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Five Minutes of Legal Philosophy (1945)⋆

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First Minute

'An order is an order', the soldier is told. 'A law is a law', says the jurist. The soldier, however, is required neither by duty nor by law to obey an order whose object he knows to be a felony or a misdemeanor, while the jurist—since the last of the natural lawyers died out a hundred years ago—recognizes no such exceptions to the validity of a law or to the requirement of obedience by those subject to it. A law is valid because it is a law, and it is a law if, in the general run of cases, it has the power to prevail.

This view of a law and of its validity (we call it the positivistic theory) has rendered jurists and the people alike defenceless against arbitrary, cruel, or criminal laws, however extreme they might be. In the end, the positivistic theory equates law with power; there is law only where there is power.

Second Minute

Attempts have been made to supplement or replace this tenet with another: Law is what benefits the people.

That is to say, arbitrariness, breach of contract, and illegality—provided only that they benefit the people—are law. Practically speaking, this means that whatever state authorities deem to be of benefit to the people is law, including every despotic whim and caprice, punishment unsanctioned by statute or judicial

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decision, the lawless murder of the sick. This *can* mean that the private benefit of those in power is regarded as a public benefit. Indeed, it was the equating of the law with supposed or ostensible benefits to the people that transformed a *Rechtsstaat* into an outlaw state.

No, this tenet does not mean: Everything that benefits the people is law. Rather, it is the other way around: Only what law is benefits the people.

Third Minute

Law is the will to justice. Justice means: To judge without regard to the person, to measure everyone by the same standard.

If one applauds the assassination of political opponents, or orders the murder of people of another race, all the while meting out the most cruel and degrading punishment for the same acts committed against those of one's own persuasion, this is neither justice nor law.

If laws deliberately betray the will to justice—by, for example, arbitrarily granting and withholding human rights—then these laws lack validity, the people owe them no obedience, and jurists, too, must find the courage to deny them legal character.

Fourth Minute

Of course it is true that the public benefit, along with justice, is an objective of the law. And of course laws have value in and of themselves, even bad laws: the value, namely, of securing the law against uncertainty. And of course it is true that, owing to human imperfection, the three values of the law—public benefit, legal certainty, and justice—are not always united harmoniously in laws, and the only recourse, then, is to weigh whether validity is to be granted even to bad, harmful, or unjust laws for the sake of legal certainty, or whether validity is to be withheld because of their injustice or social harmfulness. One thing, however, must be indelibly impressed on the consciousness of the people as well as of jurists: There *can* be laws that are so unjust and so socially harmful that validity, indeed legal character itself, must be denied them.

Fifth Minute

There are principles of law, therefore, that are weightier than any legal enactment, so that a law in conflict with them is devoid of validity. These principles are known as natural law or the law of reason. To be sure, their details remain open to question, but the work of centuries has in fact established a solid core of them, and they have come to enjoy such far-reaching consensus in the so-called

declarations of human and civil rights that only the dogmatic sceptic could still entertain doubts about some of them.

In the language of faith, the same thoughts are recorded in two verses from the Bible. It is written that you are to be obedient to the authorities who have power over you,[1] but it is also written that you are to obey God rather than men[2]—and this is not simply a pious wish, but a valid legal proposition. A solution to the tension between these two directives cannot be found by appealing to a third—say, to the dictum: 'Render to Caesar the things that are Caesar's, and to God the things that are God's'.[3] For this directive, too, leaves the dividing line in doubt. Or, rather, it leaves the solution to the voice of God, which speaks to the conscience of the individual only in the particular case.

[1] [See *The Holy Bible*, King James Version, 1611, at Hebrews 13:17.]
[2] [See ibid at Acts 5:29.]
[3] [Ibid, Mark 12:17.]