ARTICLES : SPECIAL ISSUE
CONFRONTING MEMORIES – CONSTITUTIONALIZATION AFTER BITTER EXPERIENCES

National Constitutions, Liberal State, Fascist State and the Holocaust in Belgium and Bulgaria

By David Fraser[*]

A. Introduction[+]

In *The Fragility of Goodness: Why Bulgaria's Jews Survived the Holocaust*,[1] Tzetvan Todorov offers the following lesson from his study of the "rescue" of Bulgarian Jews from the Nazi killing machine:
"It seems that, once introduced into public life, evil easily perpetuates itself, whereas good is always difficult, rare and fragile. And yet possible."[2]

I begin here to explore the possible consequences of Todorov's claim for our understanding of European legal and constitutional normativity in the shadow of the period of 1933-1945. At first sight, the two cases of Bulgaria and Belgium appear to offer few, if any, grounds for comparison. As Todorov and others point out, Bulgaria was the only country in Europe in which the Jewish population was spared from deportation to the East and remained on national soil. The rescue of

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[1] TZETVAN TODOROV, THE FRAGILITY OF GOODNESS: WHY BULGARIA'S JEWS SURVIVED THE HOLOCAUST (2001).

[2] *Id.*, 40.

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Danish Jews, the other well-known case of mass, national "rescue" efforts, was made possible by escape to neutral Sweden.

On the other hand, Belgium did not collectively save its Jewish fellow citizens. While the history of the Holocaust in Belgium is filled with stories of rescue, especially of children, the tragic ending of the story of Belgian Jews is that 46% of them were deported, and that of the 25,475 sent East, 24,138 did not return.[3]

On the surface, then, the only point of historical comparison would appear to be that Belgium is a country that did nothing, or very little, to prevent the killing of Jews from its territory, while Bulgaria was a nation in which rescue took place on a massive, heroic scale. But, as is almost always the case, the story and points of communality between the two countries are slightly more complex and interesting than a cursory analysis would indicate. The title of the larger project of which this a part is "*The Fragility of Law*", and it is here, at the heart of our understandings of law, legality and constitutional discourse, that we find, I believe, the most useful and intriguing points of comparison between these two nations during the Nazi period in Europe. In effect, what makes a Belgian/Bulgarian comparison of potential utility in both historical and present-day jurisprudential terms is, if not "the fragility of law", then the malleability of legal, constitutional normative structures in the face of evil.

In both countries, the introduction of anti-Jewish legal measures was met with protest from legal and other élites. Objection in both Sofia and Brussels was grounded clearly and, apparently, unequivocally in the normative world-view of the constitutional guarantees of equality and liberty. In each case, the arguments against the introduction of anti-Jewish laws were formulated and based on claims of a shared understanding of the textual embodiment of national identity and citizenship in the national Constitution. Yet, in each case, it was the very idea of national identity and the guarantees of constitutional protection afforded to citizens under some version or understanding of the rule of law, which led to the "perversion" of these basic principles. In each case, the consequence of constitutionalizing citizenship was the killing of tens of thousands of Jews. In Belgium, Jews were persecuted, identified and killed under the guise of an imposed legalized "passive" collaboration with the occupying forces. In the Bulgarian case, the Jews of the territories of Thrace and Macedonia were sent to their deaths, through Bulgarian territory and with the co-operation and collaboration of the Bulgarian government and police, precisely because the protection of "citizenship" was denied them as non-Bulgarians through the law. As we begin the lengthy

[3] MAXIME STEINBERG, UN PAYS OCCUPE ET SES JUIFS 16 (1998).

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debate about belonging, citizenship and constitutional frameworks in the next stage of the adoption of a European Constitution, we must look back and understand the ways in which laws and constitutional instruments, such as goodness, or, perhaps, justice, are rendered fragile in practice. The arguments I set out below, based on an analysis of the legalized, constitutionalized fates of Belgian and Bulgarian Jews, offer, I believe a useful starting point for our future involvement in a social and political project within Europe, which sees, at some level at least, the instrument of a Constitution as a progressive, inherently liberal, and, by definition, therefore, inherently good, step towards progress.

In addition to the lessons which we might begin to learn about the fragility of legal normativity, a comparison of the Bulgarian and Belgian situations will also serve as a useful basis to render our understanding of the legal bases for the Holocaust and persecution of European Jewry, much more subtle and complex. I can only begin to outline some of the questions and issues here, but the process of interrogating legality and its role in the Holocaust is, as yet, a nascent project. I begin my analysis here with the proposition that while Bulgarian Jews were saved, those of Thrace and Macedonia were killed, precisely because they were not "Bulgarian".

Todorov begins his study of the fate of the Jews of his native land by writing of "… the collective protection…" provided to them by Bulgaria.[4] There can be no doubt that Bulgarian Jews were saved from deportation. They were not sent to Auschwitz or any other Nazi killing facility, and for this "goodness" we must all be thankful. At the same time, however, we must not fall victim, as I believe Todorov does, to the complex moral and ethical traps which the "unspeakable" nature of the horror of the Nazi killing machine can and does impose on judgement, both ethical and legal, today. Yes, Bulgarian Jews were saved; they were "rescued" through a complex matrix of "resistance". Yet, at the same time, before Auschwitz, there were and still are crimes against humanity. Bulgarian Jews were persecuted, and removed from social and economic life; their property was "Aryanized"; they were sent to forced labour camps. In the shadow of the gas chambers and the crematoria, in the gloom cast by the *Einsatzgruppen*, there is a tendency to forget or to minimize all the other forms of suffering which fall short of death. This is our moral failure and our ethical weakness. And, in the case of Bulgaria, it is an example, one of many which haunt our jurisprudential relations to the European past, of legal amnesia, because the suffering and oppression imposed on the Jews of Bulgaria, the crimes against humanity inflicted on Bulgarian citizens, were the result of law, of a Parliamentary decision, approved by the monarch, Boris III, to impose legalized suffering on the Jews of the country by means of the proscriptions and exclusions known as the *Law for the Defence of the Nation*.

[4] TODOROV 1 (note 1).

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Thus, when we study the fates of the Jews of Belgium and of Bulgaria, it is the legal nature of their deprivations, humiliations, oppressions and deaths which must haunt us and inform our attempts to come to grips with, to work through, the constitution of the Holocaust and of persecution. We must bear in mind the insight of Vivian Curran in her brilliant study of law, democracy and persecution in Vichy France that:

> *The challenge of accepting complexity, value pluralism and internal contradiction means eschewing the urge to fuse the diverse into a harmonious, unitary myth of national proportions. It means acknowledging that pluralism will persist, whether recognized or unrecognized. Conversely, it also means questioning accepted categories that create artificial and logically untenable dichotomies, such as democracy versus dictatorship, resistance versus collaboration, and antisemitism versus anti-fascism.*[5]

In the sections which follow, I want to outline the ways in which the comparison of Bulgarian and Belgian constitutional history might help us to achieve these jurisprudential goals of understanding, or at least situating, complexity in the legal story of the fate of European Jewry between 1933 and 1945, and then perhaps, of serving as a basis upon which we might begin to construct arguments, debates, critiques and understandings of the complex matrices of constitutionalism and citizenship in the new Europe.

B. Legalizing Antisemitism: Protest, Resistance and Collaboration in Belgium and Bulgaria

I have examined the legal history of protest and collaboration in relation to the introduction of anti-Jewish laws in Belgium elsewhere, and I will not repeat the details here.[6] Two central points about the Belgian case, which serve as the central bases for comparison with Bulgaria, do merit attention, however. First, the introduction of anti-Jewish laws in the autumn of 1940 was met with refusal and protest by the Belgian government and legal officials. Second, the result of these protests and refusal was that all the anti-Jewish legal measures introduced and applied in Belgium were the lawful acts of the German occupiers. They were

[5] *The Legalization of Racism in a Constitutional State: Democracy's Suicide in Vichy France*, 50 HASTINGS L. J. 1 94. See, also, Curran's *Racism's Past and Law's Future*, 28 VERMONT L. REV. 1 (2004).

[6] See *The Fragility of Law: Anti-Jewish Decrees, Constitutional Patriotism and Collaboration Belgium 1940-1944*, 14 LAW AND CRITIQUE 253 (2003). See, also, *A Passive Collaboration: Bureaucracy, Legality and the Jews of Brussels, 1940-44* (unpublished draft manuscript, 2004).

"incorporated" into the Belgian legal system only as a result of the *de facto* jurisdiction of the occupying forces as defined and limited in the Hague Convention. They never became "Belgian" legal instruments or part of the domestic legal order.

By way of contrast, at this level of legal, constitutional normativity, the *Law for the Defence of the Nation*, which served as the basis for the persecution of Bulgarian Jews, was a creature of the Bulgarian legislative system and was, from its very origins, a domestic measure.[7]

At this first level of comparison, then, we find ourselves faced with what appears, in the context of post-war constructions of legal memory, to be an unsurprising conclusion. The remnants of a liberal democratic state structure in Belgium, the Secretaries-General who remained behind to govern under the terms of democratic legislation which delegated executive power to them in times of emergency and/or occupation, refused to violate their sworn duty to uphold the guarantees of religious freedom and equality found in the Belgian Constitution. They rejected German demands to make anti-Jewish laws part of the domestic system and, as a consequence, all antisemitic measures were introduced by way of German Military Decree. On the other hand, the fascist-dominated government of Bulgaria introduced and enforced its own, domestic version of anti-Jewish legalized persecution. Whether one accepts Todorov's conclusion that the Bulgarian government at the time is best described as "authoritarian, but not fascist",[8] or adopts the post-war Communist characterization of the system as one governed by a "monarcho-fascist establishment",[9] there can be little doubt that the *Law for the Defence of the Nation* drew its inspiration from the normative understandings of local, national antisemitism.

However, yet again, the historical reality is more complex than simple and simplified analyses based in a juxtaposition of "liberalism" or "democracy" on the one hand, and "fascism" or "authoritarianism" on the other. Three points chosen from many serve to illustrate this. First, the structure of the Belgian system after

[7] In saying this, I am aware of the historical claims that the Bulgarians were pressured to adopt the *Law for the Defence of the Nation* by the Germans. This remains a controversial historical claim which I cannot resolve here. At the level of legal positivist analysis, however, it remains the case that the statute was approved by the Parliament and sanctioned by King Boris III and was, therefore, a Bulgarian legal measure.

[8] TODOROV 4 (note 1).

[9] David Cohen, *The Monarcho-fascist Establishment, Nazi Germany and the Jewish Problem in Bulgaria*, 19 ANNUAL OF THE CENTRAL BOARD OF THE SOCIAL CULTURAL AND EDUCATIONAL ASSOCIATION OF THE JEWS IN THE PEOPLE'S REPUBLIC OF BULGARIA 63 (1984) (hereafter ANNUAL).

June 1940 depended almost exclusively on government by executive decree. The *de jure* government of the country was in exile in London. The King, as head of state, and the Secretaries-General, as fiduciaries holding limited executive power, were the remaining branches of the Belgian government on Belgian soil. The actual form of power exercised by the Secretaries-General in Belgium, who had been delegated executive and administrative authority, which was, as the Occupation progressed, transformed into government by executive decree, was both in fact and in law, increasingly akin to fascist or authoritarian systems.[10] On the other hand, while the power in Bulgaria was *de facto* vested in the King and the fascist parties, as a matter of law, the Parliament and judicial systems of the nation continued to function throughout the period. Opposition parties, albeit in the minority, were present in Parliament and spoke up in debates protesting government measures. When the *Law for the Defence of the Nation* was presented in draft form, the legislative opposition, as well as numerous bodies from the structures of Bulgarian civil society, voiced their objections in public and private *fora*. Bulgarian courts intervened to interpret and to restrict the extent of the application of the *Law for the Defence of the Nation*. In other words, one might argue that the "fascist" or "authoritarian" and "democratic" labels, in so far as formal and informal governmental structures, and legal mechanisms are concerned, might usefully and correctly be reversed in these cases, *i.e.*, Belgium was authoritarian and Bulgaria democratic.

The second point at which the comparison might be seen to be in need of a more complex interpretive matrix is exactly on the issue of our understandings of "resistance" and "collaboration", two key elements in Post War legal, political and collective, moral national memory. While it is true that the Belgian Secretaries-General refused to allow Belgian law to be used as the mechanism for the introduction of anti-Jewish juridical norms, the entire history, after this initial refusal, of anti-Jewish persecution in Belgium is characterized by what the Belgian's continue to call an innocent and legally obligatory "passive collaboration" by local governmental and legal actors.[11] Conversely, at the deportation stage, the "fascist" government of Bulgaria actively resisted and refused to comply with German demands for the deportation of Jews. Thus, the government which had actively persecuted its Jewish population "resisted" the ultimate collaboration. On the other hand, the Belgian officials, after original "resistance", pursued a policy of "passive collaboration" which culminated in the killing of 24, 138 Belgian Jews.

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[10] See Peter L. Lindseth, *The Paradox of Parliamentary Supremacy: Delegation, Democracy and Dictatorship in Germany and France, 1920's-1950's*, 113 YALE L. J. 1341 (2004).

[11] I examine this in more detail in *A Passive Collaboration* (note 6).

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The final point on which we must dwell in any comparison is the factual contexts of "protest" and "resistance" in a fuller fashion. In each country, Belgium and Bulgaria, the introduction of the legalized persecution of the Jews was met with protest and objection. In both countries, the protests were grounded in the guarantees of equality and freedom found in the national Constitution. These normative arguments were formulated, in both cases, against the competing norms of fascist antisemitism which were characterized as "unBelgian" or unBulgarian". In other words, in both cases, the Constitution was seen as embodying not just traditionally recognizable norms of liberalism- freedom and equality- but also another normative world which equally owed its recent origins to liberal political theory and practice, the ideal of a nation state, unified and free.[12] The inherent theoretical tensions between liberal ideals of freedom and equality on the one hand, and national identity on the other, paved the way, in fact and in law, for the killing of both the Belgian Jews and the Jews of the newly incorporated Bulgarian territories of Thrace and Macedonia. Neither liberal ideology and state structures, nor fascist ideology and its institutional embodiment, were operating in an independent or single factorial fashion in either Bulgaria or Belgium. What did operate in each case, although in different historical and other contextual ways, was the idea of law and Constitutionalism as constitutive of national identity. Whether Jews benefited or suffered from this underlies much of the focus of the following sections of this paper.

C. Anti-Jewish Laws, Protest and Constitutionalism

I have discussed the protests surrounding the introduction of anti-Jewish laws in Belgium elsewhere. Now, I want to turn to the history of the *Law for the Defence of the Nation* in Bulgaria in order to establish the bases for comparisons with the Belgian case, again, in order, perhaps, to deepen the interpretive matrix under which we might continue to place and analyze the complexities of our jurisprudential, ethical and historical taxonomies.

The history and context of the *Law for the Defence of the Nation* are summarized by Todorov in *The Fragility of Goodness*, and elsewhere by other authors who have studied the history of Bulgarian Jewry at this time.[13] One key element is central to our understanding of the jurisprudence of the anti-Jewish persecution in Bulgaria

[12] I recognize that this argument is oversimplified from the standpoints of jurisprudential and political theory. I believe that it is nonetheless the case that ideas of Wilsonian liberalism and national identity played a central role in the construction of the Bulgarian nation state, just as ideals of bourgeois liberalism were at the heart of the emergence of the Belgian nation.

[13] See MICHAEL BAR-ZOHAR, BEYOND HITLER'S GRASP: THE HEROIC RESCUE OF BULGARIA'S JEWS (1998) and FREDERICK B. CHARY, THE BULGARIAN JEWS AND THE FINAL SOLUTION, 1940-1944 (1974).

under the provisions of the *Law*, adopted at the end of December 1940 (roughly contemporaneous with the implementation of the first two Decrees against Jews in Belgium). The Bulgarian conception of the "Jewish menace" was, while perhaps inspired by Nazi antisemitism, and driven by those native Bulgarian fascists who wished to mimic Nazi Germany, distinctly Bulgarian in nature. By this, I mean that the focus of the *Law for the Defence of the Nation*, in its basic definitions of who was or was not a Jew, and therefore who was or was not subject to exclusion, expropriation and persecution, was grounded in an identifiable Bulgarian religious ideal. Thus, while as a matter of principle, the Nazi definition of "the Jew" was always one which was "scientific" and racial in focus, the Bulgarian conception of "the Jew" was framed in the national context of Orthodox Christianity. The operative definitional provisions of the *Law for the Defence of the Nation* were religious, and not racial in the Nazi understanding of the Jewish problem.

This is the first point of contrast with the Belgian situation. In Belgium, the Nazi definition operated because the laws were German in origin. They had nothing to do with any competing understanding of Belgian identity, at least explicitly. As a result, the legal historical mythology of Belgian national resistance is grounded in the very German-ness of the formal regime of juridical antisemitism in this country. On the other hand, and this is perhaps what makes Bulgaria such a fascinating case study, anti-Jewish persecution was grounded in a national conception of Bulgarian-ness as Christian (Orthodox), and of the Jews as enemies of this Orthodox nation. At the same time, protest against the measures contained in the *Law for the Defence of the Nation*, offered both a rejection of the notion of Bulgarian identity as founded in religion, and a series of strange confirmations of this very notion. For example, Article 33 sets out the "Bulgarian" exceptions to the Jewish question and national identity. In addition to Christianized Jews, this Article exempts:

> *"…individuals of Jewish origin who were volunteers in the wars or disabled soldiers, or were awarded the gallantry decorations."*

Similar provisions could be found in the French *Statut des Juifs*, itself modelled more closely on the *Nuremberg Laws* and adopting precisely Nazi racial taxonomies of Jewishness, as well as in the earliest Nazi anti-Jewish provisions of the *Law for the Restoration of the Professional Civil Service* of April 1933. Underlying all of these exceptional provisions was the recognition of so-called "meritorious Jews", individuals who had proved by their bravery on the battlefield for example, that they were, in fact, loyal citizens of France, Germany or Bulgaria. Of course, it is obvious that such a concept, "meritorious Jew", as a legal category, is only possible in a system in which racial taxonomies of Jew and non-Jew are not overwhelming, and in which, conversely, nationality, citizenship and "Jewishness" are understood as contradictory but not mutually exclusive constitutional and constitutive

elements. While Jews *per se* are members of a suspect and *prima facie* excluded category, individuals might demonstrate, by loyalty to the Nation, that they have transcended the inherent defects of their origins.

Similarly, the very notion of conversion and intermarriage are foundationally and constitutively different when treated in the Bulgarian manner, as compared with the Nazi racial categorizations. Conversion to Christianity, and therefore Bulgarianess, is possible, even desirable, under a definition of national identity which is religiously based. Mixed marriages do not create the jurisprudential dilemmas of the *Mischlinge* question under the Nazis. There, the overriding concern was, by legal and scientific definition, the level or degree of Jewish blood which tainted the individuals in question and the body politic, or *Volksgemeinschaft*, through the very fact of their existence, more generally. When conversion is at issue, and legally possible as a taxonomy nullifying act, any taint is transcendentally overwhelmed by the blood of Christ. Figuratively, the 'lifeblood of the Nation' is enhanced by the invisible and miraculous power of conversion and the inherent transcendence of original sin and original taint. Intermarriage and conversion create, through the holy, Christian and Bulgarian sacrament, a legal and religious mechanism of protecting, defending and strengthening 'the Nation'.

Perhaps the best example of the issues at play can be found in the protests from a number of prominent lawyers and former ministers. The letter begins with an exhortation to the members of the National Assembly to remember their duty as upholders of the Constitution:

> *The Constitution is the basis of our life as a state, as a society and as a polity.*[14]

After outlining the provisions of the Constitution guaranteeing Bulgarian freedoms, they add:

> *These words deserve our deepest respect and so do the passages of Chapters 1 through 10 of the basic law, which we must read, not mechanically, but with full understanding of their meaning, protect them from sacrilege and always, and in every instance, come out in their defence.*[15]

[14] Open Letter to the Deputies of the 25th Regular Assembly, *id.*

[15] *Id.*

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The position could not be clearer. The Constitution is a living organism, protecting and embodying the aspirations and very definition of the Bulgarian national polity. Its terms are "as essential as the air and the sun for the existence of the freedom-loving Bulgarian citizen."[16] The *Law for the Defence of the Nation* seeks to alter the shared social, political and moral understanding of Bulgarian nationhood by depriving a group of citizens of their rights and freedoms as Bulgarians on the basis of religious bias. The argument goes to the heart of constitutional citizenship and national identity, and draws no line between the two. It embodies, at this level, the ideas and ideals at the heart of a Habermasian understanding of democratic constitutional patriotism.

Yet, much of the protest, almost inevitably I believe, as a consequence of facing legalized antisemitism on its own terms, treats "Jews" as a separate and identifiable group, and perhaps more precariously from a moral or ethical perspective, as a group identifiable and identified by the protestors themselves as different or distinct from "Bulgarians". At one level, this is a traditional and almost natural result of certain types of constitutional and national identity discourses. Only one identity is, and can be, recognized and supported by the Constitution: "Bulgarian" identity. Thus, defenders of the Constitution, when faced with the anti-constitutional and, by definition, anti-Bulgarian, *Law for the Defence of the Nation*, must, at one and the same time, identify Jews and their contribution to the history of Bulgaria, while refusing to identify Jews in any way as "not Bulgarian".

The fourteen page letter proceeds to highlight the contribution of Jews to Bulgarian history and culture. The story of Jews and Bulgarian nationhood demonstrates that:

> *…historical records do not include a single account of Jews committing acts of violence against Bulgarians. On the contrary, all factual information indicates that Jews have always come out in defence of the Bulgarian world.*[17]

They also assert that a love of for the land in which they live is, in fact, "deeply rooted in the Jewish psyche".[18] I will not belabour the examples to be found in the rest of this letter or in other protests against the draft *Law*. Suffice it to say that the discourse here is, at the very least, problematical and confused in relation to any underlying principled understanding of a universal and universalizable conception

[16] *Id*.

[17] *Id*., 5. Underlining in original.

[18] *Id*., 9.

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of Bulgarian citizenship. Even for opponents of the *Law for the Defence of the Nation*, who are, by definition, in this context, supporters of the Constitution and its guarantees of citizenship and equality, there is a group called "Jews", who have a particular collective psychology, and who, almost by the force of the discourse itself, are somehow different from Bulgarians. That they can be like Bulgarians, loyal to the fatherland, is, in fact and in law, simply the obverse of the same coin which recognizes the Bulgaria-ness of 'meritorious Jews'. The only differences are the starting points for the analyses and the consequences to be inflicted on those who, nonetheless, fit into the same category, "Jew".

In Bulgaria, the very nature of the 'Nation and of the Bulgarian Constitutional order' was being aggressively contested in intra-Bulgarian political, legislative, and legal struggles. At the same time, Jews were identified, targeted and exploited, not under German law but under Bulgarian law, by Bulgarian officials who were, in theory at least, bound by and loyal to the Bulgarian Constitution. In the cases of both Belgium and Bulgaria, constitutional normativity remained formally intact, yet law in action saw the persecution of Jews in both countries. German law imposed both on a constitutionally patriotic Belgian state apparatus, and on Bulgarian law, according to the structural and formal norms of Bulgarian constitutional governance, had precisely the same consequences of identifying, excluding and exploiting the Jews of each country.

Yet another taxonomical hurdle presents itself here, one which I believe goes to the heart of any attempt to create a humanistic, ethical jurisprudential order in which constitutional citizenship can be given the appropriate content. "Imposed" collaboration in Belgium led to the deaths of more than 20,000 Jews. In Bulgaria, domestic fascist antisemitism had, as a consequence, the "rescue" of Bulgarian Jews from the Nazi killing machine, which Todorov calls:

> *"… this miraculous occurrence of goodness…"*[19]

I do not wish to be seen here to call into question either the historical fact of the "rescue" of Bulgarian Jewry or the general ethical stature of "rescue" as an act of human goodness. What I do wish to underline, however, is the danger of moral, legal and ethical relativism as we seek to understand the "fate" of Bulgarian Jewry between 1940-1944. There can be no doubt that "Auschwitz" casts a shadow over European life, morality and law.[20] The killing of six million Jews and countless

[19] TODOROV 1 (note 1).

[20] See DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITION (CHRISTIAN JOERGES / NAVRAJ S. GHALEIGH, EDS., 2003).

Roma and Sinti (Gypsy), male homosexuals, Russian prisoners of war, *etc*., has come to symbolize and to embody the moral horror of modernity in Europe. Even this list of "victims" raises complex and controversial taxonomical and moral issues. Can one speak of a Gypsy or homosexual Holocaust, or must we, and are we ethically compelled to, restrict the use of the term to describe only the fate of European Jewry?

For many, "Auschwitz" serves as the exemplar and warning of the path we must never again follow. For others, the horror of the Nazi killing machine is the "unspeakable", "unutterable" horror. What each of these attitudes, understandings and readings, and their many variants, of the Nazi state and its killing apparatus can do, however, is to set the bar and standard of outrage, of moral righteous anger and jurisprudential indignation, far too high. Somewhat ironically perhaps, one consequence of the moral, ethical and legal struggle to never forget "Auschwitz" is that we fail to remember or become unable to taxonomize other evils, other crimes against humanity, and other acts of legalized persecution which fall short of outright killing. We face, as the International Criminal Court, for example will have to face, the necessity for a jurisprudence of "lesser crimes against humanity", a legal oxymoron and judicially unavoidable category of a smaller, less significant, yet reprehensible horror.

Any final analysis of the exact impact of these legalized measures of persecution must await a more sophisticated and complete historical and jurisprudential analysis, in Belgium, Bulgaria and elsewhere. The legal system of Bulgaria continued to function throughout the period in question, and a careful examination of documentary evidence remains for future study. We do know from the record so far that various measures were in fact put into force by the Bulgarians against their Jewish fellow citizens. The policy of expropriation and Aryanization was one which was, according to Chary, "pursued with ardor" by the Bulgarian state.[21]

Other forms of persecution also occurred under Bulgarian legal norms. Jewish families in Sofia were forcibly removed from their homes and from the city and were sent to live in the countryside and in smaller towns. By the end of June 1943, 19,339 of the 25,132 Jews of the city had been removed from the Bulgarian capital. Half of the remaining 5,000 Jews were sent to forced labour camps where they were subjected to harsh, forced labour measures and separated into segregated Jewish-only work brigades for what the Germans termed as "especially heavy labour" (*verschärft zu besonders schweren Arbeiten herangezogen*).[22]

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[21] CHARY 43 (note 13).

[22] See OSS RESEARCH AND ANALYSIS BRANCH, POPULATION DEVELOPMENT OF BULGARIA (1943).

This, then, is the unavoidable lesson of the fate of Bulgarian Jewry between 1940-1944. They were not killed. They were excluded from employment; they lost their businesses and other property; they were removed from their place of residence; they were forced into compulsory labour battalions and placed in what can be described as concentration camps.[23] Yes, they were not killed, and for this we, and they, must be grateful. But this is not "miraculous goodness", unless "Auschwitz" remains our only standard of "evil" and "goodness" has come to mean nothing more than not killing.

D. Thrace, Macedonia and Foreigners: Taxonomies of Citizenship and Rescue

Raul Hilberg summarizes the fate of Bulgarian Jewry as follows:

> *"In the occupied territories of Macedonia and Thrace, where Bulgaria was, so to speak, really at war, the Jews were delivered into German hands for deportation to killing centers. In Old Bulgaria, on the other hand, the destruction process was developed through definition, expropriation and concentration, only to be broken off before the deportation stage."*[24]

What Hilberg does not highlight, but which is of central importance here, is that the deportation and killing of the Jews of Macedonia and Thrace, two of the regions of Greater Bulgaria under Bulgarian jurisdiction at the time, were made possible by a specific legal measure relating to the citizenship status of the residents and inhabitants of the two territories. When it assumed jurisdiction over both Macedonia and Thrace, the Bulgarian government introduced measures under which Bulgarian citizenship was extended to all subjects in the newly incorporated territories. The only exclusion was the one which applied to Jews, who were strictly forbidden, under the terms of the law, from applying for or gaining Bulgarian citizenship. In other words, the eleven thousand Macedonian and Thracian Jews who were ultimately sent to the death camps were transported because of the operation of the law of Bulgarian citizenship.[25] They could be deported, and handed over to the Germans, precisely because they were not Bulgarian citizens, protected by the norms and principles of national identity and the Constitution, norms and understandings at the heart, perhaps, of the "rescue" efforts. And they were not Bulgarian citizens because Bulgarian law, which applied to them under the terms of the governance arrangements with the Germans in the territories of

[23] See *Bulgaria*, ENCYCLOPEDIA OF THE HOLOCAUST 1 270 (ISRAEL GUTMAN, ED., 1990).

[24] THE DESTRUCTION OF THE EUROPEAN JEWS 2 744 (REVISED AND DEFINITIVE EDITION, 1985).

[25] 4,273 Jews from Thrace and 7,381 Jews from Macedonia.

Greater Bulgaria, excluded them from the possibility of citizenship. The original violence of the incorporation of Thrace and Macedonia, their constitution as "Bulgarian", operated to remove Jews from the 'Nation', both figuratively and, more tragically, literally.

The situation of Jews in Belgium offers an ironic and equally tragic point of jurisprudential comparison. Simply put, the vast majority of Belgian Jews who perished in the Holocaust were not "Belgian". Of the Jews deported from Belgium, "only" 1,203 were Belgian citizens. They constituted 5 % of those sent East. On the other hand, 95% of those deported from Belgium, 23,921 were foreign citizens.[26] To a great extent, this is reflective of the demographic reality of Belgian population dynamics. The vast majority of those identified or identifying themselves as Jews were in immigrant communities. At the same time, it is important to underline here, that this demographic reality was exploited by both Belgian officials and the Germans in elaborating deportation plans. Belgian Jews were exempted from arrest in the earliest stages, at the behest of the Belgian government, pleas which were welcomed by the Germans, who could be seen to be offering concessions while, at the same time, proceeding to effect large scale deportations.

In other words, the comparison of the Belgian and Bulgarian situations offers us what I think are crucial insights into the ways in which concepts such as citizenship and constitutional normativity, if they are understood purely in terms of a legal positivism, do not, and cannot, offer any form of protection or guarantee of equality in times of emergency or perceived threat. Indeed, the situation in Belgium and Bulgaria mirrors the legal evolution of the status of Jews in Germany itself - from citizens, to subjects, to non-citizens, to those capable of being killed as enemies of the "Nation". Bulgarian law and understanding of the concept of Bulgarian citizenship killed Thracian and Macedonian Jews. The failure or weakness of a truly ethically grounded Belgian understanding of constitutional norms as transcending positivist interpretation and political expediency killed the Jews of Belgium.

E. Conclusion

Zygmunt Bauman has recently analyzed the situations in which slippage can occur between the categories of bystanders and perpetrators. He argues that silence in the face of evil can easily be transformed into a more active form of complicity.

[26] See STEINBERG 27 (note 3).

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> *"In that grey area, bystanders confront the risk of becoming accessories to the devil and turning into perpetrators."*[27]

This is the conceptual, category and jurisprudential slippage and confusion which best characterizes the Belgian case. The mythology of "passive collaboration" as a form of resistance hides a clear history of overzealous and active compliance in identifying Jews and Jewish businesses for the Germans. The slippage which occurred in Bulgaria is somewhat more complex. Bulgaria, the King, the people to a great extent, the government structures and officials slide, in any ethical analysis, between the categories of "rescuer" and "perpetrator". The characterization of this phenomenon shifts from a category which is "good" and righteous, the highest ethical status we can arguably imagine, to one who is without question "evil", the perpetrator. Bulgaria refused, through law, to rescue the non-Bulgarians of Thrace and Macedonia. Bulgaria independently implemented a system of legalized exclusion and enslavement of their fellow Bulgarians. This is, without doubt and beyond question, both "evil" and "lawful".

In *Facing the Extreme*, Todorov warns that we must not confuse the moral with the political, or morality with justice, although, at times, the concepts may be used to serve the same purposes.[28] The problems and debates which emerge in our consideration of the morality of rescue in Bulgaria demonstrate that this analysis needs to be further contextualized and probed from a critical perspective. The concluding lines of *Facing the Extreme* remind us of the ethical, and I believe jurisprudential, imperative:

"If we should find ourselves unable, when the moment comes, to meet the stranger's gaze- and to be moved by it- then woe to him who is lost, who has wandered from his people."[29]

The history of Bulgaria's Jews demonstrates that there is not one moment, but a series of moments, in which we are faced with our ethical duty to the Other, the Other excluded by the force of law. We must, at some level, if we are to be just, recognize the just, the righteous among the nations who prevented the deportation of Bulgarian Jewry, while, at the same time, recognizing that, at other moments of the Other, these righteous people failed and acted in an evil and reprehensible way. Citizenship and constitutional normativity played similar roles in the cases of the

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[27] *From bystander to actor*, 2 JOURNAL OF HUMAN RIGHTS 137 (2003).

[28] TZVETAN TODOROV, FACING THE EXTREME 288-289 (1996).

[29] *Id.*, 296.

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non-Belgian Jews in Belgium and the non-Bulgarian Jews of Thrace and Macedonia. Law, state and nation all served the processes of exclusion and death. Before "rescue", in Bulgaria there was exclusion, a radical turning away from the gaze of the Other. Temporality and morality must always be reckoned together in our historical, legal and moral analyses. Complexity and plurality, of motives, of actors and of acts, do not make the task of the lawyer or the historian an easy one, but morality makes its own moral demands, which we ignore at our peril.

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