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Alex Jettinghoff

## The Wannsee Lawyers
## Legal Positivism Derailed?

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# THE WANNSEE LAWYERS

## Legal Positivism Derailed?

*Alex Jettinghoff**

**Abstract**
It appears that a considerable number of the participants in the 'Wannsee conference' were lawyers. One wonders why so many lawyers were present at such a meeting and how the contemplation of the practicalities of the 'final solution of the Jewish question' related to their traditional legal education. The paper explains why the high concentration of lawyers at a meeting of this level of administration was quite normal at the time and why the suggestion of Radbruch, that Nazi lawyers had become victims of the legal positivist bend of their legal education, cannot be upheld. Instead, it is suggested that all participants at the conference had embraced Nazi ideology, including a collectivist (discarding the individual for the 'Volk') and racist (discarding equality between Germans and non-Germans) legal terminology. However, as such these conceptions were not sufficient for the emergence of the plans discussed at the Wannsee conference.

**Keywords**
Nazi lawyers, Holocaust, legal education, legal theory

## 1. Introduction

The HBO docu-drama *Conspiracy* (Frank Pierson, 2001) offers an oppressive reconstruction of the infamous 'Wannsee conference', a meeting in a beautiful villa near Berlin (*Am Großen Wannsee* nr. 56-58) where on 20 January 1942 fifteen high-ranking Nazi officials discussed the destruction of the entire European Jewry. A striking scene shows one of the participants (making a derogative remark on the relevance of law), asking he lawyers around the table to raise their hands. The number of hands raised suggests that the lawyers were in the majority. The scene begs some questions. Were there really that many lawyers at this meeting? And if so, how can this be explained? And how could they square their participation with their legal education? First, however, we will try to establish some elementary facts about the meeting.

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## 2. Some 'facts' about the Wannsee conference

### Mystification

The problem with establishing facts about the meeting is they have been both obscured (by the Nazis) and mythologized (after the war). For instance, there is the apparently simple initial fact that Heydrich (Chief of the Reich Security Main Office, the RSHA, the central police organization of the regime) invited the participants to attend the meeting in order to give effect to a written assignment from Göring to take charge of the final solution of the 'Jewish question' (as is apparent from two salvaged copies of the invitation). After careful study, experts on the period have suggested that it might also have been that the RSHA initiated the assignment, formulated it and got Göring to sign it. [1]

The meeting had originally been scheduled for 9 December 1941. However, the meeting was cancelled on 8 December. Why this happened remains unresolved. According to some historians it was because of the attack on Pearl Harbour, while others suggest the battle for Moscow as the reason. Eventually the 'conference' was postponed until January 1942.

What transpired during the meeting has also become a matter of much speculation. During the Nuremberg Trials, Allied investigators unearthed the single remaining copy of a secret *Protokoll*, initially taken for the minutes of the meeting. A pdf-file of the yellowing document can be downloaded from the Internet, complete with the red stamp '*Geheime Reichssache!*' [State secret].[2] In all probability, however, the document does not contain minutes in the normal sense. If we may believe a later statement by Eichmann (the secretary of the meeting), it was a carefully sanitized and polished document, which mainly served (if need be) to remind hard-headed officials of who was really in charge of the operation and what the project was about.[3]

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1 M. Roseman (2003) *The Wannsee Conference and the Final Solution; a Reconsideration*, New York: Metropolitan Books, p. 53.

2 The *Protokoll* pdf-file can be downloaded from www.ghwk.de/deut/proto.htm. The site also provides short biographies of the participants.

3 Eichmann's interrogation on the 'Wannsee-Konferenz', 24.7.1961: 'Yes, it went like this. The steno typist was seated beside me and I had to ensure that everything was recorded. Afterwards, the steno typist worked out the notes and then Heydrich decided what was to be put into the protocol and what not. After that he polished it to a certain extent and with that the job was done... Heydrich wanted the essentials firmly established in the protocol, because he wanted to nail the State secretaries and hold them hostage to the protocol.' (author's translation)
Found on www.h-ref.de/vernichtung/wannsee/wannsee-konferenz.php. See also Roseman 2003, p. 97 ff.

It was (according to the invitation) a meeting 'followed by breakfast' starting at noon, so more a kind of brunch.[4] According to Eichmann, the first part of the meeting was mainly a speech by Heydrich. After a break for food and drinks, the meeting turned into a free-for-all discussion. The meeting lasted approximately 90 minutes. Afterwards, Heydrich appeared very satisfied with the results of the meeting and sat down for a few cognacs together with Gestapo chief Müller and Eichmann. He even smoked,[5] if Eichmann is to be believed.

After the war, it has often been taken for a fact that at this meeting the decision for the 'Final Solution' was taken, but that is probably a myth.[6] According to some historians, the decision must have been made earlier, because it had to come from the highest authority, from Hitler himself. The question whether there was such a decision by Hitler and – if so – on what date he made it has been a topic of some academic debate.[7] The historian Christian Gerlach concluded that 12 December 1941 must have been the fateful date, the day after the declaration of war to the United States.[8] However, more recently the consensus among historians seems to be that the 'Final Solution' was not the result of a single decision by Hitler but the result of a 'lengthy process of radicalization in search for "a solution of the Jewish Question" between spring 1941 and summer 1942'.[9] The Wannsee conference was one of the steps in this process.

**Agenda: who's in charge**

If not this, then what was the agenda for the meeting? What could Heydrich have been so satisfied about? According to historian Mark Roseman, this must have been first and foremost the question of who was to be the boss of the Final Solution operation.[10] Every Ministry had people working on the 'Jewish question', because it was high on Hitler's agenda and thus a sure way to win his favour. The consequence was that the issue was a bone of contention among the competing Ministries, making it – in the absence of any coordination – the

4 Original invitation to Luther from pdf-file (source in footnote 3): '… Besprechung mit anschließendem Frühstück zum 20. Januar um 12.00 Uhr …' [Meeting with subsequent breakfast on January 20 at noon].
5 Roseman 2003, p. 145.
6 *Ibid.*, p. 2 ff.
7 *Ibid.*, p. 48 ff.
8 C. Gerlach (1998) 'The Wannsee Conference, the Fate of the German Jews, and Hitler's Decision in Principle to Exterminate All European Jews', *The Journal of Modern History* 70, p. 784-785.
9 I. Kershaw (2008) *Hitler, the Germans, and the Final Solution*, New Haven & London: Yale University Press, p. 268.
10 Roseman 2003, p. 141 ff.

focus of an administrative mess. Heydrich presented his assignment from Göring as the ground for the claim that the RSHA was to be the principal coordinating authority for all activities concerning this issue. The other administrative agencies had to acknowledge this authority. According to Gerlach, this matter had been sounded out beforehand with the top officials of the Ministries involved.[11] This might explain why Heydrich stated the authority of his department (as far as the protocol shows) as a matter of fact.

**Agenda: evacuation**

Among the announcements during the first part of the meeting was another fateful decision phrased in ominous LTI, i.e. that the policy approach to the Final Solution had shifted from emigration to 'evacuation'.[12] Before the outbreak of the war in the European theatre, approximately 500,000 Germans had been forced into emigration.[13] Even the comprehensive emigration of the Jewish population to Madagascar had been seriously considered as an option.[14] The outbreak of war ruled this option out and therefore the alternative of 'evacuation' was the chosen method. In the protocol, a morbid page (page 6) lists the national origin and total numbers of people estimated to be eligible for 'evacuation': a total of 11 million people. This number did not only include people from the countries that were at that moment under German occupation, but also other European countries like Great Britain, Ireland, Spain, Portugal, Turkey and the Soviet Union. It was clearly a long-term project. On the meaning of 'evacuation', the protocol is rather explicit. It spells out that Europe was to be combed from West to East and all Jewish people would be fetched and transported to the East. Those fit for work would be put to work on the construction of the necessary infrastructure in the Eastern occupied territories. It was expected that the majority would quickly die of 'natural causes'.[15] The ones that survived had to be 'dealt with appropriately', because they might become the seedbed of future resistance. The fate of those 'unfit for work' is not mentioned, but not hard to guess. Logistically, this was a rather vague plan, but the chief intention is clear – the total physical annihilation of all European

11 Gerlach 1998, p. 773.

12 'LTI' stands for *Lingua Tertii Imperii*, a term coined by the linguist Victor Klemperer in a contemporary study of Nazi-speak: (1975) *LTI, Notizbuch eines Philologen*, Leipzig: Reclam.

13 G. Deschner (1977) *Reinhard Heydrich, Statthalter der totalen Macht*, Esslingen am Neckar: Bechtle, p. 194.

14 Roseman 2003, p. 31. The plan hinged on the use of the British merchant marine for transportation. Obviously, this participation was ruled out by the war.

15 A statistic in the protocol indicating that a large part of the target group had no experience of manual labour, underpinned the plausibility of the effectiveness of these 'natural causes'.

Jews. The protocol does not mention any reaction to this principle, let alone any objection.

**Agenda: range of victims**

The topic that was however intensively discussed during the meeting was the question of who was to be included in the 'evacuation'. The discussion was focussed on borderline cases, i.e. people who were partly Jewish (*Mischlinge*) and mixed marriages (*Mischehen*). These were categories that the Nazi regime was used to handle with care. It was feared that a radical approach towards these groups would undermine public support for the measures against the Jews. We encounter here a social mechanism that the sociologist Zygmunt Bauman has pointed out and analysed, that in Germany the measures against the Jews were generally supported by the public, but at the same time the public demanded that exceptions were made in particular cases – when it concerned a neighbour, friend, colleague, war veteran etc.[16] Hitler is known to have feared (and privately loathed) these reactions. Therefore, until the meeting, the *Mischlinge* had evaded persecution, more or less. During the meeting, however, Heydrich came up with a drastic proposal – half-Jews were in the context of the Final Solution to be treated as Jews (with some exceptions), while people who were one-quarter Jewish would not be included in the operation (also with some exceptions). These proposals were met in the meeting with practical objections from the participants. The ensuing discussion did not end in any definite conclusions. It is noteworthy also that the most prominent lawyer of the group, Wilhelm Stuckart (State Secretary of the Ministry of the Interior and co-author of the Nuremberg race laws), did not use any legal argument in the discussion. He allegedly only objected that the administrative implementation of the proposals would be very difficult. He suggested forced sterilization for these categories and to declare all mixed marriages dissolved by force of law.[17]

The meeting appears to have been a satisfactory result for an ambitious man like Heydrich: he had officially become the chief coordinator of an unheard-of, gigantic and ideologically 'necessary' operation and his radical proposals concerning the border-line cases had only been met with practical objections. Also later, no definite decisions were made concerning these groups,

16 Z. Bauman (1989) *Modernity and the Holocaust*, Oxford: Polity Press, p. 184 ff.

17 Roseman 2003, p. 142 ff. After the war he stated that he had proposed sterilization to sidetrack the decision making: he knew that sterilization at the time was a measure that could not be executed.

because Hitler feared the reaction on the 'home front'. This thwarted any further 'initiatives' in the matter.[18]

## 3. Elite of the State

### The lawyers

The question about the number of lawyers present at the meeting can be easily resolved by some browsing on the Internet.[19] Indeed, not all, but still the majority, were lawyers, i.e. people with academic legal training. Of the fifteen men participating in the meeting (thus excluding the note-taker), six were lawyers with a doctorate (*Dr.jur.*): Freisler of the Ministry of Justice, Stuckart of the Ministry of the Interior, Bühler of the *Generalgouvernement* (Ministry for Occupied Eastern Poland), Klopfer of the Party Chancellery, Lange and Schöngarth of the RSHA. Kritzinger of the Reich Chancellery and Neumann of the Four-Year Plan had studied law without gaining a doctorate. Meyer of the Occupied Eastern Territories (mainly the Baltic States) studied law and economics and had a PhD in political science. One can say that the level of legal expertise ran high in this group.

This begs the second question: why were there so many lawyers present? The answer can be inferred from the qualifications of those sitting at the table in Wannsee. This kind of meeting was a congregation of *Staatssekretäre* (Minister's deputies), the highest remaining body of government since Hitler discarded cabinet meetings in 1937.[20] To be sure, not all present were *Staatssekretäre* (some participants of the RSHA clearly were not), but most could speak for their Ministry. They belonged to the top-bureaucrats of the Reich.

As the sociologist Ralf Dahrendorf pointed out long ago, during the first half of the twentieth century almost three-quarters of the highest positions in the civil service of the German national state were occupied by lawyers.[21] He called this condition of the German State bureaucracy: a monopoly of lawyers (*Juristenmonopol*). This means that the density of lawyers in this group was normal or maybe even modest.

18 Gerlach 1998, p. 802; Roseman 2003, p. 147; H.G. Adler (1974) *Der Verwaltete Mensch* [Administrated Man], Tübingen: Mohr, p. 202 ff.

19 See short biographies on: http:de.wikipedia.org/wiki/; also on website mentioned in footnote 2.

20 A.J. Kay (2006) 'Germany's Staatssekretäre, Mass Starvation and the Meeting of 2 May 1941', *Journal of Contemporary History* 41 (4), p. 688.

21 R. Dahrendorf (1965) *Gesellschaft und Demokratie in Deutschland* [Society and Democracy in Germany], München: Piper, p. 260 ff.

**The SS: a band of lawyers?**

It is easy to overlook the presence of lawyers at Wannsee because of the prominent presence of the SS in the meeting, an organization one tends to associate with thugs and not with academics.[22] However, evidently these qualities are not mutually exclusive. The officer echelons of the SS were riddled with highly educated people and a large part of these were lawyers.

Gunnar Boehnert has researched the number of academics joining the SS during the years 1925-1939 and concluded that 30% of the SS officers had completed a university education and a good one-third of those were lawyers.[23] His data also show that most lawyers joined directly after the Nazis seized power in 1933, a general pattern called the '*Academiker* rush'. Of the full-time SS officers, many were recent graduates from law school and typically worked in the security apparatus, the RSHA.[24] Lawyers were apparently willing to join the club to make a career and the SS had a longstanding policy to attract academics into the officer ranks. When setting up his RSHA, Heydrich had taken the British Secret Service, with its well-educated staff, as his chief model.[25] Also the head of the legal department of the RSHA, Werner Best (we will hear more of him shortly), was a strong supporter of lawyers joining the ranks of SS officers.[26]

Of the six full-time SS officers present at the Wannsee meeting, only Schöngarth and Lange had a law degree and worked in 'security', as leaders of police death squads (*Einsatzgruppen*) operating in the Eastern Territories. But they were not the only SS members with a law degree. Another practice that the SS leadership developed was to incorporate a selection of aristocrats and high-ranking civil servants into the *Allgemeine SS*, as part-time SS members.

22 Six participants of the Wannsee meeting belonged to the regular SS. Chairman Heydrich (Chief of the RSHA/General) and Secretary Eichmann (RSHA, Dept. IVB-Jewish Matters/ Lieutenant-Colonel) were in full-time SS service and they were accompanied at the meeting by fellow RSHA staff: Müller (Head of Dept. IV-Gestapo/Lieutenant-General), and two 'experts' from the *Einsatzgruppen* Schöngarth (Security Police-SD/Brigadier-General) and Lange (Security Police-SD/Major). Hofmann was, like Heydrich, serving directly under Himmler (as Chief of the Race and Relocation Dept./Lieutenant-General).

23 G.C. Boehnert (1981) 'The Jurists in the SS-Führerkorps 1925-1939', in: G. Hirschfeld & L. Kettenacker (eds), *Der 'Führerstaat': Mythos und Realität* [The Fuhrer State: myth and reality], Stuttgart: Ernst Klett, p. 362.

24 This is the 'civil' branch of the SS (*Allgemeine SS*) as opposed to the military branch (*Waffen SS*).

25 Deschner 1977, p. 58 ff.

26 Disagreement about this very point with Heydrich became his undoing in the RSHA. He left, eventually to become Plenipotentiary (*Reichsbevollmächtigte*) of Denmark, cf. U. Herbert (1996) *Best. Biographische Studien über Radikalismus, Weltanschauung und Vernunft 1903-1989* [Best. Biographic studies on radicalism, worldview and reason], Bonn: Dietz, p. 228 ff.

They kept their normal jobs, while their membership had a largely representative function (the privilege to wear the uniform at official occasions). Apart from this, they performed some weekend exercises and may have functioned as liaison and/or spies for the SS.[27] Also some of the Wannsee lawyers were connected to the SS in this way: Klopfer (joined in 1935), Neumann (in 1934), and Stuckart (in 1936).[28] Thus, of the nine SS-members present, five were lawyers.

## 4. The influence of legal education

### Legal positivism?

The start of the Holocaust was not decided at the Wannsee meeting, but it was crucial in its execution. All braches of government were bound to support its implementation under the leadership of the RSHA. All the participants in the meeting knew what the objectives of the 'Final Solution' were and supported them. One wonders how the lawyers among them could square this unprecedented mass murder with their legal training? This is of course a somewhat loaded question. It implies that something might have been instilled in law students during their studies that would be a barrier to participation in the planning of mass murder. Natural law elements could provide that barrier, like universal human rights. But we have to realize that the modern human rights movement was a reaction to the Holocaust. During a large part of the twentieth century, universalism had to pay second fiddle to nationalism. It largely continued the nineteenth-century cult of the nation state and of the law posited by that state.

Interestingly, after the war, it was the doctrine of legal positivism that was blamed for the behaviour of the German lawyers in the Third Reich. The famous criminal law professor Gustav Radbruch (robbed of his chair by the Nazis because of his leftist sympathies) suggested that this conception of law made the lawyers defenceless against legal injustice.[29] That is how the Nuremberg racial legislation could pass as law, while these laws were clearly in conflict with substantive principles of justice, in particular with the principle of equality. He proposed to remedy this by reintroducing substantive criteria for valid law.

Is it likely that the Wannsee lawyers had become indoctrinated with legal positivism during their studies? Most of them studied during the 1920s (only Kritzinger and Neumann studied law before the First World War). Was legal

27 Boehnert 1981, p. 364.

28 They were appointed to high ranks: Klopfer and Neumann were Brigadier-General at the time of the Wannsee meeting. Stuckart must have had a similar rank at the time. See: de.wikipedia.org/wiki/.

29 G. Radbruch (1946) 'Gesetzliches Unrecht und übergestzliches Recht' [Legal injustice and meta-legal justice], *Süddeutsche Juristen-Zeitung,* 2, p. 131-135.

positivism the general standard in the law schools of that period? The magnum opus of the legal historian Michael Stolleis on the history of German public law sketches a different legal-theoretical landscape of the period.[30] In these turbulent years, apolitical and ahistorical legal positivism (the dominant position during the Imperial period) had gradually become a minority position, opposed on the one hand by the 'pure legal science' of the Vienna School around Hans Kelsen, and on the other hand by a politicizing and historizing 'anti-positivist' movement.

In this context Radbruch's hypothesis does not appear very convincing. A number of the Wannsee lawyers were early NSDAP members: Schöngarth (1922), Stuckart (1923), Freisler (1925) and Meyer (1928). The rest had joined the party in 1933, when the Nazis came to power.[31] That looks like opportunism, but they also give the impression of having been ardent Nazis before joining the party. This means that if they had any interest in legal theory during their studies, they would have felt drawn towards legal theory that took a critical stance towards the political scapegoat of the era, the Weimar Republic. According to Stolleis, during the 1920s a deep distaste for the Republic was widely shared among lawyers, but it was expressed most strongly by the 'anti-positivist' movement. This was a mixed batch of theorists, with a strong presence of nationalists. They rejected the parliamentary democracy of the Republic, with its party politics that weakened the state; they scorned the liberal *Rechtsstaat* with its emphasis on individual rights; and hated the peace treaty of Versailles – its injustice revealed the truth about international law: that it equals power. The nationalists propagated order, unity and a strong state. Also the NSDAP counted legal theorists among its party members, some of whom were hammering out legal theory that could be linked to the Party programme. One of them was Werner Best, later to become Heydrich's deputy at the RSHA.

**An early example: the nationalist legal theory of Werner Best**

Werner Best (born 1903) was until 1940 the director of *Amt 1 – Verwaltung und Recht* (Administration and Law) of the RSHA and well respected in academic circles as a legal theorist. In 1930 (the year he joined the NSDAP), Best published a paper titled '*Der Krieg und das Recht*' ('War and Law').[32] In this publication (typically under the editorship of Ernst Jünger) he presented an

30 M. Stolleis (1999) *Geschichte des öffentliches Rechts in Deutschland* [History of administrative law in Germany], Vol. 3, 1914-1945*,* München: Beck, p. 153 ff.

31 Except Kritzinger who only joined the party in 1938.

32 In: E. Jünger (ed.), *Krieg und Krieger* [War and warrior], Berlin: Junker und Dünnhaupt, p. 137-161.

analysis of contemporary international law. In his view, the peace treaties and other international agreements of and after 1918 (like those founding the League of Nations) were based on false presuppositions. These came in two versions.

The first one he called the 'utopian-rationalist' theory. This theory stated that war is essentially in conflict with human nature. Therefore war can and has to be suppressed to create a legal condition that is in accord with human nature. Multilateral treaties that prevent war, because they enable the imposition of sanctions on states that violate the peace treaties, can do this. The second theory he called the 'moral-idealistic' position. It does not take its cue from human nature, but from the idea that peace should be preserved as a valuable condition, although that may be hard to realise. Individual states must try to preserve peace. International treaties can be instruments serving this purpose, but war stands outside this legal order (aggressive states are not subject to international sanctions).

His own (third) position was called the 'heroic-realist' approach. The other two approaches reject the idea that war is a natural and unchangeable fact of life. The 'new nationalism' however accepts this reality and also does not try to change it. Struggle and war have to be considered and accepted as parts of life itself. There is no law that stands above struggle: it is implicated in it. Essentially law is a marker of the relationship between conflicting parties and the starting point for the next struggle. That is at least the situation in international law. International legal order only reflects the power relations between nations at the conclusion of the last war. International treaties are to be considered as weapons and methods of struggle between rivals. According to Best, this line of reasoning is also valid for national law. In his conception, in legal order there is no place for absolute legal elements like universal human rights. Struggle and its outcome are the foundation of morality. Law is power.

**The road to Wannsee**

We can conclude that it was not positivism that had a firm hold over the law students of the generations of the 1920s. 'Anti-positivist' positions were much more in fashion. But these legal theories, even those like Best's (though ominous in its implications) did not imply pleas for genocide. That was beyond the horizon as yet. It would take more than a theory to implicate the Wannsee lawyers in the Final Solution.

A first necessary condition was created when Hitler embarked on his road to dictatorship in 1933. He made haste to dismantle the *Rechtsstaat*, initially promising that this would be a temporary measure. But the *Führerstaat* he subsequently built was to stay for more than a decade, considered as a necessity for the war that would be inevitable. In the new political order individual citi-

zens were transformed into members of the German 'People' (*Volk*), their fundamental rights were replaced by duties of membership. The *Führerbefehl* (secret or otherwise) became the superior legal foundation for all public action. Legal niceties (like following the law) that stood in the way of effective dictatorship were not tolerated.[33] Best had nicely fathomed the attitude of the Nazis towards law and lawyers. They were to be the willing instruments of the *Führer*'s will.

A second necessary condition was the introduction after 1933 of an innocent sounding legal vocabulary, which was essentially racist.[34] It developed around the concept of *Volk*. This quasi-scientific Neo-Darwinist notion was meant to separate the members of the German *Volk* from the non-Germans (*Volksfremde*). This last group included those not of German 'blood' and those opposed to the interests of the German *Volk*. In practice this created a dual state, where part of the nation effectively became outlaws. Jews were gradually stripped of their political and civil rights and political opponents were put in prison and concentration camps. These actions also transformed the character of the German legal community. Gradually, Jewish lawyers as well as non-Jewish lawyers who opposed the regime lost their jobs and disappeared from public life. The remaining lawyers either sympathised with or acquiesced in the new Nazi regime. The regime could offer opportunities for followers and many academics joined the Nazi ranks. The lawyers present at the Wannsee meeting had made a stunning career in the new Nazi state and were well versed in (or even – like Stuckart – contributed to) its racist legal vocabulary.

But even these conditions, although necessary conditions for the involvement of lawyers in the Holocaust, were not sufficient conditions for its occurrence. As we have mentioned, before the outbreak of the war all kinds of methods to 'solve the Jewish question' were contemplated and used. It was the outbreak of the war (and especially America's participation in it) that radicalised the plans for the Final Solution. The Wannsee-lawyers were among the people who had taken it upon them to fulfil this horrid 'mission' in an administrative or practical capacity. Clearly, no substantive remains of their legal education stood in the way of this choice.[35]

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33 I. Müller (1999) *Hitler's Justice: The Courts of the Third Reich*, Harvard University Press, p. 219 ff.

34 See for an extensive study of this terminology: D. Maier (2013) '*Non-Germans' under the Third Reich,* Lubbock: Texas Tech University Press.

35 Stolleis 1999, Ch. 10. Few of the participants of the Wannsee meeting (typically in their early forties at the time) lived into old age. Some participants (e.g. Heydrich, Freisler, Lange, Meyer) died before the end of the war. Others (e.g. Schöngarth, Bühler) were tried and executed after the end of the war. Stuckart, Kritzinger and Neumann died a →

## 5. Concluding remarks

The presence of a considerable number of lawyers at Wannsee was indeed accurate and not abnormal for this kind of gremium. At the time of the Wannsee meeting, their legal education had become utterly irrelevant as a factor in guiding these lawyers. They had become pole bearers of the new political order and committed to serve it and its leader. Hitler expected that his officials obeyed him without hesitation.[36]

Of law, lawyers and the machinery of justice as such Hitler expected only two things. The first was to keep up appearances so that everything went on as normal. The shell of the organization of justice and legal practice was preserved. During the Holocaust, great care was taken to maintain some form of legality. The Nuremberg race laws were drafted with normal craftsmanship. Even in the Wannsee protocol it is mentioned (concerning an instruction to Heydrich) that: 'The mission was to clear the German living space in a *legal* manner from Jews' (*my italics*). This had nothing to do with respect for the law. Legality was considered an instrument to soothe the German public and to make the victims defenceless. The second task was to terrorise dissidents and 'antisocial' elements into submission.[37] Both demands originated from one source – Hitler's obsessive fear for the old First World War spectre of a collapsing home front during wartime.[38]

In this atmosphere, it is unlikely that the lawyers at Wannsee had professional misgivings about the subject of the meeting. The demands of the Nazi leadership on law and lawyers and the willingness of the latter to oblige were

few years later. Klopfer outlived them all. He became an attorney-at-law in Ulm and died in 1987.

36 For example, on 14 March 1942, a criminal court in Oldenburg declared Ewald Schlitt guilty of assault and battery of his wife, who died from her injuries. The court did not sentence him to death, because he was judged to have acted during an uncontrollable emotional outburst. When Hitler heard of this sentence, he became extremely enraged, demanding a death sentence out of hand. He made it clear to Acting Minister of Justice Schlegelberger that such leniency of the judiciary was intolerable and had to be corrected (as it later was). Schlegelberger did his utmost to instruct the judiciary accordingly, but Hitler was not satisfied. A fortnight later he publicly scolded the judiciary during a special meeting of the *Reichstag*. A few months later Schlegelberger was dismissed and replaced by a more understanding successor. See: N. Wachsmann (2004) *Hitler's Prisons. Legal Terror in Nazi Germany*. New Haven, CT: Yale University Press, p. 196 ff; also E. Nathans (2000) 'Legal Order as Motive and Mask: Franz Schlegelberger and the Nazi Administration of Justice', *Law and History Review* 18 (2), p. 297.

37 Cf. Wachsmann 2004, passim.

38 The so-called 'stab-in-the-back' myth. This story was largely a fabrication of the defeated German army leadership. See e.g. S. Haffner (2002) *Der Verrat: Deutschland 1918-1919* [Betrayal: Germany 1918-1919], Berlin: Verlag 1900.

rooted in a form of 'legal nihilism', the conviction that law is essentially irrelevant.[39]

39 The term 'legal nihilism' was reanimated in 2008 by President Medvedev in a critical reflection on respect for law in Russia. See: www.ft.com.