Book Reviews

I Muller, *Hitler's Justice: The Courts of the Third Reich* (Massachusetts, Harvard University Press, 1991) pp 349

In contrast to books regarding the role of other professions during the Third Reich, such as doctors, engineers and scientists, few books have been devoted to an analysis of the role of lawyers in Nazi Germany. Therefore, Ingo Muller's *Hitler's Justice: The Courts of the Third Reich* (translated from German) is a welcome addition to the literature to date. It raises important ethical and jurisprudential questions concerning the role of the legal system and individual lawyers in a Fascist State. Many of these questions are still relevant today, especially given the recent formation of the United Nations' War Crimes Tribunal and the foreshadowed prosecutions arising out of the Bosnian tragedy.

This book is thus strongly recommended to anybody with an interest in the concept of justice, but is especially pertinent for those in the legal or criminology professions. The issues raised are also of some relevance for Australia today, due to the questioning of the views and values of our predominantly white, male, Anglo-Saxon judges.

The main point of Muller's book is to debunk the major misconception about lawyers in the Nazi State, which is that they were simply tools of the system, coerced into following Nazi edicts and applying the 'laws'; left with little or no room to be independent. This was and still is the basic justification used by those who defend the lawyers of the Nazi State.[1] However, through meticulous research, using countless examples, Muller shows time and time again that lawyers — not just judges, but also academics, government bureaucrats and even private lawyers — went above and beyond what was required of them under the 'law' to enforce and even intensify the tyrannical, racist and oppressive system that characterised the Nazi State.

The book is divided into three distinct parts, focusing on the role of lawyers before, during and after the Third Reich.

The first part, consisting of three chapters, shows how the views of many in the legal profession were already conservative prior to 1933, when Hitler came to power. In fact, Hitler himself was able to get off with the minimum sentence for treason (five years, with incredibly, parole after only six months) for his part in the 'beer hall putsch' of 1923, despite already being on probation. The judgment had acknowledged that all the defendants had 'been guided in their actions by a purely patriotic spirit and the noblest of selfless intentions' (p 15). The light sentences for those of the radical right who tried to usurp the government contrasted with the harsh penalties meted out to pacifists and republicans for merely pointing to unlawful activities of the

[1] Hubert Shorn's book, still a standard work today, *Judges in the Third Reich*, adopts this approach.

army. The legal profession thus already signalled that they were prepared to pervert justice by their conservative notions that the interests of the 'State' stood above the law; that is, the kind of 'State' they believed in. The Weimar republic, on the other hand, with its liberal values, did not deserve such protection. Thus, the fundamental legal principle of the Nazi dictatorship, that the interest of the 'State' was superior to the letter of the law, 'had been established by the highest courts in the land 5 years before the Nazi's seized power' (p 24).

Admittedly, however, there were significant minorities of judges and academics who were adherents to the rule of law, civil liberties and a democratic state; what Muller terms 'the liberal element' in the German legal system. After the Nazis seized power, these elements, mostly Jews and Social Democrats, were systematically purged from the legal system, starting with the public service,[2] the universities,[3] and the private bar. Interestingly, Jews were allowed to practise law right up to September 1938, although very much harassed, restricted and discriminated against (p 62).

The second and most substantial part of the book (18 chapters) details how the legal system, particularly the criminal justice system, worked under the Nazis. Naturally, at the same time as the purges occurred, those lawyers showing admirable Nazi jurisprudential qualities or 'nationalistic orientation' were appointed and promoted to fill the vacuum. This should not detract from the fact that most lawyers, including judges, stayed on; many were just as racist, sexist and fanatical as their leaders, and did not have to be threatened or cajoled into doing their job.

Muller spells out in detail the history of the legal system during the Nazi regime, including the Nuremberg laws, the euthanasia program, the complete politicisation of the whole civil service, and the brutal terror in the prisons and concentration camps. She also discusses the formation of special courts in the occupied zones, the behaviour and judgments of the Supreme Courts, People's Courts and the Military Courts. Throughout, many cases of injustice are referred to in numbing detail; from the severe penalties imposed for trifling offences, to the ever increasing use of the death penalty even for petty crimes. Often judges showed considerable creativity in interpreting the law in a manner which enabled them to pronounce the death penalty where a literal interpretation would not have allowed them to do so. In reality, this amounted to judicial execution. Muller estimates that the number of death penalty sentences passed by German jurists was close to 80 000, and comparing this figure with fascist Italy and Japan shows that 'the jurist of the 3rd Reich had no peer anywhere in the world' (p 197).

The final factor in the farce of the Nazi criminal 'justice' system was the fact that even where, despite the odds, a defendant was acquitted, the Gestapo

[2] Only a meagre 0.16% of government employees were Jews, despite Hitler's blatant lie, made in 1933 to the American press, that almost 50% of civil servants were Jews (see p 59).

[3] Almost one third of all professors were Jews, including some famous names, such as Hans Kelson; all of them were instantly dismissed on 7 April 1933.

simply waited to arrest the defendant and take them away to a concentration camp anyway! Muller recalls that:

> The outrage expressed on occasion was directed not so much against the injustice of re-arresting people who had been acquitted as against the affront that such an obvious "correction" of a court's decision posed to the judicial system. On January 24, 1939, the Reich minister of justice instructed the presidents of the Courts of Appeals to make certain that the Gestapo at least waited until defendants were outside the court-room before making an arrest[!] (p 176)

The true culpability of the German legal system for the reign of judicial murder and terror is summed up in the very short five pages which constitute chapter 21, entitled 'Resistance from the Bench'. If there is no time to read any other parts of the book, this is the Chapter to read. Muller's conclusion is that 'no matter how hard one searches for stout-hearted men among the judges of the Third Reich, for judges that refused to serve the regime from the bench, there remains a grand total of one' (p 196). This 'one' was a Dr Lother Kreyssig, whose name should be well remembered, yet little is known about him. As Muller says: 'Kreyssig's case is extremely revealing. It shows that if a judge refused to accept the injustices of the system, the worst he had to fear was early retirement' (p 195).

Just when you think that the book cannot be any more depressing, the third part (the last 11 chapters) strikes you as being worse than the second. The story of post-war Germany's legal profession is even more frustrating in some ways than the profession's role during the Third Reich. Most judges and academics who rose to prominence in the Nazi period remained, and some were even able to advance to positions of great power in the West German government. Where prosecutions were launched against lawyers, Nazi sympathisers were treated with leniency on the rare occasions a guilty verdict was brought in. Former Jews and Social Democrats, deprived of their positions in 1933, were rarely allowed back to the universities or the bench. The legal system basically stayed intact, limited only by any promulgation of the Occupying Powers. These were always given a restricted meaning, or were circumnavigated where possible. For example, with respect to the universities: 'law professors continued to teach the same doctrines they had during the Nazi era; only their terminology had been de-Nazified' (p 237).

The German Courts' leniency towards pro-Nazi lawyers contrasted markedly with the treatment of the victims of the Nazi system; pacifist and communist sympathisers in particular were treated harshly. In chapter 29, Muller details the most important trial regarding Nazi jurists, that of 'case 3', or the 'Altstoettor trial'. The 16 defendants were charged with 'judicial murder and other atrocities which they committed by destroying law and justice in Germany, and by then utilizing empty forms of legal process for prosecution, enslavement and extermination on a vast scale.'[4] What the Court

[4] *Trials of War Criminals before the Nuremberg Military Tribunals* (Washington DC, US Government Printing Office, 1951) Vol III, 31.

found most shocking was 'not the various appalling crimes themselves . . . but the fact that they had been committed under the cloak of legality'.

Despite most of the jurists being found guilty, Muller states that the trial 'had little effect on the German legal profession, which tended to dismiss the Nuremberg trials as pure "retribution" on the part of the victors' (p 273), and ultimately only one defendant served more than a few years in jail.

The overall impression one obtains from the book is that the German legal profession, before, during and after the Third Reich, is seen as being deeply embedded in the principles of hierarchical structure, authoritarianism, racism and sexism. Thus, only a completely new generation of lawyers, educated with an understanding of democratic and civil libertarian ideals, can really make an effective change in the recently united German state. One's reading of this book brings forward fears that the current spate of widespread racist attacks on immigrants in Germany is not simply the work of a fanatical right wing, but rather there is still enormous sympathy for these views (although perhaps not the methodology) within the German establishment. Recently Yaron Svoray, a journalist who penetrated extreme right wing organisations in Germany, stated: 'I have risked my life and proved that the neo-Nazi movement is not just a bunch of skinheads, its about middle Germany.'[5]

The only criticism of this otherwise excellent book is that often the author becomes too immersed in the details of the numerous cases of injustice, which does not allow for more analysis of the broader issues. The introductory chapter poses four basic ethical and jurisprudential issues to be analysed by the study of German legal history — the collective contribution of the legal profession to the taking and retention of power by the Nazis, the question of the responsibility of lawyers, the role of the post-war Federal Republic of Germany in doing justice to what happened before, and the question of the continuation of the legal system inherited from the Nazi State.

Muller admits that the book 'sets forth a great deal of evidence in such a form that the reader can arrive at a personal judgment as to the answers' (p xv). However, it was disappointing that the author herself did not provide more of an analysis of these central issues, rather than just leave readers to digest this mass of information. Given the hierarchical structure of the Nazi State, perhaps it may have been as simple as the last chapter, 'An Attempt at an Explanation', suggests — that it all is explained by Hitler's 'complete lack of sympathy for humanistic values, civilization, and the rule of law' (p 295). However, this is hardly a sufficient explanation for the willingness, and even enthusiasm, of the bulk of German lawyers to further the ends of the Nazi regime.

This criticism does not detract from the overall fact that the book is a landmark contribution, and should provide impetus for more research and analysis to be carried out on the role of lawyers in the Nazi State. These are issues of which Australian law students, practitioners, judges, criminologists

[5] C Richards, 'Melbourne wrestler inspired man who exposed Nazis', *Age*, 27 November 1993, 6.

and academics should be aware. Even in the 1990s it is important that the lessons of history are not lost.

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H P Lee and G Winterton (editors), *Australian Constitutional Perspectives* (Sydney, Law Book Co, 1992) pp 347

This volume of nine essays is another welcome addition to the constitutional lawyer's shelf. It contains an eclectic mix of essays, by turn more reflective, more descriptive, narrowly focused and ranging over broader themes. The editors make no apology (and none is required) for the fact that the essays are not connected by any unifying themes. A review then must examine the essays separately and this reviewer likewise makes no apology for giving more attention to some than others.

Greg Craven's essay 'The Crisis of Constitutional Literalism in Australia' is described by Sir Anthony Mason in the foreword as stimulating and provocative and unduly alarmist. Craven is strongly critical of the High Court's traditional interpretative methodology of literalism. Literalism, adopted in the *Engineers* case to detonate the State-protective interpretative implications has fulfilled its main political task of expanding Commonwealth power. But the growing scepticism among lawyers about literalism's chief assumption that a text is always determinative, and the severe limits of literalism as a tool for further constitutional reform (for example in the area of human rights guarantees) are causing the rise of competing methodologies. Chief among these Mr Craven describes 'intentionalism' (essentially seeking the framers' intent through the Convention Debates and other historical materials) and 'progressivism' (interpreting the text so as to meet the needs (as perceived by the interpreter) of current and future Australian society). He persuasively argues that neither intentionalism nor progressivism in unalloyed form would provide a workable and satisfying alternative interpretative method. He notes that progressivism would be a suitable tool for extracting implied guarantees of fundamental rights from the Constitution. His comments about the likely results of such a change now seem to bear a prophetic edge given the furore following *Australian Capital Television* v *Commonwealth*[1] and *Nationwide News* v *Wills*:[2]

> The court could not avoid confronting the argument that the adaptation of the Constitution to the changing needs thrown up by time is to be achieved not by judicial fiat, but via the referendum formula set out in the Constitution. Under such a view . . . progressivism would constitute a usurpation

[1] (1992) 108 ALR 577.
[2] (1992) 108 ALR 681.

> of the basic prerogative of the Australian people to change their own constitutional arrangements. (p 25)

Mr Craven is softer on intentionalism. He sees a moderate version of this emerging in the High Court whereby both the Convention Debates and subjective intention of the framers will be considered but only when the text of the Constitution is ambiguous.

He criticises the Court for cherry-picking among literalism, progressivism and intentionalism without a clear philosophy or methodology. He proposes an alternative labelled 'contextualism' which is a synthesis of the approaches criticised in unalloyed form. Under this approach the search for the intent of the framers is paramount because this was directly ratified by the Australian people in the 1890s and the primary guide to intention is the words of the Constitution. However, where the text is ambiguous, interpreters should turn to contemporary extrinsic materials (*à la* intentionalism). Where this does not yield a clear intent the court should acknowledge this and make an explicit, reasoned policy choice of the interpretation best suited to the needs of the Australian people without violating fundamental constitutional values of the founders (eg, parliamentary and responsible government). The preferred solution of contextualism provides a methodical ordering and hierarchy of interpretative techniques. It does not resolve the difficulties in intentionalism or progressivism but seeks to counterbalance them (with a bias in favour of intentionalism). Contextualism essentially follows orthodox theories of *statutory* interpretation. Such a seemingly orthodox solution comes as something of a letdown after the colourful description of the battle between those who would remake the Constitution in their own image, those who would restore it to the framers' image and those who cannot see any image for the words.

If the High Court were to adopt a more overtly progressivist interpretative method, especially by implying a range of fundamental rights guarantees, the topics of two other essays would attain a heightened importance. Dr James Thomson's essay on 'Appointing Australian High Court Justices' explores the spartan text of s 72 of the Constitution. The key issue examined is whether Commonwealth legislation could regulate or control the power given to the Governor-General in Council to appoint the Justices of the High Court and the other courts created by the Parliament. If judges are to decide large issues of social policy under an implied or express Bill of Rights or otherwise, it may be desirable to have a more open and accountable appointment process. For example, could legislation limit appointment to nominees approved by the Senate or by the heads of Australian governments or to those on a short list of candidates recommended by an independent judicial commission? The answer depends on whether a power conferred on the executive by the Constitution is immune from legislative control for that reason or is subject to such control because of the fundamental principle of parliamentary control over the executive and, perhaps, the express incidental legislative power in s 51(xxxix). The validity of current legislative qualifications (eg, that persons may not be appointed as federal judges unless they have been legal practitioners or judges for five years: *High Court of Australia Act* 1979 (Cth), s 7;

Federal Court of Australia Act 1976 (Cth), s 6(2)) as well as possible future approval or consultation mechanisms depends on the answer to this debate. Unfortunately, Dr Thomson chooses to report the debate rather than argue it. This is rather frustrating. Although only the High Court or an alteration to the Constitution can ultimately resolve the issue, this reviewer would have welcomed the opinion of an author who has done so much research in the field rather than the non-committal conclusion that 'confronting conundrums will suffice'.

The other essay topic that may be enlivened by the possibility of a move to an overt progressivist interpretation is that of Geoffrey Lindell's thorough and scholarly review of the justiciability of political questions. In a contribution spanning 71 pages, he carefully examines the various senses in which the terms 'justiciable and non-justiciable' are used, reviews the political questions doctrine of the US Supreme Court (and its use under that or other names in Canada and Australia) and concludes that the doctrine can be subsumed into a broader set of three grounds on which a court might justify its refusal to deal with a question or issue. Mr Lindell then moves to an extended treatment of the question whether a court possessing jurisdiction to exercise judicial review (particularly in constitutional cases) is under a duty to exercise it. After discussing whether federal courts have the *authority* to engage in judicial review, he argues that they have an implied *duty* to do so but that some implied exceptions to this must be admitted to accommodate practical considerations of government and the need for stability and certainty regarding the existence of fundamental organs of government. In some cases the political nature of issues renders them unfit for judicial determination but the courts are yet to articulate a comprehensive and principled framework for deciding when and why that is the case. It may, of course, be that they will ever prefer the flexibility and freedom of not having such a framework! However that may be, Mr Lindell's learned essay will be an excellent resource when the issue is next confronted.

Professor Zines' essay on characterisation of Commonwealth laws examines the slippery concepts of connection and relevance of a law to the central scope or the implied incidental scope of a federal power. The essay is a worthy and scholarly attempt to identify and reconcile the disparate approaches to characterisation evident in the High Court cases. One aspect of it raised some questions for this reviewer. Professor Zines argues that Federal Parliament has the power to legislate on the consequences of its regulation or control of a particular matter because these consequences are incidental to the head of power on which the regulation or control is based. He gives an example based on *Airlines of New South Wales* v *New South Wales (No 2)*:[3] assuming that federal legislation for regulating intrastate road transport was an appropriate means of protecting interstate road transport, then federal provision could be made for zebra crossings in the interests of pedestrians, because that is an accommodation of other important interests closely affected by the federal regulation of commercial road transport. Professor Zines concedes that regu-

[3] (1965) 113 CLR 54.

ng the consequences of federal regulation could be left to the States but, ause the Commonwealth may not agree with State policy, he would extend incidental power to deal with consequences of federal regulation. This umes that cooperative federalism cannot produce workable regulatory emes and that the further expansion of federal power is the answer. That is assumption (and conclusion) which seems to be more readily made or ched in Australia than in other western federations such as Canada. Prosor Zines' argument for reading the incidental power this way has the peal of providing a more intellectually honest explanation for some of the cisions he recounts. But it also edges us towards the slippery slope of interrnnectedness at the bottom of which lies the doctrine of *Wickard* v *Filburn*.[4] at case read the US Congress' interstate trade and commerce power as fectively unlimited because it extended to a vast range of activities (such as rden production of food for home consumption) that could be seen as aving some economic connection with interstate trade (home production epressed demand for food imported from interstate). How far a federal ower extends is always a question of degree and remoteness but once the bject matter limitation is weakened and the federal parliament can regulate onsequences of the regulation, there may be no principled stopping place xcept the bottom of the slope.

H P Lee provides a useful account of the development of the jurisprudence f the external affairs power through to *Polyukhovich* v *Commonwealth*.[5] His ssay summarises the current law on the extent of the power (within and utside a treaty context) and the limitations on the power. He also considers he federal balance limitation asserted by the minority in the *Dams* case[6] and ejects it as effectively indistinguishable from the reserve state powers doctrine. A consideration of the Australian Constitutional Convention's and the Constitutional Commission's call for a Treaties Council involving the States rounds out the essay.

Likewise Peter Hanks' essay is a useful summary of the history of the interpretation of those few guarantees of individual rights in the federal Constitution. He concludes with a discussion of the possibility of expansion of the guarantees either through textual amendment as recommended by the Constitutional Commission or through judicial creativity.

Michael Coper provides an interesting account of s 92 post *Cole* v *Whitfield*[7] and gives us the benefit of his opinion on several important aspects of s 92 which have not been determined in that landmark case or its recent progeny.

Henry Burmester's essay on 'Locus Standi in Constitutional Litigation' proposes that standing be limited to those plaintiffs who suffer 'concrete' or 'direct' injury from a statutory provision and excludes those with generalised grievances. That seems to be a reversal (or at least an arrest) of the developments in standing generally in recent years and, as Sir Anthony Mason

[4] 317 US 111 (1942).
[5] (1992) 172 CLR 501.
[6] *Commonwealth* v *Tasmania* (1983) 158 CLR 1.
[7] (1988) 165 CLR 360.

remarks, whether that view will be adopted by the courts must remain a matter for conjecture.

The final essay by George Winterton on 'The Constitutional Position of Australian State Governors' is a most thorough and scholarly piece of work which includes a case study of the consequences of the 1989 Tasmanian election. The essay repays a careful reading.

It is unlikely that any one reader would be deeply interested in each essay in this wide-ranging collection but, by the same token, there would be few readers interested in constitutional law who would not profit from some or many of the essays collected here. This book is to be welcomed for what it contains and, we can hope, as a harbinger of more volumes of high-quality reflective essays on Australian constitutional law.

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