A legal path to injustice?

In a system ruled by immoral leaders, it may be fanciful to believe that lawyers can or will make a difference: John Gould considers a chilling lesson from history

Oswiecim, Auschwitz Birkenau, Poland

As lawyers, we pride ourselves that we are independent, act with integrity and uphold the rule of law. However, history suggests that when the law itself is captured by immoral or illiberal forces, lawyers and judges may become more or less reluctant servants of the new order.

Dictatorship is not necessarily the product of violence or revolution; sometimes it grows out of democratic constitutions in states which espouse the rule of law and have embedded within them independent lawyers and judges. Although the decline into autocracy may be incremental, that does not mean it is inevitably slow. A handful of years can be enough for even the most civilised of societies to be subverted.

Law is a system of governance by which politics is played out. A legalist philosopher might have said that law and morality should be completely separate because law is only there to enforce the decisions of government, but most lawyers would think that laws should be moral and adhere to values which are more fundamental than the will of a person with an electoral mandate. In practice, however, faced with a conflict between law and some long-held ideas of justice and good, what is a lawyer to do? The lawyers' default position may be to co-operate with the law as it is, however abhorrent.

It is, therefore, a simplification to say that the rule of law is a universal good. The rule of laws which do not go hand in hand with a moral code may be even worse than an absolutist dictatorship. Extra-legal dictatorships may be even more arbitrary, but without law they are likely to be less effective. The key question is not how lawyers and judges might resist immoral laws, but how a law-based but fundamentally immoral system might come into existence in the first place. In words attributed to the Spanish-American philosopher George Santayana: 'Those who forget history are condemned to repeat it'.

Nazi Germany: a slippery slope

Although the paradigm of Germany in the 1930s may be too obvious, it does serve to illustrate the legal steps along such a path, and suggests that lawyers and judges, when faced with a strong populist movement focusing anger on an allegedly alien part of the population, may well take the line of least resistance and follow the law.

For the historical facts, I have drawn heavily on an article in the *UCLA Law Review* by the late Justice Richard D Fybel entitled 'Judges, Lawyers, Legal Theorists, and the Law in Nazi Germany (1933–1938)' and the sources upon which he relied (*bit.ly/3Z9iPof*).

Germany in 1932 had a formal constitution dividing power between a federal government and individual states. There had been a period of deep division between the far left and the far right, who were relatively evenly matched. The division was marked by mutual fear and loathing with outbreaks of political violence. The leader of the far right, Adolf Hitler, had unsuccessfully attempted to take over the government by force some years previously and had been jailed. Germany had a framework of law, a developed legal profession and independent judges.

After some electoral success, Hitler was appointed Chancellor in January 1933. The National Socialist Party's (Nazi) chosen approach was to seek to carry out their programme within the existing framework of German law. Lawyers were necessary to do this.

Article 48 of Germany's Weimar Constitution, which became known as the Dictatorship Article, provided broad powers to the president in the event of an emergency. Necessarily the definition of an emergency is imprecise and, for the leader's purposes, his lawyers were able to formulate the necessary narrative without too much difficulty. Emergencies can go on for a long time, or perhaps never stop.

On 28 February 1933, an executive decree, popularly known as the Reichstag Fire Decree, suspended parts of the Weimar Constitution. The rights of individuals, including to the due process of law, were restricted. Opportunities for dissent were curtailed by restricting the right to assemble, freedom of speech and freedom of the press. Restraints on police investigations were loosened so that the police could lock people up without a specific charge, dissolve political organisations, and suppress publications. The same decree gave the central government power to overrule state laws and even remove state and local governments.

On 23 March 1933, the Reichstag passed the Law to Remedy the Distress of the People and the Reich, known as the Enabling Act. The Enabling Act permitted the leader to enact laws. This included laws contrary to the constitution, and did not require the participation of the legislature.

The Law for the Restoration of the Professional Civil Service, passed on 7 April 1933, excluded all Jewish people from civil service, including the ability to serve as judges or government attorneys.

In April 1934, the National Socialist People's Court (*Volksgerichtshof* or VGH) was created. The VGH had jurisdiction over treason cases. Its judges were party members who functioned as judges, investigators and prosecutors. A special tribunal to consider cultural or political crimes does not have to be a court; a committee of the legislature with a similar constitution would also serve. It allows a way to focus pressure on opponents.

In August 1934, Hitler used his legislative powers to merge the offices of President and Chancellor and assume the power and the authority of both under a new title: Führer.

From August 1934, German judges were required to take an oath to follow Hitler, not the country's constitution. The oath was: 'I swear loyalty to the Führer of the German

Reich and people, Adolf Hitler, obedience to the law, and conscientious fulfilment of the duties of my office, so help me God.'

Richard Fybel reports that no German judge refused to take the revised oath.

By September 1935, the Reichstag was completely controlled by the Nazi party. Ways were found to pressure, threaten or exclude non-compliant parliamentarians.

On 15 September 1935, the Reichstag passed the Nuremberg Race Laws. The Reich Citizenship Law restricted citizenship to persons with German blood; Jewish people lost the right to vote. The Law for the Protection of German Blood and German Honour prohibited marriage or even sex between Germans and Jewish people.

By December 1935, the dismissal of all Jewish professors, teachers, physicians, and lawyers had been ordered.

In 1936, in interpreting the Nuremberg Race Laws, the German Supreme Court legitimised discrimination based on race.

So, within four years, by a process within the law, power became concentrated in the hands of a single person, a section of the population was stigmatised and excluded, the legislature and the judges were suborned, and lawyers were actively engaged in serving this new reality. This is not to mention all of the other ways in which any other possible organised opposition was dismantled or the continuing role of violence and repression in 'cowing' possible opponents. Meanwhile, the Nazi 'base' of around 30% of the population contributed their active support.

What, you may ask, were lawyers and judges doing while all of this was going on? After all, the Nazi Party had made no particular secret of its intention to establish Nazi rule within the framework of traditional German law. In order to do this, the legal community had to do a lot more than silently acquiesce.

As one might expect, lawyers had to work to incorporate and harmonise the new arrangements with pre-existing law. New provisions were commonly difficult to reconcile with existing legal principles of existing law, but it was managed. No doubt there were principled lawyers who took a stand and suffered as a result. Some may have been afraid, some may have been self-interested, some may not have appreciated the wider significance of what they were doing, and many may have been Nazis themselves. Most judges and lawyers continued to play their day-to-day parts in evil clothed in law.

> *"The legal community had to do a lot more than silently acquiesce"*

It is wrong to be critical of individuals at this distance of time; but the point is that they did not represent collectively an effective barrier to the corruption of the legal system, and many are likely to have assisted in its corruption.

Making the system work for good

So, what does this lesson of history suggest? There are some obvious conclusions. Institutions and conventions may be washed away by an incoming tide of law. Ideologies and populist movements can subsume existing legal structures incrementally. Individuals can be picked off relatively easily. Collectively, lawyers, including judges, may be incapable of not following the law and facilitating its imposition, whatever it says.

It would of course be wrong to assume that anyone who does not embrace the liberal values which have hitherto prevailed in western democracies is a would-be fascist. In Germany, the perceived failure of social democratic government coupled with economic instability made an ideology which was simple, direct and forceful attractive to a substantial proportion of the population, with the added bonus of offering someone else to blame.

The streets of Nuremberg in 1933 may seem far away from the UK today, but elsewhere there are reminders of the path that began there. It would be a mistake to think dramatic change could never happen here. Lies in elections are not a new phenomenon—Joseph Goebbels, the Nazi propaganda chief, is reported to have said: 'Make the lie big, make it simple, keep saying it, and eventually they will believe it.' If legislators become the cyphers of government, a domino effect through the pillars of the existing law may follow.

There are, of course, many examples of courageous lawyers standing up against arbitrary rulers who place themselves above the law, but those lawyers tend to use the law itself. Sometimes lawyers collectively have acted to fight threats to the rule of law, where, for example, the independence of the courts is threatened; but again, this tends to use the law. Where, however, the law itself is used by governments and political checks and balances fail, lawyers may turn out to be weaponless in a fight for justice.

Lawyers have an important part to play in maintaining confidence in the rule of law, the administration of justice and our democratic system generally. It is a role which must be based on values and integrity. It must deliver justice, because injustice is the void into which the values of autocracy can permeate. The lawyers' role is to make the system work, because once the system is captured by bad actors, it may be fanciful to think that lawyers can or will make a difference. **NLJ**

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