NICOLAUS COPERNICUS SUPERIOR SCHOOL | SGMK
Copernican Journal of Law
No. 2 (1/2025), pp. 37–57
DOI: https://doi.org/10.71042/CJL01202503

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Rethinking Radbruch's *Laws That Are Not Right and Right Above the Laws*. A New Translation with Introductory Note

• **Abstract** •

A new translation of Gustav Radbruch's *Laws That Are Not Right and Right Above the Laws* is published and its relevance explained and illuminated. Although there is an excellent translation published by the *Oxford Journal of Legal Studies*, the present one adopts a perspective closer to Roman Law and, therefore, closer to Radbruch's own juridical vocabulary and understanding of justice. It is difficult to over-emphasize the relevance of Radbruch's short work. He had been a positivist before the Nazi Party's rise to power. After the experience of Hitler's totalitarian rule, he realized that legal positivism is wrong and proposed some judicious principles for the application of natural Right to the problems posed by crimes committed during the Nazi era. This little work should have been the death blow for positivism. Surprisingly, however, after the formulation of Radbruch's deep insights there was a strong positivist reaction that threw them into oblivion. There even have been attempts to destroy Radbruch's character through a misconstruction of his actions. It is time to bring his insights back to memory and to defend his character.

Keywords: Gustav Radbruch, Positivism, Natural Right, Legal certainty, Invalid laws.

Introductory Note: Relevance of this Text

Gustav Radbruch was a Social-Democrat, an eminent German jurist and philosopher of Law. After the devastation of totalitarianism and war, Arthur Kaufmann, the jurist, stated that in 1945 there were only two great philosophers of Law in the German speaking world left: Hans Kelsen and Gustav Radbruch (Martínez

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Bretones, 2003, p. 78).[1] Immediately before the Nazis came to power, he defended Positivism, although not in a Hartian sense (Paulson, 2006, pp. 18–19).[2] He thought that the plurality of fundamental views made it necessary to abide exclusively by positive Law, which would guarantee legal security or certainty and would be inspired by the various conceptions of justice competing in society (Radbruch, 1973, chapters 9–10, pp. 164–179). Underlying this conception of legal positivism was the belief that statutes promulgated in a country of a long rational tradition could never be outrageously unjust and actually worse than a false peace or security. However, the experience of Nazism shattered this belief. At the end of the War, Radbruch was reinstated by the Allies in his Chair at the University of Heidelberg and became the Dean of the School of Law. He was sick and felt weak, which is why he was not able to re-write neither his *Introduction to the Science of Law* nor his *Philosophy of Law*. Yet, he left us precious, short writings on the latter discipline: *Fünf Minuten Rechtsphilosophie* and *Gesetzliches Unrecht und übergesetzliches Recht*. The latter piece is the one that we are presenting here in translation. A couple of years after writing it, Radbruch retired, in 1948. One year later he died.

This work had an enormous influence and attempted to elucidate the justice and conformity to Law (or injustice and disconformity to Law) of the criminal prosecutions that took place after the War and punished as crimes actions that were legal according to the Statutes and positive norms that were valid at the time when they were committed. His position was very nuanced and really shed light on the issues examined. He had no spirit of revenge, although he had been expelled from the University in 1933 and banned from publishing for having been a Social-Democrat and for criticizing the reform of the criminal Law system by the Nazis (through his 1933 paper *Strafrechtsreform und National-sozialismus*) (Martínez Bretones, 2003, pp. 60–61, 63–66). He only sought what was just and right, and on this he was faithful to his 1919 paper, *Ihr jungen Juristen!*: "[jurists] must feel united […] against every violation of Right with no regard to who the violator is, against whom or why he acted" (Martínez Bretones, 2003, p. 42). According

[1] She is citing G. Radbruch, *Gesamtausgabe*, A. Kaufmann (Ed.). (1987). Heidelberg: C. E. Müller Juristicher Verlag, note 2, vol. I, p. 44.

[2] Paulson is right that there is continuity in Radbruch's pre-Nazi rule and post-Nazi rule legal philosophical views. But he stresses that continuity too much. He perceives in Radbruch's earlier writings the tension between the different values (purposiveness, legal certainty and justice), but not well the issue of the different views concerning the meaning of "justice" itself. Due to this variety of views, Radbruch held before the Nazi rule that the courts are subject only to the valid laws, even if they seem outrageously unjust, because the courts are forbidden to use their private judgment concerning "justice," so that they have to declare the Right which is contained exclusively in positive laws. See Radbruch (1973, p. 178).

to Radbruch, National Socialism was able to subject the jurists, and especially the judges, in Germany because of the long and almost undisputed reign of the positivistic theory of Right plus the fear of death. For this reason, he thought that the majority of the judges who were tried after the war should be acquitted. Some authors have recently attempted to use this lack of a vengeful spirit against him. They argued that it was Radbruch's character flaws that led him to defend the judges who decided cases according to Nazi law. They objected that the Nazi legal theory was not positivistic and, therefore, Radbruch's explanation of the failure of the judges was completely wrong (Morris, 2016).[3] This is a non-sequitur because, although obviously totalitarian regimes are not positivistic (Nazis did not like "neutrality" and Communists use "alternative theory of Law"),[4] Radbruch never argued that

[3] The author also holds that Radbruch's 1934 lecture "Relativism in Legal Theory" held a position entirely different from his 1932 book *Rechtsphilosophie*, but this claim is wrong. All the content of the 1934 lecture that Morris cites in his paper is also in the 1932 book, especially in chapter 10, where the "relativist conception of reason and science" is invoked as grounds for legal or juridical positivism. Morris also claims that after the war Radbruch did not study legal proceedings. This is extremely surprising because the very paper Morris is criticizing ("Gesetzliches Unrecht und übergesetzliches Recht") is in its entirety precisely a review of legal proceedings. Morris gives an example of one courageous judge, Kreyssig, to state that it was possible for judges to resist the Nazi tyranny. Morris wrongly states (on p. 669) that Kreyssig rejected Nazi legal theory and failed in his attempt of saving some human lives because he invoked natural law instead of positive law, when (a) one page earlier Morris shows that Kreyssig argued that, in order to consider that positive law grounded the injustice he was asked to tolerate, "[he] would need to see the original [order by Hitler commanding the murder of handicapped people with the argument that their lives were unworthy]", and (b) Morris also demonstrates that Kreyssig was forced to use the natural law argument when he was shown Hitler's written order (p. 669). So, Kreyssig accepted Nazi legal theory and was forced to use natural law arguments, according to the evidence that Morris himself brings into his paper. But Radbruch did not deny that it was possible for a judge to resist Nazi tyranny, he just stated that Positivism made resisting difficult for the judges and that the threat of death excluded the subjective element of the crime, in the case of judges. I disagree with this latter point, but for this I do not blame Radbruch's character. About the other points that Morris brings to the fore concerning Radbruch's character, I do not know sufficiently the facts to judge. However, Morris himself confesses that he does not know the facts either, but attempts to fill the gaps by criticizing Radbruch's pity for his friend Schlegelberger, although both in public statements and in private correspondence Radbruch stated that he found just the guilty verdict against his friend. It is easy to criticize from the outside those who have kept their innocence amidst an established totalitarian regime. It seems that his zeal for legal positivism is what leads Morris to try to destroy the character of one of the morally and scholarly strongest champions of natural Right theory. In any case, it is certain that Morris fails to draw the lesson from Kreyssig's example: it is obvious that he found the courage to effectively oppose injustice precisely in those sources that Morris wants to reject: religion and Natural Right theory.

[4] It must be clarified that the rejection of positivism by totalitarian regimes does not come from the regimes' commitment to truth. Hannah Arendt admirably grasped that totalitarian regimes utterly reject the notion of truth as correspondence. See Arendt (1994, pp. 384–385).

the Nazi legal theory was positivist. His point was that legal positivism made all but impossible the resistance against the Nazis, as long as these kept the formalities that allowed to cover their crimes with positive norms. He did not defend a judge who violated the positive law to please his masters, but only the judge who applied the positive law because he had been trained in considering that, and only that, as the Right (*Recht*, *ius*).

Shortly after a decade of their publication Radbruch's two mentioned works on the philosophy of Law were the subject of sharp criticism. Perhaps a reason for this is that in the 50s some of the new powers-that-be seemed to have been concerned with the prevalence and resurgence of Natural Right theories in the field of Legal Philosophy. A picturesque manifestation of this concern was the organization of the *Bellagio Conference on Legal Positivism* that took place in Northern Italy in 1960, generously funded by the Rockefeller Foundation with the aim of promoting legal positivism and burying once more the classical theories of Natural Law that Radbruch had espoused and promoted. Among the senior participants at this conference, we found none less than Norberto Bobbio, Alf Ross and H. L. A. Hart[5] (who in 1958 stated that to hold that the post-war trials in Germany signaled the overthrow of positivism and the triumph of the doctrines of natural Law, "seems to me to be hysteria").[6] This conference led Bobbio to a confirmation of his positivist theses (Silva, 2008, p. 112),[7] lending force to Italian legal positivism in general. Thus, the conference proved to be a very strategic move, because, as stated by the authors of a paper that outlines the conference, its participants, its purpose and its results, "North Italy [… is] the area in which the most important work on legal philosophy is taking place [in 1960]" (Falk and Shuman, 1961, p. 214).

The report on the *Bellagio Conference* brought to daylight some ideological motives that often lurk behind the spousing of positivism. It did so in passages such as the following: (a) the apparent neutrality of Kelsenianism in Italy "smokescreened a strong commitment to common sociopolitical positions […]. Especially did it become evident that in the background of many Italian presentations was a desire to strengthen the legal order against interference from the Catholic Church either directly by institutional interference or indirectly through its advocacy of natural law" (Falk and Shuman, 1961, pp. 217–218). (b) Legal positivism, viewed in its historical role can be identified as a group of related legal theories that tried to

[5] See, Falk and Shuman, (1961).

[6] See, Hart (1958, p. 619).

[7] A. Ruiz Miguel (1980, pp. 30–31) is of the same opinion.

describe the new state-dominated legal order. At the same time, many of the early positivists were eager to establish the state as liberated from its one remaining rival for law-making power–the church. Thus, there is an anti-natural law objective found at the very inception of legal positivism. Along with this, one discerns a correlative tendency by the early legal positivists to take an anti-metaphysical view of human experience and to rely instead upon empirical observation (rather than reason or revelation) to discover the content of the legal order" (Falk and Shuman, 1961, p. 223). And (c) The authors of the report find reasonable that there are different conceptions of positivism in the United States and in Italy, because "special factors indicate that what is regarded as liberal theory in the United States might operate in a reactionary fashion in Italy" (Falk and Shuman, 1961, p. 227).

Thanks to this surprising frankness, the deepest motives of these critics of natural Right theory surface in the said paper as the following: (1) an anti-metaphysical commitment that postulates that Man must be the ultimate measure of justice and law; (2) a Statist view that aspires to eliminate any rival to the State in defining what is legal, particularly the Church; (3) in some cases, it is also an attempt to find limits to the regulations of the State within the State itself (Falk and Shuman, 1961, pp. 219–220 and 223–224).[8] Radbruch is especially spiteful to those who cherish these motives, since he stated very clearly that no "objectivity" could resist totalitarianism; only a courageous fidelity to justice and Right [*Recht*] and to God, its ultimate source, could effectively resist. In this regard, a very interesting point is that Radbruch, in his 1932 book limits his citation of the New Testament to Romans 13:1, "be subject to the authority that has power over you", while in 1946 he widens it to include Acts 5:29, "obey God rather than men".

Another quality of Radbruch's approach that is especially threatening to positivism is that he was a professional jurist. So, he knew that there is no opposition between "positive Right" and "natural Right", but only between the positivistic theory of Right and natural Right theory. His natural Right theory, in other words, was not of the rationalist kind that conceives a set of "natural Laws" parallel to the set of "positive Laws". No, he saw that the art of the jurist sought for Right [*Recht*, *ius*] and this required a responsible use of his professional knowledge.

There is another reason that makes Radbruch's approach to natural Right interesting. He based the force of natural Right neither on subjective rights nor on

[8] Cristóbal Orrego and Max Silva have demonstrated that both H. L. A. Hart and Norberto Bobbio rejected natural Right theory in part because both understood that it would lead to acknowledge a divine principle of justice. See Orrego (1997, chapter 6, especially pp. 415–419); and Silva (2008, p. 341).

the prohibition of "crimes against humanity" (although he mentions these due to the norms imposed by the Allies) nor on rationalist theories, although he, of course, like Cicero, invoked human dignity as the basis of Right. He uses a clear and laconic classical approach to natural Right.[9]

The latter reason is also why I think my new translation adds something to the excellent translation by Bonnie Litschewski Paulson and Stanley L. Paulson. I have tried to preserve the German difference between *Gesetz* and *Recht* that is so difficult to express in English. This difficulty has been present for long enough time in the history of English legal thought. Already Bracton found it in his *Introduction*. As Paul Vinogradoff expresses it: "He [Bracton] finds himself confronted with a peculiarity of English phraseology, namely, with the absence of an equivalent in English to the word *ius*. Though writing in Latin, he does not want to make his teaching dependent on a foreign use of terms, and therefore he introduces, though very shortly, the terms *lex* and *consuetudo* –law and custom– explaining that they correspond to *jus*, which in this case would be rendered by the English word 'law'" (Vinogradoff, 1909, p. 94). According to Vinogradoff, by "law" was understood "the objective order of things and duties" (1909, p. 94). However, since the prevalent meaning of *ius* in Roman Law actually is "what is just" in the concrete case (what the judge should declare, and the mean of the virtue of justice found in things and in each concrete juridical relation), I have resorted to the solution of the English translators' of Aquinas' and Cicero's works, who might reflect a long tradition in juridical philosophy. They translate *ius*, the equivalent to the German *Recht*, as right (in the objective sense).[10] Perhaps some interpreters would think that Law in one of its meanings is equivalent to the Roman *ius*. I would

[9] In the classical and Roman view of Law, and also in the traditional Western view until recently, the pretended separation of Right and morality would have been regarded as absurd. Of course, what is prudent for a judge to declare is not the same as what is prudent for a private mind or conscience to conclude in practical reasoning. Ius, nonetheless, is the object of justice, one of the cardinal virtues. And "Ius est ars boni et aequi."

[10] Thomas Aquinas, *Commentary on the Nicomachean Ethics* (1964), book 5, lecture 12. Cicero (2014). The handbooks of Roman Law, instead, followed Bracton's tradition and either translated "jus" as "law" or left it as "jus." See, for example, Sherman (1917). Leo Strauss uses the word "right", but in the central passage of his *Natural Right and History* (1953, pp. 156–165) the many meanings proposed by him (laws applicable in normal times, immutable principles, the preservation of society, the height in rank of an objective and the urgent) do not include "the just thing." I would say that Thomas Hobbes in his *Leviathan* contributed very much to the disappearance in English of the meaning of "right" as a translation of ius understood in its primary meaning as "the just thing." See Hobbes (1909), Part 2, chapter 14. For an introduction to the controversy on the meanings that ius has had during the history of Western thought, the reader can see Villey (1969); Tierney (2001); and Casanova (2016, pp. 113–140).

disagree with such interpreter, but, even if I am wrong, a translation that preserves the problem and does not preclude the realization that such problem exists seems to have special value.[11]

I do not think this short work by Radbruch contains in itself the solution to all the problems concerning the existence of natural Right and its connection to positive Right. What it contains is a testimony that man, through intellectual and professional training, can know the Right that gives its meaning to the existence of the courts. The parties of a juridical controversy seek at the court a *just*, rational solution, and it is the task of the judge to find it, enlightened by the laws but with his eyes fixed on the intelligible reality that is the subject matter of his discipline. Thus, although the judge must follow in principle the commands of positive law (as Radbruch and Aristotle have taught us)[12] and must use the legal forms that guarantee that both parties are properly heard,[13] he can discern that in a particular case the law does not point at the rational solution,[14] the Right, or even that, in general, a positive law is a violation of Right. In our tradition, the judge is understood as the most proper subject, bearer of the virtue of justice.[15] As long as we keep at least a spark of this great tradition, we must accept that the judge, through his knowledge of what is just, might find gaps in the law and correct such gaps, and in extreme situations might find that a valid law is unapplicable due to its extreme violation of justice. As Theodor Viehweg formulated it: "In our discipline [*Recht*] we deal with the question of what is just here and now. This question, unless things can be changed, is unavoidable in the decisions of the courts. If this eternal question of the just resolution of controversies and of human rightness were missing, then we would have lost the ground on which jurisprudence is based" (Viehweg, 2007, p. 151). If this were lost, we would come to the situation in which Hans Kelsen would be right: there would be no real gaps in the Law (Kelsen, 1970, pp. 245–249) and we would have to admit that the indirect Administration (understood as one of the three "functions" of the State), the power by which public clerks "apply the law", imposing fines or other sanctions, is not different in essence from the jurisdiction of the courts. The difference

[11] The strength of the word "Right" (in German Recht, in Italian diritto) is such that the very existence of the word is what allegedly has forced the Italian positivists to postulate a non-cognitivist conception of morality in order to defend juridical positivism. See Falk and Shuman (1961, p. 228).

[12] See *Rhetoric* I 1, 1354a31–b16.

[13] The forms must be observed, and they exist for the protection of the great principle, audiatur et altera pars.

[14] This is what Aristotle called *epieíkeia* in book 5, chapter 10 of the *Nicomachean Ethics*.

[15] See *Nicomachean Ethics* 5.4, 1032a21–22.

would be merely organizational (the separation of the bureaucratic apparatus, on the one hand, and the courts, on the other) and due to historical inertia (Kelsen, 1970, pp. 262–267).[16] For a jurist this should be a horrifying nightmare. Gustav Radbruch's piece is a strong stand against a tendency that has crept into Western culture towards precisely such nightmare.

The Romans, by the influence of Aristotle mediated by Cicero (Viehweg, 2007, pp. 37–53), were the creators of our discipline. In a way, Radbruch, admirer and reader of Cicero (Martínez Bretones, 2003, p. 71), is the great witness that we need to direct our eyes toward our Roman origins again.[17] But our Western world seems reluctant to return to its roots. For a very long time many of our greatest minds have turned their backs to this knowledge of the "just thing", the *ius* of the Romans. After experiencing the great plague of Nazi totalitarianism, Radbruch has called us to finally supersede positivism in all its forms, normative, judicial, or cultural. There is real evil and there is real Right, and to know them and punish the one and enforce the other is the essence of the courts' main business.

[16] This same idea is stated more clearly in the French edition of the Pure Theory of Law. See, Kelsen (2009, pp. 121–122).

[17] Vinogradoff proved that English Law was very much influenced by Roman Law, contrary to what is often believed: "Civil law did not become a constituent of English common law acknowledged and enforced by the courts, but it exercised a potent influence on the formation of legal doctrines during the critical twelfth and thirteenth centuries, when the foundations of common law were laid." (Vinogradof, 1909, p. 84). Also: "[Bracton's…] *Introduction* was undoubtedly intended to strengthen native legal doctrine by the infusion of legal conception of a high order drawn from the fountain head of civilized and scientific law" (p. 90), that is to say, Roman Law and its reception in Italy. More recent studies on Roman Law not only confirm Vinogradoff's judgment, but extend it to the cultivation of English Law in later centuries. See, for example, Watson (1991). The Preface states the case.

Translation by Carlos A. Casanova

"Laws That Are Not Right[A] and Right Above the Laws".[B] By Gustav Radbruch

I

By means of two principles Nazism subjected to itself, on the one hand, the soldiers and, on the other hand, the jurists: "an order is an order" and "the law is the law". The principle of "an order is an order" has never been fully applied. The duty of obedience stopped when orders for criminal purposes were given by the commander (MStrGB [Military Criminal Code] Sec. 47). The principle of "the law is the law", however, knew no limits. It was the expression of the positive legal thinking that prevailed through many decades almost unopposed among the German jurists. "Legal violation of Right" was therefore a contradiction in terms, as was a Right that was above the law [or legislation]. But both problems are now confronted in our practice again and again. For example, in the *Journal of the Jurists of Southeastern Germany* (p. 36) a decision of the District Court of Wiesbaden was published and discussed, according to which "the laws declaring the property of the Jews to be forfeited by the State were quite contrary to natural Right and therefore null from the moment of their publication" (Kleine, 1946, p. 36).

II

In the area of criminal Right, the same problem has been raised, notably through declarations and decisions of the courts within the zone occupied by the Russians.

1. In a trial at the Thuringian Juries, in Nordhausen, the court clerk Puttfarken was sentenced to life in prison. His crime was to have caused the conviction and execution of the merchant Göttig by a denouncement of him.[18] Puttfarken had

[A] Or "legal violation of Right".

[B] The translator used Radbruch (1946); and a Spanish translation of 1971 by J. M. Rodríguez Paniagua (Transl. and Ed.), pp. 1–22. It is hard to translate the title into English because "law" is used today to express what in Latin is expressed as *lex* (in German, *Gesetz*) and/or as *ius* (in German, *Recht*). Moreover, in English right is normally understood today as subjective right: "I have the right to do this or that". I will translate *Gesetz* as law or legislation; and *Recht* as objective right. Objective right is what the Romans called *ius* and Aristotle *tò díkaion*. I will use Right (capitalized) to mean objective right, "what is just", what the judge should declare as just, not "my right to do this or that", subjective right.

The footnotes contained in the original will be enumerated with Arabic numbers; those added by the editor/translator will be identified with Greek letters.

[18] A similar case was opened against those who denounced the Scholl siblings. [Translator's note: this note appears in the Spanish edition only.]

reported Göttig [to the Nazi authorities] for an inscription he left in a WC: "Hitler is a mass murderer and is to blame for the war". The conviction was not only for this inscription, but also for listening to foreign radio broadcasts. The plea of the Thuringian Prosecutor, Dr. Kuschnitzki, has been extensively reproduced by the press (in *The Thuringian People*, in Sonneberg, on May 10, 1946). The Prosecutor first asks the question: was the act contrary to Right?

> Although the defendant declared (according to the Prosecutor's report) that he made his denunciation on the basis of his Nazi convictions, this is juridically irrelevant [i.e. irrelevant from the viewpoint of Right]. There is no juridical obligation to denounce [no obligation in accordance to Right], not even out of political convictions. Not even in the Hitler era this legal obligation existed. The decisive factor is whether he acted in the service of the administration of justice. But this presupposes that the courts are ready to pass sentence in accordance to Right [or to Law]. Lawfulness, the pursuit of justice, legal security[Γ] are the requirements of a judicial system. All three conditions were missing from the political criminal justice system in the Hitler era.
>
> He in these years who denounced another, should expect and did expect that he was not delivering the accused person to a legal trial with legal guarantees for the investigation of the truth and for a fair judgement, but he was delivering the accused person to arbitrariness.
>
> I fully subscribe, therefore, a report on this issue written by the Dean of the School of Law of the University of Jena, Full Professor Dr. Lange. At the third year of the War the situation in the Third Reich was well known so as to be aware that if someone was held to account for a note that stated 'Hitler is a mass murderer and he is to blame for this war', then this person's life would not be spared. A man like Puttfarken could not know how the courts would bend the law, but he could be certain that they would do it.
>
> There was also no legal obligation to denounce, according to Article 139 of the Criminal Code. It is true that this provision threatens with punishment the person who has reliable knowledge of an act of high treason and fails to notify the authorities in good time; and it is also true that the Supreme Regional Court in Kassel sentenced Göttig to death for attempted high treason, but according to authentic Right there was no attempted high treason. The sentence, courageously stated by Göttig, 'Hitler is a mass murderer and is to blame for the war', was always only the bare truth. He who spread and proclaimed it did not threaten the *Reich* or its security. He only tried to contribute to the removal of the illness suffered by the *Reich* and thus to save the *Reich*, which is the opposite of treason. One must be careful not to alter or muddle, through formalist considerations, this clear fact. It may also be doubtful whether the so-called *Führer* and Chancellor of the *Reich* could ever have been regarded as a legal head of

[Γ] Translator's note: this is hard to translate. I suppose the right way would be "legal security". The concept means that everybody knows what is according to Right and what is not, so that everybody can be certain that what he or she is doing is or is not in accordance to Right or to the Law.

State at all, whether he was therefore protected by the articles concerning treason.[Δ] In any case, in his denunciation, the defendant did not and could not have (due to his lack of knowledge) even mentioned the issue of the legal classification of the offence he was denouncing. He also never declared that he had told on Göttig because he had in fact seen in Göttig's action the crime of attempted high treason and therefore had felt obliged to file the denunciation.

The Attorney General then poses the question, whether Puttfarken is guilty of the action committed by him.

Puttfarken essentially admits that he wanted to bring Göttig to the scaffold. A number of witnesses confirmed this. Now, that is the intention of a murderer according to Article 211 of the Criminal Code. The fact that Göttig was sentenced to death by a court of the Third Reich does not affect Puttfarken's agency. He is a mediated agent. There is no doubt that the precedents of the Reich Supreme Court concerning mediated agency consider other types of cases, mainly those in which the mediated agent uses as instruments objects without will and incapable of liability. Nobody could have thought that a German Court could be the instrument for a crime. But today we are facing precisely this type of fact. Puttfarken's case will not be the only one. The fact that the Court acted in accordance with formal Right does not prevent the instantiation of mediated agency when the Court's decision is null and void. In any case, the remaining doubts that we could still keep, have been removed by the complementary Thuringian Act of February 8, 1946, which, in its Article 2 and in order to dispel doubts, changes the writing of Article 47, first paragraph of the Criminal Code: 'Any person that performs the criminal act by himself or through another person, even if the other person acts in accordance to Law, must be punished as the perpetrator of the crime'. With this, no new Right with retroactive effects is established, but this is simply the interpretation of the Criminal Law in force since 1871.[19]

I myself believe that, after careful consideration of the reasons in favor and against of the typification of the actions [by Puttfarken] here considered as murder by mediated agency, I see no reason to reject it. But let's assume (and we have to consider this possibility) that this court perhaps comes to a different conclusion. What would follow

[Δ] Editor's note: In a trial like this one, this statement is, to say the least, subject to legitimate doubt. How was a clerk supposed to even fathom the supposed complete illegitimacy of Hitler when he won the elections is 1933, was legally appointed Chancellor by Hindenburg and acknowledged as such by many heads of States, like Stalin (the Russian) and Chamberlain (the British)?

[19] In his edition of the Criminal Code in the Thuringian version, Professor Richard Lange (1946, p. 13) states that "many doubts have risen concerning the concept of mediated agency in cases in which the perpetrator has used the administration of justice to achieve his criminal intent (procedural fraud, political denunciation). Article II of the Law of 8 February 1946 on the Supplement, etc., therefore, made it clear that mediated agency is punishable even if the instrumental agent has acted in compliance with an official obligation and/or legally".

> from there? If one rejects the conclusion of mediated agency, one can hardly fail to regard the judges, who, contrary to all Right and reason, condemned Göttig to death, as murderers. In that scenario, the defendant would have assisted in the murder and would have to be punished accordingly. Should also these considerations find serious objections in this court − and I do not exclude this possibility −, then Act No. 10 of the Allied Control Council of January 30, 1946, remains in place, and according to its Article 2 c, the accused was guilty of a crime against humanity. In the framework established by this Act, whether the country's national law is infringed no longer matters, but all inhuman actions and procedures are punished, in particular if they are motivated for political, racial or religious reasons. According to Article 2, n. 3, whoever is found guilty of having committed such crime must be punished with the penalty that the court may determine, including the death penalty.[20]
>
> As a jurist, I am used to restrict myself to merely juridical valuations. But it would be very good to consider reality in itself and come to a conclusion in accordance with healthy common sense. The juridical background is no more than the instrument with which the conscientious and responsible jurist can come to a conclusion that is juridically acceptable.

The jury gave a damning verdict not based on mediated agency, but on cooperation to murder. According to this, the judges who condemned Götig against Right and law, would have to be prosecuted for murder.[21]

2. In fact, the press (see *Tägliche Rundschau*, March 14, 1946) states that the Saxony State Prosecutor, Dr. J. U. Schroeder, has the intention of demanding criminal liability for "inhumane court decisions", even if they were based on National Socialist laws:

> The legislation of the National Socialist Party State, on the basis of which death sentences, such as those referred to, have been handed down, is devoid of any juridical validity.
>
> Such legislation is based on the so-called 'enabling law' [giving Hitler full power to legislate without the Parliament], which was not established by the two-thirds majority vote required by the Constitution. Hitler had forcibly prevented the Communist members of the Reichstag from attending the meetings and had them arrested in contempt of their Parliamentary immunity. The remaining representatives, namely

[20] The criminality according to KontrGes 10 (German Bankruptcy Act of 1910) 10 is not discussed in the following paragraphs, because the German courts are not primarily in charge of this (Article III ld). [Translator's note: This footnote is absent in the Spanish translation.]

[21] Another denunciation trial took place at the Munich Court against those who denounced the Scholl siblings. Denazification is directed against a politically and morally base character, without having to ask about the lawfulness or legality or the culpability of their activity. Hence follows a demarcation of Criminal Law's limits, but also interference with it. Cf. Article 22 of the Exemption Act. [Transtator's note: this footnote is not in the Spanish text.]

from the Center, were coerced by the threat of the SAs to cast their votes in favor of the enabling law.[22]

No judge can invoke, and no precedent can be set on, a law that not only is unjust, but *criminal*. We invoke the human rights that surpass all written statutes, the indefeasible and immemorial Right that denies validity to the illegitimate commands of inhumane tyrants.

Based on these considerations, I hold the opinion that the judges who have pronounced judgments contrary to the principles of humanity, and have pronounced death sentences for trifles, should be prosecuted.[23]

3. There are reports from Halle that the executioners[E] Kleine and Rose were sentenced to death for their active participation in numerous unlawful executions. Kleine participated in 931 executions from April 1944 to March 1945, for which he obtained the amount of 26,433 Marks in compensation. The conviction seems to have been based on Act No. 10 of the Allied Control Council (crimes against humanity). "The two defendants freely practiced their gruesome profession, because any executioner is free to step down at any time due to health reasons or on other grounds" (*Liberal Democratic Newspaper*, Halle, June 12, 1946).

4. The following case is also known from the Federated Land of Saxony. (See article by the Prosecutor General Dr. J. U. Schroeder of May 9, 1946.) In 1943, a Saxon soldier, who in the eastern front was commanded to guard prisoners of war, had deserted, "disgusted by the inhuman treatment that the prisoners experienced, and perhaps also because he had had enough of the service in Hitler's army". When he escaped, he was unable to forgo a visit to his wife at her home. There he was caught and was to be transferred by a chief guard. He managed to get a hold of his loaded service pistol unnoticed and to shoot the chief guard in his back and kill him. In 1945 he returned from Switzerland to Saxony. He was arrested, and the Public Prosecution was ready to proceed against him on the grounds of treacherous murder. But the General Prosecutor ordered him to be freed and stayed the procedure, considering that such was the course of action prescribed by Article 54. He invoked the state of necessity in order to ground the exemption of

[22] It would also need to be examined to what extent regimes that result from revolution achieve legitimacy due to the "normative force of the factual". By the way, the allegation that the two-thirds majority required for the approval of the Authorization Act was achieved only through the exclusion of the Communists is ungrounded, according to the friendly remark from my colleague Jellineck.

[23] Concerning the criminal liability for judicial decisions contrary to Right, see the noteworthy work by Buchwald (1946, p. 5ff).

[E] Translator's note: literally in German it reads "executioner assistants". But this derives from a tradition in which the main executioner attended the hard cases (like killing with an ax) and left the easy cases to his assistants. These were really, in English, "executioners".

liability on the supposition that "what was then proclaimed as Right by the people in charge of guarding it cannot be today considered as such anymore. Deserting from the armies of Hitler and Keitel does not mean in our conception of Right anything that either goes against the honor of the deserter or may call for punishment: he is not guilty".

Everywhere, then, a fight against legal positivism has been raised, taking as the point of departure that there are laws [*leges*, acts, statutes] that are not Right [*ius*] and that there is a Right that is above the laws.

III

Positivism, in fact, with its conviction that "the law is the law", rendered the German juridical profession defenseless against laws of arbitrary and criminal content. Positivism is not in a position to device with its own resources a reasonable ground for the validity of laws. It is true that Positivism believes that the validity of a law is proven by it having the power to assert itself. But on power perhaps necessity can be grounded, never duty and real validity. Real validity can be grounded only on the value that is inherent in the law. Of course, any positive law without regard to its content has already some value, because it is always better than the total absence of laws and of juridical security [or *legal certainty*]. But legal certainty is clearly not the only value, and it is neither the decisive value that must be realized through Right. In addition to legal security, there are two other values: expediency and justice. In the order of precedence of these values, we must assign the last place to expediency (with respect to the common good). In no way is Right [*Recht*, *ius*] all that "benefits the people", but ultimately benefits the people only what is Right, what creates legal certainty [juridical security] and strives for justice. Legal certainty, which is a property of any positive law because of its positivity, occupies a mean position between the values of expediency and justice. Both, justice and expediency require legal certainty. That Right be secure in its interpretation and application, not such here and now but different tomorrow and there, is a requirement of justice itself. When there is conflict between legal certainty and justice, between a law [statute] that fails in its content but that is positive, and a just Right that has not reached the firmness of a law, we truly witness the conflict of justice with itself, a conflict between apparent justice and true justice. This is the conflict admirably expressed by the Gospel when it commands us, on the one hand, "be subject to the authority that has power over you"[Z] and yet, on the other hand, commands, "obey God rather than men". The conflict between legal certainty

[Z] Translator's note: I decided not to use the English version, but to translate the German text,

and Right could be resolved preferring positive Right which enjoys the firmness given to it by its enactment and by its coercive power, even in case it is unjust and prejudicial. But, if the contradiction between positive law and justice reaches an unbearable degree, then the law [statute], as an "incorrect Right", must yield to justice.[H] It is impossible to draw a clearer line between the cases in which we confront laws that are not Right and the other cases in which, despite the incorrect content, the laws keep their validity. It is possible, however, to draw with all precision a different dividing line: when the law does not even attempt to achieve justice, when while devising the positive law the core of justice (which is equality) is purposely left aside, the law is not just "incorrect Right", but it entirely lacks the nature of Right. This is so because it is impossible to define Right, even positive Right, without mentioning that it is an order established whose meaning is to serve justice.[Θ] By this standard, entire parts of the National Socialist legal system never attained the quality of valid Right. The most prominent feature in Hitler's personality, which also became a prominent feature of the whole "Right" of National Socialism was his complete lack of the sense of truth and the sense of Right: because he lacked any sense of truth, he could give, without shame and scruples, the accent of truth to anything that was rhetorically efficacious; because he lacked any sense of Right, he could impose as law the grossest arbitrariness. At the beginning of his rule, we can point out the friendly telegram he addressed to the murderers of Potempa, at the end [of his rule, we can point out] the sinister defamation of the July 20, 1944, martyrs. Already on the occasion of the Potempa trial Alfred Rosemberg stated in the *Völkische Beobachter* (*People's Observer*) the becoming theory that one man is not equal to another, and one murder is neither equal to another murder.[I] The fact that in France the murder of the pacifist Jaurès and the

in order to grasp Radbruch's mind better. The first quotation is from Romans 13:1 and the second from Acts 5:29.

[H] Editor's note: The court would be unable to make this judgment without knowledge of the Right existing really in the concrete situation subject to its knowledge and decision. In this case, the court has to act in accordance with the Roman maxim: *non ex regula ius sumatur, sed ex iure, quod est, regula fiat*.

[Θ] Editor's note: This observation on the meaning of the law is absent from Hans Kelsen's account of Right. This is one of the reasons why he might think that there is no substantive difference between the courts and the administration of the State.

[I] Editor's note: this is certainly a gross violation of the nature of commutative justice as Aristotle described it in book 5 of the *Nicomachean Ethics*: "for it makes no difference whether a good man defrauds a bad one, or a bad man a good one, nor whether a man who commits adultery be a good or a bad man; the law looks only to the difference created by the injury, treating the parties themselves as equal, and only asking whether the one has done, and the other suffered, injury or damage" (1132a1–5).

attempted murder of the nationalist Clemenceau had been valued very differently was right [according to Rosemberg]; it would be inconceivable to apply the same punishment to a person who committed a crime for patriotic motives and a person who is moved by reasons that are (according to National Socialist assessment) contrary to the people. In this way it was left clear since the beginning, the intention to deprive the "Right" of National Socialism of the essential requirement of justice, i.e. to treat equally those who are equal. As a result, it [such apparent Right] was deprived entirely of the nature of Right. It was not just an incorrect Right, but it was no Right at all. This is particularly true of the provisions by which the National Socialist party, against the partial character that is an essential trait of every party, claimed the totality of the State. Provisions that treated as sub-human and/ /or denied human rights to certain human beings also lacked the nature of Right.[K] Those provisions lacked the nature of Right, as well, that established punishments with no consideration of the differing gravity of the crimes, punishing with the same penalties actions widely diverging in gravity, even imposing frequently the death penalty with no other consideration but the need of intimidating at a given time. These are just some examples of laws that are not Right.

One may not ignore – especially after the experience gained during those twelve years [of National Socialist rule] – the great dangers for legal certainty [juridical security] entailed by this conception of "laws that are not Right", by denying the standing as Right to positive laws. We must hope that this lack of Right stays as a unique case of disorientation and confusion of the German people, but we must be ready to confront any eventual return of this State deprived of Right. For this, we need to fundamentally supersede juridical positivism, because it was this doctrine that destroyed all the defenses apt for combatting the National Socialist abuse of the law.[24]

IV

This has been said in consideration of the future. Regarding the laws of those twelve years with no juridical validity we must bring justice detracting from legal

[K] Editor's note: The terminology of "human rights" is in the new legislation imposed by the Allies. I think that what lies under Radbruch's observation here is that all true Right is born, as Cicero stated, from our love of human beings. If we lost this love, then our juridical discipline would end up being lost as well. See Cicero, *De Legibus* I 43: "In fact where will liberality be able to exist, where affection for the fatherland, where piety, where the will either to deserve well of another or to return a service? These things originate in this, that we are inclined by nature to cherish human beings; that is the foundation of right".

[24] Buchwald (1946, p. 8ff.) also accepts the notion of a supra-legal Right. See, also Roemer (1946, pp. 5ff).

certainty in the smallest possible measure. Not just any judge should be allowed to create laws with his own hands, but this function should be given to a higher court or to legislation (Kleine is in agreement with this opinion, *Journal of the Jurists of Southeastern Germany*, p. 36).[Λ] A law [statute] of such kind exists in the zone occupied by the United States and it is based on an agreement reached in the Council of the Territories, the "law on the reparation of the violation of Right in the National Socialist administration of criminal justice". Since this law declares that "the political acts of resistance against National Socialism and/or militarism are not punishable", the difficulties raised by the case of the deserter (see above, n. 4), for example, could be solved. In turn, the other, sister law, the "law for the punishment of the criminal actions of National Socialism" may only be applied to the other cases here referred if the respective deeds were already punishable, in accordance with the Right then valid, at the time of their commission. Therefore, we must consider the punishability of the other three cases independently of this law, and according to the laws contained in the *Reich*'s Criminal Code.

In the case of the denouncer there is no obstacle to point out the mediated commission of murder by the denouncer if there is such murderous intent for the completion of which the court and the juridical automaton of criminal procedure were used as instruments. This kind of intent is found "when the perpetrator has some kind of interest on the elimination of the accused person, because he wants to marry his wife, or because he wants to seize his house, or take his workplace, or because he has vengeful desires or any other similar motive["]. (In this sense has pronounced judgment the cited report by the Jena Full Professor Richard Lange).[25] In the same way in which the person who abuses his authority inducing his subordinates to commit crimes is a mediated perpetrator, so is as well the person who, with criminal intent, sets in motion the judicial apparatus through his denunciation. The use of the court as a mere instrument is especially clear in those cases in which the mediated perpetrator could have counted, and in fact counted, with a tendentious exercise of the judicial function, be it due to political fanaticism, be it for pressure from those who held power at the time. If the denouncer did not have this murderous intention, but he just wanted to provide material to

[Λ] Editor's note: Radbruch is writing about the current situation in 1946: he was calling for a judicious application of the principle that many National Socialist laws were void. The punishment of crimes committed in accordance with valid laws could not be left licitly to the whim of just any judge.

[25] Of course, in the doctrine of participation there is a height of subjectivism brought in by the intention of the agent regarding a kind of "subjective anti-juridical element" (the unlawfulness), that is in the person of the remote agent but is not present in the instrumental agent. [Translator's note: this footnote is not in the Spanish translation.]

the court and leave the rest to the judge's decision, he could only be accused of having caused the sentence and, indirectly, of the execution of the death penalty, and this only as an assistant to the murder, if the court, in turn, has committed the crime of murder through its decision and execution. This is the line followed at the Nordhausen Court.

In turn, the punishability of judges for murder presupposes the simultaneous determination that they have perverted the administration of justice (Articles 336 and 344 of the Criminal Code). Because, indeed, the decision of an independent judge may be the object deserving punishment only when he has not complied with the fundamental principle to which his independence must submit: the subjection to the law, that is to say, to Right. If, in accordance with the principles we have laid out, it can be determined that the law applied was not Right (as, for example, in the case of the death penalty decided in accordance with the principle of free assessment), but rather made a mockery of any intention of obeying justice, we witness a case of objective violation of Right. However, since judges were so immersed into the dominant juridical positivism that they did not know other Right than that established in positive laws, one may ask, whether they could possibly act with the criminal intent of perverting the administration of justice when applying positive laws. Even if we admitted that they could, they would still have a last resource for their defense, although certainly painful, to adduce the danger of death in which they would have entered [if they decided in accordance with the real Right], given the National Socialist conception of Right, that is to say, the absence of Right despite the existence of laws. They could have recourse to the [argument of] state of necessity established in Article 54 of the Code of Criminal Law. We stated that it would be painful because the *ethos* of the judge must be directed to justice at all costs, even of his own life.[M]

The easiest question to answer is the question of the punishability of the auxiliaries of justice that execute the death sentences. We may ourselves be swayed neither by the impression that the persons who hold this profession of executing

[M] Editor's note: I actually find that this exculpation of the judges is not right. First of all, as Aristotle formulated it in *Nicomachean Ethics* bk 3 chapters 1 and 5, the ignorance of the law (unless it is hard to know: see 1113b29–1114a7) is a sign of evil character, not a cause that excludes liability. In a difficult case, perhaps the judge could be exculpated. But in many cases, he could not. This means two things: first, that positivism is a blinding ideology, but there are situations in which reality must impose itself to the mind and, if it doesn't, that is due to the evil character. And second, that there are situations in which human beings are either heroes or criminals, as Aristotle argues in chapter 1 of bk. 3 (see 110a26–27). I think that Radbruch here is moved by shame because his *Rechtsphilosophie* claimed that the judge should always apply the positive norm, even if he thought that it was unjust. See Radbruch (1973, pp. 178–179).

death sentences against their neighbors produce on us nor by the extraordinary circumstances and the economical profitability of such profession. When the executioner's profession was still a sort of hereditary craft, those who practiced it were used to always exculpate themselves with the idea that they just executed what the judges were in charge of deciding: "the lords control evil, I just enforce their final decision". This famous saying of the year 1698 is once and again repeated when the executioner's sword falls. The death penalty decided by a judge cannot be a punishable murder unless it is grounded on perversion of the administration of justice. In the same way the executioner may not be punished for an execution unless it is an instantiation of the type established in Article 345 of the Criminal Code: deliberate carrying a penalty out that must not be carried out. Concerning this issue Karl Binding states (in his *Treatise of Criminal Law*, special part, volume II, 1905, p. 509): the person in charge of carrying out the decisions of the courts finds himself, regarding the sentence that he has to carry out, in a relationship analogous to that of the judge regarding the law. The whole duty of the executioner lies on subjecting himself accurately to the sentence. The sentence is what determines his whole activity: "this activity is just if it subjects itself to the sentence, unjust if it does not. Since the core of culpability lies only on this deviation from the only authority that determines the execution considered as such, this crime can be named (the one typified in Article 345) as perversion of sentence". It cannot be the job of the executioner to examine the conformity to Right of the decision. For this reason, he cannot be harmed by the sentence's perversion of the administration of justice, and one may not find him guilty for not having resigned to his position.[N]

V

We disagree with the opinion expressed in Nordhausen that "considerations juridical-formal" are prone to "muddle the clarity of the facts". We think exactly the opposite: after twelve years of contempt for legal certainty, it is today more needed than ever, to rely on "formal" juridical considerations in order to protect ourselves from temptations that could easily rise in the animus of those who have suffered threats and oppression during these twelve years.[O] We have to search for justice,

[N] Editor's note: This is reasonable. One may not ask a person like this to judge the juridicity of a decision handed down to him by the highest jurists of his country. That the Nazis were mass murderers escaped the notice of some foreign governments for a long time. A private citizen subject to the constant totalitarian propaganda and occupying a position of executioner might well be innocent.

[O] Editor's note: Clearly, as human being, Radbruch felt the impulse towards revenge. But he kept it in check.

but at the same time we must (1) protect the legal certainty, which is but an aspect of justice itself; and (2) rebuild the State subject to the rule of law, so that both values [justice and security] can be satisfied as much as possible.[11] Democracy is certainly a precious good, but the rule of law is like our daily bread, like drinkable water, like the air that we breath. Perhaps democracy is precisely this: the only form of government able to guarantee the rule of law.[P]

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[11] Editor's/translator's note: This is reasonable. The forms of Law are wise and prudent and without them there can be no Right. The numbers in this paragraph I introduced to make clearer the translation.

[P] Editor's note: This seems false to me. A cursory study of history teaches that other regimes may guarantee the rule of law better than many democracies. I would agree with this other formula: only real republics guarantee the rule of law. But "republics" may adopt any good regime.

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