

# Statutory Lawlessness and Supra-Statutory Law (1946)\*

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## I.

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

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(ed.), and 8th edn, Erik Wolf and Hans-Peter Schneider (eds) (Stuttgart: K. F. Koehler, 1950–73); and on a partial, unpublished translation by Lon L. Fuller, which appeared, *inter alia*, in his ‘Supplemental Readings in Jurisprudence, 1958–9’ (Harvard Law School).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

<sup>1</sup> Military Criminal Code of 1940, § 47.

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

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

## II.

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

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

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

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

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

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

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

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

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

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

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

Puttfarken essentially admits that he intended to send Göttig to the gallows, and a series of witnesses have confirmed his intention. *This is premeditated murder, according to section 211 of the Criminal Code*. That it was a court of the Third Reich that actually condemned Göttig to death does not argue against Puttfarken's having committed the crime. *He is an indirect perpetrator*. Granted, the concept of the indirect commission of a crime, as it has been developed in Supreme Court adjudication, usually looks to other cases, chiefly those in which the indirect perpetrator makes use of instruments lacking in will or the capacity for accountability. No one ever dreamed that a German court could be the instrument of a criminal. Yet today we face just such cases. The Puttfarken case *will not be the only one*. That the Court observed legal *form* in declaring its pernicious decision cannot argue against Puttfarken's indirect commission of the crime. Any lingering hesitancy on this score is cleared away by article 2 of the Thuringian Supplementary Law of 8 February 1946. Article 2, in order to dispel doubts, offers the following rendition of section 47, paragraph 1, of the Criminal Code: 'Whoever is guilty of carrying out a criminal act, either by himself or through another person, even if that other person acted lawfully, shall be punished as perpetrator'. This does not establish new, retroactively effective substantive law; it is simply an authentic interpretation of criminal law in force since 1871.<sup>7</sup>

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

<sup>6</sup> *Ibid.* [Emphasis in original.]

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

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

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

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

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

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

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

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

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

<sup>11</sup> *Thüringer Volk*, above n 5 [emphasis in original].

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### III.

Positivism, with its principle that 'a law is a law', has in fact rendered the German legal profession defenceless against statutes that are arbitrary and criminal. Positivism is, moreover, in and of itself wholly incapable of establishing the validity of statutes. It claims to have proved the validity of a statute simply by showing that the statute had sufficient power behind it to prevail. But while power may indeed serve as a basis for the 'must' of compulsion, it never serves as a basis for the 'ought' of obligation or for legal validity. Obligation and legal validity must be based, rather, on a value inherent in the statute. To be sure, *one* value comes with every positive-law statute without reference to its content: Any statute is always better than no statute at all, since it at least creates legal certainty. But legal certainty is not the only value that law must effectuate, nor is it the decisive value. Alongside legal certainty, there are two other values: purposiveness<sup>17</sup> and justice. In ranking these values, we assign to last place the purposiveness of the law in serving the public benefit. By no means is law anything and everything that 'benefits the people'. Rather, what benefits the people is, in the long run, only that which law is, namely, that which creates legal certainty and strives toward justice. Legal certainty (which is characteristic of every positive-law statute simply in virtue of the statute's having been enacted) takes a curious middle place between the other two values, purposiveness and justice, because it is required not only for the public benefit but also for justice. That the law be certain and sure, that it not be interpreted and applied one way here and now, another way elsewhere and tomorrow, is also a requirement of justice. Where there arises a conflict between legal certainty and justice, between an objectionable but duly enacted statute and a just law

<sup>16</sup> *Tägliche Rundschau*, above n 14, 9 May 1946.

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

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

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

The most conspicuous characteristic of Hitler’s personality, which became through his influence the pervading spirit of the whole of National Socialist ‘law’ as well, was a complete lack of any sense of truth or any sense of right and wrong. Because he had no sense of truth, he could shamelessly, unscrupulously lend the ring of truth to whatever was rhetorically effective at the moment. And because he had no sense of right and wrong, he could without hesitation elevate to a statute the crudest expression of despotic caprice. There is, at the beginning of his regime, his telegram offering sympathy to the Potempa murderers,<sup>19</sup> at the end, the hideous degradation of the martyrs of 20 July 1944.<sup>20</sup> The supporting theory had been provided by the Nazi ideologue, Alfred Rosenberg, writing in response to the Potempa death sentences: People are not alike, and murders are not alike; the murder of the pacifist Jaurès<sup>21</sup> was properly judged in France in a different light than the attempt to murder the nationalist Clemenceau,<sup>22</sup> for it is impossible to subject the patriotically motivated perpetrator to the same punishment

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

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

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

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

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

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

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

#### IV.

That looks to the future. In the face of the statutory lawlessness of the past twelve years, we must seek now to meet the requirement of justice with the smallest possible sacrifice of legal certainty. Not every judge acting on his own initiative should be allowed to invalidate<sup>25</sup> statutes; rather, this task should be reserved to a higher court or to legislation.<sup>26</sup> Such legislation has already been enacted in the American Zone, based on an agreement in the Council of German States. It is ‘Act No. 29, on the Redress of National Socialist Wrongs Committed in the Administration of Criminal Justice’ [31 May 1946]. A provision according to which ‘political acts undertaken in resistance to National Socialism or militarism are not punishable’ surmounts the difficulties, for example, of the previously mentioned case of the deserter.<sup>27</sup> On the other hand, the companion statute, ‘Act No. 22, concerning the Punishment of National Socialist Crimes’

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

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

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

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

<sup>27</sup> See § II, case no. 4, above.



[31 May 1946], applies to the other three cases discussed here<sup>28</sup> only if the deed in question was criminal according to the law at the time the deed was done. We have to consider the criminality of these other three cases, then, according to the law of the German Criminal Code of 1871, without reference to the later statute.

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

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

<sup>28</sup> [See § II, case nos 1–3, above.]

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

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

<sup>31</sup> § 336 and § 344 of the Criminal Code.

defence for them, albeit a painful one. They could invoke the state of necessity contemplated in section 54 of the Criminal Code<sup>32</sup> by pointing out that they would have risked their own lives had they pronounced National Socialist law to be statutory lawlessness. I call this defence a painful one because the judge's ethos ought to be directed toward justice at any price, even at the price of his own life.

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

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

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

## V.

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

<sup>32</sup> [See also § II, case no. 4, above.]

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

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