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Classical Legal Positivism at Nuremberg Considered

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COMMENT

*Classical Legal Positivism at Nuremberg Considered**

IN THE ARTICLE, *Classical Legal Positivism at Nuremberg*,[1] Stanley L. Paulson effectively demonstrates that the rejection of the criminal defenses offered at the Nuremberg Trials follows from the rejection of underlying classical legal positivist doctrines. Specifically, his aim is to show that noncontingent links exist between the doctrines of classical legal positivism and the defenses of the act of state doctrine and superior orders.

Paulson argues that the defenses of act of state and superior orders both presuppose the doctrine of absolute sovereignty. The presupposition underlying the act of state defense is explained in terms of Austin's analysis of positive legal rights as triadic relations. The presupposition underlying the defense of superior orders is explained by analyzing the requirement of unconditional obedience.

The Austinian theory of classical legal positivism depends upon the command doctrine and the doctrine of absolute sovereignty. The command situation, according to Golding,[2] involves the relationships of superiority and inferiority. For Austin, it is a necessary truth that laws emanate from superiors. He distinguishes three components of the command doctrine. These include the commander's intention that one act or cease to act in a prescribed manner; the commander's expression not only of his desire but of his intention to the other; and the commander's power to impose sanctions in the event the commanded does not comply with the directive. To validly assert that a relation of power between any particular superior and inferior exists and that an order from the former to the latter constitutes a "legal norm," it is necessary both that the commander be able to impose a sanction and that the commanded be able to comply with the order.

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[1] Paulson, *Classical Legal Positivism at Nuremberg*, 4 PHILOSOPHY & PUBLIC AFF. 132 (1975).

[2] GOLDING, PHILOSOPHY OF LAW (1966).

Austin takes sovereignty to mean that the superior in a particular power relation is at no time the inferior in another power relation. Thus, Paulson explains, Austin's sovereign possesses unlimited legal power to enforce his commands, and is himself not subject to legal limitation. The requirement of unconditional obedience thus becomes a corollary of the doctrine of absolute sovereignty, according to Paulson. An inferior cannot legally condition obedience to the sovereign on moral grounds when the sovereign is considered a repository of legally unlimited power.

Paulson clearly illustrates that a defense of act of state may well deprive an individual of his claim to victimization altogether, as in matters of positive law, it is not possible to sustain a claim against a sovereign State. Paulson does this through an explication of Austin's concept of a positive legal right as a triadic relation. He suggests that in a situation where the sovereign who sets the law is a duty-bearer, implied in Austin's scheme would be a "superior sovereign," a notion contrary to the original hypothesis that the sovereign is never an inferior in a relation.

The requirement of unconditional obedience is a corollary of the classical legal positivist doctrine of absolute sovereignty and thus comes into play when the defense of superior orders is invoked. A legally authorized subcommander's order to an inferior, bearing with it the legally unlimited power to enforce obedience through the subcommander's authorization from the sovereign, constitutes an unconditional legal obligation from which the inferior has no legal recourse to appeal. Only an order requiring action against the authority of the State could be called into question in terms of its validity as a legal obligation.

In *The Pure Theory of Law*,[3] Austinian revisionist Kelsen discusses the change of the basic norm when revolutionaries challenge the existing legitimate government:

> If they succeed . . . and the new order begins to be efficacious, because the individuals whose behavior the new order regulates actually behave, by and large, in conformity with the new order, then this order is considered as a valid order. It is now according to this new order that the actual behavior of individuals is interpreted as legal or illegal.[4]

In effect, claiming that the Enabling Act of 1933 effectively constituted the establishment of a new basic norm, the Nuremberg

[3] Kelsen, *The Pure Theory of Law*, in THE NATURE OF LAW 108 (Golding ed. 1966).

[4] *Id.* at 129.

defense urged the recognition of Hitler as the embodiment of absolute sovereignty, and his inferiors' subsequent inability to violate the requirement of unconditional obedience, a classical legal positivist notion. The defense of superior orders presupposes sovereignty.

Paulson asserts that the classical legal positivist doctrine could have provided another logical limitation on the power of the Tribunal to apply the Nuremberg Charter law. He suggests that the requirement of the power relation that the commanded person be able to comply might have been a basis for raising the defense of *ex post facto* law in the form of the *nullum crimen* rule. His argument involves three steps: At the time the defendents committed their deeds, there were no applicable legal norms declaring their actions to be illegal; Classical legal positivists would hold the Nuremberg Charter to be the enactment of new law, not merely the imposition of sanctions regarding behavior regulated by previously existing legal norms, as the Tribunal held; A present command can have no application to a past act. The Tribunal interpreted the pre-existing international norms as legal obligations and along with the classical legal positivist doctrine, rejected the notion of the definition of law as dependent upon the power to impose sanctions.

In arguing against the natural law theory in that it presents theoretical problems in the philosophy of law as well as espistemological problems, Burton Leiser recognizes the Nuremberg issue as presenting an uncomfortable choice:

> Either we expand the meaning of 'law' to include the natural law, or we invoke retrospective legislation. Whether we adopt the first or the second of these alternatives, there is no way for a person whose fate is to be decided to know in advance that his act, which seemed to him at the time to be lawful, would later be deemed unlawful.[5]

An alternative to the above dilemma, Leiser further notes, is to decide that no judicial body has a right to punish the alleged criminals. However, such a decision would amount to recognition of the doctrine of absolute sovereignty and thus a lack of accountable agencies upon which responsibility can be fixed and punishment exacted. If this is unacceptable, then we are still left facing the first dilemma.

However, although Paulson admits that the doctrine of *ex post facto* law is not derivable from classical legal positivism, the

[5] B. LEISER, CUSTOM, LAW AND MORALITY 76 (1969).

construction of his "logical limitation" must be dealt with. According to Austin: "Obligation regards the future. An obligation to a past act, or an obligation to a past forbearance, is a contradiction in terms."[6] The command doctrine requires that the commanded be able to comply in order for a legal obligation to be established. The avenue of retroactive legislation produces difficulties for the positivist tradition, in spite of the fact that state power is held to be unlimited.

There are other problems engendered by the positivist approach. Paulson demonstrated that both the defenses of act of state and superior orders are noncontingently linked to the classical legal positivist doctrine. And, in fact, the defense at Nuremberg raised both claims. However, U.S. Chief Counsel Jackson showed the absurdity of the combination of these two defenses which sprang from the same roots:

> Those in lower ranks were protected against liability by the orders of their superiors. The superiors were protected because their orders were called acts of state . . . the combination of these two doctrines means that nobody is responsible.[7]

Yet, in deciding that we must choose between the two paths of the first dilemma, we have already rejected the idea of not fixing responsibility. Another problem with classical legal positivism is that it not only provides a lack of a basis for the establishment of international law, but would preclude it.

The criticism of natural law, that it is vague, is inescapable. However, it does provide a basis for the establishment of a system of international law. Although we have barely mentioned the issue of the vagueness of natural law, it would seem that as illustrated in the instance of the acts performed by the Nazis (which could only be described as unconscionable crimes against humanity) the burden of vagueness would seem to be outweighed by the benefits arising from, and the desperate need for, a system of international law. Paulson states that any explication of the reasons for rejection of the classical legal positivist doctrine would "ultimately call for a philosophy of international law."[8] We must recognize that we are open to the criticism here of slighting the issue of the vagueness of natural law, against which many objections have traditionally been raised. However, we merely note that in a longer diatribe, objections might be effectively raised as well to

[6] *Supra* note 1, at 156.

[7] *Supra* note 1, at 149.

[8] *Supra* note 1, at 158.

Leiser's assertion that in regard to natural law, "there is *no* way for a person whose fate is to be decided to know in advance that his act . . . would later be deemed unlawful (author's emphasis)."[9] Issues of socialization, internalization of values and theories of personality development would have to be taken into account.

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[9] *Supra* note 5, at 76.

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