

## Preparing the Ground for Constitutionalization through Reconciliation Work

By Anton Legerer\*

### A. The Narrative

In a letter of 1952, the former German judge Lothar Kreyssig launched his idea of a reconciliation programme based on the religious – Christian – concept of atonement. From the manual work of German volunteers, those who had formerly been persecuted and their enemies, namely, the State and the People of Israel and Jews on the one hand and Great Britain and the British on the other, should benefit. The addressee of this letter was Graf Paul Yorck von Wartenburg, the brother of the executed resistance fighter Peter Yorck, then working for the Ecumenical Council of Churches in Geneva, who later worked as a German diplomat with a consul assignment in Lyon.<sup>1</sup>

It took two more years for Kreyssig to develop his idea into a workable concept, expanding it to all former war enemies, with special emphases on Poland, Russia and Israel, and it took him another four years until he finally succeeded in obtaining official support for his programme from high ranking church functionaries at the Synod of the German Protestant Church in 1958.<sup>2</sup> Since then, thousands of German volunteers have been sent to the countries that were effected by the Nazi war and killing machinery in order to rebuild villages, hospitals,

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<sup>1</sup> Letter Kreyssig to Graf Paul Yorck von Wartenburg (1902-2002) of 10 June 1952 [EZA 614/45]. Biographical Information on Yorck von Wartenburg see Munzinger-Archiv/Intern. Biograph. Archiv Eintrag Yorck [Y-ME, 2 December 1972 - Lieferung 48/72 - P - 10789].

<sup>2</sup> LOTHAR KREYSSIG, *Bericht über die dritte Tagung der zweiten Synode der Evangelischen Kirche in Deutschland vom 26. bis 30. April 1958*, in: KIRCHENKANZLEI DER EVANGELISCHEN KIRCHE IN DEUTSCHLAND, (IM AUFTRAGE DES RATES DER EKID) 278 (1958).

churches and other communal buildings. The buildings were meant to serve both an actual communal purpose in communities effected by the Nazis as well as symbols for atonement, and thus as a first step towards reconciliation. During the first years in the late 1950s and early 1960s, and despite difficulties in entering the originally targeted countries of Russia, Poland and Israel, *Aktion Sühnezeichen* had built a workers' recreation centre in the Netherlands, a building for handicapped children in Norway, a Synagogue in France, a water supply system in Greece, a meeting centre at Coventry in Britain, and a school for the blind in Israel, *etc.*<sup>3</sup> Despite some opposition to *Aktion Sühnezeichen* from both within and outside the Protestant Church, Kreyssig was soon supported by West German politicians and fellow Church leaders. The programme, which still exists, succeeded in two ways; first, the media coverage in the receiving countries was overwhelmingly positive, and it resulted in exchange programmes when volunteers from the formerly victimized countries came to work in Germany. Second, the programme enabled thousands of mainly younger Germans to receive an additional perspective – the victim's perspective. Many of the volunteers, after their return to Germany became involved in the media, in politics, in memorial sites, became priests, *etc.*, and continued to promote the idea of reconciliation with the former enemies.

#### B. Who was this Lothar Kreyssig?

Lothar Kreyssig was born in Saxony in 1898 in a bourgeois family of secular Protestants, who had no extreme political position. In his young years Kreyssig was a German nationalist who voluntarily joined the army in order to participate in the First World War.<sup>4</sup> He then studied law in Dresden and joined a students fraternity called *Grimensia* committed to a German nationalistic *Weltanschauung* and practiced duels. One of these fights was to leave a lifelong scar on Kreyssig's face. After his studies, and following practical training, he became judge at the district court of Chemnitz in 1928, and, from 1937 onwards, at the lower district court of Brandenburg.

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<sup>3</sup> On the programme, see JOHANNA PÜTZ, *IN BEZIEHUNG ZUR GESCHICHTE SEIN: FRAUEN UND MÄNNER DER DRITTEN GENERATION IN IHRER AUSEINANDERSETZUNG MIT DEM NATIONALSOZIALISMUS* (1999); FRANZ VON HAMMERSTEIN / VOLKER VON TÖRNE, *10 JAHRE AKTION SÜHNEZEICHEN* (1968); KARL-KLAUS RABE, *UMKEHR IN DIE ZUKUNFT. DIE ARBEIT DER AKTION SÜHNEZEICHEN/FRIEDENSDIENSTE* (1983); ANSGAR SKRIVER, *AKTION SÜHNEZEICHEN. BRÜCKEN ÜBER BLUT UND ASCHE* (1962).

<sup>4</sup> On Kreyssig, see KONRAD WEIß, *LOTHAR KREYSSIG, PROPHET DER VERSÖHNUNG* (1998); SUSANNE WILLEMS, *LOTHAR KREYSSIG. VOM EIGENEN VERANTWORTLICHEN HANDELN. EINE BIOGRAPHISCHE STUDIE ZUM PROTEST GEGEN DIE EUTHANASIEVERBRECHEN IN NAZI-DEUTSCHLAND* (1995); KURT SCHARF, *Zum 70. Geburtstag von Lothar Kreyssig*, in: FRANZ VON HAMMERSTEIN / VOLKER VON TÖRNE 5 (note 3); Helmut Kramer, *Lothar Kreyssig. Richter und Christ im Widerstand*, in: KRITISCHE JUSTIZ, *STREITBARE JURISTEN. EINE ANDERE TRADITION. FESTSCHRIFT FÜR JÜRGEN SEIFERT ZUM 60. GEBURTSTAG* 342 (1988).

His professional career as judge was interrupted when he forbade further deportations of all the wards of court in his custody by written order after he had discovered that several of them had been deported and had soon after died from quite implausible causes. He consulted with the *Reichsjustizministerium* and argued in a rather positivistic way that the killings were illegal since there was no legal bases for deporting and murdering of the wards of court, and, moreover, he claimed that both the procedures of expert witness and the possibilities of appeals against a juridical decision were absent in the cases in question. Thus, the actions had to be considered as illegal, and thus, as a judge, he could not accept them. The *Führer's* will, as was shown to him in a facsimile print by the Minister of Justice Franz Gürtner himself, could, in Kreyssig's eyes, not represent a legal basis. In his legal fight against euthanasia, he even denounced the murder cases that he had revealed to the state attorney and filed an official case against *Reichsleiter* Philip Bouhler for murder.<sup>5</sup>

To this day, Kreyssig is remembered as the only judge who intervened against the systematic murdering of the so-called T4 Euthanasia programme. Kreyssig himself was not persecuted by the Nazis even though he had challenged the National Socialist legal system; but he was forced to retire from his position in December 1940. After an on-going disciplinary case against him was dropped in 1942, he even received state pension from the Third Reich and worked as a full-time farmer between 1941 and 1945. It should be noted that he was everything but a maniac; he was the ordinary German man: a well-integrated and responsible family father.

As mentioned earlier, he argued along positivistic theorems, but from the mid-1930s onward, he became influenced by the opposition Protestant Brotherhood Movement of the Confession Church (*Bekennende Kirche*). He became a leading figure and promoted their opposition to the Nazi followers of *Deutsche Christen*.<sup>6</sup>

After the defeat of the Nazi regime, he rejected an offer to be appointed as a judge again and decided on a career within the Protestant Church instead. By 1946, he had already become the head of the administrative body of the Saxony Church Province at Magdeburg, and was soon elected president of his regional church. He was one of the leaders of the church of the Union and was elected member of the

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<sup>5</sup> On Kreyssig's resistance' see LOTHAR KREYSSIG, *Aus seinem Lebensbericht*, in: BRANDENBURGISCHES OBERLANDESGERICHT. FESTGABE ZUR ERÖFFNUNG 77 (PETER MACKÉ, ED., 1993); MICHAEL BURLEIGH, *THE THIRD REICH. A NEW HISTORY* 398 (2001); LOTHAR GRUCHMANN, *Ein unbequemer Amtsrichter im Dritten Reich. Aus den Personalakten des Dr. Lothar Kreyssig*, 32 *VIERTELJAHRESHEFTE FÜR ZEITGESCHICHTE* 463 (1984); INGO MÜLLER, *FURCHTBARE JURISTEN. DIE UNBEWÄLTIGTE VERGANGENHEIT UNSERER JUSTIZ* (1989); HELMUT KRAMER (note 4), 342-353.

<sup>6</sup> KURT SCHARF (note 3).

all-German Council of the Protestant Church in Germany, an umbrella organization of all the German Protestant churches. He held leading church positions until the late 1960s.

Throughout the years immediately following the war, Kreyssig was haunted by the idea of collective German guilt and the need of reconciliation in order to achieve peaceful co-existence in Europe. He, a lawyer by profession, a judge who had been respected even by the Nazis, turned away from the positivistic *Weltanschauung* and invented the theologically and psychologically inspired programme entitled *Aktion Sühnezeichen*. In all of his numerous but unpublished texts, a notion of German guilt which goes beyond mere criminal guilt and the psychological need for reconciliation for future co-existence dominates. In contrast with the vast majority of his fellow Germans, Kreyssig was very much aware of the overwhelming criminal history of the Third Reich, in which all legal and moral institutions had failed to prevent the total collapse of human integrity. He was concerned that the on-going denial of this collective moral bankruptcy would destroy both the German soul and German relations with the outside world.

What I refer to as the “positivistic turn” that is illustrated in Kreyssig’s biography, is when he turned away twice – during the Third Reich and also afterwards – from his original profession in order to remain loyal to his inner convictions, which he could not achieve by legal means. By means of his theological and psychological conceptions, he actually promoted the building of foundations both within the German nation and in its international relations. The lesson that Kreyssig drew from his experiences during and after the Third Reich was that legal means would necessarily fail if they lacked a morally grounded foundation. His first written thoughts coincide with the ambiguous post-war development, when Germany was divided into two states in 1949 as the syndrome of the beginning cold war began, and – almost at the same time – the initiation of Europeanization was launched by Robert Schuman and Jean Monnet in 1950. Although West Germany and France were already partners in the European Community and in the NATO by the mid-1950, and were thus bound together with strong legal commitments, the governments of both countries recognized the need for a deeper grounding of their bi-lateral relations beyond these means, and started a five year negotiation process in 1958 which resulted in the signing of the German-French Friendship Treaty in 1963. This bi-lateral treaty included, as a main issue, the agreement on a generously sponsored youth exchange programme aimed at bridging the century old rivalry between France and Germany.<sup>7</sup>

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<sup>7</sup> MANFRED STEINKÜHLER, DER DEUTSCH-FRANZÖSISCHE VERTRAG VON 1963. ENTSTEHUNG, DIPLOMATISCHE ANWENDUNG UND POLITISCHE BEDEUTUNG IN DEN JAHREN VON 1958 BIS 1969 (2002).

Kreyssig's programme represents a similar approach, although it mainly focused on the aftermath of the crimes of the Third Reich, and addressed not just one country but all of the German Reich's war enemies. Kreyssig's perception of guilt beyond legal or political understanding challenged the *Zeitgeist*, particularly within post-war West-Germany.

In 1946, at the time of the trials of the Nazi élite, the philosopher Karl Jaspers published his booklet *Die Schuldfrage* ("The question of German Guilt").<sup>8</sup> Jaspers argued against collective guilt and supported the individual juridical persecution of individual perpetrators. He distinguished between political, criminal, and moral guilt. With his approach, Jaspers considered the guilt of bystanders as a private moral issue rather than an issue at societal level. Jaspers book sold poorly in Germany, but, nevertheless, his arguments largely reflected the post-war attitudes in Germany. Thus, while Jaspers promoted a more pragmatic attitude including even apologetic elements (such as pointing at the guilt and failures of other countries during World War II) which would enable every German individual to find his way out of the German guilt question, Kreyssig emphasized the guilt of all Germans and proclaimed that:

*"Whoever of us surviving Germans that did not want the Nazi crimes to happen did not do enough in order to prevent those crimes".*

With this formula, he avoided any distinction between types of guilt and referred the notion of collective guilt to each and every German that had survived. This unresolved guilt, according to Kreyssig, prevented any conciliation with the former enemy, and thus has prevented peace. In his mystical-religious understanding, Kreyssig, who continued living in the communist part of Germany, perceived the destruction of Germany and the division into two states as just punishment which had to be accepted by the guilty German population. Kreyssig went as far as to plead for war criminals such as Eichmann, who, according to his belief, should have been handed over to German justice by the Israeli authorities in order to have him tried in his homeland. The German criminal should not be "exported", or externalized, but should be internalized instead. Similarly, he requested the pardoning of war criminals sentenced to lifelong prison or death. Again, he was motivated by his wish to integrate the criminal history into the German presence. Death sentences as well as livelong sentences would bring an easy exit – an externalization rather than an identification and internalization. In using the psychological terms externalization and internalization, I am also referring to the German sociologist Rainer M. Lepsius, who applied these terms to the three

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<sup>8</sup> KARL JASPERS, *DIE SCHULDFRAGE: VON DER POLITISCHEN HAFTUNG DEUTSCHLANDS* (1946, transl. 1947).

successor states of the Third Reich (FRG, GDR, A) and their coming to terms with the Nazi past.<sup>9</sup>

Kreyssig, like Jaspers, referred to the guilt of the others, but he interprets this guilt in the causal consequence of the original German guilt. Thus, he argued, it is the German task first to forgive the guilt of others and then to offer reconciliation via voluntary building programmes. With his logic, Kreyssig turned the distinction of criminal acts according to the perpetrator's act into a distinction of the victims rather than the perpetrators. He thus made a dramatic shift beyond justice, referring to theological and psychological concepts instead.

Kreyssig's concept wished for the unification of Germany, and the peaceful co-existence with Germany's neighbours as result of the acknowledgement of collective guilt. In other words: whatever inhuman acts had occurred, the division between the peoples in the aftermath of the Third Reich and as result of the East-West division should be bridged by reconciliation. Official contacts and legislation were considered insufficient - they needed to be grounded by a programme like the *Aktion Sühnezeichen*. Consequently, Kreyssig addressed state leaders with his approaches.

I wish to conclude my article with some questions and some points which may contribute to the understanding of the historical impact of post-war reconciliatory efforts which, to my understanding, is a main pretext of the "Shadow approach":

During the Third Reich, German national law as well as international law and international conventions failed to guarantee even a minimum of legal security, and failed to secure basic human rights. Is it this failure that overshadows post-war constitutionalization?

When speaking about Constitutionalization of Europe in a historical perspective, are we speaking about the recognition of and the search for a missing or lost moral as a lesson drawn by leading figures? Is the moral imperative of "never again" the implicit underlying motive?

Is positivistic interpretation of law the key to amoral societies, and, if so, what are the conclusions with regard to post-war legislation and international agreements?

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<sup>9</sup> Rainer M. Lepsius, *Das Erbe des Nationalsozialismus und die politische Kultur der Nachfolgestaaten des "Großdeutschen Reiches"*, in: KULTUR UND GESELLSCHAFT. VERHANDLUNGEN DES 24. DEUTSCHEN SOZIOLOGENTAGES, DES 11. ÖSTERREICHISCHEN SOZIOLOGENTAGES UND DES 8. KONGRESSES DER SCHWEIZERISCHEN GESELLSCHAFT FÜR SOZIOLOGIE 247 (MAX HALLER / HANS-JOACHIM HOFFMANN-NOWOTNY / WOLFGANG ZAPF, EDS., 1989).

Finally, I would like to emphasize that, when speaking about Constitutionalization, one should consider both individual agents, their biographies, and institutional agents and their motivation. Major agents such as Churches, Trade Unions, Industrial associations and other transnational networks are not only involved in constitutionalizing in legal terms, but also in other terms including humanitarian, religious, economical, and social ones.