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Radbruch's Legal Philosophy: From the Cultural Concept of Law to the Radbruch-Formula

A Filosofia do Direito de Gustav Radbruch: Do conceito cultural de direito à fórmula de Radbruch

Lars Vinx*

Abstract: It is proposed in this paper that, to understand the Radbruch formula, one must consider its theoretical background, which is provided in the author's early legal-philosophical writings. The Radbruch formula – the denial of the legality of extremely unjust directives – is rooted in the neo-Kantian jurisprudential methodology Radbruch adopted from Emil Lask. This paper reconstructs this methodology, outlines the legal-philosophical system Radbruch built on it, and explains how Radbruch's legal philosophy, from its very beginning, supported the view that wicked directives lack legality.

Keywords: Radbruch-formula, Baden neo-kantianism, concept of law, law as cultural fact, justice, legal validity, reasonable pluralism.

Resumo: Este artigo defende que, para se compreender a fórmula de Radbruch, impõe-se considerar o seu enquadramento teórico, que é fornecido pelos escritos iniciais do autor no âmbito da filosofia do direito. A fórmula de Radbruch – a negação da legalidade de diretivas extremamente injustas – enraíza-se na metodologia jus-filosófica que Radbruch recolhe de Emil Lask. Este artigo reconstrói esta metodologia, identifica as linhas mestras do sistema jus-filosófico que Radbruch construiu nessa base e explica como a filosofia do direito de Radbruch assentou, desde o seu momento inicial, no entendimento de que as diretivas ordenadas ao mal carecem de legalidade.

Palavras-chave: Fórmula de Radbruch, neo-kantismo de Baden, conceito de direito, direito como facto cultural, justiça, validade jurídica, pluralismo razoável.

Summary: 1. Introduction; 2. Radbruch on Statutory Lawlessness; 3. Radbruch on the Task of Legal Philosophy; 4. Law as Cultural Fact; 5. Individualism and Transpersonalism; 6. Radbruch's Changing Views on Justice; 7. Radbruch's Three Conceptions of Legal Validity; 8. The Radbruch-Formula; 9. Conclusion: Hart's Radbruch-legend.

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1. Introduction

Gustav Radbruch's claim that extremely unjust directives issued by political authorities must fail to qualify as laws has figured prominently in jurisprudential debate ever since HLA Hart highlighted it in his classic article *Positivism and the Separation of Law and Morals*.¹ Hart's treatment of the claim, however, was unsympathetic and uncharitable. Hart claimed that Radbruch had converted from legal positivism to natural law in response to the personal experience of living under Nazi dictatorship and went on to dismiss the Radbruch-formula as 'a passionate appeal supported not by detailed reasoning but by reminders of a terrible experience.'² At least in Anglo-American debate, Hart's assessment of the Radbruch-formula as an *ad hoc* response to Nazism undefended by genuine jurisprudential argument has never been fully dislodged.³

Recent German scholarship on Radbruch has shown that Hart was wrong to claim that Radbruch had switched from positivism to natural law theory.⁴ If Radbruch was a natural lawyer all along, Hart's second claim – that Radbruch's denial of the legality of wicked directives was an emotional response to dictatorship unsupported by argument – should likewise be questioned. It will be argued here that to understand the Radbruch formula, one must consider its theoretical background, which is provided in Radbruch's early legal-philosophical writings. A careful look at the first edition of Radbruch's *Rechtsphilosophie*,⁵ which appeared in 1914, shows that

¹ HLA Hart, 'Positivism and the Separation of Law and Morals', *Harvard Law Review* 71 (1958), 593-629, at 615-621.

² See *ibid.* 615.

³ But see David Dyzenhaus, *The Long Arc of Legality. Hobbes, Kelsen, Hart* (Cambridge: Cambridge University Press, 2022), 358-367.

⁴ See Martin Borowski, 'Gustav Radbruch's Critique of Legal Positivism', in Torben Spaak and Patricia Mindus (eds.), *The Cambridge Companion to Legal Positivism* (Cambridge: Cambridge University Press, 2021), 627-650 and the contributions in Martin Borowski and Stanley L. Paulson (eds.), *Die Natur des Rechts bei Gustav Radbruch* (Tübingen: Mohr Siebeck, 2015), particularly Stanley L. Paulson, 'Zur Kontinuität der nichtpositivistischen Rechtsphilosophie Gustav Radbruchs', 151-182.

⁵ Gustav Radbruch, *Grundzüge der Rechtsphilosophie* (Leipzig: Quelle & Meyer, 1914), included in the second volume of Radbruch's collected works, and I will cite from that version: Gustav Radbruch, *Gesamtausgabe*, vol. 2, ed. Arthur Kaufmann (Heidelberg: CF Müller, 1993), 9-204. Radbruch produced several further editions of this textbook. The one cited most often is the third edition from 1932: Gustav Radbruch, *Rechtsphilosophie*, in Gustav Radbruch, *Gesamtausgabe*, vol. 2, ed. Kaufmann, 206-450. The treatment of properly legal-philosophical issues in this later edition is much briefer, however, than in the original *Rechtsphilosophie* of 1914. My discussion will therefore put emphasis on the first edition.

Radbruch's postwar denial of the legality of wicked directives, far from being an unprincipled response to the experience of Nazi dictatorship, was rooted in the neo-Kantian jurisprudential methodology Radbruch adopted from Emil Lask.⁶ This paper will reconstruct this methodology, outline the legal-philosophical system Radbruch built on it, and explain how Radbruch's legal philosophy, from its very beginning, supported the view that wicked directives lack legality.

The paper begins, by way of reminder, with a summary of Radbruch's famous but rather terse postwar paper on *Statutory Lawlessness and Supra-Statutory Law*⁷ which contains the canonical statement of the Radbruch-formula. The paper will then present Radbruch's reflections on the methodology of jurisprudence and explain how they inform the architecture of Radbruch's legal philosophy. Once that architecture is understood, it will become possible to show how the Radbruch formula can be derived from Radbruch's analysis of the values of justice (*Gerechtigkeit*), purposiveness (*Zweckmässigkeit*) and legal security (*Rechtssicherheit*). These values are referenced in *Statutory Lawlessness*, but Radbruch leaves them unexplained and unanalysed in that paper, perhaps because he assumed that his German readers would be familiar with the discussion they had received in the several editions of his textbook on legal philosophy. The unfortunate result of Radbruch's omission has been that the central statement of the Radbruch-formula tends to give the impression, to the reader unfamiliar with Radbruch's legal philosophy, of being a piece of trite dogmatism. As we will see, nothing could be further from the truth.

2. Radbruch on Statutory Lawlessness

Radbruch's paper on statutory lawlessness, published in 1946, reports several criminal cases that had recently dealt with instances of individual collaboration in Nazi injustice. The case Radbruch discussed in most detail was a grudge informer case.⁸

⁶ Emil Lask, 'Rechtsphilosophie', in Wilhelm Windelband (ed.), *Die Philosophie im Beginn des 20. Jahrhunderts. Festschrift für Kuno Fischer*, second edition (Heidelberg: Carl Winter, 1907), 269-320.

⁷ Gustav Radbruch, 'Gesetzliches Unrecht und übergesetzliches Recht', in Gustav Radbruch, *Gesamtausgabe*, vol. 3, ed. Winfried Hassemer (Heidelberg: CF Müller, 1990), 83-93. For an English translation see Gustav Radbruch, 'Statutory Lawlessness and Supra-Statutory Law', ed. and transl. by Bonnie Litschewski-Paulson and Stanley Paulson, *Oxford Journal of Legal Studies* 26 (2006), 1-11.

⁸ The term 'grudge informer' is due to Lon Fuller. See Lon L. Fuller, *The Morality of Law. Second edition* (New Haven: Yale University Press, 1969), 245-253. For a critical take on Hart's discussion of grudge informer cases in *The Concept of Law* see David Dyzenhaus, 'The Grudge Informer Case Revisited', *New York University Law Review* 23 (2008), 1000-1034.

A man named Puttfarken had denounced a man named Göttig to the Nazi authorities for having defaced a public toilet with scribbblings claiming that Hitler was a murderer and to blame for the war, whereupon Göttig had been sentenced to death. Puttfarken had admitted that his motive for denouncing Göttig had been to rid himself of a personal enemy. The prosecutor pointed out that Puttfarken had not been under any legal duty, even assuming the validity of Nazi laws, to denounce Göttig. Puttfarken would have been aware, moreover, that a court was likely to impose excessively severe punishment and sentence Göttig to death. The prosecutor then offered two different but mutually exclusive explanations for why Puttfarken's denunciation had been criminal. Puttfarken, the prosecutor argued, might either be regarded as an indirect perpetrator who had relied on the predictably perverse mechanisms of Nazi criminal justice to kill Göttig or as an accessory to a murder perpetrated by the judges who had sentenced Göttig to death. The court decided to adopt the second of the two theories and then sentenced Puttfarken to death.⁹

Before commenting on the case, Radbruch introduces his thesis that Nazi laws (or some Nazi laws) always lacked legal validity. Positivism, Radbruch claims, is unable to establish the validity of law. Positivism takes it that a rule is legal if it is backed up by a power that can enforce it. In language akin to Hart's distinction between 'being obliged' and 'having an obligation',¹⁰ Radbruch points out that mere power cannot make any law obligatory. It can only ground a must (*müssen*), not an ought (*sollen*). Law is not the gunman situation writ large.¹¹ If law is not merely compulsory but obligatory, its validity, Radbruch implies, must result from the fact that it serves moral values.

The very condensed discussion in section III of *Statutory Lawlessness* references three moral values the law is to serve – purposiveness (*Zweckmässigkeit*), justice (*Gerechtigkeit*) and legal security (*Rechtssicherheit*) – and seeks to establish a ranking among them. Radbruch quickly relegates purposiveness to the lowest rank. The Nazis had argued that law is what is useful to the people. Radbruch responds that only what is just and conducive to legal security can be useful to the people.¹² Without much further ado, Radbruch then confronts the reader with his famous formula, which is meant to clarify the relation of justice and legal security:

⁹ See Radbruch, 'Gesetzliches Unrecht', 83-86.

¹⁰ See HLA Hart, *The Concept of Law. Second edition*, with a Postscript edited by Penelope A. Bulloch and Joseph Raz (Oxford: Oxford University Press, 1994), 82-85.

¹¹ See Radbruch, 'Gesetzliches Unrecht', 88.

¹² See *ibid.*

‘The conflict between justice and legal security should be resolved as follows: the positive law, secured by enactment and power, takes precedence even when it is unjust and unpurposive in content, unless the positive statute conflicts with justice to such an unacceptable degree that the statute, as incorrect law, must give way to justice. It is impossible to draw a sharper dividing line between cases of statutory unlawfulness and statutes that, despite their incorrect content, remain valid. One other delimitation, however, can be performed with utmost sharpness: where justice is not even pursued, where equality, which makes up the core of justice, has been deliberately denied in the enactment of positive law, the statute is not merely incorrect law. Rather, it altogether lacks the nature of law, since one cannot define law, even positive law, in any other way than as an order and enactment the meaning of which is that it is intended to serve justice.’¹³

Radbruch's formula refrains from establishing a simple priority of one of the two values it compares to the other. In most instances, legal security, Radbruch argues, will take precedence to justice. The interest in the preservation of legal security makes law valid and morally binding even where it is unjust in content. However, the priority of legal security is merely presumptive. The ranking of justice and legal security will reverse if the content of law is either excessively unjust or if the aim to secure justice is openly flouted in the making of law. In both cases, the law in question will lack obligatory force and thus be invalid.¹⁴ In the last instance, justice is revealed as the sovereign value of legality, but Radbruch offers no argument for the ultimate priority of justice other than the blunt and seemingly dogmatic claim that one cannot define law without reference to justice.

Radbruch goes on to claim that some laws enacted by the Nazis, including the law on which Puttfarken relied to rid himself of Göttig, were invalid *ab initio* for openly flouting any commitment to the pursuit of justice. This view leads Radbruch to the conclusion that Puttfarken was indeed guilty of murder, under

¹³ Ibid., 89. All quotes from Radbruch in this paper are my translations.

¹⁴ The German literature on Alexy tends to emphasize that Radbruch distinguished between two different ways in which enacted rules can fail to be laws due to their injustice. See for instance Robert Alexy, ‘Gustav Radbruch's Concept of Law’, in Robert Alexy, *Law's Ideal Dimension* (Oxford: Oxford University Press, 2021), 107-117, at 115, who distinguishes an ‘intolerability formula’ from a ‘disavowal formula’. Dyzenhaus, *The Long Arc of Legality*, 362-363, denies that Radbruch operated with ‘two distinct formulas’ and claims instead that Radbruch ‘presuppose[d] an interpretive spectrum’ ranging ‘from minor to major value conflicts’ and calling for different judicial responses depending on the degree of injustice in flawed statutory law. As will become apparent, the closer analysis of Radbruch's early legal philosophy offered here supports the view that Radbruch's formula has two different parts.

the *Strafgesetzbuch* (Code of Criminal Law) of 1871 which had remained in force in the Weimar Republic and in Nazi Germany, though he expressed dissatisfaction with the court's choice for the second of the two theories of Puttfarken's culpability that had been floated by the prosecutor. The prosecutor's second theory, Radbruch observes, implies that the judges who sentenced Göttig to death are guilty of murder, and should likewise be prosecuted and punished. Radbruch was evidently uncomfortable with that implication. He points out that a criminal prosecution of a judge for a judgment rendered is possible, under German law, only if the judge is guilty of perversion of law (*Rechtsbeugung*). While Radbruch concedes that the death sentence for Göttig did indeed amount to a perversion of law, he doubts that the judges could have been aware that their judgment constituted a perversion of the law:

'But could judges who had been so deeply miseducated by the reigning positivism that they did not know any law other than enacted law have had the intent to pervert the law in the application of positives statutes?'¹⁵

Radbruch's claim that legal positivism – epitomized in the phrase 'law is law' (*'Gesetz ist Gesetz'*) – had made legal officials, including judges, unable to resist Nazi injustice was thus more than just an empirical observation about the supposed consequences of the adoption, on the part of legal officials, of a positivist theory of law. It was also intended to shield legal officials who had dutifully served their Nazi masters from criminal responsibility.¹⁶

It is not hard to see why Hart would have taken issue with Radbruch's discussion of the grudge informer cases. Radbruch's seeming eagerness to punish the grudge informers stands in awkward contrast with his rather more lenient treatment of Nazi judges. Hart angrily rejected the claim that positivism, as he understood it, might serve to exculpate perpetrators of official wickedness. To insist on the separability of law and morality, in Hart's view, is to strip the law of an undeserved aura of presumptive legitimacy, to emphasize that it need not be morally binding, and thus to enable disobedience and resistance on the part of officials or ordinary

¹⁵ Ibid., 91-92.

¹⁶ Radbruch's claim that the German tradition of legal positivism played into the hands of the Nazis is historically unconvincing. Nazi legal theory was much more closely related to the anti-positivist strands of Weimar legal thought than to the legal positivism of the time. For an influential critique of Radbruch's claim see Manfred Walther, 'Hat der juristische Positivismus die deutschen Juristen im „Dritten Reich“ wehrlos gemacht?', in Ralf Dreier and Wolfgang Sellert (eds.), *Recht und Justiz im „Dritten Reich“* (Frankfurt am Main: Suhrkamp, 1989), 323-354. On the anti-positivist character of Nazi legal thought in general compare Herlinde Pauer-Studer, *Justifying Injustice. Legal Theory in Nazi Germany* (Cambridge: Cambridge University Press, 2020).

citizens when it might be called for. That Radbruch took all valid law to be morally obligatory, Hart averred, was evidence that Radbruch had failed fully to digest the lessons of liberalism.¹⁷

Hart also argued that Radbruch had failed to acknowledge the apparent retroactivity of the punishment of the grudge informers.¹⁸ If the grudge informers had known that their behaviour would, at some point in the future, be regarded as criminal, they might have abstained from it, but they had no reason to expect any such turn of events. It might be replied that this charge begs the question against Radbruch's view that the laws the informers relied on were never valid to begin with. That response, however, seems unsatisfactory, as it does not address the substance of the moral problem of retroactivity that Hart was concerned about. The grudge informers, after all, were not legal philosophers. A more developed argument for the Radbruch-formula than is offered in *Statutory Lawlessness* is needed to make sense of Radbruch's take on Nazi law. That argument is available in Radbruch's *Rechtsphilosophie*, and in particular in the first edition of that work, to which I now turn.

3. Radbruch on the Task of Legal Philosophy

Contemporary legal philosophy is concerned to give an account of the nature of law, and methodological debate revolves around the question whether that account can be given in purely descriptive terms.¹⁹ Radbruch's understanding of the subject matter of legal philosophy is different. For Radbruch, legal philosophy is an explicitly normative project.²⁰ The central task of legal philosophy is not to offer an account of the nature of law, and to determine whether that account can be given in the form of a value-neutral description, but rather to tell us what law ought to be, to provide what the neo-Kantian Wilhelmine legal philosopher Rudolf Stammler called the doctrine of correct law, the '*Lehre von dem richtigen Rechte*.'²¹ Insisting on the separation of is and ought, Radbruch's legal philosophy is opposed to both natural law theory and the jurisprudence of the 19th-century German

¹⁷ See Hart, 'Positivism', 617-618.

¹⁸ See *ibid.*, 618-621.

¹⁹ See Julie Dickson, *Evaluation and Legal Theory* (Oxford: Hart Publishing, 2001).

²⁰ Radbruch, *Grundzüge der Rechtsphilosophie*, 22: 'And legal philosophy in particular does not treat of the law that is valid, but of that which ought to be valid, not of that which is positive but of that which is correct, not of the law but of its value, its meaning, its purpose – it is concerned with the law's justice.'

²¹ Rudolf Stammler, *Die Lehre von dem richtigen Rechte* (Berlin: J Guttentag, 1902).

historical school associated with Savigny. Both approaches, in Radbruch's view, wrongly identify the law as it is with the law as it ought to be, though in different ways.

The historical school assumed that law is grounded in the spirit of a nation and concluded that any nation's law is legitimate in its own terms and cannot be morally evaluated from a perspective external to a people's legal and political tradition.²² Radbruch's charge against historical jurisprudence goes beyond the mere observation that the view illicitly infers an ought from an is. Historical jurisprudence wants to support normative claims, but it also tries to present itself as a sober and objective historical science that refrains from contestable moral argument. Historical jurisprudence achieves a fusion of facts and value only by being crypto-theological, that is, by assuming that any historical epoch or nation or culture is, as the historian Leopold von Ranke once put it, equally immediate to God, so that whatever exists in the way of law is providentially legitimate. A community's law is held to be morally binding for its members, but there is no legal-philosophical explanation of that claim.²³

Radbruch's understanding of natural law theory is narrower than the one that prevails in contemporary jurisprudential debate. Following Hart, contemporary legal philosophers ask whether there is a necessary connection between law and morality, and they regard any view that answers the question in the affirmative as a version of natural law theory. Radbruch, by contrast, identifies natural law with *Vernunftrecht*, with the law of reason postulated in German enlightenment thought.²⁴

Emil Lask, whose jurisprudential work was a major inspiration for Radbruch's legal philosophy, distinguished between a formal and a material version of natural law theory.²⁵ The former derives the validity of positive law from the law of nature as ascertained by practical reason, whose norms are treated as legally valid in virtue of being morally sound, while the latter claims that practical reason is capable, by itself, to supply all the specific normative content of a correct legal system. These two theses are separable in principle, Lask observed. One might be a natural lawyer in the material sense without being a natural lawyer in the formal sense and treat

²² See Olivier Jouanjan, *Une histoire de la pensée juridique en Allemagne, 1800-1918. Idéalisme et conceptualisme chez les juristes allemands du XIX^e siècle* (Paris: Presses Universitaires de France, 2005), 9-184.

²³ See Radbruch, *Grundzüge der Rechtsphilosophie*, 25-27.

²⁴ See *ibid.*, 23-25. For an overview of the German tradition of *Vernunftrecht* see Franz Wieacker, *Privatrechtsgeschichte der Neuzeit unter besonderer Berücksichtigung der deutschen Entwicklung*, 3rd edition (Göttingen: Vandenhoeck & Ruprecht, 2016), 249-347.

²⁵ See Lask, 'Rechtsphilosophie', 273-278.

the law of reason as a normative model of the content the positive law ought to have while denying that it grounds the validity of positive law. In practice, however, the two views will tend to appear in combination, as in the Thomist natural law doctrine of the Catholic Church. Derivation from natural law, in that picture, provides both the ground of the validity as well as much of the content of positive law.

Radbruch, like Lask, emphatically rejects natural law theory both in its formal and in its material sense. All law in the proper sense, he argues, is validated by positive enactment, not by the principles of the law of reason.²⁶ Radbruch likewise opposes the view that practical reason alone is capable to provide a complete and universally applicable system of correct law. The claims of material natural law are implausible on their face, given the wide variety of different legal cultures and legal systems with different ethical orientations.²⁷

Radbruch's rejection of natural law theory in both its formal and material guise makes it difficult to understand how he can hold on to the view that the task of legal philosophy is to offer an account of practically correct law. Such an account, after all, is precisely what material natural law theory had claimed to provide. Radbruch responds that his legal philosophy, though it aims to work towards a doctrine of correct law, is committed, in contrast to the tradition of *Vernunftrecht*, to moral relativism.²⁸

At first glance, this response would appear to be unhelpful. It seems that if there is to be legal philosophy, understood as an attempt to identify morally correct law, and if that endeavour is to possess academic respectability, there must be objective moral truths ascertainable through some methodically controlled form of inquiry, which, of course, would vindicate the claims of *Vernunftrecht*. In taking a relativist stance, Radbruch seems to deny that there are moral truths. He argues that moral beliefs are not capable of being known but can only be professed, that they are *Bekanntnis* not *Erkenntnis*.²⁹ If that is the case, how can legal philosophy

²⁶ As we will see, the early Radbruch tends to fudge two different versions of this claim – one that has it that enactment is a necessary condition of validity and another that holds that enactment is not only necessary but also sufficient for validity. Only the second version of the claim that all law is validated by enactment is unambiguously positivist in the contemporary understanding. The former, for which Radbruch will in the end settle, suffices to reject formal natural law in Lask's sense, but it is compatible with the Radbruch-formula.

²⁷ See Radbruch, *Grundzüge der Rechtsphilosophie*, 24.

²⁸ See *ibid.*, 40–45. See also Gustav Radbruch, 'Der Relativismus in der Rechtsphilosophie', in Gustav Radbruch, *Gesamtausgabe*, vol. 3, 17–22.

²⁹ See Radbruch, *Grundzüge der Rechtsphilosophie*, 44.

as Radbruch understands it be more than a random collection of the personal preferences and predilections of the legal philosopher?

To understand Radbruch's answer to this challenge, it is important to take a closer look at the character of his moral relativism. Radbruch's relativism does not match the view that contemporary meta-ethicists associate with the term 'moral relativism'.³⁰ It does not claim that the mere fact that some moral view is prevalent in some society makes that view true or binding for or in that society. That is the view of the historical school which Radbruch rejects. Neither does Radbruch adopt a sophomoric expressivism that claims that moral judgments are matters of private taste, like one's preference for strawberry ice cream.

Radbruch's relativism is best understood as an insistence on the pluralism of fundamental value, coupled with a Weberian emphasis on the limits of scientific cognition of values, where scientific cognition is understood to provide evidence that leaves no room for reasonable disagreement. The set of claims that Radbruch refers to as 'relativism', in his various writings that touch on the issue, may be summed up in the following propositions:

- a) **Value Pluralism:** There are several competing value systems that flow from the three fundamental values of goodness, truth, and beauty. These systems are mutually incompatible, in the sense that they may generate conflicting demands on individual action and proper social organization.
- b) **Rejection of moral scientism:** One cannot prove – either by appeal to *a priori* moral reasoning or by appeal to the results of scientific research – that one of the different value systems made available by the pluralism of fundamental values is to be preferred to the others or that those who reject it in favour of another must be unreasonable.
- c) **Reasonable faith:** If one's moral and political commitments are held in the face of reasonable disagreement they partake in the character of conviction, belief, or faith, which is not to say, however, that they aren't subject to standards of cognitive and practical rationality.
- d) **Possibility of analysis:** The moral or legal philosopher can describe and analyse the competing value systems that arise from the plurality of fundamental values. A philosopher can test value systems for internal

³⁰ Compare Bernard Williams, 'The Truth in Relativism', *Proceedings of the Aristotelian Society* 75 (1974), 215-228.

consistency and for their compatibility (or lack thereof) with other value systems. They can also draw out a value system's implications, to show what is entailed in a commitment to this or that fundamental value. Using such techniques of analysis, philosophy cannot rationally compel attachment to a particular system of values. But it can contribute to the clearer articulation of value systems, and the philosopher or social scientist can also ask what actions or policies would provide the most purposeful means to realize the demands of one system or another.

Radbruch's commitment to these propositions explains how there can be room, after the rejection of formal and material natural law, for a legal philosophy that is a theory of correct law. The task of legal philosophy is to offer a complete and comprehensive taxonomy of the different possible moral value systems that might come to be expressed in a system of positive law.³¹ To develop that taxonomy of fundamental values and of their implications, Radbruch argues, is a scientific enterprise. To work towards it, the legal philosopher need not (and should not) take the perspective of a partisan of one of the systems of value they analyse.³² Legal philosophy is thus ideologically agnostic, but this does not mean that it cannot have a critical edge. Legal philosophy, as Radbruch conceives of it, can make legislators, judges, and citizens aware of the implications of their moral commitments and it can help to separate questions having to do with the realization of values that have been accepted or agreed upon from questions that concern the choice of ultimate moral commitments. As Max Weber argued,³³ analysis of this type will help to compel political actors to exhibit integrity in their practical attitudes and it will force them to assume responsibility for their moral choices. That is no small service.

Before we go on to look at the early Radbruch's concept of law, let me flag up a problem for Radbruch that lurks in the shadows. *Vernunftrecht* and the historical school agree on one important claim: they both hold law to be inherently obligatory, and Radbruch concurs – not merely in *Statutory Lawlessness* but, as we will shortly see, in his early work as well. If the law may be committed to one or

³¹ Radbruch, *Grundzüge der Rechtsphilosophie*, 44: The aim of legal philosophy is to 'ascertain all the different starting points of political thought that are at all conceivable.'

³² See *ibid.*, 44-45.

³³ See Max Weber, 'Der Sinn der „Wertfreiheit“ der soziologischen und ökonomischen Wissenschaften', in Max Weber, *Gesammelte Aufsätze zur Wissenschaftslehre*, ed. Johannes Winckelmann (Tübingen: Mohr Siebeck, 1988), 489-540.

another of several different systems of moral value, and if commitment to any one of these systems must partake in the character of reasonable faith, how can law be morally binding for those who find themselves confronted with a legal system that aims to realize a system of values they reject? Wouldn't it have been more in keeping with the ideological agnosticism of legal philosophy for Radbruch to argue that law is only contingently binding, binding only if it expresses values to which the legal subject is also committed? Radbruch's relativism, his emphasis on the positivity of law, and his understanding of its normativity might seem to make for potentially unhappy bedfellows.

4. Law as Cultural Fact

The account of Radbruch's methodology given thus far may appear to entail that the prewar Radbruch was a garden-variety positivist, as Hart suggested. To be sure, Radbruch's understanding of the core task of legal philosophy differs from that of contemporary positivists. According to Radbruch, legal philosophy is to help develop an account of correct law, whereas post-Hartian positivists would argue that it should be concerned with developing a descriptive account of the nature of law. But the difference, it might be argued, is merely verbal. A Hartian positivist need not deny that to develop a picture of what the law ought to be is an important endeavour. What they are concerned to argue is that the two tasks of value-neutral legal-theoretical description and subsequent moral evaluation are to be tidily separated, and that the former must precede the latter. And Radbruch, it might appear, must agree with this approach, given that he seems committed to a positivist account of legal validity that has it that laws are valid only if they are enacted by recognized authorities.

On closer inspection, the assessment of Radbruch's early views just outlined turns out to be misleading. Though Radbruch's primary interest is to put legal philosophy as theory of value in the service of the development of an account of correct law, he also makes it responsible for providing a concept of law, and he argues that any attempt to delimit the subject matter of legal theory must be committed to a perspective that is morally evaluative.³⁴

The concept of law, Radbruch observes, cannot be gathered from experience by way of induction. It is presupposed in any cognition of some event as legal. Radbruch's claim is not merely that one would have to have some preliminary

³⁴ See Radbruch, *Grundzüge der Rechtsphilosophie*, 46-90.

grasp of the extension of the concept of law to begin to investigate the nature of legal phenomena if one wanted to develop a real as opposed to a nominal definition of 'law'. Radbruch argues, rather, that the concept of law is a generative concept (*formender Begriff*) and not merely an ordering concept (*ordnender Begriff*), that it is a category in the Kantian sense. Phenomena given in experience are legal only by virtue of falling under the concept of law.³⁵

Generative concepts make the raw material of experience intelligible, but they can do so in two different ways, depending on whether the perspective they operate within is descriptive or evaluative. If one considers what is given in experience without concern for questions of value, and relies exclusively on theoretical categories such as causality, reality is presented as a realm of being or nature populated by physical objects. No physical description of reality, Radbruch points out, is ever going to produce any legal fact. But objects and events in the realm of nature may also be considered in evaluative terms, in their relation to norms, purposes or values, which latter are themselves given *a priori* and belong to a realm of purposes (*Reich der Zwecke*). A natural fact (or some collection of natural facts) can acquire the character of a legal fact only if it is conceived in its relation to the realm value.³⁶

As we have already seen, Radbruch's account of the realm of purposes recognizes three fundamental values: the moral value of the good, the aesthetic value of beauty and the cognitive value of truth.³⁷ Radbruch does not explicitly address the question whether these values are objective or whether they are values only because and insofar as they are valued by human beings. The first assumption, however, fits much better with the claim that it is possible to develop a complete taxonomy of the different possible value systems. The attempt to do so would be futile if values were arbitrary human projections, since it would not be possible, in that case, to compile a short list of fundamental values that are apt to serve as a starting point for the exercise of taxonomy. The way in which Radbruch portrays conflicts of value further supports the view that he was an objectivist about fundamental value. Radbruch points out that 'the relationship of these values to each other is not that of a peaceful mutual tolerance [...] but that of a bitter struggle for primacy.'³⁸ This claim portrays values to be in conflict, not merely the people who profess commitment to different systems of value. Radbruch rejects the view, in other words, that

³⁵ See *ibid.*, 46-50.

³⁶ See *ibid.*, 51.

³⁷ See *ibid.*, 57.

³⁸ *Ibid.*, 95.

different moral commitments are merely rationalizations of pre-existing social conflicts. According to Radbruch, it is the fact that different fundamental values may imply incompatible demands that generates social conflict in the first place. That view makes sense only if one assumes that each of the fundamental values has objective character, that values rightly demand our commitment, and may then, due to their irreducible plurality, force us into a choice for one value system or another. To be a relativist, in the Radbruchian sense, is to acknowledge the existence of an irreducible plurality of incompatible objective values, that is, of values that may turn out to make incompatible demands on individual behaviour or social order and thus give rise to tragic moral and political conflict.

The primary relation between fundamental values and natural events or objects, Radbruch argues, is that of instantiation. A natural event or object (or some combination of natural events or objects) – a human action or a product of human activity, for instance – may be good, beautiful, or true. It may also fail to instantiate value, as Radbruch is keen to emphasize. However, a judgment, for instance, that some human action is morally defective still assumes that human actions are fit to be objects of moral evaluation, that they are properly understood in their relation to the values which they can either instantiate or fail to instantiate.³⁹

Radbruch argues that ‘only a narrowly limited part of reality is capable to become substrate of the highest values: only products of human activity (*menschliche Werke*) can become the object of logical or aesthetic value, only human personalities can become objects of ethical value.’⁴⁰ The products Radbruch has in mind here are systems of belief that are truth-apt or works of art. The claim that only a human personality can directly instantiate ethical value affirms Kant’s view that the only thing that is morally good in itself is a good will.

It follows that the law, whatever it may be, is neither part of the realm of purposes, nor directly related, by way instantiation, to any fundamental value.⁴¹ This does not entail, however, that law is altogether unrelated to fundamental value. The triad of fundamental values, Radbruch argues, gives rise to derived or subordinate values, the value of justice among them. These derived values indirectly relate certain parts of nature that cannot directly instantiate fundamental values to the realm of purposes. Natural objects or events that cannot directly instantiate fundamental value may still have the capacity to serve or to enable the realization of fundamental values or, again, fail to do so.

³⁹ See *ibid.*, 57-58.

⁴⁰ *Ibid.*, 57.

⁴¹ See *ibid.*, 51 and 57.

To refer to reality that is value-related (*wertbezogen*) in either way, Radbruch uses the term 'culture.' Law, for Radbruch, is a cultural fact,⁴² constituted by reference to the value of justice, which is dependent on the value of moral goodness:

'Law is whatever can be made the object of a judgment of justice, and therefore also of injustice, as the case may be. Law is what ought to be just law, regardless of whether it is just law. Law is what has the purpose of law, but it need not have attained it. Law is the successful as well as the failed attempt to be correct law. Law is the constellation of existing things (*Seinsgebilde*) that serves as the stage or the substrate for the legal value, the idea of law. All these turns of phrase serve to make clear that even while the concept of law must be sharply distinguished from the concept of correct law, the former can only be drawn from the latter, that [...] the question of the concept of law, while it does not fall together with the question of the purpose of law, is nevertheless predetermined by the latter.'⁴³

The claim that law is a cultural fact constituted by reference to justice entails that any account of the nature of law is necessarily evaluative. The delimitation of the legal is possible only through the oblique relation of legal phenomena to the value of the good. The law comprises those aspects of cultural reality that are proper objects of judgements of justice. To claim that a phenomenon is legal is to invite an assessment in terms of justice. But for something to be law, that assessment does not have to come out positive, there is space, as a result, for unjust law.

As a dependent value, justice relates to the fundamental value of the good, which Radbruch understands in Kantian terms, and not to the values of truth and beauty. How can that dependence be compatible with any separation of law and morality? If the only thing that is good in itself is a good will, then the only actions that are morally worthy are actions that are autonomous, that is, actions that are not only conformable to moral laws one has given to oneself but that are also motivated by respect for the moral law. The law can coerce its subjects, but it cannot make their acts morally worthy. Even if the demands of law overlap with the demands of morality, an action compelled by the threat of punishment will fail to manifest a good will and thus be heteronomous. It seems that the law is

⁴² See *ibid.*, 53-54. The philosophical inspiration for the claim that law is a cultural fact is drawn, in part, from Heinrich Rickert's on the methodology of social science. See Heinrich Rickert, *The Limits of Concept Formation in Natural Science. A Logical Introduction to the Historical Sciences*, ed. and transl. by Guy Oakes (Cambridge: Cambridge University Press, 1986).

⁴³ Radbruch, *Grundzüge der Rechtsphilosophie*, 54.

both insufficient and unnecessary to bring forth actions that instantiate moral value.

Radbruch is adamant, in all his legal-philosophical works, that compulsion is incapable to generate obligation: 'A heteronomous obligation, an obligation imposed by an alien will, is a contradiction in itself.'⁴⁴ Radbruch acknowledges that his legal philosophy seems to face a dilemma:

'And thus one arrives at the following dilemma: to either conceive of the law as [the product of an alien] will – but then to do without any justification of its obligatory character (*Gesolltheit*), of its duty-imposing force or its validity; or else to consider law to be obligatory, duty-imposing, valid – but then to justify this validity by appeal to autonomy, as a demand arising from the legal subject's own ethical personality.'⁴⁵

Radbruch acknowledges that one must embrace the second horn of this dilemma if one claims that law is not the gunman situation writ large:

'The source of the validity of the law enjoys the same autonomy as that of morality. To be more precise: both law and morality have one and the same source of validity. Or to be even more precise: the law can derive its validity only from morality, the prescriptions of the law attain validity only in virtue of the fact that the ethical personality appropriates those norms as ethical norms [...].'⁴⁶

Radbruch denies, however, that this dependence of legal validity on morality undercuts the distinction between law and morality. Though all obligations are moral obligations, there are moral obligations the content of which is not given by individual moral reason but determined by social factors. One can therefore distinguish between direct and indirect moral obligations. A direct moral obligation is an obligation the content of which is supplied by one's own moral reason. Examples of indirect obligations include 'cultural obligations,' which impose the duty to foster the sciences and the arts, as well as the social-ethical obligations imposed by justice, 'in which [compliance with] the positive law appears as an ethical value.'⁴⁷

'In the case of these indirectly ethical obligations, morality defers to an external legislation, it gives itself over to the specific dialectic of another realm of reason, it accepts

⁴⁴ Ibid., 68.

⁴⁵ Ibid., 68-69.

⁴⁶ Ibid., 69.

⁴⁷ Ibid., 70.

in advance a content of obligation that is yet to be determined by another side. It is morality itself that makes truth, in the form of truthfulness, a moral good, but it leaves it to logic to determine what is true. And in just the same way morality makes law and justice into moral tasks, even while the determination of their content remains with a procedure external to morality, that of legislation, of politics, of legal philosophy.⁴⁸

To sum up, Radbruch argues that all legal obligations are moral obligations. His account of legal obligation is an anticipation of what is now called the 'moral impact theory' of law,⁴⁹ which has it that legal duties are simply those of our moral duties that are generated by the decisions of legislative and judicial authorities. Such an understanding of legal obligation and validity, however, would seem to stand in tension with the positivist dimension of Radbruch's concept of law. Radbruch is keen to emphasize, as we have seen, that law may fail to serve justice. There can be unjust laws, and perhaps even laws sufficiently unjust to lack moral obligatoriness and legal validity.

There are two different ways for Radbruch out of this impasse. As we have seen, Radbruch argues that legal phenomena are phenomena that one can meaningfully assess as just or unjust. A focus on this first understanding of the cultural concept of law is likely to lead one to a positivist account of the nature of law that denies that any legally valid duty-imposing official directive must also generate a moral obligation. The morally wicked laws that were exploited by the grudge informers in Nazi Germany, for instance, can clearly be assessed to have been unjust, but they did not impose moral obligations. Along these lines, we are led to a position reminiscent of Raz's, who argued that the law necessarily claims moral authority but does not necessarily possess it.⁵⁰

Radbruch, however, often suggests a different take on the claim that law is a cultural fact. In this alternative view, the fact that legal phenomena are liable to be evaluated with reference to the value of justice is indicative of a more fundamental characteristic of law, namely that the law is meant to serve the ideal of justice. Radbruch claims, for instance, that the positive law is the aspect of social existence 'in which the value of justice ought to realize itself'.⁵¹ It is difficult to spell out

⁴⁸ Ibid., 70.

⁴⁹ Mark Greenberg, 'The Moral Impact Theory of Law', *Yale Law Journal* 123 (2014), 1288-1342.

⁵⁰ An interpretation along these lines is offered in Andreas Funke, 'Radbruchs Rechtsbegriffe, ihr neukantianischer Hintergrund und ihr staatsrechtlicher Kontext', in Borowski and Paulson (eds.), *Die Natur des Rechts bei Gustav Radbruch*, 23-52.

⁵¹ Radbruch, *Grundzüge der Rechtsphilosophie*, 73. Interestingly, Greenberg, 'The Moral Impact Theory of Law', 1294, makes a similar claim, in affirming 'the view that a legal system is supposed

this latter understanding with precision. Intuitively, the idea is that law is always directed towards some conception of justice, though it may not be sure in its aim. Legislators and judges at least aspire, over time, to put in place a scheme of rules that serves the realization of justice, though they may often go wrong in their judgment about what justice requires or about how best to implement it. Despite the potential for legislative mistakes, however, it is only where a system of official directives can be understood to carry an aspiration towards justice that the directives in question qualify as laws and are morally binding even if they are incorrect.

One of the attractions of relativism, for Radbruch, apart from the fact that it puts some distance between his legal philosophy and *Vernunftrecht*, is that it promises to soften the tension between the naturalist claim that the law is always morally binding and the positivist claim that enactment by public authority suffices to turn a directive into law – even if the directive in question is morally defective. The two theses will appear compatible if one assumes that positive legal enactments are very unlikely to be so unjust as to fail to be morally binding.

While his elaboration of understandings of justice, the so-called *rechtsphilosophische Parteienlehre*, emphasized the unavoidability of ideological conflict in modern society, Radbruch did not portray such conflict as a simple result of clashing interests or competing desires. Rather, he tried to show that the plurality of competing ideological orientations in modern society corresponds to different ways in which the realization of fundamental values might be pursued in a social context. Radbruch's relativism, in other words, stakes out the domain of reasonable conceptions of social order that are compatible with law's moral bindingness. As we will shortly see, the early Radbruch argued that if official directives are committed to one or another of the conceptions of justice articulated in the relativist legal philosopher's taxonomy of value systems, they are laws and are morally binding, insofar as they serve the interest in legal security.

The view that disputes over which of the available value orientations to choose, individually or collectively, cannot be resolved through scientific inquiry, does not make it impossible to draw a line between political programmes that are devoted to the realization of ultimate value, in some form or other, and political programmes mired in simple despotism, tawdry self-interest or sheer wickedness. The early Radbruch, however, did not see the need to draw that line and did not consider the possibility that there might ever be a government that would openly abandon

not merely to change moral obligations, but to do so in a way that improves the moral situation [...].'

any attempt to put the law in the service of fundamental value. Nazism did not change Radbruch's understanding of the nature of law. It simply disabused him of the optimistic view that any political regime will be committed to the realization of some conception of justice. Once he had abandoned that optimistic assumption, Radbruch was forced to make an unambiguous choice for one of the two ways out. His understanding of the normativity of law compelled him to opt for the second.

5. Individualism and Transpersonalism

Though it is surprisingly insightful, and though Radbruch regarded it to be the legal-philosophical main event, I will discuss his attempt to develop a taxonomy of systems of moral, legal, and political value only in a very brief and perfunctory manner. Radbruch's taxonomy offers a wonderful conceptual map of political ideologies,⁵² but its details have limited relevance for the argument of this paper.

The key idea behind Radbruch's taxonomy of legal values is again adopted from the work of Emil Lask. Lask argued that the fundamental ideological dividing line separating different value systems is that between individualism and transpersonalism, which roughly corresponds with the divide between liberalism and conservatism as ideological orientations.⁵³

Recall that Radbruch argues that fundamental value can be directly instantiated only by human actions and character or by human works that have aesthetic or cognitive value. Individualism is the claim that the only legally relevant fundamental value is the moral perfection of individual ethical character and that the law should serve that end.⁵⁴ The question of law's purposiveness, from this perspective, must turn on whether it provides the conditions under which its subjects are enabled to develop and perfect a moral character. Transpersonalist social philosophies, by contrast, hold that individual actions can be made valuable not merely by their morality but also by their service to the realization of cognitive or aesthetic value. Though it remains unclear how this claim would fit into the trinity of fundamental values, Radbruch goes on to observe that transpersonalism can also take a more

⁵² See Radbruch, *Grundzüge der Rechtsphilosophie*, 91-151.

⁵³ See Lask, 'Rechtsphilosophie', 283-297 and compare Radbruch, *Grundzüge der Rechtsphilosophie*, 96-99.

⁵⁴ This is not a plea for the sort of paternalism associated with the Thomistic idea that the law has an educative function. Radbruch argues that the law, by protecting our external freedom, can do no more than to give us the opportunity to develop a moral character.

openly political form, in the view that the successful life and preservation over time of a political community is a value in itself, so that individual acts derive value from their service to the nation.⁵⁵ In the different versions of transpersonalism, the purposiveness of law depends on whether it succeeds in putting the individual in the service of the relevant transpersonal goal.

As we have already seen, Radbruch is committed to the view that moral obligations can only be generated by one's own lawgiving practical reason. It might seem that this claim about the source of obligation conflicts with transpersonalism. Radbruch argues that this is not so. If it is a moral obligation, say, to foster the growth of knowledge or to work to increase the power of one's nation, the obligation must still be grounded in one's own will. One can autonomously subject oneself to the service of a transpersonal goal. To do so is to deny that the individual development of an ethical character is the only or the highest value, but it is to affirm that values, as well as the laws that serve them, can bind only in one's own conscience.⁵⁶

6. Radbruch's Changing Views on Justice

Given that the value of justice is made central in the Radbruch-formula, we must ask what Radbruch's taxonomy contributes to understanding justice. The discussion of justice in Radbruch, it must be conceded, is frustratingly oblique, and Radbruch's views on justice underwent important development over time, even before the advent of National Socialism. In a nutshell, the Radbruch of the 1914 *Rechtsphilosophie* denies, as we have seen, that justice is a self-standing ideal and therefore argues that there are as many different conceptions of justice as there are accounts of the purposes of law that might be developed either from an individualist or a transpersonalist perspective. The early Radbruch's doctrine of correct law therefore claims that the correctness of law is determined entirely by whether it is purposive, that is, by asking whether the law is apt to serve whatever system of value the legal order at hand may be committed to.

The claim that the justice of law is a direct function of the purposes attributed to law, and therefore entirely dependent on the three fundamental values of goodness, beauty and truth, is significantly modified in the course of the 1920's and Radbruch comes to acknowledge the value of justice as an independent

⁵⁵ See Radbruch, *Grundzüge der Rechtsphilosophie*, 94-95.

⁵⁶ See *ibid.*, 99-101.

fundamental value.⁵⁷ In outlining the content of the idea of justice, Radbruch distinguishes between commutative and distributive justice. He then goes on to claim that distributive justice is the more fundamental form of justice, since considerations of commutative justice must operate from a baseline of distributive justice. Distributive justice, Radbruch adds, requires that equals be treated equally and unequals unequally, but he concedes that this formal notion of justice does not by itself determine who is to be regarded as equal or unequal. The claim that justice requires equal treatment for equals must be given material content, and the latter can only be drawn from one or another account of the purposes of law: 'Only justice and purposiveness together are capable of delivering an idea of law that is determinate both in form and content.'⁵⁸

Radbruch nevertheless argues that the requirement of justice is morally relevant independently of considerations of legal purpose. The demand to treat like cases alike imposes at least a weak rule-of-law-constraint on legality. Anticipating the 'disavowal formula', Radbruch has the following to say in 1924 about unjust directives:

'A directive that does not even manifest a will to treat equals equally and unequals unequally, for instance an emergency decree against determinate individual persons or groups of persons, may be positively valid, it may be purposive and even necessary, and therefore be valid absolutely – but the title of 'law' (*Recht*) should be denied to it, since law is only that which at least intends to serve justice, just as science is only that which is undertaken – whether successfully or unsuccessfully – in the service of truth. Justice is the idea that determines the specific difference of law.'⁵⁹

Though Radbruch seems to concede that a directive that is not just since it does not treat equals equally may be purposive and morally binding, since it may be required by exceptional circumstances, he denies that such a directive should be recognized as law. The claim that law must intend to serve justice is cashed out in terms of an idea of generality of law. If law is to treat equals equally and unequals unequally, then law must operate with general rules, and it must draw distinctions between categories of people that are at least recognizably intended to express some coherent account of the purposes of law.

⁵⁷ See Gustav Radbruch, 'Die Problematik der Rechtsidee', in Radbruch, *Gesamtausgabe*, vol. 2, 460-467; this article appeared first in 1924. The new account of justice is then integrated into the 1932 edition of Radbruch's *Rechtsphilosophie*. See Radbruch, *Rechtsphilosophie*, 255-262.

⁵⁸ Radbruch, 'Die Problematik der Rechtsidee', 463. It is instructive to compare Radbruch's discussion of justice with that offered in Hart, *Concept of Law*, 157-167.

⁵⁹ Radbruch, 'Die Problematik der Rechtsidee', 462.

7. Radbruch's Three Conceptions of Legal Validity

The last and most important piece of background for understanding the Radbruch-formula is Radbruch's account of legal validity (*Geltung des Rechts*)⁶⁰ to which we can now turn. As should have become clear, there is a tension between the account of legal validity that comes to the fore in Radbruch's rejection of *Vernunftrecht* and his cultural concept of law. How does Radbruch propose to harmonize the claim that the law is 'the constellation of existing things (*Seinsgebilde*) in which the value of justice ought to be realized'⁶¹ with the claim that laws are validated through their enactment by recognized authorities?

One way to do so, as we have seen, would be to argue that since any rule enacted by a recognized authority can be assessed for its justice, even if it is gravely unjust, all rules enacted by recognized authority must qualify as laws, though they may not be worthy of obedience from a moral point of view. That positivist way out, however, is not available to a theorist who claims that legal normativity is a species of moral normativity and that all legal norms are morally binding. To maintain the latter claim, it seems that Radbruch would have to argue that enactment by recognized authority is not only necessary but also sufficient to endow any norm that an authority might choose to put in place with categorical moral bindingness. Though the early Radbruch comes close, in one respect, to embracing this view, he acknowledges that it would be implausible to accept it without qualification.

Radbruch's discussion of validity distinguishes between three different senses of legal validity: a doctrinal sense, a sociological sense, and a philosophical sense.

The doctrinal sense of validity, employed by the legal scientist, the lawyer, and the judge, aims to establish the validity of a legal norm by recourse to other legal norms that authorized its creation. In validating norms by reference to other norms, a jurist will eventually arrive at legal norms that are ultimate in the sense that their validity cannot be derived from any other law. Doctrinal reasoning does not question ultimate legal standards or aim to establish their validity; it simply uses them, as Hart put the point, or presupposes their validity, as Kelsen had it.⁶² To make these observations, however, does not explain why it is appropriate for doctrinal reasoning to limit itself to the application of a factually accepted rule of validation. The reasons, Radbruch suggests, must be practical:

⁶⁰ See Radbruch, *Grundzüge der Rechtsphilosophie*, 152-174.

⁶¹ *Ibid.*, 73.

⁶² See *ibid.*, 152-155.

‘Though it has been created to serve a purpose, the law nevertheless claims that it is to be applied not merely for the attainment of this purpose, and insofar as it serves that purpose, but to be applied unconditionally – the law absolutizes itself. From the perspective of the legislator who is charged with the task of creating law it may be appropriate to correct the old saying: *Fiat justitia, ne pereat mundus* – for the jurist, who interprets and applies created law, the old version of the maxim remains in force: *Fiat justitia – pereat mundus*.’⁶³

Given that Radbruch identifies the range of possible purposes of law with the range of conceivable conceptions of legal justice, it should be clear that he does not argue that the restraint the doctrinal concept of validity imposes on legal reasoning stems from considerations of theoretical purity or descriptive accuracy as they figure in the positivisms of Kelsen or Hart. His suggestion, rather, is that there are moral reasons, reasons referenced by the maxim *fiat justitia*, that require jurists to work within the limits set by the doctrinal concept of validity.

Radbruch's sociological sense of validity is straightforwardly Austinian. It claims that a legal norm is valid, and therefore obligatory, if and only if there is a power that will enforce it. Radbruch offers a rebuttal of that view which anticipates the key arguments Hart deployed against Austin's conception of obligation half a century later.⁶⁴ The reader will recall one of Hart's key examples against Austin's conception of obligation: a young man who is legally obligated to do military service pays a bribe to officials, to avoid military service without having to fear a sanction. The sociological account must fail to explain, Hart pointed out, how it can be the case that the man is still legally obligated to serve.⁶⁵ Radbruch makes the same point when he observes that, in contrast to the sociologist, whose conception of validity can rest content with the likelihood of the enforcement of some rule, the jurist and the legal philosopher must ‘demand the proof of the validity of the law for every individual case and, for that reason alone, cannot identify validity with effectiveness [...]’.⁶⁶

The philosophical conception of validity, finally, is concerned to outline the conditions under which the law is morally binding.⁶⁷ The most obvious answer that might be given here is that the law will be morally binding only if it serves

⁶³ Ibid., 152-153.

⁶⁴ See *ibid.*, 155-161.

⁶⁵ Compare Hart, *The Concept of Law*, 83.

⁶⁶ Radbruch, *Grundzüge der Rechtsphilosophie*, 156.

⁶⁷ See *ibid.*, 161-171.

the realization of the correct conception of justice or of the purposes of law and if it does so in a purposive way. But to adopt this view, Radbruch worries, would amount to a form of intellectual backsliding. One would regress into the empty pretensions of *Vernunftrecht* and deny the significance of the doctrinal perspective together with the methodological achievements of positive legal science. One would also encourage a form of legal anarchism induced by moral disagreement.

Radbruch concedes that any attempt to offer a justification for the validity of incorrect law would be unavailing if ‘the purpose of law and the means necessary for its attainment were scientifically cognizable.’⁶⁸ Radbruch’s relativism, the claim that a choice between the competing available accounts of the purpose of law cannot be shown to be correct in a way that would make dissent unreasonable, once again comes to the rescue:

‘It has turned out to be impossible to answer the question of the purpose of law in any other way than by offering a list of the many partisan opinions about the matter – and it is only in this impossibility of natural law that one can ground the validity of positive law; at this point, relativism, which so far has been only the method of our theorizing, becomes a limb of the construction of our system. The order of communal life cannot be left to the legal opinions of the individual persons who live together, since these different individuals might issue instructions that are opposed to one another. It must be regulated by a supra-individual authority. Since reason and science are unable to fulfil this task, it must be discharged by will and power: if no one is in a position to establish what is just, then someone must determine what is to be rightful. Law is the ordering of community in the service of justice, justice is the law’s remote purpose, but the proximate purpose of the law as an order of communal life is legal security, to resolve the challenge of creating some supra-individual order of this or that kind, and thus of settling the practical dispute between different conceptions of justice by way of an authentic decision. The law will fulfil its more remote purpose only if it is correct in content, but it will always fulfil its proximate purpose, in virtue of its positivity.’⁶⁹

The philosophical concept of validity, in other words, claims that law is morally binding insofar as it performs a settlement function under circumstances where members of a society reasonably disagree about justice.

This philosophical account of validity will be charged with being too Hobbesian and with putting the bar for the law’s moral obligatoriness too low. However, to

⁶⁸ Ibid., 161.

⁶⁹ Ibid., 162-163.

assume that Radbruch means to claim that any rule made by a *de facto* powerholder will have moral bindingness would be to misunderstand his relativism. Radbruch's relativism does not claim that any political goal is of equal dignity and has a claim to be respected merely because someone holds it. As we have already seen, it is better to understand Radbruch's relativism as a form of value pluralism rather than as a celebration of moral subjectivism or a license for identity politics.

For Radbruch, a conception of justice must meet certain constraints to be eligible as a conception of the purpose of law. It must be committed to the indirect realization of fundamental value in some intelligible way, and its relation to fundamental value must be worked out in a coherent manner that permits evaluations of the purposiveness of the positive law which is to serve it. The laws in question, what is more, must take the form of general rules that treat equals equally and unequals unequally, where the notions of equality and inequality are given content by a coherent account of the material purposes of law. These requirements on what might qualify as lawful governance leave legislators with considerable leeway, but they do impose real constraints. What Radbruch's relativism claims is that the realm of purposes has room for a range of different worldviews or conceptions of good social order that are plausibly connected to fundamental value and that could be expressed in legal form, that is, in a way conformable to the idea of justice.

What Radbruch suggests, then, is that rules enacted by authority are legally valid and morally binding on the condition that they are credibly committed to the lawful realization of one or another of the conceptions of good social order made available by the different ways in which culture can instantiate fundamental value. It is only once this condition is satisfied that the interest in legal security and the settlement of normative disagreement comes into play to explain why those whose conception of the proper material purposes of law may differ from that embedded in the positive law are morally bound to comply.

The early Radbruch makes it clear, what is more, that the argument from legal security, at least from a philosophical perspective, establishes no more than a presumption that the law is morally binding. A subject faced with laws they deem problematic would have to ask themselves, from the point of view of their own orientation towards fundamental value, whether a perceived injustice brought about by the law becomes tolerable in light of the interest in legal security, which is an interest that adherents of all conceptions of justice are taken to share. Radbruch concludes that one who operates with the philosophical conception of validity – and that includes not merely the philosopher but also the ordinary citizen – may, in extreme cases, justifiably come to deny the validity of a positive directive they

hold to be unjust.⁷⁰ However, Radbruch explicitly applies a different standard to the jurist or legal official:

‘[...] only the jurist, whose power of understanding is theoretically concerned with the meaning of legal order, is obligated to recognize the validity that is claimed by every legal order unconditionally, but not the legal associate (*Rechtsgenosse*) whose conscience is practically concerned with its bindingness.’⁷¹

The philosophical and the doctrinal conceptions of validity, then, offer differing accounts of the grounds of law. From the perspective of the philosophical conception, enactment by a recognized legislative authority is a necessary but not a sufficient condition of the validity of a norm, whereas the doctrinal conception claims that enactment by authority is both necessary and sufficient to give validity to a norm. The impact of enactment on the moral situation of the citizen and the official is thus different: the citizen may find that some enacted norm cannot be morally binding and may therefore deny its validity. The jurist, by contrast, is duty-bound to accept any norm enacted by authority as valid.

A further differentiation is needed to clarify Radbruch’s view about the position of jurists. The reference to the jurist in the above quotation may either refer to the legal academic or to the legal official. In the first case, what Radbruch claims when he says that the jurist is obligated to recognize the validity of positive law unconditionally is that a doctrinal legal scholar will have no reason to wade into a debate on the justice of the positive law to arrive at or to support doctrinal claims. This claim is connected to Radbruch’s account of the nature of legal science (*Rechtswissenschaft*), which emphasizes the claim that the legal scholar, like the legal philosopher, can remain ideologically agnostic while wearing their academic hat.⁷² If Radbruch’s reference to the jurist in the above quotation is taken to refer to legal officials, his claim turns out to be more practically consequential, and comes to the demand that the legal official, and the judge in particular, defer unconditionally to the positive law when they exercise their official powers:

⁷⁰ See *ibid.*, 168 and 171 and compare Radbruch, *Rechtsphilosophie*, 315: ‘The individual conscience will and may in most cases judge a violation of the positive law to be more problematic than the sacrifice of one’s own legal conviction, but there may be shameful laws (*Schandgesetze*) that conscience rightly refuses to obey.’ As an example of a *Schandgesetz*, Radbruch refers to the Wilhelmine law that outlawed the social-democratic party.

⁷¹ Radbruch, *Grundzüge der Rechtsphilosophie*, 173.

⁷² See *ibid.*, 175-200.

‘There is, however, one profession whose members must unconditionally respect the law’s will to validity in their professional activity: the profession of judges. But this obligation [...] cannot be defended by the juristic doctrine of validity which appeals to positive law, it can only be grounded by ethics, by an appeal to the oath through which the judge has undertaken to give effect to a statute’s will to validity, to sacrifice their own sense of justice to the authoritative legal command, to ask only what the law requires, and never to ask whether the law is just.’⁷³

The claim that judges must pay unconditional deference to the positive law in taking their decisions, then, is itself a moral claim. That judges have sworn an oath to obey the law is not what really matters, of course. The reason why Radbruch demands that judges treat the positive law as categorically binding is that he thinks that it is necessary for judges to do so if the practical interests in legal security and in the maintenance of the law’s settlement function are to be realized. It is this concern with legal security that motivates the distinction between a doctrinal and a philosophical conception of validity as well as the claim that the use of the former does not require engagement with the question of the practical correctness of law.

Radbruch’s attempt to impose a positivist account of the grounds of law on jurists serves the moral purposes articulated by his legal philosophy. Legal officials are not to be permitted to question the validity of positive law by reference to the values of purposiveness or justice. This restriction is intended to make sure that positive law can serve the interest in legal security and peacefully settle reasonable disagreement about justice. However, Radbruch’s defence of the importance of unconditional official deference to the law and his insistence on a positivist conception of validity for judges make sense only as long as it is assumed that any legislator can be counted on to be committed to the pursuit of a conception of the purpose of law that bears an intelligible relation to fundamental value and that respects the formal constraints that arise from the kinship of law and justice. Nazism showed that assumption to be false.

8. The Radbruch-Formula

The context provided by the preceding discussion of Radbruch’s legal philosophy explains the ranking Radbruch imposes on the three values of justice, purposiveness, and legal security in *Statutory Lawlessness*. It therefore also explains how Radbruch was led to his formula.

⁷³ Ibid., 173.

Radbruch's claim that purposiveness is dependent on justice should not occasion surprise. Law's purposiveness, in Radbruch's system, consists in its aptitude to realize some conception of the material purposes of law that is properly related to fundamental value. Radbruch therefore had good reason to counter the Nazi claim that law is what is useful to the people by pointing out that law can only be purposeful if it is just. What is deemed useful to the people may not be just; it may not be conformable, that is, to any of the conceptions of good social order intelligibly related to fundamental value. What is more, it may not be implementable in ways that respect the formal constraint of justice, that is, in general laws that treat equals equally and unequals unequally.

It should also be clear how Radbruch arrived at the view that legal security normally takes precedence to justice. In a society in which citizens disagree about the material content of justice, the law will be able to play a settlement function only if the shared interest in legal security can bracket disagreement over what material purposes the law is to serve. This accounts for the first limb of the Radbruch-formula, the 'intolerability formula'. That one believes that a legislative choice for a conception of material justice, from among those that fall into the range of reasonable disagreement, is incorrect does not by itself invalidate any law, even from the perspective of the philosophical conception of validity. Neither does a failure on the part of legal authorities to implement that conception in the most purposive way. Legislative authorities thus have considerable leeway to create binding law while making mistakes. However, if the tension between official directive and the values that the law claims to serve becomes intolerably large, it will cease to be morally binding and therefore lack validity.

The second limb of the Radbruch-formula, the 'disavowal formula', concerns directives that openly repudiate the aim to achieve justice which Radbruch, as we have seen, held to be constitutive of law. It puts emphasis on the formal constraints of justice, that is, on the requirement that law must consist of general rules that treat equals equally and unequals unequally, where equality and inequality are defined by some coherent account of the material purposes of law. It took the experience of National Socialism to convince Radbruch that a government may fail to be committed to the pursuit of any morally plausible conception of the purposes of law and also be willing to throw overboard the requirement of generality, so that its directives would fail to be laws as a result of the absence of any discernible intention to serve the realization of justice.

Both the intolerability and the disavowal formula do little more than to draw out implications of Radbruch's early theory; implications that had become more salient and evident due to the experience of Nazism. The only novelty in Radbruch's

postwar position is that the reasoning about the limits of validity encapsulated in the formula, even while it is offered from the perspective of the philosophical conception of validity, is now addressed to legal officials and not merely to citizens. This mode of presentation expresses the conviction that it is counterproductive, in morally catastrophic circumstances, to imprison jurists and legal officials in a purely doctrinal perspective that compels them to eschew questions of justice. In the face of radical despotism, jurists and judges must engage with legal philosophy if they are not to become instruments of injustice. To do so, they must be permitted to operate with the philosophical conception of validity even when wearing their professional hat and, consequently, to determine the proper limits of their own deference to the legislator. Radbruch did not change his account of the nature of law. What he changed was his view on what distribution of authority between the legislator and the judiciary would best serve the moral aims of law.

In this perspective, Radbruch's irritating leniency towards the judges who sentenced the victims of the grudge informers begins to look like a *mea culpa*. When the postwar Radbruch claims that legal positivism had aimed to drill it into judges that the law is the law, he is attacking the tradition of statutory positivism, but he is also implicitly referring to his own earlier work, and he intends to qualify his previous views about the proper scope of judicial deference; views which, or so he might have felt, deprived him of standing to call for the legal punishment of judges who had applied the laws of Nazi Germany.

Radbruch's claim that legal positivism had made German legal officials disposed to become complicit in Nazi dictatorship has always puzzled commentators, as it does not seem to fit with the historical fact that positivist authors were over-represented among the defenders of democracy and opponents of Nazism, whereas most natural law theorists of the Weimar period turned into willing collaborators of Nazism. Against the backdrop of Radbruch's legal philosophy, the claim that positivism disposed officials to collaboration with Nazism is best understood, I submit, as a repudiation of his own earlier view that judges are not only required to consider legislative enactment as the sole ground of law but also duty-bound to apply the legislator's directives come what may.

Radbruch's early work did not compel him to be as hesitant in discussing the fate of the grudge informers as he was in considering the responsibilities of judges. As ordinary citizens, the grudge informers had not been morally bound, even under Radbruch's early approach, to accept the maxim that the law is the law. They ought to have taken their decisions from the point of the view of the philosophical rather than the doctrinal conception of validity, which ought to have encouraged them to question the validity of extremely unjust Nazi laws.

Radbruch's postwar affirmation of the legitimacy of the punishment of the grudge informers is well-supported by the conception of legal validity he espoused from 1914 onwards.

9. Conclusion: Hart's Radbruch-legend

Is there any sense in which Radbruch was ever a positivist? There must be, it might be argued, because the postwar Radbruch himself claimed to have abandoned positivism.

Radbruch seems to have understood positivism in two different ways, neither of which aligns with the contemporary understanding of the position. On the one hand, Radbruch associated positivism with a rejection of *Vernunftrecht*. Though Radbruch, ever so hesitantly, seems to have questioned the rejection of *Vernunftrecht* after the war, the Radbruch formula is perfectly compatible with the repudiation of formal natural law in Lask's sense. The Radbruch formula claims that enactment by positive authority is a necessary (though not a sufficient) condition of validity, and that claim is opposed to formal natural law as defined by Lask. On the other hand, the early Radbruch held to the view that legal officials ought to work with a positivist conception of the grounds of law, and he argued as well that judges were morally bound to decide in accordance with that conception. It is this conception of the moral duties of judges that Radbruch gave up after the war.

It should be clear that neither of the two features of his early theory that Radbruch himself considered positivist makes his legal theory a positivist theory in the contemporary understanding articulated by Hart. The rejection of *Vernunftrecht* and the claim that enactment is a necessary condition of validity are compatible with the claim, consistently affirmed by Radbruch throughout his career, that there is a necessary connection between legal validity and moral bindingness. Even the early account of judicial role was not properly positivist in the contemporary understanding. Hartian positivists reject any commitment to the claim that judges are morally bound to decide in accordance with a positivist account of the grounds of law. In methodological terms, finally, Radbruch's legal philosophy took jurisprudence to be a form of value-analysis from the start.

Hart's discussion of the Radbruch formula seems to have been blissfully unaware of the nuances of Radbruch's legal-theoretical views. It simply projected Hart's own understanding of positivism onto the early Radbruch. As a result, Radbruch's actual legal-philosophical position was lost in translation. Consider the description Hart gave of the early Radbruch's supposed positivism:

‘Before his conversion Radbruch held that resistance to law was a matter for the personal conscience, to be thought out by the individual as a moral problem, and the validity of a law could not be disproved by showing that its requirements were morally evil or even by showing that the effect of compliance with the law would be more evil than the effect of disobedience.’⁷⁴

It is true that the early Radbruch claimed that resistance to law was a matter for the personal conscience. Radbruch, however, never abandoned that view, and it is difficult to see why it should have committed Radbruch to legal positivism, as Hart seems to intimate. A subject of the law who accepts a natural law theory must still assess whether rules enacted by authority qualify as laws and whether their moral force is sufficient to be conclusive. These are surely matters for the personal conscience. As we have seen, the prewar Radbruch disagreed with the second claim that Hart attributed to him, that is, the view that the validity of a law cannot be disproved by showing that it is gravely unjust or evil. What Radbruch did argue was that judges are bound to work with a positivist understanding of the grounds of law in their official capacity. But even that demand was justified in openly moral terms, and it does not rule out that a judge who is also a citizen may justifiably conclude that the laws they are asked to apply are legally invalid from a philosophical or practical perspective and that they should therefore resign.

Hart's patronizing claim that his adversary, in holding on to the view that law has intrinsic moral force, ‘had only half-digested the spiritual message of liberalism’ misunderstands Radbruch's intentions. Radbruch clung to that view because he wanted to maintain the law's ability to settle ideological conflict. Hart's retort that it would be morally wrong to grant that positive law is at least presumptively binding, even in a society governed by rulers who are honestly committed to realizing an intelligible conception of justice, simply begs the substantive moral question Radbruch was interested in putting on the table. It assumes – wrongly, in Radbruch's view – that the fact that some legal system succeeds in providing legal security and in settling ideological conflict has no bearing on the question whether its directives should be regarded as at least presumptively morally binding.

In Hart's account, Radbruch was a woolly romantic, beholden to the childish view that ‘all the values we cherish will ultimately fit into a single system, that no

⁷⁴ Hart, ‘Positivism’, 616. Hart does not give any source for this assessment, so it is unclear what text of Radbruch's or what other information Hart relied on here.

one of them has to be sacrificed or compromised to accommodate another.⁷⁵ As we have seen, this was precisely not Radbruch's position. Radbruch's legal-philosophical thought, rather, begins with a repudiation of the belief that all discord is harmony not understood. It was therefore quite inappropriate for Hart to feel entitled to posture in the role of the sober realist willing to grasp the nettles of moral controversy. Radbruch would surely have agreed with Hart that 'the thing to do with a moral quandary is not to hide it',⁷⁶ and he considered the legal-philosophical implications of that claim as carefully as Hart.

⁷⁵ Ibid., 620.

⁷⁶ Ibid., 619-620.