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## Enmity and the Law

dings nicht wahrgenommen. Zum Briand-Kellogg-Pakt fehlt Roschers Dissertation (2004), zum Völkerrechtler Karl Strupp vermisst man Sandra Links Studie (2003). Gerade angesichts des erklärten Anspruchs, juristische Perspektiven zu akzentuieren, sind diese und weitere Auslassungen verwunderlich.

So kommt die Studie nicht über Einzelfallbeobachtungen hinaus, die aber vielfach noch durch Systematisierung gewonnen hätten. Das Ergebnis, wonach in beiden Weltkriegen auf deutscher Seite »ein fehlendes Rechtsbild des Krieges« bestanden habe (427), erscheint in seiner Radikalität argumentativ zu wenig abge-

stützt. Ohnehin problematisch wäre der subkutan-legitimatorische Aspekt eines solchen Schlusses. Denn wo »das Rechtsbild« gefehlt hat, liegt juristisch der Schluss auf ein fehlendes Unrechtsbewusstsein der Akteure nahe, und zwar auch in Fällen, in denen die »Verbrechen der Wehrmacht« objektiv tatbestandsmäßig begangen wurden. Wollte uns der Verfasser das wirklich sagen, und wäre das jene »sachlich korrekte Verortung der Wehrmacht in der Geschichte«, von der er anfangs spricht?

Miloš Vec

## Enmity and the Law\*

The latest issue of the *Quaderni Fiorentini* is dedicated to the history of political enmity in Europe. Across the thirty-six articles contained therein, the historical, doctrinal, philosophical and sociological aspects of the way in which hostility has been conceived throughout both the medieval and modern traditions is addressed. It starts with the Crusades and ends by considering the legal and political questions arising from the recent proliferation of ›enemies‹ in the context of global terrorism and the increasing significance of security-oriented ideologies. Considering the size of the volumes, more space could have been given to sixteenth and seventeenth century enmity, all the more so because some nineteenth and twentieth century issues seem to be over-represented.

Does it still make sense to speak of ›Rights of the Enemy‹? The editor, Pietro Costa, says yes. In his introductory article, he asserts that this

means approaching a ›fluid and uncertain zone, hovering between law and politics, order and violence, rule and exception‹.<sup>1</sup> This grey zone has never been dissolved by modern lawyers, despite their efforts to conceptualise and absolutize either of such opposing terms.

For better or worse, it seems that addressing ›The Rights of the Enemy‹ today entails engaging with Carl Schmitt. He is mentioned repeatedly in the *Quaderni* and there are specific articles on his understanding of ›Law and Hostility‹ and his ›Concept of Piracy‹, too. Geminello Preterossi argues that, although the Schmittian notion of the political enemy as a community's existential threat may render inter-state war scenarios obsolete, it remains valid in relation to new forms of enmity.

Moreover, Schmitt's emphasis on the ›intensity of the conflict‹ can be recovered in order to distinguish actual enemies from the generi-

\* I diritti dei nemici, hg. von PIETRO COSTA (Quaderni fiorentini per la storia del pensiero giuridico moderno 38), 2 Bde, Milano: Giuffrè 2009, 1955 S., ISBN 88-14-14644-6

1 PIETRO COSTA, ›Pagina introduttiva. I diritti dei nemici: un ossimoro?‹, I 2 (translations mine).

cally discriminated, marginalised or excluded through social practices or the law. This being so, the argument presented by Elisabetta Grande seems problematic. She claims that in some Western countries today, homeless people, illegal immigrants, and the poor in general are publicly perceived as enemies of society. However, while there is certainly an alarming tendency to criminalise such social groups at present, that does not necessarily make them ›real enemies‹ in the eyes of the public. The point is rather, as Pietro Costa puts it, that the classical categories of public and internal enmity are not exhaustive because the enemy is whoever threatens or attacks the constitutive elements of a given political and legal order.<sup>2</sup>

It seems well-established by now that, despite its ideological character, Schmitt's theory is a useful hermeneutic tool. However, one should not give in to *Nomos*-enthusiasm for this reason alone. Geminello Preterossi states that contemporary ›hyper-sovereignties‹ are underpinned by the improper use of morals in international relations, not by Schmittian ideas. One may reply that there is no trace of universalism in the doctrines surrounding the use of force as recently advanced by ›hyper-sovereign‹ powers, and that their rhetoric of universalism and international moralism after 9/11 has been especially weak in comparison with traditional narratives of a similar sort. What kind of universalism is this, if it is neither genuine nor well-faked?

Foreign policy today does look like militant Schmittianism. One might wonder whether governments now appeal to the international community in matters of war only to keep their staff busy making reports to the UN – a very laudable intent in times of economic crisis. If what we have experienced in the last decade is a return to policing as the central feature of domestic, as

well as foreign, affairs, it is hard to see how a conception based on order for order's sake can take us any further.

Schmitt is best administered in small doses. Most contributors to the *Quaderni* recognise that, while Schmittian theory is undoubtedly helpful to analyse the increasing trend towards exceptionalising law, such developments represent a dangerous drift from constitutional democracy. The return of politics is more likely to spread fear and uncertainty than provide safety. In particular, in their articles on criminal law, Massimo Donini, Roberto Bartoli and Federica Resta insist that the European legal systems are well-equipped to face the challenges of terrorism as well as illegal immigration and should not relinquish their principles in favour of the regressive logics of security and retribution.

The essays by Sebastián Martín, Monica Stronati and Paolo Marchetti give examples of how, under the influence of state propaganda, press reports and nascent criminology, nineteenth century public opinion began to regard certain criminal figures as enemies of society and mankind. From the 1860's on, *briganti* and repeat offenders had unquestionably become socially dangerous subjects whose nature was analysed according to pseudoscientific criteria in an attempt to discover how they might be properly eradicated. Martín and Stronati stress the political implications of this process in Spain and Italy, where exceptional legislation and the deployment of the army amounted to a particularly harsh form of repression. Marchetti focuses on the complicity between law and medicine that underpinned these developments and comes to the conclusion that recidivists and perpetrators of atrocious crimes were often punished not because they had breached the law, but because they were conceived as ›constitutively ›monsters‹

2 COSTA (Fn. 1) I 3.

and irreparably hostile to society. The same was said of revolutionaries and anarchists, who were deemed to be sworn enemies of all well-ordered commonwealths and could be punished on the basis of suspicion alone. This policy put into question the capability of modern legal systems to apply the principle of equality before the law and to overcome the two-tiered approach of the *Ancien Régime* of penal justice.

Maria Pia Paternò shows, however, that even the apparent irreconcilability of Restoration and Revolution was not necessarily conducive to ›absolute enmity‹. She recalls Metternich's respectful attitude towards the prisoner Federico Confalonieri, an Italian insurrectionist but also a European nobleman like himself, points out the differences between the detention of Silvio Pellico and Pietro Maroncelli at the Spielberg Fortress and that of Primo Levi at Auschwitz. She deduces that »in Restoration Europe, the enemy was never totally the Other, nor was he deterministically an enemy, *ab origine*, as if he constitutively could not be something other than that.«<sup>3</sup> Political adversaries were denied freedom and were heavily punished for instigating rebellion, but they were not systematically sentenced to death or deprived of their human dignity. To stop the ›moral gangrene‹ of the ›revolutionary principle‹, it was not imperative to amputate those members of the social organism which posed a risk to its health.

When speaking of ›absolute enmity‹ in Western history, scholars usually refer to the kind of hostility that appeared during the Crusades and the Wars of Religion, was then neutralised by Westphalia, secularised and recovered by the French Revolution, neutralised again, and finally came back with the major ideologies of the twentieth century. According to many, we still live in a climate of absolute and universal hos-

tility. If binary categories such as ›absolute enmity‹/›real enmity‹, *Freund/Feind*, inclusion/exclusion are appealing in that they simplify phenomena that we hardly grasp and help us decide about what stance to take in theory and life, it is less clear whether they are useful for the purposes of historical understanding.

Tomaž Mastnak, author of a contribution regarding the medieval struggle between Christians and Muslims, likely takes a different view on the usefulness of dichotomies. Although he is correct that the wars against the ›Infidels‹ were made possible by an unreflected religious hostility and were fomented by the Church to enhance Christianity's internal unity, he overlooks the fact that propaganda in favour of ›absolute enmity‹ was not always effective and that military operations in the Holy Land were sometimes conducted according to the rules of chivalry. The thesis that the Crusades were far more brutal than inter-Christian or inter-Muslim conflicts is well-known. What is desirable now is to historicise it by considering the research of military historians.

Diego Quaglioni indicates in his article on Jews that the position of non-Christians in medieval Europe cannot be understood in simplistic categories. Jews were neither merely discriminated against nor tolerated, rather they experienced both. Quaglioni asserts that the regulation of their status and relationship with Christians rested on restrictive, as well as permissive, rules – a fact to which the oscillating character of much contemporary legal literature attests. Under Roman Law, for instance, Jews could be regarded as *cives Romani*, despite the Church's increasingly persecutory tendencies, which had escalated since the Fourth Council of the Lateran. Quaglioni reminds us that the characterisation of Jews as *Christianis infesti* was not just a product

<sup>3</sup> MARIA PIA PATERNÒ, La rivoluzione come nemico: giacobini, patrioti e cospiratori nell'Europa della Restaurazione, I 506.

of theology and prejudice, but also a useful means for canonists to assert the supremacy of spiritual power over earthly authorities. In this regard, anti-Semitism was largely instrumental to concrete political ends in a manner similar to the anti-Islamism of the Crusades.

This is not to deny that religious hostility managed both to trigger and embitter bloody wars in Europe until the age of Louis XIV. As is evident in the articles on the history of international law by Aldo Andrea Cassi, Francesco Mancuso, Luigi Nuzzo and Michel Senellart, the neutralisation of theological and moral elements in the theory and practice of warfare that started in the sixteenth century took a long time and was never completely achieved, not even in the heydays of the *Kabinettskriege*. Mancuso points out that Emer de Vattel, designated by many commentators as the first consistent denier of the just war doctrine, did not shrink away from using moral arguments to discriminate against public enemies when they jeopardised the international community as a whole. In such circumstances, the adversary was not only ›unjust‹ but he was also a criminal (maybe he would have gotten away with it in the Middle Ages). Such ›opacities‹ were, and partly still are, structural to international law as a political pseudo-naturalist or pseudo-positivist discipline. As Michel Senellart shows, they can also be detected in the epoch-making work of Johann Caspar Bluntschli, who advocated both humanity and imperialism in the same breath. In the international legal narratives on civilisation and colonisation, morals and religion served politics and vice-versa.

Luigi Nuzzo explains that far into the nineteenth century religious and ethical arguments were central to the construction of a deeply European and Christian international legal sci-

ence that legitimated colonial exploitation. Although policymakers might have been interested in colonisation alone, most scholars actually believed that Christianity and civilization were equivalent and assumed that a ›differentiated inclusion‹ was the proper way non-Christian countries should participate in the international community. In accordance with the idea of a global cultural hierarchy, the treatment accorded to African peoples was very different from that accorded to the Ottoman Empire, China or Japan. This being so, Nuzzo wisely suggests that the traditional chronological criteria of periodisation in international law be integrated with spatial criteria, which would help account for the legal issues specifically related to determinate environments in a given epoch.

Pointing to the connections between external and internal hostility, Bartolomé Clavero argues that colonial experience was the origin of exceptional legislation and also of a ›law of the enemy par excellence, a law that can deny rights and refuse guarantees without any restriction‹.<sup>4</sup> Thus, we are brought squarely back to the reality of world politics after dreaming of the civilising power of international law. From this perspective, the ›Rights of the Enemy‹ are just a device within the self-legitimizing and discriminatory discourse of the West.

And yet, most contributors to the *Quaderni* insist on taking the ›Rights of the Enemy‹ seriously. In a detailed article on the position of the enemy under international law, Giuseppe Palmisano stigmatises the doctrine of pre-emptive war by suggesting that it undermines the principle of sovereign equality and is counterproductive for all in the long term. Since almost all states recognise the fundamental values embodied by the UN and disagree mostly only on the facts, not on the law, he argues that the problem with

4 BARTOLOMÉ CLAVERO, *No distinction shall be made: sujeto sin derechos y enemigo sin garantías en la Declaración Universal de Naciones Unidas, 1945-1966*, II 1606.

world order is not the clash of civilizations but the inefficiency of multilateralism. Palmisano accurately reconstructs legal categories that may sound unfashionable, but to which there is

currently no alternative if exceptionalism is not to have the last word.

**Walter Rech**

## Überdokumentiert\*

Die Bio- und Bibliographie Carl Schmitts ist nicht gerade unterdokumentiert. Die Eckdaten seines Werdegangs, die Stufen seiner geistigen Entwicklung, die Spuren seines Einflusses, die Freundschaften, die Feindschaften: sie sind hinlänglich bekannt,<sup>1</sup> mitunter sogar bis ins Kleinteilige der sauerländischen Heimatgeschichte ausgelotet.<sup>2</sup> Wozu noch eine Biographie? Gibt es neue Tatsachen oder eine neue Deutung?<sup>3</sup>

Der Schmitt-Novize findet mit Mehrings Buch eine in sich geschlossene und beeindruckende Gesamtdarstellung vor, die das Leben mit Umsicht und Akribie, weder beschönigend noch anklagend, Revue passieren lässt. Die Biographie darf als ausgewogen bezeichnet werden; neue Deutungen kann und will sie nicht erheben. Wer sich nicht mit Schmitts Vita beschäftigt hat, findet hier eine redliche Chronologie, in angenehmem Deutsch mit manch überraschender Wendung geschrieben, gleichermaßen unterhaltend wie verdichtend, manchmal jedoch auch arg in die Belanglosigkeit der Wochenchronik verfallend. Es muss nicht jeder Archivfund registriert, nicht jedes nachweisbare Treffen mit

Bruder Jupp erwähnt, nicht jede Geburtstagschmeichelei dokumentiert werden. Das Glück jedweden Archivfunds mag sich nicht immer mitteilen. Hier wäre stärkere Konzentration ein Dienst am Leser gewesen und hätte geholfen, die eher knappen, mitunter ausgesprochen gelungenen, bewertenden Verdichtungen Mehrings stärker in den Vordergrund zu heben. So stellt das Banale des Wissenschaftsalltags das Mitteilenswerte in den Schatten.

Den Schmitt-Kenner muss das erneute Ausbreiten des Bekannten ermüden. Seine Aufmerksamkeit wird sich auf Details aus neu zugänglichen Archivalien konzentrieren, vor allem die Auswertung des Nachlasses und die Entzifferung stenographisch verfasster Tagebücher. Zum Ertrag dieser Biographie avanciert dann Material, das den tiefsitzenden Antisemitismus Schmitts weiter belegt, ein amouröses Doppelleben in der Weimarer Republik (»erotischer Ausnahmezustand«, 235 ff.) offenbart oder Ressentiments gegenüber der jungen Bundesrepublik dokumentiert, deren politischer Erfolg Schmitts Prophetie in Frage stellte – was dieser auch am Ende seines

\* REINHARD MEHRING, Carl Schmitt. Aufstieg und Fall. Eine Biographie, München: C. H. Beck 2009, 750 S., ISBN 978-3-406-59224-9

1 Bisherige überwiegend biographisch ausgerichtete Titel: GEORGE SCHWAB, The Challenge of the Exception, Berlin 1970; JOSEPH W. BENDERSKY, Carl Schmitt. Theorist for the Reich, Princeton 1983; PIET TOMMISSEN, In Sachen Carl Schmitt, Wien 1987; BERND RÜTHERS, Carl Schmitt im Dritten Reich, München 1989; NICOLAUS SOMBART, Die deutschen Männer und ihre

Feinde, München 1991; REINHARD MEHRING, Carl Schmitt zur Einführung, Hamburg 1992 (3. Aufl. 2006); DIRK VAN LAAK, Gespräche in der Sicherheit des Schweigens, Berlin 1993; PAUL NOACK, Carl Schmitt. Eine Biographie, Berlin 1993; ANDREAS KOENEN, Der Fall Carl Schmitt. Sein Aufstieg zum »Kronjuristen des Dritten Reiches«, Darmstadt 1995; OLIVIER BEAUD, Les derniers jours de Weimar. Carl Schmitt face à l'avènement du nazisme, Paris 1997; WILLIAM SCHEUERMAN, Carl Schmitt, Lanham 1999; RAPHAEL GROSS, Carl

Schmitt und die Juden, Frankfurt am Main 2000; GOPAL BALAKRISHNAN, The enemy. An intellectual portrait of Carl Schmitt, London 2000; DIRK BLASIUS, Carl Schmitt. Preußischer Staatsrat in Hitlers Reich, Göttingen 2001.

2 Vgl. etwa jüngst CHRISTIAN LINDER, Der Bahnhof von Finnentrop. Eine Reise ins Carl Schmitt Land, Berlin 2008. Der Autor lässt den Leser an Schmitts Spaziergängen durchs Sauerland teilhaben und breitet intellektuelle Devotionalien aus.

3 Aus der Fülle der Werkdeutungen als Auswahl: JÜRGEN FIJALKOW-