CHAPTER 3

THE THEORY OF GUSTAV RADBRUCH

1. INTRODUCTION

The subject of this chapter is the theory of Gustav Radbruch. Radbruch, who lived from 1878 until 1949, was a prominent philosopher of law, criminal law jurist and social-democratic politician in Germany. Most of his life he taught at German faculties of law, in Königsberg, Kiel, and Heidelberg, but he also served as minister of justice for a short period in the Weimar Republic. In 1933 he was fired as a professor in Heidelberg by the Nazi regime and he led a private life until his rehabilitation in 1945, when he became Dean of the Heidelberg faculty of law.¹

Radbruch was a scholar with a wide range of interests, whose writings vary from a draft of a criminal code (1922) to essays on Shakespeare and Goethe. His main interests were legal philosophy and criminal law theory, both of which he pursued throughout his career.² His political interests are not only apparent from his career as a social-democrat, but also from his writings on socialism and his contributions to public debate. During the Nazi regime he was unable to pursue his usual subjects because these were deemed threatening to the state. He turned to more historical and literary themes, writing a biography of Feuerbach and a collection of essays on biographical and literary subjects: Gestalten und Gedanken. As the result of a year in Oxford, he wrote a short account of English law: Der Geist des Englischen Rechts (1947).³

However, what interests me here is Radbruch’s work on ideals and law,

¹ For more biographical information, see Kaufmann’s introduction to the Gesamtausgabe (GRGA 1, p. 7-88), his biographical study of Radbruch (Kaufmann 1987), and Radbruch’s autobiography Der Innere Weg (Radbruch 1951).
² His dissertation on the concept of action in criminal law is witness to both (Radbruch 1903). See volumes 7-10 of the Gesamtausgabe for his work in criminal law.
³ For the Feuerbach biography (Paul Johann Anselm (von) Feuerbach: ein Juristenleben erzählt, 1934) see GRGA 6; the essays in Gestalten und Gedanken (1944), depending on their subject, are to be found in GRGA 5 (literary writings) and GRGA 16 (biographical writings); Der Geist des Englischen Rechts in GRGA 15 (comparative law). On Radbruch in Oxford (1935-1936), see Vulpius 1995.
which for Radbruch was a subject of legal philosophy. His methodological point of view entailed that there is a separation in the subject matter and method of legal philosophy and legal science, the first of which is occupied with the values of law. Since Radbruch saw legal science as separate from legal philosophy, it seems warranted to focus on his philosophical works. The reader will notice that references in the following discussion are predominantly to the Rechtsphilosophie of 1932. The reason for this is that the Rechtsphilosophie is Radbruch’s most complete account of his legal philosophy. Although he has elaborated on many of its themes and has revised some of its tenets, the fundamental ideas of his theory, especially those on values, are presented most clearly in the Rechtsphilosophie. Therefore I have opted to concentrate on this book and to confine the discussion of other works to points where these provide important additions or changes to the argument.

The structure of this chapter is as follows. I will start with an explanation of Radbruch’s philosophical principles, his methodological dualism or triadism and his relativism, and relate those to theorists who influenced Radbruch’s thinking. I will then turn to Radbruch’s theory of law and try to show how his philosophical position shapes his legal theory. Finally, I will discuss the famous issue of Radbruch’s turn from legal positivism to natural law and consider the relevance of this issue for this study.

2. RADBRUCH’S GENERAL PHILOSOPHICAL VIEWS

In this section I will discuss Radbruch’s views on general philosophical questions, such as his ideas on method and the nature of philosophy and science. I will relate these general ideas to law in the next section. Radbruch builds his philosophy on two pillars: methodological dualism and relativism. I will first discuss his account of dualism and go on to examine related themes that seem to relax the dichotomy involved in his dualistic view. I will conclude

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4 Page references are to the Gesamtausgabe (GRGA). Here I have used the first three volumes of the GRGA, which deal with his legal philosophy. I refer to the year of first publication and the page in the GRGA. Thus, the Rechtsphilosophie is 1932, p. 205-450 (in GRGA 2). In the edition prepared by Dreier and Paulson, there is a table comparing the page numbering of the different editions of the Rechtsphilosophie (1999, 234).

5 The 1932 edition was the third, but the first two editions appeared under the title Grundzüge der Rechtsphilosophie (1914) and were so much revised in 1932 that the two can be regarded as separate works.

6 Science is the translation of Wissenschaft, which is a broad notion of science, including all academic disciplines.
this section with a discussion of Radbruch’s relativism.

Methododualismus & Methodentrialismus
Radbruch’s methodological starting point is the Kantian distinction between is and ought (Sein und Sollen) (1932, 230). Because there is a strict separation between what is and what ought to be, arguments concerning the ought, or the realm of value, can only consist of value statements. Any conclusion about values can only be justified by appealing to higher value statements, not by using statements of fact. This is what Radbruch calls methodological dualism (Methododualismus). We should preserve the clear distinction between is and ought in all our scientific pursuits and never base judgments of value on factual judgments or vice versa.

The dualism of is and ought was given great emphasis by the neo-Kantian school of thought at the end of the nineteenth and the beginning of the twentieth century. The Heidelberg or Southwest-German neo-Kantian school, of which Wilhelm Windelband, Heinrich Rickert, and Emil Lask are the main exponents, developed the distinction between reality and value (Wirklichkeit und Wert) into a doctrine about the nature of philosophy and science. Radbruch goes beyond the ideas of the neo-Kantians in many respects, especially in regard to law, but some of his basic philosophical tenets are based on the ideas of Windelband, Rickert, and Lask. The Heidelberg neo-Kantians saw the distinction between reality and value as the basis for the distinction between science and philosophy: science is concerned with realities and philosophy with values. The three traditional branches of philosophy — logic, ethics, aesthetics — can be seen as examining the determination of value in relation to the three highest values: the true, the good, and the beautiful (Windelband 1903, 27-28). While philosophy is the critical examination of the validity of values, science is the examination of empirical realities. These, however, are not all of the same kind: there is nature and culture. The two are distinguished by their relation to values: nature has nothing to do with values, while culture designates the reality that is oriented towards values. Examples of this are art, which pursues the value of beauty, and law, which strives for

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7 Contrast with the Marburger neo-Kantian School of Cohen and Natorp, which was an important influence on the legal philosopher Stammel. Hans Kelsen is also regarded as influenced by neo-Kantianism, although opinion is divided which school exercised the most profound influence (see Dreier & Paulson 1999, 237n). Generally on neo-Kantianism, see Ollig 1979.

8 See Radbruch’s own references in the foreword to 1914 (GRGA 2, 13) and the first footnote in 1932, 221. On neo-Kantian influences in Radbruch’s work, see further Kim 1966 (6-47), Seidel 1999 (62-69), König 1999 (222-229).
The Concept of Ideals in Legal Theory
Taekema, S.
2003, IX, 253 p., Hardcover