
Book Review

The state made criminal: Nazi law and lawlessness

by Molly Kronberg

In the Name of the Volk: Political Justice in Hitler's Germany

by H.W. Koch

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The study of Nazi Germany in all its aspects has retained, for historians and laymen alike, an enormous fascination—and one not to be attributed simply to the murderousness of that regime (for bloodbath, slaughter, and even genocide were not unique to Nazi Germany); nor one to be accounted for by its duration (the Nazi nightmare lasted but 12 years); nor even one to be explained by the fact that it precipitated the greatest war the human race has yet endured.

No: Above all, the reason the study of Nazi Germany is so horribly spellbinding now, 45 years after the death of Adolf Hitler and the collapse of his Reich, is that these horrors occurred in the heart of Europe, in a country both cultured and humane, a stronghold of the Judeo-Christian principles that have shaped our Western civilization.

The lessons of Nazi Germany, with which we grapple to this day, and are by no means sure our society has learned, is that a cultured, civilized Western country may descend into the depths of depravity and murder, into a lawless, heartless, godless pursuit of genocide. The fascination of the study lies in this: How do we understand it? How do we guard against its happening, somewhere, sometime, again? And indeed, is it not happening again today, if not in the West, in Western institutions—like the World Bank and International Monetary Fund—respectable gentlemen all, who so casually cut off millions of human beings in the Third World, and leave them to die? Do not we Americans see in our time, in our own country, what might again become, as Dr. Leo Alexander called them at the Nuremberg Trials, the “small beginnings” from which grew up the legalization, acceptance, of stark murder? In America today, this means the legalization

of euthanasia, for example: the Nazi crime *par excellence*, for which the U.S. convened its own military tribunals after the war in order to try the perpetrators. And yet, today, we scarcely seem to notice—as so many Germans scarcely seemed to notice when the state became the criminal, under Hitler.

The present book, *In the Name of the Volk*, written by a man who was born the year that Hitler came to power, and who grew up in Hitler's Germany, concerns itself with one of the important conundrums of the Nazi eruption: the fact that every action Hitler took—from his accession to power, to his unimaginable *Endlösung*, his “Final Solution” to exterminate Europe's Jews—he undertook “legally,” ensuring at every step that his action, or contemplated action, met the requirements of “law.” To achieve this maniacal legalism, to achieve his boast that *his* revolution would be made from within the institutions of German law, not against them—the approach which earned him, in the 1920s, the nickname “Adolphe Legalité”—Hitler, of course, was compelled to pervert and contaminate every aspect of the legal system of Germany. And it is one part of that perversion and contamination, that Koch examines in this book.

The subject Koch explores, is the creation and function of the *Volksgerichtshof*, the National Socialist People's Court which presided over crimes of treason against the Nazi state. And, as Koch emphasizes at the outset of his book, the study of this subject “provides us with frightening evidence of the ease with which the instruments of a state based on law can be transformed into the means of its destruction.”

For the *Volksgerichtshof* (VGH) based itself on a principle of German law older than Nazism—that of *Treu' und Glauben*, “Loyalty and Faith”—and the leap which the German courts of law, and the German judiciary, made from old, well-founded legal practice into the nightmare world of Hitler's law, is strikingly simple to characterize, if not to fathom. It was the leap from the rule of law, to the rule of men—that gigantic distinction of which our own Founding Fathers warned us; and, although gigantic, not a distinction always easy to perceive. For, if one is fortunate enough to have a decent, moral, humane ruler, it is not always so obvious that his one-man rule is dangerous—not because of what it is in itself, but what it may lead to. And when Adolf Hitler is the absolute ruler, the very fount of law, the disaster is complete.

What happened to the German courts and judges, was not different from what happened to all the institutions of the German state, in Hitler's hands: complete fusion of loyalty to the country, with loyalty to the man. To most living within it, it happened almost imperceptibly, a step at a time. To the outcast, to the Jews, it was a hecatomb; to others, it came more slowly, in the shadows.

Where the Constitution of the Weimar Republic, with all its defects, had attempted to assert the primacy of *Law*, not ruler, Nazism asserted—and Hitler *embodied*, in his own

person—the primacy of The Man. Characteristically, Hitler never repudiated the Weimar Constitution; that would have gone counter to his fundamental principle, of revolution within the law. Rather, Hitler took up that one fatal defect in the Weimar Constitution—Article 48—which permitted the declaration of a state of emergency, suspension of the other clauses of the Constitution and all the rights they guaranteed, and direct rule by presidential decree. Twice in February 1933, Hitler caused to be issued such decrees; but, with his mania for legal dictatorship, that was not enough. Thus, in March 1933, still at the very outset of his rule, Hitler secured the votes of 82% of the Reichstag (every party except the Socialists), for his Enabling Act, his—as it were—permanent state of emergency. So great was his passion for legalism, that Hitler had the Enabling Act renewed three times, twice before the war, and once during it. So great was his confidence in his power to hypnotize, that Hitler declared to the Nazi delegation in the Reichstag, “If any one of you believes that my actions are determined by anything else but my love for Germany, then I give him the right to shoot me down.”

And from that day, Hitler ruled constitutionally, legally, and with unimarginably terrible effect.

And yet, nothing Hitler did could have—or, at least, should have—come as a surprise. In 1930, three years away from power but already Germany’s most prominent politician and head of its largest party, his every word caught and carried in the press, Hitler appeared as a defense witness in the treason trial of supporters of his in the Army.

In his testimony, Hitler laid out his program for his legal revolution. The presiding judge asked him to explain a remark attributed to him, that, when the Nazi Party came to power, “heads will roll in the sand.” Yes, Hitler replied, he *had* said that. And then he added: “May I assure you that when our movement, in the course of a *legal* struggle, comes to power—a *German State Court will come*, November 1918 will find its revenge, and then heads will roll” (emphasis throughout is added).

Asked by the judge how he envisioned his party coming to power, Hitler replied: “The National Socialist movement will endeavor to attain its aims *by constitutional means*. The Constitution prescribes for us the methods, *but not the aims*. In a constitutional manner we shall obtain decisive majorities in the legislative bodies in order that, from the very moment of our success, *we may cast the state in the form which corresponds with our ideas*”. The judge: “You mean by constitutional means?” Hitler: “*Jawohl!*” (Yes, absolutely).

Thus was his Enabling Act voted up in 1933, the constitutional basis of his rule. The following year, on Aug. 2, 1934, every member of the German Armed Forces swore his undying loyalty, not to the country, not to the state or its Constitution, not to the office of Chancellor or Führer, but to a man: “I swear by God this holy oath to Adolf Hitler, Führer of the German people.”

And so, too, with the judges and the lawyers, the men to whom, in 1936, Reich Commissioner of Justice Hans Frank deliriously cried, “There is no independence of law against National Socialism. Say to yourselves at every decision you make: ‘How would the Führer decide in my place?’ In every decision ask yourselves: ‘Is this decision compatible with the National Socialist conscience of the German people?’ Then you will have a firm iron foundation, which, allied with the unity of the National Socialist People’s State, and *with your recognition of the eternal will of Adolf Hitler*, will endow your own sphere of decision with the authority of the Third Reich, and this for all time.”

The VGH was to become, under Chief Judge Roland Freisler, a dreaded instrument for execution of Hitler’s will against whatever domestic opposition might be found. And yet, writes Koch, as with so many other institutions of the period, its beginnings were little marked, nor did they seem a lawless innovation. Formed April 24, 1934 at Berlin, the VGH had almost exclusive jurisdiction over treason cases. It operated within the penal code, not under some new law devised for it; says Koch, “neither the legal basis for, nor the legal procedure of, the VGH differed significantly from treason trials of the past.”

It was 1922 amendments to the treason law—made in the wake of the assassination of Foreign Minister Walther Rathenau—which enacted that he who was accused of treason would be tried without right of appeal. It was those same 1922 laws which suspended the ancient German legal maxim, *Nulla poena sine lege* (“no punishment without law”). Too, the legal basis of the VGH’s judgments was scarcely different from those obtaining before Hitler: The 1871 penal code, and the types of treason defined in German law since the late Middle Ages: *Hochverrat* (high treason) and *Landesverrat*.

What changed was not the law, nor the structure of the court: It was the judges’ *interpretation* thereof, based on the “eternal will of the Führer,” and the barbaric harshness of the sentences. As war and conquest unfolded, so did the reach of the VGH: All Germany, Germans in other lands, and non-German “terrorists” in the occupied countries. Only Jews, after 1943, were not subject to its jurisdiction; comments Koch, “As ‘inferior people,’ they were not worthy of the rule of law.”

Beyond Freisler

As Koch has written it, *In the Name of the Volk* suggests in various ways that the central issue of any study of the Nazi judiciary, is what I have stated it to be at the outset of this review. For example—and rightly—Koch rejects the post-war myth that has grown up around Roland Freisler, the venomous and merciless chief justice of the VGH, made particularly infamous by his role in the 1944 trials of the conspirators against Hitler. That postwar myth has made of Freisler the cause and repository of, and the force and animus

behind, all the evils of the People's Court. Certainly, Freisler was evil—sadistic, fanatical, and brutal, without question. But the evil inherent in the VGH, and the Nazi judiciary, and Nazism overall, is far vaster than Roland Freisler. No generalities or overviews excuse Freisler, nor diminish the criminality, the inhumanity, of his conduct, nor can historical and political generalities exculpate any individual for the guilt of his own actions. But Koch, rightly, wants to go further in his history than simply saying Freisler was a monster, and calling that an adequate explanation of the VGH.

So he examines, in considerable detail, the evolution of the VGH: its roots and background in pre-Nazi legal practice. He reviews the background of its judges—who, after all, were not Nazi brownshirts whom Hitler had elevated to the bench; they had been judges and attorneys before Hitler ever came near power. Implicitly, by developing this wealth of detail, Koch raises once again the question I referred to at the outset of this review, the one which haunts any historian of the Nazi period: How did it happen?

For historians today, with access to a voluminous archive of material documenting the most minute and intimate transactions of the Nazi government—the largest such archive ever compiled—it is not so difficult to say what happened. It is as difficult as it ever was, to say why. Nor is that a question that any historian of the Nazi period has been truly successful in answering. But Koch, like a growing number of, especially, German historians (among them one might name Eberhard Jäckel, Sebastian Haffner, and Matthias Schmidt; and, on the English and American side, Charles Flood, Richard Hanser, and John Dornberg), performs an important service in creating the preconditions for examining the question more closely, by collating and presenting the raw material of the Nazi period, and illuminating it with thoughtful commentary.

The riddle of how Hitler was *possible*—not what he did, or how he did it—is *the* lesson of 20th century history that we in the West must unlock, because what Hitler did, he did in the West, in the heart of Western civilization. The key to the riddle lies somewhere in the tension between two outlooks: on the one hand, the outlook of what one might call the average German, in the aftermath of World War I and the punishing Versailles Treaty, that his country needed a strong national government dedicated to giving Germany back its place in world affairs; and, on the other hand, the outlook of Adolf Hitler—that he would build a state, a nation, and a world based on a mass cult of *Gnosticism*, paganism in power, to annihilate the two things he hated most. Those two things were Judaism and Christianity, the bedrock of Western civilization; and, like the Gnostic Marcion of the second century A.D., Hitler feared and loathed Judaism for evangelizing the Gentiles; he loathed and feared Christianity, as being (in his words) the “greatest Jewish lie,” a sort of Judaism for the Gentile.

Koch has certainly not defined the riddle in those terms,

and no more than his predecessors has he answered it. But the postwar German historians among whom he is counted are giving us in exemplary form the data from which to proceed. That it is German historians who are doing the most serious and competent work in this area today, is easy to explain: They care more than any others, they are more concerned that the question be answered.

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