4. The Law as an Accelerator of Genocide

The defendants, officials of various Reich Ministries, in the Wilhelmstrasse Trial, Nuremberg, Germany.

Photo Credit: Yad Vashem Photo Archives

B'nai Brith International

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The Law as an Accelerator of Genocide

by David Matas

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In the Third Reich, the complicity of the legal profession in Nazi persecution permeated the bench, the prosecution and even the defence bar. The laws and those that upheld them helped to legitimise brute prejudice and facilitate the marginalisation and exclusion of the Jews from society. This raises a number of questions that warrant investigation. Was there not an international standard of ethics that honourable judges and members of the legal profession should have followed? What if members of the legal profession had refused to cooperate? Why didn't they? What impact did this have on the perpetrators?

One case regarding opposition to Nazi practices by Judge Lothar Kreyssig, of Brandenberg Germany, might provide some of the answers. Judge Kreyssig, in charge of guardianships, noticed that a number of his wards, mentally retarded children and adults housed in a local mental hospital, died suddenly after transfer to certain institutions. He concluded that they had been murdered by the Nazi regime under its policy "Operation Mercy Killing" and wrote to the Minister of Justice Franz Gurtner to object.

When nothing happened, Judge Kreyssig in July 1940 filed with the state attorney in Potsdam a murder complaint against Philip

Bouhler, the head of both Hitler's Chancellery and the Nazi euthanasia programme. He then, in August, issued injunctions against the hospitals housing his wards, ordering the hospitals not to transfer his wards without his prior approval.

Justice Minister Gurtner summoned Kreyssig to Berlin and asked him to abandon his efforts. Kreyssig refused and Gurtner ordered his early retirement.[1] Kreyssig suffered no other consequence; he received a state pension from the Third Reich. He lived until 1986.

In his book, *Hitler's Justice: The Courts of the Third Reich*, Ingo Muller wrote:

> *No matter how hard one searches for stout-hearted men among the judges of the Third Reich, for judges who refused to serve the regime from the bench, there remains a grand total of one: Dr. Lothar Kreyssig.*[2]

An extreme form of a more typical phenomenon, the anti-Semitic jurist, was Oswald Rothaug. The Nazi race laws prohibited, amongst other things, sexual relations between Jews and Aryans. Leo Katzenberger was prosecuted in March 1942 for having an affair with Irene Seiler. Both denied the affair and there was no evidence to the contrary other than that they knew each other and were friends. Katzenberger was nonetheless convicted by Judge Oswald Rothaug, sentenced to death and executed in June 1942.[3]

Oswald Rothaug was prosecuted at Nuremberg after the war in the Justice Trial, a trial of sixteen members of the Reich Ministry of Justice or People's and Special Courts. The trial was conducted by a United States military court in the United States occupied zone of

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1 Henry Friedlander, *The Origins of Nazi Genocide: From Euthanasia to the Final Solution* (UNC Press, 1997), p. 121.

2 Ingo Muller, *Hitler's Justice: The Courts of the Third Reich* (Harvard University Press, 1991).

3 Christiane Kohl, *The Maiden and the Jew: The Story of a Fatal Friendship in Nazi Germany* (Steerforth, 2004).

Germany in Nuremberg after the International Military Tribunals were completed.

One element of the charge against Rothaug for war crimes and crimes against humanity was his conduct of the Katzenberger trial. Rothaug was convicted December 1947 and sentenced to life in prison. In convicting Rothaug, the Unites States military tribunal wrote:

> *From the evidence it is clear that these trials [one of which was the Katzenberger trial] lacked the essential elements of legality. In these cases the defendant's court, in spite of the legal sophistries which he employed, was merely an instrument in the programme of the leaders of the Nazi State of persecution and extermination.*[4]

Rothuag was released in 1956 and died in 1967.

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A fictionalised version of the prosecution of Rothaug was included in the movie *Judgment at Nuremberg*. Judy Garland played the part of a character based on Irene Seiler.

The complicity of the legal profession in Nazi persecution, of which the Katzenberger prosecution was an example, permeated the bench and the prosecution. It also convulsed the defence bar. Counsel for the defense saw themselves as agents of the state and routinely turned against their clients in pursuit of what they saw as Nazi state interests.[5]

Nazi corruption of the law was not confined to the criminal sphere. Every legal domain, including contract law, labour law and child custody, became venues for the application of Nazi racist ideology.

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4 *United States of America v. Alstoetter et al.* ("The Justice Case") 3 T.W.C. 1 (1948), 6 L.R.T.W.C. (1948), 14 Ann. Dig. 278 (1948).

5 Yitzchok A. Breitowitz, book review of *Hitler's Justice: The Courts of the Third Reich*.

Moreover, this exclusion through law was not limited to Nazi Germany. In every country but Denmark that the Nazis invaded, racial laws excluding Jews from economic activities were enacted and enforced.[6]

It is easy to see why Nazis would want to use the law to promote their racist ideology. Totalitarianism meant total control, control of the legal profession along with every other profession. But there was more to Nazi control of the legal profession than that.

The law is normative. It is statements by the lawmakers of what they want society to be. The law sets out the legislator's ideal. Legal discourse is a discourse about what ought to be.

To exclude Jews in fact from society was just bigotry, discrimination. To exclude Jews by law from that same society was exclusion at a higher level, a level of standards. Legislated anti-Semitism was marginalisation in principle, dehumanisation as an ethic.

In the Third Reich, the legality of exclusion provided an additional justification for that exclusion, reinforcing the marginalisation, making it more systematic. Law gave respectability to brute prejudice.

It is harder to explain why the legal profession went along with this Nazi attempt to legitimise bigotry. Kreyssig, the one judge who resisted the Nazis, as noted, suffered no other consequence than dismissal with a pension. And this was the result of active opposition to Hitler in 1940, long after the Nazi project had gathered steam, even after World War II had started. If the judges and lawyers had actively opposed the Nazi project in the early years of the Third Reich, it seems likely that they would not have suffered even this sort of adverse consequence.

Why did they not do so? In light of how little happened to Lothar Kreyssig for resisting so boldly so late in the Third Reich, the answer cannot be that they cooperated because they had to. The answer must be that they cooperated because they wanted to.

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6 "Anti-Jewish Legislation", Shoah Resource Center, The International School for Holocaust Studies at Yad Vashem, the Holocaust Martyrs' and Heroes' Remembrance Authority.

How could the legal profession have abandoned so completely and systematically its ideals? The explanation is the same for the lawyers as for the rest of society, the pervasiveness of anti-Semitism.

In Germany and virtually everywhere the Nazis went, vicious anti-Semitism had become an informal ethic. Legalising that ethic just formalised what was already rampant. The legal profession did not resist the anti-Semitism of the Nazis because all too many jurists were anti-Semitic themselves.

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There may be a temptation to suggest that this legitimisation of anti-Semitism did not matter. The death camps, the roving killing squads, the Final Solution, the Holocaust, were not implemented through legislation and court orders. Yet, the complicity of the legal profession mattered very much indeed.

If the legal profession had insisted from day one of the Third Reich on obedience to justice, fairness, due process and the rule of law, the Nazi project could have been stopped before it developed a full head of steam. Only because the legal profession and the legal system tolerated and cooperated in the lesser wrongs did the greater wrongs become possible.

When Rothaug was prosecuted at Nuremberg, he argued in mitigation that the numbers killed as the result of his decisions paled in comparison to the numbers killed by those who ran the death camps or operated the roving extermination squads.[7] The Court, in convicting him, said:

> *That the number the defendant could wipe out within his competency was smaller than the number involved in the*

7 Matthew Lippman, "Law, Lawyers and Legality in the Third Reich. The Perversion of Principle and Professionalism" in *The Holocaust's Ghost: Writings on Art, Politics, Law, and Education* — edited by F. C. DeCoste and Bernard Schwartz, (University of Alberta Press, 2000), p. 302.

> *mass persecutions and exterminations by the leaders whom he served, does not mitigate his contribution to the programme of those leaders. His acts were more terrible in that those who might have hoped for a last refuge in the institutions of justice found these institutions turned against them and a part of the programme of terror and oppression.*[8]

The failure of legal recourse makes crimes against humanity even more terrifying. Victims of persecution are entitled to expect refuge, safety, protection from the law. When the law joins in the persecution, the horror of the persecution is amplified.

The law of the Nazi era provided a continuity with the past, camouflaging the abrupt nature of the change the Nazi regime inflicted on Germany and the other countries where the Nazis went. Relying on the law made discrimination easier, not just easier to accomplish but easier to attempt. Those who hesitated to wallow in the pure discourse of bigotry could hide behind the fig leaf of the law.

Exclusion through law cloaked Nazi ruled countries in a semblance of similarity with other countries where the rule of law prevailed, giving Nazis a smokescreen of respectability as they went about their business of exclusion. The legitimisation of exclusion served as form of self delusion for the perpetrators and a deception of outsiders and non-participants, mitigating their objections and interference.

When Nazis preempted and coopted the law to serve their ideology of exclusion, they gave an excuse, a pretence of civilisation to some of the most barbaric behaviour the world had ever seen. Those who could not seek comfort for their inhumanity in bigotry alone sought and obtained solace in the connection with legal traditions with which they were familiar. To all too many, both insiders and outsiders, what the Nazis did was not wrong because it was legal.

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8 *United States of America v. Alstötter, et al.* ("The Jurists' Trial"), 3 T.W.C. 1 (1948), 6 L.R.T.W.C. 1 (1948), 14 Ann. Dig. 278 (1948). PDF available at Library of Congress Web site http://loc.gov/rr/frd/Military_Law/NTs_war-criminals.html.

It is noteworthy that the one judge who did object to Nazi murders, Lothar Kreyssig, did so in legal terms. In his letter of protest to the Minister of Justice, Kreyssig argued that the killings of his wards were illegal on both substantive and procedural grounds.

On substance, he asserted that there was no legal basis for killing wards of court. On procedure, he inveighed against the absence of both the opportunity to call expert witness and the possibility of appeal.

The Minister of Justice Gurtner attempted to persuade Kreyssig that what was done was legal because it met with the Fuhrer's will, something which was stated in print in a document Gurtner showed Kreyssig. Kreyssig asserted the view that the Fuhrer's will could not represent a legal basis for the killing of his wards.[9]

In one sense, the objections Kreyssig made, legal and not moral, seem formalistic, suggesting that a mere change in the law would have removed his objections. Nonetheless, his insistence on legality was more than just form. In another sense, he hit dead on a least part of what was amiss in what was happening, the abuse of law.

Perpetrators developed a sense of immunity through law. Though at the end of the day, after the War, when Nazis were hauled before the Nuremberg courts, their defences based on local law were dismissed, many thought they had those defences, thought that they would be immune from prosecution for what they were doing because it was legal. The then legality gave the perpetrators what later turned out to be a false sense of security; but at the time the crimes were committed it helped mobilise partners in exclusion and undermined attempts to turn them away from their awful deeds.

Sometimes, all that is necessary to prevent wrongdoing is to see it plainly for what it is. The mask of legality prevented the clear and unequivocal exposure of wrong doing. It muddied the waters, confused and obfuscated, making it unclear to those without strong moral grounding where their duty lay.

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9 Anton Legerer, "Preparing the Ground for Constitutionalisation through Reconciliation Work", 6 German Law Journal No. 2 (1 February 2005).

The phrase, "I was only doing my job", when it came to applying Nazi exclusion law, was more than just an excuse. It became an effective means for getting Nazi dirty work accomplished. If the task of exclusion can be extracted from its impact on humanity, if it can be turned into a mere technical abstraction, it becomes that much easier to perform.

Making exclusion legal sanitised the task and anesthetised the perpetrators. Legalisation became a technique of avoidance. Instead of confronting and flinching from the infliction of suffering on real human beings, perpetrators thought instead only about the mundane, everyday application of legal technicalities. Killing real human beings is a bloody business; but applying legal technicalities can seem bloodless.

Violations of human rights are a spreading stain. By being complicit from the very start, the legal profession in Nazi Germany legitimated, spread and amplified exclusion.

Those who did not think that what they were doing was right because it was racist could and did think that what they were doing was right because it was legal. Legality expanded the range of perpetrators beyond true believers to encompass the full, formal machinery of the state.

Violations of human rights are a spreading stain. By being complicit from the very start, the legal profession in Nazi Germany legitimated, spread and amplified exclusion. The law in Nazi Germany became a building block of the Final Solution; the legal profession was a builder.

What are the lessons which can be learned from this experience? One is that civil society can be suborned to the process of marginalisation, dispossession, dehumanisation and deportation. One would have thought the legal profession, with its ideals of justice, equality, due process, fairness and the rule of law, would be steeled against this subornation. But Nazi Germany showed that this was not so.

Before Nazi Germany there had been an equation of law with civilisation. If one looks at the statute of the Permanent Court of

International Justice which began in 1922, it states as one of the sources of international law "the general principles of law recognised by civilised nations".[10] International law, according to the Court statute, came from civilised nations.

While the Statute of the Court did not state which nations were civilised and which were not, it was drawn up in the era where the colonial powers were thought to be the civilised nations and the colonised states were not. The phrase "civilised nations" was understood to refer to the states of continental Europe, the United Kingdom and the United States.[11]

The Holocaust was distinctive, unprecedented, unique from a wide variety of perspectives. Germany at the time of the Holocaust was an advanced civilisation in a myriad of ways, not least of which was its development of legal scholarship and jurisprudence. It was startling to see the failure of the participants in a fully developed legal culture, judges as well as the legal profession, with the sole exception of Lother Kreyssig, to oppose Nazi crimes as illegal, and, on the contrary, their willingness to participate actively in these crimes.

In Nazi ruled countries, human rights violations were perpetrated by means of visible legal structures. Nazi ruled countries were states dedicated to the violations of human rights, built upon the principle of human rights violations. Nazi ruled countries used the law to pursue the Nazi racist agenda.

Because of the behaviour of the legal profession in Nazi ruled countries we have to think of the law in a completely different way. The participation of the legal profession in Nazi crimes showed in a way that jurisprudence alone never could the complete divorce between law and morality, between the law and the rule of law, between law and respect for human rights standards. The Holocaust showed that advanced civilisation, even an advanced legal culture,

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10 Article 38 (3).

11 Hanna Bokor-Szeg, "General Principles of Law", Chapter 8, *International Law: Achievements and Prospects*, editor Mohammed Bedjaoui, UNESCO, 1991, p. 214.

is no defence to the worst crimes known to humanity. Legality and barbarity can go hand in hand.

The advanced legal culture of Germany in the first half of the twentieth century speaks to the universality, the contemporary relevance of the Holocaust. It may be tempting to say of other killers in other genocides that they were nothing but uncivilised barbarians. It cannot be said of the perpetrators of the Holocaust.

The law can make an oppressive state even more oppressive; that the law can partner and reinforce tyranny as much as liberty; that the law can be a harbinger and accelerator of genocide.

Even during the midst of the Holocaust, many of the most accomplished German jurists of the day were among its most enthusiastic supporters. The Holocaust tells us in a way that no other tragedy can that the law alone can not immunise us from evil.

On the contrary, law can and in the case of the Holocaust did contribute to dehumanisation. Laws and lawyers and courts, by giving an appearance of legality to the exclusion of the Jews, served to legitimise that exclusion.

Nazis did not just flout the law; they used it. There is a tendency even today to think of the law as a friend of the oppressed, as a bulwark or defence against the authority of the state. Yet, if we direct our attention to the law and the legal profession in Nazi ruled countries, we can see the complete opposite, not just that the law can be overwhelmed and undermined, but that the law can make an oppressive state even more oppressive, that the law can partner and reinforce tyranny as much as liberty, that the law can be a harbinger and accelerator of genocide.

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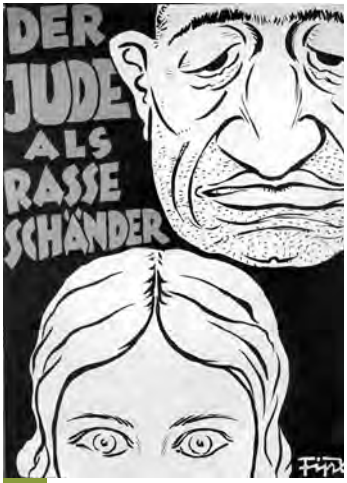

A Nazi anti-Semitic poster depicts the Jew as "the defiler of racial purity".

Photo Credit: Yad Vashem Photo Archives.

This poster served to reinforce the Nuremberg race laws adopted in Germany in 1935, which excluded German Jews from Reich citizenship and prohibited them from marrying or having sexual relations with persons of "German or related blood".

Participants in the roundtable discussion on "Justice and Accountability after the Holocaust" organised by the United Nations Holocaust Programme on 9 November 2011. From left: Ramu Damodaran, (moderator, DPI/UN); Karen Odaba Mosoti (ICC/NY); Kimberly Mann (DPI/UN); Stéphane Dujarric (Officer-in-Charge, DPI/UN); Patricia Heberer (US Holocaust Memorial Museum); Irwin Cotler (MP, Canada); and Cecile Aptel (IBA/War Crimes Committee; Tufts University).

Photo Credit: UN Photo/Paulo Filgueiras

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Discussion questions

1. What might the case of Judge Kreyssig tell us about the possible impact that other judges and lawyers who actively opposed the Nazis might have had?
2. Why didn't members of the legal profession oppose the racist laws and exclusionary laws of the Nazis?
3. What impact did this have on the perpetrators?
4. What should be the international standard of ethics that the legal professional should be called upon to uphold?
5. What does the Holocaust tell us about the role of law in a society?