

*Five Minutes of Legal Philosophy (1945)**

GUSTAV RADBRUCH

TRANSLATED BY BONNIE LITSCHESKI
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First Minute

‘An order is an order’, the soldier is told. ‘A law is a law’, says the jurist. The soldier, however, is required neither by duty nor by law to obey an order whose object he knows to be a felony or a misdemeanor, while the jurist—since the last of the natural lawyers died out a hundred years ago—recognizes no such exceptions to the validity of a law or to the requirement of obedience by those subject to it. A law is valid because it is a law, and it is a law if, in the general run of cases, it has the power to prevail.

This view of a law and of its validity (we call it the positivistic theory) has rendered jurists and the people alike defenceless against arbitrary, cruel, or criminal laws, however extreme they might be. In the end, the positivistic theory equates law with power; there is law only where there is power.

Second Minute

Attempts have been made to supplement or replace this tenet with another: Law is what benefits the people.

That is to say, arbitrariness, breach of contract, and illegality—provided only that they benefit the people—are law. Practically speaking, this means that whatever state authorities deem to be of benefit to the people is law, including every despotic whim and caprice, punishment unsanctioned by statute or judicial

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decision, the lawless murder of the sick. This *can* mean that the private benefit of those in power is regarded as a public benefit. Indeed, it was the equating of the law with supposed or ostensible benefits to the people that transformed a *Rechtsstaat* into an outlaw state.

No, this tenet does not mean: Everything that benefits the people is law. Rather, it is the other way around: Only what law is benefits the people.

Third Minute

Law is the will to justice. Justice means: To judge without regard to the person, to measure everyone by the same standard.

If one applauds the assassination of political opponents, or orders the murder of people of another race, all the while meting out the most cruel and degrading punishment for the same acts committed against those of one's own persuasion, this is neither justice nor law.

If laws deliberately betray the will to justice—by, for example, arbitrarily granting and withholding human rights—then these laws lack validity, the people owe them no obedience, and jurists, too, must find the courage to deny them legal character.

Fourth Minute

Of course it is true that the public benefit, along with justice, is an objective of the law. And of course laws have value in and of themselves, even bad laws: the value, namely, of securing the law against uncertainty. And of course it is true that, owing to human imperfection, the three values of the law—public benefit, legal certainty, and justice—are not always united harmoniously in laws, and the only recourse, then, is to weigh whether validity is to be granted even to bad, harmful, or unjust laws for the sake of legal certainty, or whether validity is to be withheld because of their injustice or social harmfulness. One thing, however, must be indelibly impressed on the consciousness of the people as well as of jurists: There *can* be laws that are so unjust and so socially harmful that validity, indeed legal character itself, must be denied them.

Fifth Minute

There are principles of law, therefore, that are weightier than any legal enactment, so that a law in conflict with them is devoid of validity. These principles are known as natural law or the law of reason. To be sure, their details remain open to question, but the work of centuries has in fact established a solid core of them, and they have come to enjoy such far-reaching consensus in the so-called

declarations of human and civil rights that only the dogmatic sceptic could still entertain doubts about some of them.

In the language of faith, the same thoughts are recorded in two verses from the Bible. It is written that you are to be obedient to the authorities who have power over you,¹ but it is also written that you are to obey God rather than men²—and this is not simply a pious wish, but a valid legal proposition. A solution to the tension between these two directives cannot be found by appealing to a third—say, to the dictum: ‘Render to Caesar the things that are Caesar’s, and to God the things that are God’s’.³ For this directive, too, leaves the dividing line in doubt. Or, rather, it leaves the solution to the voice of God, which speaks to the conscience of the individual only in the particular case.

¹ [See *The Holy Bible*, King James Version, 1611, at Hebrews 13:17.]

² [See *ibid* at Acts 5:29.]

³ [*Ibid*, Mark 12:17.]

Statutory Lawlessness and Supra-Statutory Law (1946)*

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I.

By means of two maxims, ‘An order is an order’ and ‘a law is a law’, National Socialism contrived to bind its followers to itself, soldiers and jurists respectively. The former tenet was always restricted in its applicability; soldiers had no obligation to obey orders serving criminal purposes.¹ ‘A law is a law’, on the other hand, knew no restriction whatever. It expressed the positivistic legal thinking that, almost unchallenged, held sway over German jurists for many decades. ‘Statutory lawlessness’ was, accordingly, a contradiction in terms, just as ‘supra-statutory law’ was.² Today, both problems confront legal practice time and time again. Recently, for example, the *Süddeutsche Juristen-Zeitung* published and commented on a decision of the Wiesbaden Municipal Court [handed down in November of 1945], according to which the ‘statutes that declared the property

* ‘Gesetzliches Unrecht und übergesetzliches Recht’, first published in the *Süddeutsche Juristen-Zeitung* 1 (1946) 105–8, repr. *inter alia* in Gustav Radbruch, *Gesamtausgabe* (Collected Works), 20 vols, Arthur Kaufmann (ed.), vol. 3: *Rechtsphilosophie III*, Winfried Hassemer (ed.) (Heidelberg: C. F. Müller, 1990) 83–93, 282–91 (editor’s notes), and in Radbruch, *Rechtsphilosophie, Studienausgabe*, Ralf Dreier and Stanley L. Paulson (eds) (Heidelberg: C. F. Müller, 2nd edn, 2003) 211–19, 234–5 (editors’ notes). The translators have drawn on the original printing of 1946; on a reprinting in Gustav Radbruch, *Rechtsphilosophie*, 4th–7th edns, Erik Wolf (ed.), and 8th edn, Erik Wolf and Hans-Peter Schneider (eds) (Stuttgart: K. F. Koehler, 1950–73); and on a partial, unpublished translation by Lon L. Fuller, which appeared, *inter alia*, in his ‘Supplemental Readings in Jurisprudence, 1958–9’ (Harvard Law School). The translation here is published with the kind permission of Mrs. Dorothea Kaufmann (Munich). The translators would like to thank Ralf Dreier (Göttingen), Thomas Mertens (Nijmegen), and Julian Rivers (Bristol) for very helpful comments and suggestions.

¹ Military Criminal Code of 1940, § 47.

² [Translating ‘Unrecht’ as ‘lawlessness’ here—not as ‘injustice’, ‘wrong’, or ‘evil’, among other possibilities—and ‘Recht’ as ‘law’—not as ‘justice’ or ‘right’—underscores the legal context of the sharp distinction Radbruch draws between the two terms. Better reflecting the ‘positivistic legal thinking’ he mentions, the phrases themselves might read ‘statutory (or positive-law) lawlessness’ and ‘supra-statutory (or supra-positive) law’.]

of the Jews to be forfeited to the State were in conflict with natural law, and null and void the moment they were enacted'.³

II.

In the criminal law, the same problem has been raised, particularly in debates and decisions within the Russian Zone.⁴

1. A justice department clerk named Puttfarcken was tried and sentenced to life imprisonment by the Thuringian Criminal Court in Nordhausen for having brought about the conviction and execution of the merchant Göttig by informing on him. Puttfarcken had denounced Göttig for writing on the wall of a WC that 'Hitler is a mass murderer and to blame for the war'. Göttig had been condemned not only because of this inscription, but also because he had listened to foreign radio broadcasts. The argument made at Puttfarcken's trial by the Thuringian Chief Public Prosecutor, Dr. Friedrich Kuschnitzki, was reported in detail in the press.⁵ Prosecutor Kuschnitzki first takes up the question: Was Puttfarcken's act a violation of law?

The defendant's contention that his belief in National Socialism had led him to inform on Göttig is legally insignificant. Whatever one's own political convictions, there is no legal obligation to denounce anyone. Even during the Hitler years, no such legal obligation existed. The decisive question is whether the defendant acted in the interests of the administration of justice, a question presupposing that the judicial system is in a position to administer justice. *Fidelity to statutes, a striving toward justness, legal certainty—these are the requirements of a judicial system.* And all three are lacking in the politicized criminal justice system of the Hitler regime.

Anyone who informed on another during those years had to know—and did in fact know—that he was delivering up the accused to arbitrary power, not consigning him to a lawful judicial procedure with legal guarantees for determining the truth and arriving at a just decision.

With respect to this question, I subscribe fully to the opinion given by Professor Richard Lange, Dean of the Law Faculty of the University of Jena. So well known was the situation in the Third Reich that one could say with certainty: Any person called to account in the third year of the war for writing 'Hitler is a mass murderer and to blame for this war' would never come out alive. Someone like Puttfarcken certainly could not have had a clear view of just *how* the judiciary would pervert the law, but he could have been sure *that* it would.

No legal obligation to inform on anyone can be drawn from section 139 of the Criminal Code either. It is true that, according to this provision, a person who obtains reliable information of a plan to commit high treason and fails to give timely notice of this

³ Heinz Kleine, in the *Süddeutsche Juristen-Zeitung* 1 (1946) 36.

⁴ [Post-war Germany was divided by the occupying powers into four zones—Russian, French, British, and American—for purposes of Allied administration of the devastated country.]

⁵ *Thüringer Volk* (Weimar), 10 May 1946. [In the immediate post-war period, official reports of judicial proceedings were not generally available, and so Radbruch quotes extensively here from newspaper accounts.]

plan to the authorities is subject to punishment. It is also true that Göttig had been condemned to death by the Appeal Court at Kassel for *preparing to commit high treason*. In a legal sense, however, there had certainly been no such preparation to commit high treason. After all, Göttig's brave declaration that 'Hitler is a mass murderer and to blame for the war' was simply the naked truth. Anyone declaring and spreading this truth threatened neither the Reich nor its security, but sought only to help rid the Reich of its destroyer and thus to rescue it—in other words, the opposite of high treason. Scruples of legal form must not be allowed to obfuscate this plain fact. Furthermore, it is at least questionable whether the so-called Führer and Chancellor of the Reich should ever have been regarded as the legal head of state at all, and therefore questionable whether he was protected by the provisions on high treason. In any event, the defendant had not reflected at all on the legal implications of informing on Göttig, and, given his limited understanding, he could not have done so. Puttfarken himself has never declared that he informed on Göttig because he saw Göttig's inscription as an act of high treason and felt obliged to report it to the authorities.⁶

The Chief Public Prosecutor then addresses the question: Did Puttfarken's act render him culpable?

Puttfarken essentially admits that he intended to send Göttig to the gallows, and a series of witnesses have confirmed his intention. *This is premeditated murder, according to section 211 of the Criminal Code*. That it was a court of the Third Reich that actually condemned Göttig to death does not argue against Puttfarken's having committed the crime. *He is an indirect perpetrator*. Granted, the concept of the indirect commission of a crime, as it has been developed in Supreme Court adjudication, usually looks to other cases, chiefly those in which the indirect perpetrator makes use of instruments lacking in will or the capacity for accountability. No one ever dreamed that a German court could be the instrument of a criminal. Yet today we face just such cases. The Puttfarken case *will not be the only one*. That the Court observed legal *form* in declaring its pernicious decision cannot argue against Puttfarken's indirect commission of the crime. Any lingering hesitancy on this score is cleared away by article 2 of the Thuringian Supplementary Law of 8 February 1946. Article 2, in order to dispel doubts, offers the following rendition of section 47, paragraph 1, of the Criminal Code: 'Whoever is guilty of carrying out a criminal act, either by himself or through another person, even if that other person acted lawfully, shall be punished as perpetrator'. This does not establish new, retroactively effective substantive law; it is simply an authentic interpretation of criminal law in force since 1871.⁷

After a careful weighing of the pros and cons, I myself am of the opinion that there can be *no* doubt that this is a case of murder committed indirectly. But let us suppose—and we must take this contingency into account—that the Court were to arrive at a different

⁶ *Ibid.* [Emphasis in original.]

⁷ In his edition of the Criminal Code in its Thuringian rendition (Weimar: Landesverlag Thüringen, 1946), 13, Prof. Richard Lange states that 'in those cases where the perpetrator has misused the judicial system to pursue his own criminal purposes (deception during litigation, political denunciation), much uncertainty has arisen about the concept of the indirect commission of a crime. Therefore, article 2 of the Supplementary Law of 8 February 1946 makes clear that the indirect commission of a crime is punishable even if the instrument that is employed has itself acted lawfully or in compliance with its official duty.'

opinion. What would come into question then? If one rejects the view that this is a case of murder committed indirectly, then one can hardly escape the conclusion that the *judges who condemned Göttig to death, contrary to law and statute, are themselves to be regarded as murderers*. The accused would then be an *accomplice to murder* and punishable as such. Should this view, too, raise serious misgivings—and I am not unmindful of them—there remains the Allied Control Council Law No. 10 [of 20 December 1945]. According to article 2, paragraph 1(c),⁸ the accused would be guilty of a crime against humanity. Within the framework of this statute, the question is no longer whether the national law of the land is violated. Inhuman acts and persecution for political, racial, or religious reasons are, without qualification, subject to punishment. According to article 2, paragraph 3,⁹ the criminal is to be sentenced to such punishment as the court deems just. Even capital punishment.¹⁰

I might add that as a jurist I am accustomed to confining myself to a purely legal evaluation. But one is always well advised to stand, as it were, *outside* the situation and view it in the light of ordinary common sense. Legal technique is, without exception, merely the instrument the responsible jurist uses in order to arrive at a legally defensible decision.¹¹

Puttfarken was condemned by the Thuringian Criminal Court not as an indirect perpetrator of the crime, but as an accomplice to murder. Accordingly, the judges who condemned Göttig to death, contrary to law and statute, had to be guilty of murder.¹²

⁸ [Control Council Law No. 10, article 2, paragraph 1(c): ‘*Crimes against Humanity*. Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated’.]

⁹ [Ibid, article 2, paragraph 3: ‘Any persons found guilty of any of the crimes above mentioned [in article 2, paragraph 1] may upon conviction be punished as shall be determined by the tribunal to be just. Such punishment may consist of one or more of the following:

- (a) Death.
- (b) Imprisonment for life or a term of years, with or without hard labour.
- (c) Fine, and imprisonment with or without hard labour, in lieu thereof.
- (d) Forfeiture of property.
- (e) Restitution of property wrongfully acquired.
- (f) Deprivation of some or all civil rights.

Any property declared to be forfeited or the restitution of which is ordered by the Tribunal shall be delivered to the Control Council for Germany, which shall decide on its disposal.’]

¹⁰ Criminal liability according to Allied Control Council Law No. 10 is not discussed in what follows, for German courts do not have primary jurisdiction here. See article 3, paragraph 1(d). [‘Each occupying authority, within its Zone of Occupation, shall have the right to cause all persons so arrested and charged, and not delivered to another authority as herein provided, or released, to be brought to trial before an appropriate tribunal. Such tribunal may, in the case of crimes committed by persons of German citizenship or nationality against other persons of German citizenship or nationality, or stateless persons, be a German Court, if authorized by the occupying authorities.’]

¹¹ *Thüringer Volk*, above n 5 [emphasis in original].

¹² Another proceeding involving denunciation took place before the Munich denazification panel, against those who had informed on the Scholls. [Siblings Hans and Sophie Scholl, leading members of the White Rose, a resistance group at the University of Munich, were distributing anti-Nazi leaflets when they were arrested on 18 February 1943. Condemned to death on 22 February 1943, they were executed the same day. Hans was 24 years old, Sophie 21.] Denazification is levelled against a politically and morally inferior sentiment, and need not enquire into the legality or legitimacy or the culpability of putting that sentiment into practice. It follows then that a line is drawn between denazification and criminal jurisdiction, but it also follows that the two overlap. Compare article 22 of the *Befreiungsgesetz* [Law for Liberation from National Socialism and Militarism, 5 March 1946].

2. In fact, the Chief Public Prosecutor of Saxony, Dr J.U. Schroeder, announces in the press the intention of enforcing the principle of criminal ‘responsibility for inhuman judicial decisions’, even when such decisions are based on National Socialist statutes:

The legislation of the National Socialist state, on the basis of which death sentences like those cited here were pronounced, *has no legal validity whatsoever*.

National Socialist legislation rests on the so-called ‘*Enabling Act*’ [of 24 March 1933], which was passed without the constitutionally required two-thirds majority. Hitler had forcibly prevented the Communist representatives from participating in the parliamentary session by having them arrested, in spite of their immunity. The remaining representatives, namely from the Centre Party, were threatened by Nazi storm troopers (the SA) and thereby compelled to vote for the emergency powers.¹³

A judge can never administer justice by appealing to a statute that is not merely unjust but *criminal*. We appeal to *human rights* that surpass all written laws, and we appeal to the inalienable, immemorial law that denies validity to the criminal dictates of inhuman tyrants.

In light of these considerations, I believe that judges must be prosecuted who have handed down decisions incompatible with the precepts of humanity and have pronounced the death sentence for trifles.¹⁴

3. A report comes from Halle that the executioner’s assistants, Kleine and Rose, are condemned to death for actively participating in numerous lawless executions. From April 1944 to March 1945, Kleine took part in 931 executions, for which he was paid 26,433 RM. The condemnation of Kleine and Rose seems to be based on the Allied Control Council Law No. 10 (crimes against humanity). ‘Both of the accused practiced their grisly trade willingly, since every executioner’s assistant is free to abstain from his activity at any time, for health reasons or otherwise.’¹⁵

4. In Saxony again, the following case comes to light in an article by Chief Public Prosecutor J.U. Schroeder: A soldier from Saxony, assigned to guard prisoners of war on the eastern front, deserted his post in 1943, ‘disgusted by the inhuman treatment they received. Perhaps he was also tired of serving in Hitler’s army.’ While on the run, he could not resist stopping by his wife’s apartment, where he was discovered and was to be taken into custody by a sergeant. He succeeded, unnoticed, in getting hold of his loaded service revolver and shot the sergeant in the back, killing him. In 1945, the deserter returned to Saxony from

¹³ Also requiring discussion here would be the extent to which the ‘normative force of the factual’ [Georg Jellinek] makes valid law out of systems that come to power by way of revolution. And my colleague Walter Jellinek has kindly pointed out that it would be inaccurate to suggest that the two-thirds majority was achieved only by eliminating the Communists.

¹⁴ *Tägliche Rundschau* (Berlin), 14 March 1946 [emphasis in original]. On criminal responsibility for unlawful judicial decisions, see also Friedrich Buchwald in his notable work, *Gerechtes Recht* (Weimar: Panses Verlag, 1946) at 3–8.

¹⁵ *Liberaldemokratische Zeitung* (Halle), 12 June 1946. [See above, n 8.]

Switzerland. He was arrested, and the office of the public prosecutor prepared to charge him with having maliciously killed the official. The Chief Public Prosecutor, however, ordered his release and the abandonment of criminal proceedings, appealing to section 54 of the Criminal Code and arguing that the soldier, having acted out of necessity, was blameless, since

what the judiciary called law then is no longer valid today. In our view of the law, deserting the Hitler-Keitel army is no misdemeanor dishonouring the deserter and justifying his punishment; he is not blameworthy because of it.¹⁶

With statutory lawlessness and supra-statutory law serving, then, as points of reference, the struggle against positivism is being taken up everywhere.

III.

Positivism, with its principle that 'a law is a law', has in fact rendered the German legal profession defenceless against statutes that are arbitrary and criminal. Positivism is, moreover, in and of itself wholly incapable of establishing the validity of statutes. It claims to have proved the validity of a statute simply by showing that the statute had sufficient power behind it to prevail. But while power may indeed serve as a basis for the 'must' of compulsion, it never serves as a basis for the 'ought' of obligation or for legal validity. Obligation and legal validity must be based, rather, on a value inherent in the statute. To be sure, *one* value comes with every positive-law statute without reference to its content: Any statute is always better than no statute at all, since it at least creates legal certainty. But legal certainty is not the only value that law must effectuate, nor is it the decisive value. Alongside legal certainty, there are two other values: purposiveness¹⁷ and justice. In ranking these values, we assign to last place the purposiveness of the law in serving the public benefit. By no means is law anything and everything that 'benefits the people'. Rather, what benefits the people is, in the long run, only that which law is, namely, that which creates legal certainty and strives toward justice. Legal certainty (which is characteristic of every positive-law statute simply in virtue of the statute's having been enacted) takes a curious middle place between the other two values, purposiveness and justice, because it is required not only for the public benefit but also for justice. That the law be certain and sure, that it not be interpreted and applied one way here and now, another way elsewhere and tomorrow, is also a requirement of justice. Where there arises a conflict between legal certainty and justice, between an objectionable but duly enacted statute and a just law

¹⁶ *Tägliche Rundschau*, above n 14, 9 May 1946.

¹⁷ [The German '*Zweckmäßigkeit*' is often translated, respectably, as 'utility' or 'expediency'. In the present context, however, any suggestion of utilitarianism would be misleading, as would the connotation of opportunism that attaches to 'expediency'. 'Purposiveness' has the virtue of stemming directly from 'purpose', thereby underscoring Radbruch's point.]

that has not been cast in statutory form, there is in truth a conflict of justice with itself, a conflict between apparent and real justice. This conflict is perfectly expressed in the Gospel, in the command to ‘obey them that have the rule over you, and submit yourselves’, and in the dictate, on the other hand, to ‘obey God rather than men’.¹⁸

The conflict between justice and legal certainty may well be resolved in this way: The positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as ‘flawed law’, must yield to justice. It is impossible to draw a sharper line between cases of statutory lawlessness and statutes that are valid despite their flaws. One line of distinction, however, can be drawn with utmost clarity: Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely ‘flawed law’, it lacks completely the very nature of law. For law, including positive law, cannot be otherwise defined than as a system and an institution whose very meaning is to serve justice. Measured by this standard, whole portions of National Socialist law never attained the dignity of valid law.

The most conspicuous characteristic of Hitler’s personality, which became through his influence the pervading spirit of the whole of National Socialist ‘law’ as well, was a complete lack of any sense of truth or any sense of right and wrong. Because he had no sense of truth, he could shamelessly, unscrupulously lend the ring of truth to whatever was rhetorically effective at the moment. And because he had no sense of right and wrong, he could without hesitation elevate to a statute the crudest expression of despotic caprice. There is, at the beginning of his regime, his telegram offering sympathy to the Potempa murderers,¹⁹ at the end, the hideous degradation of the martyrs of 20 July 1944.²⁰ The supporting theory had been provided by the Nazi ideologue, Alfred Rosenberg, writing in response to the Potempa death sentences: People are not alike, and murders are not alike; the murder of the pacifist Jaurès²¹ was properly judged in France in a different light than the attempt to murder the nationalist Clemenceau,²² for it is impossible to subject the patriotically motivated perpetrator to the same punishment

¹⁸ [*The Holy Bible*, King James Version, 1611, Hebrews 13:17 and Acts 5:29 respectively.]

¹⁹ [In 1932, five Nazi storm troopers were condemned to death by a court in Upper Silesia for the brutal murder of a Communist in the village of Potempa. Under pressure from the Nazis, their sentence was commuted to life imprisonment. After Hitler came to power, they were pardoned.]

²⁰ [Wehrmacht officers and others, arrested following their failed attempt to assassinate Hitler on 20 July 1944, were tortured, viciously humiliated in a sham trial, and executed.]

²¹ [Jean Jaurès, an eloquent politician known as an intellectual champion of socialism, was assassinated in Paris in 1914 by a fanatical nationalist, Raoul Villain. Villain was taken into custody pending trial, but acquitted in 1919 by jurors who reportedly felt he was a patriot who had done France a favour by getting rid of the antiwar Jaurès.]

²² [Georges Clemenceau, a Radical Nationalist politician, survived an attempt on his life made in 1892 by a rival political group, taking revenge for his repudiation of their leader, General Boulanger, a convicted traitor who had committed suicide in 1891. The Boulangerist who failed in his attempt to assassinate Clemenceau was unceremoniously executed.]

as one whose motives are (in the view of the National Socialists) inimical to the people.²³ The explicit intention from the very beginning, then, was that National Socialist ‘law’ would extricate itself from the essential requirement of justice, namely, the equal treatment of equals. It thereby lacks completely the very nature of law; it is not merely flawed law, but rather no law at all. This applies especially to those enactments by means of which the National Socialist Party claimed for itself the whole of the state, flouting the principle that every political party represents only a part of the state. Legal character is also lacking in all the statutes that treated human beings as subhuman and denied them human rights, and it is lacking, too, in all the caveats that, governed solely by the momentary necessities of intimidation, disregarded the varying gravity of offences and threatened the same punishment, often death, for the slightest as well as the most serious of crimes. All these are examples of statutory lawlessness.

We must not fail to recognize—especially in light of the events of those twelve years—what frightful dangers for legal certainty there can be in the notion of ‘statutory lawlessness’, in duly enacted statutes that are denied the very nature of law. We must hope that such lawlessness will remain an isolated aberration of the German people, a never-to-be-repeated madness. We must prepare, however, for every eventuality. We must arm ourselves against the recurrence of an outlaw state like Hitler’s by fundamentally overcoming positivism, which rendered impotent every possible defence against the abuses of National Socialist legislation.²⁴

IV.

That looks to the future. In the face of the statutory lawlessness of the past twelve years, we must seek now to meet the requirement of justice with the smallest possible sacrifice of legal certainty. Not every judge acting on his own initiative should be allowed to invalidate²⁵ statutes; rather, this task should be reserved to a higher court or to legislation.²⁶ Such legislation has already been enacted in the American Zone, based on an agreement in the Council of German States. It is ‘Act No. 29, on the Redress of National Socialist Wrongs Committed in the Administration of Criminal Justice’ [31 May 1946]. A provision according to which ‘political acts undertaken in resistance to National Socialism or militarism are not punishable’ surmounts the difficulties, for example, of the previously mentioned case of the deserter.²⁷ On the other hand, the companion statute, ‘Act No. 22, concerning the Punishment of National Socialist Crimes’

²³ *Völkischer Beobachter* (Munich) [publication of the National Socialist Party], 26 August 1932.

²⁴ Buchwald, too, argues for supra-statutory law in his book, above n 14, at 8–16. And compare Walter Roemer, *Süddeutsche Juristen-Zeitung* 1 (1946) 9–11.

²⁵ [‘Entwerten’ (translated ‘invalidate’ here) appears in the Wolf editions of Radbruch’s *Rechtsphilosophie*, but ‘entwerfen’ (‘to draft’) is used in the original printing as well as in the Collected Works, above at asterisk note. In the context here, ‘invalidate’ is clearly the better fit.]

²⁶ See also Kleine’s article in the *Süddeutsche Juristen-Zeitung*, above n 3.

²⁷ See § II, case no. 4, above.

[31 May 1946], applies to the other three cases discussed here²⁸ only if the deed in question was criminal according to the law at the time the deed was done. We have to consider the criminality of these other three cases, then, according to the law of the German Criminal Code of 1871, without reference to the later statute.

In the case of the informer Puttfarken, the view that he was guilty of indirectly committing murder is unchallengeable if he intended to cause Göttig's death, an intention he realized by using as his instrument the criminal court and as his means the legal automatism of a criminal proceeding. According to the opinion submitted by Professor Lange,²⁹ such an intention exists especially in those cases 'in which the perpetrator had an interest in getting rid of the person he denounced, whether an interest in marrying his victim's wife, taking over his victim's home or job, or an interest in revenge and the like'.³⁰ Just as a person is the indirect perpetrator where, for criminal purposes, he has abused his power of command over someone bound to obey him, so also is a person the indirect perpetrator where, for criminal purposes, he has set the judicial apparatus into motion by informing on someone. The use of the court as a mere instrument is especially clear in those cases where the indirect perpetrator could and did count on a politically tendentious exercise of the office of the criminal judiciary, whether owing to the political fanaticism of the judge or pressure applied by those in power. Suppose, on the other hand, that the informer had no such criminal intent, but intended instead to provide the court with evidence and leave the rest to the court's decision. Then the informer can be punished for complicity—having brought about the conviction and indirectly the execution of the person he denounced—only if the court itself, in virtue of its decision and the carrying out of its sentence, is guilty of having committed murder. This was in fact the route taken by the court in Nordhausen.

The culpability of judges for homicide presupposes the simultaneous determination that they have perverted the law,³¹ since the independent judge's decision can be an object of punishment only if he has violated the very principle that his independence was intended to serve, the principle of submission to the statute, that is, to the law. Objectively speaking, perversion of the law exists where we can determine, in light of the basic principles we have developed, that the statute applied was not law at all, or that the degree of punishment imposed—say, the death sentence pronounced at the discretion of the judge—made a mockery of any intention of doing justice. But what of judges who had been so deformed by the prevailing positivism that they knew no other law than enacted law? Could such judges, in applying positive-law statutes, have had the intention of perverting the law? And even if they did have this intention, there remains one last legal

²⁸ [See § II, case nos 1–3, above.]

²⁹ [See § II, case no. 1, above, and see above, n 6.]

³⁰ It is of course the height of subjectivism in the doctrine of complicity, that criminal intent—in the form of a 'subjective element of wrongdoing'—entails in the person of the indirect perpetrator illegality that is lacking in the person of the direct agent or instrument.

³¹ § 336 and § 344 of the Criminal Code.

defence for them, albeit a painful one. They could invoke the state of necessity contemplated in section 54 of the Criminal Code³² by pointing out that they would have risked their own lives had they pronounced National Socialist law to be statutory lawlessness. I call this defence a painful one because the judge's ethos ought to be directed toward justice at any price, even at the price of his own life.

The simplest question to deal with is that of the culpability of the two executioner's assistants for carrying out death sentences. One cannot allow oneself to be influenced either by one's impression of people who make a business out of killing other human beings or by the booming prosperity and profitability of that business at the time. Even when their occupation was still a trade of the sort passed down from generation to generation, executioners repeatedly took care to excuse themselves by pointing out that they were merely carrying out sentences, and that the task of pronouncing sentence belonged to the lord judges. 'The lords and masters hold evil in check, and I carry out their final judgment.' This 1698 maxim, or something similar, appears frequently on the blades of executioners' swords. Just as a judge's pronouncement of the death sentence can constitute murder only if it is based on perversion of the law, so the executioner can be punished for his deed only if it fits the circumstance described in section 345 of the Criminal Code: the deliberate carrying out of a punishment that should not be carried out. Karl Binding, with reference to this circumstance, writes that the relation of the executioner to the enforceable sentence is analogous to the relation of the judge to the statute; his single, total duty lies in its precise realization. The executioner's entire activity is determined by the sentence:

His action is just, in so far as it complies with the sentence. It becomes unjust in so far as it deviates from the sentence. This amounts to a disavowal of the single authority that matters for the execution as such, and therein lies the kernel of guilt. The delict [in section 345] ... can therefore be characterized as 'perversion of a sentence'.³³

Verification of the legality of the sentence is not incumbent on the executioner. The supposition of its illegality, then, cannot be damaging to him, nor can his failure to resign his post be charged against him as culpable nonfeasance.

V.

We do not share the opinion expressed at Nordhausen that 'scruples of legal form' tend 'to obfuscate' the plain facts. Rather, we are of the opinion that after twelve years of denying legal certainty, we need more than ever to arm ourselves with considerations of 'legal form' in order to resist the understandable temptations that can easily arise in every person who has lived through those years of

³² [See also § II, case no. 4, above.]

³³ Karl Binding, *Lehrbuch des Gemeinen Deutschen Strafrechts, Besonderer Teil*, vol. 2 (Leipzig: Engelmann-Verlag, 1st edn, 1905) 569.

menace and oppression. We must seek justice, but at the same time attend to legal certainty, for it is itself a component of justice. And we must rebuild a *Rechtsstaat*, a government of law that serves as well as possible the ideas of both justice and legal certainty. Democracy is indeed laudable, but a government of law is like our daily bread, like water to drink and air to breathe, and the best thing about democracy is precisely that it alone is capable of securing for us such a government.

附录二

五分钟法哲学

第一分钟

对于军人而言,命令就是命令;而就法学人士来说,法律就是法律。但是如果军人知道,一个命令是以犯罪或者违法为目的的,他就有义务和权利拒绝服从这个命令。而自从大约一百年前最后一个自然法学者从法学人士中消失之后,法学人士就再也没有像军人那样认识到法律效力与听命于法律的例外情况。法律之所以有效,是因为它是法律,并且只要在通常情况下有强制力来执行它,它就是法律。

法律及其有效性的观点(我们称之为实证主义学说)使法学人士以及这个民族都丧失了抵抗能力,来反对如此专制,还如此残暴、如此罪恶的法律。归根结底,它是把法律和强制力等同起来:哪里有强制力,哪里就有法律。

第二分钟

人们曾经希望用另一句话来补充或者替代这句话:法者,于民众有益之物也。

这就是说:专制,违约,犯法都是法了,只要它们是对民众有益的东西。这实际上就是说:国家权力掌有者自以为对公众有益的事,独裁者的每个突发奇想和一时的兴致,没有通过法律和审判而实施的刑罚,无视法律而杀害患者等等都是法了。我们还可以说:统治者的私人利益也可以被看做是公共利益。这样,将法和臆想的或者自称的民众利益等量齐观,就把法治国家变成了非法治国家。

不,这并不必然等于说:凡是对民众有益的东西都是法。恰恰相反,应该说,只有法,才是对民众有益的。

第三分钟

法是追求正义的意愿。而正义就是:无论是谁,一视同仁。

如果对政治对手的谋杀受到推崇,对异族人的杀戮受到祈求,对相同的行为,但因为其是反对自己的志同道合者的,就处以最残忍、最侮辱人格的刑罚,那么这就既不是正义也不是法了。

如果法律有意识地否认追求正义的意愿,例如任意的同意或者拒绝赋予人们人权,那么法律就缺乏有效性;那么民众也就没有义务来服从这些法律;那么法学人士就必须鼓起勇气来否定这些法律的法的特性。

第四分钟

当然,除了正义之外,公共利益是法的另一个目标。诚然,即使是上述的法律,甚至是恶法,也还仍然具有某种价值——相对于置疑它仍旧保障了法律的价值。当然,人类的不完善性使法所有的三个价值:公共利益、法的安定性和正义,在法律中不是总能和谐统一,所以我们只能权衡,是否为了法的安定性,仍然认为那些恶的、有害的或者不公正的法律应该是有效的,或者因为它的非正义性或具有公共危害性,而能够否认它的有效性。这样就必须在民众和法学人士的意识中打上一个深深的烙印:有可能存在具有如此程度的非正义性和公共危害性的法律,以至于我们必须否定它的有效性和法的特性。

第五分钟

存在一些法律原则,它们比其他的法律规章具有更高的效力,以至于只要哪个法律与它们相悖,那么这个法律就失去其有效性了,人们把这些法律原则称为自然法或者理性法。的确,它们在具体方面还处于一些置疑的包围之中,但是经过几个世纪的努力已经形成了一个稳定的规模,而且广泛协调地集中在所谓人权和公民权宣言之中。就这些法律原则中的某些部分而言,只有那些吹毛求疵的疑问才有可能仍然对这些法律原则保持着怀疑。

在宗教信仰的话语里,同样的思想被用两句圣经箴言记录了下来。圣经中一方面写道:在上有权柄的人,人人当服从他*;另一方面写道:顺从神,不

顺从人,是应当的。*——这并不仅仅是一个虔诚的愿望,而且还是一个有效的法律规则。不过这两句圣经箴言之间的紧张关系不可能通过第三者来消解,例如说通过这句箴言:恺撒之物当归恺撒,神之物当归神*——因为这句话也会使它们的界线变得不清楚。而是:这句话将这种紧张关系的解决诉诸于上帝的声音,而这种声音只会就特殊情况在个人的良心中说给他听。

附录三

法律的不公正和超越法律的公正

民族社会主义懂得通过两条原则来约束它的追随者,一方面是对军人,“命令就是命令”;另一方面是对法学人士,“法律就是法律”。“命令就是命令”这条原则从来没有毫无限制地存在过。当命令者的命令出于犯罪目的的时候,服从义务就终止了(《军事刑法典》第47条, MStrGB § 47)。而与之相反,“法律就是法律”这条原则就不受限制。这是实证主义法律思想的表达,这种思想几乎毫无争议地统治了德国法学界数十年。因此,法律的不公正与超越法律的公正一样,本身就是一个矛盾体。有两个问题目前一再地在实践当中被提了出来。刊登在“南德法学人士报”(SJZ, 36页)上的威斯巴登初级法院的一份判决引发了一些评论*——按照该判决,“将犹太人的财产宣布收归国有的法律是和自然法相矛盾的,并且从它颁布之时起就应该是无效的。”

在刑法的范围内,同样的问题在苏联占领区内主要通过讨论和决定被提了出来。

位于诺德豪森(Nordhausen)的图林根刑事陪审法庭在一个主审诉讼程序(Hauptverhandlung)中判处司法局官员普特法尔肯(Puttfarken)终身监禁,由于他的告发而致使商人戈提希(Göttig)被判决处死。普特法尔肯指证了戈提希在一个厕所里留下的字迹:“希特勒是屠杀者,并对战争负有罪责。”这个

判决的产生不仅单纯是因为他的这句留言,而且还因为他收听了外国广播电台的节目。图林根总检察官库施尼茨基(Kuschnitzki)博士的公诉词已经由报纸(“Thüringer Volk”, Sonneberg, 1946年5月10日)详细地刊登出来了。总检察官首先深入讨论的问题是:这个行为违法吗?“如果被告解释说,他告发别人是出于对民族社会主义的信仰,那么这件事就是不受法律追究的。不存在告发别人的法律义务,无论是否出于政治信仰,即使在希特勒时代也不存在这样的法律义务。关键的是,他是否在执行司法公务活动。这里有一个前提条件,就是司法机关有能力进行审判执法。合法性,对正义的追求,法的安定性,是司法的基本要求。但这三个前提条件在希特勒时代的政治性刑事司法方面都是缺乏的。”

“谁在这些年里告发了别人,就必须考虑到——而且他也这么做过——他并没有将被告送交到一个对查明真相和公正审判有法律保障的、合法的审判程序之中,而是交给了一个专制机关。”

“在这种意义上,我完全同意耶拿大学法学院院长朗格(Lange)教授对此问题所做的法律鉴定意见。在第三帝国中,这些关系都是众所周知的,以致人们都非常清楚地知道:如果有人因为一张写有‘希特勒是一个屠杀者,并对战争负有罪责’的纸条而在战争的第三年被追究责任,那么这个人很可能就性命难保了。一个像普特法尔肯这样的人显然还不知道司法部门是如何歪曲法律的,但是他已经可以确信,司法部门是干得出这样的事的。”

“根据刑法典第139条,不存在一种叫做‘告发’的法律义务。本来这个规定恐吓人们将会受到刑罚,如果你获悉了某人企图谋反的可靠信息,而又消极地没有及时向国家机关报告;本来也可以确定,戈提希是因为预备谋反而被卡塞尔的州高级法院判处死刑的,但是在法律意义上绝对不存在一种谋反的预备。戈提希勇敢地说出的那句话:‘希特勒是一个屠杀者,并对战争负有罪责’充其量不过是一个苍白的真理。传播和散布这句话的人,既不会威胁到帝国,也不会威胁到其自身安全。他只是在尝试为清除损害帝国利益者而贡献一己之力,并且希望能够由此拯救这个国家,因此他的行为与谋反罪行是对立的。通过形式法学思想将这一清楚的事实构成变得模糊不清的所有行为是能够被杜绝的。此外可能会有疑问的是,所谓的元首和帝国总理究竟是否在任何时候都能被看做是合法的国家首脑,并且是否因此他就受到了谋反罪条款的保护。无论如何,这个被告人在告发别人的时候都从未考虑过

其行为在法律上的归属,他也从来没有宣称,他之所以告发戈提希,是因为他事实上看出了戈提希的谋反意图,并由此认为自己有告发他的义务。”

然后,总检察官转向了这个问题:这个行为有罪吗?

“普特法尔肯基本上承认,他是有意要把戈提希送上断头台的。一系列的证据也证明了这一点。这符合刑法典211条的意义上所谓的谋杀罪的故意。而戈提希是由第三帝国的某个法院判处死刑的,与普特法尔肯的罪名成立并不矛盾。他是一个间接的罪犯。然而必须承认的是,从帝国法院的判决书中引申出的间接犯罪的概念通常令人想到的是其他的事实构成,这里主要指的是那些间接犯罪人利用无意志的或者无责任能力的工具进行犯罪的情况。在这个案件中,以前从没有人想到过德国法院可能成为犯罪的工具,而我们今天所面临的就是这样的一个事实构成,并且普特法尔肯一案也不会是惟一个这样的案件。当法院做出不公正的判决时,形式上它仍然是依法办案,但这并不能阻碍该间接犯罪罪行。此外,就这个方面而言,1946年2月8日的《图林根补充法》(Thüringisches Ergänzungsgesetz)消除了一些已经存在的疑虑,为了消除疑问,这部法律在第2条中对刑法典第47条第1款做了如下理解:‘自己或通过他人实施应受刑罚之行为者,即使他人是合法行为的,他也应作为犯罪人而受到刑罚。’新的,被赋予溯及力的实体法并未由此而制定;它只是对从1871年开始生效的刑法的一种正式解释。”〔1〕

“我自己持这种观点,根据对支持和反对意见的仔细斟酌,这些疑虑不可能与对间接犯罪中的谋杀假设自相矛盾。但是我们假设一下,而且我们也必须考虑到,如果法院也有可能持另外一种意见,那么又会出现什么问题呢?如果人们否定了间接犯罪的构成,那么也就很难不将有悖公正和法律而判处戈提希死刑的法官视为杀人犯了。这样,被告就成为了谋杀罪的从犯,并且出于这种观点他应当受到刑罚。如果人们对这个非常重要的疑虑有所异议——我没有考虑到这一点——那么人们就必须注意到1946年1月30日颁布的盟国监管委员会第10号法令,按照这部法令第2条C句,该被告是犯

〔1〕 理查德·朗格教授在图林根本文(魏玛1946年)的刑法典中(第13页)说道,就间接犯罪的概念在很多案件中都产生了置疑,在这些案件中,犯罪行为人为了谋求他的犯罪目的滥用了司法手段[如诉讼欺骗(Prozessbetrug),政治揭发(politische Denunziation),等]。1946年2月8日的这部法律的第3条因而也非常清楚地表明了这一点,如果被利用者是在履行职责或者自己的合法行为,那么间接犯罪也是应受处罚的。

有反人类罪的。在这个法律的框架内,这个问题已经不再取决于是否违反了这个国家的国内法。应当受到刑罚的是反人类的行为和完全出于政治、种族与宗教原因而迫害他人的行为。根据第2条和第3条的规定,犯罪人应当被处以由法院认定为正当的刑罚。这里也包括死刑。”〔2〕

“此外,作为法学人士,我习惯于把自己限定在纯粹的法学评价范围之内。如果人们能够置身事外,并且用健康的人类理智去对待,那么这就是非常值得赞赏的。法学一直都只是一种为有责任感的法学人士用来达到在法律上站得住脚的判决之工具。”

刑事陪审法庭的判决,不是因为间接犯罪,而是因为胁从谋杀。然后,那些违背法律和公正而判处戈提希死刑的法官们,也必须对谋杀承担罪责。〔3〕

(二)

其实,萨克森州总检察官J. U. 施罗德博士(Dr. J. U. Schroeder)在报刊(“每日评论”,Tägliche Rundschau,1946年3月14日)中也发表观点,提出了刑法上的“反人类之判决的归责性”,即使这些判决是根据民族社会主义的法律做出的:

“可以根据其死刑判决而得知,比如这里引用的这个,民族社会主义政党国家的立法缺乏法律上的所有有效性。”

“它们建立在所谓的‘授权法’*基础上,而该法不是经宪法规定的2/3必要多数原则通过的。希特勒使用暴力阻挠德国议会中的共产党议员参加会议,无视这些议员的豁免权而将他们关押起来。剩下的议员,特别是来自(德国天主教)中央党的议员,在冲锋队(SA)的胁迫下不得不同意授权。”〔4〕

〔2〕 在下文中,对监管委员会第10号法令的刑事当罚性没有再讨论,因为德国法院对此没有初始的管辖权(见第3条第1款d句)。

〔3〕 另一桩因告发而引起的诉讼程序发生在慕尼黑的一个特别法庭(该法庭是第二次世界大战后占领德国的盟国专为消灭民族社会主义而设立的),被告是告发者朔尔兄妹。肃清纳粹针对的就是政治上和道德上卑劣的思想,该思想认为,无须探究他们的活动是否合乎法律或者合乎公正或者应当负有责任。由此得出的是,可以划定相对于刑事司法的界限及相互重叠之处。参见解放法第22条(Befreiungsgesetz)*。

〔4〕 可能还需要我们讨论的是,在多大程度上,由于变革而产生的秩序通过“事实的规范力量”变成了有效的法律。还有这段说明文字,对授权法的2/3多数只是把共产党人排除在外就获得了通过,那么按照耶利内克先生的友好提示就显得不切合实际了。

“任何法官都不能援引一部不仅是不公正的、而且甚至是**犯罪性**的法律,然后再利用根据该法律所做出的判决来审判案件。我们依据的是高于一切成文法规的人权,是否定那些反人类之暴政犯罪命令所具有的有效性的、不容放弃的、亘古不朽的公正。”

“基于这种考虑,我认为,那些做出不符合人性信条的判决,并且事先已经认识到该死刑之无效性的法官,必须受到指控。”〔5〕

(三)

来自哈勒(Halle)的报道说,助理死刑执行官克莱纳(Kleine)和罗泽(Rose)因为主动参与了无数起的非法行刑而被判刑。1944年4月至1945年3月,克莱纳参与了931起判决执行,并由此得到报酬26433帝国马克。这个判决看上去是根据盟国监管委员会制定的第10号法令(反人类的犯罪)所做出的。“这两位被告是完全自愿地从事令人恐惧的职业,因为对每个行刑官来说,他们都是自由的,可以随时借以健康或者其他的理由而退出这个工作。”〔“自由民主报”(Liberaldemokratische Zeitung)哈勒,1946年6月12日〕

(四)

萨克森州的这个案件也是广为人知的(见总检察官J. U. 施罗德博士1946年5月9日文):1943年一位在东部前线服役的萨克森士兵,被安排看管在押的战俘,但他“非常反感那些战俘所遭受的非人待遇,可能还有对在希特勒军队中服役的厌倦”,就逃跑了。他在逃亡的路上,不禁闯入了他妻子的住处,并在那里被发现,据说还被一位巡警抓获。他趁该巡警不备,夺下其装有子弹的公务佩枪,从背后将其一枪射死。1945年他从瑞士回到萨克森,后被逮捕,检察机关原本准备就残忍杀害国家公务人员的罪名对他提起诉讼。但总检察官做出批示,释放并中止了该诉讼程序。他将第54条*视为已经制定的法律规范,他论证在紧急状态之下不承担刑事责任的根据是,“当年由法律捍卫者作为公正来制定的东西在今天已经不再适用了。从希特勒和凯特尔的军队逃跑,从我们的法律观来说并不含有过错,不能成为对逃跑者施以刑罚的

〔5〕 关于对不按照法律而做出判决所应当承受的刑事责任也可参见(弗里德里希)布赫瓦尔德值得注意的论著“Gerechtes Recht”,Weimar 1946,第5页及以后。

论证理由,逃跑者也不会因此而名誉受损;这并不能给他招致罪责。”

这样,在法律的不公正和超越法律的公正观点之下,对实证主义的斗争在各处广泛地开展了起来。

三

事实上,实证主义通过“法律就是法律”的信念,已经使德国法学界无力抵抗具有暴政和犯罪内容的法律了。与此同时,实证主义也就完全没有能力运用自己的力量来证明法律的有效性了。实证主义认为,因为法律享有使自己得以施行的权力,所以法律的效力也已经被证明了。而在权力基础之上可以建立的可能是必然(Müssen),但是绝不可能是应然和效力(Gelten)。它们更有可能建立在一种价值之上,该价值就包含在法律自身之内。很清楚的是:即便不考虑其自身内容,任何一种实在法也都拥有一个价值:有法总还是好于无法,因为它起码还实现了法的安定性。但是法的安定性不是法律必须实现的惟一的、决定性的价值。与法的安定性同时存在的还有另外两个价值:合目的性和正义。在这个价值序列中,我们把有利于公共利益的法的合目的性置于了末位。这绝对不是说,所有“对人民有利的东西”都是法,而是说,法就是实现法的安定性和追求正义的东西,且最终是对人民有利的。每一个实证法律因其实证性而具有的法的安定性,占据了合目的性与正义之间的一个值得注意的中间位置:它一方面是公共利益所要求的,而另一方面也是正义所要求的。法是安定的,它不能被解释和适用为今天在这儿是这样的,明天在那儿是另外一个样子的,这些同时都是正义的要求。在法的安定性和正义之间、在一个内容上尚有争论但属于实在法的法律之内、在一个公正但还未以法律形式制定的法律内部存在着争议的地方,事实上也存在着正义与其自身的冲突,表面正义和实际正义的冲突。《新约》“福音书”对这种冲突做了精彩的表达,借此它一方面命令道:“在上有权柄的人,人人当顺服他”,而另一方面又要求:“顺从神,不顺从人,是应当的。”

正义和法的安定性之间的冲突可能可以这样来解决,实证的、由法令和国家权力保障的法律有优先地位,即使在内容上是不正义或者不合目的性的,除非实证法与正义之间的矛盾达到了一个如此令人难以忍受的程度,作为“不正当法”的法律则必须向正义让步。我们不可能在法律不公正的情况与尽管内容不正当但仍然有效的法律之间划出一条清楚明确的界限;但是对

其他界限还是能够非常清楚地划分:在所有正义从未被诉求的地方,在所有于实证法制定过程中有意否认构成正义之核心之平等的地方,法律不仅是“不正当法”,而且尤其缺乏法律本性。因为人们不能把法律,包括实证法,定义为规章制度之外的任何东西,而这里的规章制度,按照它们的意义,必须为正义服务。根据这个标准来衡量,纳粹法律整体上都从来没有达到法律能够有效所应达到的高度。

希特勒人格中最突出的个性——由此出发而塑造了全部纳粹“法律”的特性——就是完全缺乏真理意识(Wahrheitssinn)和法律意识(Rechtssinn):因为他不具有任何真理意识,所以他能够给每次演讲的、不带有羞耻感和道德顾虑的效果赋予真理的腔调;因为他不具有丝毫法律意识,所以他能够毫无顾忌地把最极端的专制上升为法律。在统治初期,他给波腾巴的谋杀罪犯发去了同情的电报*,在末期则对1944年7月20日殉难的烈士施以令人发指的虐待。为了纪念波腾巴判决,阿尔弗雷德·罗森贝格在“人民观察家报”已经对此发表了理论:人,各不相同,谋杀,也各不相同;在法国根据法律,不会对谋杀和平主义者约雷(Jaurès)和试图谋杀纳粹分子克莱蒙梭(Clemenceau)予以相同的评价。一个出于爱国动机而犯罪的罪犯,和另一个动机旨在反对人民的罪犯(按照纳粹主义的观点),不可能被处以相同的刑罚。所以它从一开始就表明,纳粹主义的“法律”要取消正义本质所限定的要求——相同的,相同对待。因此就这个方面来说,纳粹法律从根本上缺乏法律本性,它不仅不是不正当法,而且压根儿就不是法。这一点尤其表现在那些被纳粹党用来针对其他所有党派的部分特点,以便独自占据国家整个(政权)的规定之中。所有那些把人当做劣等人来对待,并否认其人权的法律都缺少法律特性。所有那些不考虑犯罪行为的不同的严重程度,只遵从暂时的惩戒需要,不同程度的犯罪行为处以相同的刑罚,经常以死刑相恐吓的刑罚威慑,都不具备法律特性。所有这些不过是法律的不公正的例证。

必须承认的是——也正是在经历了那12年(纳粹统治时代)之后——“法律的不公正”概念和对实证法法律本性的否定能够给法的安定性带来多么可怕的危害啊!我们当然希望,一个如此严重的不公正只是一度使德意志民族处于迷惘与困惑之中,但是我们也必须通过对使人们丧失了反对纳粹滥用立法权力的防卫能力的实证主义在原则上加以克服,对一切可能发生的情

况做好准备,以防止这样的一个非法治国家死灰复燃。〔6〕

四

这一点也适用于将来。面对过去那 12 年法律的不公正,我们必须尝试着去满足正义的要求,而且同时还要尽可能少地伤害到法的安定性。并非每个法官都应该被许可自行草拟法律,这项任务还是应该由一个更高级的法院或者立法机关来掌有〔克莱纳也持有相同的观点,见“南德法学人士报”SJZ (1946) 第 36 页〕。在美军占领区,根据联邦委员会(Länderrat)的一项协议已经通过了一部这样的法律:即“关于纳粹刑事司法中不公正之赔偿法”(Gesetz zur Wiedergutmachung nationalsozialistischen Unrechts in der Strafrechtspflege)*。根据这部法律,“用以反抗民族社会主义和军国主义的政治行为,不应当受到刑罚”,并且由此,如同逃兵案(见前文案例四)的难点问题都会被解决。与之相反的是,只有在按照当时的法律行为,这些行为的刑事当罚性就已然存在的时候,一部与此相关的法律,“**纳粹时期犯罪行为处罚法**”(Gesetz zur Ahndung nationalsozialistischer Straftaten)* 才能够适用于这里其他要处理的案件。因此,我们不应依赖这部法律,而是应当按照帝国刑法典(RStGB)的规定来对其他三起案件的刑事当罚性加以考查。

在本文已经提到的告发案件中,如果告发者已经怀有犯罪意图,并为了实现这个意图,将刑事法庭作为工具、将刑事诉讼程序的司法自动运行作为手段加以利用,那么将告发者本人假设为杀人罪行中间接犯罪人也就无可指责了。这样的意图尤其存在于此类情况中,“在这一类情况中,犯罪人有意要消除(另案的)犯罪嫌疑人,无论是为了与他的妻子结婚,或者占据他的房子拟或他的职位,还是出于复仇欲以及类似情况。”(耶拿大学里夏德·朗格教授的已被谈及的意见书持此观点)〔7〕如果说滥用自己的命令权而使他人服从以犯罪为目的之命令的人是间接犯罪人,那么通过告发行为而运行司法机器达到犯罪目的的人也是间接犯罪人。在某些案件中,间接犯罪人能够并且已

〔6〕 布赫瓦尔德也赞成超越法律的公正,同上文注,第 8 页及以后。另外请参见罗默尔(Roemer),SJZ 第 5 页。*

〔7〕 无疑这是主观主义(Subjektivismus)在参与理论(Teilnahmelehre)中的顶峰,犯罪意图——像一种“主观的不法因素”——违法性。

经估计到刑事法官职责的行使,要么是出于政治盲目狂热的原因,要么在当时权力掌有者的压力之下,会带有一定的政治倾向性,而此时,将法院纯粹作为工具来使用就体现得尤其明显。假设告发者并不怀有这种犯罪意图,而只是要向法院提供一些材料,并交由法院对之后的诉讼进行判决,那么他就只能因为协助犯罪而作为这份判决的肇始者和死刑执行的间接引发者来受以刑罚,如果法院就其自己的立场上来说已经通过这份判决以及对这份判决的执行而犯有杀人罪行的话。事实上,诺德豪森法院采用的就是这种办法。

法官因杀人而具有的刑事当罚性必须以对他们所实施的枉法行为同时加以确定为前提(刑法典第 336、344 条)。因为,审判独立之法官的判决,只有当法官恰好违反了被审判独立所确定为之服务的基本原则时,违反了服从于法律的,也就是说服从于公正的原则时,才可能成为刑罚的对象。如果借助于由我们发展出的原则能够确认这些曾经应用的法律不是公正的,曾经应用的刑罚标准,比如根据自由裁量所做出的死刑判决,是对旨在正义的所有意愿的嘲讽,那么枉法现象就是客观存在的。但是那些深受居于主导地位的现实主义毒害、除了法律其他的一概不予承认的法官还可能在应用实证法的时候怀有枉法的意图吗?即使他们有这样的意图,但对于他们来说,对他们可能由于作为法律之不公正的民族社会主义法律观而给自己招来的生命危险的引证,对刑法典第 54 条紧急状态的引证,都只是一种最后的、当然也是尴尬的法律救济手段——之所以说是尴尬的,是因为法官的道德品质应当是不惜任何代价,甚至以生命为代价而指向于正义的。

最容易解决的是两位助理行刑官因为死刑判决的执行而产生的刑事当罚性问题。我们既不允许自己受到对将杀害他人作为赢利性职业的人们的印象,也不允许受到这种职业当时的繁荣景象和丰厚利润的左右。尽管刽子手这种职业过去是一种世袭的手艺,但这个行当的掌握者还是经常一再地推托说,他们只负责行刑,而法官先生们的任务才是判决。“这些先生们操控着吉凶祸福,我只是执行他们的最终判决”——1698 年的这句名言反复以这种或者相近的语调闪现在行刑刀的利刃之上。正如只有当一个法官的死刑判决以枉法为基础,此判决才可能表现为应受刑罚的杀人行为一样,也只有当行刑表现为第 345 条的事实构成:有预谋地执行一个不应执行的刑罚的时候,刽子手才可能因为这一行刑行为而受到刑罚。卡尔·宾丁(刑法教科书,分论部分,第 2 卷,1905,第 569 页)就这一事实构成说道:行刑官与应执行的

判决之间的关系与法官与法律之间的关系类似;行刑官全部的且唯一的义务就在于准确地执行判决。判决决定着他的全部职业行为:“只要他的行为遵循了判决,那么此行为就总是正当的,只要这个行为偏离了判决,它也就变得不正当了。因为这个罪责的核心就在于对唯一的、就执行而言是决定性的权威的否定之中,所以人们也可以将(第345条中规定的)违法行为视为是曲枉判决的。”审查判决的合法性不是行刑官的责任。因而对判决非法性的接受也不会对他造成任何损害,而他未履行该职责也不能归为违法的渎职行为。

五

我们的观点与在诺德豪森所做出的判决的观点是不同的,他们认为“形式法学的思考”只会将“清楚的事实构成弄得模糊”。而我们的观点是这样的,在对法的安定性长达12年的否定之后,我们就更需要凭借“形式法学的”考量来反对那些会在所有经历了12年迫害和压制的人心中理所应当产生的蛊惑。我们必须寻求正义,同时注重法的安定性,因为它本身就是正义的一部分,并且重新建立法治国家,以便尽可能地满足这两种理念。民主当然是一种值得称赞的善,而法治国家就像日常的面包、饮用的净水和呼吸的空气,正是民主中最美好的部分,只有它能够对法治国家加以保障。

编辑备注

拉德布鲁赫《法哲学》不同版本的页码对照

一、1932年版《法哲学》

序言部分

在拉德布鲁赫手稿的序言部分中标有一些以下的手写备注(参见《拉德布鲁赫全集》第二卷手稿摹本,第206~209页):

——在前言衬页中:对西班牙语、葡萄牙语和波兰语译本与下列评论的说明(相关的说明见方括号内):

1. [海恩里希(Heinrich)] 德罗斯特(Drost), “Justiz” VIII, i [Die Justiz 8 (1932/33), 第1~11页]。
2. W. [威廉]绍尔, Arch. f. RuWPh (“Er plustert sich auf, als ob er…… wäre” Arno Holz) [ARWP 26 (1932/33), 第75~79页]。
3. [乔治]古尔维奇, Archives de Philosophie du Droit, 也见于其著作 L'expérience juridique 1935, 第220~231页。
4. [龟治]木村龟治, Hogaku-Sirin [Zeitschrift der Hosei-Universität/Tokyo] August 1932, [第34卷(8/1932), 第966~991页]。
5. 格明根男爵(Fhr. v. Gemmingen), Achaftbgs Monatsschrift, 第24年度第1册[1933, 第60页及以后]。
6. 绍尔兰德对法学周刊的评论 1933年7月27日被新的编辑部门以不再允许公开发表为由加以拒绝!!
7. [卡尔]佩特拉谢克, Kritische Vierteljahresschrift [für Gesetzgebung und Rechtswissenschaft]第3期, 第27卷[1935, 第135~150页]。
8. [加科莫(Giacomo)]佩尔提科纳(Perticone), Archivio di Storia della