The Road to Tyranny – The Continuing Legal Legacy and Lessons of Nazi Germany

THE ELEVENTH BIRKENHEAD LECTURE
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The following is a version of the lecture abridged by the Editor. The full text, including footnotes detailing sources, is available on the Gray's Inn website.

The rise of the National Socialist German Workers' Party came at the end of a long period of upheaval: the disastrous defeat of Germany in WW1, chronic inflation in the 1920s, appalling depression in the early 1930s, constant political instability and civil violence.

In the November 1932 elections the National Socialists' share of the vote was 33.1%. Hitler was appointed Chancellor by President Hindenburg on 30th January 1933. On the day after his appointment, President Hindenburg authorised Hitler to dissolve the Reichstag and hold further elections on 5th March 1933. On the night of 27th February 1933, when the election campaign was at its height, a fire was started in the Reichstag building by an unemployed Dutch construction worker and former communist. Using the fire as a pretext, the National Socialists began the round up of their political opponents that same night.

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 8th May 1945 when it was cancelled by the Allies' military government.

At the first parliamentary session the National Socialists pushed through the Enabling Act, which, with the concomitant suspension of

the Constitution, was the instrument that enabled Hitler and the Nazis to make laws without any effective legislative or political restraint. Institutional change came swiftly. On 7th 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.

In May 1933 trade union leaders were arrested. The German Social Democratic Party was banned on 21st 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. In September 1933 Göring established the Gestapo. The entire police force was brought under Nazi command. The Gestapo were not subject to control by the courts.

A succession of laws led to the dismissal of Jews from orchestras, opera companies, art galleries, theatres, radio and the film industry; barred them from working as newspaper editors; stopped them entering the legal profession; and banned them from practising as doctors and dentists within the state sector. Hereditary Health Courts were established with the power to order the compulsory sterilisation of individuals deemed mentally or physically disabled and liable to pass on disability if they had children.

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.

The Nuremberg race laws were passed in September 1935. Among other things, they prohibited marriages and sexual relations between Jews and Aryans. They restricted German citizenship to persons who were of 'German or kindred blood'. 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; from access to places of public entertainment; and banned from all sporting and recreational activity.

In 1939 a project known as T-4 was initiated on the personal signed authorisation of Hitler. Specially selected doctors identified those 'unworthy of life'. Several clinics were adapted as killing centres. 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 carbon monoxide. The operation was

finally stopped after a critical sermon by the Bishop of Münster.

The largest campaign of extermination, however, was the Nazis' genocide of European Jewry. Two (of many) examples: by the end of 1941 the Germans had murdered 200,000 Jews in Soviet Byelorussia; and in the summer of 1942 in Ukraine, over the course of less than 70 days, the Germans and their assistants murdered 150,000 Jews. By 1942 the Nazis were engaging in a more mechanical method of genocide. Chelmno was the first of the death concentration camps. By mid-1943, Auschwitz-Birkenau was (as described by David Cesarani) the 'single mass extermination site in the genocidal armoury of the Third Reich'. In Auschwitz alone, over 1.1 million people were killed.

The consequences

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.

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. The charges included two new crimes in international law: crimes against humanity, and genocide. The offence of 'crimes against humanity' 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 concerned with the killing of civilian populations in order to destroy particular races and classes of people and national, racial and religious groups.

The convictions of some of the most important war criminals in the judgment delivered by the International Military Tribunal on 1st October 1946 established for the first time crimes against humanity as part of international law. 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 11th December 1946.

None of the defendants was found to have committed genocide, and that word was not mentioned in the judgment. In another resolution on 11th December 1946, however, the UN General Assembly affirmed

that genocide is a crime under international law. Two years later, on 9th December 1948, the General Assembly of the UN adopted the Convention on the Prevention and Punishment of the Crime of Genocide. It has been described as the first human rights treaty of the modern era. According to the preamble to 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.'

The International Court of Justice, located in The Hague, is the primary judicial organ of the UN. It began work in 1946 as the successor to the Permanent Court of International Justice. 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.

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 their common heritage and facilitating their economic and social progress.' The European Convention on Human Rights was signed in 1950. The British Prosecutor at Nuremberg Sir David Maxwell Fife played a leading role in the text, which created in Strasbourg the first international human rights court to which individuals had access.

Finally, the origins of the EU also lay in the reaction to those horrors. The Schuman Declaration proposed placing French and German production of coal and steel under one common High Authority, which would be open to the participation of Western European countries. The vision was that 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. On 18th April 1951, the six founding members – 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.

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. They laid the ground for an intensification of debate about the Rule of Law and provided a context for the development and enforcement of principles to restrain abuse of power by executive government and legislatures. In the context of the UK, the extent of that leap is illustrated most simply by reference to two matters.

First, prior to 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 the rights of minorities. Secondly, the speeches of the majority of the Law Lords in *Liversidge v Anderson* 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 origin or associations but without any obligation to give any grounds for that belief.

The judiciary under the Nazis

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

On 21st 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.

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'. As in the other trials, the charges concerned war crimes, organised crime and crimes against humanity. By 1951 all the defendants were at liberty again except one, who was not released until 1956. Prosecution of German judges who had exercised jurisdiction only in Germany was left to the domestic German prosecutors and courts. Taking into account 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.

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. That explanation was deployed specifically in the defence of the accused at the Nuremberg Justice Trial. 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. 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. 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.

Lessons and comparisons

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

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 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. While 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.

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. Where the fundamental values of a society are reflected in a codified constitution, and that constitution is suspended, it 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 facilitated.

On the face of it, those twin principles are robustly reflected in the UK's constitutional and legal arrangements. In short, the constitutional arrangements, at least in principle, are that the 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.

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. 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.

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* [1968] AC 997 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. 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 or fundamental rights.

On the face of it, this all seems pretty satisfactory. There are two contemporary legislative trends, however, which some consider troubling. 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. 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 approved by Parliament or if Parliament does not positively object. Parliament can, of course, both repeal a Henry VIII clause and reverse the effects of anything done by the executive pursuant to such a clause.

The second UK legislative phenomenon which troubles some commentators is what has been called 'legal black holes'. 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. 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. These clauses can come in many varieties 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.

It is clear, however, that decisions purportedly within the ambit of an ouster clause are subject to all of the usual grounds of judicial review. 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': *R (Privacy International) v Investigatory Powers Tribunal* [2017] EWCA Civ 1868; [2018] 1 WLR 2572 at [32]. Again, however, as was made clear in that case (subject

to the pending appeal to the Supreme Court*), that approach has its limits: if Parliament is clear enough on the matter, an ouster clause will have effect in excluding the jurisdiction of the courts in judicial review proceedings.

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.

Stress test

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 political power and control were to be wholly concentrated in one political party and its leader.

With complete control of the House of Commons, the dominant party could pass such legislation as it wished, whether creating new law or revoking existing law. 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. The courts are also very reluctant to look into the process of legislation in order to declare it invalid. In theory, laws could be passed to facilitate the removal of judges and of civil servants deemed unsuitable.

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. First, 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. 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.

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. 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, and such pressure is particularly effective when linked to adverse economic consequences for the defaulting state. There is also now a greater international focus on the need to promote the Rule of Law than ever before.

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. 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.

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', 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. This is today very much a minority view. It would not be accepted by the overwhelming majority of British jurists and judges.

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. 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 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.

Master Etherton expressed his gratitude to his Judicial Assistant Joshua Cainer for his assistance in the preparation of the lecture.

**Editor's note*. The Supreme Court allowed the appeal by a majority: [2019] UKSC 22.

'Manners maketh man, it is said, well, they go a long way towards making the advocate … I suppose a man's manner will always reflect his mind and character. If he is a man of honour and integrity, he will inevitably convey it in the manner in which he does that which is in hand. If he is fair-minded he will seem fair to others. If he is generous, he will not seem mean. The sure way then to great advocacy is to act only, and at all times, according to the highest standards of professional honour and integrity …'

Sir Malcolm Hilbery, giving a lecture in Hall,
Hilary Term 1938