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LEGALITY AND THE RIGHT OF RESISTANCE[1]

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I Introduction II Genesis III The Establishment of the Principle of Legality and Legal Positivism IV Criticisms on Legality and the Natural Law Doctrine V Legality and the Right of Resistance VI Conclusion

I INTRODUCTION

Let us begin by citing a common example. We always think that we should abide by law. This idea appears to be part of common sence in our daily life. Why then is it so? That it is because law is given by the ruler is a pre-modern explanation which no longer obtains. We may now answer the question by reasoning as follows: In modern states political power is exercised in acordance with law. In other words, it is *legally* exercised. Here lies the foundation on which a system of legality is established to guarantee the security of citizens. Shouldn't we then do the same and obey law on our part? Through this reasoning law abiding or *legality* has become an axiom in modern states or in the minds of us moderns.

Recently, however, the validity of this idea of legality as part of common sense has been challenged or exposed to criticism. Fascism, for instance, does not now pass in its true color, but assumes the name of law into which, however, political designs are incorporated. In the form of such 'legal fascism' various oppressive measures have found their way into the code, to the infringement of civil rights and liberties. Law abiding or legality is no bulwark against contemporary *legal*

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1) This summary forms a part of the author's important theme 'The Natural Law Doctrine and Legal Positivism'.

fascism. Hence the necessity of devising such a thing as the *right of resistance.* So goes the argument. Thus we see the poles of legal thought in legality on the one hand and the right of resistance on the other.

Legality and the right of resistance are among the most fundamental problems with which jurisprudence is confronted, both because the one has been part of common sense and because the other is calling the common sense in question. Instead of tackling the whole problems squarely, however, the writer must content himself with offering an introduction to it within these pages. We will first examine the genesis of the idea of legality and of the right of resistance and the reasons why they are at issue. We will then proceed to consider some attempts at solving the problemes with relerence to a doctrine or two by drawing only on German literature. We will not go beyond trying to give a clue to an understanding of the fundamental problems by discussing them as problems of the history of thought involving the natural law doctrine and legal positivism.

II GENESIS

It is common knowledge that the doctrine of the right of resistance or the right of revolution is of ancient origin. But it was in the Declaration of Human Rights made at the time of the French Revolution that the right of resistance was definitely declared in the specifically modern sense of *l'resistance a l'oppression.* It is also worthy of notice that the doctrine was not necessarily opposed to the principle of legality at first. The revolutionary bourgeois in those days claimed, on the one hand, civil rights and liberties against the arbitrary rule of their feudal government and the right of resistance against its oppression as natural and inviolable rights. Thus the right of resistance was asserted as one of the civil rights and liberties on the basis of, or in connection with, the natural law doctrine. But, on the other hand, the revolutionary bourgeois also insisted on the principle of legality. For the point of the principle was that all political power be exercised on the sole basis of *law,* by which term law, however, they meant legislation enacted in the Assembly dominated by themselves.

Taken altogether, therefore, there is no doubt but that the principle of legality and the right of resistance doctrine have their common roots in the claims of the bourgeois, and that to that extent both the theories are not diametrically opposed to, but closely related with, each other. We may point out the fact, for example, that in the history of thought the theory of the separation of powers was growing side by side with the doctrine of natural rights or fuudamental rights.

But it goes without saying that both the principle of legality and the right of resistance doctrine are basically conditioned by the process of growth of civil society and the state in the respective countries. It is only too natural, therefore, that the tempo and structure of such growth should give a peculiar color to the relations between the two doctrines. In Germany under consideration, for instance, we see indications of the rise of the principle of legality and the fall of the right of resistance doctrine earlier in legal theory and legal opinions than in legal institutions. Thus the sharp distinction made between law and morals (Legalität und Moralität) by Thomasius—Kant may be cited as indicative of the trend. Towards the middle of the 19th century, the principle of legality was established, while the doctrine of the right of resistance along with its legal provisions was almost wiped out of existence. We say *almost*, for we see it lingering in Marx, Engels, O. Gierke and others.[2] With these few exceptions, the right of resistance disappeared. Why? Let us discuss in the following pages the factor responsible for the dissolution of the right of resistance doctrine and that instrumental in the establishment of the principle of legality.

III THE ESTABLISHMENT OF THE PRINCIPLE OF LEALITY AND LEGAL POSITIVISM

As the first factor (of the dissolution of the right of resistance doctrine) scholars often point to the formation of a consiitutional state. In a constitutional state, say Wolzendorff, Heyland and others,[3] the right

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[2] Neue Rheinische Zeitung, 19, 25, 27, 28, Februar, 1849. 日本訳，マルクス・エンゲルス選集，第4巻 408ページ。
Otto von Gierke, Recht und Sittlichkeit, in: Logos, Bd. VI. 1916/7. 237-9.

[3] Kurt Wolzendorff, Staatsrecht und Naturrecht, 1916, 461ff. ,, Im modernen Staat ist

of resistance has no reason or need for being, because the right of resistance was devised as one of the civil rights and liberties or so as to safeguare them, and that was exactly what a constitutional state was for. A constitutional state has civil rights and liberties to secure on the one hand and has machinery set up for that purpose in the shape of a system of separated powers on the other hand. Here, so goes the argument, the right of resistance has no longer any raison d'être or anything to exist for either as an institution or as a doctrine.

A constitutional state is synonymous with a government of law (Rechtsstaat) and, therefore, it was founded on the principle of legality. It may be said with some exaggeration that the right of resistance as a doctrine or as an institution is dissolved in a constitutional state, or is swallowed up by the rising principle of legality.

Now let us inquire into the second factor (in establishing the priciple of legality). Legality presupposes the existence of law in definite form. We cannot make such law, interpret it and make a system of legality without theory or legal thinking. Especially rational legal thinking is required for definite law. This factor, therefore, is related to the process of rationalization of law and legal thinking. Now we will go into the question how this process went on in Germany:

1. The Process of Rationalization of Law. It was not until the March Revolution of 1848 that modern bourgeois society was formed. Growing capitalism helped build up a firm foundation for such society. But capitalism in the modern sense, as M. Weber says, had some demands as to law and its administration. It demanded rational justice and rational administration to fit its rationality.[4] It was really in this period extending from the latter half of the 19th century to the beginning of the 20 century that legislation including codification grew

aber diese Herrschermacht *in das Recht gestellt*,……der Staat ist Rechtsstaat. Daher würde für den modernen Staat die Anerkennung eines Volkswiderstandsrechtes den rechtlichen Verzicht auf die Wahrung seiner Herrschermacht bedeuten, also eine Selbstentäusserung seines Wesens" (461-2). Carl Heyland, Das Widerstandsrecht des Volkes, 1860, 76-8.

4) On this thema see the excellent studies by Max Weber, Rechtssoziologie, in: Wirtschft und Gesellschaft, 487ff, or Wirtschaftgeschichte, 1924, 240, 292, or Gesammelte Aufsätze zur Religionssoziologie, Bd. I. S. 11.

until finally it dissolved and replaced a heterogeneous hierarchy of laws —consisting, for instance, of popular law, lawyers' law, custormary law, statute law (Volksrecht, Juristenrecht, Gewohnheitsrecht, Gesetz). Thus law was increased in quantity and at the same time was rationalized in form.

2. Legal Positivism. Attention must also be paid to the role legal thinking played in the meantime. Most typical of it is legal positivism, which may be described as a position with a definite subject matter and method. It confines its subject matter to positive law susceptible of empirical recognition and grasps it in an empirical and positivistic way. In its relation to the process of rationalization of law, it was not sociological positivism but conceptual or logical positivism that matters. Such legal positivism was founded in private law by Windscheid, the master of pandect jurisprudence, in public law by Laband and in legal philosophy by Bergbohm.[5] It is characterized by extremely condensed logical thinking. With some variations this theory has as its media well-defined concepts, logic and interpretation to rerson that a legal system is perfect without holes or inconsistencies. On the one hand, therefore, such legal thinking may be said to have played no unimportant part in making law rational in form, and that in making modern bourgeois law fit to meet the needs of capitalism, while, on the other, it established the principle of legality and a system of legality in a constitutional state through interpretation and application.

Since the latter half of the 19th century the principle of legality seems to have thus overcome the right of resistance till it finally absorbed the other into itself. But the very process of establishment of principle of legality was one in which many questions concerning the legality were brought to light and, moreover, the right of resistance asserted itself for reconsideration. To disclose the points of such questions let us trace the process of establishment of the principle.

3. Legality. The principle of legality has it that political power is,

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[5] Bernhard Windscheid, Lehrbuch des Pandektenrechs, Bd. I. 8 Aufl., bearbeitet von T. Kipp, 1900, 90ff, 93. Paul Laband, Das Staatsrecht des Deutschen Reiches, 5 neubeabeitete Aufl., Bd. I. 1911, Vorwort zur 2 Aufl., IX-X. Karl Bergbohm, Jurisprudenz und Rechtsphilosophie, 1922, 81ff, 381ff.

and should be, exercised on the basis of law or, in other words, legally exercised. Besides, in a modern constitutional state a logically closed system of legality is formed, or, to use a common phrase, the idea is formed of the rule of *norms*, not of *men* or *power*. Thus a judge should always obey law alone and maintain a neutral position. Here a judge bound by legal rules appears in the light of a legal slot-machine.[6] In this often caricatured judge we see on important consequence of legal positivism and a concrete aspect of the legality principle. A similar picture may be expected of people at large. In this case laws should of course be respected, since it is the very kernel of legality. Hence comes the idea that we should obey all laws or legislation, whatever it may be. This is the idea of which we spoke above as part of common sense. In short, the legality principle is established on the basis of the observance of laws, for power as a principle of restraining it and for people at large as a principle of their behavior.

On the other hand, however, we must pay attention to an important *assumption* underlying such reliance on legality or state legislation. It is the assumption that legality guarantees legitimacy[7] or that laws (Gesetze) are an exhaustive embodiment of justice or law (Recht).

The logical consequence of this assumption is that a judge has not to look beyond laws, nor has a legal positivist to worry about justice or injustice in handling concrete problems, and that the general public can obey laws with a good conscience.

There is some room for doubt, however, as to whether this assumption was really carried to the said consequence. Let us first take up the idea that justice or law (Recht) is exhaustively embodied in laws. State laws are made by the legislature, but as a matter of form it is free from social and moral responsibility. It is possible then that a legislature dominated by an extremely one-sided political will or social interest may enact socially or morally bad, unjust laws, such as social legislation (Sozialistengesetz) enacted under sham constitutionalism (Scheinkonsti-

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6) Cf. Gustav Boehmer, Grundlagen der bürgerlichen Rechtsordnung, II. 1 Abt., 1951, 126. Max Weber, Rechtssoziologie, 491ff.

7) Franz Wieacker, Privatrechtsgeschichte der Neuzeit, 1952, 272.

tutionalismus) in the age of Bismarck. The last mentioned is an early specimen of bad laws; it purported to control the freedoms of speech, assembly, the press and others with reference to a specified class of persons and made breaches punishable in accordance with special penal provisions. Indeed this is none the less a law and to abide by it is legal. But the result to be expected from its observance would be to make an exception to, and place a restriction on, the guarantee of civil rights and liberties which is the proper mission of a constitutional state and the proper object of the legality principle. Some say that the law was meant to restrain socialists. Much the same remark applies as well to Nazi legislation, to cite another example. The arbitrary rule (Willkürherrschaft) by the Nazi was no doubt immoral. But their rule was realized in the name of, and in the shape of, laws. From the point of view of form, it was a body of laws and their rule was legal. Hence the name ***legal fascism.***

It is questionable in these cases, especially in that of the Nazi, whether the assumption is really valid that legality guarantees legitimacy. An extreme legal positivist (Gesetzespositivist) may still say that a law is a law and must be obeyed in these cases, too, and that all that is needed is legality. Then the Nazi rule will be given free scope in the form of legal fascism and civil rights and liberties ignored. If, therefore, the legality principle or laws are consisdered from the standpoint of form alone, it follows of logical necessity that unjust rule or unjust laws will be justified as legal or just. Here is a question. This is why criticisms are leveled at legal positivism or why the legality principle or law abding is questioned and shaken. Such criticisms are basically directed to the following point: We should give consideration to the substantial side of the legality principle or of laws rather than to the formal side, and we may present a protest againt unjust rule or unjust laws. But criticisms will naturally vary with basic standpoints. Let us introduce below a few criticisms with wide variation.

IV CRITICISMS ON LEGALITY AND THE NATURAL LAW DOCTRINE

1. The Free Law Doctrine. We may start with the free law doctrine (Freirechtslehre). It attacks the dogma of logically closed and

consistent law (die Geschlossenheit und Widerspruchslogigkeit des Rechts), the basic assumption of legal positivism. It assumes that there are a variety of forms of law besides legal rules and it insists on free law finding and free law making by judges. The doctrine expands our legal horizon beyond the narrow range of state legislation, to be sure, but, on the other hand, as is often pointed out, the theory was found fit to meet the needs of the bourgeois ie entering upon the imperialistic stage, with the noteworthy result that it rendered the legality principle practically meaningless. It is no wonder, then, that it should indeed have paved the way for the apparently legal Nazi fascism. Was this free law doctrine the only legal thought that lent a helping hand to the growing Nazi fascism? Where are we to find the standard of criticism applicable to Nazi fascism? The post-war natural law doctrine shows an interesting trend.

2. The Post-war Natural Law Dcotrine. In founding his natural law doctrine, the late Professor Radbruch, the distinguished legal philosopher, said that, on the one hand, the Nazi used as their tool extreme legal positivism that assumes the unquestionableness of given laws,[8] while, on the other, they accepted the position of the free law doctrine when they turned laws into dead letters by the use of general clauses.[9] This is how they established their rule. But their laws, even if it is written in the code, are nothing but legal injustices (gesetzliches Unrecht). It should, therefore, the great jurist goes on to say, be subjected to criticism from the point of superlegal law (übergesetzliches Recht).

Coing, Mitteis, Welzel and others join with him in leading the post-war natural law movement in Germany. On the basis of natural law they try to answer two questions. One is the question of criticism by judges on laws that are against natural law. The other is the question of the right of resistance. According to Professor Coing, judges may, in limited cases of course, positively criticize anti-natural

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8) Gustav Radbruch, Gesetzliches Unrecht und übergesetzliches Recht, 1946 (in: Rechtsphilosophie, 4 Aufl., 1950, 347ff.). Geist des englischen Rechts, 1947, 65ff.

9) Radbruch, Vorschule der Rechsphilosophie, 1948, 78ff.

law laws and refuse to obey them. This is his answer to the first question. He goes on to the second. When the government is intentionally acting against natural law, positive resistance is allowable and just. But the tremendous modern technical power being in the hands of the Government, positive resistance will be in any case a matter of life or death. Now a duty imposed by natural law is primarily ethical. There is no positive law duty to resist, but a mere appeal for spontaneous struggle.[10]

Here in these two answers we see the ultimate standard in natural law or, more concretely, in substantial justice or ethics, or in any case in *extra*juristic or *meta*juristic norms.

Now we must perhaps admit that ethical and other norms may find their way into laws. We must also avoid the legal positivist's way of looking on law as complete without holes or inconsistencies. In no way, however, do we mean by so saying that natural law should hold. It goes without saying that laws sbould meet the demands of objective justice. But this propositition does not lead to the validity of natural law. Furthetmore, natural law is based on metajuristic recognition, and, to make the matter worse, it has too many meanings and is understood from many points of view. Isn't it questionable to employ such natural law as the substantial standard to be applied to laws? It may be useful as a critical standard for Nazi fascism, but we must admit that it involves the risk of weakening legality like the general clauses of free law advocates. For judges' criticism passed on laws in the name of natural law has the same implications as free law finding and free law making.

Legal Positivism Reexamined. Now let us go back to legal positivism where we started. There the principle of legality is stressed; the principle in itself should no doubt be highly appreciated as such. Only problems rose under extreme legal positivism in which absolute reliance on laws or state laws was not accompained with reflection and criticism on its assumptions. Are laws just? Does legality

10) Helmut Coing, Grundzüge der Rechtsphilosophie, 1950, 168f.

guarantee legitimacy? The absence of such reexamination will often lead to an absurd conclusion that it is legal to observe laws which are bad in substance. This has given rise to complicated problems of legality.

V LEGALITY AND THE RIGHT OF RESISTANCE

After all this consideration we have come to the last question. How can we, with due respect for legality, defend civil rights and liberties against bad law and oppression—the proper object of the legality principle? Or, we may put it this way, how to solve the dilemma of formalism? Let us take up an interestiug theory that has a little different approach.

This doctrine attaches much importance to legality, condtending that the principle of legality has a positive meaning in capitalist society. So far it shares the idea of legal positivism. But it distinguishes itself sharply from legal positivism in that it views legality and laws in sociological and historical light:

Now laws as the standard of legality guarantee civil rights and liberties in a broad sense. Thus they meet the historical demands of bourgeoisie and they are subject to the law of development of modern bourgeois society; in other words, they follow historical law (historische Gesetzmässigkeit). With the development of capitalism the proletariat comes to the front to make the situation complicated. The proletarians claim legality for themselves, while the bourgeois, with the growth of monopoly, try to abridge civil rights and liberties and render laws less meaningful and the legality principle of their own making less rigid. This is especially the case at the imperialist stage. In such a case this doctrine atually offers positive criticism, and its position is as follows: the strict observance of legality in the true sense which is founded on historical law, the stressing of the right of resistance to defend legality, or the advocating of a new legality principle through the recognition of historical law.[11]

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[11] Friedrich Engels, Einleitung (in: Die Klassenkämpfe in Frankreich, von Marx, Dietz Verlag, 1951), 26. Hermann Klenner, Formen und Bedeutung der Gesetzlichkeit in der Führung des Klassenkampfes, 1953, 14f, 35, 51ff. Günther Rösner, Das Widerstandsrecht des deutschen Volkes, Neue Justiz, 1955, Nr. 13, 403ff.

The foregoing idea is markedly in evidence in Marxian legal theory since the classic founders of Marxism, with Hermann Klenner among recent exponents. The theory partakes of legal positivism in that it values legality. What is more interesting, it goes into the meaning of legality and laws in the historical and social setting that lends itself to emprirical recognition. It is more empirical and natural than the natural law doctrine which has the basis of criticizing positive law in metajurisitic natural law. It has also an interesting line of thought: legality—historical law (historische Gesetzmässigkeit)—the right of resistance. But the theory is not without some difficulties. Isn't it dangerous to derive the meaning of legality and laws from historical law directly and unconditionally? The reason is that in bourgeois society the variety of recogntion is insisted on, and that the same may be said emphatically of the recognition of historical law. There may be a correct recognition, to be sure, but to present historical law uncoditionally without definite qualifications in such society where the variety is insisted on will give rise to various ways of undeastanding legality.

VI CONCLUSION

Now our consideration has come to an end. As stated at the onset, it was the purpose we had in mind to give a clue to understanding the most fundamental and real problems in jurisprudence. We may add a few words. We may stress the necessity of observing legality after all, but we must call special attention to civil rights and liberties or what are known as fundamental rights, which are what legality is really for.

Fundamental rights is a legal concept but it has an historical character. It is a concept, and a legal concept, too, that has been forced in accordance with historical law that governs the development of society from the dissolution of the peasant classes to the growth of the modern bourgeoisie. From this standpoint the right of resistance may be justified as one of the fundamental rights or as a guarantee of liberties. As an example, we may cite the *case of the Tokyo University Popolo Theater.*[12] It is the opinion of the writer that this approach to

the relations between legality and the right of resistance is one of the ways of solving the fundamental and real problems.

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[12] The case of the Tokyo Unversity Popolo Theater referred to in the text arose when the 'Popolo Company', a group of student players authorized by Tokyo University, staged some dramas in a large classroom of the said university on February 20, 1952. The case has its origin in the entrance into the extempore theater by some plainclothes policemen, who, however, were caught by some of the students in the act of watching the behavior of those present. Thereupon the students, from motives of defending university autonomy, surrounded and questioned the policemen, forcing them to surrender their official pocket-books. Against the apparent leader of the students prosecution was instituted on the principal charge of employing violence against the officers. But the accused was acquitted by the court of the first instance, which held that he was not guilty of a breach of criminal law in that he had acted in defence of university autonomy (May 11, 1954). On appeal the decision was sustained by the high court (May 8, 1956). The judicial opinion of the trial court in particular is worthy of special note in that it approves of means of 'revolt and protest' being used for the purpose of defending university autonomy or, more generally, academic freedom. "It would be to give up freedom to look on the unlawful action of officers with folded arms and fail to use all proper means available in *revolt and protest* against such action. Freedom will be violated unless we are constantly on our guard against all possible infringements" (The Hanrei Jiho, No. 26, 1954; The italics are the writer's). Here in this case the public interest of academic freedom and the private interest of the officers' persons are balanced against each other after giving due justice to each of them, with the consequence that the former was adjudged somewhat preferable to the latter.