

# GUSTAV RADBRUCH'S DIRITTO E NO. TRE SCRITTI

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Lately the attention of philosophers of law has focused on the figure of Gustav Radbruch, and, particularly, on his most famous theory: the Formula. *Diritto e no*, edited by Marina Lalatta Costerbosa, proposes an overview of Radbruch's philosophy of law through the analysis of three of his papers: *Der Mensch im Recht*, *Fünf Minuten Rechtsphilosophie* and *Gesetzliches Unrecht und übergesetzliches Recht*. This work, together with the translation of the *Philosophy of Law* by Gaetano Carlizzi (Radbruch, 2021a), represents a perfect instrument for studying of one of the most important philosophers of the Nineteenth century.

In the introduction to *Diritto e no* Radbruch is rightly presented as the protagonist of the normative disruption determined by the Nazi regime (Radbruch, 2021b, p. 15-16), and, even if seems that Lalatta Costerbosa doesn't want to express a clear position about the continuity or discontinuity in the radbruchian philosophy—because the purpose is openly to give a complete view of his philosophy of Law—, she clearly emphasizes the role that Radbruch played in the reconsideration of the positivist doctrine. In Lalatta Costerbosa's opinion, the German philosopher could even be considered as the ancestor of the current theory of the inclusive legal positivism because of his reference to the necessity of substantial criteria of validity of law.

Radbruch's philosophy of law is centered on the Idea of law, which is divided into three main values: justice, legal certainty, and purpose compliance (Chroust, 1944; Radbruch,

1950). The relationship between those values can be characterized by conflict and the task of the interpreter is to establish a mobile axiological hierarchy among them. As mentioned above, for many authors it is essential, in Radbruch's philosophical theory, to distinguish between two different periods: before and after the Second World War (see Spaak, 2009; Paulson, 2006). In the first one we can see, as Lalatta Costerbosa perfectly explains, a philosopher inspired by an optimistic vision of his present (Radbruch, 2021b, p. 75), a theorist of democracy and an advocate of pluralism, exactly as Kelsen was (Kelsen, 2013). We can agree with Lalatta Costerbosa when she outlines the similarities between the two authors: both Radbruch and Kelsen were theorists of the democracy as pluralism and not only as majority principle, although the former doesn't recognize it (Radbruch, 2021b, p. 68-70).

After sketching out the essential features of Radbruch's philosophy, Lalatta Costerbosa offers the reader a clear explanation of the three essays translated in the book. She decided to start with *Der Mensch im Recht*, which is, chronologically, the first paper set out by Radbruch. Here the philosopher, Lalatta Costerbosa explains, proposes a relativization of the concept of Law making it depend on the image of man to whom it refers: the evolution of man and the complexification of legal systems, determines, according to Radbruch, the evolution of Law (Radbruch, 2021b, p. 94).

Nevertheless, after the discovery of the Nazi regime's atrocities, this perspective has changed, as shown by the two essays of 1945 and 1946. As Lalatta Costerbosa points out, in *Fünf Minuten Rechtsphilosophie* (Radbruch, 2021b, p. 117) the radbruchian critical target is the legalist theory of law—whose main assumption could be summarized as “a law is a law” —, which is accused of having legitimized Hitlerian *Unrechtsstaat*. This change in the theoretical paradigm brings Radbruch closer to the natural law doctrines and makes him, *de facto*, the “ancestor” of the neoconstitutionalist doctrines destined to flourish right after the Second World War.

When Radbruch affirms «Law is the will to justice. Justice means: to judge without regard to the person, to measure everyone by the same standard» (Radbruch, 2021b, p. 118), means that now Justice is, in his philosophy, an absolute value, or, which is better, that equity (decision case by case, and individualized justice) is the preeminent value. Here Lalatta Costerbosa utterly remarks the main problem Radbruch must face: the relation between the notion of equity and the redefinition of the concept of legality (Radbruch, 2021b, p. 21-22).

Finally, last paper presented in *Diritto e no is Gesetzliches Unrecht und übergesetzliches Recht*. Before stressing the central aspects of this paper may be interesting to make

some notation on the title's translation. In particular, Lalatta Costerbosa chooses to translate *gesetzliches Unrecht* as *legalità senza diritto*<sup>1</sup>, nevertheless other authors (i.e. Gaetano Carlizzi, see Carlizzi, 2018, p. 54-56) think that the core of the radbruchian thesis expressed in the Formula could be better synthesized with the expression *negazione legale del diritto*<sup>2</sup>. Thus because, with the enforcement of an extreme unjust law, the legislator denies the central value of Law, which is justice (although this aspect is well explicated by Lalatta Costerbosa, see Radbruch, 2021b, p. 24-25). In fact, the central thesis of the Formula is that a law which realizes an extreme injustice ceases to be law and, using Radbruch's words, it becomes *nicht-Recht*. This is an evolution of the main thesis exposed in the previous essay, particularly because here there is the theorization of the existence of an *übergesetzliches Recht*, which is a sort of natural law, a supra-statutory law.

As Lalatta Costerbosa highlighted, this new theory leads to the philosophical theory of neo-natural law doctrines, and as mentioned before, becomes the ancestor of the neoconstitutionalist doctrines. Particularly, Radbruch's Formula anticipates, Lalatta Costerbosa explains, one of the cornerstones of Robert Alexy's Ideal dimension of law: the claim to correctness (Alexy, 2018; Radbruch, 2021b, p. 77).

Despite the importance of the radbruchian theory, it is impossible to ignore its inherent limitations and weaknesses: it can't be identified, with objective criteria, the threshold of extreme injustice and even further it can't be determined the concept of justice. To go beyond these fragilities is therefore necessary to retrace the different contents of the concept of justice developed over time. This is the only way to understand whether justice is a set of empty formulas (Ross, 2019), or if is possible to identify a common pattern underneath the different ideas of justice.

Despite all of this, and even if Lalatta Costerbosa is perfectly aware of those problems, she chooses not to highlight them, and paying more attention to the profound innovation represented by the Formula. She, with lucid clarity, point out four different combination that can arise from the application of the Formula to a positive law. In fact, according to Radbruch, law could be just and valid, unjust but valid, unjust and invalid, and not law (*nicht-Recht*): that is one of the clearer explanations of the double content of the Formula (see Vassalli, 2001).

However, even if it is impossible to find a unitary concept of justice it is necessary to draw a doctrine of fundamental rights (Dworkin, 1978; Alexy, 1996) which

1. Translatable as "legality without right or without law".

2. Which could be translated as "legal denial of Law".

ensure the fulfillment of the basic human rights to each individual. Even here, as Lalatta Costerbosa seems to suggest (Radbruch, 2021b, p. 77-78), Radbruch, through his philosophical theory aimed at pluralism, ethical relativism, and the democratic choice—seen as the only way to give the legal system fair laws (here it's possible to see also an anticipation of Nino's theory of the democratic law, cf. Nino, 2014)—, can lead to a strong affirmation of human rights centered on the concept of dignity and respect for each other.

A final observation on *Diritto e no* must be made, in particular on the title chosen for its introduction: *Alla ricerca del diritto perduto*, which can be translated as “in search of the lost right”. With this entitlement seems that Lalatta Costerbosa wants to emphasize the role Radbruch plays in the reconstruction of the concept of law and, above all, his contribution to the current human rights debate. With this book Lalatta Costerbosa gives us a clear overview on the philosophy of law of Gustav Radbruch, and its evolution through time. She shows us that the mainly legal, rather than political, problems of certain laws are a warning which must be constantly repeated, something that Radbruch had already lucidly—and tragically— understood.

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