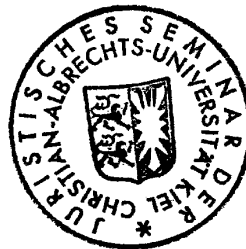


Recrafting the Rule of Law: The Limits of Legal Order

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*A Defence of Radbruch's Formula*¹

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The problem of dealing with a past devoid of the rule of law has twice confronted the courts in Germany in a century which is now drawing to a close: in 1945 after National Socialism was crushed and in 1989 after the collapse of the German Democratic Republic. In both cases the following question had to be answered. Should one regard as continuing to be legally valid something which offended against fundamental principles of justice and the rule of law when it was legally valid in terms of the positive law of the legal system which had perished. To use a handy though imprecise formulation, can something be illegal today which in the past was legal? After 1945 German courts answered "yes" to this question,² and the Federal Court of Justice has followed this tradition after 1989 especially in its decisions in regard to the so-called wall shootings.³ The Federal Constitutional Court forged ahead in this course in cases of National Socialist injustice⁴ and affirmed it in cases concerning the injustice committed by the German Democratic Republic.⁵ Radbruch's formula formed the jurisprudential core of the judges' reasoning. In what follows, the first task will be to present this formula. Then its practical significance will be illustrated through two examples. Finally, we will ask whether the formula can stand up to jurisprudential critique.

I. THE FORMULA

Gustav Radbruch presented his famous formula under the immediate impression of twelve years of National Socialism. It reads:

"The conflict between justice and legal certainty should be resolved in that the positive law, established by enactment and by power, has primacy even when its content

¹ Translated by David Dyzenhaus. I thank Professor Alexy for the great care he took in suggesting improvements to my first draft though the responsibility for all errors is mine.

² See for example OGHSt 2, 231 (232 ff.); 2, 269 (272 ff.); BGHSt 2, 173 (177); 2, 234 (237 ff.); 3, 357 (362 ff.).

³ BGHSt 39, 1; 39, 168; 39, 199; 39, 353; 40, 48; 40, 113; 40, 218; 40, 241; 41, 10; 41, 101; 41, 149; 42, 65; 42, 356.

⁴ BVerfGE 3, 58 (119); 3, 225 (232 ff.); 6, 132 (198); 6, 389 (414 ff.); 23, 98 (106); 54, 53 (67 ff.).

⁵ BVerfGE 95, 96 (130 ff.).

is unjust and improper. It is only when the contradiction between positive law and justice reaches an intolerable level that the law is supposed to give way as a 'false law' [*unrichtiges Recht*] to justice. It is impossible to draw a sharper line between the cases of legalized injustice and laws which remain valid despite their false content. But another boundary can be drawn with the utmost precision. Where justice is not even aimed at, where equality—the core of justice—is deliberately disavowed in the enactment of a positive law, then the law is not simply 'false law', it has no claim at all to legal status".⁶

It is easy to see that this formula is composed of two parts. In the first part, the claim is that positive law loses its legal validity when its contradiction with justice reaches an "intolerable level". We can call this the "intolerability formula". In the second part, positive laws are denied legal status when in their enactment equality, which Radbruch says is the core of justice, is "deliberately disavowed". We can call this the "disavowal formula".⁷ The intolerability formula has an objective character. It is attuned to the level of injustice.⁸ In contrast, there is something subjective about the disavowal formula: the purpose or intentions of the legislators. One can think of cases in which both formulae lead to different results. One can easily imagine a legislator who in fact strives for equality as the core of justice, but nevertheless brings about something which is intolerably unjust, just as one who is bent on bringing about injustice might fail to cross the threshold of intolerable injustice. But in general it is true that result and purpose should coincide when in issue is intolerable injustice. In this respect one can speak of an "overlapping" of both formulae.⁹ Judicial reasoning has first and foremost applied the intolerability formula. In favour of this is that an "intention to warp justice" is very difficult to prove in doubtful cases.¹⁰ In this chapter, the intolerability formula is the focus.

Remarkable about Radbruch's formula is that it does not require any complete coincidence between law and morality. It allows enacted and effective law—Radbruch speaks of the "law established by enactment and by power"—to be valid even when it is unjust and it does not even require that the law as a whole orient itself to morality. It is much more the case that it builds into law an outermost limit. In general, law is that which is appropriately enacted and

⁶ G. Radbruch, "Gesetzliches Unrecht und übergesetzliches Recht", in G. Radbruch, *Gesamtausgabe*, in A. Kaufmann (ed.), (Heidelberg: C.F. Müller, 1990), vol. 3, p. 89. Radbruch's famous essay was first published in 1946 in the first volume of the *Süddeutschen Juristen-Zeitung*, 105–8.

⁷ See B. Schumacher, *Rezeption und Kritik der Radbruchschen Formel* (Diss: Göttingen, 1985), p. 24 ff.; A. Kaufmann, "Die Radbruchsche Formel vom gesetzlichen Unrecht und vom übergesetzlichen Recht in der Diskussion um das im Namen der DDR begangene Unrecht" (1995) 48 *Neue Juristische Wochenschrift* 81 at 82.

⁸ More precisely, two aspects should be distinguished within the framework of the intolerability formula. The first concerns the weighing, the second the threshold.

⁹ S.L. Paulson, "Radbruch on Unjust Laws: Competing Earlier and Later Views?" (1995) 15 *Oxford Journal of Legal Studies* 489 at 491.

¹⁰ R. Dreier, "Gesetzliches Unrecht im SED-Staat? Am Beispiel des DDR-Grenzesetzes" in F. Haft, W. Hassemer, U. Neumann, W. Schild, U. Schroth (eds.), *Strafgerechtigkeit. Festschrift für Arthur Kaufmann* (Heidelberg: C.F. Müller, 1993), p. 58.

socially effective; only when the threshold of extreme injustice is crossed do appropriately enacted and socially effective norms lose their legal character or their legal validity. Hence, one can express Radbruch's formula concisely:

appropriately enacted and socially effective norms lose their legal character or their legal validity when they are extremely unjust.

Even shorter:

Extreme injustice is no law.¹¹

Whoever supports this thesis has ceased to be a legal positivist. When a positivist wants to establish what law is, he inquires only into what is appropriately enacted and socially effective. Though these are ideas which can be very differently interpreted and evaluated, as the many forms of legal positivism show, nothing more will be said on this issue here. Of interest in this chapter is only that for the positivist nothing about legal character or validity turns upon the content of the norm. The great legal positivist Hans Kelsen expressed this idea in a much cited formulation: "Hence any content whatsoever can be legal".¹² This is the positivist thesis of the separation of law and morality, in short, the positivist separation thesis. Even the anti-positivist takes into account appropriate enactment and social effectiveness if he wishes to be regarded as in his right mind. Radbruch's formula is clear evidence of this. But for the anti-positivist who adopts the formula there is nevertheless a limit, that of extreme injustice. In this way substantive correctness is imported as a limiting criterion into the concept of law. The concept of law is not filled out by morality but it is limited by morality. This is clearly only a partial connection of law and morality but it is a connection. Whoever advocates Radbruch's formula therefore supports the anti-positivist connection thesis.¹³

The conflict about Radbruch's formula is a philosophical conflict because it is a conflict about the concept of law. It speaks volumes about the character of legal philosophy that this conflict over its foundational concept—the concept of law—has at the same time direct practical consequences. We will take such consequences into account before we ask whether the better argument speaks for or against anti-positivism in the form of Radbruch's formula. And this can be done through two examples.

¹¹ Radbruch comes close to this formulation when he says that "horribly" unjust laws can be denied validity; see G. Radbruch, *Vorschule der Rechtsphilosophie*, in G. Radbruch, *Gesamtausgabe* (A. Kaufmann (ed.), Heidelberg: C.F. Müller, 1990), vol. 3, p. 154. The *Vorschule der Rechtsphilosophie* was published first in 1948 as lecture notes which were revised and approved by Radbruch.

¹² H. Kelsen, *Reine Rechtslehre*, 2nd edn. (Vienna: Deuticke, 1960), p. 201.

¹³ R. Alexy, *Begriff und Geltung des Rechts*, 2nd edn. (Freiburg and Munich: Alber, 1994), p. 15 ff., p. 52 ff.

II. PRACTICAL SIGNIFICANCE

The first example is a 1968 decision of the Federal Constitutional Court concerning Decree 11 in regard to the Reich's Citizenship Law of 25 November 1941.¹⁴ Section 2 of this decree reads:

"A Jew loses German nationality

- (a) with the coming into force of this decree when he has his usual residence abroad at the time of the coming into force of this decree,
- (b) when he at a later date takes up his usual residence abroad at the time when he changes his usual residence to abroad".

The occasion of the Federal Constitutional Court's decision was whether a Jewish lawyer, who had emigrated to Amsterdam shortly before the Second World War, had lost his German nationality in accordance with this rule. The outcome of a matter concerning an inheritance turned on this point. The lawyer had been deported from Amsterdam in 1942. There was no news about his fate beyond that, so it had to be accepted that he had lost his life in a concentration camp.

The Federal Constitutional Court decided that the lawyer had not lost his German nationality because Decree 11 in regard to the Reich's Citizenship Law was from the outset void. The core of its reasoning reads:

"Hence the Federal Constitutional Court has affirmed the possibility of depriving National Socialist 'legal' decrees of their legal validity because they so evidently contradict fundamental principles of justice that the judge who applied them or recognised their legal consequences would pronounce injustice instead of law (BVerfGE 3, 58 (119); 6, 132 (198)).

Decree 11 offends these fundamental principles. In it the contradiction with justice has reached so intolerable a level that it must be regarded as void from the outset (see BGH, RzW 1962, 563; BGHZ 9, 34 (44); 10, 340 (342); 16, 350 (354); 26, 91 (93))."¹⁵

This is a classical anti-positivist argument. An appropriately enacted norm, one which was socially effective for the duration of its validity, is denied validity or—on this point the decision is not unequivocal—its character as law, because it offends suprapositive law. While Radbruch was not in fact mentioned by name, one finds his name nevertheless in earlier decisions of the Federal Constitutional Court on which the Court in this decision expressly relied.¹⁶ In any case more significant is that Radbruch's formulation of the "intolerable level" of the "contradiction" with "injustice" is applied. The decision on nationality is thus a paradigmatic case of the application of Radbruch's formula.

Expatriates often had no desire to get their old citizenship back. But generally in the case of property things were different. This was the issue in a decision of

¹⁴ RGBL I p. 722.

¹⁵ BVerfGE 23, 98 (106).

¹⁶ In the decision BVerfGE 3, 225 (232), which is mentioned in BVerfGE 22, 98 (106) immediately prior to the text quoted above, Radbruch's formula is cited in its entirety, word for word.

the Great Panel of the Federal Court of Justice for Civil Matters, which should rank with the decision on nationality. Once again the outcome of the proceedings turned on the validity of Decree 11 in regard to the Reich's Citizenship Law, this time on section 3, paragraph 1, provision 1, which reads:

"The property of Jews who have lost their German nationality on the basis of this Decree becomes the property of the Reich with the loss of nationality".

A Jewish woman who emigrated to Switzerland in 1939 had left securities in a deposit in a German bank. During the entire period of National Socialist rule and also thereafter this deposit remained entered in the books of the bank in the name of the emigrant. After the end of the war she again took up domicile in the Federal Republic of Germany. Presently she demanded that the securities in the deposit be restored to her. The question was whether she had lost her property on the basis of the immediate expropriation in terms of section 3, paragraph 1, provision 1 of Decree 11. The Federal Court of Justice answered "no" to this question and therefore confirmed her demand for restitution. The details of its reasoning are complex but the core reads as follows:

"§3 of Decree 11 under the Reich's Citizenship Law is to be regarded as from the outset void because of its iniquitous content which contradicts the foundational requirements of every order based on the rule of law".¹⁷

Following this anti-positivist solution the emigrant could demand her property back simply because she had never lost it. From the standpoint of legal positivism some retroactive or correcting regulation was required if she were to have any title to claim restitution. Whether she could demand the property back would hinge then on the discretion of the legislature. The decision for or against legal positivism therefore can have immense practical significance for the victim of a tyrannical regime.

The second example of the practical significance of Radbruch's formula comes from the judicial decisions in regard to the deaths of fugitives on the border formerly internal to Germany. The Federal Court of Justice confirmed the guilt of simple border soldiers in its first judgment on wall shootings in November 1992,¹⁸ a good two years after reunification. Two years later in 1994 it decided that higher and the highest German Democratic Republic officials, among them the last Minister of Defence of the German Democratic Republic, Army-General Kießler, were criminally responsible for the killings on the border. It found them guilty of being the indirect cause of manslaughter.¹⁹ Again two years later, in October 1996, the Federal Constitutional Court declared this line of adjudication to be in accordance with the Constitution.²⁰ Here only the leading decision is examined—the first judgment on wall shootings by the Federal Court of Justice.

¹⁷ BGHZ 16, 350 (354).

¹⁸ BGHSt 39, 1.

¹⁹ BGHSt 40, 218.

²⁰ BVerfGE 95, 96.

This judgment concerned a twenty-year-old fugitive, who on 1 December 1984 at about 3.15 a.m. attempted to get over the border structure with a four-metre-long ladder. Two soldiers of the border patrol of the German Democratic Republic, one about twenty the other about twenty-three years old, caught sight of the fugitive about 100 metres away, as he prepared to cross the 29-metre-wide border strip. In the middle of the strip stood a 2.5-metre-tall alarm fence and at its end stood a 3.5-metre-high border wall. Neither calls nor warning shots could stop the fugitive. As he leant his ladder against the border wall and quickly ascended, it became clear to the two soldiers that only directed fire stood any chance of preventing his flight. They shot several bursts of fire at the fugitive. Though they aimed at his legs, they knew that there was the possibility that he would be killed especially because of their sustained fire. But even at this price they were determined to prevent his flight. The fugitive was hit a few seconds after they opened fire, at the moment his hand reached the top of the wall. He died within hours.

In 1992 the Berlin Provincial Court found both soldiers jointly guilty of manslaughter and sentenced the younger one to imprisonment in a young offender's facility for a year and six months and the older to a prison term of one year and nine months.²¹ The execution of both punishments was deferred pending probation. In its first wall shooting decision, the Federal Court of Justice rejected the appeals against this judgment and confirmed the convictions though not the reasoning behind them.

In accordance with the rules of the treaty on the restoration of German unity the general principle was valid for both soldiers that their deed was punishable only if it was punishable in terms of the valid law governing at the time and in the place it was done. The crucial question was thus whether they had a permission or justification in terms of the law then in force in the German Democratic Republic. In issue as their ground of justification was section 27 of the 1982 Border Law of the German Democratic Republic.²² In the present case, section 27, paragraph 2, provision 1 was significant:

“The use of firearms is justified to prevent the directly imminent carrying out or the continuation of a criminal act which, in the circumstances, appears to be a felony”.

The fugitive's crossing of the border was directly imminent and the soldiers fired to prevent him from that. According to the interpretation of the criminal law—both the dominant theory and the practice—of the German Democratic Republic it was a felony to attempt to break through the border as the fugitive had done.²³ Hence all the preconditions of section 27, paragraph 2, provision 1 were in evidence. Even the remaining preconditions of section 27 were fulfilled.

²¹ LG Berlin, NStZ 1992, 492 (493). Army-General Kefler has incurred the most severe punishment so far, as he was sentenced to seven years and six months; see BVerfGE 95, 96 (97).

²² DDR-GBl. I p. 197.

²³ See R. Alexy, *Mauerschützen. Zum Verhältnis von Recht, Moral und Strafbarkeit* (Hamburg: Vandenhoeck & Ruprecht, 1993), p. 11 ff.

Fire was only opened after milder measures did not work (section 27, paragraph 1, provision 2). In this case the fugitive could only be stopped by fire. He was called back and a warning shot was fired (section 27, paragraph 3). Finally, section 27, paragraph 5 had to be observed:

“When firearms are used the life of the person is if possible to be spared”.

Even this norm was respected since it does not require that one may not in any way threaten life. It only says that “if possible” life is to be spared. The flight could not have been prevented at all without firing at the fugitive and, given that he was seconds away from succeeding, single shots would not have been as sure. When the prevention of the flight is understood as a justificatory ground in the sense of section 27, paragraph 2, it follows that section 27, paragraph 5 was also not violated.

The attempt to convict the border soldiers was undertaken by interpreting section 27 of the Border Law of the former German Democratic Republic in the light shed in the present by the principles of the rule of law. The judgment of the Berlin Provincial Court, which convicted both soldiers in the first instance, is an example of this. It held that the soldiers should have complied with the fundamental principle of proportionality, which meant that the soldiers should not have opened continuous fire. In addition, the aim of preventing a criminal act which did not endanger the life of another could never justify the killing of a person, since life is the most prized legal value.²⁴

One should welcome the fact that the Federal Court of Justice did not adopt this reasoning, at least in the first part of its judgment which is the part of interest here. Whoever interprets the former law of the German Democratic Republic in the light shed in the present by principles of the rule of law is pursuing a covert kind of retroactivity which is worse than an open one. The question whether the punishment today of both soldiers offends the proposition *Nullum crimen sine lege* or *Nulla poena sine lege* would be evaded. In this regard, the Berlin Provincial Court got the positive law wrong. For not only the wording of the positive law makes up the positive law in force at the time; there is also the interpretative practice of the time. If one applies this standard, then the deed of both soldiers, as the Federal Court of Justice effectively and in full detail showed,²⁵ was justified by section 27, paragraph 2, provision 1 of the Border Law of the German Democratic Republic. The deed was thus legal in terms of the positive law valid at that time. Since a retroactive law which declared the deed as punishable today did not exist, both soldiers could be punished only if the justificatory ground in section 27, paragraph 2, provision 1 did not apply. The Federal Court of Justice brought Radbruch's formula into play on exactly this point:

“It is much more the case that a justificatory ground taken from the time of the deed can only be disregarded because of its offence to a higher order of law when in it is

²⁴ LG Berlin, NStZ 1992, 492 (494).

²⁵ BGHSt 39, 1 (10 ff.).

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manifested a patently gross offence to the fundamental tenets of justice and humanity; the offence must be so weighty that it violates the legal convictions of all nations in regard to people's worth and dignity (BGHSt 2, 234, 239). The contradiction between positive law and justice must be so intolerable that the law has to give way to justice as a false law (Radbruch, SJZ 1946, 105, 107).²⁶

The last sentence is an almost word for word repetition of Radbruch's intolerability formula. The Court then explained that the scope of application of Radbruch's formula was not limited to National Socialist injustice:

"In these formulations (see also BVerfGE 3, 225, 232; 6, 132 f., 198 f.) the attempt was made to define the worst violations of the law after the end of the National Socialist regime of violence. The transfer of these perspectives to the present case is not easy, because the killing of people on the internal German border cannot be equated with National Socialist mass murder. All the same, the insight achieved at that time remains valid that in judging deeds done at the command of the state one has to take into account whether the state has crossed the outer limits which are ordained to it by general convictions in any country".²⁷

Thus everything turns on the question whether the deaths on the internal German border amounted to an extreme injustice in Radbruch's sense. This is very controversial.²⁸ The Federal Court of Justice answered in the affirmative with a detailed justification in the guarantees of the rights to life (Article 6) and mobility (Article 12) of the International Covenant on Civil and Political Rights of 19 December 1966, which, as it said, were drawn on as "guiding principles". This reasoning will not be reiterated here, since the issue is the presentation of the way in which Radbruch's formula works in practice. And this is shown with great clarity in the sentence with which the Federal Court of Justice removed from both border soldiers the justification in terms of the positive law of the former German Democratic Republic:

"The justification stipulated by the law of the German Democratic Republic, described in § 27 of the Border Law, had for this reason from the outset no validity in the interpretation which is defined by the actual relations on the border".²⁹

III. THE ASPIRATION AND THE LIMITS OF LAW

Radbruch's formula excludes certain contents from entering into the content of law, namely extreme injustice. In this way it restores a necessary connection between law and morality, that is, between the law as it is and the law as it ought to be. Appropriately enacted and socially effective law does not, to be sure, have to be just or right in order to be law, but it must not cross the threshold of

²⁶ BGHSt 39, 1 (15 ff.).

²⁷ BGHSt 39, 1 (16).

²⁸ See R. Alexy, *Mauerschützen*, n. 23 above, p. 23 ff.

²⁹ BGHSt 39, 1 (22).

extreme injustice. If this occurs, its legal character or validity as law is lost. This is a denial of the positivist thesis that there is a complete separation of law and morality and a profession of the anti-positivist connection thesis.

1. A conceptual framework

The conflict over legal positivism seems to be a conflict with no end, and that means it is a philosophical debate. In such disputes which are at once endless, acute and stubborn, one can surmise that all the participants are right in one or other aspect or in regard to one or other assumption. Our next task will be to cast a glance over these aspects or assumptions and here four distinctions are useful.³⁰

(a) Norm and procedure

The first distinction is between the legal system as a system of norms and the legal system as a system of procedures. As a system of *procedures* the legal system is a system of interactions dependent on rules and guided by rules by means of which norms are enacted, grounded, interpreted, applied and executed. As a system of *norms* the legal system is a system of results or products of the procedures provided for producing norms. This distinction approximates Fuller's between the law as "activity"³¹ in the sense of a "purposive effort that goes into the making of law and the law that in fact emerges from that effort",³² hence, the law as "product"³³ or "results".³⁴ It is obvious that the understanding of law as a system of procedures or activities is more suitable to an anti-positivist position than the exclusive focus on norms as the results of such procedures.

(b) Observer and participant

The second distinction is between the observer and participant perspectives. This dichotomy maps onto Hart's distinction between an "external" and an "internal" point of view.³⁵ Hart's distinction is clearly in need of interpretation.³⁶ Here

³⁰ For the sake of simplification, I will here avoid the distinction employed in earlier work between concepts of law which include the concept of validity and those which do not; see R. Alexy, "On Necessary Relations Between Law and Morality" (1989) 2 *Ratio Juris* 167 at 170. The list presented here could be supplemented with more distinctions than the one just mentioned. For example, it is very fruitful for some purposes to take up the distinction between single norms and legal systems as a whole; see R. Alexy, *Begriff und Geltung*, n. 13 above, p. 57 ff., 108 ff.

³¹ L.L. Fuller, *The Morality of Law*, 2nd edn. (New Haven and London: Yale University Press, 1969), pp. 106, 119.

³² *Ibid.*, p. 193.

³³ *Ibid.*, p. 106.

³⁴ *Ibid.*, p. 119.

³⁵ H.L.A. Hart, *The Concept of Law*, 2nd edn. (Oxford: Clarendon Press, 1994), p. 89.

³⁶ See N. McCormick, *Legal Reasoning and Legal Theory* (Oxford: Clarendon Press, 1978), p. 275 ff.

we will interpret it with the help of the concepts of argumentation and of correctness: the *participant perspective* engages one who within a legal system takes part in argumentation about what it requires, forbids and permits and in addition about what it enables. The judge stands at the centre of the participant perspective. When other participants, including legal academics, lawyers, and citizens who concern themselves with the legal system, bring forth arguments for or against the particular meaning of laws, then they refer ultimately to what a judge would decide when he wanted to make a correct decision. The *observer perspective* engages one who asks not what the correct decision is in a particular legal system, but what the actual decision in a particular system will be. Again it is easy to recognise that the observer perspective is more suitable for the positivist and the participant perspective for the anti-positivist.

(c) *Classification and qualification*

The third distinction concerns the two different kinds of connection between law and morality. The first kind will be defined as “classificatory”, the second as “qualificatory”. One has to do with a *classificatory* connection when one maintains that norms or systems of norms which fail to meet a particular moral criterion fail to be legal norms or legal systems. Radbruch’s formula creates such a connection since it excludes legal norms containing extreme injustice from the class of legal norms (or of valid legal norms). One has to do with a merely *qualificatory* connection when one maintains that norms or systems of norms which fail to meet a particular moral criterion could indeed be legal norms or legal systems, but are legally defective legal norms or legally defective legal systems. It is crucial that the defect asserted is a legal one and not merely moral.

The concept of a qualificatory connection is tightly bound up with the claim to correctness, since if the law necessarily raises a claim to correctness, then there necessarily exists a qualificatory relationship between law and morality.³⁷ Fuller’s “internal” or “inner morality of law” as a “morality of aspiration”³⁸ resembles in a crucial respect the thesis of the claim to correctness. The incomplete fulfilment of the eight “principles of legality” which, according to Fuller, define the “inner morality of law”, do not lead in general to a loss of legal character or legal validity.³⁹ It has therefore no classificatory meaning but rather the result is a qualification of the law or legal system as “bad”.⁴⁰ Thus Fuller’s theory is a classic example of theory which essentially depends on qualificatory connections.

³⁷ See R. Alexy, “Law and Correctness” in M. Freeman (ed.), *Legal Theory at the End of the Millennium* (Oxford: Oxford University Press, 1998), p. 214 ff.

³⁸ L. Fuller, *The Morality of Law*, n. 31 above, p. 43.

³⁹ *Ibid.*, pp. 39, 41 ff.

⁴⁰ *Ibid.*, p. 39. In contrast, one has to do with a classificatory connection when Fuller says that “a total failure” in the fulfilment of any one of his eight principles of legality “does not simply result in a bad system of law; it results in something that is not properly called a legal system at all”; *ibid.*

The qualificatory connection does not imply any classificatory one.⁴¹ It is however easier to justify the latter when the former exists than when it does not. The justification of Radbruch's formula will thus begin with the justification of the qualificatory connection.

(d) *Analytical and normative arguments*

The fourth distinction is that between analytical and normative arguments for and against legal positivism. An *analytical* argument is presented when one shows it to be the case that the inclusion of moral elements in the concept of law is conceptually or linguistically necessary, impossible or merely possible. In contrast, the separation or connection thesis is supported by a normative argument when it is proposed that the inclusion or exclusion of moral elements is necessary to fulfil certain norms, such as the prohibition on retroactivity, or to realise certain values, such as human rights.⁴²

As we have already seen, Radbruch's formula has to do with a classificatory connection. That the issue here cannot be decided on analytical grounds alone is demonstrated by the fact that neither of the following two sentences contains a contradiction:⁴³

- (1) The Norm N is appropriately enacted and socially effective and therefore law even if it contains extreme injustice.
- (2) The Norm N is appropriately enacted and socially effective but not law because it contains extreme injustice.

Because of the vagueness and ambiguity of the expression "law" (*Recht*), a decision on the correctness of Radbruch's formula is ultimately possible only on the basis of normative arguments. These lead to completely different results depending on whether one adopts the observer or the participant perspective.

⁴¹ See N. MacCormick, "Natural Law and the Separation of Law and Morals", in R.P. George (ed.), *Natural Law Theory* (Oxford: Clarendon Press, 1992), p. 112 ff., p. 130.

⁴² One could suggest that whoever justifies the positivistic thesis of the separation of law and morality with moral and hence normative arguments ceases to be a positivist. On this interpretation, it would be the case that any use of a moral argument in the framework of a theory of law turns the theory into an anti-positivist one. One reason that speaks against such an extremely strict definition of legal positivism is that hardly any positivist would survive. A much more weighty consideration is that the crucial difference is flattened between authors who claim that a norm loses its legal character or validity when it violates a moral criterion and authors who claim that nothing about legal character or validity turns on any moral criterion. Both supporters and opponents of Radbruch's formula could then be equally characterised as anti-positivists when they adduced for their position any non-positivist, normative and in this sense moral argument, for example, that of legal certainty. This mode of conceptual argument would be confusing.

⁴³ Hart suggests that "the positivist might point to a weight of English usage" that sentences like (1) contain no contradiction; see H.L.A. Hart, *The Concept of Law*, n. 35 above, p. 209. The argument is then to be extended to sentences like (2). Hart's argument is then compelling: "Plainly we cannot grapple adequately with this issue if we see it as one concerning the proprieties of linguistic usage".

2. The observer

To answer the question whether Radbruch's formula is acceptable from the observer standpoint we will return to Decree 11 in regard to the Citizenship Law of the Reich of 25 November 1941, which deprived the Jew who had emigrated of citizenship and property. Imagine a contemporary observer of the National Socialist legal system, a foreign jurist who was composing a yearly report on the National Socialist legal system for a law journal in his homeland. How would he at the end of 1941 describe the case presented above of the emigrant whose securities section 3, paragraph 1, provision 1 of that Decree declared to be the property of the German Reich? It would be the case that anyone in his homeland would understand without any further explanation the proposition:

- (1) A lost ownership of the securities in accordance with German law.

But this is not the case with the following proposition:

- (2) A did not lose ownership of the securities in accordance with German law.

When no further information is given with this second proposition, he is either giving false information or confusing. The reason is that one can use the expression "law" in a way which serves only the value neutral identification of appropriately enacted and socially effective norms together with their consequences. Only this use is appropriate for the observer perspective. It serves clarity and truth of speech. A lawyer who had to advise a Jew at the end of 1941 and neglected Decree 11 would be in gross dereliction of duty. An appeal to Radbruch's formula would not help him in any way. Naturally, he could conclude his opinion with the following remark:

- (3) She has lost her property in accordance with regulations which are now valid in Germany, but which amount to extreme injustice and are therefore not law. After the collapse of National Socialism we will ensure that the loss of property is declared to be invalid.

With this, the position of the mere observer is relinquished and one takes up in anticipation the position of a participant in a discourse about how to classify legally the expropriation after the collapse of the dictatorship. With this change of perspective, the expression "law" takes on a different meaning.

3. The correctness argument

Properly understood the real question in the debate about Radbruch's formula is whether it is acceptable from the standpoint of a participant in a legal system. Here one has to distinguish between participants in legal procedures in an iniquitous state and participants in procedures which begin to come to terms with

the former injustice after the collapse of the system. The question of whether the law necessarily raises a claim to correctness plays a decisive role in an explication of what it means to be a participant in a legal system. The thesis that the law necessarily raises such a claim can be called the "correctness argument". The correctness argument makes up the basis of the justification of Radbruch's formula.

The correctness argument maintains as valid that individual legal norms, individual legal decisions, and also whole legal systems necessarily raise a claim to correctness.⁴⁴ This can be demonstrated by examples in which there is an explicit negation of the claim to correctness. Here only one is dealt with.⁴⁵ It concerns the first provision of a new constitution for state X, in which a minority suppresses the majority. The minority would like to enjoy the advantages of the suppression of the majority while being honest about it. Their constitutional assembly thus decides on the following as the first provision of the constitution:

X is a sovereign, federal and unjust Republic.

Something is flawed in this constitutional provision, but the question is in what the flaw consists. One could immediately think of a conventional flaw. The provision doubtless offends conventions about the composition of constitutional texts but that in itself does not explain the flaw. For example, a 100-page catalogue of fundamental rights would also be most unusual and unconventional, but despite its unusualness it would not partake in the slightest of what makes the provision about injustice senseless. The same goes when one accepts that there is a moral flaw. From the standpoint of morality it makes no difference if the rights of the majority, at whose denial the provision about injustice aims, are expressly withheld in a second provision. But from the standpoint of what is flawed there is a real difference. The provision about injustice is not merely immoral it is also somehow crazy. One could perhaps think that there is just a political flaw in the provision about injustice.⁴⁶ There is such a flaw here, but even that does not explain its flawed nature completely.⁴⁷ A constitution can contain much that is politically inappropriate and in this sense technically flawed without it looking as odd as our first provision. Neither the conventional, nor the moral, nor the technical flaws can explain the absurdity of the

⁴⁴ This thesis finds a certain parallel in Radbruch's somewhat dark proposition: "Law is that reality whose meaning is to serve the legal value, the idea of law"; see G. Radbruch, *Rechtsphilosophie*, as published in G. Radbruch, *Gesamtausgabe*, in A. Kaufmann (ed.), (Heidelberg: C.F. Müller, 1993), vol. 2, p. 255.

⁴⁵ For further examples, see N. MacCormick, "Law, Morality and Positivism" in N. MacCormick and O. Weinberger, *An Institutional Theory of Law* (Dordrecht, Boston, Lancaster, and Tokyo: Reidel, 1986), p. 141; R. Alexy, *Begriff und Geltung*, n. 13 above, p. 68 ff.

⁴⁶ E. Bulygin, "Alexy und das Richtigkeitsargument" in A. Aarnio, S.L. Paulson, O. Weinberger, G.H. v. Wright and D. Wyduckel (eds.), *Rechtsnorm und Rechtswirklichkeit. Festschrift für W. Krawietz* (Berlin: Duncker & Humblot, 1993), p. 23 ff.

⁴⁷ R. Alexy, "Bulygins Kritik des Richtigkeitsarguments", in E. Garzón Valdés, W. Krawietz, G.H. v. Wright and R. Zimmerling (eds.), *Normative Systems in Legal and Moral Theory. Festschrift for Carlos E. Alchourrón and Eugenio Bulygin* (Berlin: Duncker & Humblot, 1997), p. 243 ff.

provision about injustice. This results, as is so often the case with the absurd, from a contradiction. A contradiction comes about because a claim to correctness is necessarily bound up with the act of giving a constitution, and in such cases it is above all a claim to justice. This claim, implicit in the act of giving a constitution, contradicts the explicit content of the provision about injustice. Such contradictions between the content of an act and the necessary presuppositions of its fulfilment can be called “performative contradictions”.⁴⁸

The claim to correctness determines the character of law. It excludes understanding law as a mere command of the powerful. Built into the law is an ideal dimension, an “aspiration” in Fuller’s sense. This still tells us nothing definitive about Radbruch’s formula. But it is clear that the law is not indifferent to its content.

The claim to correctness comprises the eight formal principles which, according to Fuller, define the inner or internal morality of law. But it goes further, including substantive justice⁴⁹ and thus what Fuller terms the external morality of law.⁵⁰ This connection of formal or procedural aspects with those of a material or substantive kind permits it to take into account the institutional as well as the ideal character of law.⁵¹

4. The injustice argument

The correctness argument does not by itself suffice to ground Radbruch’s formula. While the mere non-fulfilment of the claim to correctness does lead to legal defectiveness, it does not strip a norm or a legal act of its legal character or legal validity. Thus further arguments are required in order to ground Radbruch’s formula as a limit of law. The bundle of all these arguments can be called “the injustice argument”. It is composed of seven arguments⁵² which are in essence normative and which sometimes are made up of several strands.

⁴⁸ In this regard, see R. Alexy, “Law and Correctness”, n. 37 above, p. 209 ff.

⁴⁹ *Ibid.*, p. 214 ff. One can show this to be the case since justice is nothing other than correctness in regard to distribution and commutation and law certainly concerns distribution and commutation.

⁵⁰ L. Fuller, *The Morality of Law*, n. 31 above, pp. 44, 96, 132, 224.

⁵¹ See in this regard N. MacCormick, “Natural Law and the Separation of Law and Morals”, n. 41 above, p. 114 ff.

⁵² This number is not written in stone. Some of the seven arguments can be divided up further which would increase the number. Conversely, they would decrease if one coupled together some of the arguments. In addition, one could simply leave out or add arguments. An example of the latter would be a “semantic argument” which made it the case that for certain purposes a concept of law must be free of morality; see R. Alexy, *Begriff und Geltung*, n. 13 above, p. 72 ff. But this point is already dealt with in dealing with the adequacy of Radbruch’s formula from the observer’s perspective.

(a) *The clarity argument*

The first argument to be dealt with is the clarity argument. Hart gave it its classic formulation:

“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 . . . ; when we have the ample resources of plain speech we must not present the moral criticism of institutions as propositions of a disputable philosophy”.⁵³

This objection has a certain force but it is not decisive. A positivist concept of law which rejects the inclusion of any moral elements is indeed *ceteris paribus* simpler than a concept of law which contains moral elements, and simplicity *prima facie* implies clarity. Still it is not the case that every increase in complexity brings a corresponding increase in unclarity. There is little to fear in the way of confusion on the part of jurist or citizen when the formula “Extreme injustice is no law” is built into the concept of law. Confusion could also come about when courts or legal philosophers say to them that the most extreme injustice can be law. It is true that unclarity can come about because of cases like the wall shootings in which the line between extreme and less than extreme injustice is not easy to draw. Still this is not a problem for the clarity argument, only for the legal certainty argument. The clarity argument concerns itself exclusively with the question whether confusion results when moral elements in particular are included in the concept of law.

One should agree with Hart that clarity is a “sovereign virtue in jurisprudence”.⁵⁴ However one should not agree with his attribution to positivism of the “ample resources of plain speech” and to anti-positivism the “propositions of a disputable philosophy”.⁵⁵ Anti-positivism can also be formulated in plain speech and positivism can also be seen as a disputable philosophy. In the conflict between positivism and anti-positivism both camps confront each other on fundamentally equal terms. That positivism cannot even claim for itself a presumption of correctness is demonstrated by the fact that the law necessarily raises a claim to correctness. This speaks more for than against the inclusion of certain criteria of correctness in the concept of law. Hence, the clarity argument is not a knockdown one in this respect.

⁵³ H.L.A. Hart, “Positivism and the Separation of Law and Morals”, in H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), p. 77 ff.

⁵⁴ *Ibid.*, p. 49.

⁵⁵ *Ibid.*, p. 78.

(b) *The efficacy argument*

Radbruch put forward the view that legal positivism had made “both jurists and the people defenceless against just such arbitrary, cruel and criminal statutes”.⁵⁶ It had “disempowered every capacity to resist National Socialist legislation”.⁵⁷ His new⁵⁸ formula was supposed to provide jurists “with weapons against a recurrence of such an unjust state”.⁵⁹ In these quotations the future is as much a concern as the past. In respect of the past, we find two theses in Radbruch: a causal thesis and an exoneration thesis.⁶⁰ The causal thesis maintains that positivism eased the National Socialist takeover of power in 1933. The exoneration thesis argues that the unjust judgments given by judges of the Third Reich on the basis of unjust laws could “not lead to an attribution of personal responsibility . . . just because they were educated in the spirit of positivism”.⁶¹ There are serious objections to both theses,⁶² but these will not be pursued here. The acceptability of Radbruch’s formula as a thesis of legal philosophy does not depend on Radbruch’s conjectures about legal history, whether these are right or wrong. Rather, it depends on whether it, at an altogether general level, contributes somewhat to preventing the worst sort of injustice, thus whether it is effective. This is the future directed aspect of the arming “against a recurrence of such an unjust state”.⁶³

Hart accused Radbruch of “extraordinary naïvety”.⁶⁴ One could hardly take seriously that an anti-positivist concept of law “is likely to lead to a stiffening of resistance to evil”.⁶⁵ The objection about inefficacy is in good part completely justified. It makes little substantive difference to a judge in an unjust state whether he relies on Hart and refuses to apply an extremely unjust law on *moral* grounds or, with Radbruch, does the same by calling on *legal* grounds. In both cases he has to reckon with personal costs and the preparedness to take these on board depends on factors other than the concept of law.

Nevertheless, there are differences from the perspective of efficacy. The first becomes clear when one focuses on legal practice rather than the individual

⁵⁶ G. Radbruch, “Fünf Minuten Rechtsphilosophie” in G. Radbruch, *Gesamtausgabe*, (A. Kaufmann (ed.), Heidelberg: C.F. Müller, 1990), vol. 3, p. 78.

⁵⁷ G. Radbruch, “Gesetzliches Unrecht”, n. 6 above, p. 90.

⁵⁸ For the relationship between Radbruch’s legal philosophy after 1945 to his (in effect) positivistic stance before 1933, see S.L. Paulson, “Radbruch on Unjust Laws”, n. 9 above, p. 489 ff.

⁵⁹ G. Radbruch, “Gesetzliches Unrecht”, n. 6 above, p. 90.

⁶⁰ S.L. Paulson, “Lon L. Fuller, Gustav Radbruch, and the ‘Positivist’ Theses” (1994) 13 *Law and Philosophy* 313 at 314.

⁶¹ G. Radbruch, “Die Erneuerung des Rechts” in G. Radbruch, *Gesamtausgabe*, in A. Kaufmann (ed.), Heidelberg: C.F. Müller, 1990) vol. 3, p. 108.

⁶² See in this regard, S.L. Paulson, “Lon L. Fuller, Gustav Radbruch, and the ‘Positivist’ Theses”, n. 60 above, p. 314 ff. and H. Dreier, “Die Radbruchsche Formel—Erkenntnis oder Bekenntnis?” in H. Mayer (ed.), *Staatsrecht in Theorie und Praxis. Festschrift Robert Walter* (Vienna: Manz, 1991), p. 120 ff.

⁶³ G. Radbruch, “Gesetzliches Unrecht”, n. 6 above, p. 90.

⁶⁴ H.L.A. Hart, “Positivism and the Separation of Law and Morals”, n. 53 above, p. 74.

⁶⁵ H.L.A. Hart, *The Concept of Law*, n. 35 above, p. 210.

judge who measures legalised injustice against his conscience.⁶⁶ When there exists in legal practice a consensus that the fulfilment of certain minimal requirements of justice is a necessary condition for the legal character or validity of the rules of the state, then anchored in legal practice is the capacity to provide resistance to the acts of an unjust state by dint of arguments which are juridical as well as moral. In this respect it is true that one should not be under any illusions about the prospects for success of such resistance. A fairly successful unjust regime is in the position quickly to destroy the consensus of legal practice by individual intimidation, changes in personnel, and rewards for conformity. But it is after all thinkable that a weaker unjust regime will not succeed, at least in its beginning phase. This is a relatively limited effect, but still an effect, which we can call the "effect on practice".⁶⁷

Once an unjust state is successfully established, legal concepts can no longer do much work. As the German judicial decisions after 1945 and after 1989 show, they can make a substantive difference only after the collapse of such a state. But somehow there is a delicate and not unimportant effect of the anti-positivist concept of law which can successfully work against legislated wrongs even in a successfully established unjust state. We can call this the "risk effect".

For a judge or official in an unjust state his own situation will look different depending on whether he has reason to interpret it in accordance with a positivistic or an anti-positivistic concept of law. Take for example a judge who confronts the question whether he should impose a terroristic prison sentence which falls within the scope of the legislated injustice. He is neither saint nor hero. He is as little concerned about the fate of the accused as he is greatly concerned by his own. On the basis of historical experience, he cannot exclude the possibility that the unjust state will collapse and he wonders about what would then happen to him. Suppose that he must accept that an anti-positivistic concept of law will prevail or be generally accepted, according to which the norm on which he based his terroristic judgment is not law. It follows that he undertakes a relatively high risk of not being able to justify himself later and thus of being prosecuted. The risk is diminished if he can be sure that his conduct will be judged later in accordance with a positivistic concept of law. The risk does not disappear altogether, because a retroactive law can be enacted on the basis of which he could be deemed responsible, but it is still not equivalent. Given the problems for the rule of law created by retroactive penal statutes it is quite likely that no such law will pass, and if it does pass, he can still defend himself on the basis that he acted in accordance with the positive law of the time. This makes

⁶⁶ See W. Ott, "Die Radbruch'sche Formel. Pro und Contra" (1988) 107 *Zeitschrift für Schweizerisches Recht* 335 at 347.

⁶⁷ It has been objected that the inclusion of moral elements in the concept of law holds the danger of an "uncritical legitimization" of the law; see H. Kelsen, *Reine Rechtslehre*, n. 12 above, p. 71. Radbruch's formula confines this danger by setting only an outermost limit to law; see R. Alexy, *Begriff und Geltung*, n. 13 above, p. 82 ff. The actual source of this danger is the claim to correctness which the law necessarily raises. But this claim, when taken seriously, provides at the same time the most effective means of combatting the danger.

it clear that a prevalent or general acceptance of an anti-positivist concept of law increases the risks for the individual in an unjust state who goes along with or participates in unjust acts which are covered by statute. It may follow that even for those who see no reason to refrain from participating in injustice, or who would think such participation valuable, an incentive is established or strengthened to refrain from participation in injustice or at least to modify it. In this way, the prevalent or general acceptance of an anti-positivist concept of law can have positive effects even in an unjust state.⁶⁸ In sum, one can say that from the perspective of keeping legislated injustice at bay the anti-positivist concept of law in some respects at least has the advantage over the positivist.

(c) *The legal certainty argument*

A third argument against the anti-positivist concept of law supposes that it endangers legal certainty. In point of fact this argument affects those varieties of anti-positivism which propose a complete coincidence of law and morality and thus say that any injustice leads to the loss of legal character. And when one accords anybody the authority to decide not to follow laws if this is what his judgment about justice requires then the legal certainty argument becomes even stronger—an anarchism argument. We do not have to go further into this, since no anti-positivist who is worth taking seriously has put forward such views.⁶⁹ For Radbruch legal security is a value of the highest order. His reference to the “heavy”⁷⁰ and “frightful dangers for legal certainty”⁷¹ show that he knew what was at stake. Radbruch’s formula is not the result of a natural law intuition or an emotional reaction to National Socialism. Rather, it is the result of a careful balance of three elements which according to Radbruch make up the idea of law, which—as in the case of the claim to correctness—is implicated in the concept of law.⁷² The three elements are justice, purposiveness and legal certainty.⁷³ In 1932 it was the case for judges, though not citizens, that the balance was achieved through giving legal certainty an “unconditional precedence” over justice and purposiveness.⁷⁴ In order to get to his famous formula after 1945,

⁶⁸ Of course, these positive effects can be accompanied by negative ones. The prospect for the elite of an unjust regime of finding itself in court can strengthen their resistance to the threat of losing dominance. Here obviously a lot depends on the prevailing circumstances. Moreover, it is generally true that dictators and tyrants will only hand over power when there is no other choice and that their helpers and those who do their dirty work will be the more impressed by the risk effect the closer the hour of their downfall.

⁶⁹ This may be the reason why Hart speaks of a “danger of anarchy” which older authors like Bentham and Austin “may well have overrated”; H.L.A. Hart, *The Concept of Law*, n. 35 above, p. 211.

⁷⁰ G. Radbruch, “Gesetzliches Unrecht”, n. 6 above, p. 90.

⁷¹ G. Radbruch, “Die Erneuerung des Rechts”, n. 61 above, p. 108.

⁷² G. Radbruch, *Rechtsphilosophie*, n. 44 above, p. 255; id., “Gesetzliches Unrecht”, n. 6 above, p. 89. See on this F. Salinger, *Radbruchsche Formel und Rechtsstaat* (Heidelberg: C.F. Müller, 1995) p. 7 ff.

⁷³ G. Radbruch, *Rechtsphilosophie*, n. 44 above, p. 302.

⁷⁴ *Ibid.*, p. 315 ff.

Radbruch had to make only a minor adjustment in the system. It establishes a "hierarchy", which corresponds to Radbruch's older positivist understanding, in which purposiveness was at "the bottom" and legal certainty generally preceded justice. Only in the extreme case of intolerable injustice does the relationship reverse.⁷⁵ When there exists such a thing as extreme injustice then this way of conceiving the relationship of legal certainty and justice is not only acceptable but mandatory. To give legal certainty precedence even in the case of extreme injustice could not be reconciled with the claim to correctness, which includes justice as well as legal certainty.

(d) *The relativism argument*

At this stage everything turns on the question whether there is such a thing as extreme injustice. Hart remarked that nothing followed for the concept of law from the fact that moral principles are "rationally defensible" or "discoverable".⁷⁶ We shall not attempt to decide this issue here.⁷⁷ In any case, the converse is right. If all judgments about justice were nothing more than mere expressions of emotions, decisions, preferences, interests or ideologies, in short, if the thesis of radical relativism and subjectivism were correct, little could be said in favour of the anti-positivist concept of law. Radbruch's formula would then be nothing other than an empowerment of the judge to decide against the law in cases in which his subjective convictions are particularly intensively affected.⁷⁸ Hence, anti-positivism presupposes at least a rudimentary non-relativist ethic.

It is not possible to discuss here the problem of the justification of moral judgements or the objectivity of moral knowledge. Radical relativism can be opposed here only by means of a thesis and its illustration using two examples. The thesis states that judgments about extreme injustice are genuine judgments, capable of a rational justification and in so far possessing a cognitive and objective character.⁷⁹ Both examples are those already presented—the decisions on National Socialist injustice and on the killings on the internal German border.

The Federal Constitutional Court justified its application of Radbruch's formula in the decision about loss of nationality by saying that:

"the attempt to destroy physically and materially certain parts of one's own population, including women and children, in accordance with 'racial' criteria"

⁷⁵ G. Radbruch, "Gesetzliches Unrecht", n. 6 above, p. 88 ff.

⁷⁶ H.L.A. Hart, "Positivism and the Separation of Law and Morals", n. 53 above, p. 84.

⁷⁷ Radbruch thought otherwise; see G. Radbruch, *Rechtsphilosophie*, n. 44 above, p. 312: "Doubtless, if the purpose of law and the means towards its achievement could be scientifically and clearly ascertained the conclusion would be inevitable that the validity of positive law must cease to exist which deviates from the natural law which science once recognised, just as the exposed error gives way to the revealed truth. No justification is conceivable of the validity of demonstrably false law".

⁷⁸ See on this point N. Hoerster, "Zur Verteidigung des Rechtspositivismus" (1986) 39 *Neue Juristische Wochenschrift* 2480 at 2482.

⁷⁹ See R. Alexy, *A Theory of Legal Argumentation* (Oxford: Clarendon Press, 1989), p. 177 ff.

“intolerably” contradicts justice⁸⁰ and so amounts to an extreme injustice. This example is decisive. Naturally one can ask the further question why the destruction of parts of one’s own population on a racial basis is extreme injustice. This question would however approach what Radbruch called “wilful scepticism”.⁸¹ Here we should accept that there is a core area of human rights such that harm to it amounts to extreme injustice.⁸²

If this is right then in principle the relativism objection is rebutted. Naturally nothing has yet been said about the degree or scope of the rebuttal. The wall shooting cases show this clearly. In contrast to the destruction of Jews in the Third Reich, there is a serious controversy about whether the killings on the internal German border amount to extreme injustice.⁸³ The mere fact of this controversy shows that in this case the question whether there was extreme injustice cannot be decided by appeal to evidence but only with the help of arguments. In this regard the issue is not confined to the killing of people on a border. In addition, there is the fact that the killing took place because the fugitive wanted to leave a country in which he had to conduct his whole life in accordance with the will of the political leadership under circumstances which he did not desire and which he apparently detested. Even this might not amount to extreme injustice. But if one considers as a third factor that in the political system which the fugitive wanted to escape there was no possibility of changing the relationships through free public discussion and a political opposition, then there is something to be said for classifying as extreme injustice the killing of for the most part young men at the Berlin wall and on the border strips which until 1989 divided Germany.

Fuller objected that Radbruch’s recourse to some or other “higher law” was superfluous.⁸⁴ Fuller’s target here was what Radbruch defined as “suprapositive law” and specified primarily as human rights.⁸⁵ Fuller suggested bringing into play as a substitute for such substantive standards his inner or internal morality of law, that is, his principles of legality:

“To me there is nothing shocking in saying that a dictatorship which clothes itself with a tinsel of legal form can so far depart from the morality of order, from the inner morality of law itself, that it ceases to be a legal system”.⁸⁶

Fuller applied this expressly to “the invalidity of . . . statutes”,⁸⁷ and, like Radbruch, he worked with a threshold which had to be crossed—“so far depart”. One can therefore speak of a Fullerian version of Radbruch’s formula.

⁸⁰ BVerfGE 23, 98 (106).

⁸¹ G. Radbruch, “Fünf Minuten”, n. 56 above, p. 79.

⁸² For an attempt to ground such acceptance, see R. Alexy, “Discourse Theory and Human Rights” (1996) 9 *Ratio Juris* 209.

⁸³ See on this point, R. Alexy, *Mauerschützen*, n. 23 above, p. 23 ff.

⁸⁴ L.L. Fuller, “Positivism and Fidelity to Law” (1957/58) 71 *Harvard Law Review* 630 at 659.

⁸⁵ G. Radbruch, “Gesetzliches Unrecht”, n. 6 above, p. 90; id., “Fünf Minuten”, n. 56 above, p. 79.

⁸⁶ L.L. Fuller, “Positivism and Fidelity to Law”, n. 84 above, 660.

⁸⁷ *Ibid.*

This version has the advantage that Fuller's principles of legality, for example, the requirement of publicity, the prohibition on retroactivity and the requirement of compliance with law⁸⁸ offer the relativism objection a much smaller target than Radbruch's substantive standards which are directly oriented to justice. In addition, it is generally true that extreme injustice is bound up with extreme harm to principles of the rule of law. However, the "overlapping" of substantive justice and of the formal requirements of the rule of law which Fuller observed is not strong enough to make Radbruch's formula superfluous. Decree 11 under the Reich's Citizenship Law of 25 November 1941, the topic of both of the cases set out above on National Socialist injustice, was enacted on the basis of an enabling provision⁸⁹ contained in section 3 of the Reich's Citizenship Law of 15 September 1935⁹⁰ and was published in the appropriate fashion.⁹¹ The Reich's Citizenship Law, which expressly reserved citizenship to those of "German or substantively related blood", thus setting the stage directly for Decree 11, was unanimously approved by the Reichstag. Decree 11 is clear and determinate and it was followed by the official organs of the Third Reich. It does contain certain retroactive elements, because when it came into force it removed the citizenship and property of Jews who had emigrated before it came into force. But that is a relatively weak form of retroactivity. It consists simply in its being coupled to a set of circumstances at a particular point of time and with particular legal consequences, which obtained and persisted in the past. Taken by itself, this does not amount to a nullity.

Finally, nullity results not from the form of the regulation but from its substance, from its extreme injustice. Fuller's criteria can therefore complement but not replace Radbruch's formula. This is true also of section 27, paragraph 2 of the German Democratic Republic's Border Law, which was the focus of the wall killing cases.

(e) The democracy argument

The democracy argument is closely related to the legal certainty and to the relativism argument. It states that lurking in the anti-positivist concept of law is the danger that the judge in answering the call of justice will oppose the decisions of the legislature, which gets its legitimacy from democracy.⁹² Since in addition

⁸⁸ See L.L. Fuller, *The Morality of Law*, n. 31 above, p. 39.

⁸⁹ One can still ask whether the declaration of loss of property in section 3, paragraph 1 of Decree 11 is something which belongs to the domain of citizenship of the state and of the Reich and therefore whether the enabling provision permitted the issuing of that part of the Decree. Here there are arguments both for and against which is perhaps the reason that the Federal Court of Justice left the question open (BGHZ 16, 350 (353)). Section 2 of Decree 11 in contrast is clearly included within the scope of the enabling provision.

⁹⁰ RGBl. I p. 1146.

⁹¹ RGBl. I p. 722.

⁹² See I Maus, "Die Trennung von Recht und Moral als Begrenzung des Rechts" (1989) 20 *Rechtstheorie* 191 at 193: "The moral argument can thus easily be abused as a substitute for democracy".

this results in an intrusion of the judicial branch into the legislative, the objection can also be formulated as one about the separation of powers. This objection comes up empty when, as in the cases discussed here, the law of dictators is in issue, who know neither democracy nor the separation of powers. But the objection also loses its force at a more general level. Radbruch's formula pertains only to extreme injustice. It works only in a core area. The controls on harms to basic rights exercised by constitutional courts in democratic constitutional states have a content which goes much further. If one wants to present a democracy or separation of powers argument against Radbruch's formula, one must therefore renounce any judicially controlled accountability of the legislature to the basic rights.

(f) *The lack of necessity argument*

Radbruch,⁹³ Fuller⁹⁴ and Hart⁹⁵ agreed that a retroactive law is to be recommended over the application of Radbruch's formula. One could go a step further and say that Radbruch's formula, at least in the period after the collapse of an unjust regime, is unnecessary because the new legislature has the power to override legal injustice by means of a retroactive law. However, this would be no solution if one takes into account the possibility that the new legislature—for whatever reason—is altogether inactive or not sufficiently active. The case discussed above of the Jewish emigrant's deposit of securities shows this with great clarity. If it were left up to the legislature whether she could get restitution of her property, and the legislature remained inactive, she would endure a violation of her rights based on extreme injustice. There are thus cases, required by the claim to correctness, in which Radbruch's formula is necessary to protect fundamental rights. In the actual case, a restitutory statute had been enacted. It provided for a limited period in which demands for restitution could be validated and the emigrant who had returned to Germany had failed to make a timely claim. The Federal Court of Justice swept this limitation aside with Radbruch's formula and thus prevented the denial through the restitutory law of restitution to the emigrant.⁹⁶ This example shows that respect for the rights of the citizen requires Radbruch's formula.

(g) *The candour argument*

The candour argument asserts that Radbruch's formula leads to a circumvention in criminal cases of the fundamental principle *nulla poena sine lege*. Hart illustrates this argument through the case decided by the Superior Provincial Court Bamberg in 1949 of a woman who wanted to get rid of her husband and

⁹³ G. Radbruch, "Die Erneuerung des Rechts", n. 61 above, p. 108.

⁹⁴ L.L. Fuller, "Positivism and Fidelity to Law", n. 84 above, 661.

⁹⁵ H.L.A. Hart, "Positivism and the Separation of Law and Morals", n. 53 above, p. 76.

⁹⁶ BGHZ 16, 350 (355 ff.).

thus denounced him to the authorities in 1944 for having made insulting remarks about Hitler. The husband was sentenced to death, but this was not carried out and he was sent to frontline service. The Superior Provincial Court held that, although the conduct of the woman did not violate the law of the Third Reich, it was to be classified as a violation of the law because it "offended against the sense of justice and reasonableness of all right thinking people".⁹⁷ It thus convicted her of deprivation of liberty. Hart objected in the following way:

"There were, of course, two other choices. One was to let the woman go unpunished; one can sympathize with and endorse the view that this might have been a bad thing to do. The other was to face the fact that if the woman were to be punished it must be pursuant to the introduction of a frankly retrospective law and with a full consciousness of what was sacrificed in securing her punishment in this way. Odious as retrospective criminal legislation and punishment may be, to have pursued it openly in this case would at least have had the merits of candour".⁹⁸

The candour argument is the strongest argument against Radbruch's formula but it is not a knockdown one.

The simplest path to its rescue would consist in narrowing its scope of application. One could say that it indeed leads to the conclusion that statutes which justify extreme injustice can never be law or achieve legal validity, but this does not mean that the trust of the actor in positive law should not be protected. The principle *Nulla poena sine lege* must be exclusively connected to this end and must take its bearings solely from enacted and effective norms whatever their content of injustice. The practical significance of Radbruch's formula would then, in order to protect the actor, be limited by the principle *Nulla poena sine lege*.

However, it is better to take the opposite path which consists in a narrowing of the principle *Nulla poena sine lege* by Radbruch's formula. This narrowing is obviously susceptible to limits for two reasons. The first reason is that Radbruch's formula has an exclusively negative character. It does not create new bases of criminality but only destroys particular grounds of justification in an iniquitous regime. The second reason arises out of the distinction between the prescription of the *lex scripta* and the *ius praeivium*. Radbruch's formula cannot by definition offend against the prescription of the *ius praeivium*—that the act must be punishable before it is undertaken. According to the formula, it is the justificatory ground of an iniquitous regime that is from the outset a nullity. Thus applying Radbruch's formula does not retroactively change the legal situation, it just determines what at the time of the act the legal situation was. Of course from the perspective of the sheer facts of the matter there is a change, and just in this lies the critical bite of Radbruch's formula. This change means that the prescription of the *lex scripta* is not upheld which secured trust in the appropriately enacted and socially effective law which existed at that time. The

⁹⁷ OLG Bamberg, *Süddeutsche Juristen-Zeitung* 1950, column 207.

⁹⁸ H.L.A. Hart, "Positivism and the Separation of Law and Morals", n. 53 above, p. 76.

core of Hart's accusation of lack of candour is thus that Radbruch reduced the principle of *Nulla poena sine lege* to the prescription of the *ius praevium* and thus concealed the harm to the prescription of the *lex scripta*. In this way the fact is concealed that there is a choice between "the lesser of two evils". The impression is created 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".⁹⁹

One can in fact abuse Radbruch's formula in this way.¹⁰⁰ The potential of abuse, however, never entails necessity. In Radbruch himself one finds no simulated harmony. The opposite is the case for he talks of antinomies,¹⁰¹ conflicts¹⁰² and "frightful dangers".¹⁰³ Radbruch was clear that his formula involved a choice between two evils and he did not make the slightest attempt to conceal this. That judicial decision-making can take this line is shown especially by the judgment of the Federal Constitutional Court about the wall shootings. Despite some false steps,¹⁰⁴ it is clear that in the end the question is whether it is preferable to incur the cost of a loss in legal certainty or a loss in substantive justice.¹⁰⁵ When it is not diluted by unnecessary extra features, the application of Radbruch's formula cannot be accused of lack of candour.

With this we are at the close of our review of the seven arguments. They showed that many perspectives come into play in the conflict over Radbruch's formula. Most of the objections can be deprived of their force. Against this background, one is weighing the trust of an actor who is active in an unjust state in an enduring justification on the basis of legislated injustice, a basis which supports his deeds, against the rights of the victim and indeed, because of the risk effect, also against the future victim. As a result, everything speaks in favour of not preserving any protection for the trust of the actor, if the threshold of extreme injustice is crossed. Radbruch's formula can thus also be accepted within the domain of criminal law.¹⁰⁶

⁹⁹ Ibid., p. 77.

¹⁰⁰ See on this point, R. Alexy, *Mauerschützen*, n. 23 above, p. 30; id., *Der Beschluß des Bundesverfassungsgerichts zu den Tötungen an der innerdeutschen Grenze vom 24. Oktober 1996* (Hamburg: Vandenhoeck & Ruprecht, 1997), p. 19 ff.

¹⁰¹ G. Radbruch, *Rechtsphilosophie*, n. 44 above, p. 302.

¹⁰² G. Radbruch, "Gesetzliches Unrecht", n. 6 above, p. 89.

¹⁰³ Ibid., p. 90. See on this point, L.L. Fuller, "Positivism and Fidelity to Law", n. 84 above, 655 ff.

¹⁰⁴ See R. Alexy, *Der Beschluß des Bundesverfassungsgerichts*, n. 100 above, p. 19 ff.

¹⁰⁵ BVerfGE 95, 96 (130,133).

¹⁰⁶ Radbruch's formula results in the deed being in violation of the law. The question of individual responsibility, without which the issue of punishment does not arise, is not thereby answered. In its first wall shooting judgment, the Federal Court of Justice described this pressing problem as "very difficult" but then decided simply on the obviousness to the young border soldiers of the injustice because of its extreme character; see BGHSt 39, 1 (34). This conclusion is problematic; see R. Alexy, *Mauerschützen*, n. 23 above, p. 36 ff. The Federal Constitutional Court explicitly contested this conclusion. It reasoned that the extreme character of injustice not always implies its obviousness for everybody; see BVerfGE 95, 96 (142). But the Court then sat on the fence since it allowed the Federal Court of Justice's conclusion to stand that there was subjective evidence simply on the

basis of objective extreme injustice; see R. Alexy, *Der Beschluß des Bundesverfassungsgerichts*, n. 100 above, p. 35 ff. There is something to be said for holding that many young border soldiers, because of their upbringing and their environment, lacked the potential to cultivate the capacity to appreciate clearly the extreme injustice of their act which would be required to confirm their guilt. It would follow that in spite of the violation of the law brought about by Radbruch's formula, they were not just to be punished in a mild way but acquitted; see R. Alexy, *Mauerschützen*, n. 23 above, p. 24 ff., p. 36 ff. Something different is required in the case of their superiors. In the meantime the Federal Court of Justice has decided the case of the shooting of an armed deserter on the Berlin border in this fashion; see BGHSt 42, 356 (362).