

## Radbruch and Fuller: Their Similarities and Differences

Hidehiko Adachi

IVRJ2018, 8<sup>th</sup> July 2018 in Kyoto

This presentation focuses on two important non-legal positivists of the last hundred years: Gustav Radbruch (1878–1949) and Lon L. Fuller (1902–1978). The presentation's aim is to point out similarities and differences between their concepts of law.

In a short essay from 1946, based on his experience with the Nazi regime, Radbruch claimed that National Socialist 'law' lacked the validity and nature of law. His claim was later called 'Radbruch's formula'. He said,

The conflict between justice and legal certainty may well be resolved in this way: The positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as 'flawed law', must yield to justice. It is impossible to draw a sharper line between cases of statutory lawlessness and statutes that are valid despite their flaws. One line of distinction, however, can be drawn with utmost clarity: Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely 'flawed law', it lacks completely the very nature of law. For law, including positive law, cannot be otherwise defined than as a system and an institution whose very meaning is to serve justice. Measured by this standard, whole portions of National Socialist law never attained the dignity of valid law.<sup>1</sup>

In fact, Radbruch's formula is composed of two sub-formulas. The first is called the 'intolerable formula' (*Unerträglichkeitsformel*) because it claims that a positive law (*Gesetz*) is invalid if it promotes intolerable injustice. The second is called the

---

<sup>1</sup> Gustav Radbruch (Bonnie Litschewski Paulson and Stanley L. Paulson trans.), 'Statutory Lawlessness and Supra-Statutory Law (1946)' (2006) 26 *Oxford Journal of Legal Studies* 7.

‘betraying formula’ (*Verleugnungsformel*) because it claims that a positive law (*Gesetz*) is not law (*Recht*) if ‘equality, the core of justice was deliberately (*bewusst*) denied when the law was issued’. In the following, we argue that the second formula is substantially the same as Fuller’s account, but that the first is absent from Fuller’s theory.

## I. Similarities

Both Radbruch and Fuller regarded law as a project attempting to realise a purpose.

### 1. Radbruch:

Radbruch considered law a cultural phenomenon. According to him, ‘culture is not realisation of value, but it is whatever has significance or meaning for the realisation of values’. Moreover, because he regarded justice as the value of law, he concluded from it, ‘The concept of law can be determined only as something given, the meaning of which is to realise the idea of law. Law may be unjust; but it is law only because its meaning is to be just’. ‘Law is the reality the meaning of which is to serve justice’.<sup>2</sup> This idea of justice consists of three elements: equality, expediency (suitable for the purpose; *Zweckmäßigkeit*) and legal certainty. Among these three elements, Radbruch considered equality the core.

Radbruch’s second sub-formula, the betraying formula, follows straightforwardly from his argument above. According to him, law is the given that Radbruch named ‘reality’; its meaning is to realise justice, and the core of justice is equality. Therefore, ‘law’ that does not strive to realise equality is not law.

### 2. Fuller

Fuller insisted that law should ‘be viewed as a purposeful enterprise’.<sup>3</sup> Because its success depends ‘on the energy, insight, intelligence and conscientiousness of those who conduct it’, it is fated ‘to fall always somewhat short of a full attainment of its goals’.<sup>4</sup> Moreover, he argued that the purpose (goal) of law is ‘subjecting human conduct to the guidance and control of general rules’<sup>5</sup> and that the law’s required nature attains this purpose. Fuller enumerated eight internal moralities of law: generality, promulgation,

---

<sup>2</sup> Gustav Radbruch (Kurt Wik trans.), ‘Legal Philosophy’ in *Legal Philosophy of Lask, Radbruch and Dabin* (Harvard University Press 1950) 75.

<sup>3</sup> Lon L. Fuller, *The Morality of Law* (Yale University Press 1964) 145.

<sup>4</sup> Id.

<sup>5</sup> Fuller, *The Morality of Law*, 146.

non-retroactivity, clarity, avoidance of contradiction and of impossibility, constancy through time and non-retroactivity.<sup>6</sup>

Based on this argument, Fuller supports Radbruch's 1946 claim, but he thought that his argument differed from Radbruch's. Fuller distanced himself from a 'higher law' on which, according to Fuller, Radbruch's postwar view was based<sup>7</sup> and denied to Nazi 'law' the name of law by reference to its inner morality.<sup>8</sup>

### 3. Law as a Purposeful Enterprise

Although Radbruch and Fuller differ on the purpose of law, because Radbruch believed in realising justice and Fuller regarded 'subjecting human conduct to the guidance and control of general rule' as the law's purpose, so the two grasped law in a similar fashion. For them, law was a project attempting to realise a purpose. This comprehension of law as a purposeful enterprise can lead jurisprudence or legal philosophy into two different directions, subjective and objective. In his betraying formula, Radbruch focused on the intention of legislators to deny equality in issuance of law. Like Radbruch, if we focus on the subjective will of lawmakers or interpreters of law, we reach discursive or argumentative theories of law. The most prominent scholar of this direction in our time is Robert Alexy. On the other hand, if we focus on objective construction of legal inference as valid, we reach deontic logic. We can locate Radbruch and Fuller's theories at the starting point with which we can connect the two (subjective and objective) directions of modern non-positivistic directions for legal philosophies.

### II Difference

Fuller believed that Radbruch's formula is based on 'higher law'. His belief is correct insofar as it refers to the first part of Radbruch's formula: the intolerable formula. After the end of the Nazi regime, he admitted the validity of natural law, saying, 'There are principles of law, therefore, that are weightier than any legal enactment, so that a law in conflict with them is devoid of validity. These principles are known as natural law or the law of reason'.<sup>9</sup> Radbruch's reference to natural law evoked the 'renaissance of natural law' after the Second World War in Germany.

---

<sup>6</sup> Fuller, *The Morality of Law*, 39.

<sup>7</sup> Lon L. Fuller, 'Positivism and Fidelity to Law', 71 *Harv. L. Rev.* 656.

<sup>8</sup> Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (Hart Publishing 2013) 70–71.

<sup>9</sup> Gustav Radbruch (Bonnie Litschewski Paulson and Stanley L. Paulson trans.), 'Five Minutes of Legal Philosophy' (1945), 26 *Oxford Journal of Legal Studies* 14.

Although Fuller maintained distance from natural law, recourse to natural law's tradition is no less important. Consider a sound inference, for example. A sound inference is valid, and all its premises are true. A sound inference guarantees the truth of its conclusion. Just like sound inferences, we need not only to study legal inferences, but also theories with which we can decide whether any given law in legal inference is just or unjust, so we can guarantee its conclusion's justice. Radbruch's postwar theory, especially his formula as whole, focused both on legal inference and natural law, and is therefore still an appropriate starting point for improving our thinking about law.