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Soft Power
Revista euro-americana de teoría e historia de la política y del derecho

Vol. 9(1). Enero-junio 2022
ISSN (online): 2539/2239
ISSN (print): 2389-8232
http://dx.doi.org/10.14718/SoftPower.2022.9.1.10

READING RADBRUCH'S PHILOSOPHY OF LAW: THE USEFULNESS OF MORAL CONFLICT AND CONTRADICTIONS FOR THE CONSTITUTIONAL STATE[1]

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Abstract

In this short paper, in occasion of the Italian translation of Radbruch's *Rechtsphilosophie*, I will offer a reading of his main work, in particular by looking at how Radbruch was able to glimpse the possibility of moral conflict and the impossibility for a constitutionally founded law to always being able to offer a juridically and morally satisfactory answer as an authentic puzzle for the philosophy of law, anticipating issues as incommensurability and tragic cases.

Keywords

Radbruch; Philosophy of Law; Moral conflict; Tragic cases.

1. Reception date: 17th February 2022; acceptance date: 23th March 2022. The essay is the issue of a research carried out within the Dipartimento di Giurisprudenza, Università degli Studi di Napoli Federico II.

Resumen

En este breve artículo, con motivo de la traducción al italiano de la Rechtsphilosophie de Radbruch, ofreceré una lectura de su obra principal, en particular observando cómo Radbruch pudo vislumbrar la posibilidad del conflicto moral y la imposibilidad de que un derecho constitucionalmente fundado puede siempre ofrecer una respuesta jurídica y moralmente satisfactoria como un auténtico enigma para la filosofía del derecho, anticipando cuestiones como la inconmensurabilidad y los casos trágicos.

Palabras clave

Radbruch; Filosofía del Derecho; Conflicto moral; Casos trágicos.

The history of non-fiction translations is studded with difficulties, lack of interest, editorial blunders as well as inexplicable omissions. If we add to this the precariousness of the translator's work, the low value of editing and publishing activities in the productivist university and the absence - with some exceptions - of specifically dedicated cultural policies, the picture becomes gloomy. It is not just an aspect linked to the dynamics of scientific publishing, it can become an element that subtly tends to shape cultural trends and orientations in a given field, contributing to make it more or less exposed or sensitive, open or closed to certain languages. Thus, it happens that in a world where translation occurs mainly from English, a significant indicator of the dominance expressed by Anglo-Saxon culture, capital works of scientific thought can be condemned to an editorial oblivion that has nothing to do with their intrinsic value. Certainly the philosophy of law, as in general contemporary legal culture, given the rapprochement between the once distant traditions of civil law and common law, has increasingly turned to the Anglo-Saxon world. Within a reconfiguration of the global legal space, there is a need for a *lingua franca* which, as happens in other disciplines, can connect an increasingly extensive and global scientific community. Of course, law remains a phenomenon that is difficult to separate from the cultural and institutional contexts in which it develops and the Anglo-Saxon prevalence in the end is nothing more than the globalization of a localism (Santos 2006, p. 396). However, it is also true that sometimes non-English speaking authors aspire to nothing more than to be marginally mentioned in a footnote

in some Anglo-Saxon book (paraphrasing from Atienza 2012, p. 128). These are some of the reasons, which may contribute, at least partially, to explain the delay with which the reader of Italian language, is finally able to access a key work of legal philosophical thought such as the *Rechtsphilosophie* (1932, 2021) by Gustav Radbruch, thanks to the accurate translation and edition by Gaetano Carlizzi and Vincenzo Omaggio, who also authored two important and profound introductory essays.

If, as it has been argued, the classics of legal philosophy, in addition to contributing to the educational dimension, are real deposits, available to those who want or know how to contact them (Labriola 2019, p. 23), the re-discovery of this one seems a bright confirmation of this. Without a doubt, Radbruch is certainly a classic of the philosophy of law. But which Radbruch? Often the fate of an author's success is marked by the formation, sometimes even fortuitously, of a conceptual sign that goes beyond the work itself. Certainly Radbruch is an author translated and studied more or less everywhere, managing to attract a relative interest even in the Anglo-Saxon context, often reluctant to engage in laborious work of translation and comparison in different languages, an interest that continues as shown by the recent publication of translations and unpublished works in several languages (Radbruch, 2021b; 2020).

The great fortune that has, rightly, accompanied his much discussed "formula" (Radbruch 2006) and the secondary literature that continues to grapple with the subject, has perhaps ended up excessively crushing the author's image on that work which, however meritorious, cannot be read in isolation from the rest of its scholarship but in connection with an intellectual path adequate to the richness of a personality and a biography like that of Radbruch. A reflection of the success of the formula was the animated debate on the evolution of his thought, in the contrast between "continuist and discontinuist" interpretations, the latter fuelled by a traditional view of Radbruch's thought as initially an advocate of a positivist stance.

The debate on these two issues therefore ended up perhaps excessively engulfing Radbruch's philosophical legal proposal, a proposal that the current edition instead returns to us intact in its dynamic of conceptual development. In this short paper, I will therefore keep these two issues relatively in the background while I will try to illustrate what a reading of Radbruch's *Rechtsphilosophie* in 2022 can reward us exactly 90 years after the consolidated edition, in particular by looking at how Radbruch was able to glimpse the possibility of moral conflict and the impossibility for a constitutionally founded law to always being able to offer a juridically and morally satisfactory answer as an authentic puzzle for the philosophy of law.

An idea of the law

Even if the constitutional state that Radbruch was historically able to know was very different from the one in which contemporary European jurists place their reflections today, what is striking is the ability of this jurist to understand how the relationship between law and morality could not be narrowly confined to the single question, however fundamental, of conceptual and epistemological separability. Radbruch seems to have understood before many others that moral conflict in the legal sphere could not only be a purely methodological problem but could also condition the "recognisability" of the law itself. Already in 1932 and therefore long before the formula impregnated the entire reading of his work, the question of how to represent the relationship between law and justice was essential for Radbruch. If we briefly examine some of the most crucial chapters of the work, this fact is immediately noticeable. In chapter 9, Radbruch explicitly speaks of the antinomies of the idea of law and of a tension between them. Law - or rather its idea - is made up of justice, utility and legal certainty. It is a relationship not determined once and for all. The three elements of the idea of law require each other - but at the same time contradict each other. Justice and utility are in fact destined to require opposite measures, one based on generalization, where utility must be able somehow to be individualized. Justice and utility contradict legal certainty, as the latter requires positivity, but positive law aims to be valid regardless of justice and utility (2021, p. 83). Every juridical culture and historical epoch will tend to give prominence to one of the aspects to the detriment of the others. If the police state seeks to maximize utility, the era of natural law sought to derive the entire content of the law from the appeal to a principle of justice. In the end, the epoch -passed- of legal positivism saw only positivity and legal certainty. It is precisely the inadequacies of vision of these one-sided approaches that show the heuristic fecundity of the idea of law understood *à la* Radbruch, that is the object of possible conflicts and contradictions, an aspect which, however, does not seem to worry too much the author, who does not see in this aspect, characterizing in an original way his philosophy of law, a lack of systematicity or a fatal flaw of the theory. Here, too, Radbruch's contemporaneity is almost unsettling, when he writes: "Philosophy must not make decisions but lead precisely in their presence (86)".

In chapter 10, devoted to the topic of the validity of law, there is an attempt to solve a problem that often hovers in the work, that is how a norm can be deducted from a fact, how it can arise given that a will can certainly produce a necessity but never an

ought (2021, p. 87). In some passages, he seems to hesitate in wanting to fully recognize the validity of Hume's law and the consequent impossibility of deriving an *ought* from what it *is*. Radbruch's treatment is original, in this case as well. While recognizing that the normative doctrines of validity must be committed to predicating the validity of the law for each individual case, this is not necessarily so for the validity of a legal order, its effectiveness is not required in each individual case, as long as it is successfully effective on average. Two theories are mentioned, that of power and that of recognition. According to the first, the law would be valid because it is capable of being imposed, as it happens with the element of physical coercion in order to comply with a course of action, perhaps even with violence. But for Radbruch the efficacy of the law cannot rest solely on the physical dimension and must be recognized by those who are subject to it, according to an adhesion mechanism. It is not a question of an approval that would prevent the obligation as in a psychological dimension as much as its social dimension. According to this perspective, even those who violate the law by doing so "recognize" it. All this, however, does not lead to a doctrine of validity of a sociological type or implies the equation between validity and correct law. Indeed, it is the purpose of the law that it cannot be scientifically established once and for all, having in some way to be traced back to the opinions of the parties. To this regard, the attention to their role constitutes a more fully twentieth-century aspect of Radbruch's theory of law, who was a leading Social Democrat exponent and which at least partially establish a potential link between the visions of Rabruch's law and of Kelsen's theory of democracy, a perspective that today presents greater theoretical difficulties and less explanatory capacity due to the weakening of the social power of political parties and the recurrent crisis of parliamentarism. As the author himself states, it is at this point that relativism becomes a theoretical structural element of the system, which must be able to impose itself without the loss of normativity. At the same time, the three aspects of the idea of law being all necessary can enter into conflict. Radbruch clarifies with an example. From the point of view of the judge, it is noted that in fact it is rare to call men or judges *legal*, emphasizing that the law must serve *both* justice and certainty *at the same time*. In the event of a conflict between law and justice, the judge remains the servant of legal certainty. If we are concerned with showing the validity of the law also in relation to the single individual, another recurrent particularly original aspect of Radbruch's legal thought, it is unlikely that the law will be able to show him its validity but only its power.

Radbruch as a pioneer of tragic cases in legal thought?

After a long argument, referring to this figure of the delinquent convinced and bound by his own conscience to consider the unjust or useless law invalid (2021, p. 95), it comes to the definition of tragic, "[…] a tragic case precisely because it does not allow any solution". (p. 96). Here Radbruch sees in his definition of a tragic case the expression of a conflict between different duties, that of the judge to the faithful observance of the law and that of the offender to a law that sees the same as unfair or not useful. This definition of tragic case by Radbruch is worth a closer look at the issue. The discussion on moral dilemmas and in particular the different versions of the so-called *trolley problem* has often been associated with prominent figures in Anglo-Saxon philosophy such as Philippa Foot or Judith Jarvis Thomson. Yet, as it has recently been noted, leading German jurists such as Hans Welzel and Karl Engisch, would have identified the problem in substantially similar terms as early as in 1951 and 1930 respectively (Jeutner, 2017, p. 38; Morandin-Ahuerma, 2020). In reading the definition of a tragic case we could also add Radbruch to the ranks of German jurists who have anticipated issues that will only become the object of philosophical and legal reflection several years later. If the idea of the difficulty of some choices regarding the allocation of scarce assets will be called tragic choices by the North American jurists Bobbitt and Calabresi, a phenomenon only partially overlapping with that of tragic cases, it will be Manuel Atienza who later coined the expression *tragic case* and made the way for the expression in legal theory. Atienza (1996) referred to tragic cases as "aquellos que no tienen ninguna resposta correcta y que, por lo tanto, plantan a los jueces no el problema de cómo decidir ante una serie de alternativas (o sea, como ejercer su discreción), sino que camino tomar frente a un dilema" (Atienza, 1996, p. 13). Subsequently, for the first time, a distinction is introduced between two types of cases that can be qualified as tragic from the point of view of the judge: "a) una situación en que su ordenamiento jurídico le prove al menos de una solucion correcta (de acuerdo con los valores de ese sistema) pero que choca con su moral; b) una situación en que el ordenamiento jurídico no le permite alcanzar ninguna solución correcta" (1996, p. 19). The identification of tragic cases in Atienza is not an occurrence connected to pre-constitutional legal systems or a lack of constitutional features in a certain legal order but rather they are a consequence of constitutional legal regimes and of their partial openness to moralization. In some ways, Radbruch's idea seems to anticipate that of Atienza and in general the possibility that a legal order could

be incomplete and, as it seems to be interpreted, not capable of self-integration without sacrificing an essential value. With an almost astonishing sense of modernity, for Radbruch is already clear that the problem of incommensurability between goods is destined to become crucial not only for ethics but that it can have significant repercussions for the legal domain. If law and morality are distinguishable, their relationship can give rise to "tragic conflicts between law and morality, which can emerge, in the figure of the convinced criminal, from the fact that the law is based on the statute, the morality on the conviction" (2021, p. 52).

In fact, in Radbruch's theory, contradiction and antinomy are not bogeys to be eradicated at any cost to save the system but rather indications of the impossibility of the form completely dominating life. Beyond the aforementioned sentence also mentioned in Carlizzi's essay in which Radbruch explicitly rejects a vision of the aspiration of philosophy to a rational system without contradictions, the prodigious thinker of Lübeck is clear that the finitude of human life and its practical action in the world inevitably leads to choices that today we would define as "incommensurable". A problem that cannot fail to be crucial in the constitutional state of law of a pluralist type but which in the period when Radbruch writes was still only embryonic. In this regard, it should be remembered that in the crucial chapter on the purpose of law (Radbruch, 2021, pp. 60-67), it is argued that the idea of law does not come to an end in justice but in order to produce the content of the law, a second thought must be added: utility. The way to measure this utility is given by single human personalities, collective human personalities and human works to which correspond three types of values, individual, collective and work. These values come into conflict and their ordering appears according to the individualistic, transindividualistic or transpersonal conception that is adopted and which reverberates on the relative conception of law and the State around these groups of values. Radbruch's examples and quotations seem to have been chosen specifically to emphasize the possibilities of conflict both between different conceptions but also within the same conceptions, as it is evident from the reference to the episode in which Sir George Birdwood, a controversial British cultural administrator of Indian art in the 19th century, states that he, in the case of a fire in the house, would have preferred to save the Madonna Sistina by Raffaello to a living child, while Gerhart Hauptmann would have gladly sacrificed Rubens to save another human being (2021, pp. 64-65). Radbruch states that it is cultural value that constitutes the legacy of a society when it extinguishes, which would explain the apparent favour for the

transpersonal conception based on construction as opposed to those based on contract (individualistic) and organicism (transindividualistic) and which is based on the common work that derives from it. An idea that in a nutshell seems to anticipate that of a law as a constructivist social practice that will animate an important part of contemporary legal philosophy from Nino to Dworkin.

Contradictions in the constitutional state

Here Radbruch, despite not having been able to know the evolution of the post-war European constitutional state, shows that he has identified a structural and at the same time constitutive limit of it, namely the need to guarantee legal certainty but at the same time to be able to allow criticism of incorrect law without being overcome by the capacity of criticism. From this point of view, it is also possible to articulate a different vision of the famous Radbruch's formula. Herbert Hart in his well-known essay on the relationship between positivism and the separation of law and morals, had reproached Radbruch for the argument of the candour, criticizing him for the impression 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 (1958, p. 620). In one of the best defenses of the formula, Robert Alexy (1999), recalls that it is possible to interpret the formula in this way but it would be contrary to the approach of an author who continually writes about antinomies and conflicts as Alexy recalls that for Radbruch the formula was certainly a choice between two evils and could not have been read in other ways (1999, p. 38). Radbruch had sensed that the experience of law could not be protected from contingency and that it should rest not on theoretically unstable foundations, but rather on a certain "pragmatism", in which the relationships between justice, certainty and usefulness are not given once and for all. That the formula is unable to clearly evoke its conditions of application is neither a defect of the formula nor a convenient rhetorical choice but a precise conceptual consequence of the theory developed by Radbruch. In this sense, the constitutional state, as the pandemic reminded us in extraordinarily dramatic ways, lives also and above all in difficult choices when the legal balance not only appears unattainable but perhaps has already slipped out of hand. That an order remains and that from the point of view of which values it is still acceptable, it is precisely what a theory like that of Radbruch helps to evaluate.

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