

## The Study of the Past as Exercise in Political Theory and the History of Ideas

By Shannon Ishiyama Smithey\*

**Darker Legacies of Law in Europe. The Shadow of National Socialism and Fascism over Europe and its Legal Traditions (Christian Joerges & Navraj Singh Ghaleigh eds.) (Oxford and Portland/OR: Hart Publishing, 2003). XVI, 416 pp., ISBN: 1-84113-310-8; BP 55,-\*\***

High expectations can be a curse. When I read the title of this book, I hoped (and expected) that it would contribute a great deal to my own research about courts in regimes transitioning from authoritarianism to democracy. I expected (and wanted) it to be about the efforts of post-WWII elites to establish legal institutions and rules in order to avoid repeating the mistakes of the fascist period, or perhaps to cover the difficulties that modern democratic regimes face in trying to overcome the “dark legacies” of their past. I was disappointed to find that the book does none of these things.

*Darker Legacies* is an edited volume, with most of the chapters having been presented at a conference on “Perceptions of Europe and Perspectives on a European Order in Legal Scholarship During the Era of Fascism and National Socialism,” or as part of a seminar at the European University Institute. As with many edited volumes, some of the chapters respond to one another fairly directly, while others seem only tangentially related to a common theme. The majority of the articles focus on Germany and various aspects of National Socialism, with additional pieces on fascism in Austria, Italy, France and Spain.

---

\* Assistant Professor, Westminster College, New Wilmington, PA. Email: [smithesi@westminster.edu](mailto:smithesi@westminster.edu)

\*\* Originally published in: 15 THE LAW AND POLITICS 764 (August 2005).

The book is primarily an exercise in political theory and the history of ideas. Readers will likely encounter new details on fascist politics, and find some topics more absorbing than others, based on personal taste and interest. Those interested in the ideas of Carl Schmitt will find much to read as multiple chapters (by Navraj Ghaleigh, Ingo Hueck, John McCormick, Peter Burgess, and Christian Joerges) discuss the nuances and implications of Schmitt's views. Since Schmitt is not one of my particular interests, I felt like I was entering mid-debate without a good feel for the arguments or the stakes of the various disagreements. I expect those most intrigued by Schmitt and fascism to react differently.

Similarly, there are two chapters on Constantin Mortati (a prominent judge and legal commentator in Mussolini's Italy), which should appeal most directly to those who already have a stake in any ongoing debate about Italian fascism. There are also a couple of chapters comparing similarities and differences between German and Italian fascism, which might be of use to someone teaching political history or ideologies. Of more personal interest to me was Oliver Lepsius' chapter on the participation of German lawyers in undermining the rule of law and dismantling the Weimar constitution.

Other chapters should have wider appeal to non-specialists. The best of these, in my opinion, is Vivian Curran's chapter *Formalism and Anti-formalism in French and German Judicial Methodology*. Fascist judges' tendency to apply positive law formalistically, despite manifest injustices, has left judicial positivism with a negative reputation. But, Curran argues, legal formalism was not to blame for the actions of fascist judges in Germany and France. Curran documents differences in French and German judicial "methodology," and contends that, "we will not be able to identify the responsible culprit for fascist-era injustice in France or Germany in the methodological distinctions that separate positivism from anti-positivism, or formalism from anti-formalism. The driving force behind court decisions in both Germany and France was political ideology."<sup>1</sup> She blames the lack of pluralism, the "unicity" of fascist societies, instead of the methods of judicial interpretation employed. Curran then goes on to argue that "the European Union should develop from this history a resolve to prevent its constituents from merging into oneness, even at a sacrifice of some efficiency."<sup>2</sup> I enjoyed the way this argument draws attention to the limits of institutional design—we can carefully craft statutes and constitutional provisions, but their efficacy depends on their application by judges and other policy makers.

---

<sup>1</sup> Vivian Grosswald Curran, *Formalism and Anti-Formalism in French and German Judicial Methodology*, DARKER LEGACIES OF LAW IN EUROPE, 205, 225 (Christian Joerges and Navraj Singh Ghaleigh eds., 2003).

<sup>2</sup> *Id.*, 226

I particularly appreciate Curran's ability to find relevance for current politics and institutional design in contrast to the rest of the book. As a whole, the book concentrates on discussing the nuances of an isolated though important historical period. There are occasional references to modern concerns. For example, Navraj Ghaleigh compares government claims for emergency powers in the wake of September 11th to Schmitt's justification of constitutional dictatorship. Neil Walker considers whether there is any hint of Nazi *Großraum* in the current move to "European supranationalism." And, Alexander Somek discusses the ways in which authoritarian constitutional law in Austria "exclude[d] the election of, and control by, popular assemblies," creating faint echoes of some of the arguments about democratic deficits facing EU institutions."<sup>3</sup> These contemporary references, though, tend not to be the central concern of the authors.

Personally, I find the historical focus frustrating. I would have liked the book to be more forward looking in its discussion of these issues. I do not think it would have taken more than a few additional paragraphs per essay to make current implications explicit. So, while I feel a bit awkward for complaining that they wrote the book they wanted to write it, I also expect other readers interested in modern judicial or European politics to have similar complaints.

---

<sup>3</sup> Alexander Somek, *Authoritarian Constitutionalism: Austrian Constitutional Doctrine 1933 to 1938 and its Legacy*, DARKER LEGACIES OF LAW IN EUROPE, 361, 362 (Christian Joerges and Navraj Singh Ghaleigh eds., 2003).