

# Chapter 1

## The Judicial Role and the Rule of Law

### Introduction

The judge is under pressure when the legislator attacks the law. Should the judge enforce laws that intentionally and incessantly violate basic rights of individuals, deprive them of due process and the protection of the law, and submit them to draconic and disproportionate punishments? Should he contribute to turning the law into a systematic instrument of persecution on racial, political, or other grounds?

Many will perhaps be inclined to answer the above questions with a clear “no”. This is also my answer. One might say that the answer is obvious and in no need of deeper thought. According to the ideals of our western legal tradition, judges and courts should be the protectors of rights and liberty. At the same time, they should uphold the law; sometimes these two expectations are in conflict. In such situations, the judge has to choose whether to side with the legislator or to side with the ideals of the rule of law. Many judges, when the questions have arisen in practical real-life situations, have answered yes, they should uphold the law. This shows that the answer is not as clear-cut as we would like to have it.

Not only do many judges uphold oppressive law and enforce tyranny. In many cases, they at the same time believe that they are defending the rule of law as they carry out evil policies. Trying to show why this is the wrong answer while at the same time taking the situation of the judges seriously is what this book is about. The book revolves around three basic questions: what happens in situations when states turn oppressive and the judiciary contributes to the oppression? How can we, from a legal point of view, judge the judges who contribute to oppression? And how can we understand their participation from a moral point of view and support their inclination to oppose?

In oppressive regimes, there are always people who wholeheartedly support the oppression for ideological or personal reasons. Renowned jurist, Nazi ideologist, and president of the Peoples’ Court Roland Freisler of Hitler’s Germany is an example of this. Another example is Oswald Rothaug, of whom the US Military

Tribunal said: “He was and is a sadistic and evil man”.<sup>1</sup> This book is not for them and their likes.

The book is addressed to judges who experience oppressive legislation as a challenge to their conscience: should they follow the law and participate in the undermining of the rule of law, or should they follow their conscience and bend or depart from the law? I believe these to be the majority of the judges participating in the oppression of authoritarian regimes. They are performing a task that is distasteful and disagreeable to them but that they feel obligated to carry out.<sup>2</sup> My aim is to show that there are other answers to the question of contributing to turning the law into a systematic instrument of persecution than the answer most often given by judges who are faced with this dilemma. I try to describe the situation of judges in some recent historical examples, test the limits of judicial cooperation to oppression under international and national criminal laws, and argue the extent to which judicial cooperation and resistance are justifiable from the point of view of legal and moral theory.

Judicial contribution to oppression and tyranny is a classic topic of critical legal theory and of sociolegal studies. This tradition seeks the explanations of judicial participation in social and political contextual factors. Judges do not always participate in oppression by authoritarian regimes and are sometimes together with others trained in law, such as the legal profession and civil servants engaged in activities to obtain, maintain, and defend the basic legal freedoms of liberal society. In many parts of the world today, judges and the legal complex are engaged in the struggle for liberal rule. In such struggles, the legal complex often plays a progressive role in line with the ideals of the rule of law and protection of basic legal rights. In fact, there is evidence to say that the “legal complex”, which is the body of legally trained occupations, in general mobilises in protection of basic legal freedoms. There are exceptions to this, particularly in situations of widespread public fears about internal disorder or threats to domestic security, when an otherwise liberal legal complex tends to support oppression by the executive.<sup>3</sup>

I wish to explore the endurance of the rule of law when it exists but is under attack. The main emphasis of the book is where there is a transition from the rule of law to a state where the legislator and the rule of law are in conflict. The examples I study all have in common a transition from a society with respect for the rule of law to authoritarian and oppressive rule. The book is a case study of examples from our recent western legal history where judges have supported the regimes in departure from the rule of law, notably Nazi Germany, South Africa of apartheid, and military dictatorships in Argentina, Brazil, and Chile. In addition, I study western European countries under Nazi dominance during World War II. All these cases are examples where public security has figured high on the list of social priorities. I am particularly interested in the development of legal thought and reasons as expressed in the

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<sup>1</sup> The Justice Case (1951), p. 1156.

<sup>2</sup> Milgram (1974), p. 167.

<sup>3</sup> See Halliday et al. (2007), pp. 32–33.

rulings of the courts in such situations. In the study of Germany and South Africa, I go to original legal sources; in the other cases, my studies are based on secondary literature.<sup>4</sup>

One can ask whether there is anything of a general nature to be said about judges disembedded from their differing social and political contexts. In some of the situations described in the book, the society has been in a state of war. In others, the authoritarian regime has emerged from deep social conflicts and unrest. Some have been under foreign occupation. In some cases, the legislator has had at least some sort of basis in the existing constitution such as in Germany after 1933 and in South Africa. In others, the rulers have come to power through an unconstitutional coup. In most cases, the courts have been taken over by the new regime with the corps of judges more or less intact. Some authoritarian regimes make changes at least in the higher levels of the judiciary by packing the Supreme Court like in South Africa or by substituting its judges as in Argentina. In many cases, the regime established special courts or military courts to enforce oppressive legislation.

The issue of whether one can draw general conclusions from such a diverse set of circumstances is obviously a valid concern regarding a survey as the one I undertake here in the book. The reason I believe it is a worthwhile undertaking is that despite differences in role, function, legal tradition, and social conditions, judges of our western legal tradition do have some things in common. According to American legal historian Harold J Berman, western legal tradition has common roots and a history where law at different points in time has been invoked to protect the dissident and the heretic against the prevailing political and moral forces of society.<sup>5</sup> I believe Berman is right about this. The ideology of law as something autonomous dedicated to protecting more general values such as justice, equality, and the rule of law binds judges together across time and space. The purpose of the book is to examine to what extent this is true. This binding may be subtle and fragile at times, but it is nevertheless there in the way we speak about law in our societies. The ideology that the law is autonomous is the very reason why also authoritarian rules seek the legitimacy that can be bestowed upon them by the law. The book is a survey of how judges struggle to accommodate this ideology, how they defend it, and how they depart from it when it is under attack from the legislator or the executive. In order to test the extent to which there is such a common line binding judges together, it is necessary to cut across a lot of different settings where the rule of law has been systematically imperilled.

Judges in the situations I study have in common the fact that the basic values of the western legal tradition are under attack from the state and the judges are called upon to join this attack against the tradition. I will argue in the book that there are some standards by which to measure the response of the judges to the attacks on the rule of law. Based on criminal cases against judges for participation in atrocities of

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<sup>4</sup>For a brilliant analysis of the reasoning of South African judges under apartheid with the aim of testing positions in legal theory on authoritarianism and law, see Dyzenhaus (2010).

<sup>5</sup>See Berman (1983), p. 43.

authoritarian regimes, it is possible to perform an evaluation regardless of the specific social and political situations. These standards entail a minimum core of justice applicable to any legal regime. They are not based on natural law but on decisions of international tribunals and national courts and codified in international conventions. I will also argue that there are common dilemmas facing a judge in the situation where positive law contradicts standards of justice, equality, and the rule of law. The answers to these dilemmas will vary with place and time, but the type of reasons the judge must consider in order to take a sound and defensible course of action is the same in all situations.

Drawing upon the tradition of David Dyzenhaus, I focus my study around “wicked legal systems”, societies where the law is used to enforce a repugnant moral ideology, be it an ideology of racism, such as Nazi Germany or South Africa, or an ideology of severe oppression of any opposition, such as the military dictatorships of many Latin American countries of the second half of the last century. Laws that are systematically employed in the persecution of people on racial, ethnical, or political grounds may easily be characterised as evil. The same characterisation may be given to laws that mete out grossly disproportionate punishments and that treat persons accused of a wrong according to who they are and not what they have done. Evil also are laws that depart fundamentally from standards of equality before the law and from the demand that the subjects of the law should be able to predict the outcome of legal proceedings on the basis of laws that are enacted in advance. Such laws are immoral and in clear contradiction to any notion of justice and the rule of law. The so-called positivism debate on whether such laws can be rightly characterised as “law” or not lies outside the scope of this analysis. The question of whether positivism is to blame and can offer an explanation for wicked judging is, on the other hand, part of my analysis.

One may ask whether conclusions relevant to our time can be drawn from studying pathological cases of authoritarian law. The Nazi experience, in particular, was extreme in the way it dissolved normal legal principles and safeguards. The law was reshaped to serve the ideology and the aims of the Nazi Party and any traits of a liberal concept of law actively and systematically exorcised. It is true that the material content of Nazi law was abominable. It is also true that there was less regard for formal legal sources. Instead, informal and flexible sources, such as Nazi ideology of race, the party programme of the Nazi Party, and the will of the Führer, were the main sources, breaking down legal predictability and the rule of law. Many would, for these reasons, deny the categorisation of “law” to the Nazi legal order. But the legal order was administered by the traditional legal institutions of courts, prosecutors, and the bar with a continuation of the personnel. This continuation persisted into the Federal Republic of Germany. These lawyers and judges applied familiar legal techniques in their legal reasoning, such as the letter or the spirit of the law; textual, purposive, and contextual approaches to statutes; extensive or restrictive interpretation; reasoning by analogy and systemic integrity; and finding and filling of gaps in the law.

We might not be able to draw general conclusions about law from the study of Nazi law, but we can certainly draw conclusions of a general nature from the study

of Nazi lawyers and judges. The same is the case for studies of judges in other authoritarian settings. By examining these examples, I try to explain and understand the nature of amoral and even immoral lawyering. As Eric L. Muller, I believe that studies of amoral lawyering can be an educational tool for the ethical instruction of judges and lawyers.<sup>6</sup> The knowledge that judges have positive duties towards the rule of law, especially if it means that they can be punished for upholding the laws of the regime by employing normal legal methods, tells us something about the nature of law as such in our society.

The book surveys judges in many different contexts in many different social settings. They all have two things in common, however: firstly, in all the situations studied, the judges were given their legal training and had professional background in legal orders that cherished the rule of law and the protection of individual rights. This excludes judges from, for instance, the former communist countries or countries with legal systems from outside of our western tradition from the ambit of my study. Secondly, in all the situations, the judges were faced with a legislator and an executive who consciously and systematically departed from these ideals. Although the examples examined have different social and ideological trajectories—anti-Semitism in Nazi Germany, racism in South Africa, and deep social differences in Latin America—they have in common the fact that a judicial practice committed to the rule of law evaporated almost overnight. This happened when the Nazis took power in Germany in 1939, when the apartheid regime enacted its security legislation in South Africa in 1960 after the Sharpeville shootings, and it happened when the military seized power in Argentina, Brazil, and Chile in the 1960s and 1970s.

Can we really say something of a general nature that is not trivial and that covers situations of so great difference? I think we can. At least we can tell the stories of the judges. This will show the variety of situations judges are faced with and also reveal their common elements. In all cases, the judge who is faced with a law that so dramatically departs from an ideology of the rule of law that is at the core of the legal tradition of both civil law and common law has to come to terms with himself on the issue of whether he should apply the law in the way demanded by those in power or whether he should follow his conscience and abstain from contributing to oppression and evil. Precisely because this fundamental question appears in so many different varieties that also determine how it should be answered, I will argue that it is necessary to examine it across differences in role, function, legal tradition, and social conditions of the judge.

The theoretical starting point of my analysis is that judges have both the freedom to make such choices and a scope to act upon them. Legal oppression does not follow from the law but is the result of judges applying and enforcing the law and thus determining what becomes law. Judges, not laws, put men in prison. The book studies legal institutions and judges, not the law as such. The theoretical basis for the study is that the law cannot in a meaningful way be studied in separation from legal institutions and legal practices. In this respect, it builds on the insights of legal

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<sup>6</sup> Muller (2012).

realism and of the institutional theory of law. In these traditions, law is perceived as a social institution in line with other social institutions, albeit with a certain measure of autonomy. For ideological reasons, judges resist pressure and undue influence from the outside of what is recognised as sources of law. How is it that this resistance is broken down under certain circumstances? The historical studies seek to show how this happens through internalisation of oppressive policies by adaptation of the legal method applied by the judiciary in the interpretation and application of the law.

Given the close connection between law and legal institutions, judges cannot be studied in separation from the law. Since the main task for judges is to apply the law, and since legal reasoning is their main instrument, the book is about legal method. Studies of judges under authoritarian settings show when the question of legal reasoning becomes a political question and the choice of argument and method a moral choice. A main thesis of the book is that the question of legal reasoning becomes a fundamentally political issue when the legislator attacks the rule of law. The law ceases to be a neutral instance elevated above the political struggles of the society. Some would argue that this is inherent in law at all times. I make the more modest claim that this, at least, is the case when the rule of law is under attack. In such situations, the basis to argue for the autonomy and neutrality of the law simply erodes. Based on this thesis, the main topic of the study is the moral responsibility each judge has for his choice of legal method.

We know a great deal about the dynamics of the relationship between the legal complex and basic legal values enshrined in the rule of law and political liberalism. While this relationship is important in understanding the role of law and legal institutions, such analyses do not address the dynamics and the dilemma of the judge when there is a perceived serious threat to society. In such situations, it is often claimed that basic rights must be suspended, and those in control of the legislature and the executive often demand by ostensible legal means that the judiciary sanction and enforce oppressive legal rules.

Presently authoritarian rule seems far away in Europe and the United States. On the other hand, reactions of the legislator, administration, and even the courts in the United States and Europe after 9/11 show that we cannot take our liberal values and traditions for granted. In the first years of the “war on terror”, lower courts of the US unquestioningly accepted the administration’s claim that they lacked jurisdiction over Guantanamo. The deep disagreement among the American judges over the necessity and legality of limiting the liberty of individuals gave the executive the opportunity to act without judicial control for many years. “Faced with a determined executive and a complicit or complacent legislature in the world’s only superpower, the rest of the legal complex—lawyers, legal academics, professional associations, judges and the NGOs—could do little to protect political liberalism”, Richard Abel writes.<sup>7</sup> “Extraordinary renditions”, torture, detention without trial,

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<sup>7</sup> Abel (2007), pp. 392–398.

and the use of drones are all defended as legal and are not always successfully challenged in the courts.

History shows that public opinion may be easily swayed given the right (or wrong) circumstances, and principles that are valued highly today may become objects of attack by the public and by our leaders. Law is not as resistant to change as many believe. In Nazi Germany, the liberal ideology of the rule of law tumbled like a house of cards within months of the Nazi ascension to power. Right now, there are countries in Europe where the public authorities and even the courts discriminate against Roma and deny it the protection of law that is supposed to apply universally to all.<sup>8</sup>

The examples reviewed in the book, although extreme, tell us something about the moral dilemmas that judges are faced with also in less extreme situations. If it can be convincingly established that judges have a duty to depart from the law at some point, then the issue in all situations is not whether judges *can* depart but when they *should* depart from the law. Judges who are seen to depart from strict law are often accused of “judicial activism”. From this starting point, it could be argued that judicial deviance to avoid doing bad is something that is qualitatively different from judicial activism to achieve good.

One basic starting point is common to all legal theories: the judge has a duty to apply the law. Accepting the position as judge in any legal system entails with necessity accepting the passing of judgment based on the rules and values of the legal order and not one’s own personal rules and values. The problem, of course, is how to determine what the law is. “Law” in itself is not a clear concept. Does it refer to the legislation or something else? I will not engage in the important and wide-ranging question of defining law. For my purposes, it is enough to have a concept of “law” that refers to law as it should be construed according to prevailing canons of interpretation in a given society. Law construed according to Nazi theories of interpretation was therefore the law in Germany in 1933–1945 just as law construed according to contemporary German theories of interpretation is the law in Germany today.

Much has been written on the historical facts of judicial involvement in oppression, especially on Germany and, to some extent, on South Africa and Latin America. There is also an extensive literature on the relation between legal theory and judicial oppression, based on the discussion on positivism and natural law between H.L.A. Hart and Lon L. Fuller in 1958. Drawing on this literature, I attempt to understand the judges who find themselves in settings where they are expected to apply and enforce oppressive legislation and to show when they have to step outside of the law and exercise personal choices. My hope is that such understanding can provide insight that can serve as inspiration to judges who are confronted with difficult ethical issues—because they are faced with immoral laws or because the regime under which they operate is turning in an authoritarian direction.

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<sup>8</sup> See Korando (2012).

## Overview of the Book

The book surveys instances of judicial participation in oppression through the law in many countries in the twentieth century, seeking to outline what happened, to address the question of criminal liability for the participating judges, and to understand the moral dilemmas that judges face. The first part of the book is descriptive, the second doctrinal, and the third an excursion into legal methodology, as well as into legal theory and ethics.

The first part of the book gives an overview of how authoritarian rulers use law as a means of oppression and how judges comply with this and, in many cases, become part of the oppression of the state. There are complex relationships between oppressive rule and the law, ranging from situations where the law is bypassed completely to situations where the oppression takes place within ordinary proceedings of law. Judges contribute by closing their eyes to that which occurs outside of the legal institutions, by refusing to hear charges against the government or to provide habeas corpus, and by reinterpreting the law to accommodate the demands of the authoritarian rulers.

The relationship between oppressive rule and the law is first investigated from the perspective of the rulers in power. Of special interest is the question of why oppressive rulers seek the support of the judiciary in the first place and how they go about obtaining it. Rulers seek the legitimacy of the law that only courts and judges can give them. For this reason, judges are seldom persecuted and disciplined for opposing judgments, even in totalitarian settings such as Nazi Germany. This gives the judge a certain scope of action. Authoritarian rulers, however, employ other means than direct repression to seek compliance and loyalty from the judges and seek to limit their jurisdiction so that they do not challenge the core interests of the regime.

Next, we look at it from the perspective of the judge to see how judges exercise the choice between loyalty to the legislator and loyalty to the ideals of the rule of law. Oppressive rulers often have a basis of power that is at least questionable from a legal point of view. In many cases, however, the courts refuse to address the legality of the regime, and in some cases they outright give it their legal sanction.

Judges may, in many instances, feel compelled or coerced to support and comply with the measures taken by authoritarian rulers. This cannot be the whole picture, however, when we see the extent of the legal creativity that judges in many instances employ in support of oppression. We see such creativity in the German courts in developing the law in Nazi Germany on anti-Semitism and in the courts of South Africa developing apartheid and security legislation to oppress opposition. Such examples show that judges are not always unwilling supporters but act as convinced believers in the ideology underlying the authoritarian policies of the regime. This supports and generalises the findings of Robert M. Cover in his study of US antislavery judges in the nineteenth century. Acceptance of such underlying ideologies can also be found in liberal settings when oppressive means are used against social outcasts.



Judicial acceptance is fortunately not absolute. At the end of the first part, I relate examples of judicial opposition. The duality between loyalty to the legislator and loyalty to the ideals of the rule of law is not totally abolished, even in as oppressive settings as in Nazi Germany. It is important to keep this in mind and to learn from the examples where judges have opposed oppressive rulers and their measures.

The second part deals with the criminal liability of judges who participate in the oppression of authoritarian regimes. Experience shows that judges are seldom brought to answer for their oppressive deeds from the bench. This is in line with the trend that democratic successor regimes in general are more concerned about reconciliation and bridging social clefs than about retribution and criminal sanctions. But even in cases where perpetrators of the oppression are brought to account, the judiciary is treated more leniently.

There are, in fact, only two instances where the responsibility of judges has been a major topic: after the breakdown of the Nazi regime and after the reunification of the two German states in the 1990s. The judiciary was a topic for the Truth and Reconciliation committees of South Africa and Chile and had to suffer some criticism, but no sanctions were applied.

The main body of case law on criminal responsibility of judges in oppressive regimes thus stems from international and national cases after World War II and from German cases after the reunification. The main international case is the US Military Tribunal “Justice Case” against leading officials of the Nazi legal system. The accused were tried under international law and convicted for war crimes and crimes against the humanity. Those convicted in a judicial capacity were found guilty of discriminatory persecution and application of oppressive laws against Jews and Poles and of applying and enforcing the “Night and Fog” legislation against nationals of occupied countries. This programme was a scheme where persons accused of resistance were brought to Germany where they were convicted in secrecy in trials where they had no opportunity to defend themselves and subsequently brought to disappear in the night and fog of the concentration camps.

In Germany, several judges were accused but acquitted for lack of malicious intent. The end result of the cases after the Nazi regime was that few judges were brought to account and that international tribunals and national courts alike allowed for a set of excuses and exonerating circumstances amounting to a special judicial immunity. Judges should, however, be responsible in the same way as other representatives and officials of oppressive regimes. After the international adoption of the Rome Statute of the International Criminal Court, judges can be guilty of genocide and crimes against humanity when applying and enforcing the municipal law. This should, in the future, be the standard according to which judges should be brought to account.

The third part of the book starts with the question of why judges contribute to the evil of oppressive systems. With a starting point being the positivism debate after World War II, I examine these topics from the perspective of the judge. The decision taken by the individual judge on whether to submit to the authority of the regime or not is, in certain senses, not free. It is influenced by the socialisation he has been through in becoming a judge, his family status and dependents, his

social and economic means of subsistence, and many other factors. But it is also a moral decision that can be explained, understood, and justified or criticised. In order to pass judgment, it is important to understand the situation of the judge.

Although the pressure on the judge in oppressive settings seldom includes criminal liability, there is still cause to investigate the choices open to him and how he exercises that choice. At one level, the reasons that judges often side with authoritarian rulers seem obvious. Judges, like others, have to yield to overwhelming force. Playing along and applying the new rules may also appear to be the best alternative with all things considered. From a sociological point of view, it is no mystery that judges comply with the measures of the regime.

Nevertheless, the question of why judges contribute to atrocities has been an issue of controversy within legal theory. In particular, the question has been whether legal atrocities can be attributed to a certain legal methodology or to defects in the methodology as applied by the judge. The other side of this discussion is whether the judge can avoid taking part in oppression by applying “correct” legal methodology.

These issues are the theme of Part III of the book. Here, I first review the debate on whether legal positivism can be seen as an explanation. The arguments against this proposition are quite convincing as the theory that legal positivism is to blame confuses legal theory with adherence to authority and the general expectation that the judge avoids mixing politics and law.

Experience shows that oppression can be legitimised through a plethora of legal approaches and methods. This has led some to make the assumption that there is no connection between legal methodology and contribution to oppression through the law. I draw the conclusion that this situation shows the political side of legal reasoning. Legal reasoning is about different ways of valuing stability and change. It is also about different appraisals of legislative purpose, legal principles, and contextual conditions. All these are values inherent in the law where choices have to be made all the time as part of doing law. But in a situation where the legislator is at war with the rule of law, this choice acquires a particular political dimension that the judge cannot avoid. In this situation, the judge cannot only be a judge. He must also make a personal choice. And this choice is an inherently moral choice where the judge is accountable. The judge has a wider scope of alternatives than “just following the law”. In the final chapter, I draw upon the experiences from evil regimes to give advice on how to make more sound choices of action. I employ advice worked out by the psychologist Philip Zimbardo and the political scientist Gene Sharp on how to counter factors that pull towards submission and participation in the oppression of the regime.

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Judges Against Justice

On Judges When the Rule of Law is Under Attack

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2015, X, 301 p., Hardcover

ISBN: 978-3-662-44292-0