I

THE REPUDIATION OF RATIONAL NATURAL LAW BY NATIONAL-SOCIALISM

THE complete abolition of the inviolability of law is the chief characteristic of the Prerogative State. This repudiation carries with it the elimination of the fundamental principle of the inviolability of law from the entire legal order. If inviolability within the sphere of the Normative State exists only under certain conditions, then it does not hold true as a principle, and conditional inviolability is necessarily the opposite of inviolability. This repudiation of the principle of the inviolability of law (its actual as well as its potential abrogation) raises the general question of the significance of law.

Shortly before the National-Socialists' accession to power in 1933, Gustav Radbruch[313] discussed the principle of the inviolability of law as defined by Otto Mayer, a well-known German authority on administrative law. According to Radbruch, the principle grew out of Natural Law and was later incorporated into the system of positive law. The principle is that, once the sovereign has promulgated a law, he may not violate it at his discretion. Thus the principle that legislative power is vested in the sovereign because he is sovereign is restricted by Natural Law.[314]

Since the doctrine of the inviolability of law is part of the heritage of rational Natural Law, its explicit rejection in the legal system of the Third Reich raises the question of the whole attitude of National-Socialism towards Natural Law. Regarding this question an important source is available. In his speech to the Reichstag on the occasion of the fourth anniversary of his advent to power,

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on January 30, 1937, Adolf Hitler made several important comments upon the relationship between law and National-Socialism. He declared:

> Man is incapable of perceiving the meaning and purpose inherent in the existence of the races which have been created by Providence. The meaning and purpose of human institutions can, however, be measured by their utility for the preservation of ethnic groups…. Only the recognition of this axiom can prevent man from adopting rigid doctrines where there can be no doctrines and to falsify means into imperatives where the end ought to be regarded as the sole imperative. In the course of time our attitude towards law has been led astray, partly through the incorporation of foreign ideas and partly due to our own inadequate understanding. Two opposite extremes characterize this state of affairs:
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> 1. the assumption that law as such has any intrinsic value,
> 2. the assumption that the main function of the law is the protection of the individual.
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> Besides these potentialities, claims of the higher interests of the community as a whole were acknowledged only in the form of concessions granted to the *Raison d'état.* The National-Socialist revolution, on the other hand, provided law, jurisprudence and the administration of law with an unambiguous basis. Their task is the maintenance and protection of the people against anti-social groups which desire to evade or who otherwise fail to fulfil all obligations required by the community.[315]

In this speech Hitler officially promulgated only what National-Socialist theories had always acknowledged. The same line of thought was succinctly expressed by Professor Gerber in declaring that National-Socialist political thought is 'existential and biological, its data being the primal unique life process.'[316] Unlike liberal political thoughts, it does not consist in 'rational abstract constructions which possess universal validity'[317] and which are on that account worthy only of contempt. Gerber states explicitly that the traditional notions concerning the nature of justice have lost their validity. 'National-Socialism insists that justice is not a

system of abstract and autonomous values such as the various types of Natural Law systems. This perception helps us appreciate the historical fact that each state has its own concept of justice.'[318] Consequently, justice cannot be viewed independently of a particular existing state. *Tot res publicae, tot justitiae!* After showing how the cosmopolitan idea of a divinely appointed universal justice has been supplanted by the doctrine of a Danish monarchical and of a Portuguese republican justice, Professor Gerber presents his conception of the real nature of justice as 'nothing more than the certainty of the people that it represents a primal social individuality.'[319]

With this conclusion, Gerber is in agreement with Alfred Rosenberg, who, in a somewhat more popularized formulation, had already presented the same ideas in 1934.[320] Rosenberg stated that the distinction between 'good' and 'evil' is obsolete – an idea which he had expressed in his much reproduced quotation of an Indian proverb: 'Right and wrong do not walk about saying: "Here we are." Right is what Aryan people think is right.'[321]

It was not by accident that the first act after the National Socialist *coup d'état* (i.e., after the Decree of February 28, 1933) resulted in the abolition of the rule of *Nulla poena sine lege,* heretofore a major principle of German positive law. The *Lex van der Lubbe* provided retroactive capital punishment for a crime, subject at the time of its commission only to imprisonment. By the promulgation of this act, National-Socialism demonstrated unmistakably that it deemed itself bound neither in theory nor in practice by this old principle of Natural Law, which, until the *coup d'état,* had formed an unquestioned component of the German conception of justice. The *Lex van der Lubbe* made perfectly apparent the transvaluation of values. The National-Socialist legal theory perceives this clearly and even emphasizes it. The *Lex van der Lubbe* 'struck the intellectual revolt of the nineteenth century at its very heart. It attacked a system which had dared to substitute a hypostatized order of values, norms and rules for the creative vigor and power of living peoples and which therewith wholly destroyed the immediacy of ethical and political life.'[322]

It is interesting to note that in 1928 Rudolf Smend had envisaged the emancipation of the modern state from any 'non-political legitimation as the very inception of the modern *Rechtsstaat.*'[323] But the reduction of the legal state to a precisely articulated legal machine meant the beginning of its end. Smend had denounced the legitimation of the state in the name of any kind of 'transcendental order' as intolerable. The significant silence which he maintains today may justify the conjecture that the legitimation of the state by biological facts (which, to be sure, are non-transcendent) is no less intolerable. In the preface of his *My thus des 20. Jahrhunderts,*[324] Rosenberg stressed the fact that his book expressed the attitude of a generation which had lost its faith in the traditional absolute and universal values. Since this spokesman of disillusionment and cynicism has become the supreme director of the 'philosophical' education of a party which, in turn, rules a people of eighty millions, the conclusion is perhaps justified that the skepticism of the preceding generation had become the faith of the generation now coming to maturity. Carl Schmitt's statement that we are today experiencing the bankruptcy of *idées génerales*[325] therefore seems less important than the following declaration of a member of the young National-Socialist generation. In the review *Jugend und Recht,* Leuner states with striking frankness that 'there is no right residing in the stars; there is no equal right which is innate in the individual; there is therefore no universal transethnic Natural Law. There is only one norm which is equally valid for all individuals, namely that they live in accordance with the imperatives of their race.'[326]

In connection with the National-Socialist assertion that law has no intrinsic value of its own it is apropos to cite Hitler's famous assertion that in the Third Reich law and morality are identical. However, it should not be overlooked that this dogma[327] may have a double meaning. On the one hand, Hitler's remark may imply that contemporary German law can claim validity only insofar as it corresponds to the maxims of morality. On the other, it may imply that, in the National-Socialist state, moral norms can claim validity only insofar as they are in harmony with a legal system which is based on its own values. Actually the iden-

tification of law and morality in the Third Reich has resulted in the assimilation of morality to National-Socialist law. This opinion has been expressed unambiguously in the National-Socialist literature. Dernedde, for example, writes: 'The present promulgation of the indissoluble identity of law and morality signifies the integration of both of these categories into the ethnic community. It is the opposite of an acknowledgment of a transethnic universal Natural Law which limits the power of the legislator.'[328]

It is evident that such a sweeping simplification of the deepest problems of political theory contributes greatly to huge propagandistic successes among the masses of the people. Ideas which Machiavelli presented to a small circle of initiates are disseminated by Adolf Hitler by means of all the modern techniques of communication even to the adolescent members of the Hitler Youth organizations. Figgis' comment on Machiavelli applies equally to Hitler: 'He did not start from any ideals of government or desire to find them, he did not meditate on the philosophy of law. Social justice has to him no meaning apart from the one great end of the salvation of his country. He had the limited horizon and the unlimited influence which always come of narrowing the problem.'[329] But the reverse side of this outwardly successful enterprise is the destruction of the ethical tradition of Western civilization. Hermann Heller said that 'once conscience becomes a problem of cattle breeding, moral problems lose their inescapability.'[330]

The actual repudiation of Natural Law is less surprising than the form in which it is renounced. The doctrine of Natural Law, after all, has been discredited for more than a century. It has been refuted time and again by political science, and yet it has not lost its vitality. For more than a hundred years, we have been intellectually denying every type of Natural Law while our conscience has simultaneously been demanding its acknowledgment. At a time when, thanks to Bergbohn's unfortunate influence, positivism flourished in Germany, American legal philosophy was fully aware of this discrepancy. Morris Cohen, in a lecture delivered in 1914, said: 'To defend a doctrine of natural rights today requires either insensibility of the world's progress or else

considerable courage in the face of it.'[331] The quarter of a century which has since elapsed has not accomplished the removal of these intellectual obstacles, yet the demands for the recognition of Natural Law principles have increased. Carl Becker, pleading for the cause of Natural Law against intellectual doubts, states that although we have lost the formula, something of the old faith remained…. 'We hold to it, if not from assured conviction, then from necessity, seeing no alternative except cynicism or despair.'[332] This ambivalent attitude towards Natural Law reflects the twofold origin of our culture; in the words of Werner Jaeger: 'No theoretical attempts to bridge the gulf between them can change the historical fact that our morality goes back to the Christian religion and our politics to the Greco-Roman conception of the state.'[333]

Whereas Italian Fascism deliberately identifies itself with the idea of the *Imperium Romanum* and the Roman theory of the state, National-Socialism explicitly announces its antipathy towards Roman Law. Sophisticated analyses of the legal evolution in the new Germany have, however, already revealed just what is involved in the substitution of 'German Common Law' for Roman Law. Referring to Hoehn's studies, which claim to demonstrate that Otto von Gierke, the prophet of the German Law of Associations (*Genossenschaftsrecht*), is no longer significant,[334] Manigk explains that 'the philosophical kernel of German Law (particularly the concept of the *Genossenschaft*) is in contradiction with our state as it exists today…. The idea of authoritarian leadership was realized in Roman antiquity. The separation of powers was unknown and the Senate called the Princeps "our Leader"'.[335]

When we discuss the classical conception of the state, we do not refer to the *politeia,* the political Utopia. We have in mind rather the *polis,* the historical reality, as it existed in the Greek city-states. Late Grecian antiquity did of course produce Stoicism, a political theory which stood in direct contradiction to the ideal of the *polis.* A. J. Carlyle writes that 'there is no change in political theory so startling in its completeness as the change from the theory of Aristotle to the later philosophical view repre-

sented by Cicero and Seneca.'[336] Carlyle sees the same cleavage in the various notions concerning the equality or inequality of man. He sets the doctrine of primitive equality alongside the ancient view of inequality. The specifically 'modern' political theory is of Stoic origin and has been influential both in Christianity and in the Enlightenment. In this doctrine 'there is only one possible definition for all mankind, reason is common to all … there is no race which under the guidance of nature cannot attain to virtue.'[337] For Germany, however, this doctrine had ceased to be 'modern.' National-Socialism postulates its opposite–namely, the racially conditioned and humanly unchangeable inequality of man. Therewith the decisive step from Aristotle to Cicero comes to nought and the long tradition of Christianity and Humanism, of occidental science and philosophy passes into discard.

Moreover, owing to its repudiation of Natural Law, National-Socialism is opposed to the medieval doctrine of the power of the absolute prince. The foremost characteristic of the dictator is not the fact that he makes law in accordance with his will. The theory of modern dictatorship can only be apprehended by considering again a distinction current in the Middle Ages which was forgotten in the era of democracy and the Rule of Law. McIlwain[338] points out that in present times distinctions which were made during the Middle Ages are ignored. The medieval king was considered to be absolute and practically irresponsible, but his power was not an arbitrary one. The old maxim, 'What the king has willed has the force of the law,' was–according to Mcllwain–only valid if this will was expressed in a way prescribed by law and tradition and was restricted to certain purposes. There existed definite limitations for the will of the medieval prince which were usually expressed by the formula: 'The king is bound by the Law of God and the Law of Nature.' This distinction sheds new light on the approach pursued in the first section of this book. By the 'Enabling Law'[339] Hitler became Germany's absolute ruler after he had previously (by the Decree of February 28, 1933) acquired the power of a despot. Mcllwain, who obviously alludes to the present German situation, regrets that at present both concepts are regarded as being practically identical.[340] Furthermore, he points

out that antiquity conceived of law as a matter of politics, whereas 'modern' thought attaches politics to the category of law. From this point of view, also National-Socialism cannot claim to be 'modern.'

With this repudiation of every trace of rational Natural Law, Germany has turned her back on the community of nations which consciously adheres to the traditions of occidental civilization. National-Socialism certainly cannot be said to be — as Friedrich Engels once said of Marxian Socialism — the heir of Classical German Philosophy. It is rather its complete negation.