

The 'timeless present': At the roots of Europe's identity

By Cristina Costantini*

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, BP 55/\$116.00**

Until now, the several publications related to European integration have led us along still waters and beaten tracks: they have 'urbanized' the juridical landscape – so to speak –, choosing a conventional kind of construction. Sometimes, the 'European architects' have passed through the way of the past to select images, collective memories and traditions which may be happily packed by the placid bourgeois spirit as the common glue of the 'European identity'. More often, they have stopped at the crossroads of the present time to observe the actual arrangements and propose their abstract classification. The journey into the future follows predictable directions: now, the European Union is conceived as the accredited testing laboratory for the models of the most efficient social organization; in other cases, two levels of integration are identified in the new world order: global integration and a merely European one.

Finally, the authors of *Darker Legacies of Law in Europe* pass through an unexplored path which is able to catch us off-guard with an unexpected perspective. They cast light upon the legacies on which we should not feed, the memories which we would forget. We have to assume the form of the Heideggerian *Zukünftigen*.¹

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** Previously published in. *Rivista Critica Del Diritto Privato* XXII: 1, 2004, 183-191 (translated by the author)

¹ HEIDEGGER, BEITRÄGE ZUR PHILOSOPHIE VOL. 65 395-396 (1989)

The work is deep and wide ranging, and assembles the opinions of different scholars from Europe and beyond. *Darker Legacies* is divided into four parts. Part. I sets the tone for the book by investigating the shadows left by Nazism and Fascism on the contemporary legal systems. Part II examines the main tenets of Nazi and Fascist legal doctrines. Part. III shows the complex heritage of the present time (from the idea of Europe to the kind of legal and judicial methodology). Finally, Part. IV inspects the response to Nazism and Fascism in the contest of national legal cultures.

A. Defining Europe: from ideality to identity

In order to deconstruct the false bourgeois certainties, we have to face the theories that founded the Nazi and Fascist ideologies.

J.P. McCormick, Ch. Joerges and N. Walker focus their attention on the doctrines of Carl Schmitt. The authors have a double purpose: first, they want to cast light on the specific traits which, according to Schmitt, connote Europe as a 'self-understanding' community with a position of uniqueness in the framework of the worldwide geo-political map; secondly, they intend to re-found the theoretical and philosophical basis of liberalism, moving from the interpretation of Schmitt's philosophy.²

In the first direction, the authors mark four main steps in the elaboration of the conclusive Schmitt's thought.

1) In the young Schmitt's vision, Europe is a political, social, cultural and even human reality opposed to Soviet Russia. This conception constitutes a further response of the European intellectuals to the challenge posed by Bolshevik Russia. The pressing need - beyond the historical contingency - to resolve the contention with the Soviet East have already sounded peremptory in the admonition of B. Bauer: "This nation with human head and leonine body is the Sphinx facing Europe with the riddle of the future. The monster's eyes look at Europe watchful and fixed,

² In recent years, there has been a revival of interest in the work of Carl Schmitt, even in the English-speaking world. Ellen Kennedy says that Schmitt offers 'the most cogent and coherent critique of liberal institution in this century' and that his legal and political theories 'filled a gap in left-wing theory, supplementing the economic and social theory of Karl Marx by analyzing the condition of the liberal state under 20th century capitalism'. E. Kennedy, *Carl Schmitt and the Frankfurt School*, 39 *TELOS* 41-42 (1987); C. MOUFFE, *THE CHALLENGE OF CARL SCHMITT* (1999); D. DYZENHAUS, *LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS KELSEN AND HERMANN HELLER IN WEIMAR* (2000)

the leonine leg is cocked and ready to strike; Europe has to solve the riddle and it will be safe; but if Europe ceases to try its hand at riddling in the hope that the answer will come by itself or by chance, then it will fall prey to the Sphinx, which will dominate with fierce strength."³

At this time, Schmitt justifies the sharp opposition between Europe and Russia in theological terms. Europe is conceived as the physical incarnation of a New Christendom clashing with Byzantine Christianity and Eastern Orthodoxy: the Catholic, Apostolic, Roman Church represents the bulwark around which Europeans might unit and fight against the common enemy of Soviet Russia. Catholicism is faithful to the essence of European civilization as the public representation of substantive principles and values such as authority, community and justice, while Soviet anarchism and communism cannot play a significant role in the historical process of building Europe.⁴

In this regard, the essay of McCormick is very clear and clever in that he draws attention to the Schmittian identification of the orthodox, communist and anarchic spirit in Dostoyevsky, Lenin and Bakunin respectively, united by their being the expression of a false awareness and of being very far from Marx and Engels, who are, fundamentally, both *Europeans* and *intellectuals*, who had faith in moral authority.

2) Some years later, Schmitt develops his thesis concerning 'the political' in the 'Age of Neutralizations' essays. Here, he concludes in the sense that the main difference between Europe and Soviet Russia rests no longer with ideas and values, but with the relationship of elites to masses in general, and elites and masses to technology in particular.

3) In the 1940s, in referring to the American 'Monroe doctrine', Schmitt explains that a specific space had to become the conceptual basis for international law, and the Reich had to constitute the order of that space. The German Reich is conceived as a "*Großraum* order dominated by particular ideological ideas and principles that exclude intervention by powers foreign to the area, whose guarantor and guardian is a people that has proved itself capable of this task".⁵

³ B. BAUER, DIE RUSSISCHE KIRCHE (1855)

⁴ C. SCHMITT, RÖMISCHER KATHOLIZISMUS UND POLITISCHE FORM (1984)

⁵ C. SCHMITT, VÖLKERRECHTLICHE GROSSRAUMORDNUNG MIT INTERVENTIONSVERBOT FÜR RAUMFREMDE MÄCHTE. EIN BEITRAG ZUM REICHSBEGRIFF IM VÖLKERRECHT, 305 (1941)

4) Finally, in *The Nomos of the Earth*, which starts with the collapse of the Westphalian state, Europe is the territory, the space in which the geo-political arrangement most conducive to world peace developed.

Having stated that, it is interesting to verify which of the Schmitt's vision of Europe's identity could actually survive and found a renewed self-understanding Community. We can note that the view of Europe as a reconstructed Christendom has been drawn on by statesmen such as Adenauer, Monnet, Schuman and De Gasperi to shape the post-war European order. Likewise historians and literary man have stressed the importance of religion in the construction of the European identity. The technocratic interpretation of the EU seems to suggest that Europe must use its technology to distinguish itself from the USA, the Soviet Union, and eventually Asia.

In contrast, we can employ the *Großraum* Theory with the aim of defining what the EU is not. It is not: *a*): a territory governed by a leading, political centre; *b*): a political entity with imperial ambitions in the East; *c*): a one-dimensional order: it appears as a multi-dimensional order, as a condominium, in which the states and their legal orders co-operate with, and compete with other levels of legal order, particularly the supranational order of the EU.

Obviously, the identification of Europe in the *Nomos of the Earth* shows its problematical nature: after the collapse of the Soviet Union, it is a geo-political question of whether Europe can maintain and play the same role in opposition to the hegemony of the USA.

B. Revealing the legacies

The purpose of *Darker Legacies* is not limited to a static understanding of the past. The project goes so far as to select from the past the patterns that have flooded into the framework actually used as a means of legitimation for the new structure of European transnational governance. The intent is to investigate the roots of the modern idea of European supra-nationalism.

Joerges believes that two of the major formative influences of supra-nationalism took shape in the Germany of the 1920s and 1930s, in the more general climate of the post-Weimar critique of the limits of Parliamentary democracy and of classical liberalism. And it is here that he alludes to ordo-liberalism and technocratic functionalism.

According to ordo-liberalism, developed by German economists such as Eucken, Röpke and Böhm, the state must create a proper legal environment for the economy and maintain a healthy level of competition through measures that adhere to market principles. The very fact that Europe had started its integrationist path as a mere economic community lent plausibility to the ordo-liberal arguments. The legitimacy of the Community is grounded on the interpretation of the EC economic law provisions as a law-based order committed to guaranteeing economic freedoms. Consequently, the same legitimacy is independent of the state's democratic constitutional institutions and places limits upon the political power of the Community.

Moreover, Joerges stresses the relevance of the German contribution to the technocracy debate and the development of functionalist thinking, referring to Forsthoft and Ipsen and to the precise identification of the European community with a 'purposive association of functional integration'.

The analysis continues. Nazism and Fascism undoubtedly left shadows on the German and Italian legal systems. In this perspective, A. Somma and P.G. Monateri clarify the principles of the fascist theory of contract as follows:

- 1) the subordination of the contract to the legal system for aims outside the pursuit of the parties' interests;
- 2) the prevalence of the legal system as functional to the promotion of the economic structure imposed by political power;
- 3) the refusal of the equation which identifies contracts with bilateral juridical transactions;
- 4) the matters of contract are confined to the cases in which the parties exchange individual goods and services;
- 5) the external control on the contract derives from considerations concerning the execution of its performance according to the good faith principle. But good faith is not connected with *jus-rationalist fides* (to suppress the freedom of contract in favor of contractual equity): it confirms the social function of the contract.

These characteristics of the Fascist Law of contracts have been introduced in the civil law codification in force. This fact implies the presence of a juridical doctrine which participates in the construction of such law, albeit only 'through typical content or through the omission of established solutions'. It is hence wrong to

reserve the notion of juridical Fascism to authors who identified with the fascist regime.

Another question is at stake in *Darker Legacies*: what role did the different methodological schools play in establishing the Nazi and Fascist legal order. This is important to verify the likelihood of the post-Fascist tendency to attribute responsibility for judicial injustice to positivism.

According to Grosswald Curran, it is not possible to affirm the existence of a causal nexus between the specific judicial methodologies (positivistic/anti-positivistic; formalistic/anti-formalistic) and the substantive injustice of case results. This is testified by the judicial injustice meted out by the Courts of Germany and France during their Fascist period, despite the differences in their respective traditional national judicial methodologies. The author concludes that the driving force behind court decisions in both Germany and France was political ideology, and the particulars of judicial methodology were far less important to the outcomes of cases.

C. Appearances can be deceptive

The usual, melancholic landscape is now re-assembled in a new and unforeseen setting. The latest provocation concerns the controversial issue of analogies and connections between Nazi policies and those adopted in liberal states. According to Laurence Lustgarten, there are at least three points of contact between the historical implementation of Nazism and Liberalism. First, the usual account of the Nazi attack against Jews, criminals, and 'asocials' is imbued with ideology, from the moment that it makes us forget the arbitrary action taken against threatening presence of Communism. On the other hand, in post-war liberal societies, an attenuated version of the same process has occurred, notably in the USA in the McCarthyite period.

Secondly, we can find the use of the same rhetorical and declamatory cluster of ideas, terms and symbols. In particular, the use of the rhetoric of war ('war on drugs', war against terrorism) conceals an attempt to restrict the traditional values of civil society. Thus, even the language itself should be a warning.

Moreover, racial bigotry remains strong and politically influential in all European states. If one asks why equally horrific solutions did not occur, despite evident

parallels, this is certainly because the German attachment to liberalism was much more problematical and its democratic institutions were much more fragile.

But *Darker Legacies* raises a much more enigmatic question: were some Nazi policies, at least to some degree, the (patho-) logical working out of ideas shared by traditionalistic movements and thinkers? Could it be said that, in some sense, Nazis had the courage of the convictions of others?

Darker Legacies goes beyond the common belief that satisfies the bourgeois spirit. Now the past gaining control over the present is at issue.