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## CONTENT AND PRACTICAL SIGNIFICANCE OF RADBRUCH'S FORMULA

1. The term “Radbruch’s formula” commonly refers to Gustav Radbruch’s 1946 article *Gesetzliches Unrecht und übergesetzliches Recht* (“Statutory Non-Law and Suprastatutory Law”)\*. In this article, Radbruch says:

“Preference [in solving the conflict of legal certainty and justice, *by Author*] is given to the duly enacted law and secured by state power as it is, even when it is unjust and fails to benefit the people, unless its conflict with justice reaches so intolerable a level that statute becomes, in effect ‘false law’ [*unrichtiges Recht*] and must therefore yield to justice”. (Translated by Stanley L. Paulson)\*\*

Radbruch’s formula in fact comprises two formulae. In addition to the aforementioned first formula – the so-called *Unerträglichkeitsthese* (“intolerability thesis”) – Radbruch had developed another differentiation, the so-called *Verleugnungsthese* (“disavowal thesis”). Radbruch continues:

“Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the assurance of positive law, than the statute is not merely ‘false law’ [*unrichtiges Recht*], it lacks completely the very nature of law”. (Transl. by St. L. Paulson)\*\*\*

Both formulae make prescriptive assumptions about statutebased law. The so-called “intolerability thesis” faces the problem of legal validity (*Geltung des Rechts*), distinguishing statutory law, which is unjust but valid, from statute law, that has lost its

validity in this regard. The “disavowal thesis” in contrast deals with the concept of law (*Begriff des Rechts*), separating law from non-law (scil. statute law lacking the very nature of law). Despite the difference in subject, but with regard to both formulae’s reference to justice, one can regard the “disavowal thesis” as a concretion of the “intolerability thesis”\*\*\*\*.

2. The formula’s statement in fact is threefold: First of all that the conflict of justice and legal certainty (*Rechtssicherheit*) could not be solved absolutely, thus allowing only a conditional priority. Secondly, that this conditional priority operates in favor of legal certainty; thirdly, that the primacy of legal certainty is revoked, when injustice becomes intolerable (*unerträglicher Gerechtigkeitsverstoß*).

All three statements can be identified with crucial ideas in Radbruch’s philosophy of law. The first thesis, which refuses concepts of absolute priority in dissolving the contradiction of legal certainty and justice, makes Radbruch’s legal philosophy an option beyond concepts of legal positivism and natural law theory. This is because traditional natural law theory gives justice absolute priority, while legal positivism in contrast asserts absolute priority in favor of legal certainty, claiming legal validity of statutory law separate from its moral quality. With the second thesis, which interpretes conditional priority in favor of legal certainty, Radbruch takes the changes of the law in modern time into account: The problem of finding absolute justice, the triumph of statute law in democratic constitutional state, and the separation of law and morality. The third thesis, setting a boundary when unjust statute law loses its validity, must be interpreted as a result of the Nazi experience 1933-1945. In this time, Radbruch is forced to realize that even a statute based legal system had to be limited, especially by utilizing justice to detect and delegitimze extreme injustice and in order to keep the legal system in close connection to morality.

\* *Gustav Radbruch, Gesetzliches Unrecht und übergesetzliches Recht*, in: *Süddeutsche Juristenzeitung* 1946, pp 105-108; reprinted in a fine new German edition of Radbruch’s famous *Philosophy of law* (1932), including editorial notes, done by *Ralf Dreier & Stanley L. Paulson*, eds., *Gustav Radbruch, Rechtsphilosophie, Studienausgabe*, 2nd. ed., Heidelberg: C.F. Müller 2003. – English Translation in accordance with *Stanley L. Paulson*, Lon. L. Fuller, *Gustav Radbruch and the “Positivist Theses”*, in: *13 Law and Philosophy*, pp. 313-359 (1994).

\*\* *Radbruch, Gesetzliches Unrecht und übergesetzliches Recht*, (*supra* note 1), at 107.

\*\*\* *Id.*

\*\*\*\* For further details see *Frank Saliger, Radbruchsche Formel und Rechtsstaat*, 1995.

Through all of his life, Gustav Radbruch (1878-1949) had struggled for the solution of the conflict between justice and legal certainty\*. In respect to Radbruch's changing collision theorems, his legal philosophy shows close contact with changing political conditions. In 1914, before World War I, but still under the secure conditions of the German Empire, Radbruch holds a relativistic solution for the antagonism of justice and legal certainty: that is to say, the solution is dependent on the choice of different ideas of the state, the law and the world, which in the end can be called freedom, power or culture\*\*. In 1932, at the end of the Weimar Republic, Radbruch is advocating a subjective solution, delegating the decision on legal validity to the individual's conscience\*\*\*. In 1946, after the end of the Nazi regime, Radbruch formulates an objective antithesis between Statutory Non-Law (*Gesetzliches Unrecht*) and Suprastatutory Law (*übergesetzliches Recht*). In the course of "materialisation" (*Materialisierung*) of his concept of justice, Radbruch explicitly rejects the validity of those statutory legal provisions (as being Statutory Non-Law or Non-Law) that treat humans as inferior people as well as for acts unbalancedly enacting punishment (in many cases death penalty), or in cases of complete denial of human rights.

3. Radbruch's formula is not only the core thesis in Gustav Radbruch's legal philosophy; it had also affected the German law practice deeply. Because of this, Radbruch's formula can be called the most effective thesis in legal philosophy in the 20th century.

Radbruch himself was in no doubt about the practical application of his "intolerability thesis", for he had formulated his formula in close connection to the legal processing of the Nazi regime's criminal legality. Radbruch wants to give post-World War II jurisdiction a valuation standard for the validity of Nazi law, conciliating between either maintaining or denying validity of unjust laws\*\*\*\*.

\* Cf. Stanley L. Paulson, Radbruch on Unjust Laws: Competing Earlier and Later Views, in: 15 Oxford Journal of Legal Studies, pp. 489 ff. (1995).

\*\* Radbruch, Grundzüge der Rechtsphilosophie (= Basic concepts of Philosophy of Law), 1914, pp. 176 ff. (at 179).

\*\*\* Radbruch, Rechtsphilosophie (= Philosophy of Law), 3rd. ed. 1932, § 10.

\*\*\*\* In detail, see Björn Schumacher, Rezeption und Kritik der Radbruchschen Formel, Doctoral thesis, Göttingen University 1985.

Insofar Radbruch's formula is considered as the moving spirit of the so-called "Revival of Natural Law" (*Naturrechtsrenaissance*) in Germany after World War II. Recently, Radbruch's formula has experienced a revival in the context of the criminal processing of the East Germany regime after 1990\*\*\*\*\*. The Federal Court of Justice (*Bundesgerichtshof*) refers in several decisions to the "intolerability thesis", especially in the trials against the so-called "Mauerschützen" (Border guards at the former border of the German Democratic Republic accused of shooting and killing East German refugees)\*\*\*\*\*. Even the Federal Constitutional Court (*Bundesverfassungsgericht*) has tied up to Radbruch's formula\*\*\*\*\*.

In criminal law terms, the Radbruch's formula is said to be a violation of the ban against retroactivity (*Rückwirkungsverbot*) derived from the fundamental principle of legality (*Gesetzlichkeitsprinzip*) and in Criminal law clarified by the Latin maxim "nulla poena sine lege" (no punishment without a pre-existing law). As far as Radbruch's formula is depriving unjust regimes of criminal justification, it is questioned, whether a criminalizing act is conformable with the ban against ex post facto law making. Positivist scholars deny this question, because valid law has to remain valid law\*. Non-positivists in contrast, consent the formula's delegitimation effect, because by the use of the formula it is possible to restrict validity of unjust statutory law, at least in extreme cases\*\*. In fact, Radbruch's formula

\*\*\*\*\* See Ulfrid Neumann, Rechtspositivismus, Rechtsrealismus und Rechtsmoralismus in der Diskussion um die strafrechtliche Bewältigung politischer Systemwechsel, in: Festschrift für Klaus Lüderssen zum 70. Geburtstag, C. Prittwitz et al., eds., Baden-Baden: Nomos 2002, pp. 109-126.

\*\*\*\*\* Above all: Federal Court of Justice, Decisions of the Federal Court of Justice, Criminal cases, Official collection, vol. 39 pp. 1 ff. (at 15 f.) and vol. 41 pp. 101 ff. (at 105 ff.). See also Saliger, (*supra* note 4), at 33 ff.; Arthur Kaufmann, Die Radbruchsche Formel vom gesetzlichen Unrecht und vom übergesetzlichen Recht in der Diskussion um das im Namen der DDR begangene Unrecht, in: 48 Neue Juristische Wochenschrift, pp. 81-86 (1995); Horst Dreier, Gustav Radbruch und die Mauerschützen, in: 52 Juristenzeitung, pp. 421-434, at 426 (1997); Henning Rosenau, Tödliche Schüsse im staatlichen Auftrag, 2nd. ed., Baden-Baden: Nomos, 1998.

\*\*\*\*\* Decision of the Federal Constitutional Court, in: 50 Neue Juristische Wochenschrift, pp. 929-933 (at 931) (1997).

doesn't violate the ban against ex post facto law making, but rather the principle of legal certainty (*Bestimmtheitsgebot*) deriving from the rule of law (*Rechtsstaatsprinzip*), demanding the offence to be clearly defined in statute. This is because Radbruch's formula makes clear that unjust grounds of justification already lack validity at the time of offence, so there is no need for penalizing *retroactively*. This exception from the principle of legal certainty is legitimated by the rationale of the principle of legality which is to protect the citizen. It would be a perversion of the principle of legality to protect criminal regimes after their felonious system

has collapsed, as it is consequently argued by strict positivism. In view of intolerable injustice and extreme acts against human rights, there is no reliable trust.

Beyond practical relevance, Radbruch's formula is a normative (prescriptive) thesis for those legal problems, which are based on the conflict of legal certainty and justice. For example the problem of incorrect judgments that have already taken legal effect and the retrial in cases of intolerable violations of law, the doctrine of the null and void judgment [*Lehre vom nichtigen Strafurteil*], and the question of limitation in criminal matters\*\*\*.

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### СУЩНОСТЬ И ПРАКТИЧЕСКАЯ ЗНАЧИМОСТЬ ФОРМУЛЫ РАДБРУХА

Статья посвящена анализу термина “формула Радбрух” как способа разрешения конфликта между справедливостью и позитивным правом. Исследуются история развития и особенности реализации формулы Радбруха в правовой практике Германии. Автор проанализировал все способы апробации данной формулы на нормативном материале немецкого права. Подчеркнуто, что формула Радбруха рассматривается как основание для возрождения естественного права в Германии.

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### CONTENT AND PRACTICAL SIGNIFICANCE OF RADBRUCH'S FORMULA

The article dwells on the analysis of the term “Radbruch's formula” as the way of solution of the conflict between justice and positive law. The evolution and the peculiarities of realization of Radbruch's formula in German law practice are under research. The author has analyzed all possible treatments of the formula in German law. It is underlined that “Radbruch's formula” is considered as the basis of revival of Natural Law in Germany.

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\* See, e.g., *Günther Jakobs*, Untaten des Staates – Unrecht im Staat. Strafe für die Tötungen an der Grenze der ehemaligen DDR? In: *Goltdammers Archiv für Strafrecht*, pp. 1-19 (1994). For a critical treatment of Radbruch's formula as an illegitimate abbreviation of natural law, see *Wolfgang Naucke*, *Die strafjuristische Privilegierung staatsverstärkter Kriminalität*, Frankfurt am Main: Vittorio Klostermann, 1996.

\*\* Cf., inter alia, *Robert Alexy*, *Mauerschützen. Zum Verhältnis von Recht, Moral und Strafbarkeit*, Göttingen: Vandenhoeck & Ruprecht, 1993.

\*\*\* Further details by *Saliger*, (*supra* note 4), at 54 ff.