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BOOK REVIEW

Reviewing:

Kai Ambos, *National Socialist Criminal Law: Continuity and Radicalisation*, Baden-Baden/Oxford: Nomos/Hart, 2019, 205 pp.

The book that is reviewed here is an extended English version of “Nationalsozialistisches Strafrecht: Kontinuität und Radikalisierung” by Kai Ambos.¹ As the author explains in the foreword, the book grew out of a text that initially was planned as a short review of Eugenio Raúl Zaffaroni’s “Doctrina Penal Nazi” (“National Socialist Criminal Law Doctrine”).² The Argentinian scholar Zaffaroni is one of the best-known and most influential criminal law scholars in the Spanish- and Portuguese-language legal spheres. Ambos writes that his review quickly expanded as he examined Zaffaroni’s theories in detail, developing into a treatise about Nazi criminal law and the criminal law theorists who shaped it.

At the beginning of his book (Chapter I.), Ambos introduces readers to Zaffaroni, his career and impact. He summarises the strengths and weaknesses of the book “Doctrina Penal Nazi” before going on to develop the interpretation of Nazi criminal law that forms the basis for his own study. This model of interpretation is based on the so-called theory of continuity of criminal law, sometimes also referred to as theory of radicalisation. As its core statement, this theory posits that we can observe a continuous development in criminal law since the late 19th century in which criminal law’s liberal character and orientation towards the rule of

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¹ Baden-Baden: Nomos, 2019.

² Buenos Aires: Ediar, 2017.

law gradually disappears. Criminal law increasingly loses its power-limiting function, instead becoming a flexible instrument of power. Representatives of this theory have coined the terms “ethicisation”, “expansion”, “flexibilisation”, “functionalisation”, “materialisation” and “subjectivisation” to describe this development. The continuity theory is provocative in that it does not separate the development of criminal law between 1933 and 1945 from earlier and later periods. According to this theory’s proponents, the years of the Nazi dictatorship in fact integrate into the described line of development, albeit in a radical way.

In the next chapter (II.), Ambos presents the “Foundations of National Socialist Criminal Law”, outlining key elements of Nazi ideology. These include Nazi racial theory, according to which the so-called *Volkskörper* or “body of the people” needs to be thoroughly “cleansed” of “impure” elements. Totalitarian concepts such as the *Volksgemeinschaft* (“community of the people”) and the Führer principle are explained. Ambos vividly shows the consequences this had for criminal law under National Socialism, including the development of a material concept of wrongdoing based on Nazi ideology. Punishable conduct was defined according to specifically National Socialist values, such as – in the words of Nazi jurists – the “demands of the life of the people” (Gürtner), the “healthy sentiment of the people” (Freisler and others) and the “National Socialist concept of justice” (Dahm). Ambos shows that the National Socialist *Willensstrafrecht* or criminal law of the will likewise can be explained in this ideological context. As Freisler put it, the “self-cleansing of the body of the people” and the people’s education in the spirit of National Socialism required criminal law to be linked to the “will of the disturber of the peace”.

Ambos’ remarks are to the point and supported by extensive footnotes. Numerous well-chosen quotes convey an impression of the ideologisation of criminal law under National Socialism.

The next short chapter (III.) jumps back in time (the book’s structure does not appear completely logical at this point; presumably it echoes that of Zaffaroni’s text) and focuses upon the *Schulenstreit* or dispute between the “classical” and “modern” schools. According to Ambos, who refers to Naucke among others, it is doubtful whether the *Schulenstreit* can actually be called a dispute in the proper sense of the word. Ultimately, both schools aimed at an effective, purpose-oriented combatting of crime. This argument is convincing. Following his methodological approach throughout consistently, Ambos

places the demands of the main exponents of the *Schulenkrieg* (Binding and von Liszt) in the context of the continuity theory, showing the ways in which Nazi criminal law built upon them. Von Liszt's theory of perpetrator types, which Ambos mentions here, is only one of several obvious examples. The author is certainly right to point out that von Liszt and Binding always conceived of their demands within the framework of the rule of law and did not foresee their adaptation by the racist Führer state. However, from today's perspective, von Liszt can be blamed for developing criminal policy models that functioned just as well (if not better) in a system that ignored or even reviled the limitations of power set by the rule of law.

In an extensive chapter (IV.) that reflects the emphases set in Zaffaroni's book, Ambos deals with the alleged influences of Neo-Kantianism on Nazi criminal law. At this point, clear differences between the two authors emerge. Zaffaroni claims that the Neo-Kantian line's value-based orientation made it easier for criminal law to become charged with Nazi ideology from 1933 onwards. In support of this view, Zaffaroni cites Schwinge and Zimmerl, representatives both of Neo-Kantianism and of the "Kiel School" that had a particular affinity to National Socialism. According to Zaffaroni, liberal Neo-Kantians were unable to prevent their movement's absorption by National Socialism, as they were either already deceased, had been silenced by the Nazis (like Radbruch) or had been forced into exile (like Goldschmidt) by the time the Nazis gained power.

Ambos criticises Zaffaroni's line of argument (an argument that has been already voiced by other authors previously) as overly sweeping, pointing out the very different forms taken by the Neo-Kantian movement. This criticism is substantiated using the example of Schwinge and Zimmerl's well-known "Wesensschau und konkretes Ordnungsdenken im Strafrecht" ("Focus on the substance of the offence and concrete order-based thinking in criminal law") of 1937, which Zaffaroni only mentions in passing. As Ambos notes, the fact that some scholars regard this text as an expression of resistance against Nazi ideology's co-opting of law shows how complex this topic is. Ambos gives an outline of Schwinge and Zimmerl's book. In his opinion, one of its core statements is that "traditional concepts [such as wrongdoing, guilt, *Tatbestand* (elements of the actus reus), *Rechtsgut* (protected legal interest), M.V.] can be modernised in terms of their 'legal content' and be 'filled' with National Socialist content

instead". Against this backdrop, interpreting this book as a "resistance text" indeed seems misguided. Ambos follows this with a discussion of Neo-Kantianism and its significance for Nazi criminal law. This section, which is well worth reading, convincingly refutes Zaffaroni's blanket condemnation of Neo-Kantianism.

A further substantial chapter (V.) is dedicated to the Kiel School, with a special focus upon the biographies of the Kiel criminal law professors Dahm and Schaffstein. Ambos ruthlessly dissects these authors' careers until 1945, critically analysing their 1932 (!) joint work "Liberales oder autoritäres Strafrecht?" ("Liberal or authoritarian criminal law?") in particular. In this context, Ambos draws our attention to constructs such as "attitude-based criminal law or criminal law of duty", propagated in a 1935 article by Schaffstein, who with renown continued his career as university professor from 1954 onwards. Ambos' observation that National Socialism's desired outcomes could also have been achieved on the basis of the theory of protected legal interests stands to reason, of course.

The following chapter deals with Erik Wolf (here, too, the structure probably derives from that of Zaffaroni's book). Once again, Ambos criticises the gaps in Zaffaroni's account, which is based in the main upon an essay of 1935. Ambos analyses Wolf's writings in detail, following the chronology of their publication. He concludes that they do not exhibit Nazi ideology before 1933 (which is unsurprising, given that this was before the Nazis' accession to power). However, a "turn" towards Nazi criminal law can be detected in late 1933/early 1934. In the following years, Wolf came "very close to the Kiel School indeed", as Ambos proves in detail.

Ambos final reflections (Chapter VII.) show him to be an outstanding expert on Latin American criminal law science. The chapter portrays the reception of Nazi criminal law in Latin America, underpinned with references to numerous authors. Ambos convincingly refutes the idealised role accorded to Welzel, who Zaffaroni believes was not an "official criminal law theorist" of the Nazi dictatorship and only of "secondary importance" in National Socialism (what Zaffaroni means precisely by this remains unclear). Citing examples from Welzel's works, Ambos shows how this scholar adapted to National Socialism.

In the conclusion, Ambos once again highlights the merits of Zaffaroni's book, especially with regard to the authoritarian ten-

dencies in contemporary Latin American criminal law – tendencies that could also be interpreted in light of the theory of continuity.

Ambos has succeeded in producing a dense, convincing treatise based upon a broad range of primary and secondary texts (the book's main text is often literally pushed aside by the footnotes). Not least, the book calls to mind the Nazi-inspired thought patterns of numerous criminal law scholars. After 1945, most of these scholars were able to smoothly carry on with their careers in West Germany, and some of them continue to be read uncritically – and not only in Germany, but also in Latin America, as Ambos shows. Some of the passages quoted are so clearly indebted to National Socialism that the question of the authors' motivations – true conviction, opportunism, mere following or reluctant concessions – appears almost irrelevant.

Ambos' methodological decision to base his interpretation of Nazi criminal law solely upon the theory of continuity is not fully persuasive. While the continuity theory is essentially convincing, and it is very welcome that its core statements now appear to meet with broad agreement, it is limited in that it focuses only upon judicial criminal law. By contrast, it largely ignores "extra-judicial" criminal law and preventive law, which in the Nazi dictatorship was in the hands of the police and the Gestapo. Ultimately, this "extra-judicial" criminal law constituted the more significant part of political and ideological crime fighting – as Ambos himself admits, referring to Werle's research. The National Socialist "judgment corrections" are a particularly striking example: individuals acquitted of crimes were arrested by the Gestapo – sometimes even in the courtroom – and taken to concentration camps. In other dictatorships, the relation between prosecutors and courts on the one hand and (secret) police on the other is similar. For example, East Germany's Ministry for State Security, the "Stasi", likewise was only loosely bound to the GDR's criminal law and ultimately followed its own rules. If one of the Stasi's various measures (for example, carrying out arbitrary interrogations or applying "silent measures" such as creating awkward situations at the workplace of a citizen) seemed more likely to achieve a political goal than a formal prosecution, the former always took precedence. Ambos' treatise could have been rendered even more convincing by including extra-judicial Nazi criminal law and preventive law to a greater extent.

However, even without this, Ambos' book significantly enriches research on Nazi criminal law. Especially for researchers that are not

familiar with the German language the book is of great value, given that there is not much literature on the topic in English. Margaret Hiley, in close cooperation with Ambos and supported by Antony Duff, did an excellent job translating the book. This is especially noteworthy given the difficult terminology of both German criminal law in general and Nazi ideology in particular. Several well-chosen photographs of Nazi lawyers, trials and legal publications liven up and enrich the text.

With this treatise, Ambos appears to have invented a new genre – the “review monograph”. The advantage of this format is that it offers enough space to engage with the reviewed text in detail. The drawback is that most readers will not be familiar with the book under review. Of course, the review monograph can be a reason to remedy this. This would certainly be desirable in the case of Ambos and Zaffaroni (I do not know whether an English translation of Zaffaroni’s book is planned, M.V.). After all, in future anyone studying Nazi criminal law will need to read both texts.

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