

Gustav Radbruch vs. Hans Kelsen: A Debate on Nazi Law*

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Abstract. Can the label “law” apply to rules as amoral as the enactments of the Nazis? This question confronted the courts in Germany after 1945. In dealing with it, the judges had to take sides in the philosophical debate over the concept of law. In this context, the prominent voices of the legal philosophers Gustav Radbruch and Hans Kelsen could not go unheard. This paper draws on what could have been the “Radbruch-Kelsen debate on Nazi Law.” In examining the debate, it will argue for a substantive account of the morality of the law, as expressed in Radbruch’s Formula.

1. Introduction

After 1945, the International Military Tribunal in Nuremberg and the German courts were confronted with the unprecedented atrocities committed during the era of the “Third Reich.” In response to traumatic history, the judges had to find a way to both represent and judge a vision of atrocity that seemed to defy rational and judicial explanation (Douglas 2001). From a jurisprudential point of view, the task of rendering justice to the Nazi horrors raised the question of the relation between law and morality—an issue leading to the core of the controversy between natural law theory and legal positivism.

Immediately after the collapse of the Nazi regime, Gustav Radbruch, one of the most influential German legal philosophers of the twentieth century, redefined his position on legal certainty by introducing the following principle: When statutory rules reach a level of extreme injustice, so that the contradiction between positive law and justice becomes intolerable, they cease to be law. In denying that extremely unjust legal orders like the Nazi system could have legal value, Radbruch contested a purely formalistic (“value-free”) view on legal validity as expressed by the founders of positivist legal philosophy—notably Hans Kelsen, a leading figure in twentieth-century

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legal thought, whose “Pure Theory of Law” insisted on the autonomy of the legal order from all ethical and political questions.

In this perspective, Radbruch’s post-war work can be regarded as an implicit critique of Kelsen’s vision of “positivist purity.” By integrating criteria of basic justice into the concept of law, Radbruch rejected Kelsen’s idea that anything that can be manifested in legal form (even the decrees of the Nazis) is valid law, irrespective of its content. In 1946, Radbruch wrote: “Positivism, with its credo ‘a law is a law,’ has in fact rendered the German legal profession defenceless against laws of arbitrary and criminal content” (Radbruch 1946, 107). It seems clear that this unequivocal statement was directed, in particular, at Kelsen’s legal philosophy, one of the most influential theories of the 1920s.

Despite this substantial divergence of opinion, a post-war Radbruch-Kelsen debate on Nazi Law never took place. After 1945, the German courts, however, had to address the urgent question of whether the Nazi Regime created the law in Germany or, on the contrary, lacked legality—a jurisprudential dilemma that reflected the conflict between adherence to the form of law (as advocated by Kelsen) and adherence to criteria of minimal justice (as professed by Radbruch). On this basis, the paper explores what could be described as “the imaginary Radbruch-Kelsen debate on Nazi law.” Supposing there had been a post-war discussion between the two scholars, which arguments for or against the validity of Nazi law would they have put forward, and which solutions to the problem would they have suggested?

This paper will argue that Radbruch’s post-war work provides a coherent response to the cases of extreme conflict between statute and justice. Radbruch offers an alternative vision of law that makes room for both morality (justice) and positivity (legal certainty). This theoretical flexibility—beyond the traditional separation between natural law theory and legal positivism—makes it possible to locate an idiom adequate to the task of rendering legal justice to traumatic history, without neglecting the central role of the rule of law.

In the following two sections, I attempt to give a general account of the legal theories of Gustav Radbruch and Hans Kelsen, with an emphasis on the question of legal validity. Thereafter, the essay explores the post-war German Courts’ dealing with the Nazi regime. One of the paradigmatic cases discussed leads directly to the famous controversy between H. L. A. Hart and Lon L. Fuller on the relationship between law and morality. The essay concludes with some critical remarks about the lessons to be learnt from the jurisprudential confrontation with the Nazi past.

2. Gustav Radbruch: A Legal Philosophy of Values

It has been noted, quite rightly, that there is a close link between Gustav Radbruch’s philosophy and his life and personality (Friedmann 1960,

192).¹ Radbruch's post-war work, in particular, can be seen as a personal response to the collapse of human values during the 12 years of the "Third Reich"—a moral decline that brought direct suffering to Radbruch, who went into internal exile after having been declared "politically unreliable" by the Nazis and removed from his position as a law professor at the University of Heidelberg. In fact, the short papers that Radbruch wrote in the immediate aftermath of World War Two describe his attempt to rebuild a new order of values from the ruins of the Nazi past.²

Radbruch's attempt to come to terms with Germany's Nazi past led, for some purposes, to a correction of his earlier views. The later emphasis on the criterion of justice over "legal certainty" (in cases of extreme injustice) appears to differ strikingly from the positivism and relativism of Radbruch's pre-war work. The following statement, in a 1934 paper, seems particularly indicative of Radbruch's earlier ("relativist-positivist") view:

Because a judgement on the truth or error of the differing convictions in law is impossible, and because on the other hand a uniform law for all citizens is necessary, the law-giver faces the task of cleaving with a stroke of the sword the Gordian knot which jurisprudence cannot untangle. Since it is impossible to ascertain what is just, it must be decided what is lawful. In lieu of an act of truth (which is impossible) an act of authority is required. *Relativism leads to positivism.* (Radbruch 1990a, 18, emphasis in original)³

This form of "uncommitted relativism"⁴ has implications for the role of the judges. In his major treatise of 1932, *Rechtsphilosophie*, Radbruch argues that judges have the professional duty to be "subservient to the law without regard to its justice" (Radbruch 1950a, 182–3; 1950b, 119–20). The criterion of legal certainty legitimises this strict loyalty to the law: By enforcing positive law, whatever its content, the judges guarantee the protection of safety and order as the "most immediate task of the law" (Radbruch, 1950b, 117–8).⁵ In line with this argument, Radbruch states:

We despise the person who preaches in a sense contrary to his conviction, but we respect the judge who does not permit himself to be diverted from his loyalty to the law by his conflicting sense of the right. For the dogma is of value only as an expression of faith, while the law is of value not only as a precipitation of justice but also as a guarantee of legal certainty, and it is eminently as the latter that it is entrusted to the judge. (Radbruch 1950b, 119)

Radbruch's pre-war work, however, by no means denotes indifference to values. The concept of law presented in his *Rechtsphilosophie* is indeed value-

¹ For a detailed account of Radbruch's life, see Kaufmann 1987, 133–46.

² The idea of "renewing the law" figures prominently in Radbruch's post-war work: see, e.g., Radbruch 1990b.

³ I follow Gabriel's translation (1999–2000, 404).

⁴ The expression is borrowed from Stone 1968, 227–62.

⁵ Radbruch adds, quoting Goethe: "It is better that you suffer wrong than that the world be without law."

related: Radbruch finds that law can only be defined as the reality striving towards “the idea of law,” which is *justice* (*Gerechtigkeit*) (Radbruch 1950b, 91–3). But the idea of justice Radbruch is referring to—an objective idea of distributive justice, essentially meaning equality—does not fully exhaust the concept of law. To complete the concept of law, Radbruch adds two elements: *purposiveness* (*Zweckmässigkeit*) and *legal certainty* (*Rechtssicherheit*). The first element helps to determine the specific values that law is destined to serve and results from a particular choice of different views of law and the state; the second precept seeks to ensure peace and order by insisting on the positivity of the law as a prerequisite for legal predictability (Radbruch 1950b, 108; Leawoods 2000, 493). Between these three pillars of the idea of law there is perpetual tension. There are passages in Radbruch’s *Recht-philosophie* suggesting that legal certainty is the most basic element of the idea of law; this is especially true with respect to the role of the judge in the legal system.⁶ At the same time, however, Radbruch rejects an absolute precedence of legal certainty: He reasserts the equality of all three precepts and denies that legal certainty and positive law prevail at all times (Radbruch 1950b, 118). In line with this argument, he makes a case for a standard of justice that applies, or could apply, if the legislator or the citizen (and not the judge) were at centre stage.⁷

After 1945, under the immediate impression of the 12 years of Nazi dictatorship, Radbruch introduced a thesis and a formula (Rivers 1999, 41). His post-war thesis was that “positivism with its credo that ‘law is a law’ rendered the German legal profession defenceless against laws of arbitrary and criminal content.” This “positivist thesis” which contains two elements—the “causal thesis” (= the claim that the theory of legal positivism played a role in paving the way for the Nazi takeover) and the “exoneration thesis” (= the claim that legal positivism, in virtue of ostensibly binding the judges in Nazi courts, might serve to exonerate them)—is controversial and questionable (Paulson 1994, 313–5).⁸ The famous “Radbruch Formula,” on the other hand, was presented as a test for the validity of statutory enactments. In “Statutory Injustice and Suprastatutory Law,” a short article he published in 1946, Radbruch wrote:

⁶ See, for example, the following statement in Radbruch 1950b, 108: “The existence of a legal order is more important than its justice expediency, which constitutes the second great task of the law, while the first, equally approved by all, is legal certainty, that is order, or peace.” On these aspects, see Dreier 1998, 203; Paulson 1994, 339–40.

⁷ Concerning the legislator’s duty to make the law, see Radbruch 1950b, 111: “Equal protection of the laws or the prohibition of ad hoc tribunals, for instance, rests on requirements [. . .] of justice.” Concerning the citizen’s obligation to obey the law, see Radbruch 1950b, 118: “The individual conscience usually will, and properly may, deem an offence against positive law more objectionable than the sacrifice of the individual’s own conviction, but there may be ‘shameful laws’ which conscience refuses to obey.”

⁸ The complicitous conduct of lawyers and judges under the laws of the Third Reich is probably best understood as a combination of “blind obedience to enacted law” and “Nazi free law thinking”; for this view, see Dreier 1998, 214.

The conflict between justice and legal certainty may be resolved in that the positive law, established by enactment and by power, takes precedence even when its content is unjust and improper, unless the contradiction between positive law and justice reaches such an intolerable level that the statute, as “incorrect law” [*unrichtiges Recht*], must yield to justice. It is impossible to draw a sharper line between cases of statutory non-law and law that is still valid despite unjust content. One boundary line, however, can be drawn with utmost precision: Where there is not even an attempt to achieve justice, where equality, the core of justice, is deliberately disavowed in the enactment of positive law, then the law is not merely “incorrect law,” it lacks entirely the very nature of law. For law, including positive law, cannot be otherwise defined than as an order and legislation whose very meaning is to serve justice. (Radbruch 1946, 107)

The formula that can be extracted from this statement is composed of two parts. In the first part, the claim is that positive law ceases to be valid if its departure from justice reaches an “intolerable level” (= “intolerability formula”). In the second part, positive laws are denied legal character when in their enactment equality, which for Radbruch is the heart of justice, is deliberately disavowed (= “disavowal formula”). While the intolerability formula is attuned to the level of injustice and therefore has an objective character, the disavowal formula refers to the purpose or intention of the legislator and is in this sense subjective (Alexy 1999, 15–6). It is true that in general there should be an “overlapping” of the two formulas. However, it is not surprising that judicial practice has first and foremost focused on the intolerability formula, given the difficult problems of evidence that the “disavowal formula” poses in doubtful cases.

Radbruch’s formula does not require complete congruence between law and morality. What the later Radbruch requires is that legal validity be tested by certain minimum standards of justice. For that purpose, he introduces the criterion of extremity as a safeguard against too much judicial recourse to morality and natural law. Positive law loses its legal character or its legal validity if, and only if, it reaches a level of *extreme injustice*. Only in situations of the extreme (such as the Nazi era), does legal certainty have to give way to arguments based on justice as a ground for judicial “resistance” (Gabriel 1999–2000, 405–6; Alexy 1999, 16–7; Rivers 1999, 41–3).⁹ In ordinary times, however, morality should not be part of determining the validity of law—here, the value of legal certainty “takes precedence,” allowing enacted and effective law to be valid even when it is unjust. In this sense, Radbruch’s formula combines “positivist” arguments with “natural law” arguments (Leawoods 2000, 490–1, 503–15).

Radbruch’s legal philosophy lies in a constant struggle between the irreconcilable conflict of antinomic values (Friedmann 1960, 191–2). It reflects the

⁹ Radbruch’s post-war insistence that the judge must choose justice in cases of truly extreme conflict between statute and justice represents a substantial correction of his earlier position (i.e., the insistence on the judge’s duty to follow the statute). On this point, see Paulson 1995, 493–4, 500.

lifelong attempt to establish an appropriate balance between justice, legal certainty, and purposiveness—this triad of conflicting demands constitutes the basis of Radbruch thinking. By combining morality (justice) and positivity (certainty) into his concept of law, Radbruch offers a “middle way” between natural law theory and legal positivism (Leawoods 2000, 491). This basic idea of a “third option”—beyond the polarisation between justice-content and positivity of law—is consistent in his pre- and post-war work. In order to develop his formula after 1945, Radbruch did not need to introduce a completely new theory; he only had to make an adjustment in the system by reversing the “hierarchy” between legal certainty and justice in the case of extreme injustice (Alexy 1999, 32–3). In this sense, Radbruch’s later theory is both a continuation and correction of his pre-war work: In the face of the “renewed barbarisation” (Radbruch 1961, 62) that the Nazi regime represented, there was a need for re-examination in the context of the old theory—a theory of values (Paulson 1995, 489–500; Dreier 1998, 202–4; Kaufmann 1995, 81–2; Ward 1992, 197–9).

3. Hans Kelsen: A Pure Theory of Law

Radbruch’s post-war critique was directed, in particular, at the legal positivism propounded by the eminent Austrian jurist and philosopher Hans Kelsen.¹⁰ From the beginning of his career as a legal theorist, Kelsen subscribed to the “positivist” thesis that moral illegitimacy does not entail legal invalidity. On the basis of a relativistic theory of values (that is, the denial that there could be objective assertions about morals), he argued that morality as such is not part of the law, so that any content whatsoever can be legal. Unlike Radbruch, Kelsen never felt the need to reconsider the role of justice within his concept of law; even after the traumatic experience of the Third Reich—Kelsen fled from Nazi persecution because of his Jewish origins—he stuck to the (formal) argument that any act, no matter how morally repugnant, could be legally valid.

Kelsen’s “pure theory of law” reflects the attempt to construct “a legal theory purified of all political ideology and every element of natural sciences” (Kelsen 1992, 1). It aims to bring the study of law to the level of a legal science (*Rechtswissenschaft*), clearly separated from other sciences dealing with related subject matters (psychology, sociology, ethics and political theory). Kelsen claimed that traditional legal science had become entangled in political ideology and moralising on the one hand, and in attempts to reduce the law to the world of fact or nature, on the other. In order to avoid reductionism of any kind, he suggested a theory of positive law, aiming at “cognition focused on the law alone” (Kelsen 1992, 7–8)—a theory

¹⁰ For a complete biography of Kelsen, see Métall 1969.

about “pure legal-information-giving” (Harris 1997, 66), cleansed of all extraneous (non-legal) material.

Kelsen’s theory is, in a sense, doubly pure. The first purity consists in the separation between law and morality (*separation thesis*): Kelsen uses a thesis of moral relativism and verificationism to argue that there is no necessary connection between the (content of) law and morals (Kelsen 1948, 383–5; see also Brand-Ballard 1996, 138–41). The second purity arises in the conviction that legal science must be purified also of empirical facts (*normativity thesis*): The law, which is comprised of “ought statements” (norms), cannot be reduced to factual premises as “is statements”; legal science must therefore be separate from empirical science (Kelsen 1960, 272). This double purity within Kelsen’s legal theory leads directly to the doctrine of the basic norm. Kelsen defines the law as a system of norms ordered by a dynamic hierarchy. The validity of each norm within the system is dependent not on its content, but on the existence of some higher norm in accordance with which that norm was produced; the validity of the higher norm in turn rests on that of a still higher-level norm, and so on until one reaches the apex of the normative hierarchy, the basic norm (*Grundnorm*), which is presupposed rather than authorised by some higher norm (Kelsen 1992, 55–89).

As I have observed, in Kelsen’s system law and ethics are separate spheres. Since ethical statements (such as “Killing is wrong” or “Promises ought to be kept”) cannot be empirically verified, they cannot be meaningful within the context of legal science (Kelsen 1948, 383–5; Brand-Ballard 1996, 138–41). Hence, the pure theory of law leaves no room for judgements of justice: “A statement of law must not imply any judgement about the moral value, about its justice or injustice” (Kelsen 1960, 273). Rather, the concept of law is confined to positive law whose “content can be unambiguously ascertained by an objective method” (Kelsen 1971b, 229). This positivistic approach leads to the assumption that the validity of a given legal order does not depend on its conformity with some ethical standards: Kelsen’s concept of legal validity focuses exclusively on the elements of authoritative issuance and social efficacy, thereby ruling out correctness of content altogether (Kelsen 1992, 56–7, 60–1; see also Alexy 2002, 16–9). This claim for moral neutrality is expressed clearly in the following passage from the second edition of the *Reine Rechtslehre*, published in 1960:

A legal norm is not valid because it has a certain content, that is, because its content is logically deducible from a presupposed basic norm, but because it is created in a certain way—ultimately in a way determined by a presupposed basic norm. For this reason alone does the legal norm belong to the legal order whose norms are created according to this basic norm. Therefore any kind of content might be law. (Kelsen 1989, 198)

This contradicts Radbruch’s Formula, according to which norms lose their legal character when the threshold of extreme injustice is crossed. In the pure

theory there is no room for arguments of (moral) correctness, as expressed in Radbruch's post-war writings. Kelsen's moral relativism leads him to argue that anything that is produced or posited in accordance with the criteria of legal form is valid law. With this view, there is no rational argument against the legal validity of an extremely unjust system of norms like that of the Third Reich: According to the Kelsenian efficacy test, the principle of absolute leadership (*Führer-Principle*) constituted in Nazi Germany the basic norm and, so interpreted, founded the legal validity of Hitler's orders. So Kelsen accommodates within his analysis the eventuality of a "gangster-state," in which the gangster's command gets its authority from the basic norm.¹¹

This content-neutral concept of legal validity does not imply, however, a moral duty to comply with any and all legal norms. The legal ought is not a moral ought: "Relativism," writes Kelsen, "imposes upon the individual the difficult task to decide for himself what is right and what is wrong" (Kelsen 1971a, 22). Since moral values are only relative, the moral decision to obey or disobey the law is left to each citizen—resisting evil laws, at the risk of bearing the brunt of coercive acts, is in this sense a matter of personal responsibility (Dreier 1986, 228–47). Only for the participants in the "game of law" does the possibility of a moral criticism of law seem unavailable: "[t]he jurist ignores morality as a system of valid norms just as the moralist ignores positive law as such a system" (Kelsen 1945a, 374). For Kelsen, the proper objective role of judges and officials consists, after all, in the strict application of the law, understood as an effective system of coercive rules. Now, if an effective revolution occurs, and a new legal order comes into being with its own basic norm, then the only true choice for judges and other officials can be either to resign or to stay in office and inevitably support the new regime (Harris 1997, 80).

Finally, it is worthwhile considering Kelsen's views on the question of re-establishing the rule of law in post-Nazi Germany. After 1945, Kelsen drew special attention to the problem of retrospective punishment: Should the rule against *ex post facto* laws be read as excluding the conviction of individuals who had committed atrocities under the Nazi rule? With regard to the Nuremberg trial, Kelsen insisted that the protection against retroactive legislation was subject to important limitations (namely, the rule that ignorance of the law is no excuse) (Kelsen 1947, 164–5; 1945b, 8–11). In addition, there was a strong moral argument for establishing individual criminal responsibility: "Justice required the punishment of these men, in spite of the fact that under positive law they were not punishable at the time they per-

¹¹ I am referring here to Kelsen's claim that only by presupposing the basic norm (as ultimate source of authority) can we distinguish between the gangster's order to give him money and a similar order by a tax official. In drawing this distinction, Kelsen in fact does not exclude the possibility of a radical change in the basic norm (for instance, the establishing of a "gangster regime"), setting new standards of legality (e.g., "anything that is useful to the chief gangster is law"). See Kelsen 1992, 59–60.

formed the acts made punishable with retroactive force" (Kelsen 1947, 165). Interestingly enough, here Kelsen relied on ethical value judgements that largely contrasted with the idea of a pure theory of law, purged of all moral and political elements. In this respect, Kelsen's view seems to converge with that of Radbruch (Radbruch 1947, 135): Submitting Nazi atrocities to legal judgement was, for both of them, a matter of justice.

4. Updating the Debate: Hart vs. Fuller

After 1945, the German courts faced the problem of recrafting the rule of law and rendering justice to the atrocities committed during the Third Reich. From a jurisprudential point of view, this confrontation with the past raised the question of the relationship between law and morality: Should one consider as "law" all rules that were formally valid in terms of the Nazi legal system, regardless of their amoral content? Or, should one rather refuse the character of law to them, by saying: "This is too evil to be called law"?

In dealing with these issues, the post-war courts in West Germany were prepared to rely, if necessary, on principles of substantive justice as expressed in Radbruch's Formula. One example is the 1952 decision of the Federal Court of Justice involving official participation in the deporting of Jews. In establishing criminality, the Court referred to Radbruch's claim that positive law loses its legal status, when its contradiction with justice reaches an "intolerable level." The core of its reasoning reads:

Rules that do not even attempt to achieve justice, deliberately disavow equality, and clearly violate elementary standards of humanity common to all civilised people, have no claim at all to legal status; deeds done on this basis lack, therefore, legal justification. In fact, authoritative measures that grossly and patently offend against the fundamental tenets of justice and humanity are to be regarded as void from the outset [. . .] (BGHSt 2, 234 [238], translation by the author).

This attempt to deal with the Nazi past through law and judicial procedure was the focus of the 1958 controversy between H. L. A. Hart and Lon L. Fuller. The point of dispute was based upon a brief and misleading account of a case decided in 1949 by a German court of appeal. This decision concerned a German woman who had rid herself of her husband by denouncing him to the Nazi authorities for making disparaging comments about Hitler. The court found her guilty. But, contrary to Hart's portrayal, the court had *not* reached its conclusion by denying legal validity to the Nazi statute imposing criminal liability.¹² However, despite the fact that Hart (as he acknowledged later) had incorrectly represented this "grudge informer"

¹² That the *Harvard Law Review* essentially misreported the case was pointed out by Pappé 1960, 260–5.

case, the debate addressed a wider issue of practical significance: the question of the relationship between legal invalidity and immorality in the context of a wicked legal system.

In his 1958 essay, Hart took a stand against Radbruch's Formula and its application in German judicial practice. In his view, the vice in Radbruch's position (i.e., the assertion that certain rules cannot be law because of their moral iniquity) was that it would "serve to cloak the true nature of the problems" (Hart 1958, 619–20). This solution, Hart said, concealed the fact that the conviction of Nazi criminals was a moral quandary—one had to choose between the evil of retrospective punishment and the evil of leaving unpunished the person who had committed an outrageously immoral act. For Hart, a wider concept of law, allowing the invalidity of law to be distinguished from its immorality, had at least the merits of candour: It declared overtly "the choice between evils, which, in extreme circumstances, may have to be made" (Hart 1994, 212). This positivist approach to law, he argued, would bring into focus far better the resources of plain speech and moral criticism. On this view, the truly liberal response to wicked law lay, ultimately, in acknowledging that "laws may be law but too evil to be obeyed" (Hart 1958, 620).

Fuller's arguments in reply to Hart's article are best seen as an attempt to infuse morality into the concept of law (Dyzenhaus 1991, 18). Fuller argued that Hart's formulation of the dilemma in post-Nazi Germany, between the obligation to obey the law and the obligation to act morally, made no sense. He held that there is a necessary connection between "order" (law) and "good order" (morality)—that law involves a comprehension of moral aspirations that are inherent in the very concept of law itself. Hence, Fuller criticised Hart for neglecting the demands of what he called "the internal morality of law" (Fuller 1958, 645). Positivism, he said, failed to give "any coherent meaning to the moral obligation of fidelity to law" (Fuller 1958, 656). In setting out this anti-positivist view of law, Fuller was prepared to defend Radbruch's Formula and the "natural law approach" in post-war German justice. He approved, in particular, the possibility of stripping grossly unjust Nazi laws of their legality:

To me there is nothing shocking in saying that a dictatorship which clothes itself with a tinsel of legal form can so far depart from the morality of order, from the inner morality of law itself, that it ceases to be a legal system. (Fuller 1958, 660)

With regard to the punishment of Nazi perpetrators, both Hart and Fuller leaned toward a retrospective statute. They differed, however, on the question of what the German courts ought to do in cases in which the legislator had remained inactive. In his analysis of the case mentioned above, Hart seemed to argue that, on the whole, it was worse to convict the grudge informer without a retroactive law than to let her go unpunished (Rivers 1999, 40–65). Fuller, by contrast, saw the recourse to invalidity as the only real option open to the courts. He particularly excluded the possibility of

interpreting Nazi law according to “Nazi interpretative principles” or “conventional interpretative principles”; relying on these interpretative techniques was morally unacceptable or implied a lack of respect for Nazi law (Fuller 1958, 655).

Ultimately, the fundamental differences between Hart’s and Fuller’s views lay in their underlying concepts of law. Hart argued in terms of the (positivist) separation thesis according to which legal validity is identified by a purely legal criterion wholly separate from morality. Fuller, by contrast, adopted the (anti-positivist) morality thesis by claiming that law and morality are necessarily connected. These two different starting-points determined the course of the debate.

If a Kelsen-Radbruch debate on Nazi law had ever taken place, it probably would have moved along the lines of the Hart-Fuller controversy. Kelsen, like Hart, embraced a content-neutral concept of validity, but insisted on the possibility of a moral criticism of law; no doubt he would have rejected the natural-law implications of the post-Nazi experience, contending that the best way to deal with Nazi perpetrators was to introduce retrospective legislation. Radbruch, by contrast, argued in his post-war writings that grossly unjust Nazi laws had never achieved legal status. Like Fuller, he viewed morality as providing a constraint on the existence of law. Radbruch’s analysis of the grudge informer problem illustrates this point: A man who had used the oppressive laws and procedures of the Nazi Regime to remove a personal enemy was, in his view, guilty of murder as well as the judges who had condemned him to death; these actions amounted to a “perversion of the law,” irreconcilable with the principles of fundamental justice.¹³

It is generally thought that Hart prevailed over Fuller and Radbruch in his argument that legal positivism could offer a more candid response to the problem of wicked legal systems. This might suggest that a Radbruch-Kelsen debate on Nazi law would have ended victorious for Kelsen. In the following section, I will challenge this view, by arguing for a substantive account of the morality of law, as expressed in Radbruch’s Formula.

5. Debating the Debate: The Limits of Legality

In 1947, the philosopher Karl Jaspers addressed the “question of German guilt.” For Jaspers, the guilt question was vital to the process of coming to terms with the past: “There is no other way to realise truth for the German than purification out of the depth of consciousness of guilt”. To clarify the

¹³ Radbruch 1946, 108, was however reluctant to attribute *personal responsibility* to the judges who had pronounced the death sentence. Even if one rejected the “exoneration thesis” (arguing that legal positivism had rendered the German legal profession defenceless), the judges could invoke the state of necessity, by pointing out that they would have risked their own lives had they refused to apply Nazi law. Radbruch called this defence “a painful one,” insisting that “the judge’s ethos ought to be directed toward justice at any price, even at the price of his own life.”

German situation, Jasper suggested distinguishing between four concepts of guilt: criminal guilt, political guilt, moral guilt and metaphysical guilt.

In the present context, the concept of criminal (or legal) guilt is particularly significant. Jasper discussed it with reference to the Nuremberg trials. In doing this, he focused, in particular, on the question of the legality of the Nuremberg enterprise:

Legally we hear the following argument: There can be crimes only insofar as there are laws. A crime is a breach of these laws. It must be clearly defined and factually determinable without ambiguity. In particular—*nulla poena sine lege*—sentence can only be passed under a law in force before the act was committed. In Nuremberg, however, men are judged retroactively under laws now made by the victors.

Rebuttal: In the sense of humanity, of human rights and natural law, and in the sense of the Western ideas of liberty and democracy, laws already exist by which crimes may be determined. (Jaspers 1947, 55–6)

The opposing views described here are illustrative of what could have been a Radbruch-Kelsen debate on Nazi law. The first statement reflects the positivist separation thesis, which is at the heart of Kelsen's pure theory: Law is confined to positive law, understood as a logically closed system, confirmable by scientific inquiry. Kelsen would have agreed that the Nuremberg trials were *ex post facto*, rejecting however the view that retrospective law could not serve as a basis for the punishment of Nazi leadership. The second statement illustrates a justice-related vision of law, as advocated by Radbruch in his later writings. For Radbruch, the concept of "crimes against humanity," as applied by the Nuremberg Tribunal, did not change the legal situation, it just determined what at the time of the act the legal situation was.

From a philosophical point of view, the conflict between Kelsen and the later Radbruch centres on the thesis of ethical relativism. Kelsen's rejection of the morality thesis is grounded on his metaethics of subjectivism and relativism: Moral values are simply irrational commitments, not susceptible to objective inquiry. Radbruch, on the other hand, opted in his later writings for a substantive account of the morality of law, presupposing "at least a rudimentary non-relativist ethic" (Alexy 1999, 33).

This is not the place to discuss the problem of relativity at any length. I want to suggest, however, that there are good reasons for opposing radical relativism. David Wiggins, for instance, argues convincingly that, in all the various ethical systems, "we might find not undifferentiated difference but some cases of mutual opacity and, among cases where there is not opacity but sufficient transparency, some cases where the question can be pursued and decided and other cases where one might reasonably but undogmatically doubt it" (Wiggins 1991, 77). This implies that there are central questions of ethics (notably the problem of extreme injustice) which are capable of rational justification—they will "either collect convergent answers" or

“occasion the kind of disagreement for which the counsel of perseverance is the right reaction” (Wiggins 1991, 77).

Furthermore, moral relativism appears to be at the root of possible tensions and conflicts between a liberal concept of politics and Kelsen’s pure theory. Kelsen advocated humanism, pluralism and democracy in the face of the totalitarian pressures of the early twentieth century; his theory indeed can be understood as “a way of trying to find a view of law that would allow law to be the means of domesticating the violence inherent in politics and of encouraging tolerance” (Dyzenhaus 1997, 157–8). Kelsen’s enterprise, however, makes no provision for “good order” but only “order”. Given his value irrationalism, Kelsen cannot give a sense to the distinction between “morally right” and “morally wrong”—there is no (objective) criterion of ethical correctness against which the legitimacy of legal order can be judged. In this sense, Kelsen’s defence of the liberal-democratic state is theoretically flawed (Keekok 1990, 191).

The relativism argument is closely related to Kelsen’s formalism. Kelsen indeed gives a formalist answer to the problem of epistemological uncertainty: Since we cannot achieve “absolute truth,” the only solution is to adopt a system of procedures offering a method for establishing a “truth internal to legality” (Morrison 1997, 330). In this picture, a purely formal (or technical) methodology is the key to transparency. The Basic Norm as a formal and “empty” (i.e., content-neutral) concept reflects this reasoning. In a sense, however, Kelsen’s formalistic approach seems to be self-defeating, as it is compatible with an arbitrary and oppressive system (such as the Nazi state), in which the *Grundnorm* in place (e.g., the *Führer*-principle) provides a basis for making a mockery of the most minimal idea of legal form. Thus, while insisting on the value of formalist procedure, Kelsen’s theory makes room for the possibility of getting rid of law and positivity altogether—and this, of course, at the cost of legal security and transparency (Dyzenhaus 1997, 159).

Most importantly, there are practical arguments that speak for Radbruch’s Formula and against Kelsen’s theory. Here, I want to assume that legal theories can make a difference, and that we should adopt the view of law that offers the best results in legal practice. With this in mind, my discussion focuses on the internal perspective of a participant or insider in the legal system—the perspective of a judge, for instance, who is faced with the problem of applying grossly unjust laws (such as the anti-Semitic enactments under the Nazi regime).

Under an evil regime, the scope for judicial manoeuvre and resistance may be more or less limited (Alexy 1999, 31; see also Abel 1999, 66–80). According to a non-positivistic concept of law (as advocated by Radbruch), a judge confronting iniquitous statutes can express his moral reservation in legal terms—by dint of arguments that are inherent in the very concept of law (incorporating notions of basic justice). For positivists such as Kelsen, by contrast, a judge refusing to apply evil (but procedurally correct) enact-

ments breaks the law and therefore steps out of his judicial function. Here, the judge is caught in a formal-moral dilemma: He is torn between his objective role in the legal profession and the cause of justice. This inner conflict, characterising the classic positivist model of the judicial process, in all probability makes resistance on the part of a judge harder. In this respect, Radbruch's thesis has the advantage over Kelsen's. If our concern is to prevent the enforcement of legislated injustice, we should opt for a concept of law which makes the judge's preparedness to do so easier rather than harder (Gabriel 1999–2000, 402–3; see also Alexy 1999, 30–2; Ott 1988, 347).

After the collapse of an unjust regime, the decision for or against legal positivism can make a substantive difference to the rights of the victims. This is best illustrated with reference to a case example drawn from a 1955 decision of the German Federal Court of Justice:

A German-Jewish woman had deposited securities with a bank in Germany before fleeing to Switzerland in 1939. Later on, the Nazis enacted a statute—the Eleventh Decree to the Reich Citizenship Law of 25 November 1941—according to which emigrating Jews should automatically lose their property on the basis of immediate expropriation. After the War, the former emigrant took up domicile in the Federal Republic of Germany and demanded her property back (the securities deposit had remained registered on the books of the bank in the name of the rightful owner). Her claim for restitution, however, was *not* covered by West Germany's legislation for property restitution (which ensured unconditional return of all property taken from Nazi victims), due to the expiry of the statute of limitations. (BGHZ 16, 350)

The matter of this demand for restitution poses the question of whether to recognise the expropriating Nazi statute as valid law. In fact, what Hart (and similarly Kelsen) presented as a “candid solution” to the problem of Nazi injustice was, in the actual case, practically ineffective: The option of introducing adequate retroactive legislation was, of course, not open to the court (Rivers 1999, 57). So if denying restitution was “a bad thing to do,” as both Hart and Kelsen would have most likely acknowledged, then it was only by following an anti-positivist solution that the judges could prevent a violation of the victim's basic rights. Accordingly, the Federal Court of Justice relied implicitly on Radbruch's Formula to confirm the right to claim restitution. It found that the expropriating Nazi statute had been invalid from the outset because of its “profound contradiction with the essential core requirements of the rule of law” (BGHZ 16, 354).

The failure of the positivist side to address the practical issues at stake reflects a more fundamental failure to articulate a theoretically sound response to the legal challenges arising in the aftermath of an unjust regime. In times of political and legal change, a content-neutral concept of law provides no guidance or solution, precisely because it is essentially indifferent to issues of substantive justice. Illustrative of this is the way in which Kelsen and Hart addressed the question of transitional justice in post-1945 Germany. What they praised as the best solution was, in terms of legal theory, no solution at

all. In making a case for retroactive legislation, Kelsen, like Hart, offered a merely procedural argument, without reaching to the heart of the problem: legal validity. In this way, as Fuller rightly pointed out, the debate turned no longer on the jurisprudential foundations of law, but rather on “who should do the dirty work” (the courts or the legislator?) (Fuller 1958, 649).

As Radbruch rightly saw, the problem of extreme injustice can only be dealt with coherently if we adopt a concept of law that incorporates some basic morality as a limiting criterion. This was Fuller’s point in criticising Hart for failing to account for what he called “the internal morality of law.” However, Fuller’s formal account of the morality of the law cannot replace Radbruch’s substantive standards as the Nazi experience shows: A grossly unjust law like the aforementioned Decree 11 was passed in almost perfect accordance with the Fullerian requirements of the rule of law (constancy, generality, prospectivity etc.). What makes Radbruch’s Formula ultimately so attractive is that it provides a sound balance between legal certainty or security and the rights of the victims. In assuming that only in the case of gross injustice can the judge legitimately invalidate a formally correct law, Radbruch offers a subtle way of bridging the gap between fairness and justice, leaving space open for the interpretive turns in modern jurisprudence (Rivers 1999, 58–64).

Who would have won the debate? There is, above all, a simple moral argument speaking for Radbruch and against Kelsen: Theoretical disputes over the concept of law should not be carried out on the backs of the oppressed and the defenceless.

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Abbreviations

BGHSt: *Entscheidungen des Bundesgerichtshofes in Strafsachen* (Federal Court of Justice for Criminal Matters)

BGHZ: *Entscheidungen des Bundesgerichtshofes in Zivilsachen* (Federal Court of Justice for Civil Matters)

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