

## The Inner Temple and the Rule of Law: The Life of Helmuth von Moltke

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Patrick O'Connor QC, Doughty Street Chambers and Inner Temple Bencher

It is my privilege this evening to introduce you all, wherever you may be around the world, to the life of a remarkable member of The Inner Temple.

### 1. Early Life.

Count Helmuth James von Moltke was born in 1907, to a distinguished German military family. His great-uncle was Chief of the German General Staff until 1914, and 'aide de camp' to the Kaiser **[image 1]**. His great grand-uncle, von Moltke the Elder, was Field Marshal and a hero of the unification of Germany in 1871. He modernised the Prussian Army and led it to victory in the Austro-Prussian and Franco-Prussian wars **[image 2]**. In 1866, a grateful Bismarck, the future Chancellor, assisted him to acquire Kreisau, an estate in Silesia, [now Poland], which will feature in our story. The family also produced an Admiral and an Ambassador. Ever since 1891, a major bridge across the River Spree in central Berlin has borne the Moltke family name.

And yet on 23.1.45, Helmuth James was executed in Plotensee prison by the Nazi regime. He had been convicted of 'treason' by the so-called 'People's Court' in Berlin. We will explore this evening how he can have come to this fate. Perhaps we might all learn something from this confrontation between Helmuth's ethics as a lawyer and the Nazi dictatorship.

Having studied law, politics and history at university, Helmuth fully qualified as a lawyer in 1934. He refused a judicial career path, because the Nazis had come to power in 1933, and he would have had to join the Party. He pursued a very early commitment to human rights, seeing their importance with the rise of the Nazi dictatorship. He went into private practice, from a small office in Berlin, and specialised in private international law, assisting those trying to leave Germany, including dissidents and Jews. He warned those of Jewish heritage at an early stage to leave Germany, and indeed Europe, to seek safety. The young Helmuth was noted for his boundless energy and seriousness of purpose.

His choices had been informed by several progressive influences upon his early life. His maternal family was of British descent: his grandfather, also an Inner Templar, had been a notably liberal politician and Chief Justice of South Africa, and his grandmother an early feminist. Helmuth and his family were active in various relief programmes and discussion groups for miners and fieldworkers in Silesia during the economic crises of the late 1920s.

He mixed in creative circles in Berlin and Vienna, which included Arnold Schoenberg, Oskar Kokoschka and Bertolt Brecht. He was a very charismatic young man: here he is in 1928 in Vienna: and on the verandah of the Bergaus in Kreisau: **[Images 3 and 4]**. In Austria, he met Freya Deichmann, also to be a law student: his soulmate, whom he married in 1931. Here they are at Kreisau with wider family. **[image 5]**

Helmuth's interest in international law gave him reason to travel widely. He visited the League of Nations in Geneva and the then Permanent Court of International Justice in the Hague. Whenever he could, and especially to certain elements of the English upper classes, he warned against appeasement of the Nazi regime and of his fears for war.

After 1934, Helmuth regularly travelled to London and Oxford to learn more, and here, we are proud to say, Inner Temple played its part. He was called to the Bar in 1938, having compressed the final exam curriculum into two months of intensive study. He was religious, and must have trodden the stones of our Temple Church. He underwent [a short] pupillage in the chambers of John Foster, an expert in international law. Ultimately, Foster played a role in the post-war Nuremberg trials, in the drafting of the European Convention on Human Rights. He also co-founded the highly respected organisation 'Justice'. Helmuth also spent time in London with Lionel Curtis, founder of the Royal Institute of International Affairs, Chatham House: and with several American diplomats and journalists. These relationships must have deeply affected him. In March 1940, during the war, he wrote about a dream of being in the Temple and sitting down to work. At great risk, he maintained these contacts.

## **2. Over the precipice.**

Helmuth's choice of practice is today perfectly conventional. His courage can only be appreciated in its terrible context: the disintegration of the independent legal profession, and of German law itself, after Hitler's coming to power in 1933.

Weimar Germany, until then, had a highly developed legal system with a criminal and civil code dating from the 1870s, which applied entirely recognisable principles of a modern 'civil law' system. The Weimar Constitution of 1919 included all our current familiar human rights protections, and more, though it had suffered great pressure in the crises of the 1920s and early 1930s. Article 102 guaranteed the independence of the judiciary. The Bench was in broad terms nationalist and conservative. In many cases, the judiciary displayed sympathy for the rising Nazi movement and unconcern for its violent methods against any liberal or socialist opposition. However, they did at least operate within a 'rule of law' which we would recognise. There were two vigorous independent associations of Judges. Only the newer and smaller 'League' was expressly loyal to the Weimar Republican constitution. There was an independent Bar Association, founded in 1871, with 15,000 members.

With terrifying speed, all of this was dismantled. We descend a precipice together.

On 31.1.33., Hitler was appointed Chancellor. On 27.2.33., the Reichstag/ Parliament building was burned down. The next day, the so-called 'Reichstag fire decree' "*...for the protection of the people and the state*" was issued annulling constitutional rights, declaring a state of emergency and introducing the death penalty for various offences.

On 10.3.33., a Jewish lawyer, Dr Michael Siegel was paraded through the streets of Munich. **[image 6]** He had gone to the police HQ on behalf of a prominent Jewish businessman whose shop had been attacked. Dr Siegel was beaten up, and stripped of his shoes and trousers. He had to wear this placard saying, "*I will never again complain to the police.*"

On 21.3.33. 'special courts' were established to dispense swift justice at lowest cost: with very limited defence rights and no appeals.

On 24.3.33., the 'Enabling Act' authorised government by decree, even so as to override previous statute and the provisions of the constitution. It was the end of constitutional government. The Confederation of German Judges promptly declared "*its full trust in the Government.*"

From early April, non- Aryan [i.e. Jewish] judges and prosecutors were expelled, together with any socialists. The way had been prepared since 1931, when the then newly formed National Socialist lawyer's association, had "*... reported on the attitude and behaviour of lawyers and judges.*"

Non- Aryans could be refused admission to the Bar or disbarred. Here is one such letter dated 9.6.33. disbaring a lawyer named Finkelstein, in Tilsit, East Prussia. **[Image 7]**. It simply said ‘you are erased’ [‘geloscht worden’] from the approved list for the local and Regional Courts. As you can see, top left, this came not from a politician, but from the President of the Regional Court.

One third of all legal scholars were removed from the universities on these grounds. For appointment, new Judges, public prosecutors and attorneys had to demonstrate their ‘consciousness of being a member of the national community.’ On 21.4.33., a Federation of National Socialist jurists was formed and the existing Bar Association forcibly dissolved. All independent legal publications were suppressed.

All this happened within four months.

From June 1933, after their Final exams but before formal Call, every Bar candidate had to undergo 6 weeks training at a ‘community’ camp in Juterborg near Berlin: ‘to stimulate their National Socialist sentiment’. This was staffed largely by the military. Here **[Photo 8]** is their parade for the Prussian Minister of Justice, Hans Kerrl. He had no legal qualifications: [a precedent which seems to have been revived somewhere more recently]. Here is their version of an Inner Temple dining night. **[Image 9]** The men in black are the tutors. Another image from this camp was exhibited at the Nuremberg trials **[Image 10]**. It looks like something straight out of a Monty Python sketch. The teachers are merrily showing off a gallows over the parade ground, and there is the Minister again. In fact, the contents are deadly serious. The object suspended from the gallows is a paragraph punctuation mark, well known then as a symbol of German statute law. A Nazi legal theorist had declared that national socialist judges ‘do not need the crutches of statutes’. He was called Freisler, and we shall meet him again. This was a Nazi legal education, symbolically executing statute law, even during the roll- call **[Image 11]**.

So, if you, our Inner Temple students today, feel unhappy at any aspect of your dinners or training weekends... please remember this: it could be so much worse!

Helmuth himself had to attend this camp. He and a few friends subverted the anti-Semitic lessons about the ‘racial theory’ of history, with satirical questions. In the time dedicated to reading Nazi literature, they simply played Beethoven very loudly. Ultimately candidates for Call had to sign on their application form, that they had not even been tutored by a Jew.

By July 1933, all other political parties had been dissolved and banned: and an 'Hereditary Health Court' was established to enforce compulsory sterilisation for so-called 'defectives'.

These [images 12 and 13] show the national convention of the Bar Federation in October 1933, in Leipzig: 10,000 lawyers were taking an oath of loyalty to the Fuhrer. There were of course also the Nazi newspaper denunciations of lawyers, Jews, journalists and politicians as 'Traitors [or Enemies] of the People' [image 14] of which we have some recent experience ourselves.

On 11.3.34. by decree the Gestapo were authorised to take anyone into 'protective custody' for political reasons: and by 1935 were given legal immunity for any of their actions. Here at least the judiciary resisted for a while. In effect the regime created what we call an 'ouster' clause: excluding the jurisdiction of the Courts over Gestapo action in 'political' cases. However, what were 'political' cases? [The drawing of this distinction may ring a bell with some of you today.] Some Prussian Courts adopted a narrow construction until finally by 1938, they had all bowed to the inevitable and gave full effect to this provision.

On 24.4.34., People's Courts were established, to try treason and sabotage cases. Three of the five judges were military men. There were no appeals. [This was probably in reaction to the acquittals of Communist Defendants accused of causing the Reichstag fire.]

On 4.6.37., lawyers from the Ministry of Justice met with the Gestapo to agree upon the permitted level of violence they could use in interrogations. They agreed upon a standard form of 'club': and that it could only be used 25 times on the buttocks, with a doctor present after 10 blows.

At this time, a Court of Honour of the Nazi Bar Federation disbarred members for consulting a Jewish doctor, and for arguing political cases too strongly. Later, sometimes, defence lawyers argued for the death penalty for their clients. The term 'legal representative' was replaced by 'rechtswahrer': or 'guardian of the law'.

By 1938, all Jewish lawyers had been removed from practice. At that time, two notaries were prosecuted variously for not saluting properly in Court and in the streets: for voting the wrong way in a plebiscite: and for buying postcards for 10 pfennigs from a Jewish man.

This is merely a small sample of the institutional perversions by which the 'rule of law' was destroyed between 1933 and 1939. In those years, familiar principles basic to any recognisable legal system were reversed. Cases were not to be decided by 'logical reasoning', but by the 'feel of the case'. Criminal convictions were founded upon analogy with existing laws and retrospectively. In 1935, Article 2 of the Penal Code was amended so as to read: **[image 15 of text]**

*"Whoever commits an act which the law declares as punishable or which deserves punishment according to the fundamental idea of a penal law or the sound sentiment of the people, shall be punished. If no specific penal law can be directly applied to this act, then it shall be punished according to the law whose underlying spirit can be most readily applied to the act."*

From 1939, increasingly, during or at the end of court sentences, the law allowed the transfer of prisoners to the Gestapo or SS for further detention or execution. Any acquittals or sentences at first instance could be referred up by the prosecutor to a higher court for review. Hitler personally had the right to intervene and insist upon the death penalty: and he often did so: once for an offence of stealing eggs. Escape by a foreign 'forced labourer' amounted to 'treason'. Overall, it is estimated that 60-80,000 people were sentenced to death by the Courts under the Third Reich. They were instruments of terror. By comparison in Fascist Italy, the courts passed 29 death sentences.

All of these measures required the close involvement of countless legally qualified civil servants, lawyers and judges for drafting and implementation. The role of lawyers was critical to the functioning of this dictatorship. In 1938, of all the local Gestapo chiefs, 87% had studied law: and 50% had doctorates in law. Hans Frank, governor of most of Occupied Poland, and executed for his crimes after the main Nuremberg trial, was a Doctor of Law, and had been President of the Academy of German Law.

The permitted role of the law and of the courts was frankly and publicly set out. Goebbels in 1934, wrote in a newspaper article: *"We were not legal in order to be legal, but in order to rise to power. We rose to power legally in order to gain the possibility of acting illegally."* And in a speech in 1942: *"While making his decisions, the judge is to proceed less from the law than from the basic idea that the offender is to be eliminated from the community."* and *"The idea that the Judge must be convinced of the Defendant's guilt must be discredited completely."*

Peterson, a People's Court judge, explained that when sentencing, *the "actual deed was of no particular importance in the determination of the sentence... The important thing was whether a man had to be exterminated from the community of the people as a 'public enemy' because of his personal attitudes and his social or anti-social tendencies."*

Judge Max Reichert said of the Courts: *'What the army is at our borders, our decisions must be within them.'*

Carl Schmitt, the brilliant Nazi legal and political philosopher, wrote *'The law is there to protect the state from the individual.'* It takes a moment to compute these concepts. It is a 'through the looking glass world'.

Paradoxically, for such a totalitarian regime, unrestricted by any civilised norms, the law mattered a great deal. There were about 1,900 laws governing the treatment of Jewish people in Germany and the Occupied territories. From 1936, there was a regulation relating to the spelling out of telegrams, when dictated on the telephone: this forbade using the phrase 'A as in Abraham'. As Victor Klemperer recorded in his famous Diaries, he was not allowed to possess a typewriter: and could not buy flowers or shaving cream, since Jews were supposed to grow beards. The laws rendering German Jewish people 'stateless' in 1941- 2 were necessary for the seizure of all their property after their 'departure': but were also critical to rendering them defenceless against annihilation: as Hannah Arendt and Professor Tim Snyder have pointed out.

Often Nazi laws did not *expressly* authorise, or provide for, what we would regard as 'criminal' conduct. Instead, they used general and vague terms, and cynical euphemisms or 'language rules': or, by leaving loopholes, they gave implicit permission for abuse and atrocity.

The examples of resistance by lawyers through use of the law, were very rare indeed. A very brave Bavarian prosecutor, in 1933, Josef Hartinger, presented an indictment against named SS officers for murders in Dachau concentration camp. This was quickly suppressed, and he was moved to a provincial post. In 1940, one judge, Dr Lothar Kreysigg issued a criminal summons and an injunction against the head of the ongoing T4 euthanasia programme. He impertinently relied upon the lack of any legal authority of any kind for these killings. The proceedings were quietly dropped, and he retired on medical grounds. It is of some significance perhaps for the rest of the profession, that both these men kept their freedom and survived the War.

A few lawyers and judges did involve themselves in active resistance, and paid the ultimate price. Dr. von Dohnanyi, and Dr. Karl Sack were executed in 1945, for helping Jewish people and involvement in plots against Hitler.

So, this was the environment for the choices made by Helmuth and Freya as the War loomed: to continue living in Germany, when they could have left: to bring two children into the world, Helmuth Caspar and Konrad: and to continue to try to use the law to protect the weak against a murderous dictatorship. They made very brave choices.

### **3. In the war.**

With the outbreak of war in 1939, Helmuth was conscripted. He joined the foreign intelligence branch of the German Army, the Abwehr, as an international law expert. This would not seem to be fertile territory for Helmuth's expertise and commitment to the 'rule of law'. However, the upper echelons of the Abwehr were riddled with disloyalty and outright Nazi opposition: to such an extent that it was disbanded in February 1944, and ultimately its chief, Admiral Canaris, and many other senior officers were executed. So Helmuth must have found some fellow thinkers there.

With the administrative rank equivalent to a Major, Helmuth was party to the clearest intelligence about military atrocities in the Occupied territories of the east. He despaired at his limited influence. In his letters to Freya in later 1941, he expressed his torment: *"May I know this and yet sit in my heated flat and have tea? Don't I thereby become guilty too?... How can anyone know these things and walk around free?"* He described some reported incidents as *"surely the height of bestiality and depravity."*

He certainly fought to do what he could. Regulations and orders were sent in draft to his department for comment. He sometimes had overnight to respond and organise counter lobbying. "Today," he reported with some pride in 1939, "I won my case. But it was like winning a victory over a hydra. I chopped off one of the monster's heads, and 10 new ones have grown in its place." In March 1940, on the treatment of prisoners, he fought an internal battle insisting that his sole dissent should be recorded and passed up the hierarchy. The Generals then agreed and the Fuhrer Order so provided .... at least for the moment.



One exhibit at the 'High Command/ General Staff' Nuremberg war crimes trial, was very telling. [in US national Archives] It was a memorandum from Helmuth pleading in forceful terms for respect of the rights of captured enemy soldiers, civilians and irregular combatants in the Eastern Territories. However, in the margins, were the pencil notes of Field Marshal Keitel, saying that these rules were "*quaint*" and "*obsolete*," and reflected "*outmoded notions of chivalric warfare*." Keitel was sentenced to death at Nuremberg.

In November 1941, Helmuth argued as a lone voice against 24 others, criticising the new Nuremberg laws rendering deported Jewish people stateless, which was critical to the Holocaust. He gained some temporary support and wrote that this "... *proves the general rule that as soon as one man takes a stand, a surprising number of others will stand too.*" At this time priests were being imprisoned for saying prayers for the Jews.

In October 1942, he received "*an authentic report on the 'SS blast-furnace.'* So far I had not believed it," but "... *it was true: 6000 people a day are 'processed' in this furnace.*" His letters were tormented and sometimes angry. He described a meeting with the Army Generals as: "*he murderers' pit of loyal vassals of the Fuhrer... disgusting toadies...*"

Helmuth travelled widely for this work, so he had some direct impact upon events outside Germany. In June 1943, in the Netherlands, he extracted promises from the military to avert the execution of civilian hostages, which, if kept, saved over 1,000 lives. In October 1943, he contributed to leaking the plans to transport the Jews of Denmark to concentration camps, though his may not have been the first effective warning. Out of 6,000 hunted, only 200 were caught. The rest escaped by boat to Sweden. He used two visits to Turkey to try to set up meetings with his English and dissident German contacts. He provided to them a lengthy and detailed review of the parlous state of Germany dated 9.7.43., which survives.

Surprisingly for us, conscripted professionals were allowed to continue their non- military work part- time. Helmuth continued to run his small private legal practice close to the War Ministry building in central Berlin. In 1940, before the USA entered the war, he met George Kennan, an American diplomat, in Berlin, who later became an influential political scientist and writer. Helmuth shared with him his formative thoughts about a post-war Germany on a 'new and better moral foundation.' Kennan described him as "*the greatest person morally, and the largest and most enlightened in his concepts...*" that he had met on either side in the war.

#### 4. The Kreisau Circle.

By 1940, Helmuth had been secretly writing about a post-war constitution for a reconstructed Germany. Using his very wide range of social and military connections, and his travels, Helmuth cautiously explored the personal views of select individuals. When trust was gained, from the summer of 1940, he introduced like-minded people to wider discussions in secure conditions. Small gatherings occurred mainly in Berlin and Munich. This crystallised into a dissident discussion group, later called the Kreisau Circle, after the von Moltke family seat. Smaller sub-committees produced single-issue working drafts. Three plenary meetings, each of perhaps 12–14 people, were convened at Kreisau between May 1942 and June 1943.

It was a diverse group of conservatives, liberals, socialists, the religious and non-religious, including a banker, Jesuit priests and trade unionists. They focused upon how post-Nazi Germany would be governed as a decentralised federation. Helmuth also maintained contact with von Preysing, the Catholic Bishop of Berlin, who very bravely spoke up against euthanasia and for the protection of Jewish people. Detailed papers covered relations between church and state, education, agriculture and economics, and the right to resist oppression. They tended to foresee a prominent role for the Christian churches in the moral renewal of Germany, but on the basis of complete tolerance for race, national and religious difference. They even considered the role of Britain in a post-war European federation. How far-sighted was that?

In a draft dated 14.6.43., Helmuth envisioned a special international criminal tribunal to be convened at the conclusion of the War for the purpose of bringing to justice those who violated the laws of war. He wrote: *"Any person who violates the essential principles of divine or natural law, of international law... in such a fashion that makes clear that he contemptuously disregards the binding nature of such law shall be punished."*

International connections were made and maintained. They put out peace feelers, on the basis of a surrender conditional upon the end of the Nazi regime, before Germany was completely destroyed. The Allies would not contemplate this.

There were other more conservative dissident groups, which proposed a military coup and even restoring the monarchy. Attempts to find common ground with this 'Goerdeler' group failed. The Kreisau Circle is historically recognised as having born real credibility for post-war Germany. Its secrecy was only broken later in 1944, as we shall see.

The risks taken by Helmuth and all participants were formidable. In early 1943, several students including Sophie Scholl were arrested for distributing disloyal pamphlets in Munich. They were tried before Judge Freisler in the 'People's Court' and executed by guillotine. The BBC was able to broadcast these 'White Rose' pamphlets because Helmuth took them to Sweden and ensured they reached the British authorities.

My own mother was brought up in a solidly Nazi family in East Prussia. She once ended an innocent social telephone call without saying the obligatory 'Heil Hitler.' This caused consternation to her father, the burgermeister of the town, because it might have been overheard and reported by the telephone exchange operator.

Hannah Arendt made a rather pejorative reference to the Kreisau Circle in her book, 'Eichmann in Jerusalem'. She dismissed it, together with Goerdeler, as narrowly concerned with the material interests and honour of a defeated Germany, and as paying scant regard to the millions of victims. This does not take account of when the Kreisau Circle started to coalesce, long before defeat was contemplated: and she was not aware of the unchallengeable record of Helmuth's intense moral concerns for those victims.

#### **Detention and trial.**

Helmuth was arrested by the Gestapo on 19.1.44. and placed in so-called 'protective custody', at Ravensbruck concentration camp. This was nothing to do with Kreisau activities. He had apparently warned a friend of impending arrest. Helmuth was detained 'under investigation.' Although many around him were being tortured and executed, he was not under immediate threat. At least, it meant that he had an impeccable alibi for the months leading up to the unsuccessful Stauffenberg bomb attempt upon Hitler's life on 20.7.44.

However, eight of those plotters had been involved in the Kreisau Circle, and there were substantial connections with Helmuth personally. One member, Count Peter Yorck von Wartenburg, a close friend, was directly implicated in the plot and was executed immediately. A frenzy of 7,000 arrests, with mass executions, followed the attempt. In fact, it is rather unclear whether Helmuth supported an assassination attempt. There were moral arguments against within the Kreisau Group. Also, for political reasons, there was a good argument that responsibility for the, then inevitable, loss of the war should not be deflected onto a so-called 'stab in the back': as had happened after WW1.

Intensive investigations of such connections, and the usual Gestapo methods, broke the secrecy of the Group. On 28.9.44., Helmuth was transferred to Tegel prison, Berlin, for deeper investigation and ultimately for trial. By extraordinary chance, the prison chaplain at Tegel was Harald Poelchau [image 16]. He had attended meetings of the Kreisau Circle and was a religious socialist.

With his courageous help, for the next four months, the last of Helmuth's life, a near daily exchange of correspondence took place with his wife, Freya. This system bypassed any censor, so the letters were very frank. Freya would go to Harald's house in Berlin, and give him her letter to take into the prison. Harald would then give enough time for Helmuth to read it and write a response. Harald would then leave with both, to avoid detection, and the cycle would be repeated. Here is an image of one of Helmuth's letters: [image 17] with very small writing on both sides of thin paper.

Over 150 letters were exchanged and Freya kept them hidden from the Gestapo in the estate beehives at Kreisau. They survived the war. They are almost unbearably moving to read, and probably unique in world literature as a record of humanity, maintained under the most acute oppression. Passionate, almost every single letter could have been their last communication. They struggled between the faintest hope of clemency, and preparing emotionally and spiritually for execution.

Helmuth wrote last letters to his two sons, Helmuth Caspar and Konrad, then aged 5 and 3. He wanted them later in life to understand the values which had driven him to make his sacrifice. He wrote: *"Throughout an entire life, even at school, I have fought against a spirit of narrowness and unfreedom, of arrogance and lack of respect for others, of intolerance... I exerted myself to help to overcome ... excessive nationalism, [and] racial persecution..."*

Freya was allowed five face to face visits in this time too. She had to travel 250 miles each way from Kreisau most weekends, leaving her two young sons as Germany was crumbling. She had responsibility for running the estate with its employees too and many friends, family and refugees occupied the main manor house. As the trial approached, the Russian front was moving much closer. She ran extraordinary risks at this time, and during her earlier support for the Kreisau discussions: as had Helmuth's legal secretary, Katharina Breslauer.

Since his first arrest, Helmuth's reading had focused increasingly upon the Bible and Lutheran texts: also, Kant's Critique of Pure Reason. Prison conditions were harsh, with permanent cell lighting and Helmuth was shackled most of the day. Even so, some guards were sympathetic and allowed in extra food, which Freya would bring from Kreisau.

Apart from this direct record of their immense courage, the letters do record Helmuth's experience of the trial. This was postponed several times until January 1945. It took place before Judge Roland Freisler, who even then was notorious. He became President of the People's Courts in 1942. Here he is in thoughtful mode and in action [images 18 and 19.] His aggressive outbursts in Court and humiliation of the accused shamed even the Nazi leadership, for whom this was an unnecessary 'excess'.

Freisler was in fact a very clever jurist as well as a fanatical Nazi. He had attended the Wannsee conference, which planned the Holocaust, as a civil servant in the Ministry of Justice, in January 1942. He had sentenced the Munich students and the main July 1944 bomb plotters to death. According to Freisler's own figures for the calendar year 1943, 50% of the accused or 1,662 people were sentenced to death by the 6 'Senates' of the People's Court. In Freisler's First Senate this reached 58%. Very few indeed were acquitted.

In October 1944, Helmuth had been served with his arrest warrant, charging him with undermining the war effort, preparation for high treason, aiding and abetting the enemy, and failing to report a planned crime, namely the 'Goerdeler' plot for a military coup. The conduct alleged in the indictment was largely true, and indeed did not reflect some of the most 'subversive' aspects of the Kreisau planning. Their written papers had never been discovered by the Gestapo. The gross injustice was to indict those activities as crimes at all, let alone carrying the death penalty. Helmuth was described as an 'unrestrained defeatist' and an 'enemy of National Socialism all along'.

After the defeat at Stalingrad in February 1943, almost every honest and informed German suspected, and then increasingly believed, that Germany could not win the war. All the Kreisau Group did was to have an honest debate about the post-war and 'post-Nazi' future. It was of course patriotic in the best sense to prepare for that future. As Helmuth also argued during the trial, it was surely the job of military intelligence, the Abwehr, to take a clear-eyed view of the course of the war and its potential aftermath.

Even the prosecutor made clear that Helmuth had rejected any association with the Stauffenberg plot. As for his not reporting his knowledge of the Goerdeler plot, he claimed that the Gestapo and Abwehr already knew of it, and so he was under no such duty. This was a bold line, and quite provocative, but probably true.

His trial before the so-called 'People's Court' on 9.1. and 10.1.45., was in secret but with an invited trusted audience. It was very dramatic. There are good records, including photographs and Helmuth's own letters, vividly describing his ordeal. Here are some images of Helmuth arguing his case, and arguing for his life. **[images 20 and 21]**. He put his legal training to good use. He defiantly faced Judge Freisler, justifying his conduct. When the Judge launched into one of his infamous tirades, Helmuth caught the eye of one of the others on the bench and they exchanged a wry smile.

There was no escape from Freisler's interpretation of the law. He held: *"Anyone who objects to acts of violence, but prepares for the eventuality that another [the enemy] removes the government by force, thereby engages in preparation for high treason."* *"It is already tantamount to treason to discuss highly political questions with people who are not competent and not in the NSDAP."* *"The mere failure to report defeatist utterances is treason."* After the inevitable death sentence, Helmuth was proud that he had forced the Judge only to convict him for his ideas, indeed largely for the ethical demands of his Christianity; and not for any actions. *"We're being hanged for having thought together"* he wrote.

Helmuth maintained his wry sense of humour throughout, describing his trial as a 'C minus' death sentence case. He joked, that because Jesuits were amongst his co-accused, he would 'die as a martyr for St. Ignatius Loyola'. Pre- and post- trial, Helmuth's family name gave Freya, various privileged face- to face meetings with the prosecutor, the Judge, the Ministry of Justice and even the head of the Gestapo, General Muller. The more civilised these conversations about clemency were, the more surreal: but they were ultimately fruitless. Helmuth was executed on 23.1.45., and went to his fate with great serenity. Less than two weeks later, on 3.2.45., an air raid on Berlin killed Judge Freisler, during the court day. Even colleagues recorded that no one mourned his passing.

Freya and her sons, survived the war. With British help they were able to leave the Soviet zone of Germany. After time in South Africa, and back in Germany, the family settled in Vermont. The precious letters, 1,600 of them from 1929- 1945, were secured and kept with them. Freya

described this extended parting from Helmuth as 'beautiful', 'a great gift, so rich and marvellous'. She immediately started to educate the world about the duty to resist oppression and discrimination of all kinds. She frequently wrote and gave lectures in Germany and Poland. Here is a photograph of her at her desk in 1949. [Image 21] She survived until 2010, when she was 98 years old. Understandably, the more intimate later letters from prison were kept private until after her death. They were only published last year in an English language edition.

##### 5. Aftermath.

To what extent were the hopes of Helmuth and his fellow dissidents met after the War? For the moral regeneration of post-war Germany, they required at least a clean break with the Nazi regime and legal accountability for war crimes.

There was anything but a 'clean break': instead widespread continuity, especially within the West German legal system. By 1948, after three years, 80- 90% of judges had served under the Third Reich. Of the notorious People's Courts, 29 Judges and 69 prosecutors continued their legal careers. The law faculties largely welcomed back the teachers from the Nazi period.

One judge in Hamburg sat assessing compensation for families of those Germans [emph.] sentenced to death by the Nazi Courts. That was fine, except that he was doing so in relation to death sentences he had himself imposed. In 1946, a court in Lubeck sentenced a man, Herr Garbe, for escaping from custody and injuring a policeman. The only anomaly was that he had been escaping from a Gestapo prison in 1943, where he was awaiting execution. In the 1950s and 1960s, when sentencing communists for membership of their banned party, any previous convictions before the Nazi courts were recognised and treated as an aggravating factor.

It was argued that there could have been no post-war German administration at all without such compromises: a Faustian pact: but this went much further. In 1951, the Adenauer government granted wide reinstatement to civil servants and public officials who had lost their jobs in the 'de-nazification' process, including members of the Gestapo. 75% of judges and lawyers then had worked under the Third Reich. Indeed, under right-wing political pressure, 20% quotas of such people were introduced, as a sort of positive discrimination.

No alleged 'necessity' can explain why, as late as 1961, the West German government was having to purge 140 serving judges and prosecutors because of their Nazi past: possibly only

as a side effect of the international profile of the Eichmann trial in Jerusalem. At that time, still about 40% of serving judges had served in some capacity under the Nazi regime.

Nor can the post-war career of Hans Globke be so justified. He had been a prominent Third Reich lawyer involved with the 'Enabling Act', the anti-semitic Nuremberg Laws and with Eichmann's 'Office for Jewish Affairs'. From 1949 to 1963, showered with honours, he became the most powerful civil servant under the Adenauer government, with his past actively concealed.

Helmuth's hopes for accountability to the law were met only to a very limited extent. He had called for special punishments for 'defilers of the law': i.e. those who perverted its content and purpose.

Of course, the 'Major War Criminals' trial at Nuremberg in 1945- 1946 took place, covering those in top leadership positions, such as Goering and Hans Frank. 19 individuals and 5 organisations, such as the SS and the Gestapo, were convicted of crimes against peace, war crimes and crimes against humanity. Twelve additional trials followed under American auspices in Nuremberg: including the 'Trial of Doctors', and of those responsible for the 'slave labour' programme. 96 further people were convicted. This was just of course the tip of the iceberg.

The third of these twelve 'successor' trials was the so-called Nuremberg 'Justice' trial, in 1947, when 16 lawyers, Judges and civil servants were indicted. Seven had been judges and prosecutors at the Special Courts and People's Courts: and nine were legal officials in the Ministry of Justice. These were amongst the direct 'defilers of the law.' Ten were variously convicted of war crimes and crimes against humanity, by their abuse of the judicial and penal process. Two prosecutors before the People's Courts, were given lengthy sentences of imprisonment: but others were much shorter.

One very important landmark was thereby established. Judges, prosecutors and desk lawyers, such as Ministers and civil servants, can be criminally liable for the direct consequences of their work as lawyers. Advising on, drafting and applying laws can amount to a crime. The parameters of this principle have since been little explored, and are highly relevant today. They are beyond the scope of this current lecture.



Apart from these prominent Nuremberg trials, only some brief snapshots can be permitted now. Professor Mary Fulbrook's recent book, 'Reckonings', provides a masterly analysis. Broadly speaking, there were more than twice as many 'war crimes' trials in East Germany, than in West Germany, [though sometimes they were ideologically targeted]: and they resulted in a significantly higher level of convictions and sentences.

There were many overlapping reasons for this: the narrow definition of murder in West German law: the attitudes of the unreconstructed judiciary: various statutes of limitations: and an organisation called 'Stille Hilfe', or 'Silent Aid', which coordinated defence strategies: and in which Heinrich Himmler's daughter, Gudrun played a prominent role.

A series of surprising factors were accepted as a defence by the West German courts: so that, for example, transporting Roma people to Auschwitz was accepted as a genuine 'crime prevention' measure. Shooting civilian victims more accurately 'to lessen their suffering' was recognised as mitigation.

A Dr. Pfannmuller, Director of a euthanasia centre where 3000 children were killed, was found in 1951, not to have acted 'maliciously', since the children were successfully deceived and did not know they were slowly being poisoned: and not from 'base motives', since a respected body of opinion supported the programme. He was ultimately sentenced to two years imprisonment for manslaughter, and soon released for medical reasons. In subsequent years, further doctors obtained acquittals or very short sentences by similar means, in relation to many thousands of euthanasia killings. Some continued in medical practice even after these cases.

Stimulated by the international profile of the Jerusalem trial of Adolf Eichmann in 1961, a number of trials took place in West Germany in 1962 and 1963, in relation to specific 'death camps'. Many derisory sentences were passed. Josef Oberhauser was convicted of complicity in the murder of 300,000 victims in Belzec death camp. Typically, he was sentenced to 4 ½ years imprisonment, and released after serving half.

About 400,000 likely offenders benefitted from amnesties in 1949, 1951 and 1954. A very high proportion of prison sentences imposed at Nuremberg or before other tribunals and courts for Nazi atrocities was later commuted with very early release, especially in the early 1950s.

Today, it is widely recognised that Germany has taken a considerable journey over intervening decades and faced up to its history with integrity: even if accountability to the law was limited. By contrast, for example, in Austria, after a decent start under the Occupying Forces, there were few criminal trials at all after independence in 1955, when they left. A very wide range of atrocity perpetrators were openly living there. In 1971 and 1972, twelve such men were tried and acquitted in several trials, to cheers from former SS men attending. Survivor witnesses were subjected to much courtroom and public hostility, and needed protection. In Austria, the triple myth persisted and persists that Austria was a 'victim' nation: that Hitler was German and not Austrian, and Beethoven Austrian and not German.

To turn to more positive developments, the Kreisau estate became a focus for peace and justice in Europe and beyond. The Polish and German Prime Ministers held a reconciliation service there on 12.11.89., only three days after the fall of the Berlin Wall. **[image 23]** Kreisau was instinctively recognised as a symbolic location. They committed state funds for restoration. A 'New Kreisau' arose with the strong support of Freya, and her son, Helmuth Caspar, **[Image 24]** All family property rights were surrendered. Here, great work is done to increase awareness of the current threats to democracy and to learn the lessons of 20<sup>th</sup> Century Europe. Freya established a Foundation to support the Centre, and she and Helmuth Caspar have contributed as Trustees. International law features as an important theme. Now, about 5,000 young people a year, mainly from Europe attend conferences, exchange programmes and even re-enact 'war crime' trials. **[image 25]** Many prizes have been awarded for this work and a proud place in history is secure. Here is Freya meeting Chancellor Angela Merkel **[image 26]**, who spoke at a memorial service for Helmuth on the centenary of his birth in 2007. She described him as 'a symbol of European courage.'

Finally, looking back, we must acknowledge that Helmuth was in an unusually privileged position. He met a brutal and unjust death, but he was generally treated as a human being. He was subjected to a parody of a criminal trial, but there is no suggestion that he was at any time beaten or tortured. There are not many victims of the Nazi regime for whom the head of the Gestapo would have agreed to meet the relatives or receive a petition. Helmuth was a German citizen, of elevated heritage, and not in any persecuted category. It must be remembered, and not just in passing, that many millions of Nazi victims were dehumanised, treated barbarically and massacred, without of course any legal process of any kind.

The relevance of Helmuth James for us though, is precisely that he had the privilege of making choices. So very many used that opportunity to cooperate however reluctantly: or to keep their heads down, and just to survive. He chose to risk his life consistently over several years, because he could not put aside his values. Tragically he paid the ultimate price. By good fortune, Helmuth Caspar and Master Schiemann were called to the Bar of The Inner Temple on the same occasion in 1964. We are connected across three generations with the von Moltke family. Master Schiemann gave a moving address in memory of Helmuth here upon the 60<sup>th</sup> anniversary of his Call to the Bar in 1998.

We are all left with a chilling and timely reminder of how fragile the Rule of Law can be. Perhaps the role of the law and lawyers in the catastrophe of the Third Reich, merits closer attention than has been possible in this brief summary. We surely owe a duty to Helmuth and Freya to cherish their example in our personal and professional lives, and to pass on their inspiration to future generations. Let us ensure that we never let their memory fade.

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