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HERBERT HART'S CRITIQUE OF RADBRUCH'S FORMULA

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I. INTRODUCTION

Epochal events generally have great influence over deep-rooted beliefs, and at times they even succeed in modifying them. The values which have been considered proper and inviolable may be reassessed by such events. The disastrously negative experience of the National Socialist State changed the view of a famous German jurist and legal philosopher Gustav Radbruch, who was a legal positivist before the National-socialists' advent.[1]

The National-socialists' era clearly demonstrated to Radbruch that positivism, which acknowledges all statutes adopted through established procedures and socially effectives as law, turned into a helpless concept in the face of unjust and criminal laws.[2] We can consider his well-known formula developed in the article "Statutory Lawlessness and Supra-Statutory Law" published in 1946 to be a result of reconsideration of some values caused by his negative experience.

A critique of Radbruch's formula written by the British legal philosopher and positivist Herbert Hart, is conditioned by the latter's different views, especially the view on the separation of law and morality. In the present paper we'll try to explain Radbruch's formula and examine Hart's arguments and strength of his reasons.

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[1] Compare: *Robert Alexy*: Begriff und Geltung des Rechts, 4. Auflage, Freiburg/München 2005, S. 80; *Robert Alexy*: Mauerschützen. Zum Verhältnis von Recht, Moral und Strafbarkeit, Hamburg 1993, S. 3; *Ralf Dreier*: Recht, Moral, Ideologie. Studien zur Rechtstheorie, Frankfurt am Main 1981, S. 188 f; *Herbert Lionel Adolphus Hart*: Der Positivismus und die Trennung von Recht und Moral, in: Hart, H. L. A.: Recht und Moral. Drei Aufsätze, Göttingen 1971, S. 14 (40).

[2] Gustav Radbruch: Erneuerung des Rechts, in: Radbruch, Gustav: Gesamtausgabe, Rechtsphilosophie, Bd. 3, herausgegeben von Arthur Kaufmann, bearbeitet von Winfried Hassemer, Heidelberg 1990, S. 80 (80); Gustav Radbruch: Gesetzliches Unrecht und übergesetzliches Recht, in: Radbruch, Gustav: Gesamtausgabe, Rechtsphilosophie, Bd. 3, herausgegeben von Arthur Kaufmann, bearbeitet von Winfried Hassemer, Heidelberg 1990, S. 83 (88).

II. THE ESSENCE OF RADBRUCH'S FORMULA

In order to better understand and assess Hart's criticism, we should study the basic contents of the said formula in the first place. The addressee of the formula are the judges facing a dilemma. They have to either apply a norm which they believe is unjust, or reject it on the grounds of its unjust content. Radbruch believes that, "the conflict between justice and legal certainty may be resolved in that the positive law… takes precedence even when its content is unjust and improper, unless the contradiction between positive law and justice reaches such an intolerable level that the statute as "incorrect law"[3] must yield to justice. It is impossible to draw a sharper line between cases of statutory non-law and law that is still valid despite unjust content. One boundary line, however, can be drawn with utmost precision: Where there is not even an attempt to achieve justice where equality, the core of justice, is deliberately disavowed in the enactment of positive law, then the law is not merely "incorrect law",[4] it lacks entirely the very nature of law. For law, including positive law, cannot be defined other than as an order and legislation whose very meaning is to serve justice".[5]

An examinationof Radbruch's formula enables us to conclude that he categorized unjust laws into three groups:[6]

- The laws which should be applied by judges despite their unjust and improper nature;
- The laws which are intolerably unjust. In this case, justice takes precedence over legal certainty. Legal certainty is correctly described by Radbruch as "one value existing in the context of other values".[7] This part of Radbruch's formula is known as the so-called "intolerability thesis" (Unerträglichkeitsthese).
- The statutes which lack the very nature of law. They do not aim at achieving justice. This part of Radbruch formula is called the disavowal thesis or formula" (Verleugnungsthese). Later he clarified it in his "Introduction to Philosophy of Law" published after his death. In Radbruch's view, the norms which deprive certain people of human rights lack any degree of law or in other words, these statutes are not norms of law.[8]

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[3] Compare, Gustav Radbruch: Vorschule der Rechtsphilosophie, in: Radbruch, Gustav: Gesamtausgabe, Rechtsphilosophie, Bd. 3, herausgegeben von Arthur Kaufmann, bearbeitet von Winfried Hassemer, Heidelberg 1990, S. 121 (154).

[4] See also, Gustav Radbruch: Fünf Minuten Rechtsphilosophie, in: Radbruch, Gustav: Gesamtausgabe, Rechtsphilosophie, Bd. 3, herausgegeben von Arthur Kaufmann, bearbeitet von Winfried Hassemer, Heidelberg 1990, S. 78 (79).

[5] Radbruch: Gesetzliches Unrecht und übergesetzliches Recht, S. 83 (89).

[6] In more detail, see: Norbert Hoerster: Was ist Recht? Grundfragen der Rechtsphilosophie, München 2006, S. 80.

[7] Radbruch: Vorschule der Rechtsphilosophie, S. 121 (154).

[8] Radbruch: Vorschule der Rechtsphilosophie, S. 121 (151).

III. EXPLANATION OF HART'S CRITICISM OF RADBRUCH'S FORMULA

A criticism of Radbruch's formula goes on in the context of legal debate on the conception of law. It is disputable to what extent the conception of law should contain moral elements. The positivists agree on the so-called "separation thesis", while non-positivists support the so-called "connection/connectivity thesis".[9] The supporters of the former believe that law should be morally neutral. In their view, it is most sufficient for a norm to be appropriately issued and socially effective. The adherents of the "connection thesis" believe that a law should also be morally effective.[10] Therefore, the correctness of contents and justice are limiting criteria for non-positivistic conception of law.[11]

Legal literature underlines that Radbruch's formula contains only weak "connection thesis". According to the thesis, the norms lose legal nature when contradiction between law and morality reaches an extreme, intolerable level.[12] Nevertheless, Radbruch's formula is a disavowal of the separation thesis since, according to this thesis, all statutes, notwithstanding their contents, represent law.[13] A similar conclusion can be drawn from the definition of law that Rabdruch formulates in his paper "Introduction to Philosophy of Law": "therefore, "law" can be defined as a unity of general, positive norms for social life ("the complex of general precepts for the living-together of human beings")".[14] At the same time, under law's generality he implies that law must be just.[15]

Hart belongs to a group of adherents of the separation thesis. He supports the idea of separation of law and morals. In his view, a legal system does not necessarily need conformity with morality and justice. They cannot be criteria for norm's validity.[16] However, he recognizes the great influence of morals over the development and stability of law.[17]

In the context of criticism of Radbruch's formula, Hart's article "Positivism and Separation of Law and Morals»[18] is of utmost importance. Broadly speaking, Hart sees Radbruch's formula as a passionate and naïve reaction caused by negative experience, rather than as a view built on intellectual arguments.[19]

[9] For example, see Alexy: Begriff und Geltung des Rechts, S. 39 ff.; Hoerster:Was ist Recht?, S. 79 ff; Björn Schuhmacher: Rezeption und Kritik der Radbruchschen Formel, Göttingen 1985, S. 56.

[10] Dreier: Recht, Moral, Ideologie, S. 194, 197 f.

[11] Alexy: Mauerschützen, S. 4 f

[12] Compare: Alexy: Begriff und Geltung des Rechts, S. 71, 83 f.; Alexy: Mauerschützen, S. 4.

[13] Hoerster: Was ist Recht?, S. 81.

[14] Radbruch: Vorschule der Rechtsphilosophie, S. 121 (151).

[15] Radbruch: Vorschule der Rechtsphilosophie, S. 121 (151).

[16] Herbert Lionel Adolphus Hart: Der Begriff des Rechts, Berlin 2011, S. 218, 235 ff.

[17] Hart: Der Begriff des Rechts, S. 240.

[18] Hart: Der Positivismus und die Trennung von Recht und Moral, S. 14 (39 ff.).

[19] Hart: Der Positivismus und die Trennung von Recht und Moral, S. 14 (39 ff.).

The criticism of Radbruch's formula has been thoroughly analyzed by German jurist and legal philosopher Robert Alexy. He studied and critically evaluated the arguments against Radbruch's thesis, including Hart's interpretations.[20] We'll briefly describe Hart's arguments in this paper and evaluate them taking into account Alexy's counterarguments. Apart from the opinions of Hart and Alexy, we will also describe the views of other legal scholars.

IV. HART'S ARGUMENTS. CRITICAL EVALUATION

a) Argument from Clarity (Klarheitsargument)

Hart's most important argument against Radbruch's formula is called the "argument from clarity"[21] or "linguistic-conceptual".[22] Hart tries to prove that the formula is complex and vague: "For if we adopt Radbruch's view, and with him and the German courts make our protest against evil law in the form of an assertion that certain rules cannot be law because of their moral iniquity, we confuse one of the most powerful, because it is the simplest, forms of moral criticism. If with the Utilitarians we speak plainly, we say that laws may be law but too evil to be obeyed. This is a moral condemnation which everyone can understand and it makes an immediate and obvious claim to moral attention. If, on the other hand, we formulate our objection as an assertion that these evil things are not law, here is an assertion which many people do not believe, and if they are disposed to consider it at all, it would seem to raise a whole host of philosophical issues before it can be accepted. So perhaps the most important single lesson to be learned from this form of the denial of the Utilitarian distinction is the one that the Utilitarians were most concerned to teach: when we have the ample resources of plain speech we must not present the moral criticism of institutions as propositions of a disputable philosophy".[23]

On the one hand, Alexy admits that positivist concept of law is clearer, while on the other hand he underlines that clarity is not the only aim for formulating a definition, and that a complex concept of law may also be understandable and clear.[24] We have to agree with this view. The aim of any concept is to define a certain item or event. Reality is not changed by simplifying a definition and,

[20] Alexy: Begriff und Geltung des Rechts, S. 72 ff.

[21] Alexy: Begriff und Geltung des Rechts, S. 75 f.

[22] Schuhmacher: Rezeption und Kritik der Radbruchschen Formel, S. 57.

[23] Hart: Der Positivismus und die Trennung von Recht und Moral, S. 14 (45 f.).

[24] Alexy: Begriff und Geltung des Rechts, S. 77.

in addition, simplifying may lead to the disregarding of significant characteristics of the items and events subjected to definition.

Alexy also answers Hart's critique of "disputable philosophy" by emphasizing that the same could be told about positivism, since it is also philosophy and is similarly disputable.[25] This counterargument appears correct. In our opinion, what really matters is the essence of an idea and how it is substantiated. Nearly all opinions are disputable, but what matters, is the degree of their authenticity, rather than the mere possibility of discussing them.

Another German legal philosopher, Ralf Dreier, also criticizes Hart's linguistic/conceptual argument.[26] In Dreier's view, a conflict between law and morality is both a moral and a legal problem. He believes that the formulation of the problem as law/morals dichotomy by Radbruch, corresponds to post factum evaluation of the acts adopted in totalitarian states.

Although such difficulties occur even under the rule of law, states' situations still differ, because the principles of morality have been incorporated in the positive law. Dreier concludes that in a state governed by the rule of law, a concept of law has been defined at constitutional levels in compliance with legal-ethical principles. Therefore he confines the linguistic/conceptual clarity thesis by questioning whether the application of a neutral (from legal-ethical viewpoint) concept of law would be reasonable in the context of unjust legal orders. Dreier agrees with the idea in the framework of empirical-practical researches, but rejects it on the grounds of legal-practical and legal-dogmatic standpoints: "taking into account a phenomenon of unjust states, legal practice and legal dogmatics (doctrine) cannot avoid confrontation of law with justice; ignoring it altogether would be equal to non-fulfillment of their tasks, as the examination of the courts' practice in the National-socialist's regime of statutory lawlessness has demonstrated".[27]

In the end, Dreier concludes that juristic/ethical modification of a concept of law does not mean that it will necessarily lose linguistic/conceptual clarity. Moreover: "The normative openness of law caused by clarity is a more matching expression for the complexity of the problems described by it".[28]

Dreier's evaluation of Radbruch's formula is correct. As experience has shown, the formula has helped reconsider the gloomy juristic legacy of the totalitarian past.[29] The process cannot be led without taking justice into consideration. On the other hand, the adoption of an extremely unjust law in compliance with democratic procedures in a free, democratic and constitutional state is almost impossible. However, if it happens, other mechanisms, for example constitutional control, can be used to revoke unjust laws.

[25] Alexy: Begriff und Geltung des Rechts, S. 79.

[26] Dreier: Recht, Moral, Ideologie, S. 192 ff.

[27] Dreier: Recht, Moral, Ideologie, S. 193.

[28] Dreier: Recht, Moral, Ideologie, S. 193.

[29] Compare: Alexy: Begriff und Geltung des Rechts, S. 98.

Opponents of the linguistic/conceptual thesis often argue that it requires a comprehensive analysis of the word's usage for deciding either for or against a positivistic concept of law. The German legal philosopher Biorn Schumacher notes that Hart does not thoroughly examine a German word "Recht" (law) which, unlike its English version, is influenced by ethics. Consequently, Schumacher argues, this diminishes the importance of the linguistic/conceptual argument for the German speaking sphere.[30]

The word's contents and its usage are issues of great importance. Often it expresses the essence of a thing or significant elements which the word denotes. It is worth mentioning that the Georgian word "law", like the German one, contains connotations of truth and justice. This fact is certainly to be considered a significant factor.

b) Argument from Effectiveness (Effektivitatsargument)

Hart believes that it is naïve to think that incorporating moral elements in the definition of law could lead to a victory over statutory injustice.[31] The thesis is called "an argument from effectiveness".[32] Hart does not believe that a narrow concept which does not recognize valid, but morally unjust, norms can strengthen resistance to evil, given a threat coming from the organized power.[33]

On the one hand Alexy admits a certain reasonableness to the argument of effectiveness, since the concept of law per se cannot change reality: "For a judge in a lawless state it does not matter whether he/she relies on Hart and refuses to apply extremely unjust law on the grounds of morality or whether he/she acts according to Radbruch's instructions and legal reasons. In both cases he/she must make sacrifice; willingness depends on other factors rather than definition of law".[34] Nevertheless, Alexy sees a modest practical effect of the non-positivistic concept of law in conditions of weak and unjust regimes, and especially in the initial phases of their development. Besides, he does not have much hope that the judges, who believe a necessary prerequisite for the legal acts adopted by a state is meeting minimal requirements of justice, will successfully resist lawlessness.[35]

Alexy admits that Radbruch's formula can have some effect in a developed lawless state. He calls it a "risk effect," and it is based on the a judge or other public servant fearing that after the unjust regime collapses, he/she will be punished if a non-positivist approach is generally accepted. This risk may generate or strengthen motivation for a judge not to participate in poor administration of justice or, at least, mitigate the results.[36]

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[30] Schuhmacher: Rezeption und Kritik der Radbruchschen Formel, S. 58.

[31] Hart: Der Positivismus und die Trennung von Recht und Moral, S. 14 (42)

[32] Alexy: Begriff und Geltung des Rechts, S. 80.

[33] Hart: Der Positivismus und die Trennung von Recht und Moral, S. 14 (42).

[34] Alexy: Begriff und Geltung des Rechts, S. 86. On the Concept and the Nature of Law

[35] Alexy: Begriff und Geltung des Rechts, S. 87.

[36] In detail see: Alexy: Begriff und Geltung des Rechts, S. 88 ff.; Alexy: Mauerschützen, S. 35.

The views provided above are based on a right evaluation of human physiology and authoritarian (unjust) states' specifics. The effect of non-positivist concept of law is particularly high in the states called "democratura".[37] These states are externally democratic but display numerous signs of unlawful states. Because they are dependent on foreign financial assistance, or for any other reason, they will not dare to openly attack freedom and justice. Hence, a judge has more chances in these countries than in well-developed unlawful states. At the same time, the effect remains modest, since a state system founded on blind obedience as a rule quickly "improves" the bold decisions. Therefore the effect is not widespread, systemic and stable, although ignoring it entirely would have been wrong.

The assessments concerning risk effect are very interesting. Generally speaking, finding heroes in an unlawful country is no easy task. As a rule, individuals won't endanger their own lives and well-being, hence they prefer to be silent or cooperate with an authoritarian regime. The addressees of the risk effect are clever and pragmatic judges and public servants. On the one hand, they are not bold enough to decisively fight against injustice, but on the other hand they try to avoid or ease prospects of responsibility.

c) Argument from Superfluousness (Unnotigkeitsargument)

Hart describes a case of a German woman who denounced her husband for insulting remarks he had made about Hitler.[38] Her husband was sentenced to death though he was not executed, but instead sent to the front. In 1949 the woman was charged with illegally depriving a person of his freedom. However, the woman believed that her husband was convicted and punished in compliance with the Nazi laws and therefore she was not guilty of any offence. The Cassation Court held the Nazi laws were unfair.[39] Hart is doubtful whether the judge acted reasonably. He believes the court would have acted more properly if it had applied a law with retrospective force.[40]

Alexy calls the above viewpoint an argument from superfluousness and examines it thoroughly relying on the German constitutional-legal order. The 2nd section of the Article 103 of the Basic Law of Germany establishes a principle of "Nulla poena sine lege", which prohibits adoption of retroactive laws stipulating punishment.

Alexy raises doubts related to making an exception through constitutional changes since, in his view, it would have been legally problematic because of the guarantee for eternity established by section 3 of Article 79. It would have been also practically impossible, as it's doubtful whether the

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[37] Herman Schwartz; The Struggle for Constitutional Justice in Post-Communist Europe; Tbilisi, 2003, pg. 302);

[38] In detail see: Hart: Der Positivismus und die Trennung von Recht und Moral, S. 14 (43 f.).

[39] In detail see: Hart: Der Positivismus und die Trennung von Recht und Moral, S. 14 (43 f.).

[40] It must be noted that Hart erroneously describes the case. He wrongly believes that this ruling of the Cassation Court was conditioned by a fact that the Court did not recognize legal force of the Nazi laws (Alexy: Begriff und Geltung des Rechts, S. 103). However, this fact does not play a significant role in considering the argument from superflousness.

proposed constitutional change would receive the required number of votes.[41] However, with regards to this counterargument we can say that there are states, including Georgia, where the constitutions of which do not stipulate eternity guarantee. Thus, theoretically it would have been possible to deviate from the "Nulla poena sine lege" principle. This kind of approach would be better than a decision made by any judge of a criminal court. Laws are adopted through democratic procedures in democratic states. They are subject to constitutional control both formally and materially. A court's judgment definitely lacks this degree of democratic legitimacy. Here we should also underline that in many models, including Georgia-s, the courts' decisions do not fall under constitutional control. Although even in these circumstances the application of Radbruch's formula would have been necessary. Let's theorize how a constitutional amendment permitting an exception could have been formulated. At this moment, an application of Radbruch's formula modified in a constitutional provision would have been the most optimal decision.

In Alexy's view, when the fundamental principle of "Nulla poena sine lege" cannot be changed or restricted, the problem arises not with needlessness of the non-positivist approach, but rather with ignoring this principle. Consequently, he is right when he refuses to consider this problem in the frameworks of the argument of superfluousness and focuses on the cases outside the domain of criminal law. As he holds, legal injustice can be solved by the laws with retrospective force, but at the same time he has a question about what a judge should do when a legislator is passive. In such cases, Alexy believes that an application of the non-positivist concept of law is necessary. In the first place he emphasizes the interest of protection of fundamental human rights. In addition, Alexy notes that a ruling which is grounded on extreme injustice does not meet the requirements of justice.[42] It should be noted that Hart ignores issues concerning non-criminal spheres, as well as passivity of a legislator. This factor significantly weakens his argument from uselessness. When there is no retroactive law and a judge deals with an extremely unjust norm, then he/she should not go up against justice and his/her consciousness and should issue a fair decision corresponding to human rights.

d) Argument from Candor (Redlichkeitsargument)

The argument of Candor is based on the thesis that an application of Radbruch's formula leads to the hidden circumvention of the principle "Nulla poena sine lege" in criminal cases".[43] This argument too is related to the above described case of a woman who denounced her husband. As we have noted, Hart believes that adoption of a retroactive law would be more appropriate. He goes on: "Odious as retrospective criminal legislation and punishment may be, to have pursued it openly

[41] Alexy: Begriff und Geltung des Rechts, S. 98 f.

[42] Compare: Alexy: Begriff und Geltung des Rechts, S. 99 ff.

[43] Alexy: Begriff und Geltung des Rechts, S. 105.

in this case would at least have had the merits of candor".[44] Although Alexy admits that this argument is strong, he develops counterarguments. He thinks that the limiting application of Radbruch's formula in criminal cases by the principle "Nulla poena sine lege" may be one of the solutions for the non-positivists. In this case, the formula would be fully applicable outside the sphere of criminal legislation.[45] It should be noted, however, that it would not be an optimal solution, since it is criminal legislation in the first place which requires taking justice considerations and application of Radbruch's formula into account. Because of the specificitiess of criminal law and unusually high risks for human rights, discrimination in this sphere may reach more serious levels than in any other field of law. It is noteworthy that Alexy gives preference to a different counterargument. His thesis is derived from the position that the unfairness of those actions which are punished by Radbruch's formula, is clear. In the same way, the injustice of those norms which exclude punishment for such actions is evident. Because of the extreme injustice and vividness, everybody who commits criminal action should be aware that the norms which can exclude punishment do not represent law. Alexy decides that an idea of hidden retroactivity is out of place here, "since retroactivity does not change legal status, it rather determines the legal nature at the moment of committing a crime".[46] This thesis is founded on the appropriate perception of Radbruch's formula, as Radbruch talks not on the development of the new norms with retroactive force, but rather on application or non-application of existing unjust norms. Clear injustice can also be discerned. Extremely unjust norms intentionally violate fundamental human rights and values such as a right to life, freedom and dignity and inflict great harm on individuals. At the same time, each judge should sensibly deal with Radbruch's formula. Alexy says that an offender's belief that extremely unjust law eliminates his/her responsibility plays an important role in this context. But it would be difficult to prove the same idea to someone who was brought up, educated and ideologically "shaped" in closed totalitarian regimes.

Analyzing Hart's argument from Candor, Schumacher points out that disagreement between Hart and Radbruch can be reduced on the issue of whether a court may not apply or may "devalue" unjust norms. In order to answer this question, the court's practice should be examined. As noted above, Hart analyzed only one judgment. Hence, his reasoning does not reflect a variety of problems persisting in administration of justice.[47] This thesis is not groundless. Hart should have reasoned on the basis of the examination of problems related to various areas of law. For example, his opinion on the non-application of deprivation of property norms or their classification as not being law by a court because of their extreme unjust nature, would have been be very interesting.

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[44] Hart: Der Positivismus und die Trennung von Recht und Moral, S. 14 (44).

[45] Alexy: Begriff und Geltung des Rechts, S. 105.

[46] Alexy: Begriff und Geltung des Rechts, S. 105 f.; vgl. auch: Alexy: Mauerschützen, S. 33, 35 f.

[47] Schuhmacher: **Rezeption** und **Kritik der Radbruchschen Formel**, S. 60.

V. CONCLUSION

A brief review and evaluation of Hart's critique has demonstrated that his arguments are surely very strong at times, but they are not sufficiently decisive for concluding that Radbruch's formula is wrong. Sometimes, Hart seems to deliberately neglect important elements. The counterarguments against his reasoning in legal literature have been mainly logical and appropriate.

A successful application of Radbruch's formula in administration of justice is of no less importance than theoretical thinking.[48] The formula, like all other great ideas, is simple and universal in time and space. It has been used at different times to consider legal outcomes of essentially different totalitarian regimes as an optimal resolution of a problem. Most likely, the formula will not lose its significance in the future because the unjust legacies of many states worldwide may some day fall under legal scrutiny. At the same time, it's almost impossible to avoid mistakes while applying the formula, as its practical application is primarily caused by a mostly evaluative reasoning of a judge, which in its turn cannot be at all times flawless. In a modern, free, democratic and lawful state where justice, freedom, dignity and equality have been granted constitutional status, a moral element of law is a constitutional, legal requirement. Lawful state means supremacy of just/fair laws rather than a dominance of lawlessness cast in the legal form. Only just and fair law can get consent from a free and open society which fully agrees on the idea that just law strives to strengthen and protect freedom.

[48] Compare:: Dreier: Recht, Moral, Ideologie, S. 191.