

Gustav Radbruch

**“Statutory Lawlessness and
Supra-Statutory Law” (1946)**

Outline

- Who was Gustav Radbruch?
- The Rejection of “Positivism”
- Law and Legal Values
- The Radbruch Formula
- Application of the Formula to Nazi “Law”
- Suprastatutory Law
- Statutory Lawlessness
- Radbruch’s Legacy
- Attractive Features of Radbruch’s Theory
- Objections?

Who was Gustav Radbruch?



- 1904 Law professor
- 1914 WWI Volunteer
- 1921-1923 Minister of Justice in the Social Democratic Party
- 1926 Return to academia
- 1932 A warning
- 1933 Politically unreliable (Period of internal exile.)
- 1945-1949 Dean of Faculty of Law, Heidelberg

The Rejection of “Positivism”

- How does Radbruch conceive of positivism?
- Why is positivism, as a view about law's nature, dangerous?
- What is it about law that positivism is unable to explain?

Law and Legal Values

- Certainty
- Purposiveness
- Justice

The Radbruch Formula (p. 7)

The conflict between justice and legal certainty may well be resolved in this way: The positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as 'flawed law', must yield to justice. It is impossible to draw a sharper line between cases of statutory lawlessness 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 'flawed 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.

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Application of the Formula to Nazi “Law”

“The explicit intention from the very beginning, then, was that National Socialist ‘law’ would extricate itself from the essential requirement of justice, namely, the equal treatment of equals. It thereby lacks completely the very nature of law; it is not merely flawed law, but rather no law at all...”

(p. 8)

Suprastatutory Law

“...certain maxims of human conduct regarded as inviolable which in the course of time have come to be recognized by all civilized nations on the basis of common ideas of morality and which are held to be legally obligatory, regardless of whether the laws of some particular nation permit them to be disregarded.”

Bundesgerichtshof BGSt 2, 235-7, (1951).

Statutory Lawlessness

- An authoritative act that conflicts with suprastatutory law
 - Statutes establishing Jews forfeited their property to the State (pp. 1-2)
 - Judicial decisions that were “not merely unjust but *criminal*” (p. 5) -- e.g. imposing the death penalty for petty crimes
 - Use of the legal system as a murderous instrument

Judges and Executioners

- When judges interpret and apply laws that conflict with suprastatutory law, they are culpable.
- What about the executioners?

Radbruch's Legacy

Germany's *Basic Law*, art. 20

- (3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.
- (4) All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available.

Attractive features of Radbruch's Theory

- The concept of law is not reduced to the concept of power
- Law and justice are related but they are not identical
 - A law can be valid even if it is not perfectly just
 - It is not the case that whatever is valid is thereby just
 - It is not the case that whatever is just is thereby valid

Objections?
