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Kirchheimer: Political Justice: The Use of Legal Procedure for Political Ends

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POLITICAL JUSTICE: THE USE OF LEGAL PROCEDURE FOR POLITICAL ENDS. By *Otto Kirchheimer*. Princeton, New Jersey: Princeton University Press. 1961. Pp. 452. $8.50.

This book is a definitive study of the use of the legal process by the state against individuals as an instrument of political power. "Something is called political if it is thought to relate in a particularly intensive way to the interests of the community." (p. 26) This reviewer has put the meaning of the term political as follows: "As the intensity of attachment of the actors in a situation of conflict to the competing values involved therein increases and the number of actors in the society who are involved in such value conflict increases, the likelihood will increase of the characterization of the situation as one of a political, rather than a legal, nature. . . . When conflict in a society involves competing group demands based on incompatible values held by such groups, its resolution is typically the task of the political process and institutions, rather than the legal."[1] In the view of Justice Jackson, decisions which are "confided to the political departments of the government . . . are delicate, complex, and involve large elements of prophecy . . . and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil."[2]

The political trial involves the prosecution by the state of one or more individuals for the commission of criminal offenses. The offenses may be either common crimes or criminal acts directed against the state, such as treason and sedition. Modern security legislation seeks "to protect the political order from any intellectual, propagandist, and especially organizing activity directed toward revolution. . . . [T]he area of genuine political criticism is overhung by clouds which hide the light separating fact, fancy and wish. It is not easy to disentangle the components and isolate the maliciously slanderous contribution. Many a recent statute has ignored the difficulty, subjecting legitimate criticism to punitive provisions." (pp. 41, 43)

The political trial, as an instrument for achieving and preserving political authority, tears an incident loose from the historical context in which it was intertwined and turns the "strongest spotlights on it, to disclose its minutest detail. . . . The past is reconstructed for the sake of the future as a possible weapon in the battle for political domination." The trial requires a "segment of history" to be reconstructed. Although the past segment is part of "a still present conflict," the judge is allowed "to disregard its present elements and treat it exclusively as a past event." But any trial entails risk that its reconstruction of a past event through the

1 CARLSTON, LAW AND ORGANIZATION IN WORLD SOCIETY, ch. VII (to be published by the University of Illinois Press, Urbana, 1962).

2 Chicago & So. Air Lines, Inc. v. Waterman S.S. Co., 333 U.S. 103, 111 (1948).

testimony of witnesses will not take place as anticipated. In the political trial, it is imperative that witnesses reenact their predetermined roles with scrupulous fidelity, otherwise the political message which the trial was intended to communicate will be lost. (pp. 110-12)

The use of the legal process to suppress groups who dissent in principle from an established regime "has been directed so far against small groups of little importance in domestic affairs. . . . Open repression . . . is bound to miss the target and repel friends when the persecuted group assumes the stature of a mass movement, controlling a large segment (say, more than twenty percent) of the popular vote. . . . Even if a combination of social and economic pressure and police operations were enough to enforce the ban, there might be enough resistance to throw the judicial machinery out of gear and cancel what is the benefit of limited repression, the chance to preserve intact the legal process and the framework of democratic institutions." (pp. 159-60)

The degree of consensus of a society upon a single value system or, put in opposing terms, the heterogeneity of a society in terms of its sharing of values and the priority accorded values, is a factor of first importance in the viability of its legal system. The author develops this principle as follows: "The meaning of legal consciousness in a heterogeneous society thus offers special problems. If no informal consensus exists on fundamental community issues, the judges cannot play their traditional role in realizing the community value structure and pointing it up in relation to specific issues. . . . Impartiality presupposes a commonly accepted starting proposition. If as his point of departure the judge uses propositions which are emphatically rejected by substantial elements in the community, he will not be able to rely on the presumption of obedience owed to his office, even if he can show that he has adhered with some consistency to his initial proposition." (p. 215)

Dissent from the politics of an industrial society will reject the ethic of conformity and embrace instead loyalty to a group or cause: "The politics of an industrial society have often become a rational interplay of interest organizations whose outward form is a gigantic and permanent popularity contest. Members of the legal profession functioning as custodians of the political game must themselves conform to its rules and precepts. Why, then, should anyone else be privileged to reject the prevailing political framework and insist on recreating politics in the image of a community resting on loyalty to group or cause rather than on rational, civilized, if uninspiring, calculation of profit and loss?"

The lawyer's task in a political trial taking place in a mechanized, standardized, conformist society is to use "creative ingenuity . . . in whipping diffuse elements of a given situation into convincing enough shape to obtain a favorable reaction for his client." (p. 243) A functionary of the Czech

Lawyers' Organization pointed to the dichotomy of the lawyer's devotion to the interest of his client and public interest, which is involved in a political trial, as follows: "If the lawyer wants to keep to the principle that he has to preserve the interest of his clients in conformity with the interests of society and the principle of objective truth, he has to analyze clearly every case. He has to conform to the objective truth and the interests of society. For this reason we use the term 'justified interest of the client,' and *only those interests may be taken care of by the lawyer.*" (p. 244) (Emphasis supplied.)

The author examines the history of the manner in which political trials have been used to protect regimes from subversion and overthrow. The principles governing the use of political trials as a support for authority are elucidated and developed through illustrative examples. The requisite characteristics of the roles of the defendant and his lawyer, together with the prosecutor and the judge, are thoroughly explored. There are many perceptive statements about the nature of the judicial process and the task of the judge in trials of this character.

One chapter is devoted to the operation of the judicial process in societies characterized by "democratic centralism," in which the judiciary became integrated with the political institutions. In such societies, the judiciary becomes an instrument for attaining the changing political objectives of the state. "The essence of socialist legality, then, is guaranteeing that orders and signals are unfailingly observed at all subordinate levels. . . . When policies and official interpretation change, legality attaches to the new task at hand. Under no condition is it called upon to mediate between today's objectives of the sovereign and yesterday's expectations of the subject." (p. 298)

The Nuremberg trials are explored as an aspect of trials by successor regimes. They are termed "the most important 'successor' trial in modern history." With respect to the crime against peace charge, the author states: "Had the noble purpose of the crime against peace charge succeeded, had it helped to lay a foundation for a new world order, the uncertain juridical foundation of the charge would now be overlooked and the enterprise praised as the rock on which the withdrawal of the states' rights to conduct aggressive warfare came to rest. At the coalition pursuing the Nuremberg enterprise broke up before the ink on the Nuremberg judgment had time to dry, the dissensions among the wartime partners threw a shadow over the whole affair." (pp. 323, 324)

With regard to the crimes against humanity charge, the author concludes: "The newly coined crimes against humanity concept (Article 6c of the charter) corresponds to a deeply felt concern over the social realities of our age: the advent of policies intent on and leading to debasing or blotting out the existence of whole nations or races. But if the social and

political mechanism employed in such cases is unfortunately very clear, the legal formulas to cover and repress such actions remain problematic. In the absence of a world authority to establish the boundary line between atrocity beyond the pale and legitimate policy reserved for the individual state, the French government and its Algerian foes, the South African government and the representatives of the downtrodden negro and colored population, not to mention the Hungarian regime and its adversaries and victims, might continue to have a very different viewpoint on the meaning of the concept." (p. 326)

The final appraisal of Nuremberg is that: "The concrete condition under which the Nuremberg litigation arose and the too inclusive scope of the indictment may make it difficult for us to separate the circumstantial elements which it shares with all other successor trials from its own lasting contribution: that it defined where the realm of politics ends or rather, is transformed into the concerns of the human condition, the survival of mankind in both its universality and diversity." (p. 341)

The concluding portion of the book is entitled "Political Justice Modified: Asylum and Clemency." It embodies a "search for rational elements in asylum and clemency practice." (p. 349)

This review has summarized the highlights of the author's thesis to demonstrate the thoughtful, analytical manner in which data of political trials are employed to develop in a creative way significant principles and propositions in political and legal theory. The literature of law and jurisprudence has only episodically and tangentially dealt with the problem of the political trial, which the author investigates with such thoroughness. This study focuses directly upon the principal aspects of the problem and is a most important contribution.

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