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## **THE POLISH AND UKRAINIAN EXPERIENCES WITH RADBRUCH'S FORMULA**

The conflict between legal positivism and the natural law is something like sense of the theory of law. Since more or less XIX century each researcher in that area of knowledge have to support one between these theory. However during before the second world war supremacy of legal positivism was unquestionable, now the natural law seem to be in the period of renaissance.

Gustav Radbruch one of the most famous German lawyer is very outstanding merit in the process of rebirth of the natural law. His critics of the legal positivism and pointed out some connexion between that doctrine supremacy and the victory of nazism was the beginning of the controlling back to the some elements of natural law in the jurisprudence.

In my short article I would like to present the basically element of the Radbruch's doctrine so as to present the strong analogy between his critics of the *legal lawlessness* in the Nazi Germany and Polish and Ukrainian experiences with undemocratic regimes in the XX and XXI century. In the last part of my article I would like to consider in which way the Radbruch's doctrine was used and can be use by the our democratic governments. I suppose that such considerations can be very useful during the time than we still have problems with the heritage of undemocratic regimes and we try to build democratic system of power however without using thr simple policy of revenge.

### **The Radbruch doctrine**

Gustav Radbruch belongs to the most famous German lawyers. In 1932 he wrote the basically from the point of view of his career book *The philosophy of law*. There is very discutable things if these book expressed the support for legal positivism or even in that time include some elements of natural law. Radbruch rejected the primat of morality and the connexions between legal system and religious philosophy.

However, from the other hand it wasn't simple positivism. Radbruch has underline two basically factors of legal system. It were from the one side legal security from the other justice. He expressed the positivist's will of build the system base on unquestioned legal security. It can seem that in that Middle War time Radbruch was supporter of strong positivism. In fact he underlined the necessity of separation between law and morality. However Radbruch has created the notion; *idea of law*. *Idea of law* was something in the middle between the notion of justice and legal security. By quaranting legal security state secure subjective law and defend person against the abusing of power from the side of contemporary law. Althought there isn't one morality professional judge shouldn't decide in abstract of every morality. The idea of law is generally speaking such interpretation of case in which the principle of legal security and justice are equal. In this intepretation justice means subjective rights.

The pre-war conception of Radbruch's idea of higher law that is bidden no matter what government proclaim in legal act was the answer on the experience of the second world war during which Nazi destroyed the sens of legality. Radbruch wasn't imprisoned in the Nazi German but it was time that he can't work because of his *political uncertianity* The schock from the period of the second world war mean the end of early interperetion the legal positivism with great Radbruch contribution to the redefinition of the some elements of the natural law so as to implemented its to the legal system. What was absolutely key for the positivits before the war was the conviction that the will of sovereign is absolutely irreplaceable. However it was strong interpretation of the legal positivism. In the soft version legal positivism means the prima of legal security against uncertain moral's conception. We must remember about the beginning of the contemporary legal order. Before the positivism, since more or less XVIII century natural law was connected with the religious elements of law interpretation. Sovereign both state and the Church has right to the interpretation *what is the God's will?* However enlightenment means that people have posed the question *if we don't know if the God exist why we have right to estimate what is his will?* So the beginning of the liberalism was connected with the conviction that no one morality exist. If we have more than one moral system we shouldn't estimate which moral system should dominate. So the will of sovereign has assumed liberal conviction that in developing society the legal system should be the effect of the compromis between many other moral system. However in its source the legal positivism doesn't assume that morality doesn't exist. Legal positivism only exclude the prima of one moral dogma. Radbruch propose rather redefinition of the legal positivism than back to the natural law.

Radbruch, accusing German lawyer about lack of morality causing by influence of strictly interperetion of legal positivism suggested that he proposed back to his before war conception of balance between legal security and justice.. However he publicly stated in his annex to Philosophy of law from 1946 that some norms are valid despite of legal system. Government can't reject some norms from legal system only because they are in opposition to the contemporary will of the parliament's majority. The basically elements of natural law as for exapmle *not killed* are valid despite of which assumption we prefer. Radbruch connected the cruelty of Nazi time with the lack of sensibility between German lawyers causing by strictly and dogmatic interpetation of legal positivism. He suggested that Nazism was the essention of positivist's concetion of the unlimited will of sovereign. However in this place we can repeat the question posed by for example Jerzy Zajadlo *if nazism hasn't some elements of natural law. There aren't element of one „natural” national's morality in*

*this ideology*. So, probably for that reason Radbruch didn't propose totally replacing of legal positivism by the natural law. He was rather in favour of compromise and as in his Philosophy of law compromise between that two ideas. However his idea means absolutely death of the idea of uncontrollable will of sovereign in European's doctrine. It was beginning of back of justice' conception in the legal system on our continent. No matter what we think about nazism if it was effect of positivism or rather judges weakeness the legal positivism doesn't back to its before war image after the shock of the second world war.

However the end of nazi nightmare wasn't end of misfortune for the Eastern Europe nation including Poles and Ukrainians. The Soviet occupation was in some aspects worse than Nazi firstly for Ukrainian's people. The idea of uncontrollable will of nation was replaced by the idea of uncontrollable will of people. Working people was sovereign but what working people want decided working party. Communism also mean legal lawlessness.

However when Poland gained independence in 1989 the new government prefer conception in which legal system was changing evolutionary and many elements of former system was in that first time preserved. Why Polish people forgot about Radbruch? The creators of the Third Polish Republic have played in the reality of compromise with former apparatus. Round table conception was equal with evolutionary character of changes. However Tadeusz Mazowiecki moderate Christian politic has strong conviction that legal system even in the time of transition should be respected and the principle of evolution, revolution shouldn't be accept. The notion *transition* underline gradually, evolutionary changes instead of radical fast revolution. I suppose that the most probably explanation of such approach of opposition's politics lie in the relatively moderate character of later period of Polish People Republic. PRL in the last phase has some element of the state of law including institutions of the Constitutional Court and Ombudsman. However from the other hand creators of the new state were very moderate in their condemnation of communism and were criticized by more anti-communist or even radical right-wing part of the Polish political spectrum.

Radbruch's formula including also permission to judge the war crimes. According to Radbruch they had broken the law because of they acts were illegal even in the Nazi time. However after 1989 Poland prefer the reconciliation with former communists. During before 1989 lack of former communist's proces was rather implication of consensual character of round table and first of all the fear against the Soviet's revenge after 1991 moral solution was proposed. Adam Michnik. Joseph Tischner and others proposed formula of reconciliation base on Christian values. The idea of reconciliation was criticized by many former members of Solidarity including first of all the right wing side. However the one argument using by supporters of reconciliation concern the legality of communist activity during the time of their alleged crimes. According such interpretation during communism law had accepted for example using violence against riot such form of ruling were legal.

Does Poland didn't forget about Radbruch?. I suppose that in the issue of reforming legal system many arguments really suggested rather evolution than revolution. Firstly we must remember that only legal norms don't guarantee a progress if they aren't connected with legal practise. Moreover it is fact that in many aspects later communism was even similar to the state of law. In the 90-th Poland were doing very many to making its legal system compatybile with the EU standards. Only some legal acts from the 80-th were the legal lawlessness according to Radbruch's interpretation. However the resignation from judging former communists

crimes was very controversial. Does the reconciliation and forgiveness should be stronger than justice? It is the Polish dilemma and I doubt if this conflict between the effective road of national's reconciliation and standards of justice can be effectively solve in the nearest future. However Polish example show that in the discussion about Radbruch's formula we should remember about distinction between totalitarian and authoritarian state. Besides controversions in the later period both Poland and Ukrainian Soviet Republic were rather authoritarian. It is very more difficult to say about legal lawlessness in the state when constitutional court exist. It is more difficult to judge the crimes between politics of former regime who freely resigned from power. However in the nearest future we shouldn't forgot about Radbruch formula.

Ukraine is now in the breakthrough moment of its history. After revolution of dignity by the second time in history Kyiv try to build democratic state of law. Many legal acts from the time of Yanukovich presidency seem to be example of legal lawlessness. For example the monopolization of the economy in the hands of the people from the nearest circle of Yanukovich friends. What is more important Yanukovich gave permission to the Berkut on using violence in the Kyiv in February 2014. . The some acts from this time as for example sentence on Yulia Tymoshenko were invalid with argumentation similar to the notion of the legal lawlessness. During the time of war with Russia, war with country that support former regime argumentation appealad to the principle of Christianity insted of justice hasn't chance in Kyiv. However the early enthusiasm of contemporary elite to judge the members of regime collapsed. Not forgiveness but coherence of state seem to be more important. However one fact is sure. Radbruch formula is very useful in the Middle Europe. In the nearest future can be useful in Poland than contemporary government appealad to the *will of nation*. However the Polish and Ukrainian experiences have shown that the real character of practical implementation of that formula has many in common with the character of former regime. If the regime is more cruel the ground for invalid its acts and judged its members seem to be bigger. The weak authoritarian and none repressive regime is connected with preferention of peaceful and consensual road to democracy.

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### **CZY III RP POTRZEBUJE NOWEJ KONSTYTUCJI? KILKA UWAG DO DYSKUSJI O USTROJU PAŃSTWA**

W przyszłym roku minie dwadzieścia lat od uchwalenia obecnie obowiązującej w Rzeczypospolitej Polskiej konstytucji. Okrągła rocznica powinna sprzyjać refleksji nad obowiązującym stanem prawnym i jego ewentualnej zmianie. Od dawna trwa już dyskusja nad zaletami i wadami polskiej ustawy zasadniczej<sup>37</sup>. Dyskurs ten przybrał szczególnie na sile w ciągu ostatnich kilku miesięcy, wraz ze zdobyciem większości parlamentarnej przez *Prawo i Sprawiedliwość* oraz zamieszczeniem wokół wyboru i zaprzysiężeniem sędziów Trybunału Konstytucyjnego<sup>38</sup>.

<sup>37</sup> Porównaj: *Polskie prawo konstytucyjne*, red. D. Górecki, Warszawa 2012.

<sup>38</sup> Szczególnie aktywny w dyskusji nad polskimi zmianami konstytucyjnymi pozostaje od wielu lat prof. Jan Widacki publikujący na łamach *Tygodnika Przegląd*. Patrz: *Zmiana konstytucji?* (dostęp on line pod adresem: <http://www.tygodnikprzeglad.pl/zmiana-konstytucji/>); *Monteskiusz zapomniany* (dostęp on line pod adresem: <http://www.tygodnikprzeglad.pl/monteskiusz-zapomniany/>); *Co będzie następne?* (dostęp on line pod adresem: <http://www.tygodnikprzeglad.pl/co-bedzie-nastepne/>). Porównaj: M. Safjan, *Wyzwania dla państwa prawa*, Warszawa 2007, s. 16 – 18.