

Judge Dennis Davis | Jewish Lawyers of Weimar

- [Wendy] So great to have you back, so.

- Thanks Wendy.

- [Wendy] All good there?

- Thank you very much and thanks again for inviting me. This is a great-

- Yeah, it's great.

- You will get mentioned in this lecture, so you'll better listen to the recording.

- [Wendy] I'm listening.

- Okay.

- I'm listening. Okay, I'm going to hand over to you and yeah, thanks Moe, bye.

- Well, thanks to Wendy and thanks to indefatigable Judi, who are absolutely wonderful in helping one, I'm going to be talking about two extraordinary lawyers in a few minutes, but perhaps let me start. The topic really is about the political lawyer. And we could have many conversations about what is meant by a political lawyer. And many of you who come from South Africa will know exactly what I'm talking about, and I'll mention something in a moment about that. But what I want to talk about tonight are two lawyers who in a sense engaged with the politics of the time in the Weimar Republic in a courageous and principled way, as lawyers, not as politicians so much, but as lawyers.

And we'll get to them. But if you are South African like me, it would not be surprising to actually know that so many lawyers who were Jewish were involved in what might be called the attempt to preserve the rule of law, legality, and the fundamental normative values of illegal structure in South Africa. Very recently, the Jewish report in its achievers award, apart from the fact that it awarded very, I thought so thoughtfully, an award to our own Wendy, for all the extraordinary work that she's done, also made an award and to Wendy, for that, so richly deserved, but they also made an award to an equally richly deserved person, Sydney Kentridge.

Sir Sidney Kentridge, who I suppose I would without fear of contradiction say in my lifetime was the greatest South African lawyer. Certainly the person that for many of us as we started out in our legal careers, we would love to have been Sydney Kentridge when we grew up. And Sydney Kentridge wasn't the only great lawyer who of course, pursued as it were, legality in a apartheid-type society where the fundamental idea was to really destroy the values of the rule of law. There were many others and we could talk about that at some other session, but just to

mention a few, there was Isie Maisels who led the treason trial, an extraordinary lawyer in his own right.

There was Dennis Cooney, there was David Sager, there were attorneys, Raymond Tucker, Geoff Budlender and others. I'm only mentioning a few, so it's not surprising, therefore friends that in Germany, a similar pattern was exhibited. And of course, what occurred in Germany was in 1871, when finally Jews were allowed to assume some basis of being citizens and therefore to have free access to various positions. Although they found it extremely difficult to join law firms, which causes a pattern throughout the world, given levels of antisemitism, not just in Germany at the time, they did find a way to practise law.

And it is interesting that by 1933, to take Berlin for an example, more than half of the 3,400 lawyers were of Jewish origin. And it is unsurprising, therefore, given the fact that so many of them were extraordinarily prominent and by the way, and many interestingly were women at the same time, but there were many who pursued very courageously, political commitments for the principles of legality, Alfred Apfel, Kurt Rosenberg, Rudolf Olden to name, but a few. There are of course, the great legal theorists, Otto Kirchheimer, Franz Neumann and Hans Kelsen, an Austrian who came to Germany and who's been mentioned in Trudy's luminous lectures on the period. But the persons, the people that I want to concentrate on because it seems to me that in the duration of one hour lecture, you can't do justice to all of this.

And I want to drill down, if I may, and even then I don't think I'm going to do justice to the memories of Hans Litten and Hermann Heller, but it's about these two men that I want to concentrate tonight because I think they've got a lot to tell us, an enormous amount to tell us. I'd want to argue for the contemporary period. So let me begin then with Hans Litten. He was born to a Jewish father, a Christian mother. They were certainly German nationalists. His father, as I say, was Jewish, was the Dean of the law school at Konigsberg University.

And although interesting enough, he was raised as a Christian and his teenager, he turned to Judaism and became quite an extraordinary student, both in relation to linguistics, Arab, Sanskrit, and Chinese. But eventually, as I suppose any good Jewish parents had want, you either do medicine or you do law, and he did law. And in 1928, he entered service as a lawyer at the Court of Appeal in Berlin. And much of his work was providing legal assistance to the worker's relief, which were to defend workers. He defended workers in conflict, particularly with the National Socialists. Why he becomes particularly extraordinary for our purposes? Is what happened in 1931, when he summoned Adolf Hitler, in 1931.

It is true that Hitler only became the Chancellor at '33, but '31 Hitler was already on the up and he summons him before a court of law and exposed him to most weathering cross-examination. Now you don't have to only take my word for this, I'm now going to show you a clip. It's about seven minutes, I hope you bear with it because it's very, very interesting about Litten, the background and the background to this case.

*Video clip plays.*

- [Narrator] 1918, after years of bloodshed, the great war has come to an end. The German empire signed an arm with the allies on November 11th, finally marking piece. 1919. On August 11th, the Weimar constitution is enacted resulting in all German nobles to give up their monarchical titles and effectively declaring all Germans to be equal in the eyes of the law. This era of Germany would come to be known as the Weimar Republic. 1920. The National Socialist German Workers Party is formed. The party's foundation is deeply rooted in anti-communist ideology as well as profoundly nationalistic views. They would later be dubbed as the Nazis. 1921. A young gifted orator named Adolph Hitler, fueled by his frustration with the downfall of Germany's economy and his long-held anti-Semitism rises through the party's ranks.

His speeches attract large crowds as he preaches its rhetoric about his perception of the Jews as a menace that poses a national threat to the German people. On the 26th of July, Hitler becomes chairman of the party. For the next 10 years, Hitler's Nazi party continues to grow, as do their extreme beliefs. They quickly become the most dominant party in Germany, establishing an iron rule over the country with the formation of the Sturm Abeilung or the SA. The SA serves as an essential propaganda machine for the Nazi party, enforcing their agenda by brutalising those who do not align with the party politically and ideologically. On account of their uniforms, these paramilitary units earned the nickname the "Brown Shirts." Workers attending a meeting at the Eden...

Months after the Eden Dance Palace attack a court is called into session to try the SA members who perpetrated the attack. The man hired to represent the plaintiff of the injured workers is a young Hans Achim Litten. However, Litten doesn't want to just stop at prosecuting the SA, thus to take down the entire Nazi party. Hans Litten was born in 1903 to middle-class parents, Friedrich and Irmgard Litton. As a child, Hans was a brilliant student who found himself excelling far beyond its peers.

- [Irmgard] Striking was his fanatical love of truth, his remembrance of the given word, and his absolute insistence that a promise both given must be honoured. Besides his early and pronounced interest in science and art, he had two very marked characteristics: his great kindness and affection for the poor people, love of animals.

- [Narrator] And after the encouragement of his father, he pursued a career in law, vow to protect those who are being victimised. Under the Nazi party was af... 1929.

- [Narrator] A royal commando is a military unit organised for political purpose such as overthrowing a government. Litten was accusing Hitler of treason.

- [Narrator] Joseph Goebbels was Hitler's minister of propaganda. His words spoke for the Nazi party.

- [Narrator] Journal is also known as the Nazi-Gozi It called for revolution through violent action setting the enemies of Germany as Jews, Marxism, the Parliament and democracy. The journal was proof that the Nazis would ignore civility and the law in order to achieve their goals.

- [Narrator] Following this tantrum-like outburst, the judge ordered Litten to cease the questioning of Hitler. However, the damage had already been done. Hans had exposed a vulnerability in Hitler that had never been seen before. Adolph Hitler wasn't untouchable. After the Eden Dance Palace trial, the Nazis would seek out any opportunity to silence the man who had so publicly made a fool of their leader. They would look for any chance to prevent Litten from impeding their fascist organisation any further, including publishing propaganda, encouraging followers to put a stop to his dirty work and attacking him on multiple occasions. Litten was given the opportunity to flee the country to a house in Czechoslovakia owned by his family. However, Litten remained in Germany saying, "The millions of workers can't get out, so I must stay here as well." On February 28th, 1933, as the Nazis burned down, Germany's parliament known as a Reichstag.

Hans is arrested along with thousands of others who had also made themselves targets by standing against the Nazi party. A while after his arrest, Litten was sentenced to a concentration camp. In the camp, he was beaten for information regarding his clients, but Litten refused to betray those he had protected. He endured torture not only physically, but psychologically as well, such as when guards would point a gun at him and promise to execute him only to fire blank and laugh until the next day when they would repeat the process. Litten's mother managed to visit him in the camp on a few occasions.

- [Irmgard] He looked dreadful; his eyes were like those of a hunted animal, and there were bright red streaks round his throat, which were barely concealed by a muffler.

- [Narrator] For the next five years, Litten was moved from concentration camp to concentration camp. No matter where he was, Litten still managed to care for his fellow man. He would share what little food he was given with the other prisoners and would recite quotes from his favourite authors via his photographic memory to take everyone's mind off the horrors surrounding him. Those who had survived the camps often repeated that Hans Litten was one of the greatest and most noble men that they had ever had the privilege to know. 1938. In the early hours of February 5th, Hans Litten-

*Video clip ends.*

- We can stop it now, if we can, I'll come back to this. Thank you. Sorry, people. I'm sorry for those of you who weren't hearing the sound as accurately as I would've liked, but I hope you got the gist of what I was saying or what it was being said. So let me just recap and I want to kind of focus attention if I may, on what was an unbelievably remarkable trial. It's as I said, it's May 31 and in this particular case, which was called the Tanzpalast Eden trial, two workers had been stabbed by four SA men.

You may recall in the lectures that Trudy go, she spoke about the SA and under Ernst Rom. And Litten's actually, who's acting for some of these workers, summons Hitler, subpoenaed him to court and cross-examined him for over three hours. It's an extraordinary thing when you think about it. And the point that he was trying to make throughout his cross-examination was that Hitler was posing as a conventional politician to middle-class workers and maintaining that the Nazi party was a legal party.

And what Litten did under cross-examination was to expose the lie in a very fundamental way that these people were barbarians, that they were thugs, that they had absolutely no recourse to legality or commitment thereto. And if you think about it, here's this young man, you know in his, basically in his 30s, standing up against unquestionably one of the most powerful men in the world at that particular point in time and cross-examined him for over three hours, and exposing the lies of the Nazi party, which is the most extraordinary act. And perhaps for those who didn't able to listen to it because of course, that's Hitler's real voice there, which is why this is such a remarkable clip in its own way.

Let me just at least put on the screen for you, Judi will help me the actual text of the cross-examination and we can read a little bit of it together to understand just the bravery of this lawyer. So he says, "Did you know that in the circles of the SA there is a talk of a special rollkommando?" Which of course with these thugs of the SA, who essentially went round and beat to people. "No I haven't heard anything about a rollkommando." "You said there will be no violent acts on the part of the National Party, wasn't there the slogan by Goebbels, 'one must pound the adversary to a pulp?'"

And then of course, Hitler says, "This is to be understood as 'one must dispatch and destroy opposing organisations.' Let me pause there for a moment. It is extraordinary how dictators and those who seek as it were to use extra judicial killings always when they caught in this way say, no, no, no, no. What we really mean is politically we were going to pound the adversity to a pulp. So then the question is, "Did Hitler, as he named Goebbels 'Reichsleiter' of Public Opinion, know of the passage from his book, where Goebbels declares that fear of the coup d'etat cannot be permitted, et cetera..." Hitler, "I can't testify no longer testify under oath if I knew Goebbel's book at the time.

The theme is absolutely of no account to the Party, as the booklet doesn't bear the Party emblem, it's also not officially sanctioned by the Party." So you can see, Hitler trying to distance himself. "Must it not be measured," says Litten 'cause he's very, very tenacious against Goebbels example to waken the notion in the Party, that the legality scheme is not far away, if you neither reprimand nor shut out a man like Goebbels, rather straight away made him head of of Nazi propaganda?" "The entire party," says Hitler, stands on legal ground.

Legal ground, let me emphasise that again, this is crucial in 1931, that's their tactic. 'Cause as Trudy indicated to you in the lecture, as that she's been giving, they came to pass through the

ballots and that's what they want to show. Has her Goebbels prohibited the further dissemination? I don't know. Then hours later after lunch, is it correct that Goebbels' revolutionary journal, et cetera, has now been taken over Party it has a circulation of 120,000. And then the presiding judge say, "Hitler, you testified this morning that Goebbels' work is not official Party material." And then Hitler, "And it isn't, either. A publications official Party organ when it bears the emblem of the Party."

Now he's red faced, "How dare you say, Herr attorney, that it's an invitation to illegality? That is a statement without proof!" "How is it possible," says Litten. he's not giving up, "that the party publishing house takes over a journal that stands in stark contrast to the Party line?" And then the presiding judge to the course of disgrace of the Via Mar judiciary shuts the cross-examination down. It's an extraordinary act of cross-examination of tenacity and it rattles, it rattles Hitler to such an extent that he never ever forgot about Litten. And in fact, Litten was excoriated in the Nazi press, he was called the Red Death Defender.

And indeed, at various points in time, Goebbels said, "The Jewish lawyer Litten has made himself guilty an obvious deception to the court through his irresponsible claims. I leave that judgement of this to the public. I permit myself to publish this letter in the press as soon as it's in the hands of the court. So they really did turn on Litten in an extraordinary way. You'll see there in 1932, the Felseneck trial, that was basically the last case that Hans Litten ever did. Again, he was defending a group of workers against Nazis who had set upon them at a brawl and he began to cross-examine in exactly the same way as I've indicated this to you now.

And what actually then happens is that the prosecutors and the judge seek to get him removed from the trial. They expel him as counsel and the matter goes up to higher court where in fact, the entire decision is set aside. But shortly thereafter when the matter is remitted back to the court, yet again, he's now again accused of influencing a witness. And this time the Supreme Court actually does not come to Litten's defence. Significantly, many Berlin lawyers, including those who didn't like Litten, actually protested and demand that change to the law in order to prevent the curtailment of the fundamental rights of defence attorneys.

But that never ever happened. And that was the last case Litten's did. There's a book about this if you wish, and I'm going to also just introduce you to the BBC documentary in a second. It's well worth watching, but there's a book by Benjamin Carter Hett called "The Man Who Crossed Hitler," published in 2008. I want to just read you, if I may, one short passage of this particular book. We need to... This is after the case that you've just seen, this cross-examination of Hitler. We need to imagine how Hitler must have felt at this moment. That is at the cross-examination.

"This was a man who liked to call himself the leader of a movement of millions surrounded by a cult that revered him as a virtual messiah, come to deliver Germany from defeat and humiliation. He had triumphed in the elections of the previous fall and now presided over the fastest growing political party in Germany's volatile political environment. He was being pushed to the war by irritating the persistent young lawyer who happened to be Jewish. For all Hitler's inner circle

knew the future of their movement might hang on what Hitler said in this bill in court."

Crossing Hitler, the courtroom, Litten's question forced him to face the contradictions that lay in his protestations that the Nazi party adhere to legality. To survive the revolutionary spirits of the SA could arouse the storm to suspicions never far below the surface that Hitler would betrayed them someday, it would play into the hands of the Walter Stennes sanction, that was a faction of the SA who actually resisting Hitler at that time. Hitler was not entirely hegemonic within these thugs and possibly spent to the National Socialist Movement.

On the other hand, embracing illegality would jeopardise the electoral strategy that Hitler followed with such success since the failure of the 1923 coup. Hitler tried evasion rhetoric, extravagant rage, nothing had worked. And now whilst he might have been wondering how to feel at Litten's latest questions that judge saved him, this has nothing to do with the trial. It was Litten's turn then for outrage. I can only say the court now, I must ask you said the judge, not to criticise the court and refuse to allow him to continue. It is an extraordinary act if you think about it, of forensic legal bravery.

And it was vitally important because for those who attended the trial and for those who understood what the implications were, the idea that you could attack Hitler's commitment to legality went to the fundamental enterprise of the Nazis at that particular point in time. Not for nothing therefore, in 2011, the story of Hans Litten was filmed by the BBC. The Man Who Crossed Hitler based on the book was actually played out on the BBC, the role of Hans Litten played by Ed Stoppard and it actually can be seen, the whole thing can be seen simply on YouTube. And I invite you if you wish to watch it, I'm just going to give you the trailer just to wet your appetite so you get a sense of this remarkable man.

*Video clip plays.*

- [Narrator] On May 8th, 1931, a sensational trial took place at the Berlin Central Criminal Court. Germany's fastest growing political movement. Two years before he came to power, Hitler was summoned to Berlin by a young Jewish lawyer called Hans Litten who forced him to account for the murderous violence of his followers in the city.

- What Germany requires is a revolution, which means a mental revolution, a spiritual rebirth.

- Who are you addressing?

- Looking on the task of cross-examining this extremely dangerous man at this point, probably the most dangerous man in the world.

- I believe the court can hear you quite comfortably. Not necessary to shout or harass.

- [Narrator] An extreme anti-Semite, a brilliant young Jew. It was Hitler's worst nightmare.

- This guy is my uncle, or was my uncle. It's so close and yet it's so miles away.

- [Narrator] At stake in that Berlin courtroom was Hitler's political future. His brutal methods, his totalitarian ambitions were all exposed by the young lawyer. The acquisition of total power can make a dictator's rise to power seem irresistible, it never is. And it wasn't for Hitler. This is the story of one brave man's attempt to stop it.

*Video clip ends.*

- So if you wish to watch this, which was quite extraordinary, there is the trailer of it. I'm going to come back to Hans Litten because there's more to say about him shortly. But I want to interpose talk about the other Jewish lawyer who is equally remarkable. Hermann Heller. His dates are 1891 to 1933. He was Jewish, family had from the Austria-Hungarian empire, studied law in Germany and effectively was both an academic and a practising lawyer. Between 1920 and 1932, involves a number of youth movements.

He was involved in adult education and despite the customary anti-Semitic barriers, he had finally succoured himself academic post in Berlin in 1928 and Frankfurt in 1931. In March of 1933, he accepted Harold Laski's invitation to lecture in England. Events in Germany, including Nazi statute, which deprived him and other academics of their positions made a return to Germany perilous.

And unlike Litten, he did leave and didn't leave, he sensibly did and accepted a chair of law at the University of Madrid. Sadly, he died in 1933 and later, this extraordinary book called "The Theory of the State" was published in '34. To a large degree, Hermann Heller was forgotten by legal theorists and by legal scholars. And yet his role was very, very significant. And in order to show how significant it was, I need to introduce you to another character, a rabid anti-Semite whose legal work has become extremely important to right-wing groups in the world, in the recent past. I'm talking about constitutional lawyer and political theorists, Carl Schmitt.

1888 to 1985, like so many of these people who were significant ideological supporters of Hitler, Schmitt lasted long beyond the Second World War. And why I want to talk about Schmitt just because he was a Heller's opponent. Apart from being a rabid anti-Semite, he was actually the major legal ideologue of the Nazi regime. In fact, you cannot really understand much of the Nazi philosophy to the extent that it was it's politics without understanding the legal constitutional justification for it. In 1932, Schmitt wrote a book called "The Concept of the Political."

And what he basically said was, "A political community only exists if you have a distinction between friend and enemy who is in and who is out. And what matters in politics is whether some ideological project stands a chance to be successful, to have a group who are in as opposed to a group who are out." He also made a second major claim. Of course, I'm simplifying 'cause I could give many lectures on Schmitt and many people do including myself,



but not tonight. The second thing he claimed was that, "In effect, the sovereign, the leader is he who decides on the state of exception." What that means was this, that the person who has the power to ensure that when a state is in peril, who runs it, who in effect is then able to rise above the fray of partisan politics and represent the entire political community that is the central leader of that country.

And that is the central justification both for politics and law in the country. What is absolutely fascinating about this theory of Schmitt is if you look, if any of you read the New York Review of books, you'll be able to see that there was an article written just about a year or so ago called is "William Barr: The Carl Schmitt of our Time." So there is another article by that very, very astute political commentator for the Financial Times, Gideon Rachman within the last year, talking about Carl Schmitt being the fundamental legal theorist for right-wing projects right across the world.

And being essentially used more and more as a justification for why constitutional democracy should be assured. So he has remained a vitally important figure. And I mention this to you because I am going take you now to a case in 1932, one year after Hans Litten's case, another case which of similar importance. This was a case of Prussia versus the Reich. Now this is really important, it's 1932 and what happens is there is a clause in the Weimar Constitution, Article 48, which basically provides the president of the republic with the counter signature of the cabinet who is appointed by the president to effectively rule for 60 days even when they don't have the confidence of the Reichstag. Bear that in mind.

And what then occurs is that Prussia, which is the largest state within the Federation it is a stronghold of social democratic resistance to Hitler, to the conservative politics of Germany of the early '30s. And Von Papen, who again, was referred to comprehensively by Trudy in her lectures on this Von Papen now wants to prepare the way for insuring that the ban on on street demonstrations in Prussia, street demonstrations in Prussia, which ultimately were there to protect all sorts of politics, street demonstrations from the Nazis, that that should be lifted. And of course, the Prussian government was particularly anxious not to lift those bans because of the lethal violence that would take on the streets of Berlin, elsewhere.

And because the Prussian police were struggling to deal with it. So by lifting the ban and ensuring that in fact, street demonstrations by Nazis could occur in effect you lay the way for Hitler to ultimately come to power in a much easier way than otherwise would be the case. And that you were going to erode the social democratic power in Prussia, utterly remarkable. And so, as a result of which a case came before the Prussian Court and on the one side of the aisle as it were, was the Jewish legal theorist Hermann Heller and on the other side was Carl Schmitt. And it was a vital case because what Von Papen did was to invoke Article 48 of the Constitution to oust the Prussian government's powers, put the machinery of government in the president that is in Papen's hands, who would then allow for a lifting of a ban on street demonstrations of the Nazis and allow Hitler as it were increasing control over an authoritarian cabinet.

In short, what the idea of the invocation of Article 48 of the Prussian constitution was going to do was to let Von Papen run Prussia and essentially erode the influence that the social Democrats would have. That's why the case became so important. There's a wonderful book about this called "The Iron Kingdom" by the historian Christopher Clark, who refers to the court's decision as mealy-mouthed. Of course, it rejected Schmitt, it's true that in fact it had no jurisdiction to hear this matter. Schmitt had argued this was a political matter, courts have no interest in political matters, goodnight nurse.

And secondly, if it did have jurisdiction, it had no authority to second guess the executive as to whether a state of emergency existed and as to whether the president or the chancellor of Germany could not appropriately respond to that state of emergency. So it did that, but it also rejected the Prussian argument that there was no basis for the decree that it was invalid and that if it meant the end of Prussian government. And of course, what effectively they did in this compromise was to say, well, in relation to external relations with federal institutions, the Prussian government and authority, but internal affairs were now being transferred to Von Papen who immediately lifted the ban on street demonstrations and effectively this case, many historians regard as central to the destruction of any social democratic opposition to Hitler. It was a Heller who essentially had taken the case, it was Heller who had argued that in fact this was an incorrect decision.

And Heller's argument was remarkable for a number of reasons. And I want to offer just one to start with. What Heller said, and when I read this, I'm actually gobsmacked by how far advanced he was in terms of legal theory. What Heller said was that, "When you look at an article such as Article 48, you've got to be able to interpret it in terms of the idea of a constitution. And the idea of a constitution was effectively to ensure a system of legality and a system of governance for the states in Germany and the correct legal understanding of the presuppositions of the Constitution. The fundamental legal principle was that the legal and democratic accountability of the executive to parliament had to be preserved.

If you didn't do that, you didn't have a constitution. If you didn't do that, you didn't really have law. In short, what Heller was arguing in 1932 has become such a central argument in contemporary debate. And let me explain to you what I mean by that. Heller's argument back in '32 was to suggest this, that constitutions don't just get interpreted by the words themselves to take the modern parlance. This is not just a question of looking at the words of the founders of the Constitution and saying word A means this and word B means that 'cause that's what they intended. What you've got to ask yourself is what was the idea which was behind the constitution at the founder's past.

And when you do that and you ask yourself, what is the normative set of ideas which justifies the constitution, then you get to the correct legal result. So to take this case, what he was arguing was, if you look at the idea of the Weimar Constitution, it was to render the executive and indeed the legislature accountable to the population through proper elections to allow Von Papen to second guess the democratically elected legislature was to run foul of the very idea of

the constitution. And I want to suggest to you that Hellers theory in this particular regard is remarkably important in the present debates about whether we should preserve constitutional democracy. It's remarkably relevant to the debates that we've been raging both in Britain and America and in South Africa, to take three countries about what is the idea of law and what is the idea of a constitution. He lost that debate.

Had he won it, had he won, and had the court not been "mealy-mouthed" to quote Christopher Clark, effectively the ban on Nazi protests in Berlin and in Prussia would've stayed for a quite some while. And who knows what would've happened. And many feel that the acquiescence of the court to Von Papen's executive decree was a fundamental bloat, both the Weimar Republic and any preservation or possibility of preservation of democracy. So I want to argue that Heller was vitally important for that particular reason.

He was also remarkable because the theory at large, and let me, again, highlight this, I can't emphasise anymore that the key legal principle is that the idea of law is not just the ordinary positive laws, but the logical and ethical fundamental principles of law which underpinned, it's the idea of law to which we must have recourse when we ask ourselves whether in fact the executive is entitled to do what it does. It's the idea of law, which you would ask yourself when it comes to migrants, when it comes to questions of abortion, et cetera. This is a really modern theory being argued in the height of the Weimar Republic by an extraordinarily courageous Jewish lawyer. And he made one other point, and let me share this with you, it's an equally important point. Heller's idea of the Weimar Constitution was that the state did not provide basic social goods. Basic social goods of housing and medical care, and essentially a sufficient food for ordinary people, some form of social default position.

For those who were poor, you could not have a constitutional dispensation. In other words, if you let inequality and poverty become so rampant, you couldn't, he argued, have a kind of constitution that would be preserved during Weimar. Well, how important is that today? I ask historically. How much so in a world which is increasingly beset by levels of inequality and by increasing levels of poverty, result of COVID by authoritarian regimes around the world? By presidents refuse to accept clearly fair and free elections? By prime ministers who attack the judiciary when they're doing their job?

How important is it to ensure that effectively there is the legal system itself is seen to ensure that there's a basic bedrock of essential goods and services? It's a social democratic enterprise. But when you think about where we get in this inflexion point as a result of COVID, do we go one way to more austerity and to disregard of those at the bottom of the pile or do we regard them as sufficiently important citizens to deal with something about it? That's the debate which Heller introduced in the '30s and which seems to me, to be fundamentally equally important now.

So that's really why I regard Hermann Heller as a remarkable Weimar lawyer and why many, many years after his death in 1933, we realised that somewhere along the line, the theories which he developed then are still too modern for our world in the 21st century. I want to come

back, if I may, 'cause time is running to deal with Litten again. On the 28th of February 1933, shortly after the Reichstag fire, he was arrested. He was sent to Spandau Prison then to Brandenburg Jail and then to a forced labour camp in the Esterwegen, heavy physical labour and torture permanently damaged his health. While in custody, he made repeated attempts to commit suicide. In '34, he went to the Lichtenburg concentration camp where he worked in the camp library. And there he wrote works of his own about the middle high German artistry and history of literature.

In '37, he was transferred to Buchenwald concentration camp. And on the 17th of October 1937 to Dachau. He walked on crutches for his fellow inmates, he gave lectures on metaphysics on law and literature and art, and quoted passages many pages long from his extraordinary memory. All efforts to have him released, which especially his mother, who you heard quoted, devoted herself were in vain. On the 5th of February 1938, fellow inmates found him hanged in the latrine. But I want to play you something which is quite extraordinary before I finish up this evening, just this final clip, which I hope you'll watch.

*Video clip plays.*

- [Narrator] The 20th of April 1935 was Adolph Hitler's 46th birthday. An old Germany was expected to celebrate. Lichtenberg, the prisoners were each ordered to produce something lovely to commemorate the great day. Hans Litten's choice was lovely.

- All around them, there are the guards, you have to imagine SS men in black. And of course with guns, the prisoners are supposed to present something. What did Litten decide to do? He decided to read a poem called "Thoughts Are Free," Die Gedanken sind frei.

*Video clip ends.*

- It's an extraordinary reflection of a great man. And I feel to some extent, let me end by making three points. Firstly, I think that both Litten and Heller have a lot to offer. Litten was somebody who showed extraordinary courage, moral courage, political courage in using the law as best he could to expose breaches of illegality. It seemed to me that he gave his life for that because as I indicated in this lecture, he was never forgiven by Hitler and Goebbels and that's why he was sent to various concentration camps and died in '38. But the idea that a courageous lawyer could seek to hold power accountable to truth and to the law is an idea which we should hold onto. It's an idea which is fundamental to any constitutional system.

I know that in South Africa, even today, we're not out of the woods of the threat against constitutional democracy. And may certainly that is also true of other countries. Perhaps the lesson of the last little while in United States of America is how fragile democracy really is. And it requires, at least in part, lawyers of the courage of Hans Litten to be able to take these cases, notwithstanding the threat to themselves and to hold firm. It's a remarkable story. In relation to Hermann Heller, I think he teaches us two very fundamental points which come out of the

Prussia trial and come out of his writings.

Of course, out the Prussian case comes the same point as Litten, namely, try as best you can to curb breaches of illegality of authoritarianism, hold firm to the idea of law. But he developed a very sophisticated theory of law. So much so those of you are lawyers who know law may recognise that much of what Heller wrote about in the 1930s is not entirely dissimilar from the great legal philosopher Ronald Hawkin, who died not that long ago. And therefore, in a sense, Heller was a forerunner of that idea. The idea that you didn't just look at the literal words of the law, but you looked at the idea of the law.

And the fundamental point as well, that unless a legal system and a political system can provide essentially a default position for those at the bottom, those who marginalise, those who are poor, those who have nothing to lose, if we don't actually make the members of a political community, the legal system itself is placed in jeopardy as indeed with the case in Weimar and become susceptible to the kind of populists who roam the world today. I've given a number of lectures over this era, in this form, and of course, many, many over 40 odd years of teaching about law in all sorts of ways.

But let me say this, in conclusion, in memory of Hans Litten in particular, it's a privilege to talk. He's somebody who probably many of you did not know about. Although I was very surprised that some of you, when we spoke at the... Myself and David Pima at the Hitler trial did know he was. But to actually speak about him and what he did, and Heller for that matter, particularly Litten, is a privilege and an honour. It's not just a lecture, it's in memory of somebody who gave his life to an idea which was important and vital, and it clearly was a most remarkable human being as that moving poem right at the end illustrates. Thank you very much. Judi, I'm happy to take questions that I can't-

- [Judi] Thank you, Dennis. On the Q&A, the bottom, there's a couple of questions, but I can just ask-

- Yes, if you ask, yes, yes.

Q&A and Comments:

Q: So where can they see the film, "Litten versus Hitler?"

A: Judi, the film is actually on YouTube. The whole 59 minutes width, you can actually download from YouTube and it's worth watching. You know what? I'm surely tempted just to show that, it's probably would've been better than the lecturer, but you can, you can do that.

Q: Can you share a little bit about Rudolf Olden's involvement in the trial led by Hans Litten? It's my understanding that was Han's mentor for that trial?

A: Yes, he was, Rudolf Olden was slightly older than Hans Litten, I think he was born around about 1885. He died in 1940, so he was roughly 55. And even then, if you think about it, he would've been 46 as opposed to his 30s. He was an author of a book actually called "Hitler, The Conqueror: Debunking a Myth," and it's really an important piece of literature which was promptly banned by the Nazis. And what occurred was that just out of interest, he was a Litten's mentor, he was a very prominent liberal lawyer, more liberal than a social Democrat, but certainly very courageous, took many cases.

He finally, who really had a tough time of it, he had his citizenship revoked, but he was able to immigrate. But what was terribly sad, if I may say, was in 1940 on route of the United States, on the ship, the SS City of Benares, there was a U-boat attack and the boat was sunk and he died in 1940. So he was a very important figure, not just because of this very important book that he wrote, but because he was somebody who worked very heavily in the courts, he was certainly a mentor to Hans Litten being an older lawyer and someone who'd gone through, as it were the rough treatment beforehand. And in the literature that I've come across, Litten certainly pay a tribute to him as somebody from whom he'd learned an enormous amount, which is very typical, it seems to me, of the way we all learn from the great lawyers who preceded us.

Q: So we have one from Robert Turner. What was the fate of the Litten and Heller families under the Nazis 1932 to 1945?

- Sorry, what was the, I didn't-

- [Judi] What was the fate of the Litten and Heller families under the Nazis '32 to '45?

A: Well, in Litten's case, of course, as I say, his family seemed to have survived. Not quite sure how, as I say, he himself died in '38, but somehow his family did survive the war, as I understand it. In Heller's case, they were out of Germany. He had, as I say, lost his jobs. Ironically, one of the people who had been terribly responsible for him losing jobs was of course, Carl Schmitt. Which is just, you know, when you think about people, you just don't kind of, what's the word I'm looking for, are ever held accountable for anything. Schmitt is a par excellence, an example thereof.

Can you imagine that there's an Oxford handbook on the philosophy of Carl Schmitt, which was published about five years ago. Massive volume, about 600 pages. But they were out of the country. He did have, thanks to all the stress, he was under a bad heart. So he died in '33 in Madrid, where he was about to take over a chair. I'm not sure what happened to his family, but they were certainly out of Nazi Germany at the time.

Q: There's a question from Terrence, did Littens receive a Jewish burial?

A: I dunno, I honestly dunno that. He certainly held himself out, certainly from the literature I have read during the concentration camp as Jewish. But I honestly dunno what happened to,

you know, after, you know, I don't imagine that he was given any privileges after being committing suicide in Dachau on '38.

Q: Right, someone said that the Die Gedanken sind frei is not a poem, it's a early 19th century street protest song or early and was charted in the communist revolutions of the '30s and 1848.

A: Yeah, that's a very astute point. But he used it. And can you imagine the bravery of using that in the concentration camp? Does it matter who the real author was? The actual bravery of writing that or using that, you know, in a concentration camp, for me, I just found extraordinarily moving. Just wanted to cry almost when I read that first time because it seemed to me just to personify someone who had the chance to leave Germany and to go to Czechoslovakia and refuse to do so, that to me is just, you know, just breathtakingly extraordinary and is a monument to the man.

Q: Thank you, okay, so we have a question, I dunno who this is from. He says, please allow me to ask about the origins of Nazism. It's my understanding that after World War I, German industrialists refused to accept that Germany had lost the war. They created a fiction that Germany had been sold out. This resonated with many and became a widespread trope. It was this that he took advantage of and led to another war just two decades later. Is this correct?

A: Well, it's such a difficult question. I mean, one would have to give a whole lecture on this, but the truth about it is, which I'm more than happy to do, by the way. But the truth about it is that there are whole multiplicity of different causes. The fact that it is true, that a whole lot of people refused to accept that Germany had lost the war, the fact of the national humiliation, the collapse of German society after 1918, all of which were massive contributors.

But as is clear to me, and certainly I think if you trace the lectures that Trudy has given, Trudy did wonderful on this period. Germany was actually starting to come out of trouble in the early years of the Weimar Republic. It was indeed a weak form of government, but it held out possibilities. People like Heller and Hans Kelsen and other Jewish lawyer whom I should have mentioned far more, but haven't been able to because I wanted to concentrate on the two that I have. All of them are essentially conspired as it were to draught this constitution.

And if the crash had not occurred, it's very, very possible that the kind of almost social democratic enterprise, which was inherent within the Weimar Constitution and is well worth reading and is studied by lawyers, I should tell you, may well have pulled Germany out of the mire and prevented Hitler from coming into power. But I think there are a couple of lessons that emerge out of that question that are terribly important. One is, you know, we need today in the 21st century to work out what in fact actually are facts and what has fake news.

And the biggest problem we've got at present is the way in which sectarianism has engulfed the world to such an extent that they're vast ways of people to hold on tenaciously to a particular form of narrative which suits them, but which actually has no basis in reality or very little of

which in a sense that was partly true in Germany. And if you can wield that together, as David Pima showed in his lecture on propaganda. And if you want to, if those of you interested in a modern exposition of this particular problem, may I recommend a book by Jason Stanley on propaganda, which is absolutely fabulous, an American academic recent book, which is well worth reading and unfortunately that together with the sort of collapse of the economy were fatal issues, which is why I'm so anxious now because I think we are at an inflexion point to what extent, and that's why Heller does become important, to what extent are we going to actually redress the damage which has been done, particularly to those living more on the margins thanks to COVID, or are we going to forget about them? And we do say at our peril, and that's part of the lesson that we should learn from that particular period.

Q: Thank you, we have one from Joyce Tanner. Why was Schmitt's not convicted as a Nazi and was able to live until 1987?

A: Good question. Great question. Answer was he was never even charged. He sort of seemed to disappear out of sight, came back, you know, in after the war and continued. And part of the reason was because he claimed almost like Heidegger, you know, who was the lover of Hannah Arendt, that all he was was an academic, you know, and a theorist that he wasn't part of the sort of Nazi machine. But the truth was he was a fundamental evil man. He was a rabid anti-Semite. He certainly campaigned against expulsion of Jewish lawyers all over the place and he should have been held accountable. But in fact, the flaws of the courts, the trials of Nuremberg and beyond allowed him to escape.

And I just find it absolutely extraordinary that, you know, his work continues. So when Gideon Rachman and you can go and those of you who subscribe to the Financial Times, again, search for it, you'll find Rachman, I'm not criticising him, he's right to point to the way in which Schmitt has become influential in the 21st century. And it's extraordinary that the Oxford University handbook is a whole literally almost a thousand pages discussion on Schmitt because he's become so important in the justification of dictatorial and other anti-constitutional reviews.

And let me say more than that, if you look at some of the movements that have seek sought to appoint conservative judges, both in the US and elsewhere, including in Britain, much of the theory which they promulgate you can source back to some of Schmitt's own writings. So it's a damn good question. And the answer is, and perhaps we will talk about this in a series about the flaws and limitations of the trials at Nuremberg and who was held accountable, but he escaped and he continued and as I say, lived quite happily till 1985.

Q: Thank you, Dennis. So from Linda, how are these two lawyers viewed by the legal scholars in Germany today?

- Sorry, I didn't, how did I-

- [Judi] How are these two lawyers viewed by the legal scholars in Germany today?



A: Oh no, there's some fantastic scholars in Germany today. And let me give you just a personal anecdote. When I was the director for the Centre for Applied Legal Studies at Vitz during the '90s, and we were developing, as it were, constitutional education to help our judges and our legal profession understand a whole range of what constitutionalism was at the time, all sorts of people, fantastic people came out. So there was a whole British group, I don't know, he often participates in these calls, which, Sir Jeffrey Jowell and some very eminent English lawyers actually came out and helped us.

And why I mentioned this because at the same time, we got German lawyers, Dieter Grimm, who was on the constitutional court of Germany, and was a fabulous academic. He came out a number of times to help us. My friend, Manfred Weiss, who was the University of Frankfurt, who was a central architect in the labour relations at South Africa, who was a very, very profound social democratic labour lawyer. And there are many others like that. No, no, no, German academic writings in the modern period. Well, a lot better than the ones I'm afraid come out of my country.

Q: Another one from Ronnie, did Hitler have to use a defence lawyer?

- No, because-

- Did he have? Yeah.

A: In that particular case, what had occurred was Hitler was merely subpoenaed to give evidence. So whilst he might have had a lawyer, the lawyer had no role. And that was what was so interesting was that, Litten had basically subpoenaed Hitler because he wanted to show that this wasn't just an isolated incident, that this was, I mean, that was his political in a way. If I can go back to the beginning of my lecture, that was the political element of the lecture, if I could, sorry, of Litten's strategy. Litten wanted to prove that Hitler actually have no commitment to legality at all. So by cross-examining him, that was his purpose was to hone in on the fact that these guys were thugs. And the idea that they could campaign under a legal banner was complete nonsense. So he wouldn't have had, he may have had a lawyer who would've advised him, but the lawyer wouldn't have had rights of appearance.

But as I indicated, Judge Olsen, who is the judge presiding, certainly protected Hitler far more than he should have. And it's reflective of my point that the Weimar Republic judges, and I mentioned this in the lecture that I did with David Pima, the Weimar judges who had come out of the old school, I.e the pre, the Kaisers period, they were hugely conservative and they were very much complicit in both in the Prussian court and in this court were complicit in assisting Hitler. So in fact, had Litten's been allowed to continue with his cross-examination, who knows what would happened. But no, there wouldn't have been a lawyer who would've essentially led Hitler. Hitler was brought into court, he was subpoenaed and he had to give evidence to basically justify the policy which would underpins all of that violence that had taken place.

Q: Another one here. Are there any positive consequences you could point to arising from Litten's bravery displayed in the two trials you have mentioned?

- Any, sorry, any positive con-

- Positive consequences you could point out arising from Litten's, bravery.

A: The only thing I can say is he's an inspiration and that's why I ended my lecture in the way I did, was that for me, and I'm so grateful, can I just place on the record to people who wrote to me and said after the... We did the 1923 trial '24 trial, you know, why don't you talk about Hans Littens? And they were right. And I hope that this lecture has shown that that was right because he's not somebody who, as it were, has got the exposure he should have had. That's why that BBC commentary is so fantastic, but much more important than that. I think Judi, I can just simply say as a law teacher, you know, Hans Littens is the kind of guy you want to tell your law students, that's what you should be when you grow up.

That you really are principled, that you're courageous, and that you hold on to the law tenaciously even when the authoritarians are shouting at the gates. And I think that his memory is something we should hold sacred and the fact that he regarded himself as Jewish, perhaps in some subliminal way, he understood that wonderful injunction from the Torah, Justice, Justice Thou Shalt Pursue.

- [Judi] Thank you all, I think that's it. We've just got here from Marshe said thank you for that recognition of Rudolf Olden. He was my grandfather.

- Oh wow. But he was, let me say, you should be very proud of that because he was a remarkable man. I could have given lecture on him as well because he was a remarkable man. And let me couple him at the totes that were, because you know, again, there is somebody who, my goodness did extraordinary work during that period until he was finally lost his citizenship. Again, another person who pursued law in a vigorous and courageous and principled way. So really, to you to have had a grandfather like that. Thanks, Judi.

- [Judi] Thank you Dennis, Wendy?

- [Wendy] Yeah. Judi, do you want to just unmute me? Just open up, I can't open it myself. Maybe you can open up the video?

- [Judi] Okay, I'm starting you up. Here we go, have you.

- Dennis, thank you for an outstanding presentation, another outstanding presentation.

- Pleasure.

- So I just want to say that it might be a real opportunity to speak to his grandson, maybe the two of you to do a presentation together. That would be wonderful.

- I'd love that. because one could do a whole lecture on Rudolf Olden himself, who is an extraordinary. So yeah, I mean, if he can email me through Judi, I'd love to keep contact with him, and perhaps we could do that.

- Yes, please be in touch with us. And also, I want to take you up, Dennis, on your suggestion of the other lawyers that you spoke about earlier on another presentation. We'll talk about it offline.

- We'll talk about that-

- Dennis, I just wanted to say, I want to thank you for your incredible friendship and your unbelievable generosity with your time and your interest, and for really being so much part of this Lockdown University. You are very much part of the inner team, and my support.

- Thank you. And thank you and everybody should stay safe. And Wendy, it's a remarkable thing to have all these thousands of people. And the fact is, when I think about it, just those who listened tonight will now know about Littens, which is, I had a lot more people than would've done. We hadn't had the lecture.

- [Judi] Well, we have 1,009 on tonight, Dennis.

- Okay.

- 1,009 devices, thank you so much. Take care.

- Take care, pleasure.

- Thanks, bye-bye. Thank you everyone for joining us, bye-bye.