PROBLEMS OF LEGAL REASONING IN THE U.S. SINCE WORLD WAR II CONCERNING FORCIBLE REVOLUTION

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The essence of the underlying problem may be stated in this way: what position should logically be taken by the law of a democratic state on the question of forcible revolution ? While the question applies to any state which claims to operate on democratic principles, certain historical and contempopary conditions in the United States point up the issues with special sharpness and clarity. Some of these issues are suggested by the following questions: Is there a right of forcible revolution ? Since forcible revolution is extra-legal overthrow of government, is it logically possible for the law of a democratic state to recognize its admissibility, its justification ? Is not every judicial system obliged by definition to regard all activity directed towards it own overthrow or destruction as a crime ?

Any reasoning about these matters must take into consideration that law is part of a system of government, and that democratic government bases itself upon the sovereignty of the people, which cannot always be equated with the supremacy of the law, especially if the supremacy of the law is equated with the decisions of the judges. In one long sentence the American Declaration of Independence expressed the entire position: "We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness; that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most

likely to effect their safety and happiness" (1). A sentence later, duty is added to right: "... it is their right, it is their duty to throw off such government..." (2). In other words, without the rights of revolution, there would be no such thing as the sovereignty of the people.

Thomas Jefferson who wrote the Declaration, and his fellow-revolutionaries who signed it and set up the new government that became known as the United States of America, had been brought up on the political philosophy of John Locke. It is interesting to note that in the second of his famous *Two Treatises of Government*, Locke, in expressing this whole line of thought, applies it specifically to the logically complex case wherein a dispute arises between the people and the government over whether the government is or is not acting in accordance with the rights and the will of the people. "Here", Locke writes, "it is likely the common question will be made: Who shall be judge whether the prince or legislative act contrary to their trust?... To this I reply: The people shall be judge; for who shall be judge whether the trustee or deputy acts well and according to the trust reposed in him, but he who deputes him, and must, by having deputed him, have still the power to discard him when he fails in his trust? If this be reasonable in particular cases of private men, why should it be otherwise in that of the greatest moment, where the welfare of millions is concerned, and also where the evil, if not prevented, is greater, and the redress very difficult, dear, and dangerous?" (3) In other words, the sovereignty of the people logically implies that judges, even on the highest bench, must recognize that there is a final judgment of higher authority than theirs.

While the American Declaration of Independence is not a part of the Constitution of the United States, it is in a special sense our most basic governmental document, which explains the principles and sets forth the justification of our action in establishing an independent state. It must therefore be considered, in a sense, to underlie the Constitution, to which it has a uniquely significant relation, morally, logically and genetically. The explicit constitutional provision which touches

directly to the issues with which we are concerned is in the first Amendment: "Congress shall make no law... abridging the freedom of speech, or of the press...".

The specific legal setting of the contemporary problems concerning forcible revolution in the United States was created when the Congress passed the Alien Registration Act, 1940 (H.R. 5138), called the Smith Act after the name of its author, Representative Howard W. Smith. The principal section relevant to our problem is worded as follows: "Sec. 2 (a) It shall be unlawful for any person — (1) to knowingly or willfully advocate, abet, advise or teach the duty, necessity, desirability or propriety of overthrowing or destroying any government in the United States by force or violence... (2) with the intent to cause the overthrow or destruction of any government in the United States, to print, publish, edit, issue, circulate, sell, distribute or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force and violence; (3) to organize or help to organize any society, group or assembly of persons who teach, advocate or encourage the overthrow or destruction of any government in the United States by force or violence; or to become a member of, or to affiliate with, any such society, group or assembly of persons, knowing the purposes thereof" (4). Penalties up to 10 years imprisonment and $10,000 fine were set.

Here the logical problem emerges very sharply: Is there any rational way such a law can be reconciled with the democratic concept of the sovereignty of the people, as expressed in the Declaration of Independence ? The Declaration says it is a self-evident truth that the people have a right and duty to overthrow any government which in their judgment has become destructive of their human rights. The Smith Act says it is a crime to teach or advocate the duty, necessity, desirability or propriety of overthrowing any government in the United States; no exception is made. In other words, the Declaration says forcible overthrow of government is sometimes right and proper; the Smith Act says it is never right and proper. The

Declaration points to the specific conditions which would make it right and proper anywhere, and which in fact made it right and proper in the United States; the Smith Act takes no account whatever of any conditions that could possibly make it right and proper in the United States, and penalizes the assertion that there could be any such conditons. This is a textbook example of logical contradiction between a particular affirmative proposition and its corresponding universal negative: "Some forcible revolution is right" is contradicted by "No forcible revolution is right". A choice must be made between these two propositions; both cannot be right or true. If the first is a self-evident axiom in the system of democracy, the second becomes a denial of democracy at its axiomatic roots.

Thus the logical contradiction takes on the form of a gigantic historical paradox: A people who judge that their government has become destructive of their human rights rebel against it and set up a new democratic government, justifying their action by appeal to the truth, self-evident from a democratic standpoint, that the people always have a right to such rebellion. The new government thus set up later passes a law that the teaching of any right to rebel shall be a crime. Does that government remain democratic and free, or does it thereby transform itself into its opposite ? Does it thereby cancel, or attempt to cancel, the validity of its only birth certificate, and by due process of law solemnly condemn the basis of its own existence as illegitimate ? Specifically, did the Smith Act annul the principle laid down in the Declaration of Independence ? Did it deliberately mean to challenge and deny the democratic axioms, or their expression in the Declaration ?

I took the opportunity, while Representative Smith was still alive, to solicit his reply to these latter questions. On April 19, 1955, I wrote him as follows: "Recently I have been working on Unesco materials and other scholarly projects concerning the interpretation of civil liberties in this country. May I ask your advice on an important point which has arisen ?

"The Smith Act, which bears your name, and reflects some of your labors in the public service, provides that it shall be

a criminal offense to 'teach the duty, necessity, desirability or propriety of overthrowing or destroying any Government in the United States by force or violence'. The problem that has arisen is the relation of this provision to the position expressed in our Declaration of Independence, to wit, that under certain conditions it is the right and duty of people to remove a government by force. That is, 'when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce then under absolute despotism, it is their right, it is their duty to throw off such Goverment...'.

"In the light of this situation, do you feel that it was the intent of the Smith Act to penalize any teaching that government should be overthrown, irrespective of conditions, or in your own mind was it taken for granted that exceptions could and should be made for the conditions as laid down in the Declaration of Independence ?"

Smith replied on April 29 that he did not have time to go into the matter. On my pressing him further, he replied May 27, 1955 as follows: "I have your letter of May 14 in which you ask whether I in any way intended by the provision of the Smith Act to repudiate the principles stated in the Declaration of Independence of the right of the people to overthrow a tyrannical government. Personally I had no such intention, nor was it considered as far as I know in the debates in the House". On December 11 I asked Smith's permission to quote his letters in full in material I would be publishing. This he granted December 16. Our correspondence appears in my book, *The Communist Trials and the American Tradition* ([5]).

It would appear from these statements of the author of the Smith Act that he himself believed in the right of forcible revolution against a tyrannical government. Unfortunately, however, nothing of this appears in the text of the Smith Act, as it was written and enforced. As we have seen above, the Act outlaws any teaching or advocacy of the duty, necessity, desirability or propriety of forcible overthrow of "any government in the United States". Thus, the only qualification is a geographical one.

Two logical possibilities here present themselves. One is

that at the time the Smith Act was originally written, its author and supporters were so overmastered by the fear of possible revolution that they brushed aside the question of the relationship which such a law and its enforcement would have to the basic goals and principles of government and law which they professed. The other possibility is that the persons concerned were under no exceptional pressure of fear, but were simply intellectually incapable of discovering and understanding that there was an important logical contradiction involved.

I believe the first possibility is the more likely one because it accords more with the fact that the majority of judges in the federal courts, including the Supreme Court of the United States, for a long time tolerated the contradiction which, in the circumstances, they could not have failed to notice. The law was enforced against Communists, and it was of course quite easy for the prosecution to show that Communists believe in and teach the right of revolution. (It is important to keep in mind that the Smith Act is a sedition law — the first sedition law passed in time of peace since the Alien and Sedition Act of 1798, now universally condemned, which in any case expired in 1800. Thus the Communist defendants were not accused of any attempt to overthrow, or even conspiracy to overthrow, any government in the United States. They were accused of conspiring *to teach* a doctrine concerning such overthrow) (6). The line of legal defense naturally was that such a law was an unconstitutional invasion of the freedom of speech guaranteed in the First Amendment to the U.S. Constitution, cited above. While restrictions on freedom of speech in time of war have usually been accepted, the Smith Act presents a problem of unique gravity, not only because it was passed and enforced in time of peace, but because the particular teaching which it outlaws happens to be the precisely expressed teaching on which the state was founded.

A marked tendency on the part of judges and government lawyers was to argue that, although a right of revolution could be recognized in the eighteenth century, when governments were commonly oppressive, such a right could not and should not be recognized by a modern democratic government, such

as that in America. This argument would seem clearly invalid, since it is possible for any government to *become* a tyranny, and the teaching of the right of revolution means that forcible action shall be taken only if and when the government does become a tyranny. A government that is not now a tyranny could consistently recognize this right, just as a person, not now trying to murder anyone, can consistently recognize the right of self-defense which other persons *could* use against him in case of need. Thus I can consistently say to my neighbors: "I am not now trying to murder any of you, but if ever I become so corrupt or unbalanced as to try, I grant you the right to kill me first, and I grant you the present right to teach this right of self-defense, which may need to be acted on in the future". In the same way, any government can consistently say to its people: "I am not now a tyrannical government, but if ever I become so corrupt or unbalanced as to try to be a tyrannical government, I grant you the right to overthrow me by force, and I grant you the present right to teach this right of revolution, which may need to be acted on in the future".

The principal trials were those of national and regional officers of the Communist Party, in groups of 10 or so, beginning in 1948, and extending to 1956. In four of the later trials (1954-56) I was called as a non-Communist expert witness to give testimony as a scholar in the field of social philosophy, on the doctrines of Marxist Communism concerning forcible revolution. The burden of my testimony was that Communist doctrine did teach the right of revolution against a tyrannical government, and only against a tyrannical government, and only when there was evidence of majority support of forcible measures. I tried to point out that this was the doctrinal position expressed in our Declaration of Independence, but I was forbidden by the Court to mention the Declaration (7). The defendants were found guilty in jury trials in the lower courts, but the Supreme Court in 1957 for the first time reversed Smith Act convictions.

However, the reasoning of the Court, in deciding the Yates case (8), the first reversal, which still stands as the current interpretation, seems remarkably odd. It is not based on the

consideration that the Smith Act is unconstitutional since it abridges the freedom of speech and press by penalizing the teaching of the principle (the right of revolution) on which the state was founded. It tries to defend the Supreme Court's 1951 finding (which never considered any relationship to the Declaration of Independence) that the Act is constitutional, and that the first defendants were proprely convicted (⁹). The 1957 Court bases its reasoning on the contention that any teaching or advocacy of forcible revolution, even though not directed against the present government, but against a possible future government, is properly punishable if carried on in "inciting" language, calculated to result in future action (⁹). The 1957 Court then further contends that such inciting language was proved as to the earlier defendants, but not as to the later ones. This is odd because the whole basis of the Government case was the same in all the trials. The language relied upon to convict all the defendants earlier and later, came from the same source — "the classics of Marxism", the writings of Marx, Engels, Lenin and Stalin, and those of the national leaders of the Communist Party who repeatedly emphasized and paraphrased these writings. Again and again, early and late, the prosecutors presented the same books and passages. These represented their evidence of the conspiracy to teach forcible overthrow of government.

Though the Supreme Court thus did not face the main constitutional issue, its decision in *Yates* operatively meant that it would no longer sustain convictions obtained on the basis of such evidence. As a result, prosecutions of this kind came to a virtual standstill. However, the Smith Act remains on the books. One would like to think that it will be declared unconstitutional, as reason requires. But of course this might be prevented by forces stronger than reason.

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NOTES

(1) In SOMERVILLE and SANTONI, *Social and Political Philosophy: Readings from Plato to Gandhi*, p. 240. New York, Doubleday, 1963.

(2) *Ibid.*

(3) *Ibid.*, p. 203.

(4) In SOMERVILLE, John, *The Communist Trials and the American Tradition*, p. 233. New York, Cameron, 1956.

(5) *Ibid.*, p. 217-219.

(6) *Ibid.*, ch. 12.

(7) *Ibid.*, p. 29-30.

(8) 354 U.S. 298, June, 1957.

(9) In SOMERVILLE, John, Law Logic and Revolution: The Smith Act Decisions. *Western Political Quarterly*, December, 1961, p. 840.