

## DEVELOPMENTS

### *Review Essay - Continuity or Discontinuity of Law? - David Fraser's Law after Auschwitz: Towards a Jurisprudence of the Holocaust*

By Thomas Mertens\*

[David Fraser, *Law After Auschwitz: Towards a Jurisprudence of the Holocaust*; Carolina Academic Press: Durham, North Carolina (2005); ISBN-10 0-89089-243-1; 464 pp.; \$48.00]

The following story, from the Netherlands, would fit very well the general thesis Fraser defends in his remarkable book *Law After Auschwitz: Towards a Jurisprudence of the Holocaust*.<sup>1</sup> In May 1941, a merchant bought a substantial quantity of pork meat without the necessary valid licence. This was a criminal offence according to the legal measures issued by the German occupation authority. Subsequently, the merchant was prosecuted and convicted by a special court for economic crimes established by the Germans. The merchant appealed his conviction and, in the last instance, the Dutch High Court had to decide whether his conviction would stand. The merchant's legal complaint was that the establishment of the economic court was itself a violation of Article 43 of the International Hague Convention of 1907 and that his conviction was thus void. Article 43 determines how an occupying force should deal with the existing law in an occupied territory. It declares clearly that it should respect existing legal institutions, "unless absolutely prevented." The merchant argued that the occupier should have respected the existing statute on the organisation of the judiciary and the code of criminal procedural. The establishment of the economic court was not absolutely necessary, the merchant

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<sup>1</sup> DAVID FRASER, *LAW AFTER AUSCHWITZ: TOWARDS A JURISPRUDENCE OF THE HOLOCAUST* (2005).

contended; and thus the appeal amounted to a request for a review of the regulation in light of the higher law of Article 43 Hague Convention. This is exactly what the High Court did, but not with the result the merchant hoped for. The *Hoge Raad* held:

(...), the promulgation of the Decree ( ... ) concerning the trial of criminal cases affecting the economic life, published in the *Verordnungsblatt* for the occupied Netherlands territory (No. 71 of 1941), is to be considered a legislative measure of the occupying Power. In the prevailing circumstances such regulations cannot be denied the character of a *wet* (Act) in the sense of Dutch legislation (...) Neither the history nor the wording of Article 43 of the Regulations of 1907 afford any foundation for the assumption that the framers of the Convention intended to confer on the Courts, which had remained in function in an occupied territory in conformity with the purport of the said Article, jurisdiction to judge the measures taken by the occupant for the promotion of the interest therein set forth, in the light of the requirement that in doing so, the occupying Power is bound to respect the legislation in force in the country, unless absolutely prevented.<sup>2</sup>

This ruling was the cause of immediate controversy, which persists in Dutch legal circles to this day.<sup>3</sup> The reason is clear: the importance of the case does not reside in the fact that the conviction of this merchant was upheld, but that the decree of the German occupier was understood as “law.” The Dutch High Court made it absolutely clear how it understood the role of the judiciary *vis-à-vis* the German regulations and how it conceived of the hierarchy of legal norms. Obviously, the

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<sup>2</sup> Het ‘toetsingsarrest’, Hoge Raad [HR] [Supreme Court of the Netherlands], 1 December 1942, NJ 1942, 271.

<sup>3</sup> See J. MICHIELSEN, THE “NAZIFICATION” AND “DENAZIFICATION” OF THE COURTS IN BELGIUM, LUXEMBURG AND THE NETHERLANDS Chapter 4 (2004); D. VENEMA, RECHTERS IN OORLOGSTIJD: DE CONFRONTATIE VAN DE NEDERLANDSE RECHTERLIJKE MACHT MET NATIONAAL-SOCIALISME EN BEZETTING Chapter 3 (2007) (for an overview).

Germans were satisfied with the outcome; in Dutch resistance circles, the decision was seen as a complete surrender, as a symbol of a subservient obedience to the occupying force. The decision that the German decree "cannot be denied the character of a *wet*" had implications for the other legal measures already taken by the Germans, including some ten anti-Jewish decrees issued before early 1942, as well as for those yet to be issued. They were (would be) "law" too.

Immediately after the war, the German legal philosopher Gustav Radbruch tells us a completely different story in a couple of articles of which "Statutory Lawlessness and Supra-statutory Law" is the most famous.<sup>4</sup> Here Radbruch argued that the most extreme measures taken by the German Nazis may have had the appearance of law, but that they either never actually acquired the status of "law" or should now be considered not valid. Radbruch's postwar articles are also famous for the accusation that legal positivism induced lawyers to oversee this and that their formalism led to the moral collapse under the Nazi regime. In the mid-sixties, this position was revisited by Hart who rejected Radbruch's stance and by Fuller, who basically accepted it. Addressing the issue of "transitional justice," Radbruch comes up with the "formula" according to which statutory law has to yield when it clearly and intolerably violates precepts of morality.<sup>5</sup> But Radbruch went even further: he argued that certain legal provisions, pursuant to which the National-Socialist Party claimed for itself the totality of the state and on which the inhuman treatment of certain "categories" of human beings was justified including violations of the proportionality principle in sentencing criminals, clearly betrayed the core value of justice, i.e. equality. Therefore these were clear examples of statutory lawlessness and had never attained the nature of "law." The making of the law is, thus, intrinsically linked up with the notion of "equality" and not merely in a formal sense. A number of his post-war contemporaries followed Radbruch in this on the basis of the alleged unconstitutionality of the so-called "Enabling Act" of March 1933. In sum, in 1946 Radbruch argued that the rise of the Nazi regime constituted a break with the legal past of the Weimar republic and he argued that it was now time to break with the Nazi regime and to restore the rule of law, after "twelve years of statutory lawlessness and of the denial of legal certainty."

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<sup>4</sup> G. Radbruch, *Gesetzliches Unrecht und übergesetzliches Recht*, originally in: SÜDDEUTSCHE JURISTENZEITUNG 105-108 (1946); reprinted in G. RADBRUCH, *DER MENSCH IM RECHT* 111-124 (1957); and G. RADBRUCH, *RECHTSPHILOSOPHIE* 347-357 (E. Wolf ed., 7th ed., 1970); and G. RADBRUCH, *GESAMTAUSGABE* 83-93 (A. Kaufmann ed., 1990). There is a new German edition of the *Rechtsphilosophie* with editorial footnotes, edited by Stanley L. Paulson and Ralf Dreier, which includes this famous essay: G. RADBRUCH, *RECHTSPHILOSOPHIE (STUDIENAUSGABE)* 211-219 (1999). Recently a new translation of this famous text appeared as G. Radbruch, *Statutory Lawlessness and Supra-Statutory Law* (Bonnie Litschewski Paulson and Stanley L. Paulson trans.), in 26 OXFORD JOURNAL OF LEGAL STUDIES 1-11 (2006).

<sup>5</sup> See R. ALEXY, *THE ARGUMENT FROM INJUSTICE: A REPLY TO LEGAL POSITIVISM* (Bonnie Litschewski Paulson and Stanley L. Paulson trans., 2002) for a contemporary defense of Radbruch's approach.

Here we have two pointed examples of the fate of the “law” in relation to the Nazi regime and to Auschwitz. The example of the Dutch High Court fits very well with the central theme of Fraser’s fascinating book: there is no fundamental discontinuity between the law as it existed before the rise to power of the Nazis, the law in the Nazi-era in Germany and the occupied territories, and the law after the Nazi-era. It was law all the way through. In Fraser’s words, there was no shift from “law” to “not law” in 1933, nor did the defeat of Hitler in 1945 reinstitute a return to legality. There is in fact little which distinguishes our fundamental understandings and practices of law today from what German lawyers and judges did between 1933 and 1945. The widespread understanding of the Nazi state as a criminal regime, as radically discontinuous with that which preceded and succeeded the 1933-1945 period, is a “collective lie” that we tell ourselves in order to defend a clear line between good and evil.<sup>6</sup> Thus, the way in which the Holocaust is nowadays remembered as something that is alien to the rule of law says more about the collectivity that remembers than it does about the historical events that took place. This is particularly true with regard to the key and essential elements of the legality of the Holocaust, which have been deliberately elided. The Holocaust,<sup>7</sup> and the process leading up to the Holocaust, was - at the time - “perfectly lawful and legal.”<sup>8</sup> It was not a lawless barbarism, but, on the contrary, a “lawful” barbarism,<sup>9</sup> in which lawyers played an important part preparing, creating and perpetrating. This fact became obscured by constructions *ex post*, in which the International Military Tribunal in Nuremberg, discussed by Fraser in chapter 5, and lawyers like Radbruch played a significant role.

The central thesis of the book, presented cogently in chapter 1, draws importantly on a peculiar understanding of “law” to which I will return later and is elaborated throughout the book. Chapters 2, 3, 4 and 6 focus primarily on the years before the Nazis came to power and on their use and abuse of the law during their reign, both in Germany and abroad, notably Vichy France.<sup>10</sup> In making the claim that Nazi law was indeed “law,” Fraser importantly focuses on how others, outsiders, perceived

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<sup>6</sup> FRASER, *supra* note 1, at 44, 21.

<sup>7</sup> Fraser seems to use the concepts of Holocaust, Auschwitz and Shoah as interchangeable.

<sup>8</sup> See FRASER, *supra* note 1, at 5, 13, 15 for the proposition that Auschwitz was lawful.

<sup>9</sup> *Id.* at 48.

<sup>10</sup> Fraser has also published on the occupation of the Channel Islands and on Belgium. See DAVID FRASER, *THE JEWS OF THE CHANNEL ISLANDS AND THE RULE OF LAW: 1940-1945* (2000); David Fraser, *The Fragility of Law: Anti-Jewish Decrees, Constitutional Patriotism and Collaboration in Belgium 1940-1944*, 14 *LAW AND CRITIQUE* 253-275 (2003).

the developments unfolding in Germany after 1933; whether or not certain state regulations are legal is to a large extent dependent on the outsider's perspective. This, then, brings to light the fact that Anglo-American lawyers, in their discussions of Nazi legality, did not universally reject the German legal system after 1933 as being "non-law."<sup>11</sup> The idea of the Nazi state as an unlawful, illegitimate, criminal enterprise, operating outside Western understandings of law was not one which was dominant in the period between the Nazis' ascent to power in 1933 and the time of entry of the United States into the war.<sup>12</sup> For example, the infamous 1935 Nuremberg legislation regarding citizenship sits less uncomfortably within the Western tradition of "equal citizenship" than is often assumed, particularly when compared with racial legislation in the United States and in other Western democracies that was still in force long after the demise of the Nuremberg laws.<sup>13</sup> Similar remarks on ideological and discursive continuity can be made with regard to eugenics and compulsory sterilization, accepted medical and social practice until recent times.<sup>14</sup>

While these chapters primarily focus on the pre-Nazi-era – although they are never entirely historical in taking into account the way this era was perceived *ex post* – the remaining chapters focus primarily on the *ex post* perspective. Thus, how did "the Holocaust" make its way into the legal reality of the United States, Britain, Canada and Australia? After World War II, and with the Cold War well underway, many people were on the move, among them both victims and perpetrators of the Nazi horror. They sometimes ended up in each other's vicinity, and sometimes the identity of the perpetrators was uncovered. The question then arose as to what to do. Here, Fraser gives detailed accounts – from an astounding variety of sources – of ways in which the American, British, Canadian and Australian legal systems tried to deal with these cases, while at the same time keeping "Auschwitz" at a safe distance.<sup>15</sup> One of the guiding subtexts of these cases and trials, initiated often by requests from governments, notably the Soviet Union, now seen as the enemy in the Cold War, was how quickly the new narrative of the struggle against communism was able to replace the struggle against the evil of Nazism or at least

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<sup>11</sup> Perhaps, Fraser takes the relevance of this point too seriously; the outsider's perspective is necessarily a sociological or positivist point of view. See e.g. ALEXY, *supra* note 5.

<sup>12</sup> FRASER, *supra* note 1, at 79.

<sup>13</sup> *Id.* at 95.

<sup>14</sup> *Id.* at 425.

<sup>15</sup> Remarkably, Fraser does not discuss the Eichmann trial in Jerusalem, in which—contrary to the Nuremberg trials (in which, as he writes, the Holocaust only played a "secondary role")—this was absolutely central. See *id.* at 130.

erase the memory thereof. Former collaborators of the Nazis were now portraying themselves, sometimes successfully, as freedom fighters. Fraser's account stresses how, in these legal cases, it was absolutely essential to underline that the horrors of the Holocaust were (to remain) something "out there," something that had nothing to do whatsoever with American law,<sup>16</sup> or, for that reason, with the law of these other countries (it needed to be "a German phenomenon"<sup>17</sup>). These court cases and trials therefore never dealt exclusively with the individual perpetrators and their horrific acts but also with how to memorize the Holocaust. They were powerful instruments to keep at bay the "legality of the Holocaust" and the truth of the evil to which the law may lead. Adjudicating and constructing memory went hand in hand. This then brings Fraser to the following statements, namely that law and the rule of law may prove to be an inadequate forum for the complex issues of public memory and history which continue to surround the Holocaust,<sup>18</sup> or even stronger, that "memory and justice can be and have been ill-served by law and jurisprudence," to the extent that "memory can not be served within the legal system."<sup>19</sup> In other words, rather than doing justice to the victims, these trials added more to a distorted memory of the Holocaust as something discontinuous with our legal present.

As Fraser focuses so much on "continuity" and sees any discussion of discontinuity as a construction *ex post*, invented and designed to prevent us from being tainted by the horrors of the Holocaust (and from acknowledging that we are), his understanding of the horrors must diverge from the usual conceptual framework into which the debates on the law of Nazi Germany have developed since Radbruch's essay. Fraser is quite explicit that the "sterile debate"<sup>20</sup> on the validity of the law cannot be of any help in understanding the problem of the legality of the Nazi-era: natural law and positivism do not advance the real issue.<sup>21</sup> Rather, the debate on positivism itself was instrumental to inscribing the "law" of Auschwitz as non-law,<sup>22</sup> and thus an element which contributed to the myth of discontinuity; the natural law view that Nazi law was law in form only (or a perverted form of

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<sup>16</sup> *Id.* at 251.

<sup>17</sup> *Id.* at 254, 341, 418.

<sup>18</sup> *Id.* at 293.

<sup>19</sup> *Id.* at 213.

<sup>20</sup> *Id.* at 28.

<sup>21</sup> *Id.* at 7.

<sup>22</sup> *Id.* at 12.

law in direct reference to Radbruch<sup>23</sup>) is epistemologically and historically unsound<sup>24</sup> and rhetorical in nature only.<sup>25</sup> To a certain extent, Fraser has a point here. In the Anglo-Saxon world, the discussion on the “legality” of Nazi Germany or the lack thereof took place primarily within the confines of the Hart/Fuller debate for a very long time. This meant that it could safely be isolated and that legal theory could restrict itself to the rule of law as something primarily “good.” It is clear indeed that Hart’s example of the grudge informer, which triggered the debate, is almost a mockery of what it is at stake. Elsewhere,<sup>26</sup> I have argued that Hart grossly misunderstood this case by not acknowledging how it affected the Nazi judiciary. The grudge informer case, introduced by Radbruch in the above-mentioned paper and discussed by Hart in relation to a case heard before the Bamberg *Oberlandesgericht*, was not about some ordinary German citizen who abused the Nazi law in order to get rid of a unwanted companion or husband, but about the way the Nazi judiciary was entangled and complicit in the way evil law was implemented and upheld. Although we might now not appreciate the way in which Radbruch tried to exonerate the judiciary from applying evil law, he did - at least partly - see the problem of how the Nazi-era was “full of law and lawyers.” Unlike Hart, Radbruch tried to address this problem, by stressing the need to restructure German law and to incorporate the development that had begun with the human rights declarations and by stressing the need “to rebuild the *Rechtsstaat*, a government of law that serves as well as possible the ideas of both justice and legal certainty.”

As long, however, as the debate on the validity of Nazi law - between natural law and positivism - was concerned with minor problems of ordinary citizens taking advantage of discriminatory laws to solve their private problems, and not with the ways in which law itself was implicated in bringing evil about, Fraser is right to be sceptical about this debate. As a result, his book does not use the ordinary parameters in which the debate is normally set: a discussion of the validity of the law; of the relation between validity and obedience; of whether the law consists of rules only or of moral principles as well; of whether a natural connection between law and morality exists, etc. Indeed, some of the usual array of authors that

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<sup>23</sup> *Id.* at 142.

<sup>24</sup> *Id.* at 77.

<sup>25</sup> *Id.* at 145.

<sup>26</sup> Thomas Mertens, *Radbruch and Hart on the Grudge Informer: A Reconsideration*, 15 *RATIO JURIS* 186-205 (2002).

dominate this agenda are only briefly mentioned: Kelsen and Schmitt; Radburch, Hart and Fuller; and Dworkin, Raz and Alexy.<sup>27</sup> Where this monograph is also meant to be an essay on the nature of “law,” on what Auschwitz tells us about it, it urges us to look elsewhere, at post-modern authors, such as Lyotard, Derrida and Agamben. According to Fraser, they should be seen as our most prominent and promising guides.

Without doubt, Fraser’s book is both important and provocatively challenging. It needs to be read and reread. Yet, it sometimes overstates the point it wishes to make, and not to its advantage. This is true on a rather trivial level, as when Fraser discusses the issue of how the extradition cases of supposed former perpetrators in Western countries like the United States came to be about the lies they told about their past when applying for citizenship or residence and not about the substance of their crimes. He then concludes from this, for example, that the Holocaust is not an American problem but that only lying about it to come to the United States is.<sup>28</sup> Yet the lying and the killing are obviously connected; revealing to immigration officers that one was a Nazi perpetrator would have significantly reduced the chance of being admitted to either the U.S. or Canada. Clearly this exaggeration and others result from the moral outrage resulting from Fraser’s conclusion - justifiably - that so little has been done to bring to justice the perpetrators of the Nazi horror, and that anti-Semitism still played an important role in these and similar post war cases. The emphasis on discontinuity is important here too: they were the Nazis, not we; we are lawyers and democrats.

Overstating the case affects Fraser’s book on a more fundamental level too, i.e., in relation to legal continuity itself. As far as I see it, the thesis of continuity is substantiated by a couple of interconnected statements. First, and this is emphasised by others as well,<sup>29</sup> strong links in terms of personnel exist between the periods mentioned: most German lawyers who worked under the Weimar republic stayed in place when the Nazis took over, and then also remained at their post after 1945 when the German Federal Republic was created. Legal community is apparently very malleable and this is not only true for Germany, as the Vichy case proves.<sup>30</sup> Secondly, law and lawyers were essential for implementing anti-Semitic racism, by legally defining who were to be excluded from the body politic, by

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<sup>27</sup> FRASER, *supra* note 1, at 23.

<sup>28</sup> See *id.* at 235; or, in relation to Canada at 349: “... he was forced to leave Canada not because he killed Jews but because he lied about killing Jews.”

<sup>29</sup> See, e.g., I. MÜLLER, FURCHTBARE JURISTEN, DIE UNBEWÄLTIGTE VERGANGENHEIT UNSERER JUSTIZ (1989).

<sup>30</sup> FRASER, *supra* note 1, at 27.

legally robbing them of their property, by legally isolating them from the rest of the population and by thus preparing the legalised killing. In one word, law and lawyers were essential in creating a category of persons that could be exterminated but not murdered,<sup>31</sup> in defining them as "homo sacer." Auschwitz was only possible because of "law," and therefore it was a lawful place.<sup>32</sup> Thirdly, lawyers like Loesener, the Jewish expert in the Ministry of the Interior<sup>33</sup> did not stop perceiving of themselves as lawyers when they implemented legal regulations concerning the Jewish question, nor did outsiders, most certainly until the outbreak of the war, look upon those regulations as in any way deviating from the "law." Fourthly, the idea of discontinuity was a construction *ex post*, as a rhetorical device to shield ourselves from being implicated in the horrors of Auschwitz.

Yet, these assertions are not unequivocally true. Many lawyers and judges did remain in place after the Nazi takeover, yet, at the same time, many others were ousted as a consequence of the early and important legal measure concerning the purification of the civil service taken by the Nazi authorities, *Radbruch* being one of them.<sup>34</sup> This measure resulted in a brain drain, not only in the natural sciences but also in the fields of philosophy and law.<sup>35</sup> In the eyes of those who remained and were to become the legal backbone of the Nazi regime, the Nazi takeover was not just the result of yet another "ordinary and lawful"<sup>36</sup> application of Article 48 of the Weimar Constitution. For many contemporaries, the events in early 1933 and the Hitler regime were - contrary to what Fraser writes<sup>37</sup> - remarkable indeed and many of them saw Hitler's rise to power as a constitutional break with the past. The "Enabling Act," which gave the Hitler government legislative power, was seen as a provisional Constitution for the new Germany.<sup>38</sup> Fraser, in his attempt to

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<sup>31</sup> *Id.* at 16.

<sup>32</sup> *Id.* at 55.

<sup>33</sup> *Id.* at 36.

<sup>34</sup> This was possible because of the notorious "Gesetz zur Wiederherstellung des Berufsbeamtentums" of April 7, 1933.

<sup>35</sup> R. Zimmerman, *Was Heimat hiess, nun heisst es Hoelle*, in *JURISTS UPROOTED. GERMAN SPEAKING ÉMIGRÉ LAWYERS IN TWENTIETH-CENTURY BRITAIN 1-71* (J. Beatson, R. Zimmerman eds., 2004).

<sup>36</sup> FRASER, *supra* note 1, at 144.

<sup>37</sup> *Id.* at 24.

<sup>38</sup> This was the perspective chosen, for example, by C. Schmitt, in: *STAAT, BEWEGUNG, VOLK* 7 (1933); if on the other hand, the Enabling Act derived its legitimacy from the Weimar Constitution, as Fraser seems to say, then the constraints of that constitution should have remained valid too. But as is well known, the civil rights which could not be restricted under Article 48 were as easily put aside as other constitutional devices of "Weimar". So the continuity thesis is doubtful here either way.

emphasize continuity, has to downplay the very living sentiments in early 1933 that Germany was being reborn, either for better or for worse. Secondly, while it is undoubtedly true that law played a key role in defining, robbing and isolating the Jews, there is much less evidence that the actual mass killing of the Jews was governed by law too. Pogány makes a similar point when he writes in his review that no laws prescribed the genocide of Europe's Jews.<sup>39</sup> This brings me to the third and more general point that Fraser leaves rather underdeveloped. Ever since Franz Neumann's *Behemoth* and Fraenkel's thesis of the *Dual State* a vivid discussion exists as to whether the Nazi state could be called "legal" in any sensible meaning of the word.<sup>40</sup> While it is true that many of the legal participants were indeed still acting as lawyers in 1933, just like they did before, they had lost quite a few of their former colleagues and they were serving a leader who did not value "law" very highly.<sup>41</sup> Something similar might be said with regard to 1945, seen by many, most prominently by Radbruch and by Kelsen, as a moment of radical rupture after the defeat of the German forces which brought to an end the "legal" mechanisms of the Nazi state in what was called *Stunde Null* (zero hour). Obviously, there are continuities between the Nazi regime and the later Federal Republic - in this regard the name of Globke is worth mentioning - and it is rewarding to emphasize that the rupture was not complete, but Fraser's statement that there is a deep continuity despite all these legal transformations is simply an overstatement. The idea of discontinuity is not only a construction *ex post* to which the Nuremberg Trials and authors such as Radbruch made such important contributions.

How then can Fraser save his "continuity" thesis when confronted with such powerful counter-arguments, making it almost evident that "discontinuity" is not merely *ex post* and that there were also deep ruptures? In order to understand this, I have had to delve deeper into Fraser's use of the concept of law itself. To me, it seems that Fraser is only able to uphold the continuity thesis at the price of providing us, on the one hand, with a very formal conception of "law" and, on the other hand, with a very substantial, maybe even "metaphysical" one. Neither of these is particularly appealing to me. According to the former view, "law" is merely a tool<sup>42</sup> and little more than the persuasive deployment of rhetorical devices

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<sup>39</sup> I. Pogány, 6 HUMAN RIGHTS LAW REVIEW 428 (2006) (reviewing DAVID FRASER, LAW AFTER AUSCHWITZ (2005); See also R.O. PAXTON, THE ANATOMY OF FASCISM 163 (2004), "...outside the reach of the German normative state and of German law."

<sup>40</sup> See, e.g., R.O. PAXTON, THE ANATOMY OF FASCISM 119 (2004) (for an overview). Paxton distinguishes between the normative and the prerogative state. See also MUELLER, *supra* note 29, at 294.

<sup>41</sup> H. WEINKAUFF, DIE DEUTSCHE JUSTIZ UND DER NATIONALSOZIALISMUS: EIN UEBERBLICK 46-56 (1968).

<sup>42</sup> FRASER, *supra* note 1, at 319.

and signifiers.<sup>43</sup> Whether there is “law” entirely depends on the self-understanding of the defined professional groups such as lawyers, judges and other participants in the interpretative community. In other words, the question as to whether the Nazi era contained “law” entirely depends on whether there were sufficient Nazi lawyers, judges and other legal participants understanding themselves as acting within a legal system.<sup>44</sup> Certainly, something can be said in favor of defining “law” in such a nominalistic way. “Law” refers to the community that uses it and accepts it as such; this forms the basis of any positivistic theory that grounds the validity of the law in the formal acceptance - by its officials, as Hart would say, of its ultimate rule. But there is a considerable downside to this too. If “law” is everything and everywhere as soon as its prominent interpreters say it is, the reverse seems to be true as well: as soon as important interpreters decide that something is “not law,” or that it constitutes a rupture with the rule of law, why would this not be true also? Why not accept with Radbruch and with the International Military Tribunal that Nazi law was not “really” law, or only a “perverted” form of law? And what does it mean when Fraser argues time and again that Auschwitz is full of law? That decisions were made at the ramp, that the life in the camp was structured around some kind of rules, with its inevitable yet unpredictable exceptions, and that its inmates were being ordered, even to their own deaths? Does the predicate “law” still have a distinguishing quality if “law” merely indicates human behavior as it always is somehow “rule governed”? Understanding the world, including Auschwitz, as full of law, means understanding it as being full with competing, mutually incompatible systems of rules and norms, some legal and some not, in which choices have to be made. This is the position from which a natural law perspective inevitably begins; it searches for a criterion on the basis of which more preferable systems of norms can be separated from the less preferable ones. Despite the epistemological difficulties attached to any natural law perspective, its approach - often couched in terms of searching for the connection between law and justice - seems inescapable to me.

This, however, is not the direction in which we have to search for Fraser’s “metaphysical” conception, according to which “law” has its own substance. He argues that the concepts of law and justice should not be confused. Or even stronger: choosing law is never the same as choosing justice.<sup>45</sup> What, then, is this substantial concept of “Law” - indeed often indicated with a capital “L”?<sup>46</sup> Here,

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<sup>43</sup> *Id.* at 8.

<sup>44</sup> *Id.* at 28, 21.

<sup>45</sup> *Id.* at 77, 212.

<sup>46</sup> See, e.g., *id.* at 13, 15, 55.

"Law" is - almost - presented as an acting "subject" itself, which cannot judge the Holocaust,<sup>47</sup> which forgets and forgives itself,<sup>48</sup> which had to be saved when confronted with an insurmountable difficulty,<sup>49</sup> which continued when six million died and will always end up triumphant,<sup>50</sup> which owes a duty to the victims, yet must betray itself and is able to do so as it is a flexible instrument,<sup>51</sup> which should but cannot judge itself and its role in the Holocaust.<sup>52</sup>

Earlier, I remarked that Fraser's account of what happened before, during, and after the Nazi-era is not a distanced historical account, but that it is written with moral outrage. This outrage not only concerns the Nazi perpetrators or the lawyers who were ever present to make the horrors of Auschwitz possible; it not only encompasses the contemporary by-standers, both German and foreign who saw how law was used for evil purposes. The moral outrage not only concerns the easy acceptance of anti-Semitism both in Germany and abroad, both then and now (as became apparent during the post-war extradition procedures Fraser discusses). Despite his explicit denial that "law is inherently evil,"<sup>53</sup> his outrage, so it seems to me, concerns "Law" itself. The thesis of discontinuity was developed, Fraser repeatedly states, to save the "Law" from the damning verdict that it was so prominently present at Auschwitz. These efforts have been successful: the law is saved together with "the rule of law," and the truth of Auschwitz is hidden and conceived as something else, as an "Other," as unrelated to us and our "law." But what good, so Fraser continues, did discontinuity bring? The reestablishment of the law and its discontinuity from Auschwitz meant that no justice could be done to the victims; that hardly any serious recollection exists of the evil options entailed by living under the law or that the condition of law is a very precarious and risky one.

That the "Law" itself is one of the main perpetrators of Auschwitz is the pessimistic message I derive from this fascinating book: under law everything including genocide is possible and therefore the gap between law and justice is simply unbridgeable. While Auschwitz and law can be brought together, even easily it

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<sup>47</sup> *Id.* at 8.

<sup>48</sup> *Id.* at 10.

<sup>49</sup> *Id.* at 12-13.

<sup>50</sup> *Id.* at 145, 213.

<sup>51</sup> *Id.* at 198, 277, 298.

<sup>52</sup> *Id.* at 324.

<sup>53</sup> *Id.* at 21.

seems, this is not the case with justice. Justice and "law" are incompatible, of a qualitatively different species. "Justice" would simply burst the categories of "law"; and "law" is unable to bring justice. Failing to acknowledge the evil of "law" does not so much result from a reluctance to glance in the mirror,<sup>54</sup> but from the sheer impossibility of doing so. As for now, I am not ready to accept this as the message Auschwitz teaches us.

Let me return to the Netherlands, as the record of the law during the German occupation is not as bleak as suggested by the example with which I began this review. In early 1943, a criminal case arose before the Leeuwarden Court of Appeals. The case itself was uninteresting. The Court had little doubt that the earlier conviction by the District Court could stand legal scrutiny; even the criminal sentence was adequate, *i.e.* proportionate to the crime committed. There was not really any serious ground for the appeal. Yet, the Court of Appeals did something interesting in reducing the sentence imposed. In its short but telling opinion, it stated that it wanted to prevent the offender from serving his term of imprisonment under the harsh conditions of a newly established prison camp named "Erika," which was run by Dutch Nazis and Germans. The Leeuwarden Court argued that it could not impose the original sentence, albeit that it deemed it proportionate, as the imposition of such a sentence would violate "the legal provisions and the intent of Lawgiver and Judge." Confirming the earlier sentence would run counter to "the moral conscience of this court."<sup>55</sup>

Despite the many detailed accounts of how people fared before, during, and after the Nazi-era under law, Fraser uses a quite homogeneous conception of the law, either in its "tool" conception or in its substantial "perpetrator" conception. However, the Leeuwarden Court of Appeals case suggests that the law is the result of a choice between several sets of often conflicting norms all claiming to represent "valid law." In this battle between competing norms, judges and citizens and their representatives in legislative bodies have to decide as to what the law should be. In the Leeuwarden case, the judges took the legal claims of their conscience more seriously than the "law" of the occupier; Radbruch attributed the "statutory lawlessness" primarily to the refusal of the judiciary to acknowledge the claims of justice. Conceptualizing "law" not as homogeneous entity, but rather as the result of an ever temporary balance between conflicting claims of sets of norms striving

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<sup>54</sup> M. Stolleis, *Prologue: Reluctance to Glance in the Mirror: The Changing Face of German Jurisprudence after 1933 and post-1945*, in *DARKER LEGACIES OF LAW IN EUROPE 1-18* (C. Joerges, N.S. Galeigh eds., 2003).

<sup>55</sup> Hof Leeuwarden 25 February 1943, NJ 1951, 643.

for supremacy suggests that seeking homogeneity rather than the “Law” itself results in moral catastrophes such as Auschwitz.<sup>56</sup>

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<sup>56</sup> V. Grosswald Curran, *Formalism and Anti-Formalism in French and German Judicial Methodology*, in DARKER LEGACIES OF LAW IN EUROPE 207, 225 (C. Joerges, N.S. Galeigh eds., 2003).