Articles

Legal Positivism and National Socialism: A Contribution to a Theory of Legal Development

By Hubert Rottleuthner[*]

A. Theories of Legal Development

Recent theories of societal development carry a heavy load; they are weighed down by their inheritance from the philosophy of history. Only at the price of a paradoxical forgetfulness can they ignore the fact that there have been predecessors, whose origin and decline, as well as the particular circumstances of their revival, must also be of interest. However, there appears to be a quest for the meaning of life, coupled with an aesthetic requirement to do a kind of elegant violence to historical complexity, which gives rise to such forgetfulness about one's own history. If one has discerned the difficulties with philosophy of history, it is only with considerable irony that one could erect a handsome structure in the form of a theory of development. There are, nevertheless, some lessons from the development of theories of development, which may permit a cautious advance. In what follows I want to attempt such a cautious advance towards a theory of legal development.[1]

A theory of this type should at least satisfy the following conditions:

It must have empirical content, thus at least contain some indications of the situations, events, and processes whose existence can be tested intersubjectively. Only in this way can one avoid a vague manner of speaking which fails to concern itself with dates, places, and specifics, a neglect which makes it easy to pretend that desired conditions exist, by placing them on a newly invented stage of development. These requirements of specification hold as much for the legal dimensions as for those dimensions which are brought into relation to law for explanatory purposes.

A theory of legal development should encompass as many dimensions of law as possible, or at least make clear to which dimensions it is limited. In addition to making clear its geographical and temporal boundaries, it should specify which areas of law will be considered (private law, constitutional law, criminal law, *etc.*); whether development will

[*] Prof. Dr. Hubert Rottleuthner is a full-time professor at the Freie Universität Berlin. Email: rsoz@zedat.fu-berlin.de.

[1] Hubert Rottleuthner, *Theories of Legal Evolution: Between Empiricism and Philosophy of History*, *in* RECHTSTHEORIE, BEIHEFT 9, 217-230 (1986).

https://doi.org/10.1017/S207183220001676X Published online by Cambridge University Press

be considered in legislative activity and judicial decisions (in which courts?) or beyond that (or only) in the academic formulations of legal doctrine or in legal philosophical sublimations. (Access to the latter is easiest, at least to the big names, and therefore they are favorite subjects.) It should make clear whether the role of law in everyday life, in the opinions and attitudes of people, will be considered.

A theory of legal development should be sensitive to breaks, discontinuities, digressions and regressions. Straight line or neatly gradated models appear to be designed to satisfy some kind of need for meaningfulness and aesthetic elegance. It is simply too nice and neat to be the case that the bourgeois state inevitably leads to the *Rechtsstaat* (rule of law), then to the democratic *Rechtsstaat* and finally to the democratic welfare *Rechtsstaat*.[2]

In order to avoid the veiled normativism of developmental models in philosophy of history, whether of progress or decline, the criteria of evaluation must be openly stated before speaking at all of a "higher stage" or a regression.

In order to produce some building blocks for such a theory, I want to treat a period which has been neglected in recent presentations of developmental models of law: the period of National Socialism, including its prehistory and consequences. Apparently, this historical "detour" doesn't fit very well in these elegant models.[3]

I take my starting point from a well known thesis which Gustav Radbruch set forth in 1946 as an explanation for the behavior of jurists (=law-trained people) during the Nazi period:

> "Legal positivism, with its central conviction that 'law is law', had in fact made the German legal profession defenseless against laws whose content was arbitrary and criminal."[4]

This thesis provokes three questions about legal development in Germany before and after 1933:

Was legal positivism actually the dominant legal theory of the Weimar period or at least so influential among German jurists that it determined their professional attitudes?

---

[2] JÜRGEN HABERMAS, THEORIE DES KOMMUNIKATIVEN HANDELNS, 2 VOL. (1981), 524

[3] NIKLAS LUHMANN, RECHTSSOZIOLOGIE (1972); PHILIPPE NONET AND PHILIP SELZNICK, LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW (1978); Habermas, *supra,* note 2; Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 LAW AND SOCIETY REVIEW, 239-285 (1983); and there is only a short section in ROBERTO MANGABEIRA UNGER, LAW IN MODERN SOCIETY. TOWARD A CRITICISM OF SOCIAL THEORY (1976), 216

[4] Gustav Radbruch, *Gesetzliches Unrecht und übergesetzliches Recht* (1946), *in* RECHTSPHILOSOPHIE (6TH ED, 1963), 347-357, 352

https://doi.org/10.1017/S207183220001676X Published online by Cambridge University Press

Can the spread of legal positivism, as a distinct legal theory, be sufficient to account for a particular kind of behavior by jurists?

How did the legal profession in 1933 and thereafter conduct itself in relation to the Nazi regime? Is it accurate to describe its condition as "defenseless"?

B. Legal Positivism During the Weimar Republic

I. Was Legal Positivism the Dominant Theory?

How can one establish what the "dominant theory" was in the 20s? To what extent can it be believed that legal positivism was then a "dominant theory?" In order to be able to answer these questions through empirical analysis, the meaning of "legal positivism" must first be clarified.

One could group together those authors who called themselves at that time "positivists". Besides Hans Kelsen, however, there would not be many. When one says "positivist" – one means most often the Others. If one does not want to rely solely on self-ascription of theoretical positions – whether of an earlier period or today's – one finds oneself in a real morass. We find the most conflicting lists of diverse "schools" in legal philosophy: Neo-Kantianism, Phenomenology, Neo-Hegelianism, Material Ethics, Psychologism, Naturalism, Criticism, Rationalism, Catholic Natural Law doctrine, Positivism, *etc.*[5] The Free Law movement and the jurisprudence of interests were leading candidates for dominance in the theory of legal decision-making. If it is difficult enough to find inter-subjectively shared criteria for differentiating those neatly labeled boxes, it is even more confusing to determine the actual influence and extent of acceptance of each of these tendencies. Gmür, for example, believed that the Free Law movement "was sharply opposed by almost all practitioners and professors."[6] The jurisprudence of interests, he says, succeeded in both the fields of theory and practice and has remained the dominant theory to the present. Other authors attribute great influence to the Free Law movement upon the judiciary in the Weimar period.[7]

Manfred Rehbinder further disrupts this pretty picture when he writes:

---

[5] *E.g.,* KARL PETRASCHECK, SYSTEM DER RECHTSPHILOSOPHIE (1932)

[6] RUDOLF GMÜR, GRUNDRIß DER DEUTSCHEN RECHTSGESCHICHTE (1978), 112

[7] Ernst Fraenkel, *Zur Soziologie der Klassenjustiz, in* ZUR SOZIOLOGIE DER KLASSENJUSTIZ UND AUFSÄTZE ZUR VERFASSUNGSKRISE 1931-32 (1968)

https://doi.org/10.1017/S207183220001676X Published online by Cambridge University Press

"A closer study reveals that Ehrlich's theory of Free Law is in actuality identical to the so-called jurisprudence of interests, which later was accepted by the highest court (Reichsgericht) and today has become the pre¬vailing tendency within German legal science in the form of the jurisprudence of values."[8]

In view of this diffuse situation one could take this kind of name-dropping to an extreme and – without any content analysis – merely count on the basis of author's names: who cites whom, how often and in what way? In this way it is possible to obtain frequencies of citation and probably also citation networks. But what would we have achieved when as a result of a preliminary analysis it appeared that Rudolf Stammler was cited most frequently? Would that support a conclusion about his influence, and if so, his influence upon whom?

One could also attempt to develop substantive criteria for delimiting the various schools and movements, and then seek to arrange the authors under them and to determine the extent of their influence. We can smooth the path towards a substantive definition of that which is understood under the label "positivism", if we attempt to find out what Radbruch himself might have meant by it. The conviction that "the law is the law", which, according to the thesis of Radbruch with which we began, characterizes positivism, is, nevertheless, not very meaningful. And a closer reading also does not produce an unequivocal answer. According to Radbruch, several versions of "legal positivism" may be distinguished:

At one point he characterizes it as a view, which holds that the legislator can regulate everything substantively, that the limits of legislative competence are only those of efficacy, of enforcement. Positivism holds that the validity of law is established if it has had the capacity to be enforced. Similarly, as early as 1919, he had characterized positivism as follows: "Legal Positivism, to whom law meant nothing but governmental arbitrariness and to whom the sense of justice meant nothing but obedience, this idolatry of power, meant the judicial manifestation of *Realpolitik*, of the age of the Imperial State."[9] This view in Radbruch could be denominated as the authoritarian variant of legal positivism.

In contrast to this there is a formal variant, which holds that the legislator is bound to follow the procedural rules, even when this is no substantive limit on legislative competence. For law to be valid, it must at least have been created according to the rules and passed in a procedurally correct manner.

This formal variant is built upon a material one, according to Radbruch, insofar as bad, pernicious, or unjust laws also possess a certain value, in that they contribute to legal

[8] MANFRED REHBINDER, RECHTSSOZIOLOGIE (1977), 59

[9] GUSTAV RADBRUCH, IHR JUNGEN JURISTEN! (1919), 13

https://doi.org/10.1017/S207183220001676X Published online by Cambridge University Press

certainty.[10] A positivist would emphasize the higher priority of legal certainty in contrast to the other values of law – justice and utility – and therefore insist on obedience even to unjust laws.

All three of Radbruch's variants deal with the relation between legislator and judge. Radbruch formulates definite conditions of the validity of laws, and infers from them the postulate of the obligation of judges and lawyers to obey the law.

With this clarification of concepts we can at this point turn to the question of how the relationship between legislature and judiciary actually looked during the Weimar Republic, whether it really reflected the positivistic model of the law-following legal profession.

II. Legislature and Judiciary in Weimar

A fundamental problem for new rulers following political upheavals consists in deciding what should be done with the old administrative apparatus, including the judiciary. Apparently, the promulgation of new norms is not sufficient to convert the old judiciary to the new, politically desired path. Legality may be "the mode of functioning of the governmental machinery" (C. Schmitt) – but only in normal times. New rulers face the dilemma of either taking over the old personnel with their traditional attitudes and loyalties, in order to maintain social order, or to fire the unreliable personnel (which is still somewhat mild), without immediately having a substitute available, which can give rise to more or less significant disturbances of function. The rulers of the new Weimar Republic decided on the first alternative: the entire staff of the imperial judiciary was taken over. It showed itself to be willing to cooperate in so far as it was required to prevent starvation, civil war, a victory for the Bolsheviks and eventually occupation by the victorious allies. No democratic-republican convictions were behind it.

In this connection, the history of the Weimar Republic can be reconstructed as one of permanent and unresolved tensions between the legislative and judicial powers. In view of Radbruch's thesis what is most interesting here is the attitudes of the legal staff. For the empirical analysis of such attitudes, legal sociology has developed a varied set of instruments in recent decades (questionnaires, interviews, content analysis, *etc.*), especially within the framework of research on the administration of justice, many of which are not readily available in an historical inquiry. Nevertheless, we have some information about the class origins of jurists in the Weimar period[11] which show the high

[10] *Id., Gesetzliches Unrecht und übergesetzliches Recht* (1946), *in* RECHTSPHILOSOPHIE (6th ed., 1963), 347-357.

[11] Reinhold Scholl, *Die erste höhere Justizdienstprüfung, in* WÜRTTEMBERG 1918-1928, WÜRTTEMBERGISCHE JAHRBÜCHER FÜR STATISTIK UND LANDESKUNDE, 62-82 (1928). ID., STATISTISCHES AUS DEM JURISTISCHEN PRÜFUNGSWESEN WÜRTTEMBERGS, NACHRICHTEN DES REICHSVERBANDES DER HÖHEREN VERWALTUNGSBEAMTEN DES REICHES UND DER LÄNDER, I. TEIL: 1929, 94-96;

https://doi.org/10.1017/S207183220001676X Published online by Cambridge University Press

degree of recruitment from civil servant families (*Beamten*). Social background, however, is not a reliable predictor of professional attitudes.

Various items can be compiled on which the assumption might be based that the majority of jurists during the Weimar Republic shared a conservative, authoritarian, nationalistic, anti-republican attitude:

The resistance of the professional groups of civil servants against the oath to the new constitution; a bias against the left in political cases; an anti-republican attitude revealed by a content analysis[12] of the "*Deutsche Richter-Zeitung*", the organ of the judge's association; the opposition of this group against the recruitment of social democratic, pro-republican judges.

The real salaries of higher civil servants in relation to the average real wages of unskilled workers dropped down from 6:1 in 1913 to 2:1 after 1921. This relative "proletarization" deprived the higher civil servants of the material basis on which a positive attitude towards the new regime could have been built.

During the inflation (1923/24) legal positions were dramatically changed by judge-made law instead of by parliamentary enactments.

With this we touch once again upon the red thread that runs through the public law discussion of the Weimar period: the question of judicial review. This question was of central importance for the relationship of judicial and legislative power in the construction of the separation of powers: whether the judiciary or a particular court should have jurisdiction to make binding decisions on the validity of laws in light of certain legal norms, especially the constitution. In this way the question serves at the same time as a litmus test for the question posed at the outset about the positivistic attitudes of the judiciary in the Weimar period. Since the Weimar constitution did not provide for any court having jurisdiction over constitutional questions, one cannot classify under any of the variants of "positivism" those who held that without a special constitutional or statutory foundation there already existed a substantive power of judicial review. Such a judge with jurisdiction to review laws indeed would not accept everything, which a powerful legislator tries to enforce. Likewise, he would not confine himself to a (merely formal) test of whether a law was correctly enacted, nor only apply a standard of legal certainty, but rather subject the legislative power to broader substantive constitutional criteria.

II. Teil: 1930. 4-5 (1929/1930). Schwister, *Die soziale Schichtung der jungen Juristen*, DEUTSCHE RICHTER-ZEITUNG, 125 (1931)

[12] Friedrich Karl Kübler, *Der deutsche Richter und das demokratische Gesetz*, in 162 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 104 (1963)

Gustav Radbruch[13] and Franz Neumann[14] argued against a law to regulate the right of judicial review above all because it could be expected from a judiciary with attitudes inherited from Imperial Germany that it would attempt to limit the democratic-republican legislature. Radbruch himself was therefore thoroughly certain about the attitudes of the legal profession in the Weimar republic and about its relationship to the parliament as law-maker.

The part of his thesis which says that positivism was the dominant theory in the Weimar period, therefore, can only be understood thus: The great majority of jurists were representatives of positivism in its authoritarian variant – but decidedly not in the sense that they would have behaved conformistically towards any law-giver. Because of the authoritarian-conservative attitudes carried over from Imperial Germany, they behaved in a reserved, even rejecting manner toward the new parliamentary-republican law-giver, which did not correspond to the image of the monarchical power-state. The legislature of the Weimar republic appeared rather as a sovereign splintered into parties and interests, which in truth could not regulate everything as it wished. The power of enforcement, which according to the authoritarian variant should be the measure of the validity of laws, was curtailed by judicial decisions, legal theory and professional organizations. The authoritarian jurists of the Weimar period wagged their tongues against what they viewed as the false authority of the parliamentary law-giver.

C. The Causality of Legal-Philosophical Theory

Though Radbruch spoke of "positivism" as the dominant perspective, this would not have meant a definite legal philosophy or legal theory, but rather a political attitude. Positivism as a philosophy or theory of law – as it was sublimated for instance in Kelsen's Pure Theory of Law – was by no means the dominant perspective during the Weimar period, and also not in the public law theory.

Radbruch's characterization of the "positivistic" (*i.e.*, authoritarian, nationalistic and conservative) attitude of the jurists in the Weimar republic, however, is also misleading in another respect: for this attitude, the validity of a law is already established "when it possesses the power of enforcement". No legislature has yet appeared in such purity. The "idolatry of power" functions only on the basis of a boundless supply of legitimation. For that, theological and philosophical models of justification continually offer themselves. To this extent, the authoritarian variant is dependent on a material justification. But what

[13] Gustav Radbruch, *Richterliches Prüfungsrecht?,* DIE JUSTIZ I, 12-16 (1925/26).

[14] Franz L. Neumann, *Gegen ein Gesetz über Nachprüfung der Verfassungsmäßigkeit von Reichsgesetzen*, DIE GESELLSCHAFT, 517-536 (1929).

state has ever been content with a material-positivistic legitimation à la Radbruch, and has been satisfied with the concern for legal security as the highest value?

The distinction between legal-philosophical theory and the political attitudes of the jurists has implications for a theory of legal development. It is one thing to trace connections in intellectual history, to find out currents of legal philosophy, but something else to investigate attitudes and behavior of law-trained people. These two dimensions of legal reality are not necessarily bound up with each other. Legal-philosophical constructions do not enable conclusions to be drawn about the attitudes of jurists.

Legal theories and attitudes/behavior of jurists must be located in separate dimensions. One cannot infer the attitudes/behavior of the judiciary from legal theories. Ninety-nine percent of judges and lawyers do not read books or articles on legal theory. Being engaged in theory or philosophy of law is like preaching a sermon to fish.
One should, therefore, distinguish sharply between the content of legal theories on the one hand and their impact on the other.

D. On the "Defenselessness" of German Jurists After 1933

A consideration of the legal development, which limited itself to the rarified air of legal philosophy would lead to difficulties in the case of the positivism thesis. If it is extraordinary complicated to determine indicators which would allow one to answer the question of what was the dominant theory in the 2Os, the situation after 1933 is much clearer: positivism unequivocally counted as a negative term for the Nazis. Could then the anti-positivist propaganda of the Nazis somehow have made the alleged legal- positivists defenseless?

To give a meaningful interpretation at all to Radbruch's thesis, one must proceed again to the level of attitudes and behavior patterns. The sub-thesis of the defenselessness of the jurists is correctly placed here. It could for one thing mean that the jurists did not have at their disposal any criteria for differentiating between just and unjust laws (everything that the legislator had issued with formal correctness was to be applied). Or it could mean that they had such criteria at their disposal but were too weak to come forward with their conscience or their legal philosophical convictions.

After the phase of juristic self-justification after 1945 and later in the works of Schorn[15] and Weinkauff[16] had faded away, this picture of a value-blind, defenseless legal profession was

[15] HUBERT SCHORN, DER RICHTER IM DRITTEN REICH (1959).

[16] Hermann Weinkauff, Die deutsche Justiz und der Nationalsozialismus (1968). *Id., Was heißt das: "Positivismus als juristische Strategie"?*, JURISTENZEITUNG, 54-57 (1970).

https://doi.org/10.1017/S207183220001676X Published online by Cambridge University Press

fundamentally destroyed through investigations of the relations after 1933 between the jurists and their professional organizations.[17] Instead of value-blindness we find the most abundant adjuration of law and justice by the legal philosophers, an ecstasy of values in face of the German legal state of Adolf Hitler.[18] Instead of defenselessness we find efforts to ingratiate themselves in the form of declarations of loyalty on the part of the leadership of the German Judge's Association (already on 19 March, 1933, 4 days before the Act of Empowerment was passed) and an odious relief in view of the dissolution of the Republican Judge's Association.[19] The installation of special courts (order of 3 March 1933), the pogroms against Jewish jurists (especially on 1 April 1933) and the law on restoration of the civil service (7 April 1933), the elimination of the unions in May 1933, and the dissolution of the rest of the political parties in July 1933 did not lead to any protests. At the end of May, the German Judge's Association decided to bring itself into line with the association of National Socialist German Jurists, and on 15 December 1933, it dissolved itself entirely.

With respect to the problem of assuring the conformity of the old legal staff under a new political regime, the Nazis proceeded far more cleverly than had the Weimar Republic. Through the law on restoration of the civil service and the law on admission to legal practice of 7 April 1933, and subsequent orders, the removal of politically and socially undesired members of the legal staff was carried out (social-democratic judges – there were none who were communists – professors, attorneys, *etc.*). The estimates of the number of excluded persons vary according to particular occupations between 10-40%.[20] The remainder had an authoritarian, nationalistic and conservative attitude upon which the new power holder could build. Instead of defenselessness, one should rather speak of lack of contradiction – on the ground of inclination, agreement or "to prevent something worse". "The statement that the majority of the judges in the Third Reich at first were diligent on behalf of the new power holder, later probably harassed, but nevertheless submitted, in any case as a body served practically without opposition, cannot be denied.

The new regime, of course, did not rely only on the authoritarian attitudes of the jurists, nor only on legality as a mechanism to control the legal staff. In addition, a variety of measures were taken to secure the conformity of the judiciary (fig. no. 1): changes in

---

[17] Especially Hans Wrobel, *Der Deutsche Richterbund im Jahre 1933*. SKIZZE EINES ABLAUFS, KRITISCHE JUSTIZ, 323-347 (1982).

[18] Hubert Rottleuthner, *Substantieller Dezisionismus. Zur Funktion der Rechtsphilosophie im Nationalsozialismus, in* RECHT, RECHTSPHILOSOPHIE UND NATIONALSOZIALISMUS, ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE, BEIHEFT NR. 18 (Hubert Rottleuthner ed., 1983), 20-35

[19] The summary can be found in the DEUTSCHE RICHTERZEITUNG (1933), 121

[20] Schorn, *supra,* note 15, 729 and Lorezen *("Amtsgerichtsrat" [a lower judge] in the Department of Justice) Das Eindringen der Juden, in* DIE JUSTIZ VOR 1933, III: ZAHLENMÄßIGER UMFANG DER VERJUDUNG UND ABWEHRBEWEGUNG 1870-1938, DEUTSCHE JUSTIZ (1939) 956-966

https://doi.org/10.1017/S207183220001676X Published online by Cambridge University Press

court-organization; influence on recruitment, legal education, legal publications and professional organizations; interventions by the administration, NSDAP, police, SS, *etc.* (The St. Sebastian-figure with arrows pointing at the court system should not evoke the association that judges and lawyers became martyrs of the Nazis. Jurists played both roles; most of the time they acted routinely without any external interference.)

Fig. 1: The System for Securing Conformity of the Judiciary under the Nazis (see annex)

Did the jurists resist these pressures? If one subjects the relevant material from Schorn to a secondary analysis, it turns out that he first presents juristic "Blood Witnesses", who were killed by the Nazis.[21] Not one of these persons, however, served as a member of the legal staff under the Nazis, but rather these people, who were previously qualified as jurists, sought to oppose the Nazis in other professional relations. Those presented also include people who were killed because of their Jewish faith or the fact that they were administratively labeled as "Jews". The number of cases of jurists in the ordinary courts which then remain is thus reduced to 208. From these 208, 45 more can be deleted in which no incriminating behavior was reported. Most were cases of "Non-Aryans" who were fired because of this fact. If one examines the cases in which Schorn reports the incriminating conduct (on or off the bench) as well as the sanction (n=119), the following distribution is obtained.

Table: Incriminating conduct of judges and sanctions

sanctions	**incriminating conduct**	
	acting as judge	private conduct
reprimand, admonition, attacks in the newspapers	18	10
delay in promotion	5	17
degradation	2	2
transfer to another department or court	17	15
pensioning	9	18
others	3	4

For 1936 the statistics show 10,254 judges in the ordinary courts. In view of this number, Schorn's documentation on merely 1-2% is rather depressing. It would be wrong, in any case, to expect heroism from the remaining 98-99%. For why should one expect heroism from someone who feels himself in agreement?

[21] Schorn, *supra,* note 15, 187-207

https://doi.org/10.1017/S207183220001676X Published online by Cambridge University Press

"Despite the abuses in the Weimar Republic, the professional group of judges was healthy at its core and after the exclusion of the Jews and unsuitable employees, it was fully capable of undertaking operations for the new state."[22]

E. Consequences for a Theory of Legal Development

I. Continuity and Discontinuity

The fact that the era of National Socialism is almost never mentioned in recent theories of legal development might be explained by the view that this period of 12 (rather than 1,000) years was merely an interruption, an exception, a digression in the course of history. The discussion of Radbruch's thesis, however, reveals that the era of National Socialism cannot be simply excised from a consideration of legal development. Rather, the years between 1918 and 1933 look like an intermezzo during which the tensions between legislature and judiciary sharply increased. But after 1933 they diminished. During the Weimar Republic, rather, the jurists attempted to hibernate until they were roused by the National Revolution.

A closer look at the years of 1933/34 reveals that there was no abrupt break with legal-political traditions. The Nazi's seizure of power was legally and ideologically well prepared.

To a large extent parliamentary legislation had been displaced by emergency decrees after 1930.

Trade unions already had been weakened by mass unemployment and compulsory mediation when they were dissolved in May 1933.

The federal system was distorted by attacks of the *Reichsregierung* against the Prussian administration.

The Enabling Act (24 March 1933) which almost suspended parliamentary legislation had its predecessors in 1922/23. Legal regulations for emergency tribunals already also existed.

Long before 1933 the need for an "authoritarian criminal law" had been discussed among legal scholars who proposed retroactive legislation and the suspension of the principle of "*nulla poena sine lege*".

[22] Helmut Seydel, *Recht und Justiz*, DEUTSCHES RECHT, 817 (1942)

https://doi.org/10.1017/S207183220001676X Published online by Cambridge University Press

The purge of social-democratic judges and lawyers and the elimination of communist lawyers from the bar was in accordance with the aims of the leading professional organizations.

Anti-Semitic laws were supported by widely-held resentment (there was, of course, a long tradition of anti-Semitic legislation).

A theory of legal development should focus on these more or less explicit continuities within *prima facie* discontinuities. This holds as well for continuities after the "break" of 1945. New forms of legal regulation were invented during the Nazi era which, together with their doctrinal sublimations, continued to be applied after 1945. "Materialization" of formal civil law proceeded after 1933 and was continued after 1945, though without the neo-Hegelian overtones of Nazi legal philosophy. After 1945 the legal staff who had served the Nazis were not deprived of office – at least not in the western zones of Germany.

The search for continuities, however, comes to an abrupt end as soon as one is confronted with the unparalleled atrocities of war crimes and the holocaust.

II. Normative Assumptions in Theories of Legal Development

Stage models of legal development cannot cope with these monstrosities. No parallel can be established between ontogenesis and phylogenesis, stages of individual moral development and socio-cultural niveaus of justification. For what would be the stage of moral development (in Piaget or Kohlberg) analogous to the bureaucratically organized and justified extermination of six million people? (Eichmann referred to Kant's categorical imperative ...)

To come back to Radbruch: it appears as if Nazi legislation comes close to the authoritarian version of legal positivism insofar as the Nazi legislators were capable of regulating whatever they wanted. In fact, the maximum of legal regulations was reached – in Germany during this century – in 1938/39, as far as the number of legal norms is concerned; fig. 2 from Rottleuthner.[23]

The legal order of National Socialism can, however, be criticized from a positivistic point of view, *i.e.* on the basis of its third, material version emphasizing the value of *Rechtssicherheit*. A good explication of *Rechtssicherheit* including an application to Nazi law can be found in Fuller's *Morality of Law*.[24] Fuller argues, among others, against Hart's

[23] HUBERT ROTTLEUTHNER, EINFÜHRUNG IN DIE RECHTSSOZIOLOGIE (1987)

[24] LON L. FULLER, THE MORALITY OF LAW (1968), 38

https://doi.org/10.1017/S207183220001676X Published online by Cambridge University Press

positivism as a scientific legal theory.[25] But Fuller's "eight ways" in which the attempt to create and maintain a system of legal rules may miscarry can best be understood as an attempt to define negatively normative conditions under which the ideal of "the rule of law" can be realized.[26]

- a failure to achieve rules at all so that every issue must be decided on an *ad hoc* basis
- a failure to publicize
- the abuse of retroactive legislation
- a failure to make rules understandable
- the enactment of contradictory rules
- rules that require conduct beyond the powers of the affected party
- introducing such frequent changes in the rules that the subject cannot orient his action by them
- a failure of congruence between the rules as announced and their actual administration.

Formal organization and decision-making of the Nazi legislators as well as of the judiciary can be criticized on the basis of Fuller's eight "failures". During the Nazi era Radbruch himself, in a letter from 26. April 1939, regarded positivism as an ideal.[27] After 1945 he pleaded for *Rechtssicherheit* and for the reconstruction of the *Rechtsstaat* against the Nazi tyranny.

However, these material values of legal positivism as well as their explication in Fuller's eight "failures" are not sufficient for a critique of the Nazi legal system. There are two phenomena to which positivistic standards do not apply: terroristic, excessive court decisions issued mainly during the (end of the) war; the legislation against Jews and other out-groups which was very precise, not retroactive *etc.*

In order to be capable of criticizing these measures, to declare them invalid, after 1945, Radbruch referred to natural law.

The critique of National Socialism, of the Nazi legal system is cheap these days, in that it can be made without any personal risk. It is merely moralistic, because it is without consequences. And it is also insufficient as a basis for judging those who were involved, because such a moralistic stance cannot say what courses of action should have been

[25] Herbert L.A. Hart, *Positivism and the Separation of Law and Morals,* 71 HARV. L. REV., 593 (1958)

[26] *Id.,* 39.

[27] GUSTAV RADBRUCH, BRIEFE (Erik Wolf ed., 1968), 129; also *Id., Der Zweck des Rechts, in* G. RADBRUCH, DER MENSCH IM RECHT (1957), 88-104, 101

https://doi.org/10.1017/S207183220001676X Published online by Cambridge University Press

taken at that time, on the basis of such a condemnation. Neither legal positivism nor natural law provides standards to distinguish clearly where and when injustice begins and to decide what to do.

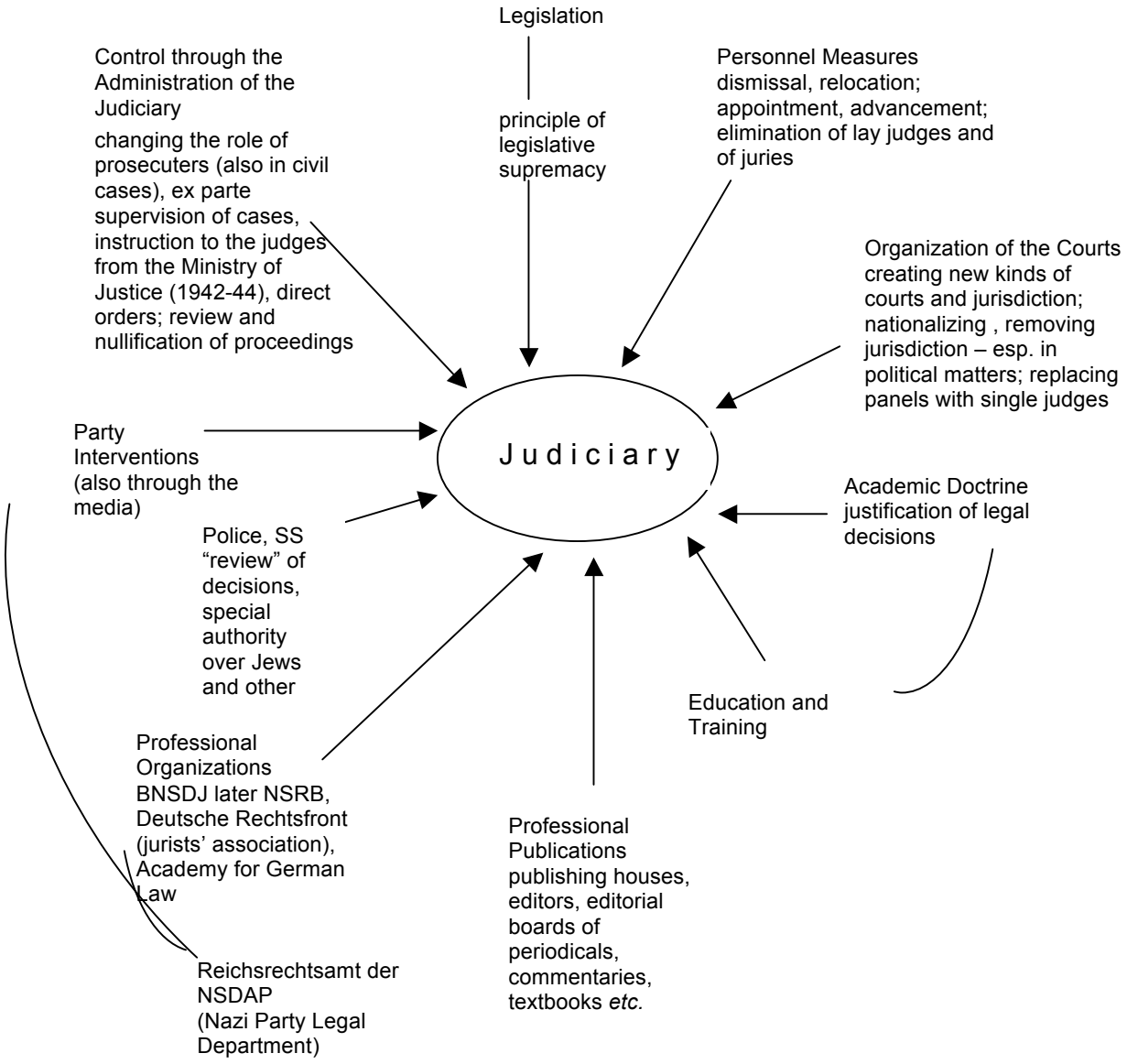
A critique of the Nazi legal system is also naive, if it does not take seriously the justifications given during this period. It is too easy to call law and courts "instruments of terror", to deplore perversions of justice and to demonize the diabolical.

From the naive point of view the justifications given and the self-concept of people acting at that time appear as conscious self-deception, as a gigantic organized deceit behind which the "true reality" of National Socialism is concealed. But one first has to cross the desert of Nazi justifications, painted with a broad palette of occidental philosophy, to be able to justify one's own views today. It would be naive to appeal to natural law against the Nazis, realizing that the Nazis had their own natural law; to conjure justice in the face of the ubiquitous use of the maxim "*iustitia fundamentum regnorum*" during the Third Reich. It would be naive to speak of the *Rechtsstaat* as a guarantee against injustice without taking into consideration what the Nazis meant by the "*Rechtsstaat Adolf Hitlers*". The superiority of our sense of justice cannot be established by arguing that the so-called "healthy popular sentiment" during the Nazi period was not "really" healthy.

We can learn from the Nazi era that everything can be justified. To be sure, not every justification given was accepted by everyone; and for us almost none of them is acceptable. But do we reject them because we, today, have good reasons or better ones than the Nazis had or is it merely owing to the superior power of the allied forces? Are the dominant moral and legal convictions solely an expression of the dominant power structure (as it may apply now to the convictions of the white minority in South Africa which they believe to be legitimated)?

What, then, are the constitutive conditions of the "horizon of plausibility", of the range of accepted justifications for the existence of social institutions? From a legal developmental theory, as applied to the Third Reich, we can get information about the fascist legal order and the justifications given. Such a theory contains also normative criteria according to which Nazi law can be deprecated. A theory of legal development, however, should also specify socio-cultural and political-organizational conditions from which those normative criteria gain their plausibility, their persuasive force. It was not the revival of natural law doctrines after 1945 which helped us to cope with the Nazi past, but rather the measures taken by the allied forces, the establishment of a new political structure and economic growth contributed to the implantation of convictions and beliefs which seem to us superior to the "popular sentiments" held during the Third Reich. Natural law doctrine, legal theories, norms and even constitutions are no guarantee against political-legal regressions. Their disposal is in the hands of human beings. The conviction that they cannot be disposed of might influence our attitudes and dispositions. But what is it that we are not disposed to do in case ... ?

Fig. 1: The System of Securing Conformity of the Judiciary Under the Nazis



https://doi.org/10.1017/S207183220001676X Published online by Cambridge University Press