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As recently as the end of the last World War the name and work of Gustav Radbruch were virtually unknown in the Anglo-American legal world. In 1938 Roscoe Pound, in his encyclopedic survey, *Fifty Years of Jurisprudence*,[1] had given a concise account of Radbruch's legal philosophy in the context of his section on "neo-idealism." In 1944 Anton Hermann Chroust[2] wrote a penetrating analysis of Radbruch's philosophy of law, and about the same time the first edition of the present writer's *Legal Theory*, published on the other side of the Atlantic, included Gustav Radbruch in the survey of major legal philosophers. It also acknowledged the author's deep indebtedness to Radbruch's principal work.[3]

Since Radbruch died in 1949 at the age of seventy-one, there has been a dramatic and welcome change. Not only has he remained the dominating figure in post-war Continental and especially German legal philosophy; in both Britain and the United States his work and views have been discussed by leading jurists such as Professors Campbell and Hart in Britain, and Professors Fuller and Patterson in this country. Radbruch's *Rechtsphilosophie* was at last made accessible (in 1950) to English readers through the translation of his principal work in the Twentieth Century Series of Legal Philosophers.[4]

The continuing vitality of his contribution is demonstrated by the place it occupies in the recent discussion between Professors Hart[5] and Fuller.[6] This remarkable transformation can certainly not be accounted for by the relatively modest volume of Radbruch's work in legal philosophy—which in this respect does not remotely compare, for instance, with that of his contemporary Del Vecchio—nor can it be attributed to the simple and classical beauty of his style which

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1. See Pound, *Fifty Years of Jurisprudence*, 51 HARV. L. REV. 444 at 454 (1938).
2. Chroust, *The Philosophy of Law of Gustav Radbruch*, 53 PHILOSOPHICAL REV. 23 (1944).
3. RADBRUCH, GRUNDZUEGE DER RECHTSPHILOSOPHIE (3d ed. 1932).
4. THE LEGAL PHILOSOPHIES OF LASK, RADBRUCH AND DABIN (Wilk transl. 1950).
5. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).
6. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

even the best English translation can only incompletely reflect. Perhaps it is not even the greatness of his intellectual contribution as such that has, after a long and lamentable delay, restored some balance between the almost exclusive Anglo-American preoccupation with the formal Neo-Kantianism of the Kelsen school, and a legal philosophy of values, which has been Radbruch's principal concern. I am convinced that the main reason for the posthumous influence of Radbruch is the link of the man's philosophy with his life and personality. Perhaps a contemporary could have analysed the transition from Plato's *Republic* to his *Laws* in conjunction with Plato's personal experiences with the Athenian democracy of his time, and with the tyrant of Sicily whom he served for a time as political advisor. For us, however, Plato as a man lives in the distant past, a legendary figure. But Radbruch is a man and a thinker of our time. Born in 1878, in a Germany bursting with national pride, growing power and prosperity, and seemingly secure in the nearly half century of peace that ended in 1914, Radbruch lived through the two major catastrophies known as World War I and World War II, and through all the social, political and intellectual revolutions that accompanied and followed these cataclysmic events. For the last four years of his life—brief but immensely significant—he played a noble and prominent part in the attempt to help Germany find her bearings and to build a new scheme of values from the ruins of the Nazi debacle.

In Radbruch's work, as in that of no other legal philosopher,[7] life and philosophy constantly react upon each other. While he strove to apply his intellectual convictions to his conduct, as private person, politician, and legal reformer, the tough and often shattering experiences of his life as soldier, politician, administrator, and scholar constantly influenced the development of his philosophy—which was never finished, never static, and which ends with a question mark. Because Radbruch is of our time and generation, because he suffered and faced far more courageously than most of us, the struggles and agonies of a world that has lost the deceptive security of the pre-1914 era, and is still always on the edge of catastrophe, his writings mean so much more to us than those of many other legal philosophers whose output has been far more voluminous and perhaps even of greater intellectual brilliance. It is for this very reason that some knowledge of Radbruch's life is not just a matter for a biographer, but an essential key to the understanding of his legal philosophy, for his entire life reflects the tensions that characterize our Western civilization, and the attempt of an individual to realize himself without cheap compromise and without self-deception.

7. Perhaps, with the exception of Petrazhitsky, who ended his life under the regime of Marshal Pilsudski in 1931.

In Radbruch's life there was a tension between the bourgeois professor, descended from generations of peasants and merchants, who through ability and industry attained academic distinction and could have led a sheltered and respected life in one of Germany's old university towns, and the dedicated humanitarian and social reformer who joined the Socialist movement and became an active and prominent member of the principal workers' party.

There was, closely related, the tension between the man of contemplation and the man of action. Training, inclination, and the not very frequent combination of brilliant gifts as teacher and scholar made Radbruch yearn for the academic life. But a sense of duty and commitment—to his country, to the underprivileged, and to humanity—made him seek the life of active politics and of public office. The two periods of office as Reichsminister of Justice, between 1921 and 1923 were the culmination of Radbruch's political career. He came to this high office first as a relatively young man of 43, because he was for a considerable period the only lawyer of distinction in the Socialdemocratic Party in the Reichstag, and the only man capable of coping with the essentially legislative tasks of the Ministry of Justice. But Radbruch's proudest moment was the agonizing period of a few hours when in 1920 he faced the indignant and aroused workers of the city of Kiel, as one committed to their cause and deeply hostile to the just defeated reactionaries of the right-wing "Kapp-Putsch," and succeeded in saving hundreds of the captured Kappists from lynching by the angry crowd. This act of individual civic courage—far more difficult than the bravery of war which has comradeship and the approval of the great majority behind it—was a matter of deep inner satisfaction to a man whose sensitivity, abhorrence of violence and even timidity made him instinctively shrink from mob scenes and public violence. Not long before, Radbruch, a Socialist, a pacifist and a hater of violent national passions, had felt compelled to volunteer in his late thirties for front line service in World War I as a private, because he wanted to share the fate and the suffering of the common man, to the amelioration of whose lot he was dedicated.[8]

Perhaps the verdict of history will be that Radbruch was more successful as a teacher and scholar than as an active politician. His tenure as Reichsminister of Justice was too short to enable him to push through cherished measures of legislative reform, especially his draft of a new German Criminal Code—which still remains a draft. Greatly though we may regret it, the really successful political

8. Radbruch's thoughts and feelings are movingly expressed in a letter written from the trenches to his small daughter reprinted in RADBRUCH, DER INNERE WEG, AUFFRISS MEINES LEBENS 115 (1957).

leaders have always had a streak of ruthlessness or cunning, or a combination of both. Guile, cunning and ruthlessness were alien to Radbruch's nature; he had to reconcile his deep Socialist convictions with his sense of justice and legality, and his abhorrence of violence and cruelty. This struggle between objectivity and partisanship for the cause that one believes in, is of course one of the perennial problems facing a person of integrity—and especially a lawyer—called to active political office, and the tension is, as we shall see, deeply reflected in Radbruch's legal philosophy.

There was also in Radbruch the tension between the artistic and the intellectual temperament. This man—who could have become a not inconsiderable poet, who had the deepest appreciation of the visual arts and who later in life developed a love for music—had in many ways an essentially artistic, a Goethean approach to the universe, an intuitive grasp of the world as a structure whose component parts, though in perpetual tension and motion, united to form an edifice of unsurpassed beauty and magnificence. But as an intellectual Radbruch was essentially and avowedly an heir of Kant. Like all Neo-Kantians, he accepted the division of *Sein* and *Sollen,* of perception and volition, as basic. His analysis of the principal legal values as antinomic, the basis of his relativistic philosophy of law, can also be seen as a development of the Kantian distinction between pure reason and practical reason. Kant had wisely separated the world of perception (pure reason) from the world of conduct and action (practical reason). And even though the latter was directed by the "categorical imperative" ("act in such a way that the maxim of your action can be made the maxim of a general action") the modern jurist, sociologist and political scientist knows that the seemingly compelling and unambiguous character of this maxim is capable of conflicting and irreconcilable interpretations. Bentham as well as Marx, Hegel as well as Duguit, can claim that the maxims of their legal philosophy comply with the categorical imperative. Trying to overcome the dualism between pure and practical reason, Stammler had sought to deduce universally valid principles of conduct from a formalized practical reason, an attempt in which he utterly failed.[9] Kelsen, another Neo-Kantian, regards the attempts to disguise value preferences as science as futile. His solution is to eliminate all formulations of values, *i.e.,* all legal "philosophy" proper from the theory of law and to confine legal science to a formal structure of norms applicable to any legal order.

Neither of these methods was satisfactory to Radbruch, for whom law as a cultural science was directed to the realization of values in

9. For a detailed critique of Stammler see FRIEDMANN, LEGAL THEORY 130-38 (4th ed. 1960).

life. And while, as a Neo-Kantian, he accepted the dualism of *Sein* and *Sollen,* his artistic vision, his Goethean temperament as well as his deep dedication to the use of law for the realization of social purposes, led him to place emphasis upon the problem of values and their implementation in law. The beauty as well as the pathos of Radbruch's legal philosophy lies in that constant struggle—between the intellectual divisions of the mind and the vision of a legal order in which the various parts seek to form a unity; between the irreconcilable conflict of antinomic values not amenable to compromise and the realization that life (and law as the organization of social life) is a complex composite of infinite shades and variations; between the scientific rigour and honesty that demanded, for Radbruch as for his older friend Max Weber, a clear separation of objective science—a matter of cognition—and the realization of values and purposes in life—a matter of volition, decision and faith.

To this intellectual tension corresponded the personal tension between scepticism and faith which accompanied Radbruch through his life. The scepticism of the clear, rational thinker made Radbruch reject the ideology of so many legal philosophers, so brilliantly—and in this writer's view most dangerously—represented by Hegel's system of legal philosophy. It also kept Radbruch, of Protestant heritage, away from the organized church throughout his life. Yet a deep desire to believe and impart faith to others, a desire which he could not satisfy either with the unquestioning acceptance of organized Christian religion or with the pseudo-religious faith of the orthodox Marxist, made him seek all his life for a faith that could unite the opposites and resolve the doubts. This desire was deepened both by the collective tragedy of the Nazi perversion of human values and the personal tragedy of the loss of both his children in their middle twenties. Significantly, Radbruch's last essay is entitled *Gnade und Gerechtigkeit* (Grace and Justice). In a sense, the tentative transformation of Radbruch's postwar legal thinking which made him modify, if not abandon, his relativistic philosophy and look for a modicum of absolute justice, is a reflection of this tension between a scepticism—which at no time meant lack of conviction—and a deep desire to believe in transcendental values.

The result of all these tensions and conflicts in Radbruch's life and work is a number of relatively brief writings whose significance far outstrips their volume. While, for an understanding of the man Gustav Radbruch, such works as his *Kulturlehre des Sozialismus*[10] or his work on the nineteenth century writer Theodor Fontane, whose

10. First published in 1922. The most recent version is the third edition, published in 1949.

alternative title is significantly *Scepticism and Faith*,[11] and most certainly Radbruch's short autobiography[12] are essential, an appreciation of his place as a legal philosopher must and can concentrate on his principal treatise,[13] and on the brief but highly significant postwar writings on legal philosophy, which have been the subject of a voluminous and still continuing discussion.[14]

THE LEGAL PHILOSOPHY OF RELATIVISM

To what extent Radbruch, in the last phase of his life, meant to modify or even abandon the legal philosophy of relativism is a much debated question to which we will turn later in this essay. Be that as it may, his outstanding intellectual and systematic contribution remains the legal philosophy as developed in the third edition of his *Rechtsphilosophie*, published in 1932. Its direction is determined by the blending of three major intellectual influences:

(1) The Kantian distinction of *Sein* and *Sollen*, of perception and volition. From this Kant himself had, in Radbruch's own words, "taught us the impossibility of deducing what is right, what ought to be, from that what is." The antithesis to this methodical dualism was the monism of the Hegelian school which fused "is" and "ought," reality and reason: "what is reasonable is real, and what is real is reasonable." This is not the place to discuss the Hegelian system of philosophy and its application to law and the state. Suffice it to say, that the Hegelian way to overcome Kantian dualism—such as his use of the dialectic method in order to demonstrate the Prussian hereditary monarchy, the nationalist state, or the pre-eminence of the husband in marriage, as being both historically and logically necessary to, and therefore reasonable evolutions of the *world spirit*—could not be acceptable to a man of Radbruch's intellectual and moral integrity.

(2) Radbruch was, however, strongly influenced by the attempt of various neo-Kantian movements prospering in Germany in the first quarter of the present century to go beyond Kant's seemingly unbridgeable antithesis between *Sein* and *Sollen*. Radbruch pays tribute to Stammler whose theory of "right law" distinguished legal concept *(Rechtsbegriff)* and idea of justice *(Rechtsidee)* with the object of

11. RADBRUCH, THEODOR FONTANE, ODER SKEPSIS UND GLAUBE (3d ed. 1954) (first published 1945).
12. RADBRUCH, DER INNERE WEG, AUFRISS MEINES LEBENS (1957).
13. RADBRUCH, RECHTSPHILOSOPHIE (1914). The citations in this article are to various editions. The 3d edition appeared in 1932; the 4th and 5th, edited after the author's death by Erik Wolf in 1950 and 1956, respectively.
14. VORSCHULE DER RECHTSPHILOSOPHIE (1947) and some essays collected in DER MENSCH IM RECHT (1957), and in the posthumous editions of RECHTSPHILOSOPHIE.

developing both as categories of general logical validity. Stammler, by trying to make Kant's practical reason (in the field of law) a matter of theoretical insight, had to make it formal in character. But as Stammler wanted to make his idea of justice at the same time a practical guide to conduct, he mitigated the formality of his idea of justice sufficiently to turn it into "an anaemic version of Kant's categorical imperative," "a hybrid between a formal proposition and a definite social idea, kept abstract and rather vague by the desire to remain formal."[15]

While this way out of the dilemma was unacceptable to Radbruch, he was no more content with Kelsen's different Neo-Kantianism. Though agreeing with Kelsen's distinction between the normative character of law as a social science and the empirical character of the natural sciences—an important distinction developed by Rickert and Lask—he could not be satisfied with Kelsen's rejection of values as incompatible with a "science" of law. From their own premises neither Stammler nor Kelsen could develop a philosophy of law; a system of legal values.

(3) A way out of the dilemma was offered to Radbruch by the teachings of Rickert and Lask treating law as a *Kulturwissenschaft, i.e.,* as a science directed to the realization of certain values.[16]

On the one hand our "value-neutral" *(wertblind)* conduct creates from the chaos of matter the realm of nature. For nature is nothing else but existence *(Gegebenheit),* purified of falsifying valuations. Conversely, spirit becomes conscious of the proportions of these valuations, of the norms and their connection, in a deliberately valuating conduct which confronts nature as the realm of values.[17] Radbruch accepts the methodological dualism of Kantian and neo-Kantian philosophy. The world of values cannot be deduced from the world of reality.[18] While ideas are tied to matter *(stoffbestimmt)* this does not mean that the idea, *e.g.,* the idea of law, is predetermined in the matter *(e.g.,* the legal materials). Thus there are obvious limits to the attempt to deduce legal norms from the "nature of things" *(Natur der Sache).*[19]

But Radbruch rejects the rigid separation of "is" *(sein)* and "ought" *(sollen)* exemplified by Stammler's rigid distinction between the concept of law *(Rechtsbegriff)* and the idea of law *(Rechtsidee).* For Radbruch no human endeavour—even the making of a table—can

15. See FRIEDMANN, LEGAL THEORY 106 (3d ed. 1953).
16. RADBRUCH, RECHTSPHILOSOPHIE (4th ed. 1950).
17. *Id.* at 91.
18. *Cf.* Max Weber's celebrated essay written in 1917, *Der Sinn der Wertfreiheit der soziologischen und oekonomischen Wissenschaften,* published in GESAMMELTE AUFSÄETZE ZUR WISSENSCHAFTSLEHRE (1922).
19. On this see further *infra.*

be understood without relation to the idea which it seeks to realize. The concept of law can only be defined as the reality striving towards the idea of law. Law as a cultural phenomenon is value-related. Legal philosophy is a cultural philosophy of law seeking to relate the matter of law to the idea of law, instead of either separating or fusing them. "The idea of law is value, law is value-related reality, a cultural phenomenon."[20]

Thus, the neo-Kantian dualism of reality and value becomes a trialism of reality *(Wirklichkeit),* value *(Wert),* and value-related reality *(wertbezogene Wirklichkeit).*

This methodological approach lays the foundations for Radbruch's understanding of the task of legal philosophy as that of relating legal reality, (such as statutes, decisions, administrative regulations) to basic ideas. But at this point he parts company not only with the Hegelian approach or with the ideological absolutism of natural law, but also with the formalization of the idea of justice by Stammler or the denial of a scientific relevance of legal ideas by Kelsen. Radbruch's approach is that of "scientific relativism," in which he was particularly influenced by Max Weber during his first Heidelberg period. It was the latter, as well as Radbruch's life-long friend and fellow-jurist Hermann Kantorowicz who time and again, amidst the passions of war and political strife, developed the thesis that normative sciences such as sociology, economics, and law are "value-free."[21] It is perhaps the unfortunately chosen term "relativism" that has accounted for the almost ridiculous misunderstanding that the relativism of Max Weber and Gustav Radbruch denotes indifference to values.[22] The personal life of both these great men who were active and courageous fighters in the cause of democracy would in itself refute such an approach. There is, moreover, no foundation for such a view in their work. A relativistic approach for Radbruch, as for Weber, simply meant that it was not possible to prove scientifically the correctness of nationalism or internationalism, of democracy or

20. RADBRUCH, RECHTSPHILOSOPHIE 118 (4th ed. 1950). Radbruch acknowledges his debt to Emil Lask as the founder of this approach to legal philosophy.

21. *Cf.* Max Weber's celebrated essay written in 1917, *Der Sinn der Wertfreiheit der soziologischen und oekonomischen Wissenschaften,* published in GESAMMELTE AUFSAETZE ZUR WISSENSCHAFTSLEHRE (1922).

22. Several noted reviewers have suggested alternative descriptions of Radbruch's legal philosophy. Thus, Georges Gurvitch calls it an "antinomic" philosophy of law. Eduard Spranger describes it as "dialectic," leading to an "existentialist" philosophy, where the conflict situation rises above the choice between thesis and antithesis to the dedication of the entire person. Karl Jaspers, on the other hand, distinguishes relativism from existentialist philosophy and criticizes the former as indulging in a "comfortable tolerance." Radbruch himself, in noting all these views [RECHTSPHILOSOPHIE 102-03 (5th ed. 1956)] says rightly that, as understood by Jaspers, his legal philosophy was one of existentialism, not of relativism.

autocracy, of socialism or capitalism. Law was indeed the implementation of values, and legal systems could be developed in great detail from certain basic value premises. Nor was it Radbruch's view that a legal system incorporated only one legal value. But ultimately the balance between the conflicting values incorporated in a possible legal system, or the measure of their blending, was a matter of decision, of faith—not of knowledge. In Radbruch's own words, it was "a matter of conscience *(Gewissen)*, not of science" *(Wissenschaft)*.

The Antinomy of Values

In contrast to Stammler, Radbruch defines law as "the reality directed to the realization of legal values of the idea of law." The idea of law can only be justice. But at this point Radbruch, the relativist, must part company with all those legal philosophies that give justice a substantive meaning. Such an approach would lead Radbruch straight to the natural law philosophy, which he rejects (at least in his principal work). To hold that certain actions or institutions, *e.g.*, private property or community property, are just or unjust, for instance, would mean expressing a particular political or social idea in absolute terms. Radbruch's idea of justice is essentially the Aristotelian one: Justice means equality, and it is divided between "commutative" or "corrective" justice which means absolute equivalence, *i.e.*, between injury and reparation; and distributive justice which lays down the principles under which persons are to be treated as equal. In one of his many succinct phrases Radbruch calls corrective justice the justice of private law, and distributive justice the justice of public law.

It is clear that such a formal definition of justice is not by itself a sufficient foundation of legal philosophy. Although justice instructs us to treat equals equally and unequals unequally, it tells us nothing about the perspective from which they are to be characterized as equals or unequals in the first place; it determines only the proportion but not the standard of treatment.

Because "justice" cannot yield objective criteria of equality, the idea of law therefore demands a second component which is "utility" *(Zweckmaessighkeit)*. This means a determination of the values which law is destined to serve. There are three categories of valuation: individual values, collective values, and work values.[23] Legal systems emphasize either individualism, collectivism, or what Radbruch styles transpersonalism.

23. In the hand-written notes to the third edition Radbruch refers to a similar division of values in the work of the philosopher Jaspers and also to the trilogy of "Certainty, Justice, Utility" in Cardozo, The Growth of the Law (1924).

The first values the individual and his integrity higher than the needs of either the community or of any cultural, scientific, technical or other achievements of civilization. This is typified by the American Constitution. The second sees that individual life as well as achievements of civilization culminate in community life. This is typified by Hegel's philosophy. The third would consider an Egyptian pyramid or a modern road or dam through a fever-stricken country as more important than the thousands of lives sacrificed for this work. Radbruch[24] quotes the question posed by Sir George Knollys to Sir George Birdwood on what he would do if he were alone in a burning house with a living child and Raffael's madonna (to which Sir George Birdwood answered that he would give preference to the madonna). This question became acute on a colossal scale when during the last war military operations demanded the destruction of immortal masterpieces of art.

In Radbruch's own formulation, the ultimate aims corresponding to these three scales of values are: for the individualistic philosophy, the idea of liberty; for the transindividualistic philosophy, the idea of nation[25]; for the transpersonal philosophy, the idea of civilization.[26]

The individualistic conception uses the legal concept of contract (social contract theories), the second uses the notion of organism (German theories of corporate personality), the third uses the symbol of an edifice erected by the common work of all. Whereas legal and political history provide abundant illustrations for both individualistic and collective systems, the transpersonal valuation has, according to Radbruch, hardly yet found adequate expression in social life. The syndicalist idea comes nearest to it. But in the existing forms of syndicalism, notably in the Fascist State, Radbruch sees but a perversion of the transpersonal idea used to bolster the power of the State.[27]

Radbruch examines the principal political ideologies in relation to

24. RADBRUCH, RECHTSPHILOSOPHIE 150 (3d ed. 1932).

25. In a note made by Radbruch himself during the Second World War on his copy of the third edition, he illustrates the "supra-individualistic philosophy" as that of the "all demanding state, *i.e.*, a state which does not recognize either the interests of the individual or the objective laws of civilization as the limits of its operations." By way of illustration Radbruch mentions an urgent operation undertaken by a doctor on an injured child during an air alarm in Tokyo. An army officer ordered the light visible behind the window to be extinguished, because "children are reborn, but a non-executed command of the emperor brings inextinguishable disgrace." RADBRUCH, RECHTSPHILOSOPHIE 151 (5th ed. 1956).

26. The German term *Kultur* is usually translated by "civilization," but this tends to obscure the essentially spiritual meaning of the word.

27. It would seem that Duguit's postulate of social solidarity as the guiding fact of a legal order would come nearest to what Radbruch calls a transpersonal system. The political and legal philosophy of the U.S.S.R. seems to stand between the second and third type, emphasizing the collective against individual values, but putting the achievement of social works above life.

these basic values and shows how liberalism emphasizes the individual as an abstract autonomous unit and idealizes it in the "Rights of Man," whereas democracy sees the individual citizen in relation to others from the standpoint of equality. Social reformism and socialism, by inquiring into social and economic reality, reveal the rigidity of formal equality and aim at mitigating formal justice by equity while still considering the individual as the ultimate value. Conservatism on the other hand adheres to the organic conception of a political community. Radbruch follows these basic values through such varied legal institutions and systems as property, marriage, corporate personality, the relations of state and law, and the possibilities of international law. The development of the institutions of contract, marriage, and property illustrates the increasing infusion of collectivist thought into originally individualist institutions and valuations. In the conception of a world state, the citizen of which would be the individuals of the whole world, Radbruch sees an application of the individualist ideal; in the nationalist state he sees an application of the collectivist idea, and in a society of states, organized in international law, an application of the transpersonal idea.

Radbruch devotes particular attention to the different purposes of punishment and the different types of criminals. Criminal law was his principal and most beloved discipline, and beside his legal philosophy, the draft of a new German criminal code, completed but not adopted during his period of office as Reichsminister of Justice, is Radbruch's most important work.

The different possible purposes of punishment illustrate for Radbruch in a particularly telling manner the antinomic values of law. Commutative justice demands punishment as retribution, proportionate to the crime. Those theories of punishment which emphasize utility *(Zweckmaessigkeit)* demand that punishment be measured in proportion to the guilt of other criminals. This can lead to the deterrent theory or to the corrective theory. In the case of the criminal from conviction *(Ueberzeugungsverbrecher)* there is an irreconcilable antinomy between the moral duty which makes the criminal commit the crime and the duty of the judge to inflict punishment, perhaps even the duty of the criminal to suffer and accept punishment, like Socrates, for the sake of the integrity of the legal order.

For alongside justice and utility, the third essential component of the idea of law is security, in other words, positivity of the law. Positivity of law often means certainty at the expense of justice or the consideration of the individual case. Even patently unjust decisions continue to be recognized in the interest of legal stability. In history the authoritarian police state tends to make utility the dominant element; the natural law period emphasizes the element of justice and

tries to give it substance; legal positivism considers nothing but certainty of the law and neglects both justice and utility. But the freer judicial interpretation advocated by modern theories emphasizes again utility rather than certainty.

Between these three pillars of the idea of law there is perpetual tension. None can ever be singly or exclusively realized in an actual legal order, although one usually prevails over the others. There are passages in Radbruch's work which suggest that justice (in his formal sense) and positivity are more basic than utility. Here Radbruch speaks as the philosopher, not as the politician or the moralist. Which of the different social and political orders he prefers is clear from his adherence to social democracy which, to Radbruch, is essentially a form of individualism. Although economic analysis may oppose socialism to individualism, because the former does not consider economic life as the free play of individual wills, any supra-individualistic regulation in a socialist society ultimately serves the individual.

The one political value that is inseparable from relativism is democracy.

> Relativism is the intellectual precondition of democracy. It refuses to identify itself with a definite political opinion but is ready to let any political opinion which can obtain a majority take over the leadership of the state, because it does not know any unambiguous criterium for the correctness of political vies, it does not acknowledge the ability of a point of view above the parties. . . . Relativism teaches at once decisiveness of one's own and justice toward the other person's position.[28]

The brief and inevitably selective account given here cannot remotely do justice to the richness and beauty of Radbruch's book. Its outstanding characteristic is its aliveness. Every page links thought and life, generalizations and concrete illustrations. Art, poetry, history, and philosophy, all are linked with legal ideas in a style whose lucid simplicity is probably unmatched in the history of legal philosophy.

THE LATER RADBRUCH—UNSOLVED PROBLEMS

Although the view that Radbruch's "scientific relativism" meant indifference to values or even the equivalence of good and evil is

28. RADBRUCH, RECHTSPHILOSOPHIE 84 (5th ed. 1956). *Cf.* the observations of another great relativist, Oliver Wendell Holmes, in his dissent in Abrams v. United States, 250 U.S. 616, 630 (1919): "[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundation of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."

patently absurd, it is certainly true that relativism gives no definite guidance to the individual but on the contrary makes him conscious of the agony and the responsibility of choice between antagonistic values. Relativism presupposes a well functioning democratic system, and it is subject to fewer strains in a settled democracy such as Great Britain than in the turbulent conditions threatening a fragile democracy which prevailed in the Germany of the 1930's.

The first question arising from the linking of relativism and democracy is whether it compels democracy to tolerate a party or a movement opposed to its very foundations—such as the Nazi movement. It seems that only in a lecture given abroad during the Nazi regime—when Radbruch had been dismissed from his Heidelberg chair—Radbruch gave an answer.[29] Here he said in a reaffirmation of his relativistic philosophy that:

> [D]emocracy can do anything—except to renounce itself. Relativism can tolerate any opinion—except the opinion which claims absolute dominion. . . . When an opinion claims absolute validity and for this reason holds itself entitled to seize power or retain power without regard to the majority, it must be fought with its own weapons, not only by ideas and discussions but by the power of the state. Relativism is general tolerance —but not tolerance towards intolerance.

Had this philosophy—on which Radbruch himself had not, however, expressed himself clearly before—been applied by the Weimar Republic, it would certainly have outlawed perhaps not the Nazi Party as such, but certainly its militant movements such as the SS and the SA. That lesson at least has been learned by the Bonn Republic where the constitutional court has been given power to outlaw "parties which, by their aims or the conduct of their adherents, purport to injure or abolish the free democratic order or to imperil the existence of the Federal Republic."[30] In implementation of this provision the constitutional court a few years ago outlawed a neo-Nazi party.

This same lecture—which seems to have been strangely neglected in the spate of discussions about Radbruch's intellectual evolution—gives other indications of Radbruch's incipient doubts about the adequacy of his legal philosophy in any time of total perversion of values, such as that occurring in his own country. Although this lecture reaffirms the philosophy of relativism, it is anxious to prove that it represents a "strong, even aggressive conviction." The lecture reasserts the necessity of positivism, but it goes on to assert that it demands liberalism, separation of powers—and socialism. That relativism demands a liberal democracy, *i.e.*, tolerance, is plausible, for

29. RADBRUCH, *Der Relativismus in der Rechtsphilosophie* in DER MENSCH IM RECHT 86 (1957).

30. GRUNDGESETZ FUER DIE BUNDESREPUBLIK DEUSTSCHLAND art. 21 § 2.

the reasons and with the limitations just indicated. But in asserting that relativism leads to socialism, Radbruch jumps from a theoretical to a sociological and political argument. "In the comparison of ideas those will be victorious to which a sociological force, be it capital or the masses, lends its suggestive strength. The liberation of the inborn ideological power of the idea, the leap from necessity to liberty, is socialism. Thus relativism leads to socialism." Here it seems that an expression of faith and defiance is substituted for rational thinking.

It is the brief and fragmentary post-war writings of Radbruch that have produced a quantity of discussion out of all proportion to their volume. In these four eventful years, when Radbruch was reinstated and was, morally as in fact, the dean of West German law teachers, Radbruch went some way toward the acceptance of a "higher law" doctrine, of the kind that he had rejected all his life.[31]

As a German in the tradition of Kant, Goethe and Schiller, as a European and humanitarian who, while a good German patriot, was never a nationalist, as a Democratic Socialist, and as a Christian, Radbruch abhorred all that the Nazi system stood for. Fortunately for posterity he was too old—and perhaps too much respected even by those among the Nazis who had not lost all sense of human values—to be arrested. He was, however, immediately dismissed from his chair. Except for a very fruitful year at Oxford[32] and occasional lectures abroad, he refused a number of offers of permanent teaching appointments abroad. Thus, Radbruch witnessed most of the Nazi period and of the war in Germany, and he suffered deeply from the collapse of all the values he had held dear. One problem paramount in his mind was the adequacy of legal philosophy including his own, to cope with the denial of elementary justice that the Nazi regime represented, and the official perpetration of mass murder and other systematic cruelties and degradations in the name of the state—and thus, in a strictly positivist definition, of the law. The relativism of Weber, Radbruch, or Kantorowicz was never "positivist" in the sense that it accepted a strict division of "Is" and "Ought" in the function and development of the law. The concept of law as "value-related reality" meant constant preoccupation with the implementation of basic values in a given legal order, and therefore a heightened awareness of the moral, political and social issues with which a legal system is concerned. But relativism did not make it possible to condemn any particular legal order—however autocratic, however in-

31. See in particular his famous essay *Gesetzliches Unrecht und uebergestzliches Recht* (1946), reprinted in RECHTSPHILOSOPHIE, app. 4 (4th ed. 1950, 5th ed. 1956).

32. From which resulted *Der Geist des Englischen Rechts.*

human—as being beyond the pale of law. In accepting the pillar of *Rechtssicherheit* as one of the three essential foundations of law, relativism of course only reaffirmed the obvious truth that in organized society there must be a law positing authority. But many Germans, including Radbruch, came to wonder whether the value of authority and security in the law, and the postulate of obedience, had become so dominant an element in the attitude of the Germans of the second and third Reich that they found it easy to accept any order from the supreme power of the state as "law," even if the content of the order was the extinction of millions of helpless individuals, or the degradation of the human being to a guinea pig.[33]

As a politician, a humanitarian, a social reformer, Radbruch, like many others, could oppose all that National Socialism stood for. He could fight to destroy such an order, but he could not regard it as being no legal order at all. This, however, was subject to one important qualification which has not, I think, been sufficiently stressed in the post-war discussions of Radbruch's philosophy: law requires a minimum of "structure." It must be an "order," *i.e.*, there must be a definite and stable relationship between the various arms of state authority, and a hierarchy of legal norms. In this respect Radbruch did not differ from Kelsen and his school, and in his above-quoted essay on relativism he stressed that separation of powers is an essential consequence of the relativistic approach. But even if this is not accepted, a definite relationship is inherent in the concept of a normative order. From this point of view, the latest phases of the Nazi regime when pronouncements by Hitler made in an outburst of rage were held as overruling any formal laws—because all "law" emanated from the Fuehrer—could well be held to destroy the legal order and produce a state of anarchy, even from a formal point of view. From the Aristotelian postulate of equality, which Radbruch had incorporated in his definition of justice, it was possible to deduce "that law should be certain, that it could not be interpreted and applied in one way today and in another tomorrow, in one way here and in another way there."[34]

33. Professor Fuller, among others, attributes with Radbruch the progress of National Socialism to the "general acceptance of the positivistic philosophy in pre-Nazi Germany." Fuller, *supra* note 6 at 657. Professor Hart strongly rejects this view. Hart, *supra* note 5 at 617. I am inclined to attribute far less blame to the open legal positivism of men like Bergbohm and Binding than to the pseudo-idealism of Hegel and the neo-Hegelians. It is the Hegelian identification of any state with "the" state as the rational embodiment of individual liberty, his identification of reason and reality, his teaching of the absolute subservience of the individual to the authority of the state, because the latter embodies the "sittliche Rechtsidee," that has poisoned German (and much non-German) legal and political thinking. It enabled many Germans to continue to profess "idealism" while in effect sanctioning the absolute authority of state power. It is not surprising that neo-Hegelian philosophy was a powerful ideological prop of the Nazi regime.

34. *Gesetzliches Unrecht und uebergesetzliches Recht* in RECHTSPHILOSOPHIE 353 (5th ed. 1956).

But Radbruch felt compelled to go further. Starting from his definition of law as an order designed to serve justice, he said that "where the contradiction between the positive law and justice reaches so intolerable a degree that the law as unright law *(unrichtiges Recht)* must cede to justice, the force of positive law must yield to the higher demand of justice."[35] Radbruch was well aware of the difficulties of such a proposition. He conceded that there were numerous laws objectionable to morality or decent human standards which yet could not be regarded as lacking the force of law. He admitted that the line could not be drawn sharply but maintained that "where justice is not even aimed at, where equality which is at the heart of justice is deliberately denied in the making of positive law, the law is not only unright, but it lacks legal nature altogether." Well aware that the denial of the legal nature of duly enacted statutes could bring grave dangers, Radbruch suggested that the task of invalidating laws should be reserved either to the legislator—which is, of course, the obvious and universal process of changing law no longer acceptable to public opinion—or to a high court. Insofar as the Bonn Constitution embodies enforceable human rights and puts limitations on governmental powers, the latter proposal has been substantially implemented by the creation of a federal constitutional court in Germany, which has the exclusive power of deciding on the constitutionality of statutes.[36]

Of Radbruch's principal commentators, some have seen in this evolution of Radbruch's thinking little more than a shift in the relation between the three pillars of law: justice, utility, and security.[37] Baratta stresses in particular that the implicit assumption in Radbruch's philosophy of law was that the individual was a subject and not merely an object of the legal order. This part of the argument we may accept. The postulate of the human individual as an essentially autonomous being endowed with a conscience is the *Grundnorm* of Radbruch's thinking. But none of these arguments can dispose of the contrary demonstration by another of Radbruch's disciples made in a deeply perceptive and sympathetic study[38] that

35. The term *unrichtiges Recht* was coined by Stammler.

36. Important reservations must, however, be made to this statement in view of the opinions expressed in some German judgments, and especially in a judgment of the German Federal Supreme Court, (BGZ Vol. 11 App. p. 34 ff.) that even certain provisions of the Bonn Constitution could be held invalid in the light of higher unwritten legal principles. According to this opinion the judge "must be left the power to examine whether constitutional norms are compatible with higher norms of the constitution or of supra-positive law."

37. See in particular Baratta, *Relativismus und Naturrecht im Denken Gustav Radbruch's* in 45 ARCHIV FUER RECHTS- UND SOZIALPHILOSOPHIE 505. See also Erik Wolf, *Umbruch oder Entwicklung in Gustav Radbruch's Rechtsphilosophie,* 45 ARCHIV FUER RECHTS- UND SOZIALPHILOSOPHIE 481.

38. HIPPEL, GUSTAV RADBRUCH ALS RECHTSPHILOSOPHISCHER DENKER (1957).

in postulating mimimum requirements of justice, however elementary, for the qualification of a statute or order as law, Radbruch had abandoned his formal definition of justice for a substantive definition. It is evident that, in speaking of a mimimum of "equality," Radbruch postulated, perhaps unconsciously, a definite principle of distributive justice as compelling, where in his principal work he had regarded the formal role of equality as the only basic principle of distributive justice, expressing the *Grundnorm* of the political order. No amount of argument can obscure the fact that this implies the substitution of a modicum of natural law principles, a mimimum of "goodness," as a yardstick by which to test the validity of law.

Certainly Radbruch did not wish to substitute a sweeping natural law philosophy for the work of his lifetime. Nor was he any less conscious than at any previous period of his life of the deep, and often irreconcilable antinomy of values. Professor Fuller has stated Radbruch's dilemma in these terms:

> Germany had to restore both respect for law and respect for justice. Though neither of these could be restored without the other, painful antinomies were encountered in attempting to restore both at once, as Radbruch saw all too clearly. Essentially Radbruch saw the dilemma as that of meeting the demands of order, on the one hand, and those of good order, on the other. Of course no pat formula can be derived from this phrasing of the problem. But, unlike legal positivism, it does not present us with opposing demands that have no living contact with one another, that simply shout their contradictions across a vacuum.[39]

Both Fuller and Hart, in their recent controversy,[40] accept, like von Hippel, that there was some transformation in Radbruch's thinking. They debate a situation dealt with in several German post-war decisions, and discussed by Radbruch himself. In the typical case, a faithless wife had used the excuse of a war-time Nazi statute which authorized and possibly ordered information on utterances hostile to the state, *i.e.*, to the Nazi regime, to report to the special tribunal derogatory remarks about Hitler made by her husband within the four walls of her home, while he was on leave from the front. The wife insisted in giving this information, even though the presiding judge of the court had warned her that she was under no obligation to give evidence under oath, that her husband was under threat of capital punishment, and that without sworn evidence testimony was not likely to carry much weight. As the result of the wife's insistence on it her husband was kept under arrest.

After the war the wife, like a number of others who had acted

39. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 636, 657 (1958).
40. See notes 5, 6 *supra*.

similarly, was held guilty of false imprisonment, not on the ground of invalidity of the statute but because of the freedom of choice exercised by the wife, in relating a private remark that she knew was bound to lead to the imprisonment or death of her husband. The wider problem adumbrated by Radbruch and discussed by Professors Hart and Fuller is not, however, essentially dependent on the question whether a particular Nazi statute could retroactively be held invalid as contrary to fundamental standards of morality.[41] Even if the wife had no duty to inform or—as was undoubtedly the case—had effective freedom to inform or not to inform, criminal prosecution was only possible by subordinating the legitimacy of her action under the law as it stood to some higher moral duty. The moral decision in this case is not difficult—though again from a post-Nazi, not a Nazi philosophy point of view. It is far more difficult and poignant in situations such as those dealt with in the so-called *Justice* case.[42] This case is both more typical and more difficult than that of the Nazi leaders who were convicted at Nuremberg not as agents of the Nazi regime but as its very personification or, on the other hand, the case of the informer wives who used the law to get rid of their husbands so that they could carry on their adulterous relations. In the *Justice* case, senior civil servants, judges, and prosecutors were convicted of one of the various crimes listed in the Nuremberg Charter by virtue of their participation in inhuman decrees (such as the notorious *Nacht und Nebel* Decree), or judgments by special courts, in the course of their ordinary duties. At what point did the official duty of these men to carry out their tasks assigned to them yield to a higher duty of humanity? Some of these men were Nazis by conviction, others were careerists, and others just took, like the vast majority of men and women everywhere, the line of least resistance. It is strange that this case has not received more discussion in jurisprudential literature.[43] None illustrates more pungently the moral dilemma which troubled Radbruch so deeply. No doubt he would have discussed this problem with his customary courage and lucidity had he lived longer. As it is, we cannot know where he would have

41. On this point, the question whether it would be theoretically preferable to declare the post-war laws exceptionally of retroactive validity, a theory more consonant with positivism, or whether to openly apply the "higher law" duty as superior to the normal duty of obedience to statute seems to me to be relatively unimportant. In either case it requires a legal revolution to substitute new morals and legal standards for the old ones. The interpretation of values will occur either under the guise of retroactivity of a statute or by the reinterpretation of a duty to obey selected positive laws.

42. 3 TRIALS OF WAR CRIMINALS (before the Nuremberg Military Tribunals under Control Council Law) No. 10 (1951).

43. See the present writer's review of the *Justice* case in 67 HARV. L. REV. 1284 (1954); further his article on *Uebergesetzliche Rechtgrundsaetze und die Loesung von Rechtsproblemen*, 41 ARCHIV FUER RECHTS- UND SOZIALPHILOSOPHIE 348, 364 (1955); and LEGAL THEORY (4th ed. 1960).

drawn the line between obedience, authority and the higher moral duty. Nobody was more clearly aware than Radbruch of the difference between the high standards which make the few accept the "moral duty" of rebellion at the risk of imprisonment, torture or death, and the "legal duty" which must be measured in terms of the average (*i.e.*, the "reasonable") man.

Thus, Radbruch's work ends with a question mark. The question mark, however, is confined to the final formulation of Radbruch's theoretical position in the perennial conflict between the values of security and justice.[44]

There is no break in Radbruch's personality or in his approach to the problems of law and life. His life as well as his work is a demonstration of humanity's unceasing struggle. Radbruch was never content either with himself or with his theoretical formulations. In that lies the vitality and nobility of both the man and his work. Neither Radbruch nor anybody else has been able to resolve the antinomies of life, and certainly his vision was not that of a "pre-established harmony," but that of a restless cosmos whose beauty and grandeur results from a precarious balance between the never-ending conflicts of life. I know of no other book in legal literature that has as poignantly and as beautifully translated the inevitable antinomies of life into legal values as Radbruch's *Rechtsphilosophie*.

44. In this writer's opinion nobody has, or is ever likely to find, a solution that does not sacrifice one of several conflicting values. See the above-mentioned article in the ARCHIV FUER RECHTS- UND SOZIALPHILOSOPHIE, and LEGAL THEORY (4th ed. 1960).