ano 18 - n. 73 | julho/setembro - 2018
Belo Horizonte | p. 1-280 | ISSN 1516-3210 | DOI: 10.21056/aec.v18i73
A&C – R. de Dir. Administrativo & Constitucional
www.revistaaec.com

A&C

Revista de Direito ADMINISTRATIVO & CONSTITUCIONAL

A&C – ADMINISTRATIVE & CONSTITUTIONAL LAW REVIEW

Fórum
CONHECIMENTO JURÍDICO

A&C – REVISTA DE DIREITO ADMINISTRATIVO & CONSTITUCIONAL

IPDA
Instituto Paranaense
de Direito Administrativo

INSTITUTO DE DIREITO
ROMEU FELIPE
BACELLAR

Fórum
CONHECIMENTO JURÍDICO

Luís Cláudio Rodrigues Ferreira
Presidente e Editor

Av. Afonso Pena, 2770 – 15º andar – Savassi – CEP 30130-012 – Belo Horizonte/MG – Brasil – Tel.: 0800 704 3737
www.editoraforum.com.br / E-mail: editoraforum@editoraforum.com.br

Impressa no Brasil / Printed in Brazil / Distribuída em todo o Território Nacional

Os conceitos e opiniões expressas nos trabalhos assinados são de responsabilidade exclusiva de seus autores.

A246 A&C : Revista de Direito Administrativo & Constitucional. – ano 3, n. 11, (jan./mar. 2003)- . – Belo Horizonte: Fórum, 2003-

Trimestral
ISSN: 1516-3210

Ano 1, n. 1, 1999 até ano 2, n. 10, 2002 publicada pela Editora Juruá em Curitiba

1. Direito administrativo. 2. Direito constitucional. I. Fórum.

CDD: 342
CDU: 342.9

Coordenação editorial: Leonardo Eustáquio Siqueira Araújo
Capa: Igor Jamur
Projeto gráfico: Walter Santos

Periódico classificado no Estrato A2 do Sistema Qualis da CAPES - Área: Direito.

Qualis – CAPES (Área de Direito)
Na avaliação realizada em 2017, a revista foi classificada no estrato A2 no Qualis da CAPES (Área de Direito).

Entidade promotora
A *A&C – Revista de Direito Administrativo e Constitucional*, é um periódico científico promovido pelo Instituto de Direito Romeu Felipe Bacellar com o apoio do Instituto Paranaense de Direito Administrativo (IPDA).

Foco, Escopo e Público-Alvo
Foi fundada em 1999, teve seus primeiros 10 números editorados pela Juruá Editora, e desde o número 11 até os dias atuais é editorada e publicada pela Editora Fórum, tanto em versão impressa quanto em versão digital, sediada na BID – Biblioteca Digital Fórum. Tem como principal objetivo a divulgação de pesquisas sobre temas atuais na área do Direito Administrativo e Constitucional, voltada ao público de pesquisadores da área jurídica, de graduação e pós-graduação, e aos profissionais do Direito.

Linha Editorial
A linha editorial da A*&C – Revista de Direito Administrativo & Constitucional*, estabelecida pelo seu Conselho Editorial composto por renomados juristas brasileiros e estrangeiros, está voltada às pesquisas desenvolvidas na área de Direito Constitucional e de Direito Administrativo, com foco na questão da efetividade dos seus institutos não só no Brasil como no Direito comparado, enfatizando o campo de intersecção entre Administração Pública e Constituição e a análise crítica das inovações em matéria de Direito Público, notadamente na América Latina e países europeus de cultura latina.

Cobertura Temática
A cobertura temática da revista, de acordo com a classificação do CNPq, abrange as seguintes áreas:

- Grande área: Ciências Sociais Aplicadas (6.00.00.00-7) / Área: Direito (6.01.00.00-1) / Subárea: Teoria do Direito (6.01.01.00-8) / Especialidade: Teoria do Estado (6.01.01.03-2).
- Grande área: Ciências Sociais Aplicadas (6.00.00.00-7) / Área: Direito (6.01.00.00-1) / Subárea: Direito Público (6.01.02.00-4) / Especialidade: Direito Constitucional (6.01.02.05-5).
- Grande área: Ciências Sociais Aplicadas (6.00.00.00-7) / Área: Direito (6.01.00.00-1) / Subárea: Direito Público (6.01.02.00-4)/ Especialidade: Direito Administrativo (6.01.02.06-3).

Indexação em Bases de Dados e Fontes de Informação
Esta publicação está indexada em:

- Web of Science (ESCI)
- Ulrich's Periodicals Directory
- Latindex
- Directory of Research Journals Indexing
- Universal Impact Factor
- CrossRef
- Google Scholar
- RVBI (Rede Virtual de Bibliotecas – Congresso Nacional)
- Library of Congress (Biblioteca do Congresso dos EUA)
- MIAR - Information Matrix for the Analysis of Journals
- WorldCat
- BASE - Bielefeld Academic Search Engine
- REDIB - Red Iberoamericana de Innovación y Conocimiento Científico
- ERIHPLUS - European Reference Index for the Humanities and the Social Sciences
- EZB - Electronic Journals Library
- CiteFactor
- Diadorim

Processo de Avaliação pelos Pares (*Double Blind Peer Review*)
A publicação dos artigos submete-se ao procedimento *double blind peer review*. Após uma primeira avaliação realizada pelos Editores Acadêmicos responsáveis quanto à adequação do artigo à linha editorial e às normas de publicação da revista, os trabalhos são remetidos sem identificação de autoria a dois pareceristas *ad hoc* portadores de título de Doutor, todos eles exógenos à Instituição e ao Estado do Paraná. Os pareceristas são sempre Professores Doutores afiliados a renomadas instituições de ensino superior nacionais e estrangeiras.

DOI: 10.21056/aec.v18i73.1010

Gustav Radbruch's supposed turn against positivism: a matter of balancing

O suposto giro antipositivista de Gustav Radbruch: uma questão de ponderação

Alexandre Travessoni Gomes Trivisonno*
Pontifícia Universidade Católica de Minas Gerais (Brasil)
Universidade Federal de Minas Gerais (Brasil)
a.travessoni@gmail.com

Júlio Aguiar de Oliveira**
Universidade Federal de Ouro Preto (Brasil)
Pontifícia Universidade Católica de Minas Gerais (Brasil)
j.aguiardeoliveira@gmail.com

Recebido/Received: 25.07.2018 / July 25th, 2018
Aprovado/Approved: 14.11.2018 / November 14th, 2018

Como citar este artigo/*How to cite this article*: TRIVISONNO, Alexandre Travessoni Gomes; OLIVEIRA, Júlio Aguiar de. Gustav Radbruch's supposed turn against positivism: a matter of balancing. *A&C – Revista de Direito Administrativo & Constitucional*, Belo Horizonte, ano 18, n. 73, p. 57-73, jul./set. 2018. DOI: 10.21056/aec.v18i73.1010.

* Professor Adjunto III da Pontifícia Universidade Católica de Minas Gerais (Belo Horizonte-MG, Brasil). Professor Associado IV da Universidade Federal de Minas Gerais (Belo Horizonte-MG, Brasil). Professor dos Cursos de Graduação e Pós-Graduação da Universidade Santa Úrsula (Rio de Janeiro-RJ, Brasil). Doutor em Direito pela UFMG. Foi Professor Visitante na Universidade de Saarland (Alemanha–2013) e na Universidade de Vechta (Alemanha–2014). Foi pesquisador visitante no Instituto Max Planck de Direito Internacional Público e Direito Comparado de Heidelberg (Alemanha–2006-2007). *E-mail*: <a.travessoni@gmail.com>.

** Professor Associado III da Graduação e da Pós-Graduação da Universidade Federal de Ouro Preto (Ouro Preto-MG, Brasil). Professor Adjunto IV da Pontifícia Universidade Católica de Minas Gerais (Belo Horizonte-MG, Brasil). Realizou estágio Pós-Doutoral na Christian-Albrechts-Universität zu Kiel (Alemanha). Doutor em Direito pela UFMG. *E-mail*: <j.aguiardeoliveira@gmail.com>.

Abstract: This essay offers an investigation on the debated question of Radbruch's supposed turn from *positivism* to *non-positivism* after World War II. It also intends to check whether this turn can be attributed to different balancing proposals among the main elements of Radbruch's legal philosophy. To do that, three main questions must be answered: (i) whether Radbruch was a positivist before the war; (ii) what was his position after the war; and (iii) what was the relationship between the turn in his thought and the weight he gives to the two main dimensions (or principles) of his philosophy, namely "material correctness" (or "justice") and "legal certainty".

Keywords: Radbruch; concept of law; positivism; non-positivism; balancing.

Resumo: Este ensaio apresenta uma investigação sobre a questão do suposto giro do positivismo ao não positivismo na teoria de Radbruch, depois da Segunda Guerra Mundial. Pretende também verificar se esse suposto giro pode ser atribuído a diferentes ponderações dos elementos principais da filosofia do direito de Radbruch. A fim de executar essas tarefas, três questões devem ser enfrentadas: (i) se Radbruch de fato era positivista antes da Guerra, (ii) qual era sua posição após a Guerra e (iii) qual foi a relação entre o giro no seu pensamento e o peso que ele atribui para as dimensões principiais (ou princípios) de sua filosofia, a saber, "correção material" (ou *justice*) e segurança jurídica.

Palavras-chave: Radbruch; conceito de direito; positivismo; não positivismo; ponderação.

1 Introduction

Gustav Radbruch's legal philosophy exerted a considerable influence in post-war time, especially in Germany. One of the main reasons for that was Radbruch's supposed "turn" against legal positivism. Radbruch would have been a legal positivist until the war, but after that he would have become a severe critic of this doctrine, for, in his view, it would have been responsible for the situation of extreme injustice that took place in Germany during the domination of the NSDAP.[1] He developed what became known as the Radbruch's formula, which states that when positive law reaches a threshold of extreme injustice it cannot be considered law.[2] No one doubts there was a change in Radbruch's legal philosophy after the war. Yet, it is controversial how significant this change was. In this essay, we want to investigate to which extent Radbruch's position changed and whether

1 RADBRUCH, Gustav. Gesetzliches Unrecht und übergesetzliches Recht. *In*: *Gustav Radbruch – Gesamtausgabe*, Band III. Heidelberg: C.F. Müller, (1990) 1946, p. 83-93, p. 107. All quotations from the works of Radbruch have been withdrawn from his *Complete Works* (*Gesamtausgabe*). Since the *Complete Works* contain a double pagination, that is, the original pagination of Radbruch's works and a self-pagination, when quoting, we preferred to refer not to the page of the *Complete Works*, but rather to the page of the original. Besides that we quoted only the year of the original, except from the quotation above, which contains the year in which the *Complete Works* were edited (1990) as well as the year of the original. The reason for that is to make it easier for the reader locating the quotations.

2 RADBRUCH, *loc. cit*.

this change was really from *positivism* to *non-positivism*. We also want to check whether this change can be attributed to different balancing proposals among the main elements of his philosophy, as Robert Alexy suggests. To do that we will start asking (i) whether Radbruch was a positivist before the war. Then we will focus (ii) what was his position after the war and, last but not least, (iii) we will investigate the relationship between the turn in his thought and the weight he gives to the two main dimensions (or principles) of his philosophy, namely "material correctness" (or "justice") and "legal certainty". In other words, we will investigate to which extent this turn has to do with balancing.

One could find at least strange that we investigate to which extent there really was a turn in Radbruch's theory. One could say it is obvious there was a considerable turn because Radbruch himself expressly declared that, insofar he openly criticised legal positivism (which supposedly was his doctrine before the war). Indeed, after 1945 Radbruch affirmed that legal positivism rendered the people and the jurists defenceless against arbitrary statues perpetrated by NSDAP's authorities).[3] Nevertheless, the question of whether there really was a significant turn is his philosophy is not so easy, for what is clear is that, after the war, Radbruch was a critic of one kind of legal positivism (statutory positivism – *Gesetzpositivismus*), but not that he was himself a positivist (especially a statutory positivist – *Gesetzpositivist*) before the war. In order one speaks of a significant turn naturally it has to be shown not only that Radbruch was a non-positivist after the war, but also that he was a positivis*t* before the war.

We will defend that the reason why this question is controversial is that some interpreters do not differentiate (a) the "elements" of Radbruch's legal philosophy and (b) the "relation between the elements", both before and after the war. We will also argue that most interpreters also do not differentiate the "theoretical structure" from the "practical results" of Radbruch's concept of law, being the former understood as the "elements" (and the "relation between the elements"), and the later as the effects that the "theoretical structure" has on the concept of valid positive law. [4]

We will try to show that the "theoretical structure" of Radbruch's concept of law presented after the war was not *very* different from the one presented before the war, but we will advocate that the "practical results" are significantly different.

[3] RADBRUCH, *loc. cit.*

[4] It should be clear that the "theoretical structure", in the context of one's concept of law, has to do with the theoretical relation one claims between law and moral, without paying attention to the effects of this relation on legal validity in general, that is, on the validity not only of legal systems as a whole, but also on the validity of norms individually considered and on their application. "Practical results" have to do with the effects of the relation between law and moral on legal validity, that is to say, whether and in which extent moral defects yield the validity of legal systems as a whole, of norms individually considered and of their application.

2 Was Radbruch really a *positivist* before the war?

The question whether Radbruch was a legal *positivist* before the war is controversial. If, on the one hand, it is widely advocated he was, on the other hand, some authors such as Arthur Kaufmann[5] and Winfried Hassemer[6] affirm that the pre-war Radbruch was far from being a *positivist*. Alexy states that Radbruch was a positivist before the war, "not in terms of justification, to be sure, but in terms of result (...)",[7] and Stanley L. Paulson emphasizes that Radbruch was already a critic of legal positivism before the war, in many of its core points.[8] Was Radbruch a positivist before the war? To answer this question, and following the plan we have sketched in the introduction, we will divide the analysis into two parts, in which we will study (a) the "theoretical structure" of his concept of law and then (b) its "practical results".

2.1 The "theoretical structure" of pre-war Radbruch's concept of law

2.1.1 The main elements

In the *Rechtsphilosophie*,[9] in which one can find a synthesis of Radbruch's view on the concept of law,[10] he affirms that the concept of law is of a cultural kind, which means that the concept of law refers to a value. This leads one to the first element of the concept of law, "the juridical value", which can also be termed "the idea of law" or merely "justice".[11] "The idea of law" means that law is determined to serve justice. The essence of justice is equality, that is, equal treatment to equal human beings in equal relations, and consequently unequal treatment of unequal human beings [in unequal relations]. According to Radbruch, this element alone

5 KAUFMANN, Arthur. *Gustav Radbruch – Rechtsdenker, Philosoph, Sozialdemokrat*. München: Piper, 1987, p. 152.

6 HASSEMER, Winfried. Einführung. *In*: *Gustav Radbruch – Gesamtausgabe*, Band III. Heidelberg: C.F. Müller, 1990, p. 1-22, p. 13.

7 ALEXY, Robert. *The argument from Injustice – A reply to legal Positivism.* Translated by Bonnie Litschewski Paulson and Stanley L. Paulson. Oxford: Oxford Universtiy Press, 2010, p.45.

8 PAULSON, Stanley L. Ein ewiger Mythos: Gustav Radbruch als Rechtspositivist – Teil I. *In*: *Juristenzeitung*, n. 3, 2008, p. 105-114.

9 RADBRUCH, Gustav. Rechtsphilosophie. *In*: *Gustav Radbruch – Gesamtausgabe*, Band II. Heidelberg: 1932, p. 206-450, p. 69. The first edition of the *Rechtsphilosophie* was published in 1914 and the second in 1922, both under the title *Grundzüge der Rechtsphilosophie*. The second edition, as explains Radbruch in the preface to the third edition, was dated for 1914 (although published in 1922), in order to show that it was a mere re-impression of the first edition (cf. Ibidem, p. 3). The third edition, which appears under the name *Rechtsphilosophie*, was published in 1932 and was substantially changed. In this essay, when we mention the *Rechtsphilosophie* unless otherwise, we will be referring to the third edition,

10 Radbruch presents his view about the idea of law in the first paragraphs of the book. Synthesis can be found in Paragraph 9.

11 We will use, from now on, "the idea of law".

is not enough, for it does not tell us anything about the standpoint from which one should be considered equal or unequal to others. Then it comes in play the second element, namely "utility" or "appropriateness to a purpose".[12] According to Radbruch, the problems of a purpose and appropriateness to a purpose cannot be solved in an absolute way, but rather in a relative way, through the different conceptions of law, State and political parties. Radbruch claims that this relativism cannot remain as the last word in terms of legal philosophy, for law as a normative order cannot be left to the different opinions of individuals.[13] Because of that, a third element of the concept of law is presented: "legal certainty", which demands the positivity of the law. If it is not possible to identify what justice is, then it is necessary to determine what law must be, from a standpoint out of which it is made possible to enforce what has been determined.[14]

Radbruch affirms that the positivity of law becomes, in such a strange way, the pre-condition for justice: being positive is part of just law and being just is a task of positive law.[15]

From the passages mentioned above, it should not be difficult to identify the main elements of Radbruch's concept of law[16] which can be arranged in the following way: the first two elements, namely the "the idea of law" and "utility" can be considered the *ideal dimension* of his concept of law while the third element, "legal certainty", belongs to the *factual* or *real dimension* of it.[17] From now on we will term the ideal dimension "moral correctness" and the factual dimension "legal certainty".[18]

Regarding the ideal dimension, in fact, it is possible to group the two elements, because, as we have seen, according to Radbruch, "utility" determines more precisely what "the idea of law" is. The second element is, therefore, a specification of the first. Indeed "the idea of law" means treating equals equally, but it does not determine the standpoint from which one should be considered equal or unequal to another. In other terms, "the idea of law" tells us to treat equally all human beings in equal situations, but does not precisely determine what must be considered "equally in equal situations". The task of the second element, namely "utility", is exactly determining more precisely what "treating equals equally" means.

---

12 We will use, from now on, "utility".

13 RADBRUCH, *op. cit.*, p. 69.

14 *Idem*, p. 69-70.

15 *Idem*, p. 71.

16 We will group the elements following Alexy's theory, in which law has a double nature (cf. ALEXY, *op. cit.*).

17 We take this nomenclature out of Alexy's writings, which we refer below.

18 These two dimensions correspond to Alexy's dual nature of law, according to which law has, at the same time, a factual and an ideal nature or dimension. The factual dimension "is represented by elements of authoritative issuance and social efficacy, whereas the ideal dimension finds its expression in the element of moral correctness" (ALEXY, *op. cit.*, p. 167).

2.1.2 The relativism

The relativism of Radbruch's concept of law can be analysed in two different points: the relativism (or absolutism) of the *elements* (and of the dimensions) that are part of the concept of law and the relativism regarding the *relationships* among the elements, or between the dimensions. In this section we will analyse only the former, that is to say, only the relativism or absolutism of the elements and dimensions themselves. The later that is, the relation among the elements (especially between the dimensions) will be analysed in the next section.

As we have seen, the *ideal dimension* has one absolute and one relative element. Indeed Radbruch asserts that "the idea of law" is absolute, while "utility" is relative.[19] This means that, in the end, the ideal dimension is altogether relative: law has to serve justice, but justice, though absolute, has to be specified by the utility. Since this specification depends on political ideology, the ideal dimension, that is to say, "moral correctness", is in the end relative. On the other hand, Radbruch affirms that "legal certainty", which corresponds to the factual dimension, is absolute.[20]

Although it assigns a relativist view of "moral correctness", the just presented "theoretical structure" of Radbruch's concept of law is typically non-positivist. Radbruch asserts that the concept of law refers to values and to "the idea of law", which can be nothing else but justice.[21] He also affirms that justice is an absolute value, which cannot be derived from anything else[22] and that law is the reality that has the meaning to serve justice.[23] As we have seen, Radbruch's *ideal dimension* of law is in the end relative, but this relativity does not make him disconnect the concept of law from its moral (or ideal) dimension as did, for example, Hans Kelsen. Indeed Kelsen's and pre-war Radbruch's conceptions have this significant point in common: for both of them the here termed "moral correctness" is relative.[24] The consequences they derive from this relativity are different: Kelsen separates law from morality even in its theoretical structure,[25] while Radbruch, although accomplishing that the ideal dimension is relative, remains theoretically non-positivist.[26]

---

19 RADBRUCH, *op. cit.*, p. 71.
20 RADBRUCH, *loc. cit.*
21 *Idem*, p. 29-30.
22 *Idem*, p. 30.
23 *Idem*, p. 32.
24 That does not mean their conception of value or even their conception of relativity is absolutely equal. Radbruch seems to share a conception in which the relativism is not methodological (cf. HASSEMER, op. cit., p. 12), while Kelsen defends a methodological relativism (cf. KELSEN, Hans. *Reine Rechtslehre*. Wien: Verlag Österreich: 1960, p. 65-68).
25 Kelsen states that, since morality is relative, it cannot be part of law (*idem*, p. 67-68).
26 The fact that already before the war Radbruch criticises different points of legal positivism, in its different conceptions, is a proof of that (Cf. PAULSON, *op. cit.*).

2.1.3 The relation among the elements (or between the dimensions)

Radbruch affirms that the hierarchical relations among the three elements are relative,[27] but he places "legal certainty" in a special position:

> It is more important to end the disputations among the juridical opinions than to make it fairly and with appropriateness to an end. The existence of a juridical order is much more important than its justice and utility; these are the secondary tasks of law, and the first one, upon which everybody agrees, is legal certainty, it means, order and peace.[28]

From this passage we can conclude that although Radbruch affirms that the hierarchy among the three elements is relative, it is actually not, because of the following reasons:

(1) The hierarchy between the first and the second elements, which together compound the ideal dimension of the concept of law, is not relative. Although Radbruch affirms that "the idea of law" is above "utility", for the former is absolute while the later is relative, since the former is too abstract, and since "utility", which is relative, determines what "the idea of law" is, the ideal dimension is altogether relative;

(2) The hierarchy between the ideal dimension and the real dimension, that is to say, between "moral correctness" and "legal certainty" is not relative, at least for Radbruch. Indeed pre-war Radbruch has no doubts about it: according to him, the real (or factual) dimension has precedence above the ideal dimension. Law has to serve justice, but the existence of a positive order cannot depend on its conformity with justice. "Legal certainty" has the precedence and positive law does not need to conform to justice to be valid.[29]

2.2 The "practical results" of pre-war Radbruch's concept of law

Radbruch asserted as we have seen that positive law is valid no matter how unjust it is. The fact that positive law exists is more important than the fact that it

[27] RADBRUCH, *op. cit.*, p. 72.

[28] The translation is ours. In the original: "Daß dem Streit des Rechtsansichten ein Ende gesetzt werde, ist wichtiger, als daß ihm ein gerechtes und zweckmäßiges Ende gesetzt werde, das Dasein einer Rechtsordnung wichtiger als ihre Gerechtigkeit und Zweckmäßigkeit, diese die zweite große Aufgabe des Rechts, die erste, von Allen gleichermaßen gebilligte aber die Rechtssicherheit, d.h. die Ordnung, der Friede" (*idem*, p. 71).

[29] Also in the *Einführung in der Rechtswissenschaft* Radbruch defends this position (RADBRUCH, Gustav. Einführung in die Rechtswissenschaft. *In*: *Gustav Radbruch – Gesamtausgabe*, Band I. Heidelberg: C.F. Müller, 1929, p. 211-406, Chapter 1).

is just. The reason for that is "legal certainty", which for the pre-war Radbruch has *absolute precedence* over "moral correctness". There seems to be no balancing here, for there is no optimisation.[30] Radbruch seems to consider that "legal certainty" can either be fulfilled or not. In a statement, he seems to see only two possibilities: either "legal certainty" is protected by the existence and enforcement of a legal order (no matter how unjust it is), or it is not. There are only these two "all-or-nothing" options, and Radbruch chooses the first. It seems that, exactly like Kant, Radbruch treated here "legal certainty" as a rule.[31]

2.3 The problem of an integral classification of pre-war Radbruch's theory

The previous analysis shows that the structure of pre-war Radbruch's philosophy is the following: law has two dimensions, one ideal and one real or factual. The ideal dimension, which can be termed "moral correctness", has two elements, namely "the idea of law" and "utility". The former, which is absolute, is abstract, while the later, which is a specification of the former, is relative. This makes "moral correctness" in the end relative. The real dimension, that is to say, legal certainty, is absolute and the relation between the two dimensions is not relative, for legal certainty always prevails.

How should such structure be classified? This question is not easy, for, if we take a closer look, we will see that concerning the "theoretical structure" Radbruch has positivist and non-positivist characteristics, while regarding the "practical results" it seems clear that his theory is really close to legal positivism.

A comparison with Kant and Kelsen can help us to have a clearer picture of Radbruch's pre-war concept of law. The structure of Kant's concept of law is mixed in its "theoretical structure", for, in his theory, law is derived out of morality but "legal certainty" is above moral correctness, and it is positivist in its "practical results", for the theoretical relation between law and morality has no effects on legal validity. It is legitimate then to conclude, with Alexy, that Kant was a *super-inclusive*[32] *non-positivist*.[33] Kelsen's concept of law is positivist regarding both its "theoretical structure" and its "practical results", for he does not derive law out of morality, and thus morality has no effects on legal validity. Because of that, he has to be considered a positivist; but since he admits that morality can be used in legal

[30] We shall return to this question below.
[31] Cf. ALEXY, Robert. On the Concept and Nature of Law. *In*: *Ratio Juris*, vol. 21, n. 3, 2008, p. 281-299, p. 289.
[32] According to Alexy, super-inclusive non-positivism necessarily connects law and moral, but "maintains that legal validity is in no way at all affected by moral defects or moral incorrectness" (ALEXY, *op. cit.*, p. 288).
[33] *Idem*, p. 288-290.

creation and application, he has to be considered an *inclusive positivist*.[34] Now, the "theoretical structure" of Radbruch's concept of law is, exactly like in Kant, a mixed one, for, according to him, law has to serve justice, but "legal certainty" is above "moral correctness". But, for the pre-war Radbruch, moral injustice does not yield legal validity at all. Alexy synthesises this with an appropriate expression; he says, as we have seen, that Radbruch was a positivist "in terms of results". Nevertheless, that does not solve the problem of classifying Radbruch's theory as a whole. How should someone who presents a mixed "theoretical structure" and at the same time presents typically positivist "practical results" be classified?

Again a parallel with Kant can clarify Radbruch's concept of law. Both Kant and Radbruch arrived at the same conclusion regarding "practical results": immoral law, no matter how immoral it is, is a valid law. Their "theoretical structures" also have much in common: for both of them law is necessarily connected to morality and "legal certainty" is above "moral correctness". The only difference in their "theoretical structures" is that "moral correctness" is relative in Radbruch, while in Kant it is not. This difference, however, does not seem sufficient for placing Kant and Radbruch in different categories. Thus, if Kant must be considered a *super-inclusive positivist*, then pre-war Radbruch also must be. Indeed, for pre-war Radbruch, even if moral defects do not yield legal validity, there is a necessary connection between law and morality. Thus, Radbruch must be considered, already before the war, a *non-positivist*. Since he does not admit that unjust law loses its validity, he should be considered *a super-inclusive non-positivist*.

3 Radbruch's position after the war

Although Radbruch had already criticised some core points of legal positivism before the war, his criticism increased in the post-war writings. The chronology of some of these post-war writings which are of interest for the topic we handle here is the following: (a) in 1945, in *Fünf Minuten Rechtsphilosophie*, he criticizes the positivist conception, which in his view rendered German jurists and people defenceless against the criminal actions perpetrated by NSDAP authorities and defends that when positive law violates justice it loses its juridical character;[35] (b) in 1946, in *Gesetzliches Unrecht und übergesetzliches Rechts*, he reaffirms his critic against legal positivism and creates the formula of injustice, according to which positive law must be accepted even if it is unjust, in order to guarantee "legal certainty", but when the threshold of extreme injustice is achieved it is no

[34] *Idem*, p. 286.

[35] RADBRUCH, Gustav. Fünf Minuten Rechtsphilosophie. *In*: *Gustav Radbruch – Gesamtausgabe*, Band III. Heidelberg: C.F. Müller, 1945, p. 78-79.

longer valid;[36] (c) in 1947, in *Gesetz und Unrecht*, he reaffirms that legal positivism was responsible for the implantation of the NSDAP regime in Deutschland.[37]

This new position Radbruch presented after the war is considered by Alexy *inclusive non-positivism*.[38] In order we can understand it clearer we must check its "theoretical structure" as well as its "practical results".

3.1 The "theoretical structure" of post-war Radbruch's concept of law

3.1.1 The elements

If we consider Radbruch's post-war writings we will see that the elements of his theory did not change. Already in *Fünf Minuten Rechtsphilosophie* (1945), he repeats the elements he had presented before the war, by saying that the three values which are part of law are "justice" "utility" and "certainty".[39]

In the *Vorschule der Rechtsphilosophie* (1948) he develops again the three elements that are part of the idea of law. He starts by saying that the first element (or value) is "justice",[40] which has equality as its core point.[41] Then he says that in order juridical propositions can be derived out of justice it is necessary that justice is completed by "utility" or "the end of the law".[42] Then he presents "legal certainty" as the third element of the idea of law, and repeats what he had already said before the war: since it is not possible to identify what just law is, it is necessary to determine it.[43]

Thus Radbruch's concept of law presents exactly the same three elements, either before or after the war: (1) "the idea of law", "the juridical value" or "justice", (2) "utility" and (3) "legal certainty". Again we can group the first two elements ("the idea of law" and "utility") together, so that we have the ideal dimension or "moral correctness", and consider the third element ("legal certainty") the real or factual dimension.

[36] RADBRUCH, Gesetzliches Unrecht und übergesetzliches Recht, p. 107.

[37] RADBRUCH, Gustav. Gesetz und Unrecht. *In*: *Gustav Radbruch – Gesamtausgabe*, Band III. Heidelberg: C.F. Müller, 1947, p. 96-106, p. 5. In other works such as *Erneuerung des Rechts* (RADBRUCH, Gustav. Erneuerung des Rechts. *In*: *Gustav Radbruch – Gesamtausgabe*, Band III. Heidelberg: C.F. Müller, p. 80-82) and *Die Erneuerung des Rechts* (cf. RADBRUCH, Gustav. Die Erneuerung des Rechts. *In*: *Gustav Radbruch – Gesamtausgabe*, Band III. Heidelberg: C.F. Müller, 1947, p. 107-114) he repeats the same ideas.

[38] Cf. ALEXY, *op. cit.*, p. 287-288.

[39] RADBRUCH, Gesetzliches Unrecht und übergesetzliches Recht, p. 79: "Gerechtigkeit, Gemeinnutz, und Rechtssicherheit".

[40] "Gerechtigkeit".

[41] RADBRUCH, Gustav. Vorschule der Rechtsphilosophie. *In*: *Gustav Radbruch – Gesamtausgabe*, Band III. Heidelberg: C.F. Müller, 1948, p. 121-227, p. 23.

[42] *Idem*, p. 26: "Zweckmäßigkeit" and "Zweck des Rechts".

[43] *Idem*, p. 28.

3.1.2 The relativism

Now we must check whether there was a change in the relative/absolute character of the elements. In the *Vorschule der Rechtsphilosophie* Radbruch affirms that "justice" is absolute[44] and that "utility" or "the end of the law", which determine what justice is, is relative.[45] He does not expressly say that "legal certainty" is absolute, but, as we have seen, he reaffirms that if it is not possible to identify what just law is, it is necessary to determine it.[46]

Thus, at least at first glance, the character of each of the three elements seems to remain the same: like before the war, after the war "justice" (or "the idea of law") seems to be absolute, "utility" seems to be relative and "legal certainty" seems to be absolute. If that is the case, "moral correctness", which is compound of "justice" and "utility", would also be in the end relative, for the same reasons presented in section (i.a.b) above. But if we take a closer look, we will see that "moral correctness" in post-war Radbruch is not as relative as it was before the war.

As Alexy puts it, after the war "Radbruch extracts a basic repertory of human and civil rights from relativistic scepticism".[47] Alexy quotes a passage from *Fünf Minuten Rechtsphilosophie*, in which Radbruch affirms that although legal principles, which are called natural law, are surrounded by doubt, the work of centuries has developed a solid repertory, collected with broad consensus in the declarations of human and civil rights. According to Radbruch, only a laboured scepticism can still doubt on some of these rights.[48]

Thus, for the post-war Radbruch, "moral correctness", though not absolute, is not as relative as it was before the war. Alexy affirms that "the *non-positivist* presupposes an at least rudimentary non-relativistic ethics".[49] In our view, that is true for the *inclusive non-positivism* Radbruch defended after the war, but not necessarily for the *super-inclusive non-positivism*, he defended before the war. If the analysis we developed above is correct, that is, if Radbruch was a *super-inclusive non-positivist* before the war, then *super-inclusive non-positivism* and relativism can live together in the same theory.

The fact that in post-war Radbruch "moral correctness" is not as relative as before the war will have direct effects on its relation with "legal certainty". Radbruch himself affirms that the main point of the concept of law is this relationship,[50] which will be analysed in the next section.

---

[44] *Idem*, p. 23.
[45] *Idem*, p. 26-27.
[46] *Idem*, p. 28.
[47] ALEXY, *The argument from Injustice – A reply to legal Positivism*, p. 54.
[48] Cf. RADBRUCH, Gesetzliches Unrecht und übergesetzliches Recht, p. 79; ALEXY, *loc. cit.*
[49] ALEXY, *op. cit.*, p. 53.
[50] RADBRUCH, *op. cit.*, p. 30.

3.1.3 The relation among the elements (or between the dimensions)

The analysis so far suggests that Radbruch did not alter the main elements of his philosophy, but it also suggests that he altered the character of the elements: "moral correctness", which was relative before the war, has a non-relativistic core after the war, and "legal certainty", which was absolute before the war, begins to admit exceptions. This new position becomes clear when we check the relation between the ideal and the real dimensions of Radbruch's post-war concept of law. Radbruch started to admit after the war that extreme unjust law loses its juridical character. As we have seen, for Radbruch, either before or after the war, law must serve justice (or "the idea of law") but also "legal certainty". But before the war "legal certainty" had absolute precedence over "moral correctness", that is to say, it should always prevail. After the war, Radbruch altered this position, by introducing the so-called "argument from injustice", which states:

> The conflict between justice and legal certainty must be solved in a way, so that positive law, which has been secured through power and regulation, also has the precedence when it is materially unfair and against public utility, unless it contradicts justice in such an unbearable measure, that the law, as 'unjust law', must succumb to justice.[51]

This passage, which has become known as "the Radbruch's formula", means that "legal certainty" prevails over "justice", except in the cases in which the threshold of extreme injustice is achieved.[52]

Thus, the relationship between "moral correctness" and "legal certainty" was altered: before the war "legal certainty" had absolute precedence; after the war, it still has the precedence, but not absolute.

3.2 The "practical results" of Radbruch's theory after the war

It is not difficult to see the "practical results" of the new relationships among the elements of Radbruch's theory: moral defects, when extreme, yield the validity

[51] The translation is ours; in the original: "Der Konflikt zwischen der Gerechtigkeit und der Rechtssicherheit dürfte dahin zu lösen sein, daß das positive, durch Satzung und Macht gesicherte Recht auch dann den Vorrang hat, wenn es inhaltlich ungerecht und unzweckmäßig ist, es sei denn, daß der Widerspruch des positiven Gesetzes zur Gerechtigkeit ein so unerträgliches Maß erreicht, daß das Gesetz als „unrichtiges Recht" der Gerechtigkeit zu weichen hat" (RADBRUCH: Gesetzliches Unrecht und übergesetzliches Recht, p. 107).

[52] Cf. ALEXY: On the Concept and Nature of Law, p. 287-288.

of positive law. The non-relativistic core of "moral correctness" allowed Radbruch to defend a new relationship between the ideal and the real dimensions of law. This new relationship, as we have seen, means that "legal certainty" still has the precedence, but is not absolute. The result of this is that extreme injustice cannot be law.

3.3 The classification of Radbruch's theory after the war

In section (i.c) we have seen that Radbruch's pre-war theory was mixed in its "theoretical structure" and positivist in its "practical results". Now, it should not be difficult to see that the post-war Radbruch must be considered a non-positivist, for besides necessarily connecting law to morality, Radbruch admits practical effects of this connection on legal validity, at least in some cases.

Indeed, the post-war Radbruch still gives precedence to "legal certainty", but allows that *extreme* injustice yields the validity of positive law. Thus, the relationship between law and morality, which, in pre-war Radbruch, because of the need to guarantee "legal certainty" and because of the relative character of "moral correctness", has no effects on legal validity, begins in post-war Radbruch to influence the validity of positive law.

4 From *super-inclusive non-positivism* to *inclusive non-positivism*: a matter of balancing?

The analysis of Radbruch's theory before and after the war already led us to two conclusions: (1) Radbruch's conversion was not from *positivism* to *non-positivism*, but rather from *super-inclusive non-positivism* to *inclusive non-positivism* and (2) this conversion was due to the different relationship Radbruch attributes to the two main principles of his legal philosophy, namely "moral correctness" and "legal certainty", that correspond to the two dimensions of his concept of law, the ideal and the factual or real dimension. The change in this relationship was possible due to the fact that, after the war, "moral correctness" begins to have a non-relativistic core.

Now it is time to check whether this new position has to do with balancing and proportionality.

4.1 Balancing and proportionality

In order to check whether the change in Radbruch's philosophy has to do with balancing and proportionality we will take Alexy's balancing model, which can be considered a triadic model and which was originally conceived as a model for the

application of law, but later was applied by Alexy himself in the concept of law. This triadic model is designed with two principles to be weighted and a maxim to weight the principles, namely the proportionality maxim.

Alexy developed the proportionality maxim[53] in his *Theorie der Grundrechte*,[54] as a maxim to solve the problem of different colliding legal principles, which were defined by him as optimisation commands.[55] Thus, this model presents a conflict between two principles and a criterion to solve this conflict, namely the maxim of proportionality, which considers, when balancing the principles, their factual and juridical possibilities.[56] Because of these three elements, namely (1) a principle, (2) an opposed principle and (3) a superior maxim to solve the collision, the structure of this model, which, in the *Theorie der Grundrechte*, was conceived only for *legal application*, can be considered a triadic one.

When one presents a concept of law there is also this triadic structure, for one has to balance the principles of "moral correctness" and "legal certainty" through a superior maxim: the maxim of proportionality, which, because of that, can be considered the supreme "principle"[57] of law or of justice. The balancing that is made when one *conceives* a concept of law also has to consider both aspects that were present in the proportionality maxim as an *application* maxim, namely, the juridical and the factual ones. The juridical aspects, which in the case of legal application were determined by the colliding positive principles, in the case of a concept of law are related to the normative concept of both "legal certainty" and "moral correctness", whereas the factual aspect is related to the historical situation in which the concept of law is being presented. Thus different legal theories which were and are formulated along human thought's history can be seen as the result of different balancing proposals between "legal certainty"

[53] Alexy says that although some authors use the German expression "Verhältnismäßigkeitsprinzip" to refer to the "Verhältnismäßigkeitsgrundsatz", he prefers not to use it, for what he understands with the so-called "Verhältnismäßigkeitsgrundsatz" is not a principle in the sense that it is weighted against other things, and thus it rather works as a rule.

[54] Alexy had already presented the idea of principles as optimisation commands, in 1979, under the concept of "ideal ought" (cf. ALEXY, Robert. Zum Begriff des Rechtsprinzips. *In*: *Rechtstheorie*, Beiheft 1, 1979, p. 59-87).

[55] We shall not handle the principles theory developed by Alexy in his *Theorie der Grundrechte* in all its extent. What concerns us here is, firstly, the idea that principles are optimization commands, secondly, the idea that the proportionality principle means paying attention to both the juridical and the factual possibilities of the application of legal principles and, thirdly, the fact, which we will explore now, that in his later works Alexy applies these ideas not only to the legal application but also to the concept of law.

[56] Alexy himself says that the idea of legal principles as optimization commands is strictly connected with the proportionality maxim and with its three partial maxims: appropriateness, necessity and the maxim of proportionality in a narrow sense. The former ones have to do with principles as optimisation commands regarding their factual possibilities and the later with principles as optimization commands regarding their juridical possibilities (ALEXY, Robert. *A Theory of Constitutional Rights*. Translated by Julian Rivers. Oxford: Oxford University Press, 2010, p. 66-67.

[57] The reason why we call this proportionality maxim a superior principle is not because it is itself an optimizing command, but rather because it is the supreme criterion of justice.

and "moral correctness", which naturally depend both on the juridical possibilities, that is, the concepts of "material correctness" and "legal security" (the juridical dimension of the proportionality maxim) and on different historical circumstances (factual dimension of the proportionality maxim).

4.2 The different proposals in pre and post-war Radbruch

The different "practical results" of pre and post-war Radbruch are due to different balancing proposals he made. Before the war, as we have seen, Radbruch gave absolute precedence to "legal certainty" over "moral correctness". The existence of a positive order is more important than its justice, and thus positive law remains always valid, no matter how unjust it is. In our view, the reason why the pre-war Radbruch attributes this precedence to "legal certainty" is its absolute character. As we have seen, according to pre-war Radbruch, "legal certainty" is absolute and "moral correctness" is, in the end, relative. This relativity means that different parties do not agree about what justice is. Since it is necessary to solve the disputations about what law must be, if it is not possible to identify what justice is, then it is necessary to determine what law must be.[58] We have said above that in pre-war Radbruch there seems to be no balancing, for there is no optimisation. Now it is possible to confirm this intuition: pre-war Radbruch gave absolute precedence to "legal certainty", that is to say, he does not treat it as an optimisation command, but rather as a command that can either be fulfilled or not. Now, a command that can either be fulfilled or not, that is to say, a definitive command, is not a principle. Thus pre-war Radbruch seems to have treated "legal certainty" as an absolute command, or, in other words, as a rule.

Post-war Radbruch treats both "moral correctness" and "legal certainty" as principles, for he admits that they both can be fulfilled in different degrees. Indeed Radbruch abandoned after the war the idea that there could be no restriction to "legal certainty". The argument from injustice means that Radbruch started admitting the gradual fulfilment of "justice" (or "moral correctness") and "legal certainty". Therefore, in post-war Radbruch there is already the idea of proportionality between the main elements that are part of the concept of law.

5 Conclusion

The purpose of Radbruch's conversion is obvious: his new position avoids that some laws, for instance, some laws as the ones approved and enforced by

[58] RADBRUCH, *Rechtsphilosophie*, p. 69-70.

the NSDAP, are considered laws. It could be said that such theory is important only in times of autocratic regimes, such as the NSDAP's, but has no importance in time of democratic states like we live today. This would diminish the importance of Radbruch's conversion. But two arguments in favour of its significance can be presented. First, although most of the western countries are democratic states, some countries still face the problems of extreme unjust laws. Second, the relationship between law and morality defended by Radbruch after the war has some effects Radbruch himself could not see, but that are of great importance. As a conclusion, we shall explore these effects.

Radbruch did not extract all the results of the meaningful change he made. As most legal theorists of his time he did not have a developed theory of legal adjudication, which could fulfil the task not only of identifying more precisely what extreme injustice is but also irradiate his correct intuition not only that law has an ideal dimension but also that this ideal dimension must somehow have concrete effects on the real dimension. Indeed, in other authors after Radbruch, the reintroduction of the ideal dimension in the realm of law is not limited to legal validity in cases of extreme injustice as he suggested. The new commitment between "legal certainty" and "moral correctness" irradiates itself to the entire system and has practical effects that are considerably more significant: "moral correctness" must be considered in the decision of each and every case.[59]

The connection between the ideal and the real dimensions of law did not have, in the first Radbruch, "practical results" on legal validity. This means, as we have seen, that Radbruch's pre-war position can be considered very similar to Kant's: law has a connection with morality, but moral defects never yield legal validity. The difference is that Kant was a *super-inclusive non-positivist* who did not defend a relative conception of moral, while pre-war Radbruch was a *super-inclusive non-positivist* who did it. Now, after the war, Radbruch, trough a tinny but meaningful theoretical change, brought to the realm of the practice the already existing connection between the ideal and the real dimensions of his concept of law.

Radbruch's theory was an important step not only in the process of reintroducing the ideal dimension in the realm of law, which was not necessarily included in some positivist theories such as Kelsen's and Hart's, but also in the process of identifying the practical results such inclusion has. One of the reasons Radbruch's formula of injustice has become so important is the traumatic experience of the Second World War.[60] But if the reasoning we just presented

[59] That is, in our view, the case of Alexy's Theory of Legal Argumentation (cf. ALEXY, Robert. *A Theory of Legal Argumentation*. Translated by Ruth Adler and Neil MacCormick. Oxford: Oxford University Press, 2010.

[60] The reason why Radbruch was critic about legal positivism was that, as we have seen, he thought that legal positivism "has rendered jurists and the people alike defenceless against arbitrary, cruel, or criminal laws, however extreme they might be" (RADBRUCH, Fünf Minuten Rechtsphilosophie, p. 78). We do not agree that legal positivism was responsible for the facts that happened during the NSDAP period, but we cannot discuss this issue within the limits of this essay.

in the paragraph above is correct, its significance goes beyond this point: from the standpoint of the history of legal philosophy we can say that Radbruch is an important link in the chain, a transition theory, from *super-inclusive non-positivism* to an *inclusive non-positivism* which handles the problem of legal application.

References

ALEXY, Robert. *A Theory of Constitutional Rights*. Translated by Julian Rivers. Oxford: Oxford University Press, 2010.

ALEXY, Robert. *A Theory of Legal Argumentation*. Translated by Ruth Adler and Neil MacCormick. Oxford: Oxford University Press, 2010.

ALEXY, Robert. On the Concept and Nature of Law. *In*: *Ratio Juris*, vol. 21 n. 3, 2008.

ALEXY, Robert. *The argument from Injustice* – A reply to legal Positivism. Translated by Bonnie Litschewski Paulson and Stanley L. Paulson. Oxford: Oxford Universtiy Press, 2010.

ALEXY, Robert. Zum Begriff des Rechtsprinzips. In: *Rechtstheorie*, Beiheft 1, 1979.

HASSEMER, Winfried. Einführung. In: *Gustav Radbruch – Gesamtausgabe*, Band III. Heidelberg: C.F. Müller, 1990.

KAUFMANN, Arthur. *Gustav Radbruch – Rechtsdenker, Philosoph, Sozialdemokrat*. München: Piper, 1987.

KELSEN, Hans. *Reine Rechtslehre*. Wien: Verlag Österreich: 1960.

PAULSON, Stanley L. Ein ewiger Mythos: Gustav Radbruch als Rechtspositivist – Teil I. In: *Juristenzeitung*, n. 3, 2008.

RADBRUCH, Gustav. Die Erneuerung des Rechts. In: *Gustav Radbruch – Gesamtausgabe*, Band III. Heidelberg: C.F. Müller, 1947.

RADBRUCH, Gustav. Einführung in die Rechtswissenschaft. In: *Gustav Radbruch – Gesamtausgabe*, Band I. Heidelberg: C.F. Müller, 1929.

RADBRUCH, Gustav. Fünf Minuten Rechtsphilosophie. In: *Gustav Radbruch – Gesamtausgabe*, Band III. Heidelberg: C.F. Müller, 1945.

RADBRUCH, Gustav. Gesetz und Unrecht. In: *Gustav Radbruch – Gesamtausgabe*, Band III. Heidelberg: C.F. Müller, 1947.

RADBRUCH, Gustav. Gesetzliches Unrecht und übergesetzliches Recht. In: *Gustav Radbruch – Gesamtausgabe*, Band III. Heidelberg: C.F. Müller, (1990) 1946.

RADBRUCH, Gustav. Rechtsphilosophie. In: *Gustav Radbruch – Gesamtausgabe*, Band II. Heidelberg: 1932.

RADBRUCH, Gustav. Vorschule der Rechtsphilosophie. In: *Gustav Radbruch – Gesamtausgabe*, Band III. Heidelberg: C.F. Müller, 1948.

Informação bibliográfica deste texto, conforme a NBR 6023:2002 da Associação Brasileira de Normas Técnicas (ABNT):

TRIVISONNO, Alexandre Travessoni Gomes; OLIVEIRA, Júlio Aguiar de. Gustav Radbruch's supposed turn against positivism: a matter of balancing. *A&C – Revista de Direito Administrativo & Constitucional*, Belo Horizonte, ano 18, n. 73, p. 57-73, jul./set. 2018.