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REVOLUTION OR EVOLUTION IN GUSTAV RADBRUCH'S LEGAL PHILOSOPHY

Erik Wolf

SINCE GUSTAV RADBRUCH'S DEATH in 1949 there has been some discussion of whether his philosophical thinking remained in principle the same from the *Grundzüge der Rechtsphilosophie* (1914) to the *Vorschule der Rechtsphilosophie* (1948), or whether it underwent a drastic revolution or reform after 1945 which could properly be designated as "a substantial change in his point of view."¹ Some legal philosophers deny any and all development;² others maintain that there was a decisive change.³ The latter opinion is particularly important in that it is the thesis of a significant and comprehensive study.⁴ The former view, however, which contests the suggestion that any such change ever took place, can appeal to a no less profound interpretation of Radbruch's legal philosophy.⁵

As for the *cause* of this alleged revolution or reform we are referred not to any inner transformation in Radbruch himself, but to two external experiences: one in the realm of German political history, and the other in the realm of the history of ideas. The first is that of National Socialist dictatorship since 1933⁶ and the Allied Occupation of Germany since 1945 — both insofar as they significantly affected German legal life. The second is that of the rise of existentialist philosophy together with the renaissance of theology in German intellectual and spiritual life.

1. Lon L. Fuller, *American Legal Philosophy at Mid-Century, The Legal Philosophy of Gustav Radbruch*, 6 JOURNAL OF LEGAL EDUCATION 457, 481 (1954). The interest of the American reader in Radbruch's philosophy of law was first aroused by Anton-Hermann Chroust in his penetrating article, *The Philosophy of Law of Gustav Radbruch*, 53 THE PHILOSOPHICAL REVIEW 23-45 (1944).

2. Cf., e.g., VALENTIN TOMBERG, DEGENERATION UND REGENERATION DER RECHTSWISSENSCHAFT 21 (1947).

3. Cf., e.g., KONRAD ZWEIFERT, VORWORT ZU RADBRUCHS EINFÜHRUNG IN DIE RECHTSWISSENSCHAFT 6 ff. (9th ed., 1952).

4. FRITZ VON HIPPEL, GUSTAV RADBRUCH ALS RECHTSPHILOSOPHISCHER DENKER (1951).

5. KARL ENGISCH, GUSTAV RADBRUCH ALS RECHTSPHILOSOPH (1949), especially on page 7: "*Er hat seinen Relativismus nicht preisgegeben.*" ["He did not abandon his relativism."]

6. FRITZ VON HIPPEL, *op. cit.* at 13, points out, however, that until the end of 1943, that is, after his evil experiences with the National Socialist regime, Radbruch never questioned the philosophical position he had held in 1932, the year in which appeared his most famous work, the RECHTSPHILOSOPHIE, the final formulation of his legal philosophy.

Three *effects* of these experiences on Radbruch's thinking are contended for: first, the rejection of relativism and rationalism in legal philosophy with a resultant turn toward the tradition of natural law; second, the formulation of a concept of "*Natur der Sache*"* as a first principle of legal philosophy — a formulation new to his thinking and independent of parallel developments in others; third, the acknowledgment that the idea of material justice is more important than the certainty or efficacy of the law, by which acknowledgment he presumably found the starting point for a changed value theory of law.

For *evidence* of this substantial transformation of Radbruch's philosophical "system" we are referred first to Radbruch's abandonment of his teaching that there exists an unresolvable antinomy among justice, legal certainty, and expediency; second, to his abandonment of a "methodological dualism" in the law, basically determined by the separation of "is" and "ought"—the basic doctrine peculiar to Neo-Kantian legal philosophy; third, to the abandonment of his (logical) rationalism in favor of a (metaphysical) commitment to value in terms of a deep faith — a commitment which supposedly also indicates his rejection of a purely formal, "value-neutral," and legal-technical conception of democracy in favor of a moral conception of a democracy.

To conclude from all this a rupture in Radbruch's thinking seems natural enough, especially since Radbruch himself gave occasion to such views by certain utterances of his, such as the notes, first published by this writer in the preface to the posthumous 4th edition of Radbruch's *Rechtsphilosophie*,⁷ which Radbruch had made for this edition. But as we interpret these re-

* The concept *Natur der Sache*, together with numerous derivatives such as *sächlich*, *zur Sache*, and *Sachvernunft*, is one of the central themes of this paper. Its adequate translation presents considerable difficulty. It seems to have been translated variously as, simply, "nature of things," or as "essence of facts," or "of objects" or as combinations of these terms. Since Wolf, like so many German writers, plays almost lyrically with the term "Sache" in this paper, it seems best to render each occurrence of the word or one of its derivatives as best befits the context, but to call attention to the German word in parentheses, in order to alert the English reader to the theme-and-variation effect in the style of the original. As for a literal translation of *Natur der Sache*, the translator suggests "The nature of the objective situation." This would seem to render most closely the sense in which Schiller used the phrase when he characterized Goethe as one who "always received the law from the object and deduced from the *Natur der Sache* its rules." Radbruch himself, citing Schiller, adds that "*Natur der Sache* is the choice of all who are making an effort to lessen the crass dualism of 'is' and 'ought,' of reality and value, of all who look for the reason in things." (*Festschrift für Laun*, 1948.) [Translator's note.]

7. RECHTSPHILOSOPHIE 11 ff. (4th ed., edited by Erik Wolf, 1950); also at 11 ff. of 5th ed., edited by Erik Wolf (1956). These two editions are subsequently cited as RPH 4 or RPH 5 respectively. The corresponding earlier editions are cited as RPH 1, RPH 2, and RPH 3.

marks we must not forget that Radbruch's posthumous papers also admit of an a posteriori conclusion as to *how* he meant to work out these new thoughts in detail.

Did Radbruch intend in this projected fourth edition to write a completely new philosophy of law? This he expressly denied.⁸ Furthermore, he had already designated the edition of 1932 as his conclusive and final word on the subject,⁹ even though the allegedly new ideas about the *Natur der Sache*, the supremacy of the value of justice,¹⁰ and the acknowledgment of "supra-positive norms"¹¹ were already affecting him.

Did he intend to revise the text? No, for he had provided that in the event of his death a new edition should be issued without changes;¹² and in 1948 he would not allow the publication of students' notes taken in his seminar in legal philosophy except under the title of *Vorschule der Rechtsphilosophie* [*Introduction to Legal Philosophy*].

From this it follows that then as always he considered the *Rechtsphilosophie* as he had formulated it in 1932 the final expression of his objective views. By his choice of a title for the seminar notes he wanted to indicate that he saw in them no more than a *pedagogically* expedient introduction to the *Rechtsphilosophie* which would clarify the "development of his thinking." Also, he himself wished to append an "epilogue" to his *Rechtsphilosophie*, in order to explain the further development of its fundamental ideas — which "nonetheless have maintained themselves."¹³ Never did Radbruch say that he considered the *Vorschule* a substitute for his main work, or even an advance to a new level of his thought transcending the *Rechtsphilosophie*. Hence the *Vorschule* is no more than a complementary introduction¹⁴ providing a better understanding of the development of his philosophical ideas and the postulates of legal policy derived from them.

This explanation of the true relation between the *Rechtsphilosophie* and the *Vorschule* does not, of course, solve by itself the question of whether we have in the *Vorschule* an example of revolution or evolution in Radbruch's thinking. To decide this, we need to consider three underlying questions:

8. *Id.* at 7.

9. RPH 3 at vii.

10. Already in the Foreword to the 1932 edition of the *Rechtsphilosophie* Radbruch stresses the "original significance" of this value called justice as well as its independence of mere pragmatic purposefulness.

11. He does this already in his *Rechtswissenschaft und Rechtsschöpfung*, 4 ARCHIV FÜR SOZIALWISSENSCHAFTEN UND SOZIALPHILOSOPHIE, Neue Folge, 355 ff. (1906).

12. Only supplemented by a "postscript" which he intended to write. Cf. RPH 5 at 7.

13. RPH 4 at 10.

14. See GIORGIO DEL VECCHIO, *LEHRBUCH DER RECHTSPHILOSOPHIE* 294 (2nd ed., translated and with an introduction by F. Darmstaedter, 1951).

The first question is: How did Radbruch understand himself? Did he understand himself correctly when he designated the alleged "new" ideas as a progressive *elaboration* rather than a *correction* of his previous thinking? The second question is: Did Radbruch's critics after 1914 and 1932 understand correctly the meaning contained in the basic theses of his *Rechtsphilosophie*? Are the traditional slogans about Radbruch's "relativism" and "positivism" appropriate to begin with? The third question is: How do the basic theses of Radbruch's legal philosophy appear in the light of his autobiographical work, *Der innere Weg*?¹⁵ For the cohesion — the objective unity and the subjective wholeness — of his legal philosophy shows itself throughout his literary as well as his philosophical works.

I

The question of how Radbruch understood himself as a legal philosopher demands, if it is to be answered, first of all the consideration of the pertinent autobiographical references. Tradition,¹⁶ it soon becomes obvious, is the source and nourishing soil of his spiritual nature; he needed to be reverent, and he could raise his soul and that of others in the contemplation of greatness.¹⁷ This innermost quality may sound paradoxical in a man who, as a person and a thinker, frequently had to oppose and combat what his own times considered to be in the best of tradition. It is less surprising, however, if one understands Radbruch's genuine spiritual kinship with Theodor Fontane, who among the German poets of the nineteenth century stands out for his skepticism and criticism of bourgeois cant, but who was at the same time extremely fond of tradition and most ready to be reverential.¹⁸

What, then, was the tradition which Radbruch considered important enough to pass on as an academician, to bear witness to as a writer, and to cultivate as a human being? Briefly, it was the spiritual tradition of classical humanism, a tradition which had grown weak politically, was hardly alive socially, and had become almost extinct in the law. It was "In grateful remembrance of the cultivation of humanistic education in the Lübeck Katherineinum," that Radbruch composed, during the war year of 1942, his excellent essay on Cicero's *Consolatio*.¹⁹ He liked to remember that as a

15. *DER INNERE WEG: AUFRISS MEINES LEBENS* (1951), subsequently cited as *IW*.

16. Cf. especially *IW* at 9 ff.; 12; 13 ff.; 25 ff.

17. *RADBRUCH, EINFÜHRUNG IN DIE RECHTSWISSENSCHAFT* 256 (9th ed., 1952).

18. *RADBRUCH, THEODOR FONTANE: ODER SKEPSIS UND GLAUBE* (1946), subsequently cited as *FONTANE*.

19. *RADBRUCH, GESTALTEN UND GEDANKEN* 208 ff. (2nd ed., 1954).

doctoral candidate in Berlin he had been greeted by the old criminologist Berner with the opening words of Sallust's *Bellum Catilinarum*.²⁰ As the biographer of P. J. A. Feuerbach, Radbruch shared Feuerbach's frequently expressed love of classical Latin. The *idea of humanity* (*Humanität*), which became the *motus animi continuus* of Radbruch's legal philosophy, was constantly nourished by the spirit and language of the classical Latin authors.²¹

He loved this humanitarian ideal in the Ciceronian tradition of classical *humanitas*; and he rediscovered it in the humanistic heritage of the sixteenth century. Accordingly, he felt himself particularly attracted as well as indebted to those spiritual leaders of the Western world who propagated and ministered to this ideal during the eighteenth century: Montesquieu, Lessing, and Goethe. Determined by such a fundamental outlook, he chose his main topics both as a legal philosopher and as a criminal law theorist; and the humanistic postulates of Voltaire, Beccaria, and Dr. Johnson became his guides in the elaboration of detail. Everything he ever wrote was profoundly influenced by this basic commitment as well as by his tenacious opposition to the forces of inhumanity: his general ideas about human rights and crimes against humanity; his accounts of human beings tormented, enslaved, and deprived of all their rights; his incessant battle against the death penalty; his intercession for the conscientious lawbreaker; his timely essays on criminal abortion; his biography of Feuerbach; and his notes on Daumier's caricatures of lawyers — all these seemingly unrelated topics are held together by Radbruch's innermost urge to be "humane" in the sense of a (neo-)humanistic ideal of life, personality, and culture. Resolutely he fought for this humanism, and he spoke boldly of "rebarbarization" where he found it disowned.²²

On the strength of these views, he began as early as 1906 to conceive of the existence of "supra-positive" norms.²³ Later he extended his vision to its practical application as, for instance, in the recognition of absolute human rights. But this constitutes an organic "progress" rather than a radical "revolution" in his legal philosophy. Karl Engisch is quite correct when he says: "Substantial elements of his [later] teachings can be found in his early works."²⁴

Radbruch understood his particular "intellectualism," just as he understood his mission as thinker and writer, in terms of the eighteenth cen-

20. IW at 77.

21. Cf., in this connection, VOM EDLEN GEISTE DER AUFKLÄRUNG 23 ff.; 49 ff. (1948); *Drei Strafrechtslehrbücher des 19. Jahrhunderts*, ROSENFELD FESTSCHRIFT 16 (1949).

22. Cf. *Der Erziehungsgedanke im Strafwesen*, HUNDERTJAHRFEIER DER BADISCHEN GEFANGENENFÜRSORGE 12 (1932).

23. See note 11, *supra*.

24. *Op. cit. supra*, note 5 at 11.

tury version of classical *humanitas*. In that "bright faith in reason"²⁵ with which he knew himself to be suffused, he found strong support as well as much of his direction in the philosophy of Kant, and this despite the fact that he himself defined his search after rationality and intelligibility as a "resolute teleological rationalism"²⁶ inspired to some extent by Ihering. He gladly and joyously concedes his bias for the "noble spirit of the Enlightenment"²⁷ and its spontaneous and rational subservience to humanitarian ends — a spirit animated by a trust in the innate goodness of man and, consequently, in the pedagogical power of secular schools and general education, and by a high esteem for the knowledge and wisdom of life to be found in books. Radbruch was an indefatigable collector and great lover of "literary mottoes."

Radbruch's conviction of the pre-eminence of *logical* problems within legal philosophy and their superiority over methodological, systematic, ontological, and even, in a specifically legal sense, "ethical" issues (such as the "problem of freedom," which became a central problem in German idealism) is grounded in his classical-humanistic understanding of the *logos*. His noetics therefore are never affected by the formalism of psychologizing tendencies inherent in the logic of the late nineteenth and the early twentieth century, but always preserve that sense of objective-realistic *rectitudo* (developed during the eighteenth century by Leibniz and Wolff along the lines already indicated by Aristotle-St. Thomas) which seeks not merely to think "correctly" but also to live "rightly" especially in the realm of thought. Hence Radbruch's "rationalism" always has to be understood in terms of an active — and above all, pedagogic — reason. His was a rationalism of intelligent guidance as well as joyous reform, a rationalism, which, as he himself wrote as early as 1932 (that is, long *before* his alleged transition from rationalism to metaphysics), "did not live in the faith that the universe divided by reason comes out even."²⁸

From the beginning, Radbruch's rationalism was nondogmatic and self-critical, determined, in the last analysis, by deeply emotional commitments²⁹ — an incessant search for "wisdom,"³⁰ or, as his colleague Max Ernst Mayer

25. ROSENFELD FESTSCHRIFT 27, cited in note 21, *supra*.

26. This idea can already be found in RPH 1 at 19 and 297, and in the ROSENFELD FESTSCHRIFT at 27. Only in GERECHTIGKEIT UND GNADE (RPH 4 at 337 ff.), that is, in the year 1949, this idea is restricted by the notion of contingency and mercy.

27. See note 21, *supra*.

28. RPH 3 at viii.

29. Already at an early stage of his intellectual development Radbruch fully understood the close and dialectically necessary relationship between feeling and *ratio*. Cf. *Über das Rechtsgefühl*, DIE TAT 337 ff. (1914).

30. Cf. R. BUCHWALD in the Postscript (*Nachwort*) to GESTALTEN UND GEDANKEN 206 (2nd ed., 1954).

put it, a willingness to "undertake wisdom's risk."³¹ Hence it cannot be said that the lasting insight into the identity of philosophy and wisdom first came to Radbruch when as an old man he was in the position of a "sage" or "elder statesman of philosophy."

Even Radbruch's positivistic approach to law was essentially rooted in humanistic traditions in that it always remained close to the classical notion of "*natura*" as Leibniz, for instance, had understood it. An empiricism or monism based on the physico-biological, mechanistic, or historico-psychological concept of "nature" had no attraction for him. In this he differed radically from his teacher, Franz von Liszt. Even those of his studies and investigations which deal with problems of legal psychology or legal history fully confirm this. These studies resort to an "empiricism" of a totally different kind, to a *realism*³² of the sort which philosophically had been demanded by Husserl's motto, "Back to the facts!" (*Zu den Sachen!*), as well as by Eugen Huber's reference to the "*Realien des Rechts*," — the "realities of the law" — which became current among lawyers and legal philosophers.

Radbruch, indeed, once said that he owed his "intellectual schooling to the Heidelberg of Jellinek, Windelband, Lask, Troeltsch, Gothein, and Max Weber."³³ But this professed allegiance to the Neo-Kantian school of Heidelberg — the influence of Rickert's methodological dualism,³⁴ transmitted through Hermann Levy,³⁵ can be detected in Radbruch as early as 1904 — is by no means wholly irreconcilable with the "turn" toward an ontological metaphysics which Radbruch took in his later legal philosophy. His desertion of Stammler and Liszt in favor of Lask and Max Weber already shows, long before the First World War, to what extent Radbruch's thinking, schooled in Lask's idea of the "*interrelatedness of methods*," sought to achieve the essential *interconnectedness* of "is" and "ought" in the law. As early as 1924, in his *Material Determination of the Idea*, he had abandoned the strict dogma of the duality of "is" and "ought" typical of Neo-Kantianism;³⁶ he had become aware of an "existential" trend in his thinking, a trend, to be sure, which must not be identified with certain "philosophical schools" of the same name.³⁷ Radbruch's empiricism and positivism — like his socialism —

31. MAYER, RECHTSPHILOSOPHIE 1 (1922).

32. Cf. his DER GEIST DES ENGLISCHEN RECHTS 12 ff. (1946).

33. DER MENSCH IM RECHT 18 (1926).

34. RPH 1 (1914), Foreword.

35. IW at 85.

36. Cf. KANT-FESTSCHRIFT DER INTERNATIONALEN VEREINIGUNG FÜR RECHTSPHILOSOPHIE 185; 190 (1924).

37. In a discussion with Karl Jaspers (cf. RPH 4 at 102, note 1) Radbruch referred to his relativism as existentialism. Cf. ERICH FECHNER, RECHTSPHILOSOPHIE 224, note 4 (1956).

were rooted not in theories but in experiences, not in general platforms but in concrete human models. More particularly, they were formed by Goethe's metaphysical poetry and tested against Goethe's image of the world.

Intimately related to the "*Visione Goethiana del mondo*,"³⁸ as well as to his revival of certain tendencies common to the Stoa and the Enlightenment,³⁹ was Radbruch's notion of *tolerance*,⁴⁰ which in his later years he saw exemplified in the personality of Fontane. This notion determined not only his attitude of open-mindedness toward everything, but also his constant readiness to listen to others and to consider other viewpoints as valid. This did not prevent him, however, from resolutely taking sides in questions of personal value judgments, nor did it interfere with his vigorous independence in matters political and pedagogical. It did prevent, however, the petrification into dogmatism that is so often the result of a hasty effort to establish a philosophical "system." Keeping in mind the basic Goethean tolerance ("not readily to reject anything outright"), Radbruch wished always to do justice to concrete historical changes and new spiritual or intellectual currents, but without committing or changing his own philosophical position. His ever-present readiness for self-criticism without any yielding of fundamental principles ideally disposed his mind for a constant broadening and deepening of his intellectual attitudes. This inner urge to become ever more conscious of himself, was, to be sure, strongly stimulated but never deflected from its path by the events of 1914, 1933, and 1945.

Radbruch's ability to appraise himself correctly was manifest not only in his determined rejection of everything essentially alien to his thinking, but also in his sure instinct for choosing trends with which he could be in accord. These two aspects of his behavior originated in a basic and unchanging attitude that determined his whole way of life, although their concrete realization — in accordance with the *καίρως* of the *τύχη* of any given "situation" — at times necessitated certain shifts in emphasis as well as in the mode of expression.

Thus early in his career he was already keeping himself apart from the legal philosophies current in his time,⁴¹ especially from that type of legal

38. Cf. Radbruch, *Il Diritto nella Visione Goethiana del Mondo*, 20 RIVISTA INTERNAZIONALE DI FILOSOFIA DEL DIRITTO, folios 4 and 5 (1940).

39. In his *Verdeutscher Cicero: Zu Johann v. Schwarzenbergs Offizien-Übersetzung*, 35 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 154 (1940), Radbruch extols the exemplary "tolerant and nonfanatical attitude of Cicero."

40. This notion of "tolerance" can already be found in RPH 1 at 28, and in *Franz v. Liszts Strafrechtslehrbuch*, DEUTSCHE LITERATURZEITUNG, col. 683 ff. (1919).

41. He flatly refused to discuss the jurisprudential literature of his time. Cf. RPH 3 at xiii.

philosophy which had hardened into a "professional discipline." He never had any ambition to play an authoritative role in these schools, much less the leading one.⁴² Philosophers and philosophical arguments had increasingly less effect on him the more they remained tied to professionalism or, worse, academicism.

He was attracted only by the kind of thought that is naturally akin to poetic thought. This does not imply, however, that he was tending toward that sort of "esthetic philosophy" which, as a rule, turns into a superficial cultural prattle engaged in by certain "philosophers of life" (*"Lebensphilosophen"*). His concern was rather with that supreme intellectual enterprise in which philosophy and art, thought and poetry, are all bound up together. Radbruch's aim was not to achieve an "esthetic science," but to transform science into art — into a concrete, comprehensive understanding of genuine and genuinely formed "*Gestalt*-perception."⁴³ But while aiming for this supreme goal, Radbruch's thinking always remained disciplined and scrupulously scientific. If we are to understand the dominant "esthetic factor" in his philosophical writings as he himself understood it, we must not misinterpret it as mere incidental ornamentation or, even worse, simply as humanistic snobbery. The wellspring of his thinking, including his legal philosophical thinking, was the poet's view of life. This would also explain his disdain for polemical discussions,⁴⁴ as well as his constant effort to find a poetic witness to his thoughts. The many "mottoes" which preface his books or the various chapters of his books; the notes and references full of literary gleanings; his collection, begun early in life, of literary aphorisms touching on legal philosophy — all this was to him no fancy game to while away idle hours, but a serious effort to secure for himself and others the "iron ration" necessary for the preservation of spiritual and intellectual life. It is here that we can find the key to some of the bases of his legal ideas.⁴⁵

All this should also explain Radbruch's *rejection of the demand for a closed legal philosophical system.*⁴⁶ Radbruch, who had been thoroughly trained in methodology by Franz von Liszt, was only too conscious of the methodological relativism to which all juridical systematizations sooner or later must succumb. Hence he denied that a genuine and workable answer to legal philosophical problems could be derived from a purely "systematic

42. Cf. Anton-Hermann Chroust, *op. cit. supra*, note 1 at 23.

43. Cf. the competent analysis of KARL ENGISCH, *op. cit. supra*, note 5 at 1 ff.

44. Cf. note 41, *supra*.

45. Cf. here RADBRUCH, *KLEINES RECHTSBREVIER, SPRUCHBUCH FÜR ANSELM*, edited after Radbruch's death by Fritz von Hippel (1954).

46. Cf. Anton-Hermann Chroust, *op. cit. supra*, note 1 at 41.

solution.” He was attracted to the “system of criminal law” not so much because of the homogeneity of the basic plan as because of the almost infinite variety of aspects in the overall picture.⁴⁷ Rather than attempt to harmonize dialectical tensions and conflicts, he directed his analytical efforts to demonstrating the unresolvable antinomy present in every problem. Such an “antinomic” gave proper and ample scope for the intrinsic experiences underlying his own thinking, but it did not result in the “quest for a system.”⁴⁸ His was a quest for the clarification of *problems*, especially the ambivalence and divergence of the possible methods of attack. This intellectual attitude cemented his legal philosophy to the truly historical point of view⁴⁹ (*Geschichtlichkeit*) which never concentrates on the “solution” of problems, or on “systematic concepts,” but on insights into “problem constellations” and “problem complexes” and, hence, on “living types.”⁵⁰ When confronted with a choice, he always addressed himself to the particular situation — spoke, as it were, from *within* the situation — without ever being distracted by pragmatic concerns from what he considered essential. This ability to speak from “within” as well as from “without” demanded a sure feeling for the “actual,” especially if he wished to preserve certain “objective,” i.e., lasting and essential values. Such values he never ignored. On the contrary, his whole approach stood in their service. For this reason his philosophical thinking after 1945 did indeed take the altered situation and “problem constellation” into account. But this ability and readiness “to do justice to a new situation” never made him in the least unfaithful to his previous focus of philosophical concern. In the years between 1914 and 1932, his mind displayed the same disciplined adaptability. This may be gathered from the fact that he declared the third edition of the *Rechtsphilosophie* to be “an entirely new book,”⁵¹ something, incidentally, he did not do with any of his post-1945 writings.

Endowed with a soberly critical mind, Radbruch did not approve of the pseudo-idealistic conception of legal philosophy that sees in it the “crowning glory” of all jurisprudence — that fraudulent intellectual attitude which expects from legal philosophy only the confirmation of what already has been attained in some other way, or, still worse, tries, through the “idealization” of current legal doctrines and practices, to remove once and for all both legal

47. Cf. KARL ENGISCH, *op. cit. supra*, note 5 at 3.

48. FRITZ VON HIPPEL, *op. cit. supra*, note 4 at 13ff.

49. Cf. Anton-Hermann Chroust, *op. cit. supra*, note 1 at 33.

50. KARL ENGISCH, *op. cit. supra*, note 5 at 4, has pointed out the affinity of Radbruch's ideas with those of Dilthey. Edward Spranger also influenced Radbruch.

51. RPH 3 at vii.

philosophy and jurisprudence from the ambit of intelligent criticism. In his legal philosophy Radbruch did not intend to furnish premature or ready-made answers: he was always patiently asking questions. Radbruch referred to this "method" by the frequently misunderstood word, "relativism," through which he intended not only to challenge the unwarranted self-assurance of certain jurists,⁵² but also to resist their inclination constantly to justify themselves.⁵³ He devised his antinomic conception of law primarily in order to create a constant stimulus to repeated testing and analytical re-evaluation. Only with a "bad conscience," he once said, can a man be a systematic jurist; only through "critical unrest" can a man of the law achieve a "clear conscience."

One of the earliest and, at the same time, most consistent of Radbruch's tendencies was his *social* or, better perhaps, his *society-reforming* impulse. It accounted for the decidedly practical bent in his legal philosophy. Through it he remained in close touch with what the Germans of the 'twenties called "*sociology*": a total and cohesive scientific attitude toward social factors and their overall effects on the intellectual life.

This *sociological* tendency of his became manifest in the realization, come by early in his career, of the social responsibility of the academician. It also appeared in his insistence that jurisprudence adjust to and extend into socio-political thinking. In accordance with this tendency, he joined the sociological school of criminal law founded by Franz von Liszt. All his life Radbruch pursued von Liszt's goal of a truly social administration of criminal law, especially during his term as Minister of Justice of the German Federal Republic (1921-1922 and 1923), when he was working out the plan for a new German criminal code.

This social or sociological tendency of Radbruch explains also his inclination, stimulated by the influence of Max Weber,⁵⁴ to pay attention to the complexity of empirical facts, a complexity which early in his career⁵⁵ he already understood as "the nature of the objective situation" (*Natur der Sache*).

52. Against this tendency, cf. Radbruch, *Juristen—böse Christen*, 9 DIE ARGONAUTEN (1916).

53. Radbruch, *Vier lose Blätter für Ricarda Huch*, 9 DIE SAMMLUNG 355 ff. (1954): "skeptische Worte über die Macht des Rechts"; "Fragwürdigkeit aller Rechtspflege." ["skeptical words concerning the effectiveness of law"; "questionable aspects of the law."]

54. As to Radbruch's contacts with Max Weber, cf. IW at 83 ff.; 88.

55. DER HANDLUNGSBEGRIFF 95 (1903); RECHTSIDEE UND RECHTSSTOFF 190 (1924): "vor allem aber erleuchtet die gewonnene Einsicht das Schlagwort von der 'Natur der Sache'" ["the motto, 'the nature of the thing,' more than anything else helps to clarify the newly gained insight"]; *La natura della cosa*, RIVISTA INTERNAZIONALE DI FILOSOFIA DEL

Radbruch's social inclinations also impelled him, despite his basically contemplative nature, to engage in *political activity*. Not "anti-worldly-wise generalities," he once wrote,⁵⁶ "but the pressing political questions of the day" had determined the basic themes of Feuerbach's early writings on legal philosophy. The same is true of Radbruch himself. Following Max Weber, he tried to draw clear distinctions between science and politics, between "value-relating" and "evaluating" thinking. Especially his *Kulturlehre des Sozialismus* (1922) bears witness to his effort to make a sharp distinction between arguments based on political or partisan considerations and scientifically grounded arguments or demonstrations. But despite his pronounced political tendencies and interests, he never tried to elaborate his socialistic convictions — Radbruch was a lifelong Social Democrat — into a legal philosophy. On the contrary, his philosophical relativism, like his methodological dualism, stood in sharp contrast both to the theory of early Marxism and to the official interpretation of history and of law to which the leaders of the German Social-Democratic movement adhered.⁵⁷ The political motivation of Radbruch's philosophical thinking was not socialistic ideology but social humanism and humanitarianism (*Humanität*).⁵⁸ The political meaning of his legal philosophy climaxed in the postulate that the truly intellectual man must accept social responsibility — a readiness which must stand the test of active citizenship.⁵⁹

Not only after 1933, but already in his earliest legal and philosophical work,⁶⁰ Radbruch unmistakably called for a *material political and social ethics*,⁶¹ he did so with renewed emphasis in his essay, "*Zur Philosophie dieses Krieges*," which he composed in 1917 under the immediate impressions of his own experiences as a soldier in the German army during World War I. In the final analysis, the reason his allegedly neutral, and in a way formalistic, value relativism became so important and even indispensable to him, despite objectively justifiable objections, was that he saw in it a political ethos: "the intellectual presupposition of a true democracy."⁶² For by de-

DIRITTO (1941); *Die Natur der Sache als juristische Denkform*, LAUN-FESTSCHRIFT 157-176 (1948).

56. P. J. A. FEUERBACH, EIN JURISTENLEBEN 24 (2nd ed., ed. Erik Wolf, 1956).

57. See what Radbruch himself had to say about this in his postscript to the 3rd edition of his *KULTURLEHRE DES SOZIALISMUS* (1949).

58. IW at 109: "*Es nicht besser haben wollen als andere.*" ["Not to wish to have it better than other people."]

59. *REPUBLIKANISCHE PFLICHTENLEHRE* (1928).

60. *Rechtswissenschaft als Rechtsschöpfung*, 4 ARCHIV FÜR SOZIALWISSENSCHAFT UND SOZIALPOLITIK 355 ff. (1905).

61. This was correctly pointed out by Anton-Hermann Chroust, *op. cit. supra*, note 1 at 28: "The ultimate grounds for his intellectual attitude are primarily moral."

62. RPH 3 at viii. Cf. Anton-Hermann Chroust, *loc. cit.*

mocracy he did not mean a sort of game played in a spirit of neutral indifference toward the state in accordance with certain formal rules. Rather, influenced on one level by Swiss and English models, and, on a deeper level, by the inborn feeling for "freedom within order" traditional among the citizens of the Free Hanseatic City of Lübeck, he saw democracy as a material ordering of social life, experienced as an organic and living "integration" and not merely written as a formal "constitution." This is also why he insisted that there exists a "system of civic and moral duties consonant with a republican form of government," an idea which he advanced in 1928 in a memorial speech before a plenary session of the German Reichstag.⁶³ It was on the same occasion that he also stressed the primacy of the idea of justice over mere utility — a notion which he subsequently emphasized still more — as well as the idea of inviolable human rights as the ultimate standard and criterion of all positive laws.⁶⁴

At that time he had also begun to stress the value of civic instruction in the schools. The *pedagogical tendency* in all his speeches and writings, of which this attempt at educational reform is but a single example, constitutes in itself one of the most important characteristics of his philosophical thinking. He aimed at nothing less than a vital strengthening of the feeling for law,⁶⁵ especially since he was sadly aware of the fact that many of his countrymen had no understanding whatever of the moral strength inherent in an organically evolved legal order. This is also the reason why, in good Platonic fashion, he always connected the objective idea of justice with the subjective notion of individual righteousness. He was never enough the Kantian to declare a purely inner-subjective "attitude-ethics" adequate to cope with a moral issue. The contrast between the formal and the material aspect of law that played an important role in Radbruch's early legal philosophy has often been seized upon to maintain that his concept of justice underwent a revolutionary change from an ethics of "pure conscience and duty" to a social ethics based on material values. It should be borne in mind, however, that this contrast never had any didactic meaning for Radbruch himself. In 1934 he wrote in his own copy of the *Rechtsphilosophie*: "Justice, not expediency, [is] the ideal of the law."⁶⁶ This, however, was not for him a new idea that would have necessitated a basic change in his thinking on the subject. He wrote it apropos of the critical sermon delivered by Archbishop Gröber of Freiburg against the killing off of the mentally ill by command of

63. See note 59 *supra*.

64. REPUBLIKANISCHE PFLICHTENLEHRE 8 (1928).

65. *Id.* at 7.

66. RPH 5 at 124, note 1.

the Nazi authorities, and wished only to take advantage of this particular concrete situation (*Lage*) to give an emphatic expression to what had long been his general (*zur Sache*) views.

Imbued from his youth with the humanistic ideal of the “right παιδεία”⁶⁷ — which meant to him not a “liberal education” in the traditional bourgeois sense, much less that pseudo-education that enables some people “to talk a little bit about everything,” but rather a training for intellectual self-reliance through properly guided reading and correct thinking — Radbruch placed his learned writings completely at the service of genuine human culture and the education of civilized mankind. Accordingly, in his philosophical or legal writings, he did not care about devising a social cosmos harmoniously constructed and consistent throughout, in which “cultured people” could find an affirmation of their values and a corresponding peace of mind. What he cared about was the cultural and intellectual needs of his students and his readers. Thus right after both wars — in 1918-19⁶⁸ as well as in 1945-47⁶⁹ — he addressed to young students a “philosophical reminder” as to the essence of the factual situation (*zur Sache*), projected into the existential situation (*Lage*) of total demoralization and of a vast spiritual, intellectual, and ethical dearth spreading out in all directions. He was a teacher in times of dearth, such as the times demanded. Taking as his model what seemed to him the finest poetic perception of a genuine educational community for the development of true human beings, namely, the idea of the “pedagogical province” in Goethe’s *Wilhelm Meister*,⁷⁰ Radbruch the educator, who was forever concerned with the right ethos in the right place and at the right time, always discussed only what was adequate to that particular place and that particular time, and was therefore always adequate to “the nature of the objective situation” (*Natur der Sache*).

II

Radbruch’s philosophical thinking, embodying as it does this pedagogical aspiration, has received much sharp criticism as well as admiring recognition.

67. IW at 27 ff.

68. IHR JUNGEN JURISTEN (1919).

69. FÜNF MINUTEN RECHTSPHILOSOPHIE (1945).

70. *Wilhelm Meisters Sozialistische Sendung*, GESTALTEN UND GEDANKEN 84 ff. (2nd ed., 1954). These ideas were first conceived in 1916, and formulated for the first time in 1919, in 8 LOGOS 152 (1919). They were the basis of a lecture given by Radbruch in Oxford in 1936.

This is not the place to go into these criticisms at length. Some have lost their meaning through Radbruch's critiques of his own work; others have been outmoded by historical, political, and ideological developments. A few remarks are appropriate, however, concerning the general tenor of these criticisms.

Insofar as his critics have been motivated by *ideological* presuppositions, they have often either read into Radbruch's thought tendencies which were not there, or have oversimplified his legal philosophy in terms of whatever principle they believed could be most effectively contrasted with their own positions. By these means Radbruch's legal philosophy has been pressed into such formulae as "systematic relativism," "materialistic positivism," or "rationalism of the Enlightenment." Such contrived and absolutizing interpretations of his thought *prior* to 1933 accord with equally contrived contradictory interpretations of his thought *after* 1945. But they easily give rise to a serious misunderstanding of both periods through inattention to the important question of how Radbruch's philosophical thought developed. This development, to be sure, is even today insufficiently clarified, because of the wealth of the sources, scattered in newspaper and magazine articles, in *Festschriften*, and in various anthologies.

The stereotyped political ideologies of our day have contributed much to the establishment of this one-sided picture, as might be expected in view of the sharp *political* contours the figure of Radbruch has taken on. He was called an "opponent of the conservative and organic theory of the state,"⁷¹ an "individualist";⁷² he seemed "to reject" the Neo-Thomist system of natural law,⁷³ and he was labelled a theoretician engrossed in "one-dimensional thinking, devoid of any understanding of social reality."⁷⁴

But the hardening of *philosophical* terminology and systematization into slogans also has a share in creating this picture of Radbruch, as false as it is dismal. In a strange *contradictio in adjecto*, "absolute relativism" was sometimes imputed to him.⁷⁵ Sometimes his doctrine was called "relative cynicism."⁷⁶ With a notable divergence of understanding, some saw in Rad-

71. Arthur Wegner, *Über den Geltungsbereich des staatlichen Strafrechts, Beiträge zur Strafrechtswissenschaft*, 1 FESTGABE FÜR R. FRANK 100, note 3 (1930).

72. JULIUS BINDER, *PHILOSOPHIE DES RECHTS* 289 (1926).

73. KARL PETRASCHKE, *SYSTEM DER RECHTSPHILOSOPHIE* 107 and 135 (1932).

74. ERICH KAUFMANN, *KRITIK DER NEUKANTISCHEN RECHTSPHILOSOPHIE* 66; 77, note 1 (1921).

75. Cf. ERNST VON HIPPEL, *EINFÜHRUNG IN DIE RECHTSTHEORIE* 99 (4th ed., 1955), whose observations are in point.

76. LEONARD NELSON, *DIE RECHTSWISSENSCHAFT OHNE RECHT* 130 (1917).

bruch's relativism a "sophistical skepticism"⁷⁷ or plain "skepticism";⁷⁸ others saw in it the expression of a "spirit turned profoundly uncreative,"⁷⁹ or a "weak and wretched philosophy,"⁸⁰ while others, again, emphasized its spirit of utter "resignation."⁸¹ On the one hand Radbruch's way of thinking was supposed to be a manifestation of a "juristic positivism";⁸² on the other, it was allegedly declaratory of an intellectualistic "rationalism,"⁸³ or of an "intellectually exhausted"⁸⁴ subjectivism.⁸⁵ The same standpoint of Radbruch which was criticized by many as being quietistic,⁸⁶ or, in fact, as pure "historicism,"⁸⁷ seemed to others the token of "the revolutionary per se."⁸⁸ On the whole, even those readers who had some intellectual kinship with Radbruch's thought found it necessary to point out in him "a despair of all ethics, a fateful denial of any possibility that legal or political problems admit of a scientific solution."⁸⁹ Almost all these critics referred to the same two statements in Radbruch's *Rechtsphilosophie*: one to the effect that values are not capable of cognition (*Erkenntnis*), that is, of rational comprehension through reason, but only of adherence (*Bekanntnis*) in terms of commitment and faith; and another to the effect that there is no possibility of scientific proof for the validity of value judgments.

Radbruch, to be sure, made it easy for his critics from the very beginning. His chosen term, "relativism," in addition to being ambiguous, had something of the character of a slogan. Indeed, he seems to have chosen the term for these very qualities. At any rate, by choosing it he more or less invited the general misunderstanding which soon materialized in phrases like "denial of all values," "cultural decadence," and plain "nihilism." In its strictly philosophical sense, too, the word met with justifiable objections. If

77. KARL JASPERS, *VERNUNFT UND EXISTENZ* 72 (1935).

78. CARL J. FRIEDRICH, *DIE PHILOSOPHIE DES RECHTS IN HISTORISCHER PERSPEKTIVE* 104 (1955).

79. KARL LARENZ, *RECHTS- UND STAATSPHILOSOPHIE DER GEGENWART* 76 (2nd ed., 1935).

80. RUDOLPH STAMMLER, *RECHTSPHILOSOPHIE: DAS GESAMTE DEUTSCHE RECHTS* 19 (1932).

81. 2 GUSTAV BOEHMER, *DIE GRUNDLAGEN DER BÜRGERLICHEN RECHTSORDNUNG*, part 1, 147 ff. (1951).

82. HELMUT COING, *GRUNDZÜGE DER RECHTSPHILOSOPHIE* 96 (1950).

83. Cf. KARL LARENZ, *op. cit. supra*, note 79 at 67.

84. AUGUST HEGLER, 4 *MONATSSCHRIFT FÜR KRIMINALPSYCHOLOGIE* 347 (1907/8).

85. CARL AUGUST EMGE, *ÜBER DAS GRUNDDOGMA DES RECHTSPHILOSOPHISCHEN RELATIVISMUS* 65 (1916); EDMUND MEZGER, *SEIN UND SOLLEN IM RECHT* 11 (1920).

86. See notes 85 and 81, *supra*.

87. WILHELM SAUER, *SYSTEM DER RECHTS- UND STAATSPHILOSOPHIE* 468 (2nd ed., 1949).

88. ERNST VON HIPPEL, *op. cit. supra*, note 75 at 107.

89. MAX SALOMON, *GRUNDLEGUNG ZUR RECHTSPHILOSOPHIE* 53 (2nd ed., 1925).

we remember, however, that for Radbruch word and object alike are derived from the complex context of cultural history and sociology, then we may realize wherein and to what extent these criticisms rest on misunderstanding.⁹⁰ It is to his concern for context that Radbruch alluded when he used the term "relativism." Because of this concern, he found more understanding and more of a following among sociologists and historians (including those of the law) than among philosophers and legal theoreticians. For the latter found in his doctrine three fundamental errors, making it untenable in their eyes:⁹¹ a falsification of critical philosophy, an erroneous conception of dialectic, and an abandonment of idealism. All three objections seem reducible to a conformism dictated by the traditional commitment of the German academic community to Neo-Kantianism and Hegelianism. For what Radbruch had in mind, however, the formulations of the "Heidelberg school" of Neo-Kantian cultural idealism could be only a methodological point of departure, never a final solution. It was his purpose to preclude any possible assertion of a legal absolute on political, cultural, or religious grounds. Thus, his only reason for declaring that "justice" must rest on relativism alone was his desire to expunge all arbitrary, authoritarian systematic teleologies from the law; his only reason for seeking "legal certainty" in positivism alone was his desire to unmask every sort of hazy emotional pseudo-romanticism in politics which conceals its true aim of power under the tactical disguise of fuzzy absolutes; his only reason for demanding a rationalistic approach in the interest of "expediency" was his desire to oppose "any irrational shrouding of the ultimate contradictions and conflicts that demand a truly ultimate decision."⁹² In taking this stand, he did not overlook the fact that such decisions can be made only in the light of a concrete existential "situation," and that the conditionedness of such a situation, its "fatal, antinomic compulsion,"⁹³ as Radbruch puts it, neither determines one's choice nor relieves one from making a choice.

III

If, from the vantage point thus far arrived at, we are to gain an *insight into the continuity* of Radbruch's philosophical thinking; if, in other words,

90. Even in the United States stress is being laid upon the fact that "relativism" is not a philosophical object but rather a philosophical method. Cf., for instance, Paul F. Schmidt, *Some Criticisms of Cultural Relativism*, 52 THE JOURNAL OF PHILOSOPHY 780; *id.* at 783, 788 (1955).

91. Cf. WILHELM SAUER, *PHILOSOPHIE DER ZUKUNFT* 68 ff. (1923).

92. RPH 3 at viii.

93. FRITZ VON HIPPEL, *op. cit. supra*, note 4 at 21.

we are to give up misleading preconceptions about his alleged "antinomic value-blindness"⁹⁴ prior to 1945, we must look at our interpretation of his threefold fundamental position also in the light of *Der innere Weg*. It would be a grave mistake to distinguish here between a "subjective" continuity in Radbruch's self-evaluation and an "objective" discontinuity in his works:⁹⁵ the *logos* of the works is none other than the spirit of the thinker; and both are the same, even where they do not always seem to say the same. To get to the bottom of this, we shall try to formulate and explain three *guiding themes* which have shaped and directed Radbruch's philosophical thinking throughout, although we naturally cannot expect to find them perfectly expressed during the period of his legal apprenticeship.⁹⁶ It was his experience of Goethe that gave them their form — that of a union of poetry and thought.

The first of these themes, which can be called the *paradox of values*,⁹⁷ characterizes the *negative* aspect of Radbruch's nature, his need to reject, counteract, turn away from things which he sensed did not properly belong to him. This negative aspect had its roots in the "Schopenhauerian pessimism"⁹⁸ of his early student days, in the then fashionable trend toward decadence, *fin-de-siècle* mood,⁹⁹ *bohème*, pathos, and rhetorical *Weltschmerz*. But it gradually became modified and restrained in the course of Radbruch's efforts to comprehend the Goethe-Eckermann conversations and the gnomic wisdom of Goethe's early period, and later through his discovery of the aged Fontane, whose world-view seemed more and more acceptable to him, as he testified over and over.

In the realm of legal philosophy, the problem of the paradox of values became the foundation of Radbruch's relativism. The real aim of this relativism, therefore, was disillusionment, the unmasking of the "conventional lies of civilized humanity."¹⁰⁰ If pursued in the interests of intellectual honesty, it was called "denial of any preconceived values" (*Wertfreiheit*). Such a denial has not the aspects of a "meaningless work";¹⁰¹ rather, it is declaratory of the vital realization that the never-ending moral tasks must forever

94. *Id.* at 35.

95. *Id.* at 99, note 54.

96. Cf. Marie Baum in her Postscript to *DER INNERE WEG* 209.

97. *IW* at 51.

98. *IW* at 52 and 85.

99. *Ibid.*

100. A statement of Max Nordau, quoted in *IW* at 52.

101. Arnold M. Rose, *Sociology and the Study of Values*, 7 *BRITISH JOURNAL OF SOCIOLOGY* 1 (1956), in a most interesting manner shows how Anglo-American philosophers have overcome the various forms of "value indifferentism" (W. C. Sumner). Cf. the works of W. F. Ogburn, K. Mannheim, and especially Robert S. Lynd, *KNOWLEDGE FOR WHAT?* (1939).

be carried on. This, in turn, requires a merciless debunking of any pharisaical "playing at virtuousness"¹⁰² in order to clear the way for the regeneration of a genuine ethos. By demolishing the façade of pseudo-justice that had been erected by nineteenth century German idealism, relativism made room for a new approach to objective justice (*Sachgerechtigkeit*), a justice, that is, which through the use of empirical, social, and practical data, clarified by an intelligent realism (*Sachvernunft*), would recognize in the realm of jurisprudence the claims of what Radbruch's friend, Hermann Kantorowicz, characterized as the "free-law movement."¹⁰³

"Because the existential relationship is firmer than an ideal relationship can ever be,"¹⁰⁴ Radbruch was unable to regard the current reprivations of idealism as a step in overcoming the "problematical nature of the law."¹⁰⁵ Aware of the paradox of values, he soon realized the dangers of premature crystallization of values and value positions into absolutes.¹⁰⁶ He also realized that all legal ideologies inferred from such "generalized" values had no binding force whatever. To this premature crystallization he opposed his "relativism," which was intended not as a limitation on knowledge (*Erkenntnis*), but as a "road sign" pointing the only way to true knowledge.¹⁰⁷ For Radbruch, relativism was simply a passageway, a transition, a sort of *transcendens* necessary to overcome those interpretations of life and law that had prematurely and uncritically crystallized into so-called philosophical systems. Radbruch's philosophical analysis of the typological doctrines current in certain historico-sociological or anthropological schools of his own time did not serve to confirm them, but rather, by demonstrating their limitations and the relativity of their assertions or actions, to call them into question. But Radbruch's relativism was much more than a "logical method" or a sociological criterion. It was an "experience of the psyche," which compelled the philosopher "to work out his own legal philosophy"¹⁰⁸ in the light of the ever vexatious "paradox of values" and the concomitant "antinomic of the law." Such an intellectual attitude could lead no further than the discovery and exposition of fundamental problems and issues. Hence Radbruch was justified in saying that his philosophical thought was spiritual action, that it was accomplished in the debate between attacking thesis and defending anti-

102. FONTANE 57.

103. IW at 96 ff.

104. IW at 135.

105. RPH 5 at 99 ff.; EINFÜHRUNG 194 ff. (9th ed.); VORSCHULE.

106. This was stressed already in RPH 1 at 95; RPH 3 at 54. See also FRITZ VON HIPPEL, *op. cit. supra*, note 4 at 20 ff.

107. Cf. RPH 3 at 10.

108. IW at 51.

thesis,¹⁰⁹ and that it taught the "how" rather than the "what" of philosophizing about the law.¹¹⁰

The second guiding theme which should establish the continuity of his thinking may be called "objective reason" (*Sachvernunft*). It characterizes the *positive* side of Radbruch's nature: his need to affirm, accept, feel enthusiasm, make himself accessible, and remain capable of further intellectual and spiritual growth. Here again the roots reach back to early personal experience, this time to his contacts with the reformatory optimism of Franz von Liszt, an optimism which became manifest in Radbruch's readiness for reevaluation of social values¹¹¹ while a young *Privatdozent* in Heidelberg. But the Goethean insight¹¹² into the mysterious connection between truth and fruitfulness quickly imposed a discipline on this "social radicalism." Concomitantly, the one-sidedly logical causalism characteristic of his early thought gradually ripened into a realism which paved the way for that wisdom of Radbruch's old age which would reverently let all things be what they are.¹¹³

In the field of legal philosophy, this road led from rational positivism (methodological dualism) to a realistic ethics of doing what socially had to be done. Especially after Radbruch (in 1935) had become acquainted with English law,¹¹⁴ he began to consider the realistic rationale (*sachliche Vernunft*) in the law to be "the union of eudaemonistic and ethical conduct of life."¹¹⁵ This personal experience with English law led him to the concept of the *Natur der Sache*. This concept he conceived as providing a counterpoise for the relativism of ideologies so that the intellect might be "cleansed" by relativism from all unwarranted value-preferences, and still remain "objective" (*sachlich*). In sum, it was to get to the ground of all things and hence to the essence (*Sache*) itself, which, in law as well as elsewhere, is the true "ground of all things." It is toward this ground that Radbruch's intellect was traveling ever since his early works on the criminal law. For "act" and

109. IW at 73.

110. RPH 3 at viii.

111. Cf. here Radbruch's observations in FONTANE 52.

112. As regards Radbruch's interpretation of Goethe, see GESTALTEN UND GEDANKEN 9-13. The impact which Goethe's *Weltanschauung* had on Radbruch's whole life is made clear in IW at 41.

113. Cf. here especially the first *excursus* to his essay on "*die Natur der Sache*," LAUNFESTSCHRIFT 164 ff.

114. "*Auf Grund des Rechtslebens und der Natur der Sache*" ("On the basis of the whole legal reality and the 'nature' [essence] of the thing") the English people both create law and decide legal issues. This is Radbruch's view of English law. Cf. DER GEIST DES ENGLISCHEN RECHTS 11 (1946).

115. IW at 186: "Happiness and fairness."

“causation” as used in criminal law have to do with the “ground” of this real “thing” (*Sache*) called “crime.” Ever since these early works, he was seeking to grasp the *Natur der Sache* as the basic concept not only of legal philosophy but of all social philosophy. This thought, too, lies at the bottom of his *socialist* doctrines. Socialism, as Radbruch understood and experienced it, meant that kind of mental attitude which considers the “social problem” with utmost seriousness,¹¹⁶ and hence never avoids the basic question of whether or not “the social” constitutes one of the fundamentals of human existence, and if so, how.

With this insight Radbruch had reached at an early stage and on a profound level that galaxy of problems which have assumed especial importance today on account of contemporary efforts to devise a new legal ontology. For this reason, if for no other, even Radbruch’s turning toward philosophical “existentialism” was not an indication of a *revolution* in his thinking, but rather an indication of its organic evolution.

The third guiding theme is presented by the main concern of Radbruch’s later years: *The Belief of the Unbeliever*.¹¹⁷ Here we meet the *ens humanum* of Radbruch’s philosophical work, that aspect which properly justifies our *thema probandum*. It is here that Radbruch’s thinking extended past the finite, past the historical existence of man with his perpetual affirmations and negations; it is here that his two fundamental doctrines, relativism and objective reason (*Sachvernunft*), were united; and it is here that we can glimpse the genuine inner continuity of his legal philosophy.

Radbruch, it is to be noted, had grown up “without any relationship to religion.”¹¹⁸ We know that after his confirmation as a Lutheran (which he inwardly rejected as bourgeois convention)¹¹⁹ he took no part in the activities of any church. He, the lover of communal life, never had the experience of Christian community. At the same time he instinctively rejected the substitute offered by sectarianism. Yet he had an intuitive awareness of the nature of religious reality. Beginning with a period of prayerful asceticism as a child¹²⁰ and with his esthetic yearning as a youth for the beauty of liturgical worship, through the lasting impression made on him as a student by the earnestness of Sohm’s confession of faith,¹²¹ down to his own conscientious

116. Cf. here also *Vom individualistischen zum sozialen Recht*, HANSEATISCHE RECHTS- UND GERICHTSZEITUNG (Aug./Sept. 1930); IW at 54.

117. Formulated by Marie Baum, who wrote the Postscript to DER INNERE WEG. Cf. IW at 211.

118. IW at 23.

119. *Ibid.*

120. *Ibid.*

121. IW at 45 ff.

efforts to understand his part in the war in religious terms,¹²² and to his attempts at a religious articulation of socialistic youth dedication ceremonies¹²³—all the time Radbruch sought seriously and honestly for God.

And with his struggle to achieve a “religious philosophy of law,”¹²⁴ Radbruch the relativist gave scope to theological questions. In his *Rechtsphilosophie* he accorded an independent place among his value-axioms to the “value-conquering” religious attitude of “love without regard to the worth or worthlessness of what is loved,” thereby preserving for theology its own place alongside the philosophical and empirical disciplines, at a time when theology’s “idealistic” opponents denied that any theological problem in law could even be discussed scientifically.

The “hidden yearning for religion”¹²⁵ of Goethe and Fontane, which Radbruch reverently brought to light in one of his few books, was to him a possible key to the reconciliation of Christianity and socialism.¹²⁶ Of course, he was strengthened in this attitude by the experiences of the renewed *Kulturkampf* which set in after 1933.¹²⁷ But even this alleged “transformation”—today interpreted by some as a “turn toward Neo-Thomist natural law”¹²⁸—is fully consistent with Radbruch’s earlier thinking. Even if it took the impressive horrors of the War and of Nazi dictatorship to make him consider seriously a conversion to the Roman Catholic Church,¹²⁹ he had ever since his early student days an appreciation of the “beauty of the Catholic faith and worship.”¹³⁰ With advancing years, his interest in theological questions increased. The humanist in him, if nothing else, turned away from the Lutheran doctrine of *sola gratia* toward the objective natural law concept of scholasticism;¹³¹ and with the last sentence of his farewell address to his students he professed the “*anima naturaliter christiana*.”¹³² To be sure, Radbruch’s commitment to natural theology was influenced by his aversion to dogma in the Christian church. This, too, attests his “belief of

122. IW at 107 and 129.

123. IW at 179.

124. Two drafts by G. Radbruch and P. Tillich in 1919. Cf. IW at 130.

125. Cf. FONTANE 10 ff.

126. IW at 179 ff.

127. IW at 179 and at 210 ff.

128. Cf. ERICH FECHNER, *op. cit. supra*, note 37 at 211, note 44.

129. Cf. IW at 34.

130. *Ibid.*

131. IW at 188. Marie Baum, in her Postscript to DER INNERE WEG 208, maintains that Radbruch rejected the Protestant-Lutheran doctrine of *sola gratia*: “Humanist durch und durch [verweigerte er] dem *sola gratia* die Nachfolge . . .” (“Devoted humanist that he was, [he refused] allegiance to the *sola gratia* [doctrine].”)

132. RPH 5 at 77.

the unbeliever.”¹³³ In a way he lived a “hidden Christianity-in-substance.”¹³⁴

Not until we have gained this insight into the innermost core of his existence, of which only his *caritas* sent rays to reach the outside world, can we properly understand the singleness of his dialectical nature and justly evaluate his antinomic legal thinking. Viewed in this light, Radbruch’s relativism is but a reference to the provisional nature of all human law — an indictment of any self-justification of the law through self-serving absolutist ideologies.

Radbruch’s legal philosophy remains a warning to which we cannot shut our ears, a warning to be sparing with our assertions about the nature and substance of justice. It calls out to every legal thinker that he must retain the status of a questioner, forever restless, never retreating into himself or losing touch with others, but persisting in the belief that even a science which knows no more of true justice than to show up the limitations of those who say they know it well, stands high in the sight of Him whose mercy elevates and makes perfect all human justice.

(Translated by MARIANNE COWAN)

133. IW at 188.

134. In a letter written while serving in the German army in 1916, and addressed to his daughter, Radbruch stated: “Es gibt zum letzten Ende nur Gott und die Seele.” [“In the final analysis there is nothing but God and the soul.”] IW at 129.