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THE ROAD TO TYRANNY – THE CONTINUING LEGAL LEGACY AND LESSONS OF NAZI GERMANY [1]

Introduction

1. The original motivation for this lecture was an invitation to participate in a Holocaust Memorial Day Commemoration event in January this year at the MoJ. I was asked to participate in a Q&A session "offering [my] legal expertise and personal views on how the Holocaust was essentially carried out within the legal framework of Germany at the time, and how it has helped shaped laws in the UK and across the EU/world today". As is the way of things, everyone else spoke for so long I never had any chance to say anything on that subject and, indeed, almost nothing at all on anything.

2. This is my extended answer to the question that never was.

The factual setting[2]

3. The rise and governance of the National Socialists in general, and Hitler in particular, is, of course, a massive subject. I shall give the briefest outline of sufficient facts in order to understand the issues at the heart of this lecture.

4. The rise of the National Socialist German Workers' Party (the NSDAP)[3] came at the end of a long period of upheaval: the disastrous defeat of Germany in

[1] I am very grateful to my Judicial Assistant Joshua Cainer for his assistance on the preparation of this lecture.
[2] The facts in this section of the lecture are taken from D. Cesarani "Final Solution: the fate of the Jews 1933-49" (Macmillan 2016).
[3] Nationalsozialistische Deutsche Arbeiterpartei.

WW1, chronic inflation in the 1920s, appalling depression in the early 1930s, constant political instability and civil violence.

5. There was a series of elections in Germany between 1930 and 1932. In the November 1932 elections the National Socialists' share of the vote was 33.1%.

6. Hitler was appointed Chancellor by President Hindenburg on 30 January 1933. On the day after his appointment, President Hindenburg authorised Hitler to dissolve the Reichstag and hold further elections on 5 March 1933.

7. On the night of 27 February 1933, when the election campaign was at its height, a fire was started in the Reichstag building by Marinus van der Lubbe. He was an unemployed Dutch construction worker and a former communist. The National Socialists immediately claimed that the fire foreshadowed a Communist revolution. Using the fire as a pretext, the National Socialists began the round up of their political opponents that same night. The offices of the Communist Party were occupied, its assets were seized and its leaders were arrested, as were social Democrats, pacifists and others.

8. The next day an emergency decree was issued, the Reichstag Fire Decree, which suspended most civil rights, permitted the police to make arrests, search houses and confiscate property without a warrant and restricted freedom of speech and assembly and the right to form organisations. It annulled almost all of the basic rights guaranteed by the Constitution of 1919. It imposed the death penalty for arson, treason and several other crimes. The decree remained in place until 8 May 1945 when it was cancelled by the Allies' military government.

9. In the March elections the National Socialists increased its share of the vote to 43.9%.

10. At the first Parliamentary session the National Socialists pushed through the Enabling Act, which permitted the government to make laws without the consent of the Reichstag or the President. A two thirds majority was needed to amend the constitution in that way. It was attained by a combination of the exclusion of various delegates and application of pressure to the Catholic Centre Party. The Enabling Act, with the concomitant suspension of the Constitution, was the instrument which enabled Hitler and the Nazis to make laws without any effective legislative or political restraint.

11. Institutional change under the auspices of the Enabling Act came swiftly. On 7 April 1933, the Law for the Restoration of the Professional Civil Service authorised the dismissal of officials considered politically unreliable. It required the enforced retirement of "Non-Aryan" officials, with certain limited exceptions. This measure not only caused the removal of many Jews, but it began the process of Nazification of the civil instruments of government, including the security services.

12. In May 1933 trade union leaders were arrested. The German Social Democratic Party was banned on 21 June. By the summer 100,000 political prisoners had been held, mostly for short periods, beaten and terrorised, in the concentration camps. A significant number had died. Smaller parties were merged into the NSDAP; the Catholic Centre Party agreed to dissolve itself. By July 1933 Hitler was able to proclaim that the NSDAP was the only legal party in Germany.

13. In September 1933 Hermann Göring established the Geheime Staatspolitzei, the Gestapo. The entire police force was brought under Nazi command. The Gestapo were not subject to control by the courts.

14. A succession of laws led to the dismissal of Jews from orchestras, opera companies, art galleries, theatres, radio and the film industry. In October 1933 legislation was passed barring Jews from working as newspaper editors.

15. By two laws of April 1933, Jews were forbidden to enter the legal profession, and Jewish doctors and dentists were banned from practising within the state sector.

16. In July 1933 a law was brought into force for the Prevention of Hereditarily Diseased Progeny. It established Hereditary Health Courts which had power to order the compulsory sterilisation of individuals deemed mentally or physically disabled and liable to pass on disability if they had children. Under subsequent legislation state secondary schooling was denied for the congenitally disabled, marriage was prohibited to a person believed to carry hereditary illness, and divorce was authorised if one spouse was unable to conceive.

17. In November 1933 there was a plebiscite which approved Germany's withdrawal from the League of Nations.

18. In July 1934 President Hindenburg died. Without any constitutional basis, Hitler combined the authority and powers of the Chancellor with those of the Head of State. All members of the army were immediately required to swear an oath of allegiance to the Führer.

19. The Nuremberg race laws were passed in September 1935. Among other things, they prohibited marriages between Jews and Aryans and sexual relations between Jews and Aryans.

20. One of the Nuremberg laws was a Reich Citizenship Law. This restricted German citizenship to persons who were of "German or kindred blood".

21. In June 1936 Heinrich Himmler was appointed chief of the German police, uniting control of the Gestapo, the criminal police, the uniform police, and the SS.

22. The Law on the Civil Service of 1937 required that the civil servant "uphold the National Socialist state unconditionally at all times and that he be guided in his every action by the fact that the National Socialist German Workers' Party, through its indissoluble ties with the *Volk*, embodies the concept of the German state".

23. In 1938 there were various supplementary regulations to the Reich Citizenship Law which prohibited Jews from practising medicine, law and many other professions. A small proportion of Jews were permitted to continue working, but only for other Jews.

24. By the 1938 Decree on the Exclusion of the Jews from German Economic Life, Jews were prohibited from earning a livelihood through selling goods or services. Those still in employment were dismissed and they were forbidden to run firms. Jews were prohibited from access to places of public entertainment. Driving licences held by Jews were revoked and their car ownership permits were invalidated. Jews were banned from all sporting and recreational activity.

The surviving Jewish newspapers were suppressed and replaced by one Gazette, whose primary function was to inform Jews of official measures against them.

25. In December 1938 the Decree on the Utilisation of Jewish Assets required the compulsory sale of Jewish-owned enterprises, the proceeds to be paid into special accounts that were controlled by the authorities. The decree also required Jews to move all their securities into blocked accounts. They then needed permission to realise even small amounts of their assets in the form of shares or bonds.

26. A decree in February 1939 commanded Jews to surrender jewellery and precious metals to the state in exchange for cash.[4]

27. In 1939 a project known as T-4 (which was not aimed specifically at Jews) was initiated on the personal signed authorisation of Hitler. Asylums and sanatoria were required to register all adults incapable of work and report on their condition. Specially selected doctors identified those "unworthy of life". Several clinics were adapted as killing centres. A transport company was set up to transfer those selected for what was called "special treatment". Initially the disabled were murdered using injections of poison. In early 1940 the clinics were equipped with gas chambers. Between October 1939 and August 1940 70,000 men, women and children deemed "unworthy of life" were driven in buses to the clinics, where they were asphyxiated by bottled carbon monoxide

[4] Other anti-Jewish measures included the following. The teaching profession was purged. Within three years of the Nazis taking power practically every teacher was a Nazi member. On 25 April 1933 the Law against the Overcrowding of German Schools imposed a 1.5% quota on the admission of Jews to schools and universities and a 5% limit to the total allowed. On 14 July 1933 legislation was passed revoking the naturalising of Jews who had entered Germany after November 1918. Under the Law on Renting to Jews in April 1939 the Jews lost any protection against eviction. Municipal authorities could order a Jewish home owner to rent space to another Jew or an entire Jewish family.

piped through shower heads in airtight gas chambers that appeared to be innocuous shower rooms. The corpses were incinerated in crematoria on site. The operation was finally stopped on Hitler's orders after a critical sermon by the Bishop of Münster on 3 August 1941. Project T-4 had no legal basis.

28. The largest campaign of extermination, however, was the Nazis' genocide of European Jewry. The following are just a very few illustrative examples and statistics. In the last two weeks of August 1941 the Nazis and Lithuanian collaborators murdered 33,000 Jews across Lithuania, including women and children.[5] By the end of 1941 the Germans had murdered 200,000 Jews in Soviet Byelorussia.[6] In Soviet Ukraine, the killing reached a climax on 29-30 September 1941 with the mass murder of 33,771 Jews at the Babi Yar ravine on the edge of Kiev. [7] In the summer of 1942 in Ukraine, over the course of less than seventy days, the Germans and their assistants murdered 150,000 Jews.[8]

29. By 1942 the Nazis were engaging in a more mechanical method of genocide. Chelmno was the first of the death concentration camps. At the Sobibor concentration death camp, between May and late July 1942 about 57,000 Jews were murdered.[9] Auschwitz-Birkenau, perhaps the most infamous camp, was not originally designed for mass murder on the industrial scale of the other extermination camps when the first transports of Jews arrived from East Upper Silesia in the Spring of 1942.[10] By mid-1943, however, it was (as described by David Cesarani) the "single mass extermination site in the genocidal armoury

[5] D. Cesarani (n 2), 390.
[6] D. Cesarani (n 2), 400.
[7] D. Cesarani (n 2), 404.
[8] D. Cesarani (n 2), 516-517.
[9] D. Cesarani (n 2), 483.
[10] D. Cesarani (n 2), 529

of the Third Reich".[11] Within a period of just a few months in 1944 approximately 440,000 Jews were deported from Hungary to Birkenau, of whom the great majority were escorted to gas chambers and murdered within sixty minutes of arrival.[12] In Auschwitz alone, over 1.1 million people were killed.[13]

Consequences

30. The universal horror and revulsion at the governance, laws and killings of the Nazi regime, both within Germany and in the countries it occupied, resulted in an unprecedented change in the landscape for international cooperation, international law and the protection of human rights.

31. The first of the Nuremberg trials, which took place in 1945-46, was without precedent in exercising jurisdiction over individuals, not states, in a trial in which the defendants would not be permitted to invoke the authority of the state in defence of their actions.

32. Philippe Sands has described the events leading up to the trial and its course in his remarkable, completely absorbing and extraordinarily moving book "East West Street".[14] It is sufficient, for my purposes, to mention the following. The charges included two new crimes in international law: crimes against humanity, and genocide. The offence of "crimes against humanity" was the inspiration of

[11] D. Cesarani (n 2), 651.
[12] D. Cesarani (n 2), 718.
[13] R.J. Evans, *The Third Reich at War: How the Nazis Led Germany from Conquest to Disaster* (Penguin 2009). Although this section of the lecture has highlighted the persecution of Jews, it must be acknowledged that other groups, notably the traveller community and homosexuals, were also targeted and suffered considerably.

[14] P. Sands, *East West Street: On the Origins of Genocide and Crimes Against Humanity* (Weidenfeld & Nicholson 2016).

Hersch Lauterpacht, the then Whewell Professor of International Law at the University of Cambridge. This crime was constituted by the killing of individual members of a civilian population as part of a systemic plan, whether or not in violation of the domestic law of the country where perpetrated. "Genocide" was the inspiration of the jurist Raphael Lemkin. It was concerned with the killing of civilian populations in order to destroy particular races and classes of people and national, racial and religious groups.

33. The convictions of some of the most important war criminals in the judgment delivered by the International Military Tribunal on 1 October 1946 established for the first time crimes against humanity as part of international law.[15] It was a recognition that individuals have international duties that transcend the national obligations of obedience imposed by the individual state. It was affirmed as part of international law by the UN General Assembly on 11 December 1946.[16]

34. None of the defendants was found to have committed genocide, and that word was not mentioned in the judgment. In another resolution on 11 December 1946, however, the UN General Assembly went beyond what the judges had decided in the first of the Nuremberg trials and affirmed that genocide is a crime under international law.[17] Three years later, on 9 December 1948, the General Assembly of the UN adopted the Convention on the Prevention and Punishment

[15] *France et al v Göring (Hermann) et al* (1 October 1946) [1946] 22 IMT 203 ("Trial of the Major War Criminals").
[16] Affirmation of the Principles of International Law recognized by the Charter of the Nuremberg Tribunal, UNGA Resolution 95(I) (11 December 1946) UN Doc A/RES/1/95.
[17] The Crime of Genocide, UNGA Resolution 96(I) (11 December 1946) UN Doc A/BUR/50.

of the Crime of Genocide.[18] It has been described as the first human rights treaty of the modern era.[19]

35. The UN replaced the discredited and ineffective League of Nations. It officially came into existence on 24 October 1945, upon ratification of the UN Charter by the five permanent members of the Security Council – France, the Republic of China, the Soviet Union, the United Kingdom and the US – and by a majority of the other 46 signatures.[20] According to the preamble of the UN Charter the UN aims:

> "to save succeeding generations from the scourge of war, …to reaffirm faith in fundamental human rights, to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom."

36. The Universal Declaration of Human Rights was adopted by the UN General Assembly on 10 December 1948 – 70 years ago this year.[21] It had been inspired by Lauterpacht's book on an international bill of the rights of man published in 1945.[22]

37. The Council of Europe was founded in 1949. Its aim is stated in Article 1 of its founding statute to be:

> "to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are

[18] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.
[19] P. Sands (n 14), 377.
[20] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI ("UN Charter").
[21] Universal Declaration of Human Rights, UNGA Resolution 217A (III) (10 December 1948) UN Doc A/RES/3/217 A.
[22] H. Lauterpacht, *An International Bill of the Rights of Man* (Columbia University Press, 1945).

> their common heritage and facilitating their economic and social progress."[23]

38. Membership is open to all European states who seek harmony, cooperation, good governance and human rights, accept the principle of the Rule of Law and are able and willing to guarantee democracy, fundamental human rights and freedoms.

39. The European Convention on Human Rights was signed in 1950.[24] The British Prosecutor at Nuremberg Sir David Maxwell Fife[25] played a leading role in the text, which created in Strasbourg the first international human rights court to which individuals had access.

40. The International Court of Justice, located in The Hague, is the primary judicial organ of the UN, and was established in 1945 by the UN Charter[26]. It began work in 1946 as the successor to the Permanent Court of International Justice.[27] Although it was not until 1998 that an international criminal court, with power to rule on genocide and crimes against humanity, became a reality, its genesis can clearly be traced back to the organisations, institutions and new international order that followed the defeat of Germany and, in particular, the reaction to the horrors of Nazism.

41. Finally, the origins of the EU also lay in the reaction to those horrors. The Schuman Declaration, namely the statement made by the French Foreign Minister Robert Schuman on 9 May 1950, proposed to place French and

[23] Statute of the Council of Europe (5 May 1949) CETS No 001, Article 1.
[24] Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 03 September 1953) ETS No 005.
[25] Subsequently Lord Kilmuir LC.
[26] See UN Charter (n 20), Chapter XIV.
[27] Which resolved disputes between states.

German production of coal and steel under one common High Authority, which would be open to the participation of Western European countries. The vision their co-operation would create common interests which would lead to gradual political integration and pacification of relations between them and the elimination of the traditional opposition of France and Germany. Just under a year later, on 18 April 1951, the six founding members, namely Belgium, France, Germany, Italy, Luxembourg and the Netherlands, signed the Treaty of Paris, which created the European Coal and Steel Community, Europe's first supranational community. It was that organisation which paved the way for the European Economic Community and subsequently the European Union.

42. It is difficult to exaggerate the extent and importance of these international institutional, legal and political consequences which followed the defeat of Germany and the end of WWII, and which were a direct result of the desire to avoid in the future the horrific policies and actions of the Nazis both within Germany and internationally. They set the scene for an unprecedented protection of the dignity and rights of the individual and of minorities. They laid the ground for an intensification of debate about the Rule of Law. They provided a context for the development and enforcement of principles to restrain abuse of power by executive government and legislatures.

43. In the context of the UK the extent of that leap is illustrated most simply by reference to two matters. Firstly, prior to the end of WWII, there were laws which promoted and protected the predominant and State religion, Christianity, such as the law of blasphemy, but there were no anti-discrimination laws in relation to any other faiths, beliefs or conduct specifically designed to protect

or enhance the rights of minorities. Secondly, the speeches of the majority in the House of Lords' appellate committee in *Liversidge v Anderson*[28] in 1941 show the ready compliance at that time of the senior judiciary with the wishes of government, upholding as they did the power of the Home Secretary to cause a citizen to be imprisoned without charge or trial for an indefinite period on the ground that he had reasonable cause to be believe that the person in question was of hostile original or associations but without any obligation to give any grounds for that belief.

44. The reference to that case is an appropriate point to return to the conduct of national affairs under the Nazis, and in particular the role played by the judiciary.

The judiciary under the Nazis[29]

45. The role played by the judiciary in the implementation of the laws, rules and policies of the National Socialists inevitably came under scrutiny with the downfall of the regime. Particularly relevant were decisions of the People's Court which was created by a law passed in April 1934. It was originally given jurisdiction over cases of treason, attacks on the President of the Reich, destruction of military property, and assassination or attempted assassination of members of the national or state governments, but its jurisdiction was subsequently significantly extended. In August 1937 the justice minister

[28] [1942] AC 206.
[29] The facts in this section of the lecture are taken from I. Müller, *Hitler's Justice: The Courts of the Third Reich* (Harvard University Press 1991).

referred to the court personnel as a "task force for combatting and defeating all attacks on the external and internal security of the Reich".

46. There are numerous instances of the judiciary enforcing Nazi laws, regulations and policies with enthusiasm, and many statements showing the politicisation of the judiciary.

47. The governing board of the Federation of Judges issued a declaration on 19 March 1933 expressing approval of "the will of the new government to put an end to the immense suffering of the German people" and offered its cooperation in the "task of national reconstruction". It said: "May German law hold sway in German domains! German judges have always been loyal to the nation and aware of their responsibility". The declaration ended with the assurance: "German judges place their full confidence in the new government".

48. On 21 April 1933 the largest judicial state organisation, the Association of Prussian Judges and Public Prosecutors, appealed to its members "to enter the frontline of Adolf Hitler's ranks and join the Federation of National Socialist Jurists for unconditional solidarity is a necessity for the success of our struggle." More and more state organisations followed the Prussian lead.

49. On 21 May 1933 the Saxon Association of Judges and Public Prosecutors placed itself "jubilantly and dutifully under the leadership of the People's Chancellor, Adolf Hitler."

50. The leaders of the National Federation then sent a telegram to the Reichsjuristenführer, the "leader of jurists in the Reich", the notorious Hans Frank, who was subsequently convicted of war crimes and crimes against

humanity at Nuremberg and sentenced to death by hanging.[30] In the telegram the National Federation declared in its own name and the name of its member organisations in the various states "its entrance as a body into the Federation of National Socialist Jurists" and acknowledged "the leadership of Chancellor Adolf Hitler."

51. The extent to which the judiciary became a critical part of the regime's system of repression and intimidation is reflected in the number of death sentences passed. There are no exact statistics but a retired judge of the Federal Constitutional Court has estimated that the courts handed down at least 40,000 to 50,000 death sentences. Ingo Müller believes that an estimate of 80,000 victims comes closest to the truth.[31]

52. In the third of the series of trials which followed the main Nuremberg war crimes trial 16 jurists were charged with crimes committed against foreigners in what has become known as the Justice Trial.[32] That limitation reflected the international law justification for the proceedings. As in the other trials, the charges concerned war crimes, organised crime and crimes against humanity. Some life sentences were imposed. They were subsequently commuted to 20 years, which were never served in full. By 1951 all the defendants were at liberty again except one, who was not released until 1956.

53. Prosecution of German judges, who had exercised jurisdiction only in Germany, was left to the domestic German prosecutors and courts. Taking into account

[30] See P. Sands (n 14), ch 6.
[31] I. Müller (n 29), 196.
[32] *United States of America v Josef Altstoetter et al* ("Justice Trial"), Trials of War Criminals before the Nuremburg Military Tribunals under Control Council Law No. 10 (US Government Printing Office 1951), Vol III, p.1156.

appeals and re-trials, not a single judge was successfully prosecuted and sentenced. The standard defences were that the judges were doing their duty in applying the letter of the law and that the apparent harshness of many of the laws was justified in view of the conditions of war.

54. It was said that their unquestioning application of the law was the consequence of their "positivist" training, that is to say the precept of the positivist school of jurisprudence that judges are obliged to give effect to the acts of a legitimate lawmaker pursuant to an accepted procedure.[33] That explanation was deployed specifically in the defence of the accused at the Nuremberg Justice Trial. So far as the judges were concerned, the laws were made by proper procedure by a legitimate lawmaker because, of course, the suspension of the Constitution, together with the Reichstag Fire Decree and the subsequent Enabling Act, enabled Hitler and the National Socialist government legally to pass the laws which they did without reference to the Reichstag or anyone else. This was the principal justification given by Hubert Schorn, a former County Court judge, in his work "Judges in the Third Reich".[34]

55. Hubert Schorn and others have also stated that judges would have risked their own lives if they had objected to the unjust laws and refused to apply them. According to Ingo Müller there is only a single documented case of resistance by a judge to the system in the course of carrying out his judicial professional duties.[35] He was Dr Lothar Kreyssig, a judge of the Court of Guardianship in

[33] According to HLA Hart's classic statement of legal positivism, when rules are promulgated by a society's accepted legal authority in accordance with that society's accepted legislative procedure (i.e. according to a society's 'rule of recognition'), those rules may be characterised as law: HLA Hart, *The Concept of Law* (3rd edn, OUP 2012).
[34] H. Schorn, *Der Richter im Dritten Reich: Geschichte und Dokumente* (Frankfurt 1959).
[35] I. Müller (n 29), 196.

the town of Brandenburg. He objected to the removal of members of the local mental hospital for killing and issued injunctions to several hospitals prohibiting them from transferring wards of his court without his permission. In addition, he brought criminal charges against Nazi party leader Phillip Bouhler as the person responsible for the euthanasia programme T-4. Having refused to withdraw his injunctions against the hospitals, he requested and was granted permission to retire early with full pension rights.

56. The view of Ingo Muller is that, contrary to the claims by Hubert Schorn of widespread judicial resistance, the overwhelming majority of German judges shared responsibility for the terror of the regime.[36] It is certainly difficult to reconcile the "positivist" training explanation with the public declarations of enthusiastic support for the regime by judicial bodies and organisations.[37]

Lessons and comparisons

57. In a properly functioning liberal democracy the two principles of the separation of powers and of the Rule of Law operate to protect the dignity and human rights of individuals, including minorities, and to protect private interests.

58. In Nazi Germany, a blueprint of absolute tyranny, there was a complete breakdown of both principles.

59. In countries which have a written constitution, suspension of the constitution or parts of it may sometimes be legitimate and in accordance with its terms, usually

[36] I. Müller (n 29), 196.
[37] The Grand Criminal Panel of the Supreme Court, presided over by President Bumke, exhorted German judges to recall that "the judiciary … can fulfil the task imposing it by the Third Reich only if it does not remain glued to the letter of the law, but rather penetrates to its innermost spirit; the judiciary must do its part to see that the goals of the lawmakers are achieved".

to meet a state of emergency. Many of the rights protected by the ECHR permit proportionate restrictions by member states for reasons such as public safety, health and order. Should circumstances prove especially difficult, Article 15(1) of the Convention states that:

> "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."[38]

60. Whilst in principle an emergency response lasts for a distinct and temporary period of emergency before the state returns to normalcy, a number of situations, one example being the omnipresent threat of terrorism, have been increasingly deployed to justify a permanent state of emergency.[39] By way of example, in Egypt, apart from a period of four years between 1957 and 1981 and the period between 31 May and 14 August 2012, there has been a permanent state of emergency;[40] and in Turkey, there was a state of emergency from 1987 until 2002 and then again since July 2016 in response to a failed army coup aimed at overthrowing President Recep Tayyip Erdoğan.[41]

61. It should be remembered that the very first repressive law of the Nazi regime, the Reichstag Fire Decree, only came into existence as the result of the invocation of Article 48 of the Constitution which empowered the President,

[38] Similarly, worded provisions can be found in Article 4 of the International Covenant on Civil and Political Rights ("the ICCPR") Article 27 of the American Convention on Human Rights ("the ACHR"). See the discussion in A. Greene, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis* (Hart Publishing 2018), 12-15.
[39] See A. Greene (n 38), 27-30 and 45-48.
[40] A. Greene (n 38), 46; S. Reza, 'Endless Emergency: The Case of Egypt' (2007) 10 New Criminal Law Review 532.
[41] A. Greene (n 38), 47 and 210-211.

when he thought that public safety and order were seriously disturbed or endangered, to take measures necessary for the restoration of public safety and order, including using the army forces for that purpose and suspending seven of the fundamental rights guaranteed by the Constitution. As I have said earlier, the Reichstag Fire Decree authorised the government to curtail key constitutional rights such as freedom of speech, of association and of the press, and was fundamental to laying the foundations for the single-party dictatorship responsible for the abhorrent laws and acts which followed.[42]

62. Suspension of the constitution, usually for long periods or even indefinitely, is a recurring hallmark of a regime which does not protect individual rights and private interests and does not observe the Rule of Law. The UK does not, of course, have a codified written constitution.

63. Although British jurists have much to say about the merits or otherwise of a written constitution, as a sitting judge I do not wish to enter into a debate which concerns ultimately a political question. What can be said as a purely factual matter, well illustrated by the example of the Nazi regime, is that, where the fundamental values of a society are reflected in a codified constitution, and that constitution is suspended, it is a clear warning sign for all to see that the twin principles which uphold the essential values of a liberal democracy, namely the separation of powers and the Rule of Law, are under threat and the transition to tyranny is facilitated.

[42] M. Head, *Emergency Powers in Theory and Practice: The Long Shadow of Carl Schmitt* (Routledge 2016), 42-46.

64. On the face of it, those twin principles are robustly reflected in the UK's constitutional and legal arrangements. The unfolding history of our constitutional settlement over several hundred years has seen the establishment of the principle that all prerogative power is subject to the law, the principle that the power to make and unmake the law is now exercised only through Parliament, and the principle that it is the exclusive right of an independent judiciary to declare what is the law. In short, the constitutional arrangements, at least in principle, are that executive, which administers the country, is subject to the law; Parliament makes the law; and the judiciary determine what is the law. The reality has fewer bright lines because, for example, the law in this country is partly common-law and partly statute, and the judges by adapting the common law to new situations in a sense make new law; and, depending on the size of its Parliamentary majority, the Government determines and dominates the legislative programme in Parliament.

65. So far as concerns the Rule of Law, this is not the place to examine in detail the extent to which the UK satisfies adequately the eight core ingredients identified by Lord Bingham in in his masterly work on the topic or indeed whether he is correct controversially to have included the adequate protection of human rights as one of the ingredients.[43] In the context of the present lecture, I wish only to concentrate on the requirement that there be an effective constraint on official abuse of power and oppression by enabling citizens to access courts

[43] T. Bingham, *The Rule of Law* (Penguin 2010). See my discussion of this topic in T. Etherton, 'The Universality of the Rule of Law as an International Standard' (Lionel Cohen Lecture 2018, Hebrew University of Jerusalem, 9 April 2018).

administered by an independent judiciary in which such abuses can be challenged.

66. It is sufficient to highlight, by way of contrast with the courts in Nazi Germany, both the ability and, more particularly, the willingness of the UK courts to judicially review decisions and acts of the executive, and also the interpretative techniques for judicial limitation of the executive's statutory powers.

67. As to judicial review, the great development of administrative law since the middle of the last century has been one of the most dramatic features of the jurisprudence and practice of our courts. There are those who would argue for an even wider supervision than is inherent in the strict *Wednesbury* irrationality test and, indeed, would contend for a proportionality test (i.e. whether the administrative action was proportionate to the legitimate object intended to be achieved), particularly in the context of the infringement of personal rights by the government, public bodies and officials.[44]

68. As to the interpretative techniques deployed to restrict executive excesses, one of the most important and enduring enlargements of judicial review has been the principle established in *Padfield v Minister of Agriculture*,[45] that there are no unfettered discretions in public law, and that statutory powers must be used to promote the policy and objects of the statute, to be determined by the courts as a matter of law.

69. Furthermore, there is now a well-established principle of statutory interpretation that Parliament does not intend to legislate so as to undermine the Rule of Law

[44] T. Etherton (n 43).
[45] *Padfield v Minister of Agriculture* [1968] AC 997.

or fundamental rights: As Lord Browne-Wilkinson made clear in *R v SSHD, Ex parte Pierson* [1998] AC 53 at 575:

> "A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect the legal rights of the citizen or the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament."[46]

70. On the face of it, this all seems pretty satisfactory. There are two contemporary legislative trends, however, which some consider troubling.

71. The critical step enabling the tyranny in Nazi Germany to be imposed was the 1933 Enabling Act which allowed the government to make laws without the consent of the Reichstag or the President, including those which deviated from the Constitution of 1919. The Enabling Act therefore involved the transference of law-making powers away from the democratically elected Parliament to the executive.

72. In the UK, the so called Henry VIII clauses in Acts of Parliament may empower the executive by means of delegated legislation to repeal, suspend or amend Acts of Parliament, including Acts of Parliament passed both before and after the enabling Act and, in some circumstances, the enabling Act itself.[47]

73. Unlike Hitler's Enabling Law, however, there are safeguards against Henry VIII clauses. Most pieces of delegated legislation, including those promulgated pursuant to a Henry VIII clause, will only take effect if they are positively

[46] See also *R v SSHD, ex p Simms* [2000] 2 AC 115,131.

[47] N.W. Barber and A.L. Young, 'The rise of prospective Henry VIII clauses and their implications for sovereignty' (2003) PL 112, 113.

approved by Parliament or if Parliament does not positively object. There remains, therefore, some parliamentary oversight, albeit briefer and more limited than that accorded to Bills intended to become Acts of Parliament.[48] Parliament, of course, remains sovereign and can both repeal a Henry VIII clause and reverse the effects of anything done by the executive pursuant to such a clause.

74. Furthermore, reflecting the interpretative techniques I have mentioned, the courts here take a strict approach to judicial oversight of Henry VIII clauses in applications for judicial review. In *R (Public Law Project) v Lord Chancellor (Office of the Children's Commissioner intervening)* Lord Neuberger reiterated that the courts have jurisdiction to declare delegated legislation unlawful and invalid if it has an effect, or is made for a purpose, which lies outside the scope of the statutory power in the enabling act pursuant to which it was purportedly made – to do so is to uphold the supremacy of Parliament over the executive.[49] That said, the court has limited power in this area. As Lord Neuberger acknowledged, where the wording of an enabling act's provisions, including Henry VIII clauses, is undoubtedly clear as to the scope of the delegated power,

[48] "Whether subject to the negative or affirmative resolution procedure, [delegated legislation] is subject to much briefer, if any, examination by Parliament and cannot be amended": *McKiernon v Secretary of State for Social Security* (1989) 2 Admin LR 133, 140, per Lord Donaldson MR. Although the position has changed somewhat with the recent introduction of the super-affirmative procedure that applies to some Henry VIII clauses, this statement remains largely true. For a description of each of the three procedures and how parliamentary scrutiny of delegated legislation operates in practice, see R. Rodgers and R. Walters, *How Parliament Works* (7th edn, Routledge 2015), 223-233

[49] *R (Public Law Project) v Lord Chancellor (Office of the Children's Commissioner intervening)* [2016] UKSC 39, [2016] AC 1531, [22], citing *F Hoffmann-La Roche & Co v Secretary of State for Trade and Industry* [1975] AC 295, 365 per Lord Diplock.

the courts may not "cut down that scope by some artificial reading of the power".[50]

75. Such clauses have been subject to a wide array of criticism.[51]. Lord Judge has recently criticised Henry VIII clauses in the following terms:

> "At the heart of the development of our constitutional arrangements, Parliament is there to protect us from authoritarianism, from despotism, from an over mighty monarch, but also from an over mighty executive. That responsibility remains undiminished … Unless strictly incidental to primary legislation, every Henry VIII clause … is a blow to the sovereignty of Parliament. And each one is a self-inflicted blow, each one boosting the power of the executive".[52]

76. The second UK legislative phenomenon which troubles some commentators is what have been called "legal black holes".[53] These are areas of activity by public bodies in which there is no legal control on the body exercising the conferred power in question, leaving the decision-maker free to exercise absolute discretion – an area devoid of rule-of-law controls.[54]

77. A classic example of a legal black hole is the 'ouster clause', a statutory provision that expressly states that judicial review of certain areas of executive or administrative action is excluded.[55] These clauses can come in many varieties

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[50] *R (Public Law Project)* (n51), [28], quoting *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2000] UKHL 61, [2001] 2 AC 349, 382, per Lord Bingham.
[51] Lord Hewart expressed concern as long ago as 1929 in his book *The New Despotism* (London Ernest Benn Ltd 1929), 9-12 and 52-58. Although Lord Hewart's forthright scepticism of delegated legislation and administrative law are to a large extent rather dated in the 21st Century, his particular concerns about the Henry VIII clauses in the Rating and Valuation Act 1925 and the Local Government Act 1929 remain relevant.
[52] Lord Judge, 'Ceding Power to the Executive; the Resurrection of Henry VIII' (King's College London, 12 April 2016), 2 and 13-14.
[53] See generally, D. Dyzenhaus, *The Constitution of Law: Legality In A Time Of Emergency* (CUP 2006); A. Greene (n 38), ch 4. The term was first used by Lord Phillips MR in *R (Abassi) v Secretary of State for Foreign Affairs* [2002] EWCA Civ 1598; [2003] UKHRR 76 to describe the legal position of detainees in Guantanamo Bay; see also J. Steyn, 'Guantanamo Bay: The Legal Black Hole' (2004) 53 ICLQ 1-15. The position of Guantanamo Bay detainees was reversed subsequently by the US Supreme Court in *Rasul v Bush* (2004) 542 US 466 which held that the detainees could petition the federal courts for writs of habeas corpus in order to review the legality of their detention.
[54] A. Greene (n 38), 100-101; D. Dyzenhaus (n 53), 30.
[55] See A. Greene (n 38), 102-105; D. Dyzenhaus (n 53), 102-120.

and were used by the Nazi regime to prevent review by courts of areas of activity by the executive government, notably acts of the Gestapo.[56]

78. Probably the best known example in recent English legal history is that which was in issue in *Anisminic Ltd v Foreign Compensation Commission*, namely section 4(4) of the Foreign Compensation Act 1950 which purported to exclude judicial review of determinations of the Foreign Compensation Commission as to the award of compensation for British property expropriated by the Egyptian government during the Suez crisis in 1956.[57] For the reasons given in that case, combined with the subsequent approach of courts in developing the grounds of judicial review, it is clear that decisions purportedly within the ambit of an ouster clause are subject to all of the usual grounds of judicial review.[58]

79. Once again, the courts exercise a restrictive approach to the interpretation of such clauses "in the light of a strong presumption that in promulgating statutes Parliament intends to legislate for a liberal democracy subject to the Rule of Law, respecting human rights and other fundamental principles of the constitution".[59] Again, however, as was made clear in *R (Privacy International) v Investigatory Powers Tribunal*[60] (subject to the pending appeal to the Supreme Court), that approach has its limits: if Parliament is clear enough on the matter,

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[56] See E. Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship* (first published 1941, J. Meierhenrich ed and tr, OUP 2017), 24-33; and generally, H. Petter Graver, *Judges Against Justice: On Judges When the Rule of Law is Under Attack* (Springer-Verlag 2015), ch 5.

[57] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147. For a detailed analysis as to the historical background to the case as well as its legal effects, see D. Feldman, '*Anisminic Ltd v Foreign Compensation Commission* [1968]: In Perspective' in S. Juss and M. Sunkin, *Landmark Cases in Public Law* (Hart Publishing 2017).

[58] This is the consequence of *R v Lord President of the Privy Council, ex p Page* [1993] AC 682 in which the House of Lords held all errors of law to be jurisdictional.

[59] *See R (Privacy International) v Investigatory Powers Tribunal* [2017] EWCA Civ 1868, [2018] 1 WLR 2572, [32]. See also *R (Evans) v Attorney General* [2015] UKSC 21, [2015] 2 WLR 813, [54].

[60] *R (Privacy International) v Investigatory Powers Tribunal* [2017] EWCA Civ 1868, [2018] 1 WLR 2572.

an ouster clause will have effect in excluding the jurisdiction of the courts in judicial review proceedings.

80. As matters currently stand, therefore, subject to a couple of potentially worrying features, our constitutional and legal arrangements are, in general, well placed for maintaining the values of a liberal democracy. What will be apparent is the critical role played by an independent and uncorrupted judiciary in those arrangements.

81. A recent survey by the European Network of Councils for the Judiciary ("ENCJ"), which was carried out at the end of 2016 and secured 11,712 responses from judges in 26 countries, shows that the UK was one of only five of those countries whose judges responding to the survey did not think that their colleagues were taking bribes or might be.[61] Only Sweden, the UK, Ireland, Finland and Denmark produced entirely negative results.

82. At a time of difficulty in recruitment of judges for a variety of reasons, the essential role played by the British judiciary in maintaining the critical balances in our polity is something which those who value our British way of life should keep well in mind.

Stress test

[61] European Network of Councils for the Judiciary, 'ENCJ Activity Report 2016-2017' (2017), 8-9. In 18 of the European countries more than 10% of judges who responded to the survey thought that some of their colleagues either were taking bribes or were not sure whether they were. In Bulgaria, Latvia, Romania, Croatia, the Czech Republic, Italy and Lithuania over 50% of judges who responded to the survey thought that some of their colleagues either were taking bribes or were not sure whether they were. Even France, Germany, Belgium, Austria and Spain were included in those countries where more than 10% of judges who responded to the survey thought that their colleagues either were taking bribes or were not sure.

83. The present UK constitutional legal arrangements operate in conditions in which there is real political choice between parties and effective political opposition, which can hold the executive to account. The question remains how well those constitutional arrangements would protect our liberal democracy if, even though highly unlikely, political power and control were to be wholly concentrated in one political party and its leader.

84. On the face of it, and leaving aside for this purpose overriding EU law, our constitutional arrangements would be weak in protecting our fundamental rights and values in such a situation.

85. With complete control of the House of Commons, the dominant party could pass such legislation as it wishes, whether creating new law or revoking existing law.[62] By virtue of the Parliament Acts 1911 and 1949, except for the requirement that a general election must be held at least once every five years, the House of Lords has power briefly to delay but not to deny the will of the House of Commons.[63] The courts are also very reluctant to look into the process of legislation in order to declare it invalid.[64] In theory, laws could be passed to facilitate the removal of judges and of civil servants deemed unsuitable.

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[62] Constitutional conventions include that the House of Lords does not oppose legislation from a government's election manifesto and the Queen never refuses to give Royal Assent to bills that are properly passed by Parliament. The validity of conventions cannot be the subject of court proceedings: see *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61, [146].

[63] It was originally envisaged that the 1911 Act should be used to effect only major constitutional changes. But the 1949 Act has been used to achieve objects of much more minor or no constitutional import, including the Hunting Act 2004.

[64] "... all that a court of justice can do is to look at the Parliamentary roll: if from that it should appear that a bill has passed both houses and received the Royal Assent, no court of justice can inquire into the mode in which it was introduced into Parliament, what was done to it previously being introduced, or what passed in Parliament during the various stages of its progress through both houses of Parliament:" *Edinburgh & Dalkeith Railway Co. v Wauchope* (1842) 8 Cl & F 710 (Lord Campbell).

86. Are we in a position to say that such a scenario is so fanciful in a modern, liberal democratic state as not to merit any serious attention? In considering that question, it is appropriate to bear the following in mind. Firstly, as I have already mentioned, the suspension of constitutional rights, even for prolonged periods, ostensibly for reasons of emergency, is no longer uncommon. Secondly, a concrete example can be seen in the experience in Turkey where, since July 2016, there has been a widespread purging of, among other institutions, the judiciary, with the removal of some 2,700 judges.[65] Thirdly, within the last few years legislative changes in Poland to the judiciary, to the courts and to the Public Prosecutor have been recognised as posing a serious threat to the institutional independence of the judiciary and to the Rule of Law. Such concerns have been expressed in a number of Opinions by the Council of Europe's Commission for Democracy through law, the Venice Commission[66] and in the European Commission's reasoned proposal on the Rule of Law in Poland pursuant to the first part of Article 7 of the TEU.[67]

[65] See A. Greene (n 38), 47 and 210-211.

[66] See Venice Commission, 'Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland' (Opinion No 833/2015) (CDL-AD (2016) 001) (11 March 2016) <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)001-e>; Venice Commission, 'Poland – Opinion on the Act of 15 January 2016 amending the Police Act and certain other Acts' (Opinion No 839/2016) (CDL-AD (2016) 012) (13 June 2016) <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)012-e>; Venice Commission, 'Poland – Opinion on the Act on the Constitutional Tribunal' (Opinion No 860/2016) (CDL-AD (2016) 026) (14 October 2016) <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)026-e>; Venice Commission, 'Poland - Opinion on the Act on the Public Prosecutor's office, as amended' (Opinion No 892/2017) (CDL-AD (2017) 028) (11 December 2017) <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)028-e>; Venice Commission, 'Poland - Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts' (Opinion No 904/2017) (CDL-AD (2017) 031) (11 December 2017) <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)031-e>.

[67] European Commission, 'Reasoned proposal in accordance with Article 7(1) of the Treaty on European Union regarding the Rule of Law in Poland: Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the Rule of Law' COM (2017) 835 final (20 December 2017) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017PC0835>. The Court of Appeal in its recent judgment on the extradition of three Polish nationals pursuant to a European

87. On the other hand, there are two critical respects in which the situation today in the scenario I have posed is different from that under the Nazi regime – one international and one domestic.

88. As I have said, one consequence of WWII and the horrors of the Nazi regime was the creation of powerful international bodies – the UN, the Council of Europe and (what is now) the EU – whose objects include maintenance of the Rule of Law and the protection of individual dignity, rights and liberty. Such bodies are able to exert pressure themselves and to encourage others to exert pressure internationally, particularly on their own members, to secure compliance with the Rule of Law. As we have often seen, such pressure is particularly effective when linked to adverse economic consequences for the defaulting state.

89. There is also now a greater international focus on the need to promote the Rule of Law than ever before. In a report to the Security Council of the UN in August 2004 the UN Secretary General said that "the Rule of Law" is a concept at the very heart of the UN's mission.[68] In September 2015 the UN agreed a set of Sustainable Development Goals ("STGs") for 2015-2030 that came into force on 1 January 2016. Goal 16.3 of the SDGs enshrines a commitment by all UN members to "promote the Rule of Law at the national and international levels, and to ensure equal access to justice for all".[69] The UN, via its General Assembly and Economic and Social Council, is to provide "follow-up and

Arrest Warrant, has noted that those reports establish that there is a serious and persistent breach of Art 2 TEU (see [INSERT NEUTRAL CITATION HERE] at [64]).

[68] UN Security Council, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: A Report by the Secretary General' (23 August 2004) UN Doc (S/2004/616), para 6, <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2004/616>.

[69] UNGA Resolution 70/1 (21 October 2015), 'Transforming our world: the 2030 Agenda for Sustainable Development' UN Doc A/RES/70/1, Goal 16.3.

review" of the achievement of the goals by governments.[70] Progress is to be measured against a number of UN-devised key indicators, called Key Performance Indicators or KPIs. In March 2016 the Council of Europe's Commission for Democracy through Law, the Venice Commission, published a report which said that the Rule of Law is a concept of universal validity. It adopted a 'Rule of Law' checklist, which it sees as helping to provide data to assist measurement of the achievement of the UN's Goal 16.3.[71]

90. The second critical respect in which the situation in the UK would be different from that under the National Socialists in Germany is the existence of our common law.

91. Under the orthodox Diceyan view of our constitution, judges are subordinate to Parliament and obliged to obey and apply primary legislation, possessing no powers to strike down or invalidate Acts of Parliament that are grossly unjust, whether because they violate procedural justice and the Rule of Law or because

[70] UNGA Resolution 70/1 (n 70), para 47.

[71] The Venice Commission, *Rule of Law Checklist* (18 March 2016) CDL-AD(2016)007, para 9 <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e>, para 23:

> 'The SDGs, which comprise a number of Goals, are aimed to be truly transformative and have profound implications for the realization of the agenda, envisaging "[a world] in which democracy, good governance and the Rule of Law, as well as an enabling environment at the national and international levels, are essential for sustainable development…" Target 16 commits States to "Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels". The achievement of Target 16 will be assessed against a number of targets, some of which incorporate Rule of Law components, such as the development of effective accountable and transparent institutions (target 16.6) and responsive, inclusive participatory and representative decision making at all levels (target 16.7). However, it is Target 16.3, committing States to "Promote the Rule of Law at the national and international levels and ensure equal access to justice for all" that offers a unique opportunity for revitalizing the relationship between citizens and the State. This Checklist could be a very important tool to assist in the qualitative measurement of Rule of Law indicators in the context of the SDGs'.

they are substantively unjust in violating the human rights of individuals and groups.[72]

92. There have been a few scholars and judges who, in recent times, have sought to challenge that established orthodoxy. According to their view, Parliament's authority to enact statutes derives from the common law's recognition of its institutional supremacy. For theorists such as Trevor Allan, it follows that "the common law is prior to legislative supremacy which it defines and regulates",[73] which means that it would be open to judges to use common law constitutional principles, including common law rights, to invalidate an Act of Parliament that was egregiously to breach those fundamental legal constitutional norms.

93. Those who support this "common law constitutionalism" approach in opposition to Parliamentary sovereignty usually cite in support the judgment of Sir Edward Coke in *Dr Bonham's Case* in 1610, where he said as follows:

> "… And it appears in our books, that in many cases, the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void; for when an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such an Act to be void …"[74]

94. Although the majority of scholars today doubt that Coke actually meant that the common law could control Parliament's legislative authority so as to authorise the judicial invalidation of a statute;[75] a few judges have, as I have said, posed

[72] See, e.g., *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645 at 723A (Lord Reid).
[73] T.R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP 2001) 271.
[74] (1610) 8 Co Rep 113b, 118a; 77 ER 646, 652.
[75] See, for example, I. Williams, '*Dr Bonham's Case* and "Void" Statutes' (2006) 27 Journal of Legal History 111.

this as a legal nuclear option in extreme circumstances. To take but one example, in *R (Jackson) v Attorney General*, Lord Steyn said as follows:

> "Nevertheless, the supremacy of Parliament is still the general principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism."[76]

95. This is today very much a minority view.[77] It would not be accepted by the overwhelming majority of British jurists and judges and was, for example, rejected out of hand by Lord Bingham[78]

96. Were, however, the people of this country actually to face the kind of discriminatory and oppressive laws brought into force by the Nazis in and after 1933, it is difficult to be prescriptive about the course that might be taken by the judiciary. Judges are the guardians of the constitution.[79] They swear to do right to all manner of people after the laws and usages of this realm without fear or favour, affection or ill will. They ride on the shoulders of countless generations of judges who have gone before them restraining unbridled exercise of executive power and protecting the liberty and rights of the individual. I would

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[76] [2006] 1 AC 262, at [102]; see also Lord Hope at [104], and Baroness Hale at [159]. See also Lord Woolf, 'Droit public – English style' [1995] PL 57-71, 69 where he said: "… if Parliament did the unthinkable, then I would say that the courts would also be required to act in a manner which would be without precedent".

[77] The thinking behind these kinds of theories did, however, influence some of the members of the House of Lords in *Oppenheimer v Cattermole* [1976] AC 249. They were required to consider the effect of the 1941 Nazi law which deprived Jews who left the country of their German citizenship and confiscated their property without compensation. In that case, the Court followed the decision of the Constitutional Court of the Federal Republic of Germany who had themselves declared the 1941 law to be "Unrecht" and "not law". However, additionally, both Lords Cross (at 277) and Salmon (at 291-282) held that, as a matter of English law, an English court would refuse to recognise the grossly unjust law of a foreign state as law at all.

[78] See Lord Bingham of Cornhill, 'The Rule of Law and the Sovereignty of Parliament' (2008) 19 King's Law Journal 223-234; and Tom Bingham, *The Rule of Law* (Penguin 2010) at pp. 166-168, quoting and agreeing with Galsworthy, Sovereignty of Parliament pp. 165-173.

[79] For the influential debate as to who should be the guardians of the constitution, between Carl Schmitt and Hans Kelsen, see the materials gathered in L. Vinx, *The Guardian of the Constitution Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (CUP 2015).

not be surprised, if the worst came to the worst, if they attempted to deploy the common law for the same purpose in order to defeat a tyrannical regime enacting laws with due procedure but abhorrent purpose and effect. The Judges would have to confront the very real difficulty, inherent in the Rule of Law, of the need for certainty as the particular circumstances in which the common law could be applied in that way. Such an approach by the court would be the very opposite of the positivism that is said to have constrained the judiciary under the National Socialists but that would surely be its merit.

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