

# Hitler and the Law, 1920-1945

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Adolf Hitler's contempt for traditional German law had been manifest from his earliest days as leader of the National Socialist German Workers' Party (NSDAP). The NSDAP's Twenty-Five point programme of 1920 proposed that existing law 'be replaced by a German common law'. By implication the NSDAP believed that the primary purpose of law should be to serve a racially defined Aryan national community, enshrined in a 'strong central state power' that would replace the democratic Constitution of 1919. Hitler shared the Party's rejection of the principle of equality for all before the law. However, by 1921 he had confused the exclusivist principles of the Party by imposing one of his own, namely that the 'Leader Principle' (*Führerprinzip*) should be the law of the Party. It was the 'will' of the Party's Führer, and therefore the 'law' of the NSDAP, that the single-minded, ruthless acquisition of political power should take priority over other considerations.

In his pursuit of power, any deference by Hitler to democratic constitutional practice or to the law and judicial procedures of Germany was as a means to an end. If the Nazi purpose was not served by the constitution or the law, then these could be evaded or broken. Once in power, as we shall see, Hitler continued to undermine a legal system that he distrusted. Crucially, he was prepared to break the law himself in order to promote and sustain his leadership of the NSDAP in German politics.

## Criminal Record

From the outset, Hitler readily resorted to illegal means. His first recorded breach of the German criminal code came in September 1921 when he was arrested and later sentenced to three month's imprisonment for violently disrupting a Bavarian League meeting in Munich. Released early for good behaviour, Hitler in October 1922 defied a police ban by joining nationalist demonstrations in Coburg, thus contravening the conditions of his parole. Acting on rumors that Hitler was plotting a putsch, the Bavarian Minister of the Interior summoned the NSDAP leader in November and warned him personally about his provocations. Hitler gave the minister a solemn promise that 'Never as long as I live will I make a putsch'.

From the beginning of 1923, Hitler was implicated in a number of public order offences. Yet political expediency prevented him from being arraigned. The national crisis and the growth of popular support for the Nazis and other right-wing groups in 1923 encouraged the Bavarian government to make deals repeatedly with politicians like Hitler. But for his protection by the Bavarian Minister of Justice, Franz Gürtner, Hitler would probably have been sent back to prison for parole violation.

Beyond the pale, however, was Hitler's treasonous and bloody attempt at an armed putsch in Munich on 8-9 November 1923. Though he fled the scene of the failed putsch, he was arrested two days later. Even now, he got off lightly. Dr Gürtner, who was turning out to be Hitler's legal fairy godfather, appointed a nationalist sympathiser who had sat on the NSDAP leader's trial 18 months previously, to preside over Hitler's arraignment for treason. A minimum five-year sentence was handed down. When the possibility of Hitler's release from Landsberg prison on parole came up after six months, the Bavarian prosecution service put up a strenuous case for turning it down. The Bavarian judiciary, however, turned Hitler loose.

## The End Justifies the Means

Hitler's imprisonment as the convicted leader of a banned party marked a turning point. On his release he altered course. Once the NSDAP had been unbanned he prepared it for participation in the constitutional process. Winning 12 seats in the Reichstag elections in 1928 was a poor showing, but the effects of the economic collapse on popular support for the major German political parties helped the Nazis to rocket to prominence in fresh elections - from ninth largest party in the Reichstag in 1928 to the largest in July 1932. Yet Hitler's unshakeably cynical view of the

Constitution remained. When, as a witness in a treason trial in September 1930, he was asked by the presiding judge how a Nazi Reich would be established, Hitler replied that this would be achieved by constitutional means, but that once 'decisive majorities in the legislative bodies' were achieved 'we may cast the state in the form which corresponds with our ideas'.

Hitler became Chancellor of Germany at the legitimate invitation of President Hindenburg on January 30 1933. The methods used henceforth by a Nazi Chancellor to 'cast the state' according to Nazi ideology owed much to the use of Article 48 of the Constitution, which in times of emergency allowed the president to rule by decree (personal edict) without consulting the Reichstag. Almost at once Hitler took Germany towards a dictatorship of rule by decree. With presidential approval, the 'laws' that were 'passed' were either decretal orders issued by Hitler or by individual ministers, or decrees that were called 'laws' but issued collectively by the Cabinet.

Within 24 hours of his appointment Hitler persuaded Hindenburg to dissolve the Reichstag and call for new elections. The cornerstone of what was to become a 'decretal', rather than a 'legal' revolution, was laid with the Reichstag Fire decree on 28th February which suspended civil liberties and provided for the creation of 'protective custody' facilities for the arbitrary imprisonment of any political detainee. When the legislative power of the Reichstag was to be used for the first – and almost the last – time after the 5 March elections, the Nazi government left nothing to chance. The passage of the crucial Enabling Bill of 23 March, that suspended the Constitution and granted the Reich Cabinet unlimited 'legislative' powers, seemed to have been achieved by a 'decisive majority' in the Reichstag. It can be argued, however, that by arbitrarily excluding the Communist deputies from the Reichstag the Nazi authorities had breached the Reichstag's legislative procedure, thus invalidating the suspension of the Constitution.

Hitler then targeted the legal system, which he regarded as being soft on criminals and run by a legal profession dominated by Jewish practitioners. Such a system would constrain his arbitrary rule as the single leader of a one-party German 'Aryan' state. Hitler set out his stall on 23 March 1933, the day of the Enabling Act, when he declared to the Reichstag that the 'legal system must ... serve this national community ... The nation rather than the individual must be regarded as the centre of legal concern.' He then purged the legal system of Jewish judges and lawyers by the same Cabinet 'law' that affected the civil service. The Supreme Court was in effect replaced by a special People's Court, set up in April 1934 to deal with cases of high treason. The Penal Code in 1935 required judges to consider not only the letter of the law but also 'healthy and popular feeling', presumably that of the 'racial-national community'. The arbiter between right and wrong was not solely the law but also the arbitrary diktat of the Nazis. Hence the definition of 'criminal' was expanded to include political dissenters and 'asocials', such as homosexuals, habitual criminals and the 'work-shy'.

Hitler also used violence as a means of 'casting' the German state in the Nazi image. If Article 48 provided Hitler with a constitutional lever in his bid for absolute executive power, the intimidatory reality of Nazi terror tactics on the streets was different. Assuming a certain political 'respectability', Hitler may have kept aloof from the bloody street warfare that had his stormtroopers, the *Sturmabteilung* (SA), and his protection squad, the *Schutzstaffeln* (SS), banned for a few months at the end of 1931, yet in August 1932 he publicly supported the convicted SA killers of a Polish communist at Potempa in German Silesia. Within days of his appointment as Chancellor, and especially after the decree of 28 February, his men went on the rampage against Communists, Social Democrats and trades unionists. While the Nazi leader may not have ordered this wave of terror, his incendiary oratory was an incitement to act. For months the SA and SS were out of control in cities, especially in Berlin, incarcerating, beating up, and murdering Jews and other opponents in scores of illegal detention centres.

## **The Night of the Long Knives**

Until the Night of the Long Knives Hitler had not been personally involved in acts of unlawful killing since his attempted putsch in 1923. The murders on 30 June 1934 and on subsequent days were collectively unique in modern German history and the more remarkable because of their direct instigation by the Chancellor and senior

members of his government against their own SA.

Historians are generally agreed on the extent of Hitler's involvement. Fearful of the SA's growing political challenge within the Nazi movement, the Chancellor and his associates secretly planned, with the help of the Army and the SS, the downfall of the SA leader Ernst Röhm. Hitler personally and without Cabinet authority went with a party of SS and police to confront Röhm and other senior SA men at their hotel at Bad Wiessee in southern Bavaria. On his orders, those detained, including Röhm, were taken, along with others to Munich and shot. Elsewhere teams of Gestapo and SS gunmen carried out scores of murders, ranging from other SA noteworthies to the former Chancellor, General von Schleicher, and ordinary civilians, including Jews.

Even at this stage, though, the traditional criminal justice system could not be ignored. The Nazis had to 'legalise' the 'Blood Purge'. Within days, Franz Gürtner, Hitler's first Minister of Justice, had come up with a decree insisting that 'The measures taken on the 30 June and 1 and 2 July for the suppression of high treasonable and state treasonable attacks are, as emergency defences of the state, legal'. Gürtner ring-fenced his decretal invention by explaining to the Cabinet that the 'law' was not a new law: it merely confirmed 'existing law'. A supplementary official communiqué praised the Führer for his legal and statesmanlike actions.

On 13 July, in a speech to the Reichstag, Hitler took full responsibility. 'If I am reproached with not turning to the law-courts for sentence,' he explained, 'I can only say: in this hour, I was responsible for the fate of the German nation and thereby the supreme judge of the German people ... I gave the order to shoot those most guilty of this treason.' He soon made it abundantly clear that his contempt for the constitution was absolute. Within three weeks of the death of Hindenburg on 2 August 1934, he defied the Enabling Act by combining the offices of Reich President and Reich Chancellor. He required all his ministers to agree to this extraordinary measure and exacted an oath of loyalty to his Führership from the armed forces. The day after a national plebiscite in which 89 per cent voted their approval of Hitler's unconstitutional assimilation of Hindenburg's office, the Führer promulgated a 'law' through the Cabinet that retrospectively recognised the validity of the armed forces' oath while now requiring a similar oath from the civil service. As Hermann Göring put it in a speech to Prussian legal officials in the summer of 1934: 'The law and the will of the Führer are one'. The power of Führerprinzip was now in effect unlimited.

## **The Law and Racial 'Cleansing'**

The people most vulnerable to Hitler and his Nazi cohorts were those they hated most: 'the Jews'. By 1934, Hans Frank, a prominent Nazi lawyer, had defined the function of the law in a racial framework: 'In the National Socialist state the law can only be a means for the maintenance, securing and encouragement of the racial völkisch community. The individual can be judged by the law only from the point of view of the völkisch community.' Non-Germans, especially Jews, would be excluded from this 'racial-völkisch' or 'Aryan people's community'. The 'Nuremberg Law' of September 1935, presented by the Führer to the party faithful at the annual Nuremberg Rally, was a decree, not a law. The wording of the 'Law' lied that the Reichstag has already approved the measure: in fact it had not. Nowhere in the September measure or in the decree that followed in November was a 'Jew' biologically defined. Vacuous and arbitrary in their wording, these measures laid the foundation for a systematic racial discrimination against Jews.

The official anti-Semitism that had come to pass with the advent of Nazi government had been stated in the NSDAP's 25 point programme of 1919 and in Hitler's venomous rants in *Mein Kampf*. Thus what had begun with the boycott of Jewish businesses on April 1 1933 and had been enshrined in the Nuremberg 'Law' of September 1935 was then revealed most clearly in the brutal Kristallnacht pogrom in November 1938. With sinister implications for the future of German Jewry, the pogrom had been the product of the Führer's covert involvement and the burning racial prejudice of his regime. The outbreak of war in September 1939 may have served as a self-justifying pretext for Hitler to consider all those who were not 'pure' Aryan German as potential 'enemies of the Reich'. And it was not just Jews that he was after. Since the summer of 1933 Hitler's government, under a 'law' passed by the Cabinet, had set up a programme in secret to 'purify' the German 'race', namely to sterilise the handicapped, 'undesirables'

and the incurably insane. Rooted in this 'law', the 'mercy killing' confidential order, issued and signed by Hitler on his personal headed note-paper in October 1939, was of special significance. Not only was this the only signed evidence of a Hitler order to murder someone, but the document was also backdated to 1 September, implying that a state of war released the Führer from restrictions imposed on him by peacetime. The Führer order signalled the extension and acceleration of what became known as the 'Euthanasia Programme'. It directly resulted in the planned murder of thousands of the handicapped.

Hitler's signature is nowhere to be found on any document authorising or detailing the murder of Jews and he was absent from the Wannsee Conference in January 1942 that decided on the 'Final Solution'. Yet the mass murder of Jewish men, women and children in Central and Eastern Europe had begun earlier. It is likely that from September 1939 Hitler had given general approval to the killing of Polish Jews overrun by his advancing armies. From the first day of 'Operation Barbarossa' in June 1941 SS Einsatzgruppen, acting on specific orders emanating from Himmler, went to work on shooting Soviet Jews. It is inconceivable that Hitler was not associated with specific decision-making concerning these mass murders or those of millions in SS death camps like Auschwitz in eastern Europe by early 1945.

## **Internal Criticism**

Hitler's subjugation of the judicial system in Germany was not immune to criticism from within, but was scarcely affected by it. The Minister of Justice, Franz Gürtner, back-tracked on occasion in a vain attempt to preserve his ministry's authority. His protest to Hitler in 1935 concerning local NSDAP interference in the outcome of the Hohenstein concentration camp trial, was on the grounds that there should be no political interference with the independence of the judiciary ('which is the basis of an orderly administration'). He was ignored by the Führer. Concentration camp guards convicted of torturing inmates were pardoned. This may not have come as a surprise to Gürtner. Since the establishment by decree of 'protective custody' for political opponents on February 1933, the SS had been constructing a subsequently autonomous concentration camp penal system in parallel to the traditional prisons service. By the end of 1937 'protective custody' had been expanded by a Ministry of Interior edict to include criminals and 'asocials'. By the outbreak of war all police forces were under the centralised control of the SS. Thus SS authority was never accountable in law while the Nazi regime was in place.

As previously suggested, the outbreak of war seemed to fireproof Hitler's position. Again, his complicity in the undermining of traditional German justice and its administration was evident in unlawful killings by the SS, from September 1939 to January 1940. The Ministry of Justice recorded 18 shootings by the Security Police or the SS in concentration camps. All had Hitler's approval. Protests by Gürtner direct to the SS and the Chancellery concerning breaches of jurisdiction were stone-walled. Not even a Führer edict on 27 October 1939, which established special SS and police jurisdiction over such matters, could disguise the fact that under existing law the shootings constituted murder.

## **The End**

By 1942 little was left of Germany's constitutional system in the wake of Hitler's ravages. The Reichstag was summoned on the 26 April for what proved to be its last meeting. In dissolving itself, the Reichstag rubber-stamped a decree that gave Hitler absolute power, 'without being bound to existing legal precepts'. By 1942, 'Hitler was now the law'.

Hitler's contempt for the courts and especially for any 'leniency' grew as the war progressed. He used his decretal powers and special Reichs courts to order the executions of certain convicted criminals already sentenced by due legal process to terms of imprisonment. As an increasingly vigorous prosecution of the war became more critical to the survival of Nazi Germany, so too was the Nazis' fanatical exaction of obedience through deterrence by punishment. The judiciary's use of the death penalty was accelerated and applied to a wider range of 'offences'. The average number of judicial death sentences carried out each year in German prisons rocketed to 2,304 during the

war, with a total of 9,600 executions in 1943 and 1944.

By April 1945 the 'system', the 'racial-völkisch community', the embodiment of Hitler's justicial 'law and order', was on the brink of disaster, threatened by the catastrophic consequences of Nazi war policy and the disobedience and disloyalty of even its most trusted *parteigenossen* (party comrades). Perhaps the most telling verdict on the acts of violence perpetrated by Hitler and his Nazi regime against fellow Germans lay in a comment said to have been made by a Gestapo official to one of the conspirators following the 20 July bomb plot in 1944: 'There is no doubt that you and your friends are good Germans. But you are enemies of the system, and therefore you must be destroyed.' Hitlerian justice took its course through the People's Court. Nearly 200 July 20th conspirators were tried and executed for treason, three of whom – Admiral Canaris, General Hans Oster and the theologian Dietrich Bonhoeffer – were hanged by the SS only weeks before Hitler's suicide.

During Hitler's final days, his most powerful friends, Heinrich Himmler and Hermann Göring, deserted him. Hitler regarded them no longer as 'good Germans' but as traitors and enemies of the Reich. A remnant of the much vaunted 'Hitler Will' revealed itself in the barbarous collapse of order in Berlin. Under the watchful eye of SS squads specifically ordered by Goebbels in the name of the Führer to shoot or hang anyone obstructing the defence of Berlin, Hitler's 'good Germans', boys from the Hitler Youth and girls from their seminaries, died by the score for their Führer as they were flung by the SS against Soviet armour closing in on the Chancellery.

It was still inconceivable that Hitler could surrender to an inferior enemy. Consumed perhaps by an immense delusion that, after his life-time, the Nazi Reich would rise like a phoenix from the ashes on terms negotiable with an allied enemy intent on its destruction, Hitler may still have believed that his 'Will' would prevail. On 29 April, he made a last testament, decreeing that on his death the office of 'Führer' would be split. The decree was worthless: within hours, the Führer had shot himself, his final act of will. Goebbels, Chancellor-designate, followed suit after killing his own family and within days Admiral Dönitz, President-designate, had surrendered unconditionally. The Nazi Reich was at an end.

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