

THE RISE OF LEGAL POSITIVISM IN GERMANY: A PRELUDE TO NAZI ARBITRARINESS?

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I INTRODUCTION

The paper will first look at the rise of legal positivism that left the door ajar for Nazi arbitrariness to enter the system, and how in adopting a separation of ‘is’ and ‘ought’ approach to the law, it left the German legal profession little theoretical resources to resist such arbitrariness. The paper will then juxtapose a hypothetical: whether natural law might have offered better theoretical resources to resist such arbitrariness and conclude with a brief reflection of the dangers of such a strict separation of ‘is’ and ‘ought’ to legal analysis if we are to learn from history and wish to avoid a repeat of the atrocities of the Nazi system.

II LEGAL POSITIVISM: THE SEPARATION THESIS

A *The ius and lex divide*

Legal positivists believe that the question of what is the law *is* separate from, and must be kept separate from, the question of what the law *ought to be*.¹ Legal positivism is thus distinguished by two claims: that the law is

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¹ Brian Bix, *Jurisprudence Theory and Concept* (Sweet & Maxwell, 2nd ed, 1999) 31.

separable from its substantive morality and that there is no necessary link between law and morality.² Evinced in Hart's recognition rule, the 'master test for legal validity',³ it 'points to the separation of the identification of the law from its moral evaluation, and the separation of statements of what the law is from statements about what it should be'.⁴ In the words of John Austin:

The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or not be conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it...⁵

Additionally, Hans Kelsen's '*reine Rechtslehre*', or 'pure theory of law', describes the law and attempts to eliminate from the object of this description everything that is not strictly 'law'.⁶ He proposes 'freeing the science of law from alien elements'.⁷ This 'pure' theory of law then may be studied without reference to political, moral or sociological notions. Legal positivism is study the science of law as separate and independent from morality and notions of ethics.⁸ Law (*lex*) does not have any necessary connection with justice (*ius*) and accordingly, what *is* can be distinguished

² David Richards, 'Terror and the Law' (1983) 5 *Human Rights Quarterly* 171, 172; Lloyd L Weinreb, 'Law As Order' (1978) 91 *Harvard Law Review* 909, 909.

³ Jonathan Crowe, *Legal Theory* (Thompson Reuters, 2009) 52.

⁴ H L A Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 (4) *Harvard Law Review* 593, 618; Bix, above n 1, 36.

⁵ John Austin, *The Province of Jurisprudence Determined* (Cambridge University Press: 1995) 157.

⁶ *Ibid* 52.

⁷ Crowe, above n 3, 36; Hans Kelsen, *The Pure Theory of Law Pt II* (1935) 51 *Law Quarterly Review* 1.

⁸ Steven J Burton, 'Ronald Dworkin and Legal Positivism' (1987) 73 *Iowa Law Review* 109, 114.

from what *ought to be*. By separating the ‘is’ from the ‘ought’ in legal analysis, positivists have expelled morality and ethics from jurisprudence.⁹

B *The Rise of Legal Positivism in Germany*

Prior to the influence of legal positivism in Germany, the *ius* and *lex* divide was less pronounced. Indeed as Radbruch noted, the study of law in Germany was once under the curriculum title ‘The Law of Nature’,¹⁰ reflecting its inseparability from justice and morality. While the exact historical origins of legal positivism are open to debate,¹¹ it is ‘rooted in the empiricist interpretation of the scientific revolution’.¹² The nineteenth century saw a series of significant events such as the French revolution and the scientific and industrial developments in Europe at the time, notably under the influence of the ‘Darwinian Age’.¹³ Technological, economic and scientific progress saw a human endeavour to pursue enlightenment through a scientific, objective approach. In light of this, the natural law, seemingly based on a subjective, ‘mystical’ morality entered hibernation (until its resurgence marked by the Nuremburg principles) as it was set

⁹ Michael Dawkins, *Social Darwinism in European and American thought, 1860-1945* (Cambridge University Press, 1997) 90, cited in Augusto Zimmermann, *Legislating Evil: The Philosophical Foundations of the Nazi Legal System* (2010) 13 *International Trade and Business Law Review* 221, 232. Though Hans Kelsen was himself expelled from his position at the University of Cologne.

¹⁰ J M Kelly, *A Short History of Western Legal Theory* (Oxford University Press, 2007) 379.

¹¹ Crowe, above n 3, 29. In retrospect, traces of positivism can be seen in Greek and Roman philosophy, see Mark Tebbit, *Philosophy of Law: An Introduction* (Routledge, 2005) 15.

¹² Mark Tebbit, *Philosophy of Law: An Introduction* (Routledge, 2005) 15.

¹³ E Hambloch, *German Rampant: A Study in Economic Materialism* (Duckworth, 1939) 14.

aside in favour of legal positivism, an approach that seemed objective, discernable and therefore more appropriate.

III THE FREE LAW MOVEMENT

A discussion of the rise of legal positivism in Germany would not be complete without a word on the Free Law Movement that emerged from the German School of Historical Law. While not entirely aligned with the school of legal positivism, it did somewhat assist in the demise of natural law by firing the first shots against it. The German School of Historical Law,¹⁴ based on the work of Friedrich Carl von Savigny and Gustav Hugo, emphasised the historical limitations of the law and stood in opposition to natural law.¹⁵ Savigny approached law as an expression of the convictions of a specific people.¹⁶ Law according to him, was not grounded in universal principles, but in a organic, growing consciousness of the spirit of the people, the *Volksgeist*, which adapts itself to the evolving needs of society. This translated into the idea that the state can be defined as a political organism comprising many legal agreements between smaller entities.¹⁷

¹⁴ The Historical School of Law lead the framework for the German conceptual jurisprudence *Begriffsjuriprudenz* (which considered social, economic, moral, political or religious considerations irrelevant to jurisprudence) and later *Gesetzpositivismus* (legal positivism), Walter Ott and Frankzika Buob, 'Did Legal Positivism Render German Jurists Defenceless During the Third Reich?' (1993) 2 *Social and Legal Studies* 91, 95.

¹⁵ Ibid.

¹⁶ Augusto Zimmermann, *Legislating Evil: The Philosophical Foundations of the Nazi Legal System* (2010) 13 *International Trade and Business Law Review* 221, 232.

¹⁷ J Seitzer and C Thornhill, 'An Introduction to Carl Schmitt's Constitutional Theory: Issues and Context', in Carl Schmitt, *Constitutional Theory* (Duke University Press, 2008) 12.

This subsequently resulted in a disinterest in individual rights in favour of ‘the sovereignty of the state’.¹⁸

However, in asking for the legal system to respect particular habits of a people, and to examine the law from a historical approach, the historicist thesis eventually resulted in a form of legal and moral relativism.¹⁹ As Leo Strauss noted, the problem with historicism ‘is that all societies have their ideals, cannibal society no less than civilised ones...If principles are sufficiently justified by the fact that they are accepted by a society, the principles of cannibalism are as defensible or sound as those of civilised life’.²⁰ This thus found fertile ground for radical Nazi justification of heinous laws.

Finally, the German School of Historical Law in some ways paved the way to legal positivism as it led to a school of jurists whose work culminated in a form of positivism.²¹ It was hoped that this new positivist approach to law could assist in building a new national legal system to unify the politically fragmented nation.²² This approach of ‘law is law’²³ therefore was predominant in Germany before the Nazi take-over.²⁴

¹⁸ Abraham Kuyper, *Lectures on Calvinism* (Hendrickson, 2008) 75.

¹⁹ Kelly, above n 10, 324.

²⁰ Leo Strauss, *Natural Right and History* (Chicago University Press, 1965) 3.

²¹ Kelly, above n 10, 324.

²² *Ibid.*

²³ Thomas Mertens, *But was it law?* (2006) 7 *German Law Journal* 191, 192.

²⁴ *Ibid.*; James E Herget, *Contemporary German Legal Philosophy* (University Of Pennsylvania Press, 1996) 1.

IV POSITIVISM AND ITS ROLE IN DISARMING GERMAN JUSTICE AND LEGITIMISING NAZI AUTHORITY

There are of course, a number of other factors which could be attributed to the legal profession's lack of resistance against Nazi authority. Müller contends that the German legal profession's inherent 'loyalty to state leadership'²⁵ found a feeling of obligation to the Nazi government authority.²⁶ It has also been suggested that a number of German legal professionals, dissatisfied with liberalism at the time of the Nazi's rise to power, already supported them in different ways.²⁷ As Kaufmann wrote, when the National Socialists intruded upon basic rights, the only audible sound was applause.²⁸

These factors aside though, it is hard to deny that legal positivism, in its strict insistence on the division of law and morality, permitted the legal profession to rationalise to themselves and others their interpretation and application of laws that they might have, upon reflection, considered to be grotesque.²⁹ Sufficed to say, while legal positivism may not have been the sole cause in the German legal profession's lack of resistance, it nonetheless is a relevant one.

²⁵ Markus Dirk Dubber, 'Judicial Positivism and Hitler's Injustice' (1933) 93 *Columbia Law Review* 1807, 1811-1811.

²⁶ Though it should be noted that Müller's argument does not explain why the same judges that applied eugenics law after 1933 had not felt the same sense of loyalty to the Weimar Republic, See Markus Dirk Dubber, 'Judicial Positivism and Hitler's Injustice' (1933) 93 *Columbia Law Review* 1807, 1811-1811.

²⁷ Arthur Kaufmann, 'National Socialism and German Jurisprudence from 1933 to 1945' (1988) 9 *Cardozo Law Review* 1629, 1634.

²⁸ *Ibid* 1635.

²⁹ Markus Dirk Dubber, 'Judicial Positivism and Hitler's Injustice' (1933) 93 *Columbia Law Review* 1807, 1811-1825-1826.

A *Disarming German Justice*

In insisting on the validity of law independent of its moral content,³⁰ or indeed to a higher order, positivism held that it was ‘not for legal scholars to be concerned with right and wrong or good and bad, but merely to clarify, conceptualize and explain the authoritative legal precepts’.³¹ Arguably, this ‘unwillingness to enquire into the morality of law by judges, lawyers and legal scholars led to an easy capture of the legal system by the Nazis and facilitated its modification to meet evil Nazi goals’.³²

There is the question as to whether German legal professionals acquiesced to Nazi authority for fear of their lives. This is conceivable, but it has been also suggested that this obedience to even arbitrary laws of the Nazi regime is not so much a lack of legal conscience or cowardice,³³ but an inherited self-understanding that one’s own conscience or discretion should neither feature in the understanding of law nor affect its outcome.³⁴ Rice contends that had the legal profession not embraced the rigid form of positivism, but denounced Nazi injustices based on the traditional principles of natural law, the Nazis may not have found it so easy to gain support. This however, was not the case and as most of the German legal profession were strict

³⁰ James E Herget, *Contemporary German Legal Philosophy* (University Of Pennsylvania Press, 1996) 1.

³¹ Ibid.

³² Ibid 2.

³³ Markus Dirk Dubber, ‘Judicial Positivism and Hitler’s Injustice’ (1933) 93 *Columbia Law Review* 1807, 1811-1817 cited in Richard A Posner, *Overcoming Law* (Harvard University Press, 1995) 146.

³⁴ Peter Caldwell, ‘Legal Positivism and Weimar Democracy’ (1994) 39 *American Journal of Jurisprudence* 273, 275.

legal positivists,³⁵ they were accordingly disarmed by the very principle they were so eager to embrace.³⁶

B *Legitimising Nazi Authority*

According to D'Entrèves, 'adherence to positivism on part of jurists under fascist, Nazi, and collaborating governments has often been adduced to explain their readiness to acquiesce to the decree of those regimes without regard for broader considerations of right'.³⁷ Burton notes that to the positivist, an evil legal system can be still be treated as legal systems without in any way implying they have moral value, while the non-positivists would struggle in maintaining such are legal systems at all.³⁸

If, as Kelsen proposes, laws are valid not by virtue of the substantive content, but in reference to being enacted by the proper legal authority, then a law which can be properly enacted by the state must not be disobeyed or rendered invalid, even if such laws are immoral.³⁹ According to Hart, a morally iniquitous law under which a husband's alleged traitorous statements about Hitler, denounced his wife, and sentenced to

³⁵ Steizer and C Thornhill, 'An Introduction to Carl Schmitt's Constitutional Theory: Issues and Context', in C Schmidt, *Constitutional Theory* (2008) 10.

³⁶ Charles Rice, 'Some Reasons for a Restoration of Natural Law Jurisprudence' (1989) 24 *Wake Forest Law Review* 539, 567.

³⁷ Alessandro Passerin D'Entrèves, *Natural Law: An Introduction to Legal Philosophy* (Transaction, 2009) xiv.

³⁸ Steven J Burton, 'Ronald Dworkin and Legal Positivism' (1987) 73 *Iowa Law Review* 109, 114.

³⁹ R A Hughes, G W G Leane and A Clarke, *Australian Legal Institutions: Principles, Structure and Organisation* (Lawbook, 2003) 32.

death, was still law.⁴⁰ Arguably, this ‘master test for legal validity’⁴¹ would have deemed Hitler’s laws valid as they met the ‘conventional criteria’ agreed upon and accepted at the time.⁴²

In the eyes of legal positivism, the validity of law is seen as a result of its authority, properly enacted, absent moral considerations.⁴³ Its attempt to separate law and morals, while normatively attractive, was analytically weak and it not only offered no theoretical legal resource for the people to resist Nazi rule, it may even have played some role in legitimizing it.

C *The Recantation of Radbruch*

Gustav Radbruch,⁴⁴ who was himself a supporter of positivism prior to World War II,⁴⁵ later renounced positive law,⁴⁶ blaming it for failing to

⁴⁰ See H L A Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71 (4) *Harvard Law Review* 593, See also Lon Fuller, ‘Positivism and Fidelity to Law: A Reply to Professor Hart’ (1958) 71 *Harvard Law Review* 630, 653-654.

⁴¹ Crowe, above n 3, 52

⁴² H O Pappé, ‘On the Validity of Judicial Decisions in the Nazi Era’ (1960) 23(3) *The Modern Law Review* 260, 262; Markandey Katju, ‘The Hart-Fuller Debate’ (2001) *PL Web Journal* 1.

⁴³ R A Hughes, G W G Leane and A Clarke, *Australian Legal Institutions: Principles, Structure and Organisation* (Lawbook, 2003) 32; Hans Kelsen, *The Pure Theory of Law Pt II* (1935) 51 *Law Quarterly Review* 1, 17 [29].

⁴⁴ For a further examination of Radbruch’s pre and post war theories see Frank Haldmann, ‘Gustav Radbruch vs Hans Kelsen: A Debate on Nazi Law’ (2005) 18(2) *Ratio Juris* 632, Stanley L Paulson, ‘Radbruch on Unjust Laws: Competing Earlier and Later Views?’ (1995) 15 *Oxford Journal of Legal Studies* 489 and Gustav Radbruch, ‘Five Minutes of Legal Philosophy’ (1945) *Oxford Journal of Legal Studies* 13.

⁴⁵ Sanne Taekma, *The Concept of Ideals in Legal Theory* (Kluwer Law International, 2003) 63.

⁴⁶ Peter Caldwell, ‘Legal Positivism and Weimar Democracy’ (1994) 39 *American Journal of Jurisprudence* 273, 274; Matthew Lippman, ‘Law, Lawyers and Legality in the Third Reich: The Perversion of Principle and Professionalism’ (1997) 11 *Temple International and Comparative Journal of Law* 199, 200.

provide an intellectual defence against arbitrary state power⁴⁷ and acknowledging that ‘the doctrine that the law was whatever a statute said had rendered German justice helpless when confronted with cruelty and injustice once those wore statute vestures.’⁴⁸ Radbruch subsequently saw a revival of belief in transcendent law by which evil positive laws may be condemned, as evinced in his later publication of *Rechtsphilosophie*.⁴⁹ In the aftermath of the war, Germany and the world realised the dangers of the expulsion of ethics and metaphysics from the understanding of law. Accordingly, the Nuremberg Principle,⁵⁰ recognising this, stated that individuals have ‘a duty to disobey laws which are clearly recognisable as violating higher moral principles.’⁵¹

V A HYPOTHETICAL: COULD THE NATURAL LAW HAVE PROVIDED BETTER TOOLS TO RESIST NAZI ARBITRARINESS?

A *lex iniusta non est lex*

Charles Rice proposes that it would be interesting to speculate what might have been the German profession’s response had it adopted a resounding

⁴⁷ Matthew Lippman, ‘Law, Lawyers and Legality in the Third Reich: The Perversion of Principle and Professionalism (1997) 11 *Temple International and Comparative Journal of Law* 199, 200.

⁴⁸ Kelly, above n 10, 379.

⁴⁹ Ibid; Gustav Radbruch, *Rechtsphilosophie* (1950).

⁵⁰ Rodger Citron, ‘The Nuremberg Trials and American Jurisprudence: The Decline of Legal Realism, The Revival of Natural law, and the development of Legal Process Theory’ (2006) 385 *Michigan State Law Review* 401.

⁵¹ G A Moens, ‘The German Borderguard Cases: Natural Law and the Duty to Disobey Immoral Laws’ in S Ratnapala and G A Moens (eds), *Jurisprudence of Liberty* (Butterworths, 1996) 147.

rejection of Nazi arbitrariness based on principles of the natural law.⁵² It is often taken for granted that the law can be criticised on moral grounds.⁵³ It is to the natural law that one can turn to obtain the basis of this understanding. Unlike legal positivism, the theory of natural law can be described as laws that are more than the mere affairs of human convention or agreement,⁵⁴ and must conform to some permanent, higher standard of justice and morality.⁵⁵ Cicero speaks of a ‘Supreme Law which had its origins ages before any written law’,⁵⁶ and articulates of the ‘foolish notion in the belief that everything is just which is found in the customs or laws of nations’.⁵⁷ Cicero however, acknowledges that ‘many pernicious and harmful measures are constantly enacted among peoples which do not deserve the name of law’.⁵⁸ Similarly, St Thomas Aquinas describes natural law as being related to natural human inclinations, such as a natural inclination to be good⁵⁹ and highlights that where human law no longer

⁵² Rice, above n 31.

⁵³ Bix, above n 1, 62.

⁵⁴ Henry B Veatch ‘Natural Law Dead or Alive?’ (1978) 1 *Literature of Liberty: A Review of Contemporary Liberal Thought* 17; See Jonathan Crowe, *Legal Theory* (Thompson Reuters, 2009) 13 and Brian Bix, *Jurisprudence Theory and Concept* (Sweet & Maxwell, 2nd ed, 1999) 63, which discusses the debate as to whether these elements of the natural law is derived from a divine or religious nature or one that can be attained through right reason of the common good. While theologians such as Augustine and Thomas Aquinas certainly had a profound influence on the natural law, its tradition can be traced to the time of Ancient Greek Philosophers. See also Hugo Grotius, *Prolegomena De Jure Belli ac Pacis*, (F W Kelsey, trans, Liberal Arts Press, 1957) 6 for a ‘secular’ theory of natural law.

⁵⁵ Crowe, above n 3, 10-22.

⁵⁶ M T Cicero, *De Legibus* Pt I. 6. 18-19.

⁵⁷ M T Cicero, *De Republica* 3.31-43

⁵⁸ M T Cicero, *De Legibus*, Part II, 5, 13

⁵⁹ Kelly, above n 10, 144.

reflected the natural law, then ‘it is no longer a law but a perversion of law’.⁶⁰

Perhaps most illustrative of this point however, is St Augustine of Hippo’s analogy with criminal gangs and kingdoms, where he noted the similarities between the two in creating rules emanating from an entity in a position of authority. According to Augustine, the only difference between the law and a set of rules observed by criminal gangs is that the former properly reflect the demands of justice, whereas the latter does not.⁶¹ These theories view the law as a concept inseparable from morality and justice,⁶² and its underlying notion is that what naturally *is*, *ought to be*.⁶³

This regard to a higher standard of justice and morality offers a safeguard to the unjust laws proposed by man. ‘An unjust law’, in the words of St Augustine, ‘would not seem to be a law at all’.⁶⁴ Natural law lays down the foundations for morality in law and sets forth the standards of universal justice of the eternal law that man-made laws should reflect in order to be ‘true law’. The unjust laws offered by the Nazis, not reflecting these higher standards would be nothing more than the rules of a criminal gang,⁶⁵ exploiting others for their own benefit, and need not, *prima facie*, be

⁶⁰ T Aquinas, *Summa Theologiae*, Pt II-I, Question 95, Article 2.

⁶¹ Jonathan Crowe, *Legal Theory* (Thompson Reuters, 2009) 23; St Augustine of Hippo, *The City of God*, Book III Para 28.

⁶² Crowe, above n 3, 10; Michael D Bayles, *Hart’s Legal Philosophy: An Examination* (Kluwer, 1992) 116.

⁶³ Henry B Veatch ‘Natural Law Dead or Alive?’ (1978) 1 *Literature of Liberty: A Review of Contemporary Liberal Thought* 17 (emphasis added).

⁶⁴ Crowe, above n 3, 24.

⁶⁵ *Ibid.*

obeyed.⁶⁶ Natural law provides the theoretical resource for us to ‘confidently make, if not always to prove, spontaneous statements like “that is not fair” or “that is unjust”’.⁶⁷ It provides, in short, the tools required to resist arbitrariness. It might have, as Rice suggests, have offered a more resounding tool for the German legal profession in resisting the evil laws of the Nazis. It could have perhaps allowed Germany to see what the Nazis truly were, in St Augustine’s analogy – a criminal gang and its laws as such should be rejected as true law.

VI CONCLUSION

In proposing a rigid separation of ‘is’ and ‘ought’ from legal analysis, positivism appears to have promoted the expulsion of ethics and metaphysics from jurisprudence.⁶⁸ This strict distinction not only saw the laws of the Nazi regime as valid, but lead to an unwillingness to enquire into the morality of law and an inherited self-understanding that one’s own conscience or discretion should neither feature in the understanding of law nor affect its outcome. The Nazi’s cruelty, upon donning the vestures of statutes, rendered German justice helpless. Legal positivism not only offered no theoretical legal resource for the German legal profession to resist Nazi arbitrariness, it may have assisted in legitimizing Nazi rule.

⁶⁶ Crowe, above n 3, 24. Brian Bix, *Jurisprudence Theory and Concept* (Sweet & Maxwell, 2nd ed, 1999) 64.

⁶⁷ R S White, *Natural Law in English Renaissance Literature* (Cambridge University Press, 2006) 3.

⁶⁸ Michael Hawkins, *Social Darwinism in European and American Thought 1860-1945* (1997) 90 cited in Augusto Zimmermann, *Legislating Evil: The Philosophical Foundations of the Nazi Legal System* (2010) 13 *International Trade and Business Law Review* 221, 233.