

Gustav Radbruch's Concept of Law

Robert Alexy*

Two legal philosophers in the German-speaking countries excelled over all the others in the 20th century, and their philosophies remain topics of lively debate in the global discussion today. I have in mind Hans Kelsen and Gustav Radbruch. I will be concerned here with Radbruch.¹

The elaboration of Radbruch's legal philosophy culminates in two developments. The first is the systematic presentation of his position in the new edition of his treatise *Legal Philosophy* (1932). In the preface to the new edition Radbruch remarks, with an eye to the first edition (1914), called *Outlines of Legal Philosophy*,² that the text from 1932 is in fact 'a new book rather than a new edition'.³ The second culminating development is represented by the article 'Statutory Lawlessness and Supra-Statutory Law (1946)', where Radbruch introduces the formula, well known as 'the Radbruch Formula', which says, in a word, that extremely unjust law is no law.⁴ With this, Radbruch clearly takes a stand as a non-positivist. The Radbruch Formula is not only one of the most

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¹ On Radbruch's biography, see Robert Alexy, 'Gustav Radbruch (1878-1949)', in: *Christiana Albertina* 58 (2004), 47-51.

² On the relation of the *Outlines of Legal Philosophy* from 1914 to the *Legal Philosophy* from 1932, see Ralf Dreier, 'Kontinuitäten und Diskontinuitäten in der Rechtsphilosophie Radbruchs', in: Martin Borowski and Stanley L. Paulson (eds.), *Die Natur des Rechts bei Gustav Radbruch* (Tübingen: Mohr Siebeck, 2015), 183-228, at 190-212.

³ Gustav Radbruch, *Legal Philosophy* (first publ. 1932), trans. Kurt Wilk, in: *The Legal Philosophies of Lask, Radbruch, and Dabin* (Cambridge, Mass.: Harvard University Press, 1950), 43-224, at 47. For the convenience of the reader, I have referred to the English-language translation of Radbruch's *Rechtsphilosophie*. Almost invariably, however, I have found it necessary to alter the translation.

⁴ Gustav Radbruch, 'Statutory Lawlessness and Supra-Statutory Law(1946)', trans. Bonnie Litschewski Paulson and Stanley L. Paulson, in: *Oxford Journal of Legal Studies* 26 (2006), 1-11, at 7.

widely discussed issues in legal philosophy, it is also of the greatest practical significance, as its application by German courts after the defeat of National Socialism in 1945 and after the collapse of the German Democratic Republic in 1989 shows.⁵ One of the main problems in interpreting Radbruch is to determine whether these two developments, that of 1932 and that of 1946, stand in a relation of discontinuity or of continuity. This question, too, will be answered here. The focus shall be Radbruch's system developed in the *Legal Philosophy* of 1932 and its relation to the formula from 1946. The analysis will lead, nearly by itself, to a continuity thesis. It claims that Radbruch was already in 1932 a non-positivist,⁶ and that his alterations in the system, far from disrupting it, were modest in character, but they had, nevertheless, far-reaching consequences.

I. Gustav Radbruch's System

The system of Radbruch's legal philosophy consists of three triads: the law triad, the idea triad, and the purpose triad.

1. The Law Triad

Radbruch gives expression to the law triad with the following sentence, which he emphasizes with italics: '*Law is the reality whose sense is to serve the value of law, the idea of law.*'⁷ The reference to the value of law alongside the idea of law has no independent significance for the content of the sentence. It serves simply as a hint in the direction of the neo-Kantian background⁸ of Radbruch's concept of law. This observation is confirmed by the fact that Radbruch refers in

⁵ See on this Robert Alexy, 'A Defense of Radbruch's Formula', in: M.D.A. Freeman (ed.), *Introduction to Jurisprudence*, 8th. edn (London: Sweet & Maxwell and Thomson Reuters, 2008), 426-43, at 428-32.

⁶ On Radbruch's non-positivismus before 1932 see Stanley L. Paulson, 'Zur Kontinuität der nichtpositivistischen Rechtsphilosophie Radbruchs', in: Martin Borowski and Stanley L. Paulson (eds), *Die Natur des Rechts bei Gustav Radbruch* (Tübingen: Mohr Siebeck, 2015), 151-182, at 158-177.

⁷ Radbruch, *Legal Philosophy* (n. 3, above), § 4, at 73.

⁸ See on this Ralf Dreier and Stanley L. Paulson, 'Einführung in die Rechtsphilosophie Radbruchs', in: Ralf Dreier and Stanley L. Paulson (eds.), *Gustav Radbruch, Rechtsphilosophie*, 2nd edn (C.F. Müller: Heidelberg 2003), 237-253, 238-241

many formulations solely to the idea of law.⁹ This lead sentence of Radbruch's connects three elements: reality, the idea of law, and sense. With the concept of reality Radbruch refers to the positivity of law, that is, to its issuance and its efficacy. This is the real dimension of law. With the concept of the idea of law Radbruch juxtaposes this real dimension with an ideal dimension,¹⁰ the centre of which is justice as the 'specific idea of law'.¹¹ Our analysis of the second triad, the idea triad of course, will show that the idea of law is not exhausted by justice. On the contrary, it includes, as its 'second element', expediency or suitability for a purpose and, as its 'third element', legal certainty.¹² This implies that Radbruch's alternative formulation of the law triad which says, also in italics, and repeated at another place,¹³ that '*law is the reality whose sense is to serve justice*',¹⁴ must be interpreted either as an abridged version accentuating the specific character of justice or as a version in which the concept of justice is used with a sufficiently broad meaning to include expediency and legal certainty. For both interpretations, clues are to be found.¹⁵

A legal positivist can accept the notion that there exists a confrontation between positivity and ideality without thereby ceasing to be a positivist. He need only maintain that the law as such is confined to positivity, a confinement that does not preclude its being criticized from the point of view of ideality, understood as a point of view external to law, which is to say a moral point of view. Radbruch's argument against the positivist's separation thesis is the third element of the law triad, the sense thesis. What Radbruch would have us understand by this thesis becomes clear when he applies it to the relation between science and truth. That science has the sense 'of serving the truth' means that scientific 'labours regardless of their success or failure ... all at least aim at the truth

⁹ Radbruch, *Legal Philosophy* (n. 3, above), § 1, 3, 9, at 52, 69, 107.

¹⁰ On the distinction between the real and the ideal dimension of law see Robert Alexy, 'The Dual Nature of Law', in: *Ratio Juris* 23 (2010), 167-82, at 168, 173.

¹¹ Radbruch, *Legal Philosophy* (n. 3, above), § 7, at 90.

¹² *Ibid.*, § 9, at 108.

¹³ *Ibid.*, § 6, at 88.

¹⁴ *Ibid.*, § 4, at 75.

¹⁵ See Radbruch, *Legal Philosophy* (n. 3, above), § 7, at 90: 'specific idea of law' and § 10, at 119: 'just judge'.

and claim to be true'.¹⁶ That is, to have the sense of serving the truth is to raise the claim to be true. With this, a bridge is constructed between the neo-Kantian concept of sense and the concept of claim stemming from analytical philosophy.¹⁷ Radbruch himself has already anticipated this, when he says that '[l]aw, by its nature, raises the claim to justice'.¹⁸ The words 'by its nature' are of special significance, here. Their import is that law *necessarily* raises a claim to justice. With another of his formulations, Radbruch clearly enters the centre stage in the contemporary debate about the concept of law, which turns on the question of whether law, first, necessarily raises a claim to correctness and, second, whether this claim as a claim to a correctness includes moral correctness.¹⁹ The sentence in question reads: "Justice means correctness as related especially to the law".²⁰ And justice is, indeed, nothing other than the correctness of distribution and compensation,²¹ and the law is essentially concerned with distribution and compensation. For these reasons Radbruch can be considered as an early representative of the claim thesis, and, as such, he is necessarily a non-positivist, at least a super-inclusive non-positivist.²²

Is Radbruch's sentence that law is the reality whose sense is to serve the idea of law – or its specification that law is the reality whose sense is to serve

¹⁶ Ibid., § 1, at 50.

¹⁷ See on this Dreier and Paulson, 'Einführung in die Rechtsphilosophie Radbruchs' (n. 8, above), 241.

¹⁸ Radbruch, *Legal Philosophy* (n. 3, above), § 3, at 64.

¹⁹ See, for instance, Eugenio Bulygin, 'Alexy und das Richtigkeitsargument', in: Aulis Aarnio, Stanley L. Paulson, Ota Weinberger, Georg Henrik von Wright, and Dieter Wyduckel (eds.), *Rechtsnorm und Rechtswirklichkeit, Festschrift für Werner Krawietz* (Berlin: Duncker & Humblot, 1993), 19-24; Robert Alexy, 'Bulygins Kritik des Richtigkeitsarguments', in: Ernesto Garzón Valdés, Werner Krawietz, Georg Henrik von Wright, and Ruth Zimmerling (eds.), *Normative Systems in Legal and Moral Theory, Festschrift für Carlos E. Alchourrón and Eugenio Bulygin*, (Berlin: Duncker & Humblot, 1997), 235-250; Eugenio Bulygin, 'Alexy's Thesis of the Necessary Connection between Law and Morality', in: *Ratio Juris* 13 (2000), 133-137; Robert Alexy, 'On the Thesis of a Necessary Connection between Law and Morality: Bulygin's Critique', in: *Ratio Juris* 13 (2000), 138-147; Eugenio Bulygin, 'Alexy Between Positivism and Non-positivism', in: Jordi Ferrer Beltrán, José Juan Moreso, and Diego M. Papayannis (eds.), *Neutrality and Theory of Law* (Dordrecht: Springer, 2013), 49-59; Robert Alexy, 'Between Positivism and Non-positivism? A Third Reply to Eugenio Bulygin', in: Jordi Ferrer Beltrán, José Juan Moreso, and Diego M. Papayannis (eds.), *Neutrality and Theory of Law* (Dordrecht: Springer, 2013), 225-238.

²⁰ Radbruch, *Legal Philosophy* (n. 3, above), § 4, at 76.

²¹ Robert Alexy, 'Giustizia come correttezza', in: *Ragion pratica* 5 (1997), 103-113, at 105.

²² On the three forms of non-positivism, exclusive, inclusive, and super-inclusive non-positivism, see Robert Alexy, 'Law, Morality, and the Existence of Human Rights', in: *Ratio Juris* 25 (2012), 2-14, at 4-7; Robert Alexy, 'Law and Morality: A Continental European Perspective', in: James D. Wright (ed.), *International Encyclopedia of the Social and Behavioral Sciences*, 2nd ed., vol. 13 (Oxford: Elsevier, 2015), 479-82, at 479-80.

justice – properly considered as his definition of law? This proposal, however, cannot be endorsed without further ado. For Radbruch, with direct reference to the specification, the justice version, goes on to say: ‘With this, a determination of the concept of law would seem to be indicated, but a determination of the concept itself has not yet been given’.²³ Now, the sentence that law is the reality whose sense is to serve the idea of law can be designated as the ‘basic sentence’ of Radbruch’s legal philosophy. Radbruch attempts to reach a definition of law from his second version, the justice version, when he writes: ‘we define law as the *complex of general precepts for human beings’ living together*’.²⁴ The bridge from the basis sentence to this definition is said to be the neo-Kantian theorem of the ‘material qualification of the idea’.²⁵ I shall not, however, pursue this. Only one point is of interest here. It concerns the demands that ought to be made on definitions. It is a postulate of rationality that a definition, in its *definiens*, use concepts that are as precise as possible. ‘Reality’ in the basic sentence is not very precise. ‘Precept’ is more concrete, ‘norm’, however, would be more precise than ‘precept’. But these are technical questions, not the main problem of Radbruch’s ‘determination of the concept of law’. The main problem is that his determination does not meet, or meets only badly, an essential demand on definitions. Definitions, and the concepts defined by them, must, as Kant puts it, be ‘adequate to the object’.²⁶ This presupposes that they capture not only the necessary properties of the object, but also its essential properties.²⁷ The two essential properties of law are power in the form of decisions and coercion, and correctness, as including justice.²⁸ In Radbruch’s ‘determination of the concept’ power is, indeed, represented by what he terms a ‘precept’, albeit not very clearly. Weighing more heavily is the fact that that the sense of ‘serving justice’ or the

²³ Radbruch, *Legal Philosophy* (n. 3, above), § 4, at 76.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ Immanuel Kant, *Critique of Pure Reason* (first publ. 1781; second edn. 1787), trans. Werner S. Pluhar (Indianapolis and Cambridge: Hackett, 1996), A 728, B 756.

²⁷ Robert Alexy, ‘On the Concept and Nature of Law’, in: *Ratio Juris* 21 (2008), 281-299, at 290-292.

²⁸ *Ibid.*, 292-6.

claim to correctness including justice, is only present in the general character of precepts in an altogether emaciated form.²⁹ In short, Radbruch's definition of law as a complex of general precepts for human beings' living together does not capture the essence of law. This, however, means that Radbruch's basic sentence, for example in the justice version, is his real definition of law, whereby the 'idea of law' version dominates for systematic reasons. This is supported by textual evidence. Thus, in section 1 of *Legal Philosophy* one reads that the 'concept of law can only be determined as something given, the sense of which is to realize the idea of law'.³⁰ This concerns the *determination* of the concept of law. But what is the determination of a concept if not its definition? Something similar is found in section 9, where Radbruch talks about the 'concept of law' which 'urged' us to the 'idea of law'.³¹ Here concept and idea are directly connected. This connection has consequences for the classification of something as law, that is, for the legal character or legal nature, consequences that Radbruch describes as follows: 'As a matter of fact, we decide by the standard of purported justice alone whether a precept is legal in nature at all, whether it accords with the *concept* of law.'³² Thus, the basis sentence clearly proves to be a non-positivistic definition of law. Still, it is not to be denied that Radbruch's definition of law as the complex of general precepts for human beings' living together has the character of a definition. This is, however, a secondary matter, to be placed behind Radbruch's real definition of law, which says: '*Law is the reality whose sense is to serve the value of law, the idea of law.*'³³ Here, in neo-Kantian terminology, Radbruch has identified the Archimedean point around which debates over the concept of law revolve and will continue to revolve over a long period of time, indeed, for as long as philosophical questions are entertained.

²⁹ See on this Andreas Funke, 'Überlegungen zu Gustav Radbruchs "Verleugnungsformel"', in: *Archives for Philosophy of Law and Social Philosophy* 89 (2003), 1-16, at 14.

³⁰ Radbruch, *Legal Philosophy* (n. 3, above), § 1, at 52.

³¹ *Ibid.*, § 9, at 107.

³² *Ibid.*, § 9, at 110. See on this Robert Alexy, *The Argument from Injustice. A Reply to Legal Positivism* (first publ. 1992), trans. Bonnie Litschewski Paulson and Stanley L. Paulson (Oxford: Clarendon Press, 2002), 34.

³³ *Ibid.*, § 4, at 73.

2. The Idea Triad

It has already been remarked that the idea of law refers not only to justice. It includes, as further elements or ‘sides’,³⁴ expediency and legal certainty.³⁵ Occasionally, Radbruch, speaks of ‘three principles’³⁶ instead of the more familiar three elements or three sides. This is of considerable importance for determining, by means of balancing, the relation of the three elements of the idea of law to each other.³⁷

a).Justice

Justice often takes the place of the greater idea of law in Radbruch’s basic sentence, a fact that indicates the particular importance that he attaches to it. This high-level systematic ranking is connected, however, with a minimal content. Justice is understood as equality,³⁸ and as equality it is defined in a purely formal way. The two classical elements of formal justice are found here, albeit not always clearly separated. The first is the general form. Radbruch says in this connection that ‘it is essential to a legal precept ... that the claim to generalizability be raised’.³⁹ ‘Generalizability’ is not thereby understood as referring to some test of universalizability. The claim of legal precepts to generalizability is confined to the claim of having a ‘general character’.⁴⁰ This is nothing more than a demand on the logical form of the legal norm, requiring that legal norms have the form: For all x , if x is a T , then it is obligatory that x is a R .⁴¹ Nothing is said here about the content of the norm. The second classical element of formal justice is the Aristotelian demand⁴² ‘that equals be treated equally, that unequals

³⁴ Ibid., §9, at 111.

³⁵ Ibid., § 9, at 108

³⁶ Ibid., § 9, at 110.

³⁷ Robert Alexy, ‘Legal Certainty and Correctness’, in: *Ratio Juris* 28 (2015), 441-451, at 444-447.

³⁸ Radbruch, *Legal Philosophy* (n. 3, above), § 4, at 74.

³⁹ Ibid., § 4, at 76.

⁴⁰ Ibid.

⁴¹ See Robert Alexy, *A Theory of Legal Argumentation. The Theory of Rational Discourse as Theory of Legal Justification* (first publ. 1978), trans. Ruth Adler and Neil MacCormick (Oxford: Clarendon Press, 1986), 222.

⁴² Aristotele, *Politics*, in: *The Complete Works of Aristotle. The Revised Oxford Translation*, ed. Jonathan Barnes, vol. 2 (Princeton: Princeton University Press, 1984), 1986-2129, at 2031 (1280a): ‘For example, justice is thought

be treated differently according to their differences'.⁴³ Radbruch correctly emphasizes that with this it is not yet said 'who is to be treated as equal and who as unequal'.⁴⁴ But this, so Radbruch in 1932, reaches beyond what justice can say. Justice determines only 'the form of what is right'.⁴⁵ And at exactly this point, Radbruch takes a step that is fraught with consequences for his system: 'In order to gain the content of law, a second notion must be added, expediency.'⁴⁶

b) Expediency

'Expediency' is generally understood as speaking to the suitability of a means for the realization of a purpose. Expediency in Radbruch's philosophy is something altogether different. It refers not to means but to purposes, and not to just any purpose but only to purposes that are 'capable of absolute value'.⁴⁷ Three kinds of such purposes are said to exist: 'individual human personalities, collective human personalities, and human artefacts'.⁴⁸ The question of whether and how, on this basis, the content of justice can be determined shall be considered in the context of the purpose triad, which consists of these three purposes. It will turn out that this triad is the place where the link between Radbruch's legal philosophy before 1933 and after 1945 is found. Ahead of this, however, it is well to turn to the third element of the idea triad, that of legal certainty.

c) Legal Certainty

The third element of the idea of law, legal certainty, serves to compensate for the weaknesses of the first two elements. These weaknesses are epistemic in character. Here one can speak of the problem of practical knowledge.⁴⁹ Practical knowledge concerns knowledge about what is obligatory, forbidden, and permit-

by them to be, and is, equality – not, however, for all, but only for equals. And inequality is thought to be, and is, justice; neither is this for all, but only for unequals.'

⁴³ Radbruch, *Legal Philosophy* (n. 3, above), § 7, at 90.

⁴⁴ *Ibid.*, § 4, at 75.

⁴⁵ *Ibid.*, § 7, at 91.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*, § 7, at 92.

⁴⁸ *Ibid.*

⁴⁹ Alexy, 'The Dual Nature of Law' (n. 10, above), 173.

ted, and what is good and bad. If this could be known in law in all cases ‘with scientific discernibility’,⁵⁰ the principle of legal certainty would play a relatively small role. The determinations of positive law would not be real determinations. They would have only a declaratory character. The real field of legal certainty would no longer rest on the field of determination but on that of enforcement. This leads directly to the question of the degree to which expediency can give justice a discernibly recognizable content. This turns on the third triad, the purpose triad.

3. The Purpose Triad

Radbruch presents the three purposes in manifold ways. The distinction, already mentioned, between individual human personalities, collective human personalities, and human artefacts is specified as a distinction between ‘*individual values, collective values, and artefact values*’⁵¹ as well as between ‘*individualistic, supra-individualistic, and completely transpersonal views*’.⁵² To this, the triad of liberty, nation, and culture⁵³ shall correspond. Here three points are of interest. The first is that liberty and, with it, ‘the human rights, the constitutional rights, and the individual’s right to freedom’⁵⁴ are assigned to the individualistic view, whereas the supra-individualistic view is connected with the catchword ‘self-interest yields to the common good’.⁵⁵ The second point is that the three views collide.⁵⁶ The third and systematically most important point of the three is that in Radbruch’s *Legal Philosophy* of 1932; the resolution of this collision is not a matter of cognition but a matter of decision: ‘One has to decide whether one wants to grant to the individual values, the collective values, or the artefact values the first place in the hierarchy of values.’⁵⁷ Radbruch characterizes this re-

⁵⁰ Radbruch, *Legal Philosophy* (n. 3, above), § 10, at 116.

⁵¹ *Ibid.*, § 7, at 92.

⁵² *Ibid.*, § 7, at 92-93.

⁵³ *Ibid.*, § 7, at 94.

⁵⁴ *Ibid.*, § 8, at 102.

⁵⁵ *Ibid.*, § 8, at 106.

⁵⁶ *Ibid.*, § 7, at 92.

⁵⁷ *Ibid.*

jection of cognition as a ‘relativistically self-imposed resignation’.⁵⁸ This relativism, reaching to the entire system of purposes, has far-reaching consequences. In particular, it led to the widely shared reading of Radbruch’s legal philosophy before 1933 as positivistic.⁵⁹ If justice as such is merely formal, that is, devoid of substance, and if expediency; which is supposed to provide for substance or content, can only offer alternatives that contradict each other, on the ground that it is ‘impossible to answer the question of the purpose of law other than by the enumeration of the manifold partisan views about it’,⁶⁰ then the decisive role falls to the third element of the idea of law, that of legal certainty. Legal certainty requires then, that when ‘no-one is able to recognize what is just, then someone must determine what shall be legal’.⁶¹ This leads, so Radbruch, to a ‘basic norm’ that is, to be sure, non-positivistic with respect to its justification but positivistic with respect to its content: ‘If in a community there is a supreme ruler, what he commands is to be obeyed.’⁶² This implies, for the judge, being completely subjected to the positive law. Radbruch puts this as follows: ‘It is the professional duty of the judge to give effect to the will of the statute, to sacrifice his own sense of justice to the authoritative command of the law, to ask only what is legal, and never whether it is also just.’⁶³ It is the principle of legal certainty that is supposed to justify this: ‘However unjust the law may be in its content, by its very existence ... it always fulfills *one* purpose, namely that of legal certainty.’⁶⁴ This suffices to render a merely ‘legal judge’ as, in the end, a ‘just judge’⁶⁵

⁵⁸ Ibid., § 9, at 108.

⁵⁹ For example, in 1992 I took the position that Radbruch was a positivist before 1933. Robert Alexy, *Begriff und Geltung des Rechts* (Freiburg and Munich: Karl Alber, 1992), 80. In the English translation, however, this was modified as follows: ‘Before the era of National Socialism in Germany, Radbruch was a legal positivist – not in terms of justification, to be sure, but in terms of result, at any case where the judge is concerned’. Alexy, *The Argument from Injustice* (n. 32, above), 45. See also Arthur Kaufmann, *Rechtsphilosophie*, 2nd ed. (Munich: C.H. Beck, 1997), 41-44.

⁶⁰ Radbruch, *Legal Philosophy* (n. 3, above), § 10, at 116.

⁶¹ Ibid., § 10, at 117.

⁶² Ibid.; see further *ibid.*, § 11, at 125, § 26, at 205.

⁶³ Ibid., § 10, at 119.

⁶⁴ Ibid.

⁶⁵ Ibid.

Something different, however, obtains with respect to the individual, for ‘the complete validity of all positive law cannot be demonstrated as applying to every individual’.⁶⁶ ‘[T]here may be “shameful laws” that conscience refuses to obey.’⁶⁷ As an example, Radbruch points to the Socialist Act of 1878. Here the reason for suspending validity is, once again, the idea of law with its three sub-principles of justice, expediency, and legal certainty. In the case of an individual, however, they are weighed in a different way. There arises, however, a contradiction if the validity that is suspended for the individual is legal validity: From the point of view of the individual something is legally allowed that is prohibited from the point of view of the judge.⁶⁸ The contradiction is resolved when, for the individual, only moral validity is suspended while legal validity persists.⁶⁹ Then the question arises, however, of how this divergence can be explained by the idea of law. This, however, is not something I wish to pursue further here. It suffices to state that in *Legal Philosophy* (1932), notwithstanding certain restrictions with an eye to the individual, legal certainty, and with its positivity, has absolute precedence for the judge.

II. The Radbruch Formula

⁶⁶ Ibid. § 10, at 118.

⁶⁷ Ibid.

⁶⁸ Dreier speaks here of a ‘split validity doctrine’. Ralf Dreier, ‘Gustav Radbruchs Rechtsbegriff’, in: Matthias Mahlmann (ed.), *Gesellschaft und Gerechtigkeit, Festschrift für Hubert Rottleuthner*, (Baden-Baden: Nomos, 2011), 17-44, at 31, see also 28. Neumann characterizes the splitting by means of the concept of a ‘relational validity doctrine’. Ulfrid Neumann, ‘Zum Verhältnis von Rechtsgeltung und Rechtsbegriff. Wandlungen in der Rechtsphilosophie Gustav Radbruchs’, in: Martin Borowski and Stanley L. Paulson (eds.), *Die Natur des Rechts bei Gustav Radbruch*, (Tübingen: Mohr Siebeck, 2015), 129-149, at 139. According to the relational validity doctrine, validity is a two-place predicate (“binding for ...”); *ibid.*, 131. With the removal of the splitting validity becomes a one-place predicate; *ibid.* One can, indeed, say this. The subsumption of a norm (n) under a one-place validity predicate (Gn), however, implies its subsumption under a two-place validity predicate which is preceded by an universal quantifier that refers to the validity addressees (x) – which have to be distinguished from the norm addressees: $\forall x(Gnx)$.

⁶⁹ Radbruch’s remark directed to the ‘criminal out of conviction’ points in this direction: ‘Duty demands the crime from the perpetrator, duty demands punishment from the judge, and perhaps duty even demands the punishment imposed for the crime committed out of duty be accepted, this for the sake of law’s inviolability, of legal certainty.’ (Radbruch, *Legal Philosophy* (n. 3, above), § 10, at 119-20.

This absolute precedence is revoked by the Radbruch formula. The formula – Radbruch introduces it in 1946 – cannot be analyzed as such here. Rather, the sole question that I wish to pursue here is its relation to Radbruch’s system in 1932. The formula has two parts, intolerability and disavowal, but only the first of these will be considered.⁷⁰ It reads:

The conflict between justice and legal certainty may well be resolved in this way: The positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as ‘flawed law’, must yield to justice.⁷¹

It is immediately recognizable that the three elements of the idea of law, justice, legal certainty, and expediency, are still in play. The use of the expression ‘flawed law’ shows, by contrast with the talk of the loss of the ‘nature of law’⁷² in the disavowal formula, that the intolerability formula is solely concerned with the loss of legal validity. Thus, everything, with a sole exception, is no different from 1932. The exception consists of the fact that the intolerability formula, when a certain degree of injustice is reached, will revoke legal validity. Thus, the old thesis that the judge is committed to the positive law ‘however unjust’⁷³ its content may be, is abandoned and replaced by the new thesis that alt-

⁷⁰ The disavowal formula is a direct application of the basic definition ‘Law is the reality whose sense is to serve ... the idea of law’ to norms which do not even represent ‘an attempt at justice’ (Radbruch, ‘Statutory Lawlessness and Supra-Statutory Law’ (n. 4, above), 7), that is, to norms that do not even raise a claim to correctness or justice. The ‘nature of law’ is denied to them (ibid.). This corresponds exactly to the statement from 1932, already quoted, which says: ‘As a matter of fact, we decide by the standard of purported justice alone whether a precept is legal in nature at all, whether it accords with the *concept* of law’ (Radbruch, *Legal Philosophy* (n. 3, above), § 9, at 110). Radbruch seems to repeat with his disavowal formula only what he already has said in 1932. Greater continuity than that is not conceivable.

⁷¹ Radbruch, ‘Statutory Lawlessness and Supra-Statutory Law’ (n. 4, above), 7. In his *Primer* of 1948 Radbruch speaks instead of an ‘intolerable degree’ of ‘horrendously unjust laws’ (Gustav Radbruch, *Vorschule der Rechtsphilosophie*, in: *Gustav Radbruch-Gesamtausgabe*, ed. Arthur Kaufmann, vol. 3 (Heidelberg: C.F. Müller, 1990), 121-227, at 154), and in the newspaper article ‘Exclusive Lesson on the Administration of Justice’ from 1947; he uses the formulation ‘cases of appalling contradiction between law and justice’ (Gustav Radbruch, ‘Privatissimum der Rechtspflege’, in: *Gustav Radbruch-Gesamtausgabe*, ed. Arthur Kaufmann, vol. 14 (Heidelberg: C.F. Müller, 2002), 150-3, at 152). If one replaces all these characterizations by the term ‘extreme’; which indicates a scale (Alexy, ‘On the Concept and Nature of Law’ (n. 27, above), Radbruch’s intolerability formula can be transformed into the short form ‘Extreme injustice is no (valid) law’.

⁷² Radbruch, ‘Statutory Lawlessness and Supra-Statutory Law’ (n. 4, above), 7.

⁷³ Radbruch, *Legal Philosophy* (n. 3, above), § 10, at 119.

though he is committed to unjust positive law, this commitment nevertheless comes to an end at the threshold of intolerable or extreme injustice. This represents a discontinuity in the degree to which legal certainty prevails. Does it also represent a discontinuity in the system?

In order to answer this question, the reasons for introducing the threshold of extreme injustice have to be taken into account. These reasons consist of human rights. In 1932, they stood in the purpose triad as individual values with a rank equal to the collective values and artefact values. One could decide in favour of them or against them. After first steps in the 1930s,⁷⁴ this complete ‘relativistically self-imposed moderation’⁷⁵ is abandoned in 1945 in the short article ‘Five Minutes of Legal Philosophy’. Here Radbruch says:

There are principles of law, therefore, that are weightier than any legal enactment, so that a law in conflict with them is devoid of validity. ... To be sure, their details remain open to question, but the work of centuries has in fact established a solid core of them, and they have come to enjoy such far-reaching consensus in the so-called declarations of human and civil rights that only the dogmatic sceptic could still entertain doubts about some of them.⁷⁶

In his *Primer*, Radbruch adds to this partly cultural and partly consensual justification⁷⁷ a justification that refers to ‘the inner freedom of the ethical decision’,⁷⁸ that is, to autonomy. Radbruch’s justification of human rights shall not be considered here. The only thing of importance is their role in his system. Radbruch

⁷⁴ Gustav Radbruch, ‘Der Relativismus in der Rechtsphilosophie’ (1934), in: *Gustav Radbruch-Gesamtausgabe*, ed. Arthur Kaufmann, vol. 3 (Heidelberg: C.F. Müller, 1990), 17-22, at 22; Gustav Radbruch, ‘Der Zweck des Rechts’ (1937/38), in: *Gustav Radbruch-Gesamtausgabe*, ed. Arthur Kaufmann, vol. 3 (Heidelberg: C.F. Müller, 1990), 39-50, at 43, 49.

⁷⁵ Radbruch, *Legal Philosophy* (n. 3, above), § 9, at 108.

⁷⁶ Gustav Radbruch, ‘Five Minutes of Legal Philosophy’, trans. Bonnie Litschewski Paulson and Stanley L. Paulson, in: *Oxford Journal of Legal Studies* 26 (2006), 13-5, at 14-5.

⁷⁷ See on this Robert Alexy, ‘The Existence of Human Rights’, in: *Archives for Philosophy of Law and Social Philosophy*, Supplement 136 (2013), 9-18, at 14-5.

⁷⁸ Radbruch, *Vorschule der Rechtsphilosophie* (n. 71, above), 146.

ascribes to them an ‘absolute nature’.⁷⁹ The concept of absoluteness implies the concept of necessity. In 1932, it was only possible to determine the content of justice by appeal to human rights. Now, this appeal has become necessary, at any rate with respect to their core. If, however, it is necessary to determine the content of justice by appeal to human rights, then human rights, to the extent that their content is necessary to determinations of justice, therefore belong to justice.⁸⁰ This implies that justice is no longer merely formal, which means, in turn, that at least some of the individual values are transported from the purpose triad into justice as the first element of the idea of law.⁸¹ One might call this the ‘transport theorem’. Here transport gives expression to an absolute substantive limit that is imposed on what was heretofore a comprehensive relativism that knew only a possible transport but by no means a necessary one. Thanks to this development, Radbruch is no longer a non-positivist who, under the aspect of content, allows anything, at any rate with respect to the judge.⁸² He has, in other words, abandoned super-inclusive non-positivism in favour of a merely inclusive non-positivism.⁸³ There are systems that collapse with small changes. Radbruch’s system, however, is not endangered by this momentous transport, but rather strengthened. That this is possible marks the eminence of Radbruch’s system, that this possibility became reality is the eminence of Radbruch.

⁷⁹ Ibid.

⁸⁰ The thesis of the ‘individualistic content of the idea of justice’ from 1937 already aimed at this (Radbruch, ‘Der Zweck des Rechts’ (n. 74, above), 49).

⁸¹ This transport is enabled by the close relationship between justice and human rights, which, to be sure, goes not so far that each injustice is a violation of human rights, but consists in the fact that each violation of human rights is an injustice. See on this Robert Alexy, ‘Die Institutionalisierung der Menschenrechte im demokratischen Verfassungsstaat’, in: Stefan Gosepath and Georg Lohmann (eds.), *Philosophie der Menschenrechte* (Frankfurt: Suhrkamp, 1998), 244-64, at 251-2.

⁸² This sentence refers to the relation between *Legal Philosophy* from 1932 to the writings after 1945. With respect to the whole work of Radbruch Ralf Dreier has established the following more comprehensive thesis: ‘Radbruch was at no time a legal positivist in the sense of a conceptual separation between law and justice’ (Dreier, ‘Kontinuitäten und Diskontinuitäten in der Rechtsphilosophie Radbruchs’ (n. 2, above), 228). Stanley L. Paulson’s ‘*Nichtpositivismusthese*’ (Paulson, ‘Zur Kontinuität der nichtpositivistischen Rechtsphilosophie Radbruchs’ (n. 6, above), 155), goes in the same direction.

⁸³ Alexy, ‘Law and Morality: A Continental European Perspective’ (n. 22, above), 479-80. Martin Borowski aptly remarks in this context that one can ask ‘of whether Radbruch’s already initially non-positivistic concept of law has turned into *another* non-positivistic concept of law’ (Martin Borowski, ‘Begriff und Geltung des Rechts bei Gustav Radbruch’, in: Martin Borowski and Stanley L. Paulson (eds.), *Die Natur des Rechts bei Gustav Radbruch* (Tübingen: Mohr Siebeck, 2015), 229-65, at 236, see further 257-8).