Wahlfach: Politische Philosophie und Philosophie des Rechts
Optional Course: Political and Legal Philosophy

(Einheit 9/Lesson 9: Debating Contemorary Legal Positivism: Hart & Fuller on Radbruch)

Mittwoch / Wednesday 23. 04. 2008

Erreichbarkeit / contact:

Mag. Jürgen Busch LL.M. D.E.A.
University of Vienna, Department for Legal and Constitutional History
Schottenbastei 10-16, A 1010 Wien
E-Mail: juergen.busch@univie.ac.at
Tel: +43/1/4277-34564 (office)

Main writings of Radbruch & Fuller

Gustav Radbruch (1878–1949), Gesetzliches Unrecht und übergesetzliches Recht, Süddeutsche Juristen-Zeitung 1 (1946) 105–108

Radbruch, Rechtsphilosophie (erstmals erschienen 1932, die „Radbruch-Formel ist aber erst in den Nachkriegsauflagen enthalten; aktuelle Ausgabe: *Radbruch*, Rechtsphilosophie. Hg. von R. Dreier und S. L. Paulson, Heidelberg 1999)

Lon L. Fuller (1902–1978), The Morality of Law (New Haven/London 1964, 2nd ed. 1969)

Internet-Links on Radbruch & Fuller

Deutsch:
http://de.wikipedia.org/wiki/Naturrecht
http://de.wikipedia.org/wiki/Gustav_Radbruch

English:
http://plato.stanford.edu/entries/natural-law-theories/
http://en.wikipedia.org/wiki/Natural_law
http://en.wikipedia.org/wiki/Gustav_Radbruch
http://en.wikipedia.org/wiki/Lon_L._Fuller

Text Examples

1. Radbruch Formula (1946)

Mertens, Radbruch and Hart on the Grudge Informer: A Reconsideration, Ratio Juris Vol. 15 No. 2 June 2002, 186-205

If, however, positivism apparently does not provide us with answers in such cases, we have to find other criteria by which to evaluate and judge what has happened. This is what Radbruch, in his third paragraph, seeks. Here he relies on the theoretical findings of the Philosophy of Law and, so it is said, alters them to a certain extent. Radbruch starts by saying that positivism as such is unable to explain the validity of the law, since it only refers to the power of the legislator to enforce compliance with its orders. From power alone, however, a normative order cannot be deduced. (Radbruch 1999, 215: "Aber auf Macht läßt sich vielleicht ein Müssen, aber niemals ein Sollen und Gelten gründen.") It must be based on certain values. Now the positivist might argue that the positing of a law itself already implies a certain value, namely that of legal certainty. (Radbruch (1957b, 96-7) distinguishes between three senses of legal certainty: certainty through law (since it protects essential human interests); certainty of law (knowability of law); certainty of law against sudden changes.) According to Radbruch, however, in addition to legal certainty law entails two more values, namely purposiveness ("Zweckmässigkeit") and justice. The former implies that law is a means to establish a certain state of being, or

goal within society. By virtue of the latter, equal cases are to be treated equally, and unequal cases unequally to the extent that they are unequal. Already in the Philosophy of Law, Radbruch argued that these three values are contained in what he terms the "Idea of Law" and that it was impossible to afford priority to one of those values. That these values do not coexist without tension, is already manifest in early biblical writings, where we are urged, on the one hand, to obey the political powers that stand above us, but on the other hand to obey God more than human beings (Radbruch 1999, 73-85). In his 1946 article, apparently departing from his earlier position, Radbruch argues that priority can be afforded to the value of justice: Under certain special circumstances the value of justice must prevail over the value of certainty and that of purposiveness. This is the formula:

Preference is given to the positive law, duly enacted and secured by state power as it is, even when it is unjust and fails to benefit the people, unless its conflict with justice reaches so intolerable a level that the statute becomes, in effect, "false law" [unrichtiges Recht] and must therefore yield to justice. It is impossible to draw a sharper line between cases of statutory injustice 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 "false 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.

2) Hart, Positivism and the Separation of Law and Morals, Harv. L. Rev. 71 (1958)

The third criticism of the **separation of law and morals** is of a very different character; it certainly is less an intellectual argument against the Utilitarian distinction than a passionate appeal supported not by detailed reasoning but by reminders of a terrible experience. For it consists of the testimony of those who have descended into Hell, and, like Ulysses or Dante, brought back a message for human beings. Only in this case the Hell was not beneath or beyond earth, but on it; it was a Hell created on earth by men for other men.

This appeal comes from those German thinkers who lived through the Nazi regime and reflected upon its evil manifestations in the legal system. One of these thinkers, **Gustav Radbruch**, had **himself shared the "positivist" doctrine until the Nazi tyranny, but he was converted by this experience and so his appeal to other men to discard the doctrine of the separation of law and morals has the special poignancy of a recantation**. What is important about this criticism is that it really does confront the particular point which Bentham and Austin had in mind in urging the separation of law as it is and as it ought to be. These German thinkers put their insistence on the need to join together what the Utilitarians separated just where this separation was of most importance in the eyes of the Utilitarians; for they were concerned with the problem posed by the existence of morally evil laws.

Before his conversion Radbruch held that resistance to law was a matter for the personal conscience, to be thought out by the individual as a moral problem, and the validity of a law Gould not be disproved by showing that its requirements were morally evil or even by showing that the effect of compliance with the law would be more evil than the effect of disobedience. Austin, it may be recalled, was emphatic in condemning those who said that if human laws conflicted with the fundamental principles of morality then they cease to be laws, as talking "stark nonsense." These are strong … words, but we must remember that they went along—in the case of Austin and, of course Bentham—with the conviction that if laws reached a certain degree of iniquity then there would be a plain moral obligation to resist them and to withhold obedience. We shall see, when we consider the alternatives, that this simple presentation of the human dilemma which may arise has much to be said for it.

Radbruch, however, had concluded from the ease with which the Nazi regime had exploited subservience to mere law—or expressed, as he thought, in the "positivist" slogan "law as law" (Gesetz als Gesetz)—and from the failure of the German legal profession to protest against the enormities which they were required to perpetrate in the name of law, that **"positivism" (meaning here the insistence on the separation of law as it is from law as it ought to be)** had powerfully contributed to the horrors. His considered reflections **led him to the doctrine that the fundamental principles of humanitarian morality were part of the very concept of Recht or Legality and that no positive enactment or statute, however clearly it was expressed and however clearly it conformed with the formal criteria of validity of a given legal system, could be valid if it contravened basic principles of morality.** This doctrine can be appreciated fully only if the nuances imported by the German word Recht are grasped. But it is clear that the doctrine meant that every lawyer and judge should denounce Statutes that transgressed the fundamental principles not as merely immoral or wrong but as having no legal character, and enactments which on this ground lack the quality of law should not be taken into account in working out the legal position of any given individual in particular circumstances. The striking recantation of his previous doctrine is unfortunately omitted from the translation of his works, but it should be read by all who wish to think afresh on the question of the interconnection of law and morals.

It is impossible to read without sympathy Radbruch's passionate demand that the German legal conscience should be open to the demands of morality and his complaint that this has been too little the

case in the German tradition. On the other hand there is an extraordinary naiveté in the view that insensitiveness to the demands of morality and subservience to state power in a people like the Germans should have arisen from the belief that law might be law though it failed to conform with the minimum requirements of morality. Rather this terrible history prompts inquiry into why emphasis on the slogan "law is law" and the distinction between law and morals, acquired a sinister character in Germany, but elsewhere, as with the Utilitarians themselves, went along with the most englightened liberal attitudes. But something more disturbing than naiveté is latent in Radbruch's whole presentation of the issues to which the existence of morally iniquitous laws give rise. It is not, I think, uncharitable to say that we can see in his argument that he has only half digested the spiritual message of liberalism which he is seeking to convey to the legal profession. For everything that he says is really dependent upon an enormous overvaluation of the importance of the bare fact that a rule may be said to be a valid rule of law, as if this, once declared, was conclusive of the **final moral question: "Ought this rule of law to be obeyed?"** Surely the truly liberal answer to any sinister use of the slogan "law is law" or of the distinction between law and morals is, "Very well, but that does not conclude the question. Law is not morality; do not let it supplant morality."

However, we are not left to a mere academic discussion in order to evaluate the plea which Radbruch made for the revision of the distinction between law and morals. After the war Radbruch's conception of law as containing in itself the essential moral principle of humanitarianism was applied in practice by German courts in certain cases in which local war criminals, spies, and informers under the Nazi regime were punished. The special importance of these cases is that the persons accused of these crimes claimed that what they had done was not illegal under the laws of the regime in force at the time these actions were performed. This plea was met with the reply that the laws upon which they relied were invalid as contravening the fundamental principles of morality. Let me cite briefly one of these cases.

In 1944 a woman, wishing to be rid of her husband, denounced him to the authorities for insulting remarks he had made about Hitler while home on leave from the German army. The wife was under no legal duty to report his acts, though what he had said was apparently in violation of statutes making it illegal to make statements detrimental to the government of the Third Reich or to impair by any means the military defense of the German people. The husband was arrested and sentenced to death, apparently pursuant to these statutes, though he was not executed but was sent to the front. In 1949 the wife was prosecuted in a West German court for an offense which we would describe as illegally depriving a person of his freedom (rechtswidrige Freiheitsberaubung). This was punishable as a crime under the German Criminal Code of 1871 which had remained in force continuously since its enactment. The wife pleaded that her husband's imprisonment was pursuant to the Nazi statutes and hence that she had committed no crime. The court of appeal to which the case ultimately came held that the wife was guilty of procuring the deprivation of her husband's liberty by denouncing him to the German courts, even though he had been sentenced by a court for having violated a statute, since, to quote the words of the court, the statute "was contrary to the sound conscience and sense of justice of all decent human beings." This reasoning was followed in many cases which have been hailed as a triumph of the doctrines of natural law and as signalling the overthrow of positivism. The unqualified satisfaction with this result seems to me to be hysteria. Many of us might applaud the objective that of punishing a woman for an outrageously immoral act—but this was secured only by declaring a statute established since 1934 not to have the force of law, and at least the wisdom of this course must be doubted. There were, of course, two other choices. One was to let the woman go unpunished; one can sympathize with and endorse the view that this might have been a bad thing to do. The other was to face the fact that if the woman were to be punished it must be pursuant to the introduction of a frankly retrospective law and with a full consciousness of what was sacrificed in securing her punishment in this way. Odious as retrospective criminal legislation and punishment may be, to have pursued it openly in this case would at least have had the merits of candour. **It would have made plain that in punishing the woman a choice had to be made between two evils, that of leaving her unpunished and that of sacrificing a very precious principle of morality endorsed by most legal systems.** Surely if we have learned anything from the history of morals it is that the thing to do with a moral quandary is not to hide it. Like nettles, the occasions when life forces us to choose between the lesser of two evils must be grasped with the consciousness that they are what they are. The vice of this use of the principle that, at certain limiting points, what is utterly immoral cannot be law or lawful is that it will serve to cloak the true nature of the problems with which we are faced and will encourage the romantic optimism that all the values we cherish ultimately will fit into a single system, that no one of them has to be sacrificed or compromised to accommodate another …

It may seem perhaps to make too much of forms, even perhaps of words, to emphasize one way of disposing of this difficult case as compared with another which might have led, so far as the woman was concerned, to exactly the same result. Why should we dramatize the difference between them? **We might punish the woman under a new retrospective law and declare overtly that we were doing something inconsistent with our principles as the lesser of two evils; or we might allow the case to pass as one in which we do not point out precisely where we sacrifice such a principle.** But candour is not just one among many minor virtues of the administration of law, just as it is not merely a minor virtue of morality. For if we adopt Radbruch's view, and with him and the German courts make our protest against evil law in the form of an assertion that certain rules cannot be law because of their moral iniquity, **we confuse one of the most powerful, because it is the simplest,**

forms of moral criticism. If with the Utilitarians we speak plainly, we say that laws may be law but too evil to be obeyed. This is a moral condemnation which everyone can understand and it makes an immediate and obvious claim to moral attention. If, an the other hand, we formulate our objection as an assertion that these evil things are not law, here is an assertion which many people do not believe, and if they are disposed to consider it at all, it would seem to raise a whole host of philosophical issues before it can be accepted. So perhaps the most important single lesson to be learned from this form of the denial of the Utilitarian distinction is the one that the Utilitarians were most concerned to teach: when we have the ample resources of plain speech we must not present the moral criticism of institutions as propositions of a disputable philosophy. [pp. 615-621]