

## Codes of Honour

By Daniel Gordon\*

**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.\*\*

Histories of European integration often begin with a spotless pedigree: Enlightenment visions of perpetual peace, Victor Hugo's call for a "United States of Europe", Winston Churchill's "we must re-create the European family" speech of 1946. *Darker Legacies of Law In Europe*, in contrast, fits the European Union into what the Germans call *Vergangenheitsbewältigung* – coming to terms with a guilty past. "All of the legal disciplines that later contributed to the legal conceptualization of the European Community had been infected by *völkisch* legal thinking" writes Christian Joerges, a German law professor who organized the conference on which the book is based. "The anti-liberal and anti-democratic legal concepts so highly rated in National Socialism represent a disquieting heritage."<sup>1</sup>

Disquieting indeed. To regain independence after 1945, West Germany had to renounce nationalism and militarism. The constitution, or Basic Law, of 1949 starts with a pledge to become a partner in a united Europe. For Germany, membership in a wider Europe is a precondition, not a sacrifice, of sovereignty. It is also a symbol of moral renewal. This special history explains Germany's dominance in the

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<sup>1</sup> Christian Joerges, *Europe a Großraum? Shifting Legal Conceptualisations of the Integration Project*, in DARKER LEGACIES OF LAW IN EUROPE, 167, 169 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003).

processes of European unification. It also explains why Joerges is in a bind. As a scholar, he wants to raise hard questions about the persistence of the fascist past. Yet, as a German, he cannot interrogate the European idea without being mistaken for a nationalist. The book's co-editor, Navraj Singh Ghaleigh, a lecturer at the Edinburgh Law School, mentions that a conference observer even referred to "Christian Joerges and his Nazis". The twenty papers in *Darker Legacies*, almost all by law professors, are heavy going. But they are written with courage and succeed in unsettling the reader.

In the 1930s and 40s, fascist jurists cultivated two important doctrines. The first is anti-formalism. Many of the papers explore its inflections: legal forms and procedures – elections, due process, jurisdictional distinctions – are secondary to the 'purpose' of a regime; the essence of a state is not its written charter but its "material constitution", its ruling officialdom; leadership is necessary to overcome chronic national "crises", so executive command is the normal mode of governance. Several contributors discern a spirit of anti-formalism in the EU today. They do not posit a fascist conspiracy. Instead, they suggest that residues of the fascist legal vocabulary strengthen apathy in Brussels about thorny constitutional problems. Alexander Somek disparages the "currency of complacent language" that obscures the democratic deficit.<sup>2</sup> With the recent effort to make a European Constitution, this question of language deserves more attention. A popular constitution, such as the American, is the result of rules prescribing brevity (4,500 words in the original), numerology (three branches, ten amendments) and repetition ("the people", "this constitution", "No state shall"). At 64,000 words, many of them technical, the draft of the European Constitution is not for laypeople. The Maastricht Treaty, too, is unreadable – it is a series of references and revisions of earlier treaties. Has the fascist contempt for "mere" paper formalities helped to undermine the art of turning public law into public literature?

The second important doctrine in fascist law is the transcendence of borders, the forging of commonality. Many of the contributors focus on Carl Schmitt, the 'crown jurist' of the Third Reich, and his concept of *Großraum* (sphere of influence). Schmitt argued that technology creates "material problems" which spill across borders and erode the territorial state. Germany, he claimed, had a special destiny to impose a new transnational order on Europe. Well after 1945, German legal thinkers continued to describe the European community as a unique area of "technical realization", where administrative tasks should not be burdened by democratic requirements.

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<sup>2</sup> Alexander Somek, *Authoritarian Constitutionalism: Austrian Constitutional Doctrine 1933 to 1938 and its Legacy*, in *DARKER LEGACIES OF LAW IN EUROPE* 361, 387 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003).

James Q. Whitman looks at another side of Nazi commonality, the effort to “level up” the prestige of social classes.<sup>3</sup> Where Communists promised a redistribution of property, the Nazis promised a redistribution of honor. They diffused traditional marks of aristocratic dignity to all members of the *Volk* (people). They passed new laws against insulting ordinary people. Some of these laws still exist and form the basis of workplace harassment regulations and other limits on free speech. Whitman suggests that a precious fixation on the right to an honorable image is shaping continental human-rights law. In a critical response, Gerald L. Neuman upholds the conventional position:<sup>4</sup> European law since 1945 is a reaction against the Nazis; it proclaims the dignity of all persons, not just Germans. He underestimates the subtlety of Whitman’s interpretation. According to Whitman, European dignity law is indeed hostile to Nazi racial hierarchy, but the European emphases on civility and reputation, as distinct from the American accent on liberty and autonomy, is not new. It is an old aristocratic priority that has traveled into the present via fascist law.

## B.

If this provocation is true, if there are traces of fascism even in continental human-rights jurisprudence, then historical research can lead only to paradox. European legal history will not separate the democratic and authoritarian traditions but will increasingly show them to be intertwined. Scholars will have to debate the merits of every law in terms of general principles, not guilt by association. Two of the contributors, J.H.H. Weiler<sup>5</sup> and Matthias Mahlmann,<sup>6</sup> wisely emphasize the need to supplement *Vergangenheitsbewältigung* (coming to terms with the past) with a fresh exposition of democratic legal principles. *Darker Legacies of Law in Europe* will please Eurosceptics more than Europhiles, yet its meaning is uncertain; it feeds criticism of Europe but also nurtures hope for a better European constitution.

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<sup>3</sup> James Q. Whitman, *On Nazi “Honour” and the New European “Dignity”*, in *DARKER LEGACIES OF LAW IN EUROPE* 243, (Christian Joerges/Navraj Singh Galeigh eds., 2003).

<sup>4</sup> Gerald L. Neuman, *On Fascist Honour and Human Dignity: A Skeptical Response*, in *DARKER LEGACIES OF LAW IN EUROPE* 267, (Christian Joerges/Navraj Singh Galeigh eds., 2003).

<sup>5</sup> J.H.H. Weiler, *Epilogue*, in *DARKER LEGACIES OF LAW IN EUROPE* 389, (Christian Joerges/Navraj Singh Galeigh eds., 2003).

<sup>6</sup> Matthias Mahlmann, *Judicial Methodology and Fascist and Nazi Law*, in *DARKER LEGACIES OF LAW IN EUROPE* 229, (Christian Joerges/Navraj Singh Galeigh eds., 2003).