# But Was it Law?

*By Thomas Mertens*[*]

**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**[**]

Gustav Radbruch, an already well- known legal philosopher and former SPD minister of Justice in the Weimar Republic, published an article in 1946 that cemented his reputation and is now regarded as one of the most important texts in 20th century legal philosophy. Earlier, long before the National Socialists' rise to power, Radbruch had already left active politics and, in 1926, returned to the academic world. He held a position as Professor of Penal Law and Legal Philosophy at the University of Heidelberg. The Nazis, however, had not forgotten his 'left' commitments and removed him from his post after their assumption of power in early 1933 on the basis of the notorious *Gesetz zur Wiederherstellung des Berufsbeamtentums*. During the years that followed, Radbruch maintained his moral integrity, refusing to compromise with the regime, and after the war, he was quickly restored to his former position at Heidelberg. Radbruch saw it as one of his primary tasks to provide some sense of orientation for a both physically and morally devastated German society. To this end, he wrote a number of articles, both scholarly and public, until his untimely death in 1949, of which the 1946 article, entitled *Gesetzliches Unrecht und übergesetzliches Recht*[1] (Statutory Injustice and Suprastatutory Law), is one. The now well-known theme of the article is Radbruch's 'conversion' from legal positivism to natural law and his

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[1] Gustav Radbruch, *Gesetzliches Unrecht und übergesetzliches Recht*, 1 SÜDDEUTSCHE JURISTENZEITUNG 105-108.

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recommendation that the legal profession in Germany should follow him in order to build, from the ruins of W.W. II, a new, decent society.

Connected with this jurisprudential theme, Radbruch's article contains a number of powerful statements, the most famous being that legal positivism and its formalism led to the moral collapse under the Nazi regime. Positivism was held directly responsible for the fact that lawyers and judges so easily adapted to the new order, and therefore to statutory, state legitimized injustice. The principle of 'law is law', predominant in Germany already decades before the Nazi take-over, made any moral examination of statutes seem superfluous, with abhorrent results. The absence of any supra-statutory, 'natural' criterion was an important contributor to the aberrations of Nazism. From this general observation, Radbruch 'deduced' the following important corollary, namely, that legal positivism, with its principle of 'law is law,' rendered the German legal profession 'defenceless' against statutes that were arbitrary and criminal.

Radbruch's guidance on 'hard cases' of what we would now call 'transitional justice', when statutory law was to be over-ruled by something 'higher', is well-known too: in extreme cases, the unjust statute should give way to the demands of justice. This requirement is located in his so-called 'formula': "Preference is given to the positive law, … , unless its conflict with justice reaches so intolerable a level that the statute becomes, in effect, *unrichtiges Recht* (false law) and must therefore yield to justice." This formula of 'intolerability' is immediately followed by another one, namely, that of 'betrayal'. Here, Radbruch writes: "Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely *unrichtiges Recht*, it lacks completely the very nature of law". This formula of betrayal has attracted considerably less attention than its twin formula, but unfairly so, since it was this that enabled Radbruch to reach the following conclusion: since the Nazis intentionally and deliberately denied 'equality' as the core element of justice – Hitler and Nazism clearly suffered from an absence of any sense of truth and justice – and since equality in the sense of treating equal cases equally is the essential characteristic of legal certainty, consequently, large parts of national-socialist 'law' lack the quality of law. Thus denies Radbruch the legal quality of the provisions with which the National-Socialist party claimed for itself the totality of the state, the laws on which the inhuman treatment of certain 'categories' of human beings was based, and the violations of the proportionality principle in sentencing criminals. All these regulations were for him clear examples of statutory injustice. From his text, it is less obvious whether he would accept that National Socialist 'legislation' was invalid from 'the very beginning'. A number of his post-war contemporaries, one of them quoted in his article, defended this position on the basis of the alleged unconstitutionality of the so-called 'Emergency Powers Act' of March 1933, since it

was passed without the required two-thirds majority. They argued that 'Hitler had forcibly prevented the Communist representatives from participating in the parliamentary session by having them arrested, in spite of their immunity. The remaining representatives, namely, those in the political middle, were threatened by Nazi storm troopers, and thereby compelled to vote for the emergency powers.' There is, however, little doubt that Radbruch believed that as much as the Nazis constituted a break with the past, that in 1946 a clear break with the Nazi era was most needed. Writing with an eye to the future, his many publications were intended to guide the restoration of justice after 'twelve years of statutory injustice and of the denial of legal certainty'.

*Darker Legacies in Europe* grew out of a conference held at the European University Institute in Florence in September 2000 and of a seminar series as the follow-up of that. The project was launched and sustained under the energetic leadership of Joerges who, with his personal enthusiasm and broad intellectual view, succeeded in bringing together a group of devoted scholars from a diversity of academic disciplines and national fora with an overlapping consensus on the importance "to explore the era of National Socialism and Fascism while Europe [at the same time] undertakes such efforts to get ahead with its integration project."[2] The quoted opening sentence of the book summarizes very well the unique character of the project of which this book is the first result. The aim of the book is not only and even not primarily to add to our historical knowledge of the era under consideration. It may very well be that a certain number of the articles in this book have a mainly historical outlook. But the underlying aim of the project as a whole was to enhance and broaden our knowledge of the past in order to understand better who we are and where we stand now, both in our national societies and in the process of the European integration. The book is thus unique in the perspective its inquiry takes into European identity, both in its diversity and in its unity. It is thus entirely appropriate that the book is opened by an excellent prologue by one of Europe's leading legal historians in constitutional law, Stolleis, addressing the unwillingness of the German legal profession, and of society as a whole, to look itself in the mirror in the period immediately following defeat in 1945 – a reluctance Radbruch apparently shared. Stolleis suggests that the unwillingness to reflect can partly be explained sociologically, since small groups tend to make "the coming generation extremely dependent on patronage" and enforce a "cartel of silence".[3]

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[2] *Preface and Acknowledgements* to DARKER LEGACIES OF LAW IN EUROPE (Christian Joerges/Navraj Singh Ghaleigh eds., 2003).

[3] Michael 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, 1-19 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003).

The epilogue is provided by Weiler, not only a leading theorist in European constitutional law but also the author of a novel dealing explicitly with the process described by Stolleis, *Der Fall Steinmann*.[4] Weiler has repeatedly argued that the unique character of the European post-war integration process lies in the way Europe tries to define its relation with the other and the others. That is to say, in its unique way of trying to overcome its 'dark past,' not by creating a European super-state, but by constitutional tolerance, and by an 'open' community of European nation states, sharing their sovereign rights without obliterating national identities. In his effort to understand the 'darker legacies' sketched out in the book, he suggests that the answer should not lie in the reverse of what Nazism and fascism taught, namely, the deification of national unity and the highest form of constitutional intolerance, but rather, in "reclaiming" nationalism and patriotism from its aberrational, intolerant form, within Europe as an genuinely ethical community.[5]

The remaining essays in *Darker Legacies in Europe* can to a large extent be grouped into the two themes highlighted earlier in relation to Radbruch's 1946 article. Firstly, the lawyers and their doctrines both with regard to the Nazi regime and other fascist regimes in Europe and, secondly, the question of the law, i.e. the role of legal methodology and the question of continuity or discontinuity between the 'dark past' and its temporal and spatial environment. In its detailed, sometimes somewhat heterogeneous and diffuse treatment of these themes, this book adds significantly to the disenchantment of the picture that could, and was in fact deduced from the story told by Radbruch, and others, and willingly believed for a considerable period of time. The Nazis (and other fascists) were a bunch of criminals who with deceptive means and by exploiting the economic crisis of the late twenties took control of German society (and some other societies). They abused, victimised and seduced important groups in those societies in order to pursue their criminal purposes. By starting a war, the darkness they brought to Germany was extended to Europe. Fortunately, the forces of light proved stronger than those of darkness to the point that gradually, Europe could reclaim its high moral ground.

Firstly, then, by sketching, sometimes in depth, the lives and works of some major German lawyers and their commitment to the 'Movement,' the book under review strengthens the message underlining the work of scholars like Rüthers and Müller, that large parts of the German population and of the legal intelligentsia lacked

[4] JHH WEILER, DER FALL STEINMANN (2000).

[5] JHH Weiler, *Epilogue*, in DARKER LEGACIES OF LAW IN EUROPE, 389-403 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003).

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loyalty to the Weimar Republic, were keen on sustaining the new regime and on developing the views by which the Nazi policies could be legitimized. Rather then being 'defenseless' victims of the regime they were active supporters. It goes without saying that Schmitt figures prominently in the book especially in connection with questions as to whether his concept of '*Großraum*' (sphere of influence) is helpful in understanding the present European project. The following contributors, Galeigh, McCormick, Burgess, Joerges, and Walker answered the question in the negative.[6] The case of other legal intellectuals both in Germany and further a field are examined too, such as Höhn (Hueck), Mortati (La Torre, Della Cananea), as well as legal doctrines and political ideologies such as the fascist theory of contract (Monateri and Somma), labor law (Nogler; in connection with Nazi practices of 'honor' and 'dignity', Whitman and in a critical response to him, Neuman), criminal law (in comparison with 'liberal' societies of those days, Lustgarten), as well as the fascist, Franquist ideology in Spain and the authoritarian constitutionalist ideology in Austria (Menéndez and Somek).

Secondly, but was it law? Some of the best essays in the book address the issue raised by Radbruch, that the lack of 'equality' in the lawmaking robbed the Nazi rules from being 'law' properly so called. From a jurisprudential perspective, this is the most interesting part. What would it mean to accept that large parts of Nazi legislation were not 'law'? From what external perspective is it then to be evaluated? For Radbruch, the unequal, later brutal, and genocidal treatment of the Jews and other minorities cannot be deemed 'in accordance with the law' irrespective of whether the lawgiver has issued regulations in that regard. But – and this touches upon the question of continuity and discontinuity as well as on the question of the exceptionality of the Nazi regime – were the Nazi policies in the beginning stages seen at the time by other nations as a radical break, as being at odds with ordinary legal practices in these other, more 'civilized' nations? Fraser directly addresses this question and argues that whether or not certain state regulations deserve to be called 'law' is to a large extent dependent on how these regulations are seen from this outsider perspective. The truth is in the eye of the beholder. He argues that whilst Radbruch's argument may have been a moral necessity in 1946 in order to establish a clear-cut break with the past and thus perhaps the necessary condition for the building of a new society, the discomforting fact is that "Anglo-American lawyers, in their discussions of Nazi legality, did not universally reject the German legal system after 1933 as being 'non-law'... the portrayal of the Nazi state as an unlawful, illegitimate, criminal enterprise, operating outside Western understandings of law was not dominant in

[6] Compare John P McCormick, *Carl Schmitt's Europe: Cultural, Imperial and Spatial, Proposals for European Integration*, in DARKER LEGACIES OF LAW IN EUROPE 133, 140 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003).

the period between the Nazis' coming to power in 1933 and the time of entry of the United States into the war".[7] For example, the infamous 1935 Nuremberg legislation regarding citizenship sits less uncomfortably within the Western tradition of 'equal citizenship' than is often assumed, particularly where 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. And similar remarks can be made with regard to eugenics and compulsory sterilization, seen as legitimate forms of crime prevention.[8]

But if Nazi legislation cannot fully be separated from 'civilized' law by the fact that the former does not, whilst the latter does, conform to 'law', wherein resides the specificity of the national socialist law, e.g. its constitutional theory? As the refutation of the 'positivist' answer given by Radbruch has long been generally accepted (Mahlmann), Lepsius tries to answer this question by reference to the "dynamic principle in National Socialism. ... The method of conceptualization, not the substantive definition of the concepts, thus contains the specific feature that marks out National Socialist law. I would call this method 'contradiction-transcending concept formation".[9] Lepsius' assertions are noteworthy, although less new than perhaps he thinks. The concept *unbegrenzte Auslegung* (infinite interpretation) coined in 1968 by Rüthers[10] made a similar claim for civil law (as well as paved the way to a much more historically sound consideration of the role of law in the Nazi period). It then might seem as if anti-formalism has replaced Radbruch's positivist formalism as one of the main culprits in the legal history of Nazi and fascist atrocities: it was not the uncritical application of the law issued by a criminal lawgiver but the willingness to mould concepts so as to suit criminal purposes that did the job, and a return to formalism, not much unlike the one advocated by Hart's claim that 'the law is one thing, morality another', could be seen as the hidden moral message. However, the essay by Grosswald Curran, in my view the best in the book, makes clear that easy methodological answers are not

[7] David Fraser, *'The outsider does not see all the game…': Perceptions of German Law in Anglo-American Legal Scholarship, 1933-1940*, in DARKER LEGACIES OF LAW IN EUROPE, 87, 89 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003).

[8] Compare also Laurence Lustgarten, *'A Distorted Image of Ourselves': Nazism, 'Liberal' Societies and the Qualities of Difference*, in DARKER LEGACIES OF LAW IN EUROPE 113, 125 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003).

[9] Oliver Lepsius, *'The Problem of Perceptions of National Socialist Law or: Was there a Constitutional Theory of National Socialism?*, in DARKER LEGACIES OF LAW IN EUROPE 19, 35 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003).

[10] BERND RÜTHERS, DIE UNBEGRENZTE AUSLEGUNG. ZUM WANDEL DER PRIVATRECHTSORDNUNG IM NATIONALSOZIALISMUS (5th edition 1997).

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available. *Formalism and Anti-Formalism in French and German Methodology* makes it abundantly clear that judicial injustice is not dependent on either methodology. Resulting from her detailed comparison between the substantive, unjust outcome in occupied France based on formalism and the same unjust outcome in Germany based on anti-formalism, she concludes that judicial methodological approach correlated weakly with substantive outcome in France and Germany during the fascist period.[11] In one sense, this is a discomforting conclusion, as the remedy proposed by Radbruch in 1946 of a switch to a natural law methodology will not then be sufficient. Yet Grosswald Curran provides an indication of the direction in which she believes preventive measures for future aberrations of the law must be sought. Here her views interestingly parallel those advocated by Weiler in response to today's European legal issues. Instead of method, the defining mark, she argues, of the fascist era was 'unicity', the value of oneness and the willed erasure of otherness. This can only effectively be countered by a fierce defense of a culture of a diversity of methods, cultures, languages and values, in other words by a culture of 'constitutional tolerance.' Such culture, however, will only sustain if it is, to use Cassirer's words, written in the citizens' minds.[12]

[11] Vivian Grosswald Curran, *Formalism and Anti-Formalism in French and German Judicial Methodology*, in DARKER LEGACIES OF LAW IN EUROPE 205 (Christian Joerges/Navraj Singh Ghaleigh eds., 2003), 224-226.

[12] *Id*., 208 with reference to ERNST CASSIRER, THE MYTH OF THE STATE (1946).

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