

An Interpretation of Radbruch's Betraying Formula Hidehiko ADACHI

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In a short essay from 1946, based on his experience with the Nazi regime, Gustav Radbruch claimed that National Socialist 'law' lacked the validity and nature of law. His claim was later called 'Radbruch's formula'.¹ This formula consists of two sub-formulas. The first is the 'intolerable formula', which claims that a positive law is invalid if it promotes intolerable injustice. The second is the 'betraying formula', which claims that a positive law lacks the nature of law if equality, the core of justice, is deliberately denied at the time the law is issued.

It has been and continues to be disputed how those two sub-formulas should be interpreted and the relationship between them. This presentation proposes an interpretation according to which the intolerable formula focuses on law itself, whereas the betraying formula focuses on argumentations about law. Because of limited time today, the discussion will mainly focus on the betraying formula and point out its two interpretations: the subjective interpretation and the objective interpretation.

I Radbruch's Concept of Law

The betraying formula follows directly from Radbruch's concept of law. In his main work, 'Legal Philosophy' from 1932, Radbruch defined law as 'the reality

¹ The English translation of the original text 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. It is impossible to draw a sharper line between cases of statutory lawlessness and statutes that are valid despite their flaws. One line of distinction, however, can be drawn with utmost clarity: Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely 'flawed law', it lacks completely the very nature of law. For law, including positive law, cannot be otherwise defined than as a system and an institution whose very meaning is to serve justice. Measured by this standard, whole portions of National Socialist law never attained the dignity of valid law.' (Gustav Radbruch, Statutory Lawlessness and Supra-Statutory Law, 7.)

the meaning of which is to serve justice'.² In his 1946 essay, he defined law as 'a system and an institution whose very meaning is to serve justice'. These two, slightly different, definitions have, at their core the phrase 'to serve justice'. It can be logically concluded that any system or institution the purpose of which is not to serve justice is not law. Radbruch's concept of law and the betraying formula are, as far as this core value is concerned, equivalent.

Radbruch regarded law as a 'value-relating' concept. The idea of value-relating was derived from historiography developed by Heinrich Rickert. Radbruch interpreted this method as a general method of the cultural science.³ According to his interpretation, culture is everything that is related to values: 'culture is not realisation of value, but it is whatever has significance or meaning for the realisation of values.'⁴ He enumerated science (*Wissenschaft*), the arts and morals as examples of culture: science is anything given that, whether attaining or missing the truth, still has the meaning to serve the truth; art is anything that has the meaning to serve beauty, and morals are anything that serve the good. Further, Radbruch considered law as a cultural phenomenon, stating, 'The concept of law can be determined only as something given, the meaning of which is to realise the idea of law. Law may be unjust; but it is law only because its meaning is to be just.'⁵

The core of the question is how cultural phenomena serve justice. In his 1946 essay, Radbruch clearly focused on the will of the legislator, stating: 'where equality, the core of justice, *is deliberately betrayed in the issuance of positive law*'.⁶ However, in his 'legal philosophy', from 1932, Radbruch revealed his understanding of value-relating, according to which cultural phenomena themselves serve values. He gave an example: the definition of 'tables' is impossible without referring to 'their purpose', that is, 'a device on which to put something for those sitting at it'.⁷ This is not to suggest that the producer of the

² Radbruch, *Philosophy of Law*, 75.

³ On Radbruch's interpretation of the value-relating attitude, see Adachi, *Radbruchsche Formel: Eine Untersuchung der Rechtsphilosophie Gustav Radbruchs*, S. 31-35.

⁴ Radbruch, *Legal Philosophy*, 50.

⁵ Radbruch, *Legal Philosophy*, 52.

⁶ „(W)o die Gleichheit, die den Kern der Gerechtigkeit ausmacht, bei der Setzung positiven Rechts bewußt verleugnet wurde“ (Radbruch, *Gesetzliches Unrecht*, S. 216).

⁷ „(E)ine Vorrichtung, um für daran Sitzende etwas darauf zu sitzen“ (Radbruch,

table intended, in making the table, to serve 'to put something on', but rather that the table itself serves to have something put on it. Strictly speaking, someone who looks at a table thinks that its purpose is for putting something on. Analogically, Radbruch's concept of law can be interpreted in such a way that law itself can serve justice. We will name the first interpretation of Radbruch's concept of law and the betraying formula, both of which focus on the intention of the legislator, as the subjective interpretation, and the second interpretation, which asserts that law itself serves justice, as the objective interpretation. These two interpretations are discussed in the following sections.

II Two Interpretations of the Betraying Formula

1. The Subjective Interpretation

According to the subjective interpretation of Radbruch's betraying formula, a positive law whose legislator deliberately denied justice lacks the nature of law. Based on 'this standard', Radbruch concluded that 'whole portions of National Socialist law never attained the dignity of valid law'.⁸

The subjective interpretation of the betraying formula faces one objection: every legislator, even a tyrannical ruler, can justify the law by referring to their own idea of justice, thus rendering this formula useless. But the existence of exceptional cases can be assumed where the legislator does not express anything about the law. If the legislator does not give any reason to justify the law, especially if the positive law concerned was not promulgated and the reason for it was hidden, the intention of the legislator cannot be known. By not providing any argumentation for the law, it is reasonable to assume that the intention of the legislator was the betrayal of justice.

This assumption could be rejected by an assertion that not providing argumentation does not necessarily have consequences for the meaning or validity of the law.⁹ A positive law can be just even when no argumentation has been provided by its legislator. This objection is theoretically correct, but incorrect in practice. A considerable relationship exists between absence of argumentation for an assertion and unjustifiable content. It is sufficient to point out that Hitler's order for the euthanasia of disabled persons was never

Rechtsphilosophy, S. 11).

⁸ Radbruch, *Statutory Lawlessness and Supra-Statutory Law*, 7.

⁹ Carsten Heidemann, *Law's Claim to Correctness*, 129.

promulgated.¹⁰ Based on this relationship in practice, in many states and, at the very least in almost all democratic states, proposers of laws are legally obliged to provide reasons for their proposals and governments must promulgate laws after they have been adopted by parliament.

2. The Objective Interpretation

The objective interpretation of the betraying formula is based on the original meaning of Radbruch's concept of law. It focuses on any possible argumentations about certain positive laws. The legislator's argumentation, which was the target of the subjective interpretation, is also considered, but it is just one of many possible argumentations. According to the objective interpretation, positive law lacks the nature of law if no persuasive argumentation can be found amongst all possible argumentations.

Argumentations that attempt to justify positive law must conform to the principle of equality. Radbruch originally understood this principle as a very formal one. He wrote: '(W)e determined the essence of justice, of distributive justice, as equality: equal treatment of equal, and correspondingly unequal treatment of different, men and relationships.'¹¹

It would be untrue to say that every positive law conforms to this formal principle of justice. The reason why the positive law concerned does not equally treat its addressee and other persons must be explained. At least one persuasive reason for this unequal treatment must be provided. If no reason can be provided, the positive 'law' concerned does not deserve to be called law.

One objection can be raised to the above paragraph. Any reason can be provided for justifying unequal treatment between the addressee of the law and others and, therefore, no positive law is deprived of having the name of law. This objection is, indeed, true and here we face the limit of the betraying formula. Radbruch argued that the principle of equality 'does not say who is to be treated as equal and who as unequal; rather it presupposes that, from a

¹⁰ Radbruch, *Privatissimum der Rechtspflege*, GRGA Bd. 14, S. 150-151 cites a private letter from Hitler, written on 1st September 1939, which entrusted Philipp Bouhler and Karl Brandt to extend the authority of doctors, so that patients who were considered incurable could be granted a mercy death.

¹¹ Radbruch, *Legal Philosophy*, 107. „(G)leiche Behandlung gleicher, entsprechend ungleiche Behandlung verschiedener Menschen und Verhältnisse“ (Radbruch, *Rechtsphilosophie*, S. 73).

viewpoint which it does not of itself provide, equality or inequality has already been established.¹² This viewpoint is, according to Radbruch, the purpose of law. He mentioned three possible purposes of law: personality value, collective value and work value; and three possible 'views' on law and state: the individualistic view, the trans-individualistic view and the trans-personal view.¹³ Further, based on his value-relativism, he wrote that 'reason and science are unable' to answer the question of the purpose of law. If we would follow this relativistic position of Radbruch, we must admit that any law can be justified, even if it discriminates against a group of people and ignores their human rights, if the discrimination is suitable for the purpose of the state.

After the Second World War, Radbruch argued for the absoluteness of human rights. He argued: 'Law is the possibility of fulfilment of moral obligation or, in other words, such the extent of the outer freedom, without which the inner freedom of ethical decision cannot exist. To guarantee that outer freedom is nature and core of the human rights. It follows from it that that rights are absolute nature (...)'.¹⁴ With this statement, Radbruch admitted an individualistic view on law and the state and, therefore, the absoluteness of human rights. This line reveals his 'equality' in the betraying formula. The principle of equality in the betraying formula is not a formal, but a material principle which includes a demand to respect the human rights of every person. Based on this understanding of the principle of equality, Radbruch could argue that 'whole portions of National Socialist law never attained the dignity of valid law'.¹⁵

However, equality, as a material principle in the betraying formula, in 1946 was very different to equality, as a formal principle in 'legal philosophy', in 1932. To maintain the coherence and clarity of his theory, it may be desirable to assign the question of human rights, not to the betraying formula, but to the intolerable formula¹⁶, which is beyond the scope of this brief presentation.

¹² Radbruch, Legal Philosophy, 75.

¹³ Radbruch, Legal Philosophy, 94.

¹⁴ Radbruch, Vorschule der Rechtsphilosophie, GRGA Bd. 3, S. 146.

¹⁵ Radbruch, Statutory Lawlessness, 7.

¹⁶ Robert Alexy defends the intolerable formula in his many works (Alexy, A Defence of Radbruch's Formula, 16 ; Alexy, Gustav Radbruch's Rechtsbegriff, S. 247-249).

References

- Hidehiko Adachi, *Radbruchsche Formel: Eine Untersuchung der Rechtsphilosophie Gustav Radbruchs*, Baden-Baden 2005
- Robert Alexy, 'A Defence of Radbruch's Formula' in David Dyzenhaus (ed.), *Recrafting the Rule of Law: the Limits of Legal Order* (Hart Publishing 1999) 15-39
- Robert Alexy, Gustav Radbruchs Rechtsbegriff, in: Andreas von Arnould/Ino Augsberg/Rudolf Meyer-Pritzl (Hrsg.), *350 Jahre Rechtswissenschaftliche Fakultät der Christian-Albrechts-Universität zu Kiel*, Mohr Siebeck, Tübingen 2018, S. 238-249
- Carsten Heidemann, 'Law's Claim to Correctness' in Sean Coyle and George Pavlakos (eds.), *Jurisprudence or Legal Science? A Debate about the Nature of Legal Theory* (Hart Publishing 2005) 127-146
- Gustav Radbruch, *Rechtsphilosophie* (1932), Ralf Dreier/Stanley L. Paulson (Hrsg.), *Gustav Radbruch Rechtsphilosophie: Studienausgabe, 2., überarbeitete Auflage*, Heidelberg 2003, S. 1-192
- Gustav Radbruch, 'Legal Philosophy' in, Kurt Wilk (tr.), *The Legal Philosophy of Lask, Radbruch, and Dabin* (Harvard University Press 1950) 43-224
- Gustav Radbruch, *Gesetzliches Unrecht und übergesetzliches Recht* (1946), Ralf Dreier/Stanley L. Paulson (Hrsg.), *Gustav Radbruch Rechtsphilosophie: Studienausgabe, 2., überarbeitete Auflage*, Heidelberg 2003, S. 211-219
- Gustav Radbruch, Bonnie Litschewski Paulson and Stanley L. Paulson (trs.), 'Statutory Lawlessness and Supra-Statutory Law (1946)' (2006) 26 *Oxford Journal of Legal Studies* 1-11
- Gustav Radbruch, *Privatissimum der Rechtspflege*, in: *Wiesbadener Kurier* vom 24. September 1947, S. 1, *Gustav Radbruch Gesamt Ausgabe (GRGA)*, Bd. 14, S. 150-153
- Gustav Radbruch; Harald Schubert/Joachim Stolzenburg (Hrsg.): *Vorschule der Rechtsphilosophie: Nachschrift einer Vorlesung*, Willsbach und Heidelberg 1947, *GRGA* Bd. 3, S. 121-227

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