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# ON THE DISCUSSION OF FIDELITY TO AND VALIDITY OF NAZI LAWS†

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- I Punishment of informer and the decision of Court of Appeal Bamberg
- II Problem of choice among possible formulas for the purpose of punishment
- III Fidelity to and validity of Nazi laws

## I Punishment of informer and the decision of Court of Appeal Bamberg

Tremendous problems concerning legality or illegality, post war Germany has been faced with to solve, emanated from the Nazi political process, as its criticism showed us. One of the most odious problems is grudge informer cases. Here, in these cases people who actually wished to drive out their personal enemies, or to get rid of unwanted spouses informed the Nazi regime, or local party leaders against their victims for their spiteful or provocative remarks about the Nazi leaders. These cases are, so to speak, a core of such problems. For after the collapse of Nazi regime people, having utilized such a means of information, are conceived as being unlawful for their acts, and often found guilty, accordingly punishment to these offenders is an urgent task

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† This is a summary of the author's Japanese article published under the same title, though a little bit modified in its content. The original article constitutes a part of the collected papers (entitled: "Problems of law and jurisprudence"), dedicated to Prof. K. Tsuneto for his 70th birthday commemoration. As to the content it constitutes a part of the author's study: "Validity of law and fidelity to law in the changing mass society". An article cited below too has been written for this purpose.

The following abbreviations are used throughout the article: CA for Court of Appeal=Oberlandesgericht, KG for Kammergericht, CCL for Control Council Law=Kontrollratsgesetz, SJZ for Süddeutsche Juristen-Zeitung, DRZ for Deutsche Rechts-Zeitschrift, MDR for Monatsschrift für Deutsches Recht, HLR for Harvard Law Review.

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for Germany and occupation authorities to rebuild the rule of law there, while these informers themselves considered and argued their acts lawful and admirable under the Nazi regime when at the height of its power.<sup>1)</sup>

This legal issue becomes more complicated when we note that several formulas for its settlement are possible. Indeed, there are at least three formulas according to the historical experience of the occupation. The first is the formula of retroactive legislation which aims at to punish informer and the Control Council Law (CCL) is the typical one. The second is the formula of a reference to a higher law to review the Nazi laws which informer pretended to rest on. The third is the formula of an interpretation and application of the German Criminal Law (1871) for the same purpose. We may call each of them the retroactive legislation, the judicial review to a material extent and the interpretation and application of the German criminal law. As a matter of fact the third formula has been brought realization in American occupied area, while the first has been applied retrospectively by German courts under the delegation of each of three authorities (English, Soviet and French) in their occupied areas. So far as these formulas have arisen from the necessity of settlement of the legal issue left by the Nazi political process, and of improvement of Germany in its legal political system, it is no wonder that each of them has been faced with hot discussions — criticism and anticriticism —. The discussion, we may well find, raises the question how to deal with fidelity to law and validity of law besides of the question of possibilities of formulas said above. I shall attempt to analyze a little closely the meaning of fidelity to law and validity of law by laying a special emphasis on the examination into a discussion on the third formula. For this purpose the decision of Court of Appeal (CA) Bamberg seems to afford the key to an understanding of this issue.

The CA Bamberg in its decision of July 27, 1949, which raised the severe controversy, dealt with a case as follows:

“In October, 1944, the defendant who during her husband’s long absence on military duty since 1940 had turned to other men and who wished to get rid of him, reported his remarks to the local leader of the Nazi party (Orts-

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1) See Arthur Kaufmann, *Das Unrechtsbewusstsein in der Schuldlehre des Strafrechts*, 1949, which gives a brilliant analysis as to the outline and depth of the informer problem as a whole.

gruppenleiter). While under travel orders on a reassignment, he paid a short visit to his wife during the single day. At this time he made disparaging remarks to her about Hitler and other Nazi leaders. He also said it was too bad Hitler had not met his end in the assassination attempt that had occurred on July 20, 1944. She denounced him to the local leader as above, observing that a man who would say a thing like that does not deserve to live. The content of his remarks was handed to the circle leader (Kreisleiter). The result was a trial of the husband by a Military Tribunal. At the trial she gave evidence on oath, and the husband was sentenced to death. After more than one week of imprisonment, he was sent to the front again, consequently he was not executed". After the collapse of the Nazi regime, the wife as well as the judge who had sentenced her husband, was brought to trial. According to the decision of a German court of last resort in criminal cases, that is, CA Bamberg, the sentencing judge was not-guilty, but the wife was guilty under Article 239 of the German Criminal Code of 1871, for the intentional and unlawful deprivation of another's liberty (Freiheitsberaubung, Freiheitsentziehung), because she utilized out of choice — right — Nazi laws to bring the death or free punishment of her husband. This is an outline of the decision.<sup>2)</sup>

Let me summarize the detail of the decision by citing a few crucial points.

1. Condemnation of the defendant for a principal by indirection. Certainly she offered a chance to the local leader to arrest her husband. But she didn't it directly, but indirectly. What is relevant here, is that she unlawfully deprived her husband of his liberty in an indirect way, that is, as a principal by indirection (mittelbarer Täter).

2. Validity of Nazi laws. During the period of the Nazi government when at the height of its power, German courts had to try the acts or utterances of people which fell under a provision of A Law Against Malicious Attacks on the State and the Party and for the Protection of the Party Uniform Law of Dec. 20, 1934, and Article 5 of A Statute Creating a Particular Criminal Law in War Time, Law of Aug. 11, 1938 (Heimtueckegesetz und Kriegssonderstrafrecht). There is no room for doubt that such laws with their provisions were "highly iniquitous

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2) Beschluss von 7. 27. 1949, Oberlandesgericht (OLG=CA) Bamberg, SJZ, 1950, S. 208ff. DRZ, 1950, S. 302f. NJW, 1950, S. 35ff.

laws (grob unbillige Gesetze). They were felt to be terror laws (Schreckengesetze) by the great majority of the German people, because of their severe penalties which offered the possibility of cruel punishment in the particular case. They cannot, however, be held to be laws violating natural law (naturrechtswidrige Gesetze). For they did not order people to take positive acts which necessarily would be prohibited by divine law or human law according to the opinion of all culturally minded nations, but ordered under penalty merely to keep silent."

3. No justification for the act of defendant-wife. She reported her husband's utterances by using the right of information which is given all members of the state, to which, however, does not correspond any duty. In this respect she is different from the sentencing judge of the Nazi Military Court who had been under the special status as being subjected to the state power (besondere Gewaltunterworfenheit). One who intentionally and despite of his knowledge of the fact that his act of information would necessary cause a frightful predicament to the informed, dare to do it, is blamable for his act, "especially in such cases when the utterances of the informed correspond to the truth, in accordance with the views of decency and morals (die Auffassung von Sitte und Anstand) prevailing widely within the German people even at the time of Nazi government." From this point of view such act is naturally unjust (Unrecht) and yet unlawful (rechtswidrig) to the extent of Art. 239.

After all it is clear that the special emphasis of this decision is laid on the value standard or standard for decision making as "the sound conscience and sense of justice of all decent human beings" (das Billigkeits- und Gerechtigkeitsempfinden aller anständig Denkenden) which should be mentioned later.

This decision has provoked so hot discussion that it has not only been noised at once throughout the scientific world of law in this country, but later in the abroad too. The matter like this is not surprising, since the decision touched on the fundamental problems in regard to fidelity to and validity of the Nazi laws. But before getting into these problems, something important does seem to me to be explained in this case. Perhaps there are the following

points so long as we can classify it. First of all, the informer's act falls under Art. 239 of German Criminal Code for the unlawful deprivation of another's liberty in the form of principal by indirection. How to consider then the act unlawful is the next problem.

According to the argument of the defendant-wife, her act is the justifiable act as being rested on the Nazi laws. If so, it might become lawful, accordingly she might become not-guilty. Such plea of the justifiable act (in other words, fidelity to the Nazi laws) has been often made by defendants in defending themselves on trial. The court, on the contrary, decided her act unlawful. Why then the court was able to decide in such a way? Certainly, Nazi laws were to be held valid laws to the formal extent. So far as their social adequacy is concerned, however, they were iniquitous laws. This fact was plainly pointed out by the decision. Moreover, we may imply the basic views underlying the decision as follows: A great number of German people still maintained the views of decency and morals even under the pressure of Nazi government. Their views rooted in the historical tradition of German society played a role as a conventional morality<sup>3)</sup> (Dr. Benn & Peters) to judge the social adequacy of Nazi laws. Viewing from this perspective, Nazi laws said above lacked the social adequacy, accordingly wrong to the material extent as Prof. v. Weber showed us. Thus the informer's act is not to be held a justifiable act. The last problem is concerning to her responsibility.

She had no duty, but merely right of information. And yet that she was ill intentioned to bring the death or free punishment of her husband is quite obvious from her observation that a man who would say a thing like that does not deserve to live. She ought, therefore, to have been conscious of the fact that her act intentionally taken was against the popular views of decency and morals as deeply rooted in the tradition of German society. If so, naturally she cannot dodge her responsibility.

## **II Problem of choice among possible formulas for the purpose of punishment**

Now let us turn to see how this decision has been reviewed by different scholars in each different countries. In Germany it is easily conceivable as a

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3) S.I.Benn and R.S.Peters, Social principles and the democratic state, 1959, P.59.

matter of fact that since the decision has raised complicated issues of legality or illegality of defendant's act, the concept of a principal by indirect, unlawfulness (*Rechtswidrigkeit*) and responsibility has come into main questions. As to the concept of a principal by indirect, this is not the first decision which applied this concept. There are several decisions in this respect, like the *Schwärzel* case<sup>4)</sup> or *Puttfarken* case reviewed by late Prof. Radbruch<sup>5)</sup>. This decision as well as the others, however, has brought scholars to a conflict of views. Prof. R. Lange agreed with this view of the decision on the one hand, observing that it frankly accepted the concept of material unlawfulness (*materiale Rechtswidrigkeit*) by applying the concept of a principal by indirect to this case.<sup>6)</sup> On the other hand Prof. v. Weber was relatively critical upon the view of this sort, Prof. Welzel and Dr. Schemel were plainly dissatisfied to it.<sup>7)</sup> I am sure that such a conflict of views would be helpful in awaking an attention to the basic problems of interpretation of laws. But instead of going further technically in these respects I shall have to content myself with some brief remarks on two points, that is, standard for evaluating informer's act and formula of settlement of the legal issue resulting from this case.

The first point becomes clear when we note the argument of Prof. v. Weber. He argued that the decision did not succeed to prove the existence of intentional act, matters accordingly would not have been helped if it showed the act to be ethically blamed.<sup>8)</sup> There would be a danger in this decision to punish immoral mind instead of legal responsibility, if it reached its height. It may safely be assumed that what is to be legally interpreted is morally or ethically judged and perverted by judicial decision. And yet the moral standard like the sound conscience and sense of justice of all decent human beings involved in the decision, to say with Dr. Schemel,<sup>9)</sup> lies just at the root of the danger of this sort. Apart from the judgement of reality of this danger, it should be remarked at this point that to solve the puzzle of informer's

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4) Der Grundsatz "nullum crimen sine lege" wurde das Kontrollratsgesetz Nr. 10 nicht verletzt, Judgement of June 21, 1947, KG, DRZ, 1947, S. 308 ff.

5) G. Radbruch, Gesetzliches Unrecht und übergesetzliches Recht, SJZ, 1946, S. 105 ff.

6) R. Lange, Anmerkung zum Beschluss, OLG Bamberg, SJZ, 1950, 209.

7) H. Welzel, Anmerkung zum Beschluss, OLG Bamberg, DRZ, 1950, S. 303f.

8) H. von Weber, Anmerkung zum Beschluss, OLG Bamberg, NJW, 1950, S. 35 f.

9) H. Schemel, Anmerkung zum Beschluss, OLG Bamberg, NJW, 1950, S. 515.

responsibility man can not help to examine Nazi laws which offer the legal basis of his motivation and the supralegal standard which is available to evaluate the act and legal basis involved in this case. But, to examine the standard for evaluation it is again necessary to consider several formulas said above. Surely these points here are closely connected with each other. In this sense, a discussion held by two leading scholars in England and America, that is, Prof. H. L. A. Hart and Lon L. Fuller, may make these points plainer. Despite of arguing on the common ground that the formula of retroactive legislation should be chosen even the case like the CA Bamberg's case, they are different in the reasoning of this formula as well as the standard for evaluation. Let me summarize their arguments by citing each different emphasis laid in them.

What Prof. Hart is anxious to argue is that those who may hold the positivistic view of law (law is law) are able, at the same time, to offer "the moral criticism of institutions". So far as this argument is concerned, he ought to be fundamentally of the CA Bamberg's opinion, except the judgement of possible formula.

In his article "Positivism and the Separation of Law and Morals", however, he conceived of the opinion of the decision as to the fact in some different meaning as follows: "The court of appeal to which the case ultimately came held that the wife was guilty of procuring the deprivation of her husband's liberty by denouncing him to the German courts, even though he had been sentenced by a court for having violated a statute, since, to quote the words of the court, the statute "'was contrary to the sound conscience and sense of justice of all decent human beings.'" This reasoning was followed in many cases which have been hailed as a triumph of the doctrines of natural law and as signaling the overthrow of positivism. The unqualified satisfaction with this result seems to me to be hysteria. Many of us might applaud the objective — that of punishing a woman for an outrageously immoral act — but this was secured only by declaring a statute established since 1934 not to have the force of law, and at least the wisdom of this course must be doubted.<sup>10)</sup>"

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10) H. L. A. Hart, Positivism and the separation of law and morals, HLR, vol. 1958, p. 619.



This is his facts analysis. According to this analysis the decision seems to consist of series of reasoning like: the standard of natural law→judicial review of Nazi laws to the material extent→nullification of these laws→guilty of the defendant-wife as resulted from this invalidity.

It follows then that the decision has been made according to the second formula of judicial decision besides of the third formula of interpretation and application of German criminal law. But this analysis is not borne out by facts, as we have seen above. The ambiguity in his analysis, mainly due to the report of Harvard Law Reviewer, has been carefully criticized by Dr. Pappe<sup>11)</sup>. In the recent magnificent work "The Concept of Law" Prof. Hart has frankly accepted his criticism by saying the analysis cited above to be "hypothetical" analysis.<sup>12)</sup>

If now it may safely be affirmed that law is law, it would be possible to say that wife's act as rested on the Nazi laws is lawful so that it means fidelity to law. Yet he has never taken the plunge of this sort. For the Utilitarian viewpoint of, or the empirical approach to law make him to consider the proposition that "laws may be law but too evil to be observed."<sup>13)</sup> Thus Prof. Hart came to be consistent in his argument concerning two points, that is, the positivistic view of law (law is law) and the moral criticism of institutions. Here there is certainly a remarkable difference of his legal positivism from the ordinary type of legal positivism to the extremely formalistic extent in regard to the acceptance of the moral criticism.

In the former article Prof. Hart showed his idea on the informer's problem by mentioning to the choice of the two evils. "One was to let the woman go unpunished.— The other was to face the fact that if the woman were to be punished it must be pursuant to the introduction of a frankly retrospective law and with a full consciousness of what was sacrificed in securing her punishment in this way.<sup>14)</sup>" Here, he preferred the retrospective legislation from the Utilitarian viewpoint. In the later work, however, he seems to emphasize the

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11) Judgement of July 27, 1949, CA Bamberg, HLR, vol. 64, 1951, p. 1006. H. O. Pappe, On the validity of judicial decisions in the Nazi era, *The Modern Law Review*, 1960, p. 263.

12) The concept of law, 1961, note 1, at p. 204. p. 255.

13) Hart, *Positivism* (cited above), p. 620.

14) *Ibid*, p. 619.

necessity of social scientific investigation of immoral law — by means of the wider concept of law in contrast to the narrower concept of law —<sup>15)</sup>, instead of to go further into the problem of choice and retrospective legislation. Here is a slight change which would be caused by Dr. Pappe's criticism.

In contrast with the argument of Prof. Hart, Prof. Fuller has placed a special emphasis on two points, that is, the interpretation of publicity provided in the Nazi laws and the internal morality, or inner morality of law.

In his reply to Prof. Hart — "Positivism and fidelity to law" — Prof. Fuller, analyzing the meaning of Nazi laws in question, has showed us that what they provide to punish, is, for instance, malicious utterances not made in private, but in public to be directed against the leading personalities of Nazi party. But husband's remarks to his wife are to be considered as private utterances as far as they were made privately when he was home. By seeing such a great discrepancy of rule and fact in the result of "the interpretative principle"<sup>16)</sup> in force during Hitler's government, he suggests us that husband's remarks originally ought not to fall under these provisions. This is his facts analysis.

On the other hand he has criticized the Nazi laws for having neglected the internal, or inner morality of law. Inner morality of law here is moral postulation as immanent within the framework of law which should be remarked and observed by people like legislators, judges, law practioners in their legislation and application of law.<sup>17)</sup> It should be still remarkable at this point that Prof. W. Friedmann calls it "a minimum rationality of structure".<sup>18)</sup>

"It is apparent that this monarch will never achieve even his own selfish aims until he is ready to accept that minimum self-restraint that will create a meaningful connection between his words and his actions."

"Here, again, it is apparent that if our monarch for his own selfish advantage wants to create in his realm anything like a system of law he will have to pull himself together and assume still another responsibility."

"Justice in the administration of the law, which consists in the like

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15) Hart, the concept of law, p. 204 ff.

16) L. L. Fuller, Positivism and fidelity to law — A reply to Prof. Hart, HLR, vol. 1958, p. 655.

17) Ibid, p. 645 f. p. 659.

18) W. Friedmann, Legal theory, 4th ed., 1960, p. 311.

treatment of like cases.”<sup>19)</sup>

In this context Prof. Fuller seems to give inner morality of law two roles, that is, to help the normal functioning of judicial process while to function itself as a value standard to criticize unlawful law, or legal wrong under the abnormal situation. Emphasizing on the latter role, he doesn't hesitate to deny to the legal wrong like the Nazi laws in question. From this aspect of the matter too he has criticized Prof. Hart for having ignored such a inner morality of law.

“Where one would have been most tempted to say, ““This is so evil it cannot be a law,”” one could usually have said instead, ““This thing is the product of a system so oblivious to the morality of law that it is not entitled to be called a law.””<sup>20)</sup>

If we presumably trace his reply along the facts analysis and the argument of the inner morality of law, it may well be said that he, in dealing with the case, suggested us two formulas, at first the judicial review to the material extent (on the basis of inner morality of law) and then the punishment of wife under the application of German criminal law to be used. This suggestion is not so far from the general tendency expressed in the CA Bamberg's decision. In his conclusion, however, he has preferred the first formula of the retroactive legislation instead of the third formula (application of German criminal law), for the purpose to “isolate a kind of cleanup operation from the normal functioning of the judicial process.”<sup>21)</sup> That is why he is relatively different from Prof. Hart's idea, but they were on the ground of the same conclusion notwithstanding.

### III Fidelity to and validity of Nazi laws

The settlement of the informer's problem by means of the judicial process and of the retroactive legislation is originally confusable in their contents. For even the retroactive law needs the intervention of judicial process for its application on the one hand and the judicial process too, in the application of German criminal law, often relies upon the creative interpretation said

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19) Fuller, *op. cit.* p. 644. 646.

20) *Ibid.*, p. 661.

21) *Ibid.*, p. 661.

above so that the judicial process makes German people to feel this application being a kind of retrospective application on the other hand.

The CA Bamberg's decision, involving several issues and raising a serious controversy, after all, is nothing but the summary expression of importance to choose possible formulas. It is to deserve attention that the areas controlled under British, Soviet and French military governments where German courts came to be qualified to apply the retrospective laws, especially Control Council Law No. 10, are continuously followed by the trend of opinions to strongly oppose to their application on the ground of *nulla poena sine lege*, while the American occupied area where German courts were not qualified to apply such retrospective laws, but merely the German criminal law (1871), are followed by the other type of opposite opinions to see this formula insufficient.<sup>22)</sup> Thus, whether to punish informer, or not, becomes an urgent problem, as Prof. Hart showed in the case of choice of two evils. Looking at the informer's problem in its extremely inhuman character and in the extraordinarily abnormal situation, it would not be unconceivable that the retrospective punishment to informer was preferred as an effective means to reestablish the rule of law and to realize the democratic values.

To consider the problem of choice among these formulas, however, we need to take account of two points, namely, the difference of German and Anglo-American legal thinking, especially in dealing with the principle of *nulla poena sine lege* on the one hand and the difference of implication of end and means relations on the other. It should be, I think, remarked from the latter point of view, when Prof. W. Friedmann said the solution of this problem being nothing but a product of the political compromise.<sup>23)</sup>

I have endeavored to show how the Nazi outlook of the world was completely criticized and the plea of the justifiable act made by informer was basically denied. On the contrary, we can not find the similar conclusion as to the validity of Nazi laws. CA Bamberg in its decision accepted the fact

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22) H. von Weber, *Das Verbrechen gegen die Menschlichkeit in der Rechtsprechung*, MDR, 1949, S. 263 f.

See also the author's Japanese article: "On the settlement of legal issues emanated from the Nazi political process and the standard for evaluating it" (prepared).

23) Friedmann, *Legal theory*, 3rd ed. 1953, p. 458.

that the Nazi laws enacted at 1934 and 1938 were conceived as highly iniquitous laws under the great number of German people. But it did not declare them invalid. As we saw above, it is relatively a common way of reasoning of German courts to limit themselves merely to deal with the informer's responsibility by avoiding to go further into the trouble matters of validity of Nazi laws. Why then they avoided to do it? If they retrospectively declared the Nazi laws invalid from the beginning of its enactment, it would be easier for them to deny the plea of justifiable act of informer and to punish him as Prof. H. Coing remarked.<sup>24)</sup> It is, however, as a matter of fact, hard to prevent the hopeless confusion arose as a result of nullification of the Nazi laws in question since such laws had become the legal basis for innumerable acts which were not always unlawful and punishable as such.

It seems to come from the consideration of this sort that the post war decisions of German courts did not always to supply definite answer to this incredibly trouble matters of the validity of the Nazi laws, they were faced with. Nazi laws enacted especially under the influence of the Nazi outlook of the world, let alone the laws of 1934 and 1938, has been naturally abolished by the post war legislation of the occupying military government.<sup>25)</sup> As the legislation made here merely concerns with the invalidity of these laws in the future, however, it appears that the legislation itself did not help to deny the plea of justifiable act made by informer.

In the light of these considerations, it seems possible to understand the meaning of fidelity to law and validity of law on referring to the decision of CA Bamberg as follows. As an example I may cite a familiar question of "What makes law to valid?" To answer this question it would be a possible way to refer to a formal structure of legal order itself. It follows that if law is enacted in accordance with the formal procedure of enactment as required by legal order (particularly, constitution), it is formally a law and valid within the formal, or logical structure of legal order, as Dr. Benn & Peters pointed out.<sup>26)</sup> It has a formal, or logical validity. To say with Prof. Hart, such a law is formally a valid law, even though it might involves immoral elements in itself.

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24) H. Coing, Zur Frage der strafrechtlichen Haftung der Richter für die Anwendung naturrechtswidriger Gesetze, SJZ, 1947, S. 62.

25) See SJZ, 1946, S. 20 f.

26) S. I. Benn and R. S. Peters, *op. cit.* p. 79.

This fact, however, doesn't mean that such a law is a law valid or effective in reality too, as he and Prof. Fuller, though from the different aspect of the matter, questioned it. For it is often the case that laws in enactment or application, being deviated from the ordinary pattern of social action of people, are not observed by them.

Dr. Benn & Peters has showed the importance of this contrast by classifying three main questions: "What criteria must a rule satisfy to be a valid law?" involves "analysis of the formal structure of a legal system, and of the relation between norms of different levels of generality." "Why so people in fact obey the law?" or "What functions does law perform in a society?" are psychological or sociological questions. At last "Why ought people to obey the law?" is moral question.<sup>27)</sup>

Among the classical scholars, we may cite merely M. Weber<sup>28)</sup> and K. Renner.<sup>29)</sup> M. Weber too pointed out the importance by classifying two different approaches to law, namely, dogmatic (juristisch or rechtsdogmatisch) and sociological. "It is obvious that these two approaches deal with entirely different problems and that their "objectives"" cannot come directly into contact with one another. The ideal "legal order" of legal theory has nothing with directly to do with the world of real economic conduct, since both exist on different levels. One exists in the ideal realm of the "ought," while the other deals with the real world of the "is". If it is nevertheless said that the economic and the legal order are intimately related to one another, the latter is understood, not in the legal, but in the sociological sense, i.e., as being *empirically* valid. In this context "legal order" thus assumes a totally different meaning. It refers, not to be a set of norms of logically demonstrable correctness, but rather to a complex of actual determinants of actual human conduct. This point requires further consideration."

What the legal validity in reality (effectiveness of law) here means is that law valid in the reality of social relations, namely, it is actually

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27) Ibid., p. 58.

28) M. Weber on law in economy and society, transl. by M. Rheinstein, 1954, p.12.

29) K. Renner, The institutions of Private law and their social functions, transl. by A. Schwazschild, 1949, p. 75 ff.

observed by people in their action (fidelity to law) — whether voluntarily by themselves, or compulsory by indirect means of judicial process. If so, it is hardly likely that two Nazi laws with their provisions mentioned above do have the potential validity in reality. Thus, they do not give a sufficient reply to the question: "What do people in fact obey the law?" For they do lack in their social adequacy. In this, it is almost conceivable that law is actually wrong, in extreme cases law might lack the very nature of law even though it might be formally a law, accordingly it has a formal or normative validity. The decision of CA Bamberg seems to suggest such a possibility of reasoning. The key to the question in terms of whether a law is wrong in reality is to be found in the fact, whether it has a potential validity in reality, in other words, its social adequacy, or not. The plea of the defendant-wife that she did merely the justifiable act, come to be hardly set up on this ground too.

Nazi laws at stake, naturally, were applied by Nazi Military Court. It is one of the typical cases at that time, in which her husband was sentenced under these laws. In accordance with this fact that these laws applied, they seem to have had the validity in reality. Referring on the decision of CA Bamberg, however, these laws in fact lacked their social adequacy, consequently the potential validity in reality.

## 2. Several standards for evaluation

Now we can return to the third, but main point: "Why ought people to obey the law?" As with the question: "Why do people in fact obey the law?" one may obey the law, the other may not obey the law because it is adapted for the pattern of their action, or it is deviated from that pattern. "Why then ought people to obey the law?" On what kind of basis for evaluation are we going to obey the law? In other words, there must be the first consideration in deciding what kind of standard for evaluation should be selected for people to obey the law. Some laws lacked the potential validity in reality, as did the Nazi laws, for they were not based on the social adequacy. There is still an unsolved question in terms of how then we can find the standard for judging the existence of social adequacy. It is certainly possible to say, as did Dr. Benn & Peters, that there is a difference of the question, "Why do people in fact obey the law?" and the question, "Why ought people to obey the law?" It is, however, hard to deny a definite connection being between these two questions, as CA Bamberg in its decision suggested us. How then

can we set up standards for evaluation?

First of all, what appeal to us is the standard of higher law, in other words, natural law. It is also the same standard which Harvard Law Reviewer partly misreported as applied to the case of CA Bamberg, accordingly Professor Hart conceived as generally applied by German courts in their decisions. In the early post war period, this standard, as Professor H. Rommen pointed out, has played the active role in respect to the second formula of judicial review to the material extent. But when the occupying forces were coming to advance more concretely the course of punishment of local war criminals, the standard of natural law itself, being treated with in different ways by different approaches, was so splitted off that it was divided into the opposite things, that is, natural law of justice or humanity and natural law of legal security or the principle of "nulla poena sine lege" on the ground of controversy on the application of CCL No.10. While the former placed the special emphasis on the realization of the democratic values, the latter resisted it on the side of the defense of the democratic values.<sup>30)</sup> It is the reality at that time when natural law was implied and applied to such a contradictory extent. If so, there is a scarce possibility to accept natural law as the unquestionably certain standard for evaluation despite of the insistence on its general validity. Frankly speaking, natural law is brought into being only within the people in believing it, as Professor W. Friedmann mentioned.<sup>31)</sup>

If we look for the standard in the wider scope of morality, however, besides of natural law, that is, pure morality, there are two other types of moralities. One is the inner morality of law, or internal morality of law which Prof. Fuller showed us. The other is morality being crystallized in the system of personality and social action of people, therefore being invisibly underlying and yet controlling the every day action of people. Briefly speaking, This is conventional morality, especially pointed out by Dr. Benn & Peters. It is also morality of the same sort which the decision of CA Bamberg called "the sound conscience and sense of justice of decent human beings", "decency and morals" prevailing within the great majority of German people even during the long period of Nazi rule. It is reasonable to assume that morality of this

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30) R. Lange, Das Kontrollratsgesetz Nr. 10 in Theorie und Praxis, DRZ, 1948, S. 156. See the author's article cited above at 22).

31) Friedmann, *op. cit.* p. 458 ff.



sort, being as the basis of way of action of people, became at the same time the standard of people in passively criticizing the Nazi outlook of the world forced on them, for instance the slogan of "law is law". Therefore, the decision of CA Bamberg gave this morality a role to examine the meaning of the Nazi laws and informer's action, and to judge their social adaptability, instead of natural law. It is actually the standard for evaluation as followed by such a meaning and function. The conventional morality here has a similar character to the consciousness of natural law (*das Bewusstsein des natürlichen Rechts*) emanating from the historical school of law in Germany, or the consciousness of living law insisted by the legal sociologists, especially by E. Ehrlich, as far as we are concerned with some socio-moral basis of law crystallized in the tradition of society and pattern of social action. Assuming citizen, public or common man in ordinary sense as the main forces for the development of history, certainly, it appeals us in many points. Since it finds the key to an understanding the validity of law and fidelity to law in legal consciousness of people, morality of this sort becomes a foundation of the so-called doctrine of acceptance of law (*Anerkennungstheorie*).

Several difficulties, however, here too prevent us to understand the conventional morality as the unquestionably certain standard for evaluation. One of them is that this morality was applied by court on a presumption. Certainly, the decision of CA Bamberg was carefully rested on this morality instead of natural law. But the decision may still seem to rest on a presumption as far as it placed a special emphasis on the fact that there were naturally a group of decent conscientious human beings under any circumstances, for instance even at the time of Nazi tyranny. If so, the matters would not have been helped, if, instead of applying natural law, courts had applied the conventional morality. For this morality might have been delimited within the meaning and function similar to higher law, or natural law, unless it became into being empirically understandable, accordingly scientifically verifiable.

The other difficulty lies in a duality emanating from the conventional morality. On the one hand, the decision of CA Bamberg seems to favor the view that the popular acceptance of law by means of the conventional morality is actually relevant to review the validity (in reality) of and fidelity to Nazi laws. On the other hand, the opposite type of view on the popular acceptance of law in contrast to the former might be possible to insist that the Nazi political

process as well as the Nazi laws being rested on the popular recognition, was able to decide everything in the decisively autocratic way.<sup>32)</sup> Both of them are same by the name of popular acceptance of law, but diametrically opposite in reality.

Looking at such a duality of the matters, it is clear that the concept of popular law consciousness, notwithstanding being so sweeping, has been stereotyped into the idea of popular acceptance of law, consequently has been applied as such a master-key in both sides, either in order to justify the Nazi political process and Nazi laws, or to criticize them, either to prosecute the Nazi offenders, particularly informers, or to object this prosecution. So far as this predicament is concerned with, it is also hard to accept and apply the standard of conventional morality as being a wholly unquestionable one.

The existing difficulty at present, however, does not mean that we can not diminish the difficulty even in the future. It is essential, I believe, to find a chain of certain standards which helps to deal with and evaluate the crucial part of the problem in the empirical and historical context, by making the conventional morality to be a scientifically varifiable standard on the one hand, by constructing a triad of this morality, pure morality and inner morality of law on the other. This idea too, leading beyond the scope of the paper here, seems to me to be one of the relevant suggestion included in the discussion on the decision of CA Bamberg.

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32) Pappe, *op. cit.* p. 272.