Gustav Radbruch's Notion of State

Marina Lalatta Costerbosa

Department of Philosophy
University of Bologna
Via Zamboni, 38
I-40126 Bologna, Italy
marina.lalatta@unibo.it

Radbruch, a critical legal philosopher

Gustav Radbruch is commonly regarded by legal theorists and historians of philosophical thought as a legal positivist who, after witnessing the upheaval of Nazi violence, returned to the classical doctrine of natural law. This portrayal does not, in our opinion, account for either the complexity of Radbruch's philosophy during the Weimar years or for his post-1945 theoretical approach.

From the very beginning of his academic and biographical career, Radbruch was an unconventional legal positivist. Because of his originality, it would be more correct to describe him from the outset as a *critical* legal positivist. With deep adherence to this theoretical position, after the fall of Hitler's criminal regime, he did not become a traditional natural law jurist, anchored again to metaphysical principles. The new appeal to a non-positivistic concept of law is, in short, only a partial revolution of his theoretical perspective. There are elements that do not change and that, in their persistence, complicate the concept of law.[1]

Moreover, the internal reworking that he gave himself was both a necessity and a moral duty; a moral duty that, for Radbruch, the German jurists of the past should also have taken upon themselves. They should have had the courage to condemn the perversion of law carried out by the Nazis, the inner strength and the deontological consistency to refuse their own collaboration, even their own complicity with the regime. They would have had the duty to confront themselves and their own theories with the twelve years of National Socialist totalitarian domination, drawing all the consequences, on a civil and theoretical level. Unfortunately, this was not the case, as Radbruch regretfully recognised.

[1] See more widely, Marina Lalatta Costerbosa, *Il diritto in una formula. Saggio su Gustav Radbruch*, DeriveApprodi, Bologna 2024. <https://cris.unibo.it/item/preview.htm?uuid=3d2c88bc-e010-4820-a3be-b08539674020>; and, from a historico-philosophical perspective, Gaetano Rametta, *Giurisprudenza e crisi della normatività nel neokantismo: Rickert e Radbruch* (in print).

In the draft of the postface conceived by Radbruch for a new edition of *Rechtsphilosophie* (draft found in the *Nachlaß*), we find a very eloquent passage on this matter:

> In the face of such documents, the Nuremberg judgement speaks of a 'cynical and open disregard for all law'. The word 'cynical' does not suffice; the National Socialist rulers did not just cynically, i.e., shamelessly, show vice in pure nakedness; what is worse, they transformed vice, e.g., fanaticism, brutality and harshness, into virtues. In the field of law, the perversion of vice into law is forever characterised by three names: Frank, Freisler and Thierack. The many individual judges who resisted such judicial dishonour must unfortunately remain unrecognised" [2].

They were certainly a minority, but they were there: cowardice, cynicism and perversion of the profession were rampant; and Radbruch would like to give voice to the silence of the dissenters.

Whether or not there is continuity or a caesura in Radbruch's philosophical reflection concerning the concept of law is, indeed, still an open question, even for recent historiography.[3] It is indisputable that after the Second World War he expressed the conviction that legal positivism could only remain the last word for a definition of law, and that his normative intention could not be resolved in a posthumous return to an outdated notion of natural law.[4] However, it should be noted that in the last paragraph of *Vorschule der Rechtsphilosophie*, he concludes by stating that "[t]he collapse of the National Socialist state of injustice repeatedly poses questions for German jurisprudence that traditional positivism is unable to answer."[5] In the face of this latter conviction, the philosophy of law takes on a new task, rediscovering its old vocation: a normative vocation that Radbruch had never denied:

> General legal theory, universal history and the sociology of law were therefore addressed as substitutes for philosophy or even as philosophy. In

---

[2]Gustav Radbruch, 'Nachwort-Entwurf zur "Rechtsphilosophie"', in *Rechtsphilosophie.* Studienausgabe, ed. by Ralf Dreier, Stanley L. Paulson, C.F. Müller, Heidelberg 1999, p. 193-208: 199: "Angesischts solcher Dokumente redet das Nürnberger Urteil von einer 'zynischen und offenen Missachtung allen Rechts'. Das Wort 'zynisch' genügt nicht; die nationalsozialistischen Machthaber haben nicht etwa nur zynisch, d.h. schamlos das Laster in reiner Blösse gezeigt, sie haben, was schlimmer ist, das Laster, z.B. Fanatismus, Brutalität und Härte, zu Tugenden umgeprägt. Auf dem Gebiete des Rechts ist di Perversion des Unrtechts zum Recht für immer durch drei Namen gekennzeichnet: Frank, Freisler und Thierack. Die vielen einzelnen Richter, die solcher Justizschmach Widerstand geleistet haben, müssen leider ungeknannt bleiben".

[3] Giuliano Vassalli, *Formula di Radbruch e diritto penale. Note sulla punizione dei "delitti di Stato" nella Germania postnazista e nella Germania postcomunista*, Giuffrè, Milan 2001, p. 29 ff. Furthermore, Thomas Mertens, Radbruch and Hart on the Grudge Informer. A Reconsideration, in "Ratio Juris", vol. 15, n. 2, 2002, p. 186-205.

[4] Vassalli, *Formula di Radbruch e diritto penale*, p. 22.

[5] Gustav Radbruch, Vorschule der Rechtsphilosophie (1948), in Id., *Gesamtausgabe*, *Vol. 3: Rechtsphilosophie III*, ed. by Winfried Hassemer, C.F. Müller Juristischer Verlag, Heidelberg 1990, p. 121-228: 226: "[d]er Zusammenbruch des nationalsozialistichen Unrechtsstaates stellt die deutsche Rechtsprechung immer wieder vor Fragen, die der überkommene Positivismus nicht zu beantworten vermag".

> view of the shake-up of our value system, however, we are particularly inclined today to see philosophy as the science of values, as the science of 'ought'. As such, it teaches us how to think correctly in logic, how to act correctly in ethics and how to feel correctly in aesthetics. Correspondingly, the philosophy of law is the science of just law (Rudolf Stammler). It therefore deals with the values and goals of law, with the idea of law and ideal law, and finds its continuation in legal politics, which has the realisability of ideal law as its object.[6]

The cultural nature and historical character inherent in law is thus confirmed.

In the historiographical debate on Radbruch's thought, there are scholars who, in spite of this evidence, downgrade the value and stability of the theoretical outcome of the so-called "second phase" of his reflection, relegating it to mere judicial praxis, to advice of prudence at the disposal of the judge.[7] And there are interpreters who grasp its theoretical depth but contest its legitimacy, given the conditioning that this normative twist suffered in the face of the tragic events linked to Nazi-fascist domination in Europe.[8]

In our view, the accusations levelled against Radbruch, according to which he is even guilty of betraying the legal positivist doctrine, as if the legal positivist doctrine were a faith to be dogmatically endorsed, are frankly inadmissible. It is not the case; first of all because Radbruch has always been a legal positivist *sui generis*. But above all, it is not about a betrayal, but about a change in his own view of law. He would have in the event—though in our opinion this did not happen—changed his own conviction, which would have attested, if there was any need, his complete distance from (here ideological) fanaticism (in tune with Amos Oz's lectures on fanaticism). He has been accused of internal incoherence of the theory, of excessive exposure to historical contingency of ideas that should—it is argued—exist in full abstraction.

All of these criticisms are burdened with prejudice and a kind of scientific-disciplinary moralism, as if criticism and the progress of knowledge did not also

---

[6] Ibidem, § 6, I, p. 137: "Allgemeine Rechtslehere, Universalgeschichte und Rechtssoziologie wurden deshalb als Ersatz der Philosophie oder gar als Philosophie angesprochen. Angesichts der Erschütterung unseres Wertsystems wird man heute dagegen besonders geneigt sein, die Philosophie als Wissenschaft von den Werten, als Wissenschaft vom Sollen aufzufassen. Als solche lehrt sie uns in der Logik das richtige Denken, in der Ethik das richtige Handeln, in der Ästhetik das richtige Fühlen. Entsprechend ist die Rechtsphilosphie die *Lehre vom richtigen Recht* (Rudolf Stammler). Sie handelt also von den Werten und Zielen des Rechts, von der Idee des Rechts und vom idealen Recht, und findet ihre Fortsetzung in der Rechtspolitik, welche die Verwirklichungsmöglcihkeiten des idealen Rechts zu ihrem Gegenstand hat".

[7] Brian H. Bix, 'Radbruch's Formula and Conceptual Analysis', in *The American Journal of Jurisprudence*, vol. 56, 2011, p. 45-57.

[8] Bernd Schünemann, 'Per una critica della cosiddetta Formula di Radbruch. Note su un concetto di diritto culturalmente e comunicativamente orientato', in *i-lex. Scienze Giuridiche, Scienze Cognitive e Intelligenza artificiale*, n. 13-14, 2011, p. 109-120; Douglas G. Morris, 'Accommodating Nazi Tyranny? The Wrong Turn of the Social Democratic Legal Philosopher Gustav Radbruch After the War', in *Law and History Review*, vol. 34, n. 3, 2016, p. 649-688.

depend on the willingness to recognise errors and revise theoretical approaches that had hitherto been considered safe.[9]

Furthermore, it should not be forgotten that Radbruchian legal positivism never resolved itself, and never presented itself, even in its germinal phase, as a purely formalistic and therefore legalistic positivism. Rather, it was always a theory of positive law anchored to minimum standards of morality, including Kantian references to a deontological morality referable to respect for the law.[10] The form of the law in its pure formality never represented, for Radbruch, the necessary and sufficient requirement to affirm the legal status of a provision or an order. This conviction found further confirmation and inevitably drew new strength in the post-World War II period, once the impotence of the law-form in resisting its fiercest instrumentalisation had been tragically revealed.[11]

What "natural law"?

How then to interpret his explicit revival of natural law in the second half of the 1940s?

For Radbruch, at stake was a clear assumption of responsibility, which could not but refer back to the theoretical and epistemological status of the category of natural law. At that time and in that cultural context, natural law in some form represented for him the only source of universalistic normativity. It is therefore understandable and inevitable that, as a critical-normative instance, a reformulation of the ancient category of natural law resurfaced from the ashes.[12]

As we have already pointed out, it is not a re-proposition of the identical—of a nostalgic or reactionary reiteration of natural law. That would be a gesture out of time, no longer justifiable metaphysically or rationalistically. On the contrary, in his inaugural address *Der Mensch im Recht* (1927), he had shown with unquestionable clarity his sense of history and historical change. In that lecture, read in front of colleagues at the University of Heidelberg, he had emphasised how indispensable it always was for him that a reflection on law and its concept should take into consideration the evolution of institutions over time, an evolution closely linked to changes in the idea of man that occur in various historical epochs.[13] There are therefore many variables that necessarily make the ideal of justice

[9] Thomas Mertens, 'But Was it Law?' in *German Law Journal*, vol. 7, n. 2, 2006, p. 191-197, but also, for example, Zong Uk Tjong, 'Über die Wendung zum Naturrecht bei Gustav Radbruch', in *ARSP: Archiv für Rechts- und Sozialphilosophie*, vol. 56, n. 2, 1970, p. 245-264.

[10] On this point, we refer mainly to Dreier and Paulson in 'Einführung in die Rechtsphilosphie Radbruchs', in *Radbruch, Rechtsphilosophie. Studienasugabe*, p. 235-250: 247-250; and Erik Wolf, 'Umbruch oder Entwicklung in Gustav Radbruchs Rechtsphilosophie?' in *ARSP: Archiv für Rechts- und Sozialphilosophie*, vol. 45, n. 4, 1959, p. 481-503.

[11] Radbruch, *Die Erneuerung des Rechts*, in Id., *Gesamtausgabe*. Vol. 3: "Rechtsphilosophie III", ed. by Winfried Hassemer, p. 108.

[12] Cfr. Gustav Radbruch, *Neue Probleme in der Rechtswissenschaft*, in *Gesamtausgabe*. Vol. 4: "Kulturphilosophie und Kulturhistorische Schriften", ed. by Günter Spendel, C.F. Müller Verlag, Heidelberg 2002, p. 232-235.

[13] Radbruch, *Vorschule der Rechtsphilosophie* (1948), in Id., *Gesamtausgabe*. Vol. 3: "Rechtsphilosophie III", ed. by Hassemer, § 6, IV, pp. 139-140.

changeable, which then corresponds, for Radbruch, to the ideal of fairness, of the universal principle of equality commensurate with the diversity among people, in their individuality:

> Justice contains within itself an insurmountable tension: equality is its essence, generality is therefore its form – and yet the endeavour to do justice to the individual case and the individual person in their uniqueness is inherent in it. This desired justice for the individual case and the individual human being is called *equity*.[14]

What idea of 'state', what relationship with law?

Against this general backdrop, Gustav Radbruch's notion of the state must be reconstructed by taking into consideration his entire work.

This is what we shall attempt to do, starting therefore with his writings from the first decades of the 20th century, where a critical-normative concept of the state was already surfacing, up to his latest production, that of the post-World War II period, a phase that had an understandable and undeniable evolution. Yet precisely in light of these changes, the unitary study of his essays, handbooks and contributions of a different nature (literary papers, parliamentary interventions, book reviews, etc.) allows us to confirm a reading of Radbruch's thought as a dynamic but ultimately cohesive whole.

Let us note at the outset that the question of the nature of the state – of what the state is – never attained a central position in Radbruch's thought. It is explicitly and specifically addressed both in *Rechtsphilosophie*, in paragraph 26 of the third edition of 1932 (a significantly expanded version of the two previous editions), and in *Vorschule der Rechtsphilosophie* (1948), specifically in paragraph 11 of the third chapter.

The answer to the question of the state must therefore be traced by referring both to texts from the Weimar era, in which the complexity of the Radbruchian version of legal positivism is evident, and to those at the origins of the quasi-naturalistic outlook of the post-World War II period, essentially represented by the three writings from 1945-1948: *Fünf Minuten der Rechtsphilosophie*, *Gesetzliches Unrecht und übergesetzliches Recht* and *Vorschule der Rechtsphilosophie*.

In order to define his idea of the state, in *Rechtsphilosophie* our Lübeckian philosopher initially advances from a fundamental distinction between the concept of the "real" state (*Wirklichkeitsbegriff*) and the concept of the "legal" state

[14] *Ibidem*, § 7, V, p. 143: "Die Gerechtigkeit enthält in sich eine unüberwindliche Spannung: Gleichheit ist ihr Wesen, Allgemeinheit ist deshalb ihre Form – und dennoch wohnt ihr das Bestreben inne, dem Einzelfall und dem Einzelmenschen in ihrer Einzigartigkeit gerecht zu werden. Man nennt diese erstrebte Gerechtigkeit für den Einzelfall und den Einzelmenschen *Billigkeit*".

(*Rechtsbegriff*).[15] Ronald Dworkin, more than a century later, would perhaps have called the former a "criterial" concept of the state and the latter an "interpretative" concept of the state, a cultural concept (*Kulturbegriff*), a concept that belongs to the sphere of "value-related concepts" (*wertbezogene Begriffe*)—as Radbruch would put it in Paragraph 11 of *Vorschule*—hence neither "value concepts" (*Wertbegriffe*) nor "being concepts" (*Seinsbegriffe*).[16]

The difference between the two concepts (the real and the legal) is of primary importance and Radbruch attempts to explain their meaning and relevance by proposing a first analogy with the aesthetic world and a second analogy with the universe of science.

The difference between the "legal" and the "real" concept of the state corresponds to the difference expressed, for example, in the concept of "Kunst" (art): "both an ideal concept and a yardstick by which the inartistic is expelled from the realm of art, like a concept of reality that encompasses all artistic achievements of a time, both artistic and kitschy."[17] It is useful to understand that the *ratio* of the distinction is the reference to the notion of "science" (*Wissenschaft*), which "on the one hand means the standard of truth of cognitive activity, by which one measures unsuccessful cognition as unscientific,"[18] therefore, a valuable concept to expunge superstition, pseudoscience, erroneous beliefs from the sphere of science, and "on the other hand, the historical concept of culture. The scientific truth and scientific error are value-neutral in themselves."[19]

Or finally, the concept of "Kultur" is eloquent, which "itself can be understood both as an ideal for the historical-social cultural facts and as the essence of these cultural facts themselves."[20]

Returning to our reflection on the idea of the state as a legal concept, the term "state" is valid as an authentic concept, corresponding to the legal institution as such, e.g. the German Reich as expressed in the Weimar Constitution. Or it may be valid as a legally relevant concept, i.e., factual, representative of the rights and duties of the state, established in the Weimar Constitution, a text in which the term frequently recurs.

This preliminary clarification is due to the semantic complexity of the concept of the state, which can be understood first and foremost—as we have seen—as a real concept and as a legal concept, and the latter in turn can be interpreted in a dual meaning: as an "authentic" legal concept, whereby the content of the norm is also taken into consideration, or, more externally, in a socio-historical sense, as a

---

[15] Gustav Radbruch, 'Rechtsphilosophie', in Id., *Gesamtausgabe*. *Vol. 2: Rechtsphilosophie II,* ed. by Arthur Kaufmann, C.F. Müller Juristischer Verlag, Heidelberg 1993, p. 206-450: § 26, p. 420.

[16] Radbruch, *Vorschule der Rechtsphilosophie*, § 11, II, p. 150.

[17] Radbruch, *Rechtsphilosophie*, § 26, p. 420: "zugleich ein Idealbegriff und Maßstab ist, mittels dessen man das Unkünstlerische aus dem Reiche der Kunst verweist, wie ein Wirklichkeitsbegriff, der alle Kunstleistungen einer Zeit, künstlerische wie kitschige, umfaßt".

[18] Ibidem: "einerseits den Wahrheitsmaßstab der Erkenntnistätigkeit bedeutet, an dem man mißglückte Erkenntnis als unwissenschaftlich mißt".

[19] Ibidem: "[A]nderseits den historischen Kulturbegriff. Der wissenschaftliche Wahrheit und wissenschaftlichen Irrtum wertneutral in sich schließt".

[20] Ibidem: "selbst sowohl als Ideal für die geschichtlich-gesellschaftlichen Kulturtatsachen wie als der Inbegriff dieser Kulturtatsachen selbst verstanden werden kann".

"legally relevant" concept. Against this background, a further question arises, which is also valuable in providing an answer to the fundamental problem concerning the concept of the state: what relationship exists between the state (understood as an "echter" legal concept[21]) and the law?

According to Radbruch, law and power, or rather, the idea of law and the idea of the state, do not identify with each other. The purpose of the state, *raison d'État*, can conflict with the principle of legal certainty and the idea of justice. This is what was unfortunately made blatantly obvious during the years of the Nazi regime. It was revealed in all its crude brutality by the violent and criminal denial of any possible notion of credible justice; the complete overturning of it and its transformation into its opposite: the upside-down world imagined by Orwell and affirmed in reality, with the help of a pervasive practice of political lies, a racist logic cloaked in pseudo-science, a deep-rooted authoritarian culture, and the unscrupulous exploitation of resentment, the need for community, and the identity crisis, which were widespread in German civil society.

The very foundations of law were thus destabilised: not only its justice, but its very correctness.[22] Legal certainty is, after all, an essential part of the idea of justice although it does not exhaust it: it counteracts arbitrariness and privilege by providing for separation of powers, transparency and stability of legislative procedures.

In *Rechtsphilosophie*, Radbruch reformulates and correctly applies to the conception of the state, the traditional Hume's law, where he asserts that "'normativity of the factual' is a paradox; an ought can never arise from a being alone, a fact such as the view of a certain epoch can only become normative if a norm has assigned this normativity to it."[23] And in *Vorschule*, Radbruch explicitly refers to Kantian philosophy precisely to reinforce the thesis of impossibility "deriving values from reality, basing an ought on facts of being, transforming natural laws into norms,"[24] and at the same time not disqualifying the realm of morality; rather, attributing to it an independent value and a nature justly not derivable from material existence in the world.

By this route, the doctrine of the "normativity of the factual" that Radbruch traces in Georg Jellinek's theory of law, but which, generalising, belongs to the widespread imperativist and decisionist legal positivist theses, takes on a paradoxical aspect in its own right. Radbruch emphasises the independence of the normative sphere, whose justification therefore cannot derive from factual reality or scientific evidence, but from the goodness of its own moral foundation. One is inevitably pushed beyond mere positive law and the mere effectivity of the actual occurrence of the state, because, "It is precisely state and legal positivism taken

[21] Ibidem.

[22] Radbruch, *Vorschule der Rechtsphilosophie*, § 9, II, p. 147-148.

[23] Radbruch, *Rechtsphilosophie*, § 26, p. 422: "'Normativität des Faktischen' ist ein Paradoxon, aus einem Sein allein kann nie ein Sollen entspringen, ein Faktum wie die Anschauung einer betimmten Zeitepoche kann nur normativ warden, wenn eine Norm ihm diese Normativität beigelegt hat".

[24] Radbruch, *Vorschule der Rechtsphilosophie*, § 6, II, p. 137: "Werte aus der Wirklichkeit abzuleiten, ein Sollen auf Seinstatsachen zu gründen, Naturgesetze in Normen umzuprägen".

to its logical conclusion that presupposes a principle of natural law,"[25] Radbruch admits already in *Rechtsphilosophie*.

Confirming the clarity of the Radbruchian analysis, recent interpretations of the so-called "Hume's principle" come to mind on this point. For example, Ronald Dworkin and, before him, Hans Jonas, reject any reading that aims to disqualify the field of morality on account of its factual non-demonstrability.[26] At the core lies a correct observation: from the descriptive sphere, the dimension of what is, one cannot deduce what should be, the sphere of prescriptiveness. But from this evidence it would not be correct to derive the unfoundedness of the normative or prescriptive dimension, but rather its independence from that of mere factuality. The prescriptive therefore emerges strengthened and not challenged. It is in this way defended and not questioned, because its self-sufficiency is claimed from the realm of brute facts.

From this perspective, the step separating us from a certain interpretation of natural law and the associated interpretative concept of the state is very short.

An interpretative concept of state

In 1932 Radbruch wrote: "If there is a supreme ruler in a community, what he orders should be obeyed."[27] The principle of legal certainty, which only political authority can guarantee and which explains this obedience, at the same time represents, on the other hand, a constraint, or rather, a limitation on the exercise of sovereign power. The intention behind the demand for recognition of the principle of legal certainty implies that the state must also be subject to the laws. "The same idea of legal certainty that calls upon the state to legislate also demands that it be bound by its own laws. The state is only called upon to legislate on the condition that it considers itself bound by its laws."[28]

The concept of state implies a claim of correctness towards the law from which can be inferred that it can never be considered *legibus solutus*. Against Hobbes, the state in its essence is a rule-of-law state, a state subject to the constraint of law.

Legal positivism and the concept of state in Radbruch's thought presuppose in this specific procedural sense a principle of natural law. "The state is thus bound

[25] Radbruch, *Rechtsphilosophie*, § 26, p. 422: "gerade der ganz zu Ende gedachte staatliche und rechtliche Positivismus einen naturrechtlichen Rechtssatz voraus".

[26] See Hans Jonas, *Das Prinzip Verantwortung. Versuch einer Ethik für die technologische Zivilisation*, Suhrkamp, Frankfurt am Main 1979, II, IV, § 6 and Ronald Dworkin, *Justice for Hedgehogs*, Harvard University Press, Cambridge, MA 2011, chap. 1.

[27] Radbruch, *Rechtsphilosophie*, § 26, p. 422: "Wenn in einer Gemeinschaft ein höchster Gewalthaber vorhanden ist, soll, was er anordnet, befolgt warden".

[28] Ibidem: "Derselbe Gedanke der Rechtsicherheit, der den Staat zur Gesetzgebung beruft, verlangt auch seine eigene Bindung an die Gesetze. Der Staat ist zur Gesetzgebung berufen nur unter der Bedigung, daß er sich durch seine Gesetze selbst für gebunde halte".

to its positive law by super-positive law, by natural law, by the same principle of natural law on which alone the validity of positive law itself can be founded."[29]

There is also a further limitation that cannot be overlooked. It corresponds to the recognition of the principle of equality, also understood as the principle of impartiality; the same principle that between 1945 and 1946 Radbruch would have defined as the fundamental principle of every democratic ideal of justice. Impartiality as a general normative principle allows the total conceptual extraneousness between a constitutional state (*Rechtsstaat*) and an unconstitutional state (*Unrechtsstaat*) to emerge clearly. "A state order that wanted to apply to individual people and individual cases as such would not be law, but arbitrariness,"[30] writes Radbruch in paragraph 26 of *Rechtsphilosophie*. And he concludes that the interest of the ruling class does not emerge in its nakedness, but rather "in the guise of law" (*im Gewande des Rechts*)*;* and "the content of the law is whatever it wants, the legal form always serves the oppressed."[31] The law has to be in favour of the dominated, the less advantaged and the weak, for whom it is always better to depend on the state and the law, rather than a coexistence without them, i.e., exposed to anomie.

With the coherence that would accompany him to the end of his days, following up on his ideas in his political and governmental activities, Radbruch tried for as long as possible, and as much as possible, to make fairer the constitutional legal system in force in Germany before the advent of Nazism.

He attempted to pursue this project of justice, in particular through personal civic and institutional commitment. And it is precisely in this context that we find a concise but limpid essay from the Weimar period entitled *Volk im Staat*, in which Radbruch succeeds in just a few pages in exhibiting the critical potential of his ideal conception of state and the centrality of the principle of equality as its criterion of legitimacy.

Particularly noteworthy are the harsh words of denunciation when he switches from the ideal plane to the desolate description of reality. The world of facts, the German society before him shows "[n]ot equality, but inequality of individuals, inequality of property, of education, in the best case still inequality of dispositions and, as a result, the difference between rulers and ruled, often rulers and dominated. Not individuals who choose and vote of their own free will and subsequently add up to majorities and minorities, but beings socialised to the core of their souls, social groups that impose certain decisions on their members externally or internally, with group-forming powers behind them: class

[29] Ibidem, p. 422: "Der Staat wird also an sein positives Recht gebunden durch überpositives, durch natürliches Recht, durch denselben naturrechtlichen Grundsatz, auf den die Geltung des positive Rechts selber allein gegründet warden kann".

[30] Ibidem, p. 423: "Eine staatliche Anordnung, die einzelnen Menschen und einzelnen Fällen als solchen gelten wollte, ware nicht Recht, sondern Willkür".

[31] Ibidem: "der Inhalt des Rechtes sei welcher er wolle, die Rechtsform immer gerade den Unterdrückten dient".

consciousness and leader suggestion, public opinion: street and press, behind this possibly the power of money majorities are potentiated minorities!"[32].

Conclusions

It seems clear that Radbruch was not only never a "traitor", never underwent a "conversion", but rather, in the face of devastating historical events, after witnessing the historical failure of an uncritical positive law, he had the honesty and courage to revise his ideas, to modify them, in search of a concept of law more suited to express his constitutive and basic demand for correctness.

In this sense, what gave strength to his determination was the same conviction that Arendt theorised a decade later, denying the Hitler regime, the Nazi law, and the power of the *Führer* the possibility of continuing to be called law and sovereign power. They originated on foundations of abuse and violence, of a "criminal legality", an oxymoron behind which lies a formalistic idea of law that Radbruch never fully accepted. As is well known, Arendt, in the epilogue to her *Eichmann in Jerusalem*, posed a question: "what sovereignty does a State like the Nazi State have? […] Can we apply the principles that apply to regimes in which crime and violence are exceptions and borderline cases to a regime in which crime is legal and indeed the rule?"[33]. The question becomes whether one can still speak of sovereignty, whether that form of domination can still be called a state, in a sense not only rhetorical, but conceptually relevant.

Thus, through this path, the question of the definition of the concept of state is transformed into the more radical issue of the distinction between an unjust state and a non-state. The semantic space of the concept of state, if properly understood, lies between the ideal of a well-ordered society (impartial and capable of honouring the value of equality) and a criminal regime. This middle position is not uniform, being capable of sustaining its own internal modulation: between a state not too far from acceptable standards of justice and an unjust state, the nuances are many, as are the possible variants of law, in its ranging from a law with a constitutional high-profile to an unjust law. The point is that even with such variability, even with a more or less intense rate of injustice, one can still speak in the former case of state and in the latter of law.

---

[32] Gustav Radbruch, 'Volk im Staat', in *Gesamtausgabe*. *Vol. 12: Politische Schriften aus der Weimarer Zeit - I. Demokratie, Sozialdemokratie, Justiz*, ed. by Alessandro Baratta, C.F. Müller, Heidelberg 1992, p. 26-32: 26-27: "[n]icht Gleichheit, sondern Ungleichheit der Einzelnen, Ungleichheit des Besitzes, der Bildung, im besten Falle noch immer Ungleichheit der Anlagen und, dadurch bedingt, der Unterschied von Führern und Geführten, oft Führern und Angeführten. Nicht Einzelne, die aus freien Eigenentschluß wählen und stimmen und sich nachträglich zu Mehrheiten und Minderheiten summieren, sondern bis in den Kern ihrer Seele vergesellschaftete Wesen, soziale Gruppen, die ihren Mitgliedern bestimmte Entscheidungen äußerlich oder innerlich aufnötigen, unter hinter ihnen gruppenbildende Mächte: Klassenbewußtsein und Führersuggestion, öffentliche Meinung: Straße und Presse, hinter dieser möglicherweise die Macht des Geldes Mehrheiten sind potenzierte Minderheiten!"

[33] Hannah Arendt, *Eichmann in Jerusalem. A Report on the Banality of Evil*, The Viking Press, New York 1963, Postscript, p. 290.

In the concluding remarks of paragraph 13 of *Rechtsphilosophie*, Radbruch observes: "that the law is in the midst of polar tensions in an unstable equilibrium that is always under threat and has to be constantly re-established."[34] But it is above all in *Vorschule* that this idea fully blossoms.

When, then, is the state no longer a state?

In the third chapter, after reaffirming that law is constituted of positive laws and customs, that it does not record facts but regulates reality through the norms of collective life, of living in society, he states that where the recognition of these norms is lacking, it is the state itself that disappears, and mere domination remains. The difference between the state (legally or conceptually understood) and domination lies in the presence or absence of certain essential characteristics. "Even expressions of the will of the state, if they lack one of these characteristics, are only pronouncements of power without the nature of law. Where, for example, the general nature of law is deliberately denied and justice is not even sought, the orders thus created can only be decrees of power, never legal principles."[35]

Not every form of dominion can be called a state, not every centralised power can be called sovereign. Neither the state nor the sovereign are brute instances of force capable of obtaining obedience: both must fulfil the minimum requirements of lawfulness. "Thus the state that legalises only one party and excludes other associations of the same character, the 'one-party state', is not a legal entity; thus the law that denies human rights to certain people is not a legal principle. There is therefore a sharp boundary here between law and non-law."[36]

Ultimately, a clear indication of what Radbruch's position is may already be obtained from the exergue chosen for paragraph 26 of *Rechtsphilosophie*, the one—as we have seen—entirely dedicated to the concept of the state as a constitutional state.

It is a passage by Friedrich Schiller, the poet and writer, and a fraternal friend of the late 18th century German democrat, Wilhelm von Humboldt. It reads: "Mistrust yourselves, noble lord, lest the benefit of the state appear to you as justice!"[37]

---

[34] Radbruch, *Rechtsphilosophie*, § 13, p. 338: "daß das Recht im labilen, stets bedrohten und immer neu wiederherzustellenden Gleichgewicht inmitten polarer Spannungen steht".

[35] Radbruch, *Vorschule der Rechtsphilosophie*, § 11, II, p. 151: "Auch Willensäußerungen des Staates sind, wenn sie eines dieser Merkmale entbehren, nur Machtsprüche ohne Rechtsnatur. Wo also z.B. die generelle Natur des Rechts bewußt verleugnet, Gerechtigkeit nicht einmal erstrebt wird, können die so geschaffenen Anordnungen nur Machtsprüche sein, niemals Rechtssätze".

[36] Ibidem: "So ist der Staat, der nur *eine* Partei legalisiert und andere Verbände gleichen Charakters ausschließt, der 'Einparteinstaat', kein Rechtsgebilde; so ist das Gestez, das gewissen Menschen die Menschenrechte verweigert, kein Rechtssatz. Hier ist also eine scharfe Grenze zwischen Recht und Nicht-Recht gegeben.

[37] Radbruch, *Rechtsphilosophie*, § 26, p. 418: "Mißtraut Euch, edler Lord, daß nicht der Nutzen Des Staats Euch als Gerechtigkeit erscheine!"