

FRANZ SCHLEGELBERGER AND THE CONCENTRATION OF POWERS

Queensland's unicameral legislature has 89 seats, of which 74 are held by the ruling Liberal National Party. In these circumstances it is a straightforward matter for the government of the day to secure passage of criminal laws through Parliament which are nothing short of extraordinary. Perhaps emboldened by their popularly bestowed power, Queensland's political masters have routinely brushed aside fundamental but inconvenient questions of constitutional law which arise by trashing Queensland judges, who for their part appear determined to continue to independently discharge their judicial responsibilities.

This was the sorry state of affairs which greeted me on my return to Australia recently after a few weeks gallivanting around Europe. Of the places we visited, Berlin left the strongest impression on me. Commendably, Berliners make every effort to confront their glorious city's shameful history. We spent the greater part of a suitably cold rainy day at the 'Topographie des Terrors', an austere, bleak museum on the site of the former headquarters of the SS and its next-door neighbours, the Gestapo and the Concentration Camps Inspectorate, in the street formerly known as Prinz-Albrecht-Strasse. There, laid out in unflinching, meticulously documented detail, is the history of the perpetrators of the Nazi project: not just the torturers, the executioners, and the high-ranking strategists; but also the clerks, the bookkeepers, the lawyers, the judges, and the myriad earnest honest citizens who all did their bit for the Third Reich.

Amongst the photographs of the scores of dissidents who were imprisoned and tortured on this site is one of Martin Niemöller. He was the pastor now best remembered for his homily which starts, "First they came for the communists, and I didn't speak out because I wasn't a communist..." Various versions of this text are in circulation. Perhaps it is time to add another: "Then they came for the bikies..."

Odious as it may seem to compare contemporary Australia with 1930s Germany – and of course we are worlds apart – the insistent point of Topographie des Terrors and Berlin's many other memorials, monuments and historical markers, is the need to be vigilant to protect constitutional democracy. Hitler, it must not be forgotten, became Chancellor in 1933 after his party had fared very well at the national ballot box. Shortly thereafter, he contrived to secure the Reichstag's passage of his infamous *Ermächtigungsgesetz* ("Enabling Act"), by which he effectively arrogated to himself plenary legislative and executive power. The following year, in the wake of the "Night of the Long Knives", he proclaimed himself *Oberster Richter des Deutschen Volkes* (Supreme Judge of the German people). He enlisted tens of thousands of willing workers into service in stolid-looking buildings such as those which used to line Prinz-Albrecht-Strasse. And he also found plenty of collaborators within the ranks of the legal profession.

Franz Schlegelberger was an eminent German jurist and legal scholar who rose through the judicial ranks to be appointed Acting Reich Minister of Justice in 1942. Schlegelberger was, it would appear, neither a rabid Jew-

hater nor an enthusiastic National Socialist. Nevertheless, he was tried, convicted and sentenced to life imprisonment¹ for war crimes and crimes against humanity by Military Tribunal III at Nuremberg.²

Schlegelberger raised the defence at his trial that under Hitler's rule, in which all powers had been concentrated, judicial officers were subject and subordinate to the will of the Supreme Judge. The Tribunal rejected this defence, essentially on the basis that the Führer and those beneath him were nonetheless still subject to international legal norms. However, Schlegelberger's defence was by no means frivolous: without clear constitutional provisions entrenching the separation of powers and the independence of the judiciary, the will of the leader can indeed acquire the force, and arguably the legitimacy, of law. This in turn can place conscientious judicial officers in an impossibly invidious position.

Schlegelberger, however, was not just a reluctantly obedient functionary. In a 1936 speech, he had said:

In the sphere of criminal law the road to a creation of justice in harmony with the moral concepts of the New Reich has been opened up by a new wording of Section 2 of the Criminal Code, whereby a person is also (to) be punished even if his deed is not punishable according to the law, but if he deserves punishment in accordance with the basic concepts of criminal law and the sound instincts of the people.

As the Tribunal observed, 'in application and in fact ["the sound instincts of the people"] became the "healthy instincts" of Hitler and his co-conspirators....'. The Tribunal's judgment concluded:

Schlegelberger is a tragic character. He loved the life of intellect, the work of the scholar. We believe that he loathed the evil that he did, but he sold that intellect and that scholarship to Hitler for a mass of political pottage and for the vain hope of personal security.

I stepped foot back on Australian soil on the very day the Northern Territory Attorney-General's first application for indefinite preventive detention pursuant to the *Serious Sex Offenders Act 2013* was refused by the Supreme Court.³ The Attorney reportedly reacted by saying, 'we will look at amending the legislation if the courts' decisions are not consistent with government expectations'.⁴

¹ Schlegelberger served four years of his sentence before being released on grounds of incapacity. He lived, on a generous judicial pension, until 1970.

² *United States of America v. Alstötter et al. ("The Justice Case")* 3 T.W.C. 1 (1948), 6 L.R.T.W.C. 1 (1948), 14 Ann. Dig. 278 (1948)

³ *Attorney-General of the NT v EE (No. 2)* [2013] NTSC 68

⁴ E Turner, "Freed sex pest row flares" (NT News, 23 October 2013)

Hearing that sent a chill down my spine. Not, I hasten to add, because I am worried that we are sliding towards fascism. I have no doubt that John Elferink is sincerely committed to securing the peace, order and good government of the Northern Territory, and moreover, I accept that his concerns on this specific issue are both clear and proper: the protection of the community, and the protection of the public purse.

But hot on the heels of my recent visit to Berlin, the Attorney's comment, together with the events referred to above emanating from Queensland, reminded me that the doctrines of separation of powers and judicial independence are not just constitutionally fundamental, but also peculiarly fragile.

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