyen of the Community law profession in Germany, started his career as one of Hitler's willing academics? And what, suspecting that the ECJ decision in *Costa v. ENEL* (supremacy) drew inspiration from a speech of the same Ipsen's harking back to his older theories and attended by ECJ-justices just five days before their judgment? Taken together these two facts suggest some intimate legal continuity between the darkest period of the last century and one of its most promising political projects. Here's the central motif of Christian Joerges' still running Florence research project *Darker Legacies of Law in Europe*. Calling the subject delicate is an understatement.

Continuities come in sorts. Is European law in a way infected by this dark element in its prehistory; are Nazi ideas carried over into it? Or worse, is even the whole European project a new guise of the same older, darker, ambitions? Or, modestly, are some flaws in the Union, related to its law, better intelligible to one knowing this historical affinity? Or, even more modestly, are these seeming affinities between the two different legal worlds of the Reich and the Union food for comparative discussion without compelling perspectives? Et cetera. With its twenty different authors, the present book logically leans to this last modest ambition and

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given this the result is far more than satisfactory. The solid book is exciting reading. But unease lingers as long as it does keep afloat some suggestions of malign legal affinities between the Union and the Reich, some *vitia originis* in the Union legal doctrine, without putting them to some consistent yes-or-no test. No one would deny Europe a dark past. To have no darkness overcome or hidden somewhere makes for a dull personality anyway. Now is the Union basically a part of Europe's redemption or also a channel of undigested repression (*refoulement*)? Was law an autonomous agent of malice in Nazi Germany or mostly an expression of malice and degeneration in more powerful departments of reality? Is the law subsequently an autonomous agent or mechanism for the past's dark slumbering powers? And can it redeem the past by itself? One would have wanted a keener analysis of the project's premise.

The book discusses three main channels of legal continuity from before to after WW II, most obviously existing inside Germany, but now opened up for investigation also between the Reich and the Union. They concern legal personnel, legal doctrine and meta-legal concepts respectively. Ipsen figures in all three, as does the inevitable Carl Schmitt.

## B.

1. Persons - Michael Stolleis (Frankfurt) opens the book with a prologue on the German mostly academic legal profession's refusal to look its past in the eye and make a clean break. This is sad but no real news. The good news, implicit in his piece, is that literature on suspicious personal continuities is beginning to be overwhelming and that almost all of the culprits have been identified. They have been remarkably longevous but are now dead, leaving only second and third generation echo's. These personal connections have no great importance, certainly not for Europe. They do help, however, to point out links in the fields of doctrine and meta-legal ideas, including those touching on the later European law (as in Ipsen's case).

2. Doctrine - German legal doctrine in the fascist era had its most obvious dark spots in the fields of criminal law, eugenics. These ideas however were not strange to the times even in the Anglo-American world, as David Fraser (Brunel) shocks to show. They can not have left a typical fascist legacy. Fascist constitutional doctrine is something else, as is demonstrated by Oliver Lepsius (Bayreuth). It simply involved the dissolution of difference between law and politics and hence the destruction of law as such. Again, no infection. What is killed cannot carry over its disease.

A base chord of relativism is struck by Vivian Grosswald Curren (Pittsburg). It is on the well known allegation by Radbruch, that the German legal profession fell an

easy prey to fascism for being too positivist, formalist. Radbruch has already been amply disproved, which has led (in the uncomplicated way of scholarship) to opposite convictions. In a good piece Curren takes the revision much further, simply to play down any relationship between a specific legal doctrine, be it positivism or its opposite, and actual fascist injustice. This analysis, based on a thorough comparative study between German and French legal culture and practice under fascism/Vichy questions the idea that legal doctrine by itself can carry over pathologies from one political reality into another.

3. Meta-legal concepts - So much for a direct doctrinal dark legal shadow over Europe. Now what about the Ipsen-connection and the suggested fascistoid origins of EC legal supremacy? This is ein weiteres Feld, literally, because it relates to the notorious Großraum theories. One agent of the infection would have been Carl Schmitt, author of a version of the Großraum-idea (who managed to continue peddling it well after the war!). 'Do any of Schmitt's visions of Europe survive in the EU's self-understanding today?' John McCormick (Yale) asks. His reasoned answer is 'no'. The Union space concept is totally different from Schmitt's. Joerges however, the book's auctor intellectualis, is not convinced. In a thorough and vital piece he finds the above mentioned Ipsen toying with the Großraum in 1942 and come up with the idea of an 'external administration for the Reich'. This external administration should be independent from the national administrations and claim unconditional supremacy. Does one need to look further? After the war Ipsen could freely funnel these ideas into his Community legal writings (and maybe infect Community doctrine).

For Joerges there is an obvious similarity between the 'triad of Großraum: economy, technology and administration' and the nature of the EC, so that "... continuity with pre-democratic heritages of German legal culture is striking..."<sup>1</sup>.

I am not so sure. The Großraum was inspired by some of the well known (and still alive) German existentialist obsessions with economy, science and technology, rooted ultimately in Kant's fears. In the Union many are irritated but few are obsessed with its undeniably technocratic and dull character, which is mostly seen as banal and often benign.

Joerges, however, finds a full salvation for the Union from its dark predicament. 'Ironically and fortunately' this continuity is, he continues, being redeemed by the Union's own success. In the way of the Mafia forced into legality by the need of a

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<sup>1</sup> Christian Joerges, *Europe as Großraum? Shifting Legal Conceptualisations of the Integration Project in DARKER LEGACIES OF LAW IN EUROPE* 167, 191 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003).

secure banking service and better profits, the Union is forced into constitutionalism in order politically to secure its economic accomplishments (the analogy is mine, WTE). All is well that ends well.

There is no room here to go into full discussion with Joerges' challenging and well wrought piece. The happy ending is elegant, but it is more convincing in a literary than in an analytical way. Was European law really saved from the dark shadows of the German legal Großraum predicament only in 2004 by the European Constitution? Or was European law from the beginning part of a serial, political, response to the secular German predicaments, a response sometimes fortuitously taking the pen and the thoughts of a tainted German author? If I prefer the second analysis it is not only because it redeems Europe gradually from 1950 instead of totally in 2004. A reading in terms of a sustained political response to a clear failure and a looming threat has greater explanatory and creative force for the EU than a happy ending based on a fortunate success.

One strong motif of direct relevance to our profession, to conclude, is added by Alexander Somek (Vienna) who feeds Austria's history into the discussion. Why not see that Europe, even in 2004, is simply authoritarian he argues, in the way of Austria from 1934-38. Authoritarian government is a stage in constitutional evolution that most countries have passed through and that is, therefore, understandable and appraisable in the political vernacular of our European tradition. Which analysis allows him to conclude with a vengeance: no need of Hitler's helpers' idiosyncrasies nor, for that matter, of the obscure 'present day currency of complacent language in both [EU] law and political science'.

This is a good piece, Somek, one of those supplying this fascinating and perforce somewhat undisciplined book, spirited by the spooks and ghosts awakened in its title, with the needed critical clout.