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Defining Rule of Law

By Jim Rankin

Rechtsspositivismus

Last month's column briefly covered the historical background of Germany after World War I through the rise to power of the National Socialists under Adolf Hitler. Also, the post World War II proceedings at Nuremberg were discussed, emphasizing the so called Justice Trials conducted between March 5 and December 4, 1947. This month, consideration will be given to the philosophical, political, and psychological influences on the German legal community, specifically judges, which contributed to the horrific and arbitrary injustices carried out during the Nazi regime, 1933 to 1945. In considering German jurisprudence, Germany's civil law—rather than common law—tradition must be kept in mind. Thus, when the issue of positivism is discussed in the context of Weimar and Nazi Germany the focus is on statutory law or statute positivism. This difference from the Anglo-American legal tradition is not, however, significant for present purposes given the basic premise of positivism.

Three German legal philosophers, including Gustav Radbruch who was mentioned in last month's column, provide the analytical foundation for the judicial actions and interpretations during the Nazi regime.

In 1921, Radbruch accused the German judiciary of "hiding behind 'judicial objectivity' to exercise a form of justice that was an 'alien authoritarian body in the social people's state.'"[1] Radbruch's comment provides a point of entry into the traditional thinking of German judges more than ten years before Hitler "legally" assumed dictatorial power. Clearly, many members of the post-World War I judiciary grew to maturity in a rigid monarchial imperial state, and did not drop their monarchist sympathies in 1918. Many distrusted republicanism, democracy and innovative forms of social planning backed by the Social Democrats in the 1920s. Additionally, behind the tradition bound views of German judges, stood the special jurisprudential tradition of *Rechtsspositivismus* (positive law).[2]

In general, positivism emphasizes the idea that law is a mere social construct. That is, the law is nothing more than posited (i.e. manmade as opposed to "natural") norms provided by legislation (or as often happens in the common law tradition, by judges). Historically, positivism served as a rationalist counter to the classical natural law tradition. In the positivist view there are no necessary—first order—constraints on law's content. Legal positivism does not demand any ethical content to a law. There is a strict insistence on dividing law from morality making concepts of justice, humanity or higher order considerations irrelevant.[3] Positivism demands only that a law—to be valid law—be properly enacted or recognized by a duly appointed legislative or administrative body or judge.

Positivist thinking is traceable to many sources but in Western tradition, one finds the idea suggested, through emphasis on the will of the prince in state craft, by the Florentine Republican Niccolò Machiavelli (1469–1527). Later, in England, Thomas Hobbes (1588–1679) examines the empirical aspects of maintaining societal order. Hobbes suggests that justice is nothing more than conformity with the right; right being the law, as given by the ruler.

In the *Leviathan*, Hobbes asks how order is possible in a chaotic society. Hobbes

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wrote at the time of the English Civil War where two sides warred, in part, over one side's refusal to accept the King's views of social and political order as law. South African legal scholar David Dyzenhaus explains Hobbes' answer in these words:

> Hobbes' answer to the question is that we require a rational justification for political and legal order, one that appeals to reason alone. He argues that reason leads us to accept a positivist theory of law which requires virtually unconditional obedience to a legally unconstrained sovereign. Hobbes' appeal is to the reason of individuals. . . Individuals can be taken to agree that peace and order, whatever its nature, are preferable to chaos. Thus, each individual should see that it is rational to submit to the judgment of the sovereign, whatever the content of that judgment. Further, the sovereign should express his judgment through a system of positive law, since the determinate content of positive law preempts disputes arising as to what law is, and so preserves the peace.

David Dyzenhaus, *Law as Politics, Carl Schmitt's Critique of Liberalism*, (1998) pp. 3-4

While Machiavelli was perhaps the first early modern thinker to propose the idea of sovereign command as a foundational justification for law, it is from Hobbes that we learned a sovereign must stand outside the law to be a law giver. The sovereign cannot be politically or legally constrained. For Hobbes, the sovereign is only constrained by a uniquely understood natural law—law subject to interpretation only by the sovereign. In simplest terms then—at least in a state of emergency—we are left with the fundamental conclusion that might-makes-right in the protopositivist political world view.

Efforts to discern an appropriate means of keeping order did not stop with Hobbes. Later philosophers wrote on the subject, including John Locke (1632–1704) and Thomas Jefferson (1743–1826). In his Second Treatise on Government, written in 1690, Locke postulates that all people are *born* with the *inalienable right* to life, liberty, and property. With Locke, we find a birthright which in 1776, Thomas Jefferson incorporates into the Declaration of Independence where it is claimed as self-evident that "all men are *created equal*" and that they are "endowed by their Creator with certain inalienable rights including life, liberty and the pursuit of happiness." In Locke's writings and even more in the writings of Jefferson, if there is a sovereign command, it is the command of a higher order power transcending the human into the realm of reason. For Jefferson, the higher order was the Creator. Unfortunately, Locke and Jefferson, who seem to reintroduce higher order natural law into the question of whether a law is law, wrote in English. This is not to say German and other continental thinkers were not subject to their influence, but until 1918, Germany did not experience the profound limitations on monarchial authority experienced in the English speaking world. Sovereignty was in the German Empire actualized in the Kaiser making legal theorizing about sovereign command (and traditional positivist thinking) a consistent concomitant to real world authoritarianism.[4] In Germany, therefore, the Kaiser's law, as expounded by the Reichstag and executed by the chancellor and the civil service, was law. German monarchial sovereignty was crushed in 1918. With this defeat, Germany fell into chaos and the old social order was jeopardized by the rise of communism. There was an emergency; a siege state.

The response, as noted last month, was the Weimar Constitution. While the Weimar Constitution adopted liberal concepts, there was enough potential in the instrument for the power of sovereign command to swamp democracy. During this chaotic period, three German speaking legal theorists stand out as bearers of principles which, in one case, served to weaken the German Rechtsstaat and, in two other cases, to provide German law a new beginning after World War II.

Carl Schmitt

Carl Schmitt (1888–1985) taught at a series of universities establishing a significant reputation as a legal theorist. Responding to the political disorder following World War I, Schmitt,

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Heard About The Bar?

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The Kansas CLE Commission awarded Jan Hamilton as the recipient of the 2015 Robert L. Gernon Award for Outstanding Service to Continuing Legal Education in Kansas. Jan has practiced law in Topeka since 1973, most of that in private practice until he was appointed as the Standing Chapter 13 Trustee for Topeka in 1998, an appointment he continues to hold today. The Commission received many letters in support of his nomination. Hon. Cynthia Norton, a United States Bankruptcy Judge for the Western District of Missouri, wrote in her nomination letter, "Kansas is blessed to have so many lawyers who give unfailingly of their time and knowledge in order to make our lawyers better. But Jan stands out even among these, in terms of his willingness and commitment to continue helping lawyers and judges, even after an otherwise lengthy and stellar career.

Justice Marla Luckert received the Mentorship Award at the second Women of Influence Awards on October 22, 2015.

Have you heard something newsworthy? Share it with us at topekabartender@gmail.com.

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following Hobbes, developed a theory of a strong executive, including the possibility, under certain circumstances, of dictatorship. Additionally, Schmitt developed the idea that the *Volk* was meaningful only in the context where the people are understood as an utterly homogeneous group. Obviously, this idea had serious implications for minority groups within Germany during the 1930s and 1940s.

As the German nation devolved deeper and deeper into economic, political, and social chaos, Schmitt argued for a legal principle adequate to undo liberal democratic regimes during exceptional times. Schmitt found this principle rested in the state of emergency provision of the Weimar Constitution, Article 48. In other words, Article 48 was the practical key, in Schmitt's political and legal theorizing, to securing order within the society because through Article 48, a supreme leader was empowered to express the true will of the German people.

In Schmitt's theory, the constitution is based either on the monarchial or democratic principle. For Schmitt, in the event of an attempt to develop a normative fiction such as "the sovereignty of the constitution," the important issue of actual power mechanics is ignored. For Schmitt, the only practical solution is a monarchial style constitution with substantial powers of sovereign command. The sovereign transcends the constitution, such as it may be written, and the sovereign's activity may not be constitutionally prescribed.

In Schmitt's view, the liberal ideal is to subject the state's power to the rule of law and to eliminate or weaken the sovereign. But for Schmitt, this ideal of absolute normativity constitutes a tenuous legal fiction. No polity can simply erase, through legal fabrications, required acts of sovereignty. Famous, even today, for pithy quotations, Schmitt wrote of liberalism as follows:

> The essence of liberalism is negotiation, a cautious half measure, in the hope that the definitive dispute, the decisive bloody battle, can be transformed into a parliamentary debate and permit the decision to be suspended forever in everlasting discussion.

Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* originally published 1922, University of Chicago Press (2005) p.63.

Somewhat more ominously for the liberal democratic project, Schmitt wrote:

> All significant concepts of the modern theory of the state are secularized theological concepts not only because of their historical development—in which they were transferred from theology to the theory of the state, whereby, for example, the omnipotent god became the omnipotent lawgiver—but also because of their systematic structure, the recognition of which is necessary for a sociological consideration of these concepts. The exception in jurisprudence is analogous to the miracle in theology. Only by being aware of this analogy can we appreciate the matter in which the philosophical ideas of the state developed in the last centuries.

Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* originally published 1922, University of Chicago Press (2005) p.36.

Reading these quotes, one can hear the millenarian fervor of *Der Führer's* declaration of the *"Tausendjährige Reich."*

Schmitt's Hobbesian form of positivism lent itself nicely to the National Socialist movement and not long after joining the Nazi Party in 1933, Schmitt was referred to as the crown jurist of the Third Reich. Unfortunately for Schmitt, more radical Nazis, including the editors of the SS magazine turned against Schmitt in a way that would have been life threatening had he not been under the protection of Hermann Göring. Nevertheless, given the personal risks, Schmitt, while remaining a Nazi party member, began to lower his public persona in the late 1930s.

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After the war, Schmitt was arrested by the Allies but since he was merely an academic supporter of National Socialism and did not meaningfully involve himself in the practical implementation of Nazi policies, he was released. Schmitt refused de-nazification and died in 1985 unrepentant.[5]

Hans Kelsen

Born in Prague, Austria-Hungary (now the Czech Republic) to a German speaking Jewish family, Hans Kelsen moved to Vienna in 1884 at the age of three. Pursuing graduate studies in Vienna, Kelsen studied Dante and Machiavelli. Kelsen's reading of Machiavelli pointed to the danger of executive power operating without appropriate legal constraints. Kelsen began legal studies and became a full professor of public and administrative law at the University of Vienna in 1911.

Today, Kelsen is best known for his book entitled *The Pure Theory of Law*, published 1934. An expanded edition was published in 1960 after Kelsen joined the faculty at the University of California Berkeley. Kelsen's Pure Theory emphasized "legal science" as separable from the realms of politics and morality. Kelsen believed that in order to protect the law from moral and political influences, it needed to be separated from these spheres. Kelsen used the term "Pure" to mean that the theory of law must be logically self-supporting and not dependent on extra-legal values as would be the case in natural law theory. Kelsen theorized that law arises from a basic norm (*Grundnorm*) accepted by a substantial portion of the community. The posited law then is developed from the *Grundnorm*. Unfortunately, the basic norm of 1930s and 1940s Germany was the principle of absolute executive power in Der *Führer*. That is, *Grundnorm* is *der Führer's diktat*. From that a German judge, wedded to Kelsen's pure theory of positivism, would *per force* conclude that the decrees of Hitler were good law and must be strictly observed.

Kelsen attempted to escape this problem by relying on the idea that individuals, including judges, must decide what is right and wrong and whether to obey or disobey the positive law, even at the risk of personal harm. This escape, however, seems like a hollow solution given the personal risk associated with disobedience to Nazi decrees. Amazingly, Kelsen relied on relativism to conclude that since morality is individual, it is up to each citizen to decide which laws to obey. Unfortunately, this leaves persons (including judges) in precisely the same position they would find themselves in if they were wedded to a particular vision of what nature, religion, or reason might suggest regarding the validity of law.

While Kelsen's total separation of law and morality, and his views regarding positive law set in a relativist world view are suspect, he did strongly favor judicial review. Kelsen's ideas were based upon his reading of the common law tradition, particularly the American constitutional writing of Chief Justice John Marshall. Kelsen, in assisting with drafting post-World War I constitutions for both Austria and Czechoslovakia, carefully delineated the domain of judicial review. Kelsen represents an early twentieth century European understanding that was a critical safeguard against abuse of executive power.

Gustav Radbruch – *Recht und Moral*

Born in 1878, Gustav Radbruch passed the state bar examination in 1901 and became a professor of law at Heidelberg in 1904. Radbruch joined Germany's Social Democratic Party and was elected to the Reichstag. In 1921, he began a brief service as the Weimar Minister of Justice. In 1933, after the Nazis came to power, Radbruch was dismissed from the civil service and, consequently, lost his university position. During the Nazi period, Radbruch retired from public life.

Prior to the end of World War II, Radbruch's legal philosophy seems much like that of Kelsen's. That is, Radbruch seems to be a relativist and a positivist. In a 1934 paper, Radbruch states:

> Because a judgement on the truth or error of the differing convictions in law is impossible, and because . . . uniform law for all citizens is necessary, the law-giver faces the task of cleaving with a stroke of the sword the Gordian knot which jurisprudence cannot untangle. Since it is impossible to ascertain what is just, it must be decided what is lawful. In lieu of an act of truth (which is impossible) an act of authority is required. *Relativism leads to positivism*.

Haldemann, *Gustav Radbruch vs. Hans Kelsen: A Debate on Nazi Law*, Ratio Juris Vol. 18 No. 2 G 2005 (162-178).

Radbruch's major 1932 treatise, *Rechtsphilosophie*, reflects similar thinking. Radbruch argued that judges must maintain a strict loyalty to the law and that assuring safety and order is their most essential role. In both his pre and post Nazi writings, Radbruch, insists that positive law is required for predictability.[6]

In 1945, Radbruch introduced a post-war thesis arguing positivism had rendered the German legal profession defenseless against the arbitrary and criminal laws of the Nazis. Legal positivism, argued Radbruch, played a role in the Nazi takeover and positivism bound judges to follow Nazi laws. Radbruch wrote:

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

Radbruch, *Five Minutes of Legal Philosophy,* (Org. Pub. 1945) Trans. Litschewski and Paulson Oxford Jr. of Legal Studies, Vol. 26, No.1 (2006) p. 13.

Such statements by Radbruch have led

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some to believe he attempted to exonerate the German judiciary working during the Nazis regime. Regardless, his post war work focused attention on the problems associated with statutory positivism.

In 1946, Radbruch introduced what was later referred to as the "Radbruch formula". The formula makes the most sense in the context of a civil law system. Nevertheless, Radbruch's formula is instructive even in the common law tradition because it divides and attempts to assign practical utility to the two fundamental principles of jurisprudence. In general, Radburch's formula holds that a judge encountering a statute which he perceives may be unjust must first consider the statute from the standpoint of positive law. Assuming the law was enacted by proper democratic authority, the statute must be upheld. This resolves the matter in most cases. The only exception arises where strict adherence to the statute creates an unbearable injustice. Radbruch sets forth his formula in these words:

> The conflict between justice and the reliability of the law should be solved in favor of the positive law, law enacted by proper authority and power, even in cases where it is unjust in terms of content and purpose, except for cases where the discrepancy between the positive law and justice reaches a level so unbearable that the statute has to make way for justice because it has to be considered "erroneous law."

Radbruch, *Gesetzliches Unrecht und übergesetzliches Recht,* Süddeutsche Juristen-Zeitung (1946)

Radbruch's formula provides a means of avoiding extreme injustice in difficult cases but, in ordinary situations, Radbruch argued that morality should not determine the validity of an otherwise lawfully enacted law. In other words, the value of legal certainty takes precedence over a judge's personal attitudes regarding injustice. Obviously, Radbruch's formula combines the critical feature of positivism—predictability—with moral considerations found in the natural law.

Unfortunately, Radbruch's formula does not fully resolve the problem faced by judges in balancing justice against the political and societal demand for legal certainty. An individual judge might, for example, find a death penalty statute so "unbearable" that the judge's sense of justice requires him to find the statute is "erroneous law." This might make sense in certain circumstances, but what if the death penalty—as a means of punishment for certain crimes—is part of a long standing legal tradition extending to the adoption of the jurisdiction's foundational law? Regardless of the obvious weakness in Radbruch's post war formula, the idea

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has had important practical benefits in post war German criminal proceedings, including trials of East German border guards after unification.[7]

Abschließend

The influence of legal positivism in German judicial thinking was one factor leading to legal abuses by the National Socialists. Hitler and the Nazis acted quickly and dramatically to change normal judicial operations in ways having nothing to do with judicial philosophy. The Nazi party and its various organs were criminal organizations praying upon people's fear of economic and social disorder. Intimidation by Hitler's paramilitaries in the early 1930s and later by Nazi security services, undoubtedly contributed to the willingness of judges to deem themselves bound by statues and decrees. Additionally, German thinking during the inter-war and war years must be considered globally. The 1920s and 1930s were generally a time of social and economic upheaval throughout the world. This was a time when democratic constitutionalism was being worked out in Western society. In the United States, the *Lochner* Court's doctrine of substantive due process was being undone to make way for constitutional approval of social and working condition legislation.[8] In Europe, outside of Germany little was settled regarding political and judicial adjustments necessary to stabilize a democracy in the inter-war industrial age. Even Britain treated this period as extraordinary adopting oppressive emergency powers in India.

Disorder at home, rapid change abroad, a new and unfamiliar constitution, a jurisprudence teaching that judges must not cross the boundaries of statutory text in order to offer a new way of reading a statute and lack of a judicial review tradition, provided German judges at Nuremberg with the background for asserting their inability to resist enforcement of Nazi laws.[9] German judges in the 1920s through the War worked in what they believed was *Belagerungszustand* – a siege state. The following fictionalized statement makes the point.

> "[T]o understand it, one must understand the period in which it happened. There was a fever over the land. A fever of disgrace, of indignity, of hunger. We had a democracy, yes, but it was torn by elements within. There was, above all, fear. Fear of today, fear of tomorrow, fear of our neighbors, fear of ourselves. Only when you understand that you can understand what Hitler meant to us. Because he said to us: 'Lift up your heads! Be proud to be German! There are devils among us. Communists, Liberals, Jews, Gypsies! Once the devils will be destroyed, your miseries will be destroyed.' ... What difference does it make if a few political extremists [and minorities] lose their rights? ... 'The country is in danger.'"

Judgement at Nuremberg, Abby Mann, p. 89 (2002)

Siege state or not, the Nuremberg tribunal determined, and we, today accept that nothing could justify judicial compliance with Nazi laws. The evidence of atrocities at Auschwitz, Majdanek, Sobibor, Mauthausen, Ravensbrueck, Bergen-Belsen, Buchenwald, and Dachau, to name only the most well-known camps, easily overwhelms any arguments for the judges' defense. This is true because of the Western traditional way of thinking about law which could not be ignored. The Nuremberg trials are in fact, best justified based upon such ideas and traditions. Radbruch and Kelsen acknowledged the relevance of these ideas as principles of law. Long before Weimar, Hitler, and the Nazis, there was a philosopher, living in a time of political and social upheaval, who seemed clearly to understand the importance of morality as a component of law:

> Remove justice, and what are kingdoms but large scale criminal gangs? What are criminal gangs but petty kingdoms? A gang is a group of men under the command of a leader, bound by a compact of association, in which the plunder is divided according to an agreed convention. If this villainy wins so many recruits from the ranks of the demoralized that it acquires territory, establishes a base, captures cities and subdues peoples, it then openly arrogates to itself the title of kingdom, which is conferred on it in the eyes of the world, not by the renouncing of aggression but by the attainment of impunity.

St. Augustine, *The City of God,* Book IV, Ch. 4 (Circa. 426 AD).

[1] McElligott, Rethinking the Weimar Republic, Authority and Authoritarianism 1916 – 1936, (2014), p. 111.

[2] In addition to positivism, another legal theory undoubtedly affected the thinking of some German judges. That is, the German historical theory of law. This theory, which arose in conjunction with the Romantic movement in literature, was a reaction to Enlightenment rationalism. Essentially, this theory held that the law is an organic consciousness of the people's spirit (Volksgeist). Unfortunately, the emphasis on the people's history and ideals offered Nazis a principled justification for abhorrent race laws.

[3] Interestingly, contemporary Positivists seem to assume that for posited law to be legitimate, it must satisfy the standards of liberalism (the current, in-vogue standard being the requirement of social equality) which somehow hovers over the posited law. Such standards are seen as imminent in legitimate laws.

[4] Following German unification, Bismarck rejected the British model of limited constitutional monarchy. In the monarchy of Bismarck's German Empire, the Kaiser wielded considerable actual executive power. Obviously, this model of monarchy was discredited and abolished following Germany's defeat in World War I.

[5] Carl Schmitt produced a significant body of work during his lifetime and much has been written about his work after his death. Perhaps the most useful introduction to Schmitt is found in a collection of essays contributed to and edited by David Dyzenhaus, Law as Politics: Carl Schmitt's Critiques of Liberalism (1998). Much of my superficial understanding of Schmitt comes from this collection.

[6] There appears to be considerable scholarly disagreement about the pre and post war nature of Radbruch's thought. See Heather Leawoods, Gustav Radbruch: An Extraordinary Legal Philosopher, 2 WASH. U.J.L. & POL'Y 489 (2000), http://openscholarship.wustl.edu/law_journal_law_policy/vol2/issI/16. Regardless of his obvious pre-war preference for positivism, it does appear Radbruch was concerned with judicial formalism and rigidity long before the Nazis came to power.

[7] For an interesting discussion of Radbruch and Hans Kelsen see: Haldemann, Gustav Radbruch vs Hans Kelsen: A Debate on Nazi Law, Ratio Juris Vol. 18 No. 2 G 2005 (162-178). For a better understanding of Radbruch's concept of Rechtsstat, See Hildebrandt, Radbruch's Rechtsstaat and Schmitt's Legal Order: Legalism, Legality, and the Institution of Law, Critical Analysis of Law Vol. 2, No. 1 (2015).

[8] Machiavelli, Hobbes, and Schmitt might have approved of President Roosevelt's 1937 attempt to "pack" the Supreme Court in order to achieve his New Deal executive policy goals.

[9] Germany was not alone in its reaction through its justice system to the fear of communist subversion. See Gitlow v. New York, 268 U.S. 652 (1925) and Whitney v. California, 274 U.S. 357 (1927). Germany, in the 1930s and 1940s, was not the only country in the world with shameful race laws. Also, the compatible theories of Social Darwinism and eugenics influenced law – and judges – elsewhere in the world. For example, in 1927, the United States Supreme Court, in a case yet to be expressly overturned, ordered an American citizen sterilized to prevent propagation of "idiots" and to protect the health of the "state." See Buck v. Bell, 274 U.S. 200 (1927).