History, Memory and the Problem of ‘Bad Laws’: Reflections on the Italian and Nordic Experience

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Abstract

This article grows out of a symposium on the experiences of the judicial system in Norway and other countries during the Second World War. It considers the experience of Fascist Italy and the Nordic countries (Denmark, Norway and Sweden) during this period, with a special emphasis on anti-Jewish laws and persecutions. The article also considers the role of legal positivism, if any, in contributing to the abuses of this period, and the lessons for future lawyers.

Keywords:

Lawyers, Judges, Legal Philosophy, Positivism, Natural Law, Italy, Fascism, Nordic countries, Antisemitism, Radbruch

1. Introduction

The role of lawyers in unjust regimes is a problem that has provoked many questions and no easy answers. Lawyers like to say that they pursue justice and, when they are implicated in evil behavior, tend to claim that it would have been even worse without them. But it is probably more accurate to say that lawyers exaggerate the tendencies of whatever system they live in, making the good ones that much better and the bad ones even worse. This dynamic was particularly apparent in Twentieth Century Europe, which was characterised by huge discontinuities in political and social systems, many involving spectacular injustices and all made possible in varying degrees by law and legal processes. The countries involved prefer, understandably, to forget this unhappy history and (when this proves impossible) to blame it on somebody else. But this is not always possible, and the continuities as well as discontinuities in national legal systems become clearer with the passage of time.

The question of law and lawyers is especially painful for the period including and immediately preceding the Second World War. During this period virtually all the countries of western and central Europe were occupied by fascist countries, had their own autonomous fascist governments, or some combination of the two. All or most of these countries adopted anti-Jewish laws, permitted or cooperated in the deportation of Jewish citizens, or some combination of the two. Lawyers were involved in drafting and

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1 I use the term ‘fascist’ somewhat loosely to include Germany, Italy, and their European allies, capitalising only in an Italian context. These countries differed in degree of German influence and other factors.
implementing the rules that accomplished this, together with other rules that resulted in the denial of civil liberties and the destruction or deformation of democratic institutions. In some countries, these changes were imposed by the occupying forces, and the argument that ‘we had no choice’ has a certain force. But in others, the countries themselves took an active role in the changes, collaborating in or even initiating the turn to extremism, intolerance, and outright oppression. Indeed, some nations demonstrated greater enthusiasm in embracing fascism and antisemitism than they subsequently demonstrated in confronting the reality of their own wartime history once democratic institutions had been restored.

This paper considers the role of law and lawyers in relation to antisemitic persecutions in Italy and the Nordic countries (Norway, Sweden and Denmark) during the wartime period, with a primary although not exclusive emphasis on the Norwegian experience. Both Italy and Norway are somewhat unusual examples, Italy having had a Fascist Government that predated Nazi Germany, and Norway having been occupied by Germany from April 1940 but retaining a degree of political independence under the now infamous Quisling Government. Denmark, which was treated as a sort of German protectorate until at least 1943, and Sweden, which remained neutral throughout the war, are even more atypical. Yet, the very uniqueness of these situations, and the relative independence of the relevant actors, allows us to examine the problem from a variety of different perspectives and reach more generalizable conclusions than would otherwise be the case.

The impetus for this paper was a symposium at the University of Oslo inspired by Hans Petter Graver’s book, *Judges Against Justice*, which concerns the wartime experience of the Norwegian judicial system. Part of the paper is accordingly devoted to themes of Graver’s book, notably the so-called Radbruchian Theory and its limitations. However, I also address other themes and concepts arising from my own work on the Italian Race Laws and from the wartime and postwar behaviour of the countries involved.

The paper proceeds in four parts. The first part summarises the Italian situation, including the Race Laws themselves, the role of lawyers in creating and interpreting the laws, and postwar responses. The second part considers the various Nordic countries and the differences between these countries and the Italian situation. The third part considers the Radbruch issue in more detail, while the fourth presents conclusions regarding history, memory, and law.

I use the term 'Nordic' rather than 'Scandinavian' to conform to current usage within the region itself. I do not address Finland which is unique for a variety of reasons, or any of the other areas (Iceland, Faroe Islands, etc.) sometimes considered part of the Nordic region. Nor do I address Germany – not part of the Nordic region but with a huge

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influence upon it, especially in the 1940s – other than in response to one conference paper which emphasises German themes at first blush.

2. The Italian Race Laws and Holocaust: A ‘Parenthesis’ or an Ongoing Trauma?

2.1. The Race Laws

Before proceeding to Italian law, a bit of history may be appropriate. Fascism came to power in 1922 and ruled for just over twenty years. It was not at first especially antisemitic, although as in all such movements there were intolerant strains. For a variety of reasons – domestic politics, friendship with Nazi Germany, the Italian colonial experience in Ethiopia, Libya and elsewhere – this situation changed dramatically in the mid- to late-1930s. The German influence was, of course, significant on a political and a psychological level, but there was little if any overt German pressure on the Italian Government to enact anti-Jewish laws, and most experts believe that this factor was not in itself determinative.

After a long propaganda campaign and the publication of the so-called Manifesto of the Racial Scientists, the Italian Race Laws (leggi razziali) were enacted in November 1938. Among the more important provisions of these laws were a ban on interreligious ('mixed') marriages and expulsion of Jewish students from Italian schools and universities. There were also limitations on property ownership and prohibition or strict limitations on Jews in management, the professions and most other areas on the Italian economy.

Although the laws themselves were not genocidal in nature, they caused irreversible and permanent harm to the Italian Jewish community, and vastly simplified the task of the Germans and Italian collaborators who introduced a genocidal policy in the northern part of the country after September 1943. About 7,000 Italian Jews (9,000 if the island of Rhodes is included) died in the Holocaust, out of a prewar population of approximately 40,000, somewhat higher if foreign Jews are included. Liliana Picciotto, the foremost expert on this subject, has estimated that about half the Jews deported from Italy were arrested by Italian police or militia, and by 1944 or 1945 the likely fate of those deported was widely known.

There is a tendency to minimise the impact of the pre-1943 Race Laws, to assert that these laws either were not enforced or were not all that bad compared to the situation in other countries. Even a cursory perusal of the files shows that this is not the case. In fact, the laws were strictly enforced and – with a few notable exceptions – tended to get harsher and more oppressive with the passage of time, a pattern that is also observed in

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other countries. My own research and that of other scholars, notably Michele Sarfatti, are consistent on this point.

It must also be noted that lawyers and the legal profession – again, with a few notable exceptions – were active and sometimes enthusiastic participants in this process. The extension of the laws to more and more areas of economic activity, including even street peddlers (commercianti ambulanti) who frequently lost their licenses and were rendered destitute, is an example of this process.

It is true that a number of judicial decisions, most notably the case of Rosso c Artom decided by Judge Peretti-Griva of the Turin Court of Appeals, held against the Government, and also that a number of administrative agencies (most notably the Ministry of Finance) sought to restrict the laws in some cases. But even here the motivations are unclear. Much of the controversy appears to have involved a struggle for judicial and/or administrative prerogatives rather than a genuine concern for the Jewish victims.

One of the principal debates about the Race Laws is whether they were an authentic ‘Italian’ product or a sort of inferior German import. This parallels the broader debate of whether Fascism was a ‘parenthesis’ in Italian history (after Benedetto Croce) or whether it is the central event in the country’s modern era. While this is a difficult question to answer, the weight of historical evidence appears to be in the direction of authenticity and lasting significance. This is particularly true of more recent scholarship, which has emphasised the continuity with the pre- and post-Fascist eras rather than the unique features of that period.

The conclusion above does not mean that there were not important differences between the Italian model of antisemitism and that in Germany or other countries. In particular, the Italian version seems to have more of a religious/cultural and less of a biological basis, a difference reflected in various legal rules (most notably those on mixed marriages) and, perhaps, in the reluctance of many Italians to participate in murder as opposed to discriminatory and exclusionary behavior. But the notion of italiani brava gente – Italians are good people and could not possibly have participated in racist behavior – stands up poorly against the evidence: it is not even clear that most Italian Jews meet this standard.

2.2. Fascist Law and Philosophy

The Race Laws were, of course, only one part of the Fascist legal system, albeit an especially inglorious part. The overall legal system was also complex and in many ways contradictory, and the debates concerning it – whether it was continuous or

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4 Michele Sarfatti, *The Jews in Mussolini’s Italy: From Equality to Persecution* (University of Wisconsin Press 2006).

5 See generally Sarfatti (n 4). A good source on the legal regime confronting Italian Jews, and the continuity between different eras, is Guido Fubini, *La condizione giuridica dell’ebraismo italiano* (Rosenberg & Seiler 1974).
discontinuous with preexisting Italian law, its similarities and differences from other ‘totalitarian’ countries, and so forth – are in many ways larger versions of the debates on the Race Laws. This is a very broad topic, and beyond the scope of this paper. However, most experts would likely agree that Fascist law remained essentially hybrid in nature, retaining its existing rules and institutions but with a gloss of Fascist philosophy and practice, especially at the highest levels. It is also the case that the vast majority of Italian lawyers and judges made their peace with Fascism, a truly meaningful split coming only from 1943 on. In this respect, Italy has much in common with its German ally, but differs from countries like Norway in which a fascist-style system was imposed from the outside: April 1940 has no precise parallel in an Italian context, at least until the final years of the war.

The situation is somewhat different after 1943, when the Allies invaded southern and central Italy and Germany occupied the northern part of the country. From this point on, the ‘legitimate’ government (including the monarchy) was in theory on the Allied side, and those who supported Mussolini’s RSI (Repubblica Sociale Italiana) Government and its German allies might in theory be viewed as traitors to the national cause. In practice, there were so many Italians on both sides of the conflict, or rather caught between the two sides, that there is a tendency to treat this period as something approaching a civil war, and relatively few Italians were subject to legal sanctions for their behaviour during this era. The legal status of actions taken by the RSI Government did, however, remain a thorny issue in the postwar era, as discussed below.

2.3. After the War

If the Italian legal system was largely effective in taking rights and property away from Jews, it was somewhat less effective in restoring them. A variety of scholars have outlined the hesitant and even hostile way that Italian courts and administrators dealt with Jewish claims after the war. As one noteworthy example, Jewish professors were offered their jobs back but had to work under direction of the people who had been hired to replace them. Those seeking restitution of property encountered numerous obstacles in identifying the property and reacquiring it from its new ‘innocent’ owners. Perhaps the most comical situation involved Jews who, in the 1960s or later, were able to reacquire confiscated property but were assessed management expenses in excess of the property’s net value (this last result was eventually overturned).

The Jewish difficulty reflects a larger worldview, in which it is argued that ‘all Italians suffered’ under war and occupation, and claims for unique or special damages on the part of specific individuals tended accordingly to be looked on unfavourably. This is sometimes compounded by the so-called Resistance Myth under which all or most Italians were antifascists and only a small number of ‘nazifascisti’ collaborated with

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6 See generally Claudio Schwarzenberg, Diritto e giustizia nell’italia fascista (Mursia Editore 1977).
7 This issue and others are discussed in Michele Sarfatti (ed), Il ritorno alla vita: vicende e diritti degli ebrei in italia dopo la seconda guerra mondiale (Giuntina Editore 1998).
evildoers. This problem was especially acute for actions taken by the RSI or ‘Salo’ Government from 1943 to 1945. Since the latter was considered illegitimate by many Italians, it was difficult or impossible to obtain compensation for its behaviour. It also seems likely that, having narrowly escaped deportation and death, many Italian Jews were themselves uneasy about pressing financial claims too aggressively right after the war, fearing (not entirely without reason) that it would contribute to renewed antisemitism.

In the last twenty years, there has been increased attention to the Race Laws and the Italian Holocaust, with a government investigation (the Anselmi Commission) of the financial restitution issue and more intense media scrutiny. As in France and other countries, this activity gave rise to hope that more systematic compensation might be in the offing. However, relatively little concrete action has been taken on this issue, and it seems unlikely that it will be taken in the near future, as the war fades into the past and the Italian right (including neofascist parties) regains political respectability.

While financial compensation is at best intermittent, there have been various efforts to memorialise the Holocaust and Race Laws, including museums, educational programs and the Day of Memory (Giorno della Memoria) in January, which is covered extensively by newspapers and other mass media. A Jewish Museum in Ferrara and a Holocaust Museum in Rome – both long-delayed but still in progress – are among the more prominent examples. It also seems fair to say that overt racism of the kind preached by Fascism after 1938 is no longer acceptable in Italian society. This change of attitudes has been sorely tested by anti-Muslim and anti-immigrant sentiment and, at the opposite extreme, by radical anti-Israel protests, which have at times skirted the line between legitimate criticism and overt antisemitism. Nevertheless, the change is a real one and constitutes a form of restorative justice or ‘cultural compensation’ that has perhaps been more successful and certainly more forthcoming than the financial kind.9

3. The Nordic Countries: A Heroic Image and a Complex Reality

3.1. General Background

Although the Nordic countries are often treated as a unit, their experiences in World War II were quite different. While Sweden remained neutral throughout the war, Denmark and Norway were invaded and occupied by Nazi Germany, while Finland fought Russia twice and was nominally an Axis Power. Even Denmark and Norway were more different than similar: while the former did not seriously resist invasion and was until at least 1943 a sort of German protectorate, the latter fought bitterly and was home

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8A report by the Anselmi Commission, issued in 2001, concluded that both Italian government and financial institutions had been complicit in the spoliation of Jewish property, some profiting handsomely in the process. The report is available in both Italian and English at <www.governo.it/Presidenza/DICA/beni_ebraici/index.html>.
to a substantial resistance movement until 1945. While the Danish King and Government remained in the country, the Norwegian leadership departed, although a regime headed by the infamous Vidkun Quisling (later executed) collaborated with the Germans during this period.

The relationship of these countries to the Holocaust, and German excesses generally, were similarly quite different. Denmark is famous for having rescued some 7,000 Jews from extermination, although its overall record under occupation was mixed, and the rescue operation involved significant help from Sweden (which accepted the Jewish refugees) as well as a local German official (who is said to have warned the Danes of the impending roundup). By contrast, almost 1,000 Norwegian Jews were deported and killed, with a somewhat larger number escaping, primarily to Sweden. Many non-Jewish Norwegians were likewise persecuted by the Quisling Government, although a significant number of these were also able to escape to Sweden and elsewhere.¹⁰ Finland did not persecute its own Jews, although a number of Soviet prisoners of Jewish background were handed over to the Germans and killed.

Swedish behaviour was perhaps the most contradictory. A theoretically neutral country, Sweden conducted an extensive and highly significant trade with Germany throughout the war, and allowed German troop trains to pass through its territory on their way to Norway and other locations. Yet, Sweden also rescued a significant number of Danish and Norwegian Jews together with a larger number of non-Jewish refugees, in some cases bending or breaking its own laws in order to do so. Swedish operatives in Budapest, the most famous of whom was Raoul Wallenberg, saved tens of thousands of Hungarian Jews, although most of these did not come to Sweden. The so-called White Buses mission, conducted by the Swedish and Danish Red Cross and led by Count Folke Bernadotte, later assassinated in the Middle East, rescued several thousand prisoners from German concentration camps near the end of the war, although the motives of the mission as well the number of Jews rescued have been the subject of some debate.

### 3.2. Comparing Behaviour: Norway

How does the behaviour of the Nordic countries compare with that of Italy, another nominally Western country with a relatively small Jewish population and at least some democratic tradition? The comparison is a strained one, because the cultures in question are so different, and because the German presence in the Nordic region was more extensive (five as opposed to one-and-a-half years) than in Italy. Nevertheless, some useful observations can be made.

Perhaps the most intriguing comparison is between Italy and Norway, each of which was occupied for a portion of the war (Norway from 1940, Italy from 1943) but each of

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¹⁰ The most widely available English-language source on the Norwegian Holocaust is Samuel Abrahamsen, *Norway’s Response to the Holocaust* (Holocaust Library 1991). There are numerous books on the rescue of Danish Jewry, although they vary in quality: one of the more scholarly is Leni Yahil, *The Rescue of Danish Jewry: Test of a Democracy* (Jewish Publication Society 1984).
which also had homegrown dictators (Mussolini, Quisling) who collaborated with the anti-Jewish and other German policies to varying degrees. A significant difference is that Quisling only came to power following the German invasion, whereas Mussolini predated Hitler and was free to follow his own policies until 1943, when the Allies invaded southern Italy and the Germans occupied the north. Some of the other issues discussed by Professor Graver in his above-mentioned book – notably the judicial response to revolutionary changes in government and the postwar treatment of judges who responded inappropriately – are thus only partially relevant in an Italian context.

The Italian situation becomes somewhat more similar after 1943, when German forces occupied northern Italy and lawyers and judges faced a choice between cooperating with the RSI or the more distant, but arguably more legitimate, Italian Government. One difference is that by 1943 it was apparent the Axis would lose the war, whereas this was far from obvious when the Quisling Government came to power in Norway. The Italian choice was, in that sense, easier than that faced in Norway.

If there are significant differences between Italy and Norway, there are also some important similarities, particularly with regard to anti-Jewish persecutions. Both Italy and Norway enacted their own antisemitic codes rather than copying them from German laws or having them be imposed by German authorities. In both cases, the laws had many parallels with, but also some significant differences from, the German Nuremberg Laws. As in Italy, Norwegian antisemitism had indigenous roots: Jews had been excluded from Norway under the 1814 Constitution, and the new antisemitic laws were presented as a restoration of local tradition rather than an entirely new arrangement. While in retrospect this appears to be a cynical ploy, at the time it was arguably more persuasive.

Perhaps because of their different histories, Italy and Norway diverge somewhat in postwar behaviour. While a number of Italian collaborators were executed at war’s end there was never a systematic purge of the judiciary and most Fascist judges and other officials continued in their posts after the war. This resulted partly from political considerations but also from historical reality: the level of complicity with Fascism was so profound that it was impossible to blame it on a small group of miscreants, as in the Norwegian case, and the legal system together with much of Italian society continued to function more or less as before, one of several factors giving rise to a powerful and often violent left-wing resistance that petered out only in the 1980s.

While Norway was more forceful in bringing perpetrators to justice, it was also arguably less honest. Support for the Quisling Government was almost certainly greater than Norwegians like to pretend, and wartime history is informed by a ‘resistance’ or hjemmefronten (homefront) war mythology that, as in Italy, may not always be consistent with the facts.¹¹

¹¹ On Norwegian memory culture and its evolution in recent decades, see Arnd Bauerkämper, Odd-Bjørn Fure, Øystein Hetland and Robert Zimmermann (eds), From Patriotic Memory to a Universalistic Narrative? Shifts in Norwegian Memory Culture After 1945 in Comparative Perspective (Klartext 2014).
There is also a divergence in postwar reparations, although it took much longer to manifest itself. Both Italy and Norway faced a similar question: what is their responsibility for the Holocaust when local mythology emphasises resistance efforts and blames the disaster primarily on a foreign power? In Italy, the question has never been answered satisfactorily. While, as noted above, the country observes a day of Holocaust memory (27 January), and while museums and educational programs are devoted to the subject, there has never been a systematic program of compensation to Holocaust victims and their families. By contrast, Norway is one of the few European countries to make a systematic accounting and pay Holocaust-related reparations, although it took until the 1990s to do so and the amounts were rather paltry in nature, in some cases being exceeded by the administrative expenses with relation to the confiscated property.\(^\text{12}\)

3.3. **Sweden**

If Norway is the more obvious parallel, Sweden also resembles Italy in some important respects. While starting out more or less indifferent to German persecution, the Swedish Government modified its approach following the deportations from Norway (1942-43) and Denmark (1943). The historian Paul Levine has described this new approach as ‘bureaucratic resistance’ – i.e., the use of creative and at times illegal diplomatic strategies that allowed Jewish refugees to be admitted to Sweden or, at very least, to avoid deportation and death in their own countries.\(^\text{13}\) The most famous example of this tactic is the issuance of protective passes (*schutzpass, skyddpass*) by Wallenberg and other Swedish diplomats to Hungarian Jews in 1944-45, an act with little diplomatic validity but which nonetheless saved thousands of lives. But there were precedents for this in earlier Swedish behaviour, including the assumption that Norwegian or Danish refugees had relatives in Sweden and similar actions that rescued a substantial number of Jews before the Hungarian situation arose. Activities of this nature are sometimes contrasted with the creativity exercised by Adolf Eichmann and others in pursuit of Nazi extermination policy: they seem to offer the happy alternative of organisational skill being applied toward saving human lives rather than destroying them.

Swedish behaviour finds a partial parallel with Italy, where judges and bureaucrats sometimes found loopholes or other interpretations which prevented the racial or antisemitic laws from being applied in given cases. The above-mentioned decision by Judge Peretti-Griva in *Rosso c. Artom* (1939), which held that the Race Laws were a derogation from the principle of equality and must be interpreted narrowly, is sometimes cited as an example of this behaviour.\(^\text{14}\) Other decisions, involving issues as wide-ranging as pension rights and corporate securities, displayed a similar pattern. But

\(^{12}\) The restitution process is discussed in Iselin Theien and Bjørn Westlie, ‘The Restitution Process and the Integration of the Jewish Minority into the Norwegian Collective Memory of the Second World War’ in Bauerkämper and others (n 11) pp. 117-34.

\(^{13}\) See Paul A. Levine, *From Indifference to Activism: Swedish Diplomacy and the Holocaust 1938-44* (Uppsala University Press 1998).

\(^{14}\) This case is discussed further in Livingston (n 3) pp. 126-28.
the parallel should not be overstated. The Italian behaviour was limited to a small number of judges and other officials and at no point represented the position of the Government or its leaders. Most of it preceded the German occupation of Northern Italy on 8 September 1943 and involved the protection of property rather than Jewish lives. Often it was motivated by bureaucratic or ‘turf’ considerations rather than a desire to protect the Jews. Still, there is some similarity in the use of ad hoc legal and bureaucratic strategies in order to resist unjust policies: further study in this area might be of value.

In both Italy and Sweden, there were substantial differences in approach to the Jewish question between different administrative bodies and (at least in the Italian case) different regions of the country. For example, the Swedish Foreign Ministry (Utrikesdepartementet) was sometimes more sympathetic to Jewish refugees than was the domestic bureaucracy, while in Italy there were important differences between the police, the courts and the Demorazza or racial office. Both countries were sometimes more solicitous of the rights of Jews elsewhere than in their home countries. These differences suggest the need for a sophisticated, institutional approach rather than generalising on the basis of broad national stereotypes.

Finally, there is an interesting parallel between Sweden and Italy in postwar attention, or lack of attention, to each country’s wartime behaviour. The comparison is imperfect because Sweden was neutral while Italy was an Axis power until 1943, switching to the Allied side – or fighting on both sides – after that point. The issue of reparations accordingly does not arise in a Swedish context. But both countries demonstrated a remarkable ability to whitewash their respective pasts, in the form of the Resistance Myth in Italy and what might be called the Neutrality Myth in Sweden, which emphasises the country’s humanitarian and peacemaking efforts and ignores its profound economic ties to Nazi Germany together with the near-total exclusion of Jewish and other refugees until the 1940s. For example, it was the Swedish Government that originally suggested that German Jewish passports be marked with a ‘J’ so that the bearers could be prevented from too easily seeking asylum in that country. Over the past twenty years, there has been a change in tone, with scholars and some Government officials confronting the country’s past behavior, but it is unclear how deeply this has penetrated the broader public consciousness. In this respect, Sweden is arguably more like Italy than its own neighbours.

3.4. Denmark

Italy is frequently compared to Denmark because (it is alleged) these were two of the less antisemitic countries in Europe and thus two of the more resistant to German-style anti-Jewish measures. As the argument above suggests, I believe that this misstates the Italian situation, and ignores the inconvenient fact that some 7,000 Italian Jews –

15 Numerous Italian Jews were later rescued by priests, resistance fighters, ordinary Italians etc. but not usually by public officials. On the Holocaust in Italy, see generally Sarfatti (n 4).
between 15 and 20 percent of the prewar population – were killed in the Holocaust. For this reason, I believe that the more ambivalent behaviour of Norway or Sweden more closely parallels the Italian situation.\textsuperscript{17} Still, there are some interesting points of comparison, including the role of the Christian Churches (rather better in Denmark than Italy) and the interactions between local government and German occupation authorities.\textsuperscript{18} Further research on these subjects would be potentially quite useful.

3.5. \textbf{Summary: Comparison and its Limitations}

The discussion above suggests the difficulty in identifying a common response even within the Nordic region, let alone Europe generally. The differences between countries, including size of population, degree of German influence, and the precise years in question, threaten to overwhelm the common aspects and make comparisons difficult. Comparisons between the Nordic countries and places like Italy, with vastly different histories and legal cultures, are all the more difficult. There is a danger of exaggerating the similarities between people and places in the search for common themes and common historical patterns.

Perhaps the lesson is not to avoid comparisons but to keep them sharply focused with regard to both period and subject matter. Thus, while a study of Norwegian vs. Italian approaches to the Holocaust may prove overly broad, research on the role of indigenous antisemitism in Italy and Norway might well be more productive. If Italy and Sweden cannot be easily compared, the role of the domestic and foreign policy bureaucracy in advancing or retarding rescue efforts in each country might form the basis for a more focused project. Reparations and cultural compensation, including educational programs and public memorials, might be the subject of further, narrower studies. The need for highly focused comparison and ‘thick description’ is always a useful lesson in comparative law, but especially relevant in these circumstances.\textsuperscript{19}

4. \textbf{Good Judges, Bad Laws: The Radbruch Theory and Its Limitations}

The comparison between Italy and the Nordic countries – and among the Nordic countries themselves – raises a number of issues in legal philosophy as well as in legal and political history. Perhaps the most important contribution of Professor Graver’s above-mentioned book is his rebuttal of what might be called the ‘Radbruch thesis’, which suggests that legal positivism substantially weakened the opposition to the

\textsuperscript{17} The Finnish situation may present more interesting parallels – the more so as both Italy and Finland were nominally Axis powers – but my knowledge of Finland and Finnish is insufficient to pursue this issue further. Generally on the Finnish situation, see Hannu Rautkallio, \textit{Finland and the Holocaust: The Rescue of Finland’s Jews} (Holocaust Library 1988).

\textsuperscript{18} On the Catholic Church in Italy, see Susan Zuccotti, \textit{Under His Very Windows: The Vatican and the Holocaust in Italy} (Yale University Press 2002).

Nuremberg Laws and the Holocaust in Germany and other European countries. According to Graver, this argument is both historically inaccurate, since the German legal profession was in fact not exclusively positivistic during the period in question, and philosophically dubious, since a mature positivism would not have excluded moral opprobrium for unjust laws of the type in question. Several chapters of his book are devoted specifically to this argument, and it informs the discussion in other sections as well.

The Radbruch thesis is central to the legal understanding of the Holocaust era, especially in the English-speaking world. In North America, it was brought to public attention by the famous Hart-Fuller exchange in volume 71 of the 1958 Harvard Law Review, which debated the question of whether unjust laws should actually be considered ‘laws’ and the implications of that question for our understanding of the fascist era. The exchange is somewhat unusual, in that it never mentions the words ‘Jew’ or ‘Holocaust’: the principal case cited involves a German soldier who was punished for criticising the Nazi regime and the postwar effort to punish the estranged wife who had betrayed him. The debate is also, in the manner of American law reviews, rather free-flowing: it is never quite clear if either of the participants really rejects positivism or whether their debate is (as one suspects) more a question of how it should be interpreted and applied. Nevertheless, the exchange framed the issue of the legal system’s failure in Germany as a question of positivism vs. natural law, with the unspoken assumption that the anglo-american legal tradition, with its putatively superior grounding in morality and stronger sense of procedural due process, would have prevented an equivalent result. More recent scholars, David Fraser in particular, have questioned this hypothesis but it retains broad support in the legal academy, both in the United States and in certain European countries.

Professor Graver emphasises Norway and Germany, but the Italian experience supports his argument in several important ways. First of all, Italy was not exclusively positivistic in the 1930s, and it isn’t today. Many of the most important Italian scholars – Giorgio Del Vecchio is one prominent example – had and have a natural law, religious bent, and others propound advanced theories (law as an institution, law as balance between norms and procedures, and so forth) that lie somewhere on the continuum between positivism and natural law. Indeed, the whole natural law/positivist distinction, as understood in England and North America, has never constituted the central dichotomy in Italian legal thought, as it might in other countries.

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There is also not much evidence that natural law would have had a beneficial influence on legal outcomes in the Race Laws or other cases. It is true that some Italian jurists, notably Peretti-Griva in the _Artom_ decision, cited the equality of citizens under Roman Law as a reason for rejecting or interpreting narrowly the Race Laws. It is possible to see this as an argument from absolute principles and hence a ‘natural law’ position. Conversely, the rejection or ignoring of this argument by other Italian judges might be described as a ‘positivist’ response.

But the credibility of the above perspective is tenuous: the issue appears to have been more one of judicial vs. administrative power rather than legal or even political philosophy. Indeed, throughout the Fascist era, it was frequently the positivists who insisted on a traditional, narrow reading of laws as written and the more radical Fascists who demanded a more flexible reading consistent with the underlying policies of the regime and the supposed will of its leader – a perverse natural law argument, to be sure, but still far from a positivist outlook. Overall, it seems difficult to identify a lot of coherent legal theory in the Race Laws decisions altogether: the outcomes seem to result more from institutional factors and the basic decency, or lack thereof, of the relevant decision-makers rather than philosophical differences. This is perhaps a frustrating description for legal scholars to accept but, I believe, an accurate one.

I have not examined the original sources closely enough to form an opinion on the ‘Radbruch problem’ in a Swedish context. However, from the work of Paul Levine and others, it seems that Swedish behaviour was determined by political and moral considerations at least as much as legal theory, of a positivist or other variety. The issue may be somewhat more complicated in Germany, where the positivist tradition was particularly strong and lawyers and judges were particularly unwilling to challenge state authority. Even here, this argument has the flavour of a postwar rationalisation and ignores the rather substantial enthusiasm that many in the legal profession had for the National Socialist program, even when it meant embracing concepts like the _Führerprinzip_ that were quite outside the positivist tradition as it was previously understood.

Although it is somewhat outside our subject, I think the same conclusion applies in my own country as well. The United States has a long and not especially distinguished history of racial discrimination – much longer than Italy, as it happens – and natural law has not done terribly much to slow it down. Indeed, natural law, in the form of a supposed distinction between races dating back to the Bible, has at times been a principal argument _in favour of_ discriminatory practices and against racial equality. That does not mean that legal philosophy does not matter, or that it must necessarily be perverted for nefarious ends. But there is something a little bit too comfortable about the Radbruch thesis, or the idea that a more robust legal philosophy will protect us from evil. Legal philosophy is a means to an end: the end is usually determined elsewhere.

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23 This issue is discussed further in Gordon (n 9).

5. Law, History and Memory: Lessons for Future Lawyers and Judges

At the end of my book on Italy's Race Laws, I speculated on the lessons of the Race Laws for the prevention of future persecution and genocide. In general, I was sceptical about the role of legal theory in doing so. It seemed to me that, if there was a lesson, it was that institutional structures – an independent judiciary, a robust and independent religious tradition, the division of power between competing institutions – were more important than theory, which seemed to me too amorphous and subject to political manipulation to be reliable in a crisis. The differences between Fascist Italy and Nazi Germany – the one a somewhat incomplete dictatorship and the other more comprehensive – were, in my judgment, an example of these differences. A sense of humility regarding one's own virtue and that of one's own country were the most important virtue of all.

A study of the Nordic countries largely confirms my suspicions. One can speak of Radbruch’s ‘conversion’ and write innumerable screeds regarding natural law, positivism and the construction of a just legal order. In the end, however, it is individual human beings and their own sense of right and wrong that determines the outcome. If Norway did better than Germany – or if Sweden did better after 1942 than before – it appears to result from historical circumstances and from personal and institutional loyalties rather than differences in legal philosophy. This is an uncomfortable conclusion for lawyers, who understandably prefer to believe that everything flows from law and legal theory, but I believe it is an accurate one. It is as true today as it was 75 years ago.

I speculated further in my book – a rather cost-free speculation – on the need for further comparative work on the response to the Holocaust and other historical evils by lawyers and the legal profession. The Nordic experience confirms the value of such work, but also its potential limitations. In particular, it suggests the need for focused studies and the scrupulous avoidance of generalisations regarding the behaviour of regions and even individual countries in any historical period. It is hard enough to generalise about Norwegian behaviour in the 1940s: generalisations about the Nordic region, or Europe as a whole, are that much less persuasive.

All nations have selective memories: that is part of what makes them nations. Yet, if they confront their past honestly and openly they can bring history and memory just a little bit closer together. This study is one part of that process, and I am grateful for the opportunity to present it.

25 Livingston (n 3).