

CONFRONTING THE DARK LEGAL HISTORY: BERND RÜTHERS – THE CONSCIOUS OF THE GERMAN LEGAL THEORY

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Summary

The German legal theory is of crucial importance for understanding the continental legal tradition to which most of the continent's legal systems belong. The continental legal tradition reaches far beyond Europe influencing the development of legal systems of countries on other continents. Having in mind the reach history of the German legal theory in reviving and rethinking the old Roman law that lies in the foundations of the contemporary continental legal tradition, researching it is a very important task for all lawyers, theorists and practitioners that work in legal systems belonging to the continental legal tradition. However, the German legal theory beside its bright side has also a very dark past during the rule of the national-socialist terror regime in Germany from 1933 till 1945. The terror regime was underpinned by legal perversion to which creation, unfortunately, many leading legal theorists contributed. After the end of the Second World War, as in many other areas of living, also in the legal science ruled a "vow of silence". During the sixties and the 20th century this "vow of silence" was interrupted by an ambitious and brave young lawyer Bernd Rüthers who revealed the intellectual crimes of the leading German legal theorists during that period in his habilitation thesis. The focus of this paper is on the intellectual work of Bernd Rüthers in researching the dark side of the German legal theory and the influence his research had on initiating a broader debate of this issue among German lawyers, but also historians during the eighties of the 20th century. That debate helped the process of "dealing with the past" in the German society that was necessary not only to understand the dark past, but also not to let the dark past repeat in the future.

Key words: National-socialist regime, German legal theory, German legal history, Bernd Rüthers, dealing with the past.

I. INTRODUCTION

Great changes in the legal and political systems or the replacement of one system of rules and values with a different one in one society are almost always a great challenge for the entire society and its institutions. That is especially the case when the transition is from an undemocratic and abusive system towards system that is based on the democratic principles, the rule of law and the protection of the human rights and freedoms. The transition isn't limited only on changes in the legal systems, changes in the institutions and building a new legal and political culture, but also on searching and providing the society with answers on the past events or building narratives that can explain the past context and the events that happened because of certain politics. The process of "dealing with the past" is essential element in completing the transition and creating new reality that can prevent the return to the old patterns. The vitality of democracies in development or a democracy in transition is largely dependent on the successful process of dealing with the past.

The process of dealing with the past consists of the intertwined processes. First process is legal prosecution of the crimes which entails sentencing the perpetrators in accordance with the legal

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norms. Second process is creating an appropriate narrative how to explain the injustice and crimes committed in the past. That process can be named as “how to speak about the past”.

The focus of this paper is the process of dealing with the crimes and the injustice committed by the national-socialist regime in Germany from 1933-1945. The legal prosecution of the crimes started with work of the Nuremberg tribunal in 1946 and continued with several other legal prosecution executed by this Tribunal, but also later by the regular courts of the Federal Republic of Germany (former West Germany) during the sixties of the 20th century and later.² Beside the legal prosecution, the second process of explaining the crimes and injustice committed by the national-socialist regime also started quite early after the end of the war, but stopped soon afterwards because of lack of interest in the then West German society to confront with its own past, largely due to the roles that many influential individuals continued to exercise also in the post war West German society.

The first early reaction of the German intellectuals and lawyers was to blame the tradition of the legal positivism in the German legal science and practice. The legal positivism isn't only characteristic for the German legal science and practice but is also in the foundations of the European continental legal tradition up to the present day. The famous German lawyer and legal philosopher Gustav Radbruch, formerly a committed legal positivist, soon after the end of the war declared that the German understanding of the law in the way that “Law is a Law” without critically evaluating and assessing the content of a certain Law and the tradition to educate the lawyers in that direction were the main reasons why lawyers during the “Third Reich” mostly remained silent, obediently executed the orders of the regime and many prominent lawyers actively worked with the regime either in creating new laws like the “Nuremberg laws”³ or in twisting the meaning of the existing laws by introducing new regime conforms methods of interpretation.⁴

This accusation by Radbruch seemed like a relevant explanation of the role of the legal science and practice and the lawyers during the nationalist-socialist regime until the sixties of the 20th century. A generation born by the end or after the end of the war became mature enough to ask the crucial questions of identifying those who collaborated with the regime and continued to hide behind their reputation and the reputation of German universities in the post war period. Bernd Rüthers (1930-2023), then young lawyer trying to find a topic for his habilitation thesis, was the first of that post-war generation that decided to enter the battle for the truth by systematically studying the teaching of the “crown lawyers” of the “Third Reich”.⁵

This article is dedicated to him, the hero in the battle for the truth whose work interrupted the “vow of silence” among German lawyers and revealed the crimes of the leading German legal theorists. His pioneer work had crucial influence on other researchers to confront the dark past of the German legal history during the national-socialist regime, especially in the eighties of the 20th century.

² Weisbrod, B., Die „Vergangenheitsbewältigung“ der NS-Prozesse: Gerichtskultur und Öffentlichkeit [in:] Schumann, E., Kontinuität und Zäsuren. Rechtswissenschaft und Justiz im „Dritten Reich“ und in der Nachkriegszeit, Göttingen 2008.

³ Koellreuter, O., Deutsches Verfassungsrecht [Bo:] *Pauer-Struder, H., Fink, J., Rechtfertigungen des Unrechts, Das Rechtsdenken im Nationalsozialismus*, Berlin 2014, p. 306.

⁴ Radbruch, G., Rechtsphilosophie, 6. Aufl., Stuttgart 1963.

⁵ Rüthers, B., Entartetes Recht, München 1988.

II. "WELL, THOSE PEOPLE ARE STILL ALIVE. IF YOU WRITE THAT, NOT EVEN A DOG WILL TAKE A CRUST OF BREAD FROM YOUR HAND"⁶

As already said, the sixties of the 20th century represented a turning point in terms of identifying the personal responsibility of legal practitioners, i.e. judges, prosecutors and civil servants, but also law professors and legal theorists, for the legal perversion during the National Socialism and for the crimes and injustice inflicted on millions of innocent people. Such a turning point is represented by Bernd Rüthers' habilitation thesis entitled "The Development of the Private Law Order in National Socialism", defended at the University of Münster in 1966.⁷ It was later published as a monograph under the title "Unrestricted Interpretation" in the autumn of 1968 by the publishing house Mohr Siebeck in Tübingen.

The entire habilitation process, from the acceptance of the topic to its defense, according to the author's description in the afterword to the seventh edition of the monograph, was accompanied by resistance, negative votes from the committee members, and heated debates at the Faculty of Law of the University of Münster. The author, as stated in the quote in the subtitle of this part of the article, even when choosing the topic was warned, which later turned out to be a justified fear, of the fact that several antiheroes of National Socialist legal doctrine and legal practice, still alive and actively working, some as retired professors, and others as active professors at various universities in Germany, would turn his habilitation into a university-political case, which is what ultimately happened. The author states that years later he was rejected for the position of head of department at several universities across Germany precisely because of his habilitation work, and later his monograph.⁸ However, it was precisely the "controversiality" of Rüthers' topic that gave rise to many invitations for public lectures amid the student revolts of the '68 generation.⁹

The monograph contains four chapters. The first is devoted to the problem of changed circumstances, i.e. the *rebus sic stantibus* clause through a historical review of the participation of judges in the correction of contracts in cases of changed economic circumstances. The second chapter examines the judicial changed interpretation of the existing laws because of the changed economic circumstances, especially during the Great Depression in the late 1920s and early 1930s. The third and central chapter is devoted to the judicial changed interpretation of the private law order during the National Socialist era. In doing so, the author analyses in detail the National Socialist "legal worldview", the impact of changed political circumstances on the legal order after the Nazis came to power in 1933, the rejection of the pre-Nazi law by the judges converted to the new ideology, the methods of interpreting law in National Socialism, the function of "general clauses", i.e. legal standards in Nazi legal dogmatics ("theory"), the function of general clauses in National Socialism's case law, the study of methods and legal philosophy in National Socialism, and the impact of new methods on the legal thinking of certain private law institutes. The fourth chapter focuses on the political function in the application of law, and on the relationship between the application of law and the study of the sources of law.¹⁰

Rüthers' monograph, although primarily devoted to the development of the private order in National Socialism, represents much more than that. It is an encyclopedia of the perversion and decay of a developed legal order in the spirit of laicism, market economy and the values of

⁶ Dialogue between Hans Brox, professor and mentor, and Rüthers, a habilitation candidate, regarding his choice of topic for his habilitation thesis on the development of civil law under National Socialism in the autumn of 1963 at the University of Münster. See: Rüthers, B., *Die unbegrenzte Auslegung*, Tübingen 2012, p. 477.

⁷ Rüthers, B., *Die unbegrenzte Auslegung*, Tübingen 2012, p. 479.

⁸ Rüthers, B., *Die unbegrenzte Auslegung*, Tübingen 2012, p. 488–489.

⁹ Rüthers, B., *Die unbegrenzte Auslegung*, Tübingen 2012, p. 482.

¹⁰ Rüthers, B., *Die unbegrenzte Auslegung*, Tübingen 2012, p. XI–XX.

civil society. The abuse of the legal order couldn't have been possible without the active cooperation of the bards of legal science and legal practitioners. In this sense, Rüthers' monograph represents a profound critique of the hypocrisy and moral relativism of the greatest intellectual authorities of that time.

Rüthers' work can be criticized in terms of its limited approach, i.e. its exclusive focus on the "acrobatics of interpretation" of the pre-Nazi legal order, which was most present in a short period of two to three years, until the adoption of the Nuremberg Race Laws in 1935. Since then, there had been many new legal regulations originally created in the "spirit" of Nazism. Although this type of criticism is based on arguments, nevertheless, a relatively short period of total arbitrariness, i.e. "unlimited interpretation of law", had far-reaching consequences for the complete decline of law and the idea of law in Nazi Germany.

III. THE CONTINUATION OF THE CRITICAL REFLECTION OF THE DARK LEGAL PAST IN GERMANY

In the 1980s, a final turning point in the confrontation with the legal perversion and injustice of National Socialism occurred. The journal "Critical Justice" ("Kritische Justiz") published by Nomos from Baden-Baden represented the backbone of the critical discussion. Confronting Nazi injustice transformed from an "excursion" of lone fighters into the task of the decade. In almost every issue of the journal from the beginning to the end of the 1980s, there was a special section entitled National Socialism and Law.

In 1982 Hans Wrobel wrote about the work German Association of Judges in 1933.¹¹ In 1983, Günter Frankenberg and Franz J. Müller considered the legal confrontation with the past of the "People's Court" before the Federal Supreme Court.¹² Hans Wrobel wrote about the problem of "racially mixed marriages," i.e. on the discrimination and disenfranchisement of Jews from 1933 to 1935.¹³ In 1984, Bernd Asbrock researched the work of lawyers in the judiciary during the national-socialism,¹⁴ Joachim Perels wrote about the restoration of legal science after 1945,¹⁵ and Udo Reifner wrote about the destruction of the free legal profession under National Socialism.¹⁶ In 1985, Christoph U. Schminck-Gustavus wrote about forced sterilization under National Socialism,¹⁷ and Jürgen Seifert described Karl Schmitt as a theorist of counter-revolution.¹⁸ In 1988, Manfred Messerschmitt described German legal history under the influence of the Hitler regime.¹⁹ In 1989, Klea Lage analyzed the dispute over the concept of "legal injustice" after 1945,²⁰ etc. Still, after the fall of the Berlin Wall in 1989 and the reunification of Germany in 1990, there was a relative decline in interest in this issue.

But at the end of the 20th and the beginning of the 21st century a new chapter began in dealing with the wrongs and injustices of National Socialism, in a form of a more intensive

¹¹ Wrobel, H., Der deutsche Richterbund im Jahre 1933 [in:] Kritische Justiz, 15. Jahrgang 1982.

¹² Frankenberg, G., Müller F. J., Juristische Vergangenheitsbewältigung - Der Volksgerichtshof vorm BGH [in:] Kritische Justiz, 16. Jahrgang 1983.

¹³ Wrobel, H., Die Anfechtung der Rassenmischehe [in:] Kritische Justiz, 16. Jahrgang 1983.

¹⁴ Asbrock, B., Justizjuristen und NS-Vergangenheit [in:] Kritische Justiz, 17. Jahrgang 1984.

¹⁵ Perels, J., Die Restauration der Rechtslehre nach 1945 [in:] Kritische Justiz, 17. Jahrgang 1984.

¹⁶ Reifner, U., Die Zerstörung der freien Advokatur im Nationalsozialismus [in:] Kritische Justiz, 17. Jahrgang 1984.

¹⁷ Schminck-Gustavus, C.U., Zwangssterilisierung im Nationalsozialismus [in:] Kritische Justiz, 18. Jahrgang 1985.

¹⁸ Seifert, J., Theoretiker der Gegenrevolution. Carl Schmitt (1888–1985) [in:] Kritische Justiz, 18. Jahrgang 1985.

¹⁹ Messerschmidt, M., Die deutsche Rechtsgeschichte unter dem Einfluss des Hitlerregimes [in:] Kritische Justiz, 21. Jahrgang 1988.

²⁰ Laage, C., Die Auseinandersetzung um den Begriff des gesetzlichen Unrechts nach 1945 [in:] Kritische Justiz, 22. Jahrgang 1989.

confrontation of state institutions with their own past. “The Rosenberg Project”, named after the building of the same name that housed the headquarters of the Federal Ministry of Justice (today: Federal Ministry of Justice and Consumer Protection) in Bonn, the temporary capital of the old Federal Republic started. “The Rosenberg Project” represents the most significant activity of this central institution of the German judicial system in dealing with its own past. Although the Ministry is neither the first nor the only institution to have dealt with this process,²¹ still this project, launched in 2012 at the initiative of the then Minister Sabine Leutheusser-Schnarrenberger, has a central place in putting light not so much on the period of the National Socialism and the committed injustices, but on the continued injustices during the “vow of silence” after 1945.²²

The work on the project was completed in 2016 with the comprehensive publication “The Rosenberg Documents – The Federal Ministry of Justice and the Age of National Socialism”, published by the Munich-based C. H. Beck publishing house. The publication consists of two parts. The first part is dedicated to the establishment, construction and development of the Ministry, while the second part examines in detail the sectors, areas and personnel development of the Ministry from 1949 to 1973.

The first part deals with issues from the Allied forces work immediately after the victory, the Nuremberg trials against lawyers, the problem of denazification and the judicial administration of the German states. The process of establishing the Ministry and the problem of continuity or a “new beginning” are described in detail. Of particular importance is the research on the personnel policy and the controversial Article 131 of the Basic Law (Constitution of the Federal Republic of Germany), as well as the subsequent Federal Law in relation to this article from 1951 which regulates the future status of civil servants, judges, professors and professional soldiers from the Third Reich who lost their jobs after May 8, 1945 (including refugees, displaced persons and those who worked in services that were later abolished).

The second part contains a sectoral and personnel analysis within the Ministry by research of individual professional files and the connections of given individuals to the crimes and injustices of National Socialism. The role of these individuals in manipulating documentation and evidence with the aim of achieving amnesty or statute is particularly important.²³

Although the project begun 67 years and ended 71 years after the fall of the Nazi regime, and most of the individuals affected have already died, it nevertheless represents an expression of the continuous efforts of German institutions to prevent the repetition of Nazi injustice by putting light on the past.

IV. CONCLUSION

Confronting one's own role in injustice in the past is a complex and controversial process for societies and states. Even states and societies with a long institutional tradition and legal culture, such as Germany, have had a hard time going through this process, often keeping quiet about their own guilt and responsibility in the name of the “future”. However, the result of

²¹ For example, in 2005, during the term of Minister Joschka Fischer, the Ministry of Foreign Affairs established the “Independent Commission of Historians for Dealing with the Past of the Ministry of Foreign Affairs”. The same year, the Federal Criminal Police Office did the same, the Federal Ministry of Justice had produced partial studies on this issue as early as the 1980s, and in 2011, the Federal Office for the Protection of the Constitution. See: Görtemaker, M. und Safferling C., *Die Akte Rosenberg: Das Bundesministerium der Justiz und die NS Zeit*, München 2016, p.13.

²² Görtemaker, M. und Safferling C., *Die Akte Rosenberg: Das Bundesministerium der Justiz und die NS Zeit*, München 2016, p. 12.

²³ Görtemaker, M. und Safferling C., *Die Akte Rosenberg: Das Bundesministerium der Justiz und die NS Zeit*, München 2016, p. 5–10.

silence and avoidance of confrontation is most often the basis for abandoning civilized life again and turning towards repressive totalitarian regimes. Germany relatively quickly went through the first phase of the judicial prosecution of the leading criminals in the Nazi regime through the Nuremberg Trials. After all, these trials were organized and led by the victors of the war, while the Germans were only passive observers.

The key problem arises when society itself must face its guilt. Especially the social elite, and in the context of this article the legal elite, both in practice and in theory, i.e. from the university, not only that did not resist, but to a significant extent actively participated in the perversion of the legal order, "harmonizing" it with the uncivilized ideology of the dictatorial Nazi regime. In doing so, this elite laid the foundation for discrimination, and later for the destruction of entire ethnic and religious groups.

However, the intensive democratic development of the Federal Republic after the end of the war was stronger than the state of silence or, more precisely, the advocacy of silence. The confrontation, initiated by individuals like Rüthers, meets with great resistance, but, on the other hand, opens the door to a detailed critical discussion, for example, with numerous contributions from the field of the legal order and various activities of lawyers in the journal "Critical Justice". The newly created atmosphere of open discussion was certainly a significant motivation to build the political and institutional will of state institutions to begin independent research into the dark sides of their history and open confrontation with it, for example the Federal Ministry of Justice. This is an expression of respect for the victims of injustice, but also a warning to future generations.

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