

*Philosophy*

## General Antecedents of Philosophy by Gustav Radbruch

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**ABSTRACT.** According to Radbruch, legal philosophy is a part of philosophy. He considers it essential to discuss general antecedents of philosophy. He points out that his views are based on the ideas of Windelband, Rickert and Lask. According to Radbruch, our life experience is formed by objective reality which represents a “raw material”, and in which reality and value are chaotically intertwined with each other and have unregulated relationship. We apperceive the people and the objects by their values, whether they have or not. He believes that the initial task of mind is the necessity of separating our own “self” from reality, confronting ourselves to it and thus, separate value from reality. Mind learns to turn off its evaluative consciousness or use it purposefully on occasions. Thus, at the beginning we unconsciously create “realm of nature” from chaos, as nature is nothing else than objective reality – a datum at present which is free from evaluation. After the mind determines particular scale of values and their interconnection as a “realm of values” , it opposes the “realm of nature”. Considering these general principles, Radbruch argues that justice should be understood within the framework of categories which belong to values. In his opinion, justice is the part of culture, same as the fact which is attributed to values. The notion of justice can be defined as a “datum at present” and its essence is the realization of the idea of justice. As far as the idea of justice belongs to the realm of values, its cognition and examination is feasible only with special evaluative reasoning method. This is the purpose of legal philosophy. As far as justice is concerned as a reality or the element of culture, it is to the subject of “legal theory” research. Radbruch defines legal philosophy as a science concerning legal values. As for the idea of justice, Radbruch perceives it in Kantian viewpoint that is the concept of perfection which we can approach to though cannot be fully attained. It can be the source of positive law making and the criteria of evaluating legal reality. © 2017 Bull. Georg. Natl. Acad. Sci.

**Key words:** legal philosophy, legal theory, legal values, positive law, natural law, legal order

Gustav Radbruch is an eminent legal philosopher who greatly affected the twentieth century legal thought. His most significant work - “Legal Philosophy” was published in 1932. After the end of the World War II, two shorter papers – “Five Minutes of

Legal Philosophy” and “Statutory Lawlessness and Supra-Statutory Law” were added to this work, where the legal positivism and Nazism are criticized. “We should strive for justice and at the same time forget its constituent element - the legal stability and re-

build a legal state where both of these ideas have been implemented, democracy is an undoubtedly kindness which is of great value. Legal State, like bread and the air, is vital, and the most important that a democracy includes is that it enables the existence of a legal state [1].

According to Radbruch, legal philosophy is a part of philosophy. He considers it essential to discuss general antecedents of philosophy. He points out that his views are based on the ideas of Windelband, Rickert and Lask. According to Radbruch, our life experience is formed by objective reality which represents a "raw material", and in which reality and value are chaotically intertwined with each other and have unregulated relationship. We apperceive the people and the objects by their values, whether they have or not. He believes that the initial task of mind is the necessity of separating our own "self" from reality, confronting ourselves to it and thus, separate value from reality. Mind learns to turn off its evaluative consciousness or use it purposefully on occasions. Thus, at the beginning we unconsciously create "realm of nature" from chaos, as nature is nothing else than objective reality – a datum at present which is free from evaluation. After the mind determines particular scale of values and their interconnection as a "realm of values", it opposes the "realm of nature". Considering these general principles, Radbruch argues that justice should be understood within the framework of categories which belong to values. In his opinion justice is the part of culture, same as the fact which is attributed to values. The notion of justice can be defined as a "datum at present" and its essence is the realization of the idea of justice [2]. As far as the idea of justice belongs to the realm of values, its cognition and examination is feasible only with special evaluative reasoning method. This is the purpose of legal philosophy. As far as justice is concerned as a reality or the element of culture, it is to the subject of "legal theory" research. Radbruch defines legal philosophy as a science concerning legal values. As for the idea of jus-

tice, Radbruch perceives it in Kantian viewpoint that is the concept of perfection which we can approach to though cannot be fully attained. It can be the source of positive law making and the criteria of evaluating legal reality.

The origination of law and legal norms is conditioned causally as any other phenomenon in the universe. However, it has a specific rule and structure of being as a form. The problem of genesis is different from the problem of value. Ideas, norms and ideals arise from empirical reality and humans also get to these ideals through empiricism. Observing the origination process and conditions of an idea, a norm or an ideal is just one thing, and it is quite another to evaluate ideal and norm; their value and importance. When we make such evaluation, is there any logic among our judgments. What is the supreme goal that we rely on when we show evaluative attitude towards the abovementioned phenomenon? By what can we justify the value of an idea or a norm?

The standpoint, which argues that the "great idea of justice" creates law, does not emanate from the fact that justice genetically, causally creates law as both Marxism and utilitarianism claim. It is rather based on the view that the idea of justice as a supreme value and criterion grants the value to law as a system of norms and social institution. This is a teleological point of view which is as important as a causal point of view. If something exists, it does not mean to conclude that it is true and it ought to be. "Kantian philosophy teaches: it is impossible to cognize what is valuable from the existing, what is true and what is not-being. Something is never true because it is, was and will be". "Withdrawal of value from reality is characteristic to logical and totally casual relations... in this case there is non-casual relationship between being and value" [2]. At the same time, even the knowledge of definite direction of the development does not give us the opportunity to judge the verity of developing in that direction [2].

Justice is the creation of a human whose essence can only be understood if we consider the goal that it

is directed to, i.e. the idea of justice. Justice aims to realize specific values. "The notion of justice belongs to the notion of culture that is the concept of value mediated to reality whose purpose is to serve legal value, the idea of justice [2]. The idea of justice is nothing more than justice". "Like a mother, justice gave a birth to law, because justice preceded law" (of course the logical aspect is considered here). "We have all the reasons to discuss justice as a way out because fair is absolute like kindness, truth and beauty, i.e. this is a value which cannot be drawn out from some other value" [there also]. "It is possible to see moral kindness in justice". According to another standpoint, there can be two kinds of justice. We can call fair to the adoption of law, following of law or the law itself. The first type of justice, especially the fairness of a judge, can be called honesty. In this case Radbruch does not refer to the justice, the criterion of which is positive law, but rather the one which is itself the criterion of positive law. As far as the idea of law belongs to the realm of values, its cognition and examination is only feasible with the help of evaluative reasoning method. This is solely the aim of legal philosophy. If we use evaluative study criterion in the examination of legal philosophy, then it may be interpreted as a doctrine of "true law". The idea of law itself represents constitutional principle and criterion of legal value at the same time.

Neo-Kantians including Radbruch are right in the fact that substantiation of the ultimate goal of an ideal with causality principle is impossible because it comes out from what "is" and not from what "ought" to be. The implementation ways and means of an ideal belongs to causality sphere. As for the human's goals, they should be substantiated – justified in other way, in particular through teleological interpretation. Necessity gives a task to human to order its goals and aspirations; to create a system of interconnected and subordinated goals and the means of their implementation. It subordinates one goal to another, moves from the given moment to the following, from the old to the new and so eventually, comes to the

absolute, unconditional ideal which is nothing but the idea of an ultimate goal for which everything is a method. Thus, the whole reality can be understood as staircase steps leading towards that goal. Here we mean the ultimate goal as an end in itself, which possesses the criterion of its own value in itself. In this regard, this goal as an idea is unconditional. At the same time, there is the question of how it originates and how a human comes to it. Everything in this world, whether material or ideal, has time, spatial and causal certainty. However, when we talk about unconditional, ultimate goal of an idea, we do not refer to its genesis and development, but rather its value: its importance as a principle. In this case we are not dealing with what it "is" but what it "ought" to be." The principles of not-being can be established and substantiated only through the other principles of not-being. For this reason the supreme principles of not-being are substantial. They are axiomatic. Their substantiation is impossible. They can only be acknowledged as being credible [2] due to the fact that they belong to the realm of values and not to the sphere of causality or abstract logic.

Although in Radbruch's opinion, the principles of not-being should not be substantiated with the inductive knowledge obtained from the facts of real essence, it does not mean that not-being as a goal has nothing to do with science. If a person is free in setting a goal, he is not free in selecting the means for achieving the goal. Here, he totally complies with the field of causality because he cannot create anything from emptiness. "Causality has an unlimited control on the selection of the means for each pursued goal; the relation between the means and the goals is nothing than the relation of a cause to effect [3]. Within the process of not-being implementation, a person leaves the abstract field of an idea and sets the whole reality, whole time and spatial and causal realm as an output point. The idea comes into contact with conditionable, ultimate means via a person. Human's will is not just the cognition of goals; it is the aspiration to the goal as well: specifically, imple-

menting the idea in the empirically given conditions. The answer to the question about how it can be implemented in reality lies with positive science which studies reality, its character and “rule of conduct”. This knowledge is essential in the process of selecting the goal implementation means. When it comes to the realization of the desirable, causality rules human activities. In the field of law “it is accepted that the selection of goals for the purpose of implementing the right goals is managed by what is called legal policy and not by legal philosophy”. From the very beginning the great importance of a goal must be formulated thoroughly in consciousness; also, the necessary means for its implementation and outcomes inevitably related to it must be defined. In Radbruch’s opinion, such evaluation of the selected means for legal goals is the sphere of legal philosophy.

From the idea of justice we can only make conclusion about attitudes towards different people, but we cannot judge their treatment practices. Radbruch’s example: in accordance with the idea of justice, theft deserves lighter penalty than murder. However, the fact that a murderer must be either confined in a prison or lashed to the breaking wheel and a thief must be hanged or fined does not rise from the idea of justice [2]. Therefore, we can conclude that it is important to have some other legal values which will complete fundamental value of law. Some philosophers (namely Radbruch) consider expediency to be such legal value: law together with justice aims to promote supreme value. These values are possible to be of different categories which were unable to come to an agreement with each other. Expediency is the second constituent part of the idea of law. However, it is not right to judge aim and expediency unequivocally. The answer can be relative. Legal philosophy should prevail this relativism because justice as the regulator of social life must not be conditioned by the differences of individual views: the nature of law lies in the fact that it is the supreme unified order; if values cannot come into agreement with each other, law will not be

able to take their implementation upon itself. It can be limited to the implementation of a particular group of values and expediency can be represented as the principle of selecting and regulating social goals containing values and according to which the law can turn “free” (e.i. legally unregulated yet) social reality into legal reality, e.i. subordinate it to legal norms is manifested as defined legal order.

However, legal order requires firmness and stability. The idea of law includes stability in itself, that is the firmness of legal order. Stability means the following: there must be unified, positive law, whose purpose is to create and maintain peace. These principles of the idea of law (justice, expediency, legal stability) sometimes eventuate or confront each other. Radbruch calls this “antonyms of the idea of law”. “Three elements of the idea of law: justice, expediency and stability rule the law altogether; however, they might come into fierce confrontation with each other”[2]. Justice means equality, which requires the generalization of norms, though in fact equality does not exist. According to Radbruch, equality is the creation of a human’s mind that holds a specific position. Hence, the expediency considers and individualizes inequality. Therefore, on the one hand it can cause a contradiction between expediency and justice, and on the other hand between expediency and legal stability; stability requires a unified system of positive law. The latter with its content and application can oppose justice or expediency. The possibility of their agreement can be expressed as: 1. the issue that whether or not the particular legal norm has a value, i.e. if it can be included in the concept of the law, should be resolved on the basis of justice; 2. the accuracy of legal norms should be resolved in terms of expediency; 3. and finally, the performance of a legal norm is determined by the relevance stability requirements. Theoretically, such agreement does not contain any logical contradiction, but in fact everything may occur in a different way: mostly, in the course of determining the content of the law either one moment plays a key role or the other. A police

state puts forward the principle of expediency; in the ruling of natural law, the determination of the content is tried to be reached on the basis of justice. Legal positivism comes out from only the inviolability of the law: “The law is the law” – the existence of legal order is more important than its justice and expediency.

The principle of the stability of the law may neither be enough, nor decisive during the implementation of the law. Attention must be drawn to the idea of justice, and the principle of expediency move to the background. It is obvious that this is the only idea of law; it might acquire unfair nature and make arbitrariness, contract violation, etc. a norm. Arbitrariness might be disguised under the form of law, and thus, it could expel the other principles of law – justice and legal stability. This was the case in Germany during fascism period when terrorist dictatorship, repressions and all lawlessness was considered “expedient” as far as it was “useful” for German “People”; thus, approving the necessity and “fairness” of fascist power. Innocence of the people’s will created basis for mental recognition. “The latest is also given to us in a form of political myths. Political myths, such as innocence of the people’s will, divine origins of monarchical order and many others represent the circumstances with the help of which we all perceive each other as potential performers of the determined legal system” [4].

Those members of the society who slavishly followed the political myths were forced to accept them as being the major value and the source of justice. The will of German people was considered to be the source of the Fascist law: justice is what people need – this was the concept of the Fascist law; Bolshevik regime was also idealizing “the will of the people”: “the will of the people” was understood as an ultimate and absolute criteria, and disregarding it was interpreted as hostility towards the people. In Radbruch’s opinion, the formula: justice is something that is beneficial for the people, justified lawlessness. If it is beneficial for the people, it actually means that

the law is what is considered beneficial by the state authority, in particular all fantasies and caprices of despotism, punishing people unjustifiably and without investigation. Otherwise, the government’s self-interest is treated as a gain. If law is equated with the so-called people’s gain, it will turn the legal state into the illegal one [5]. It is unacceptable to say that everything that is beneficial for the people is a law. On the contrary, as Radbruch believes, it is only the justice that is beneficial for people which is the annex of the formula: “The law is the law”. The law rules because it is the law in case its authority is acknowledged. Such perception of law and its rule – the theory of positive law as Radbruch calls it, made everyone including lawyers helpless against the horrible and criminal laws. Eventually, law and power is equated here – justice is only there where the power is.

It is true that besides justice the aim of law is at the same time a common benefit. However, as Radbruch believes, human’s imperfection does not allow combining all the three legal values (common benefit, legal stability and justice) in the law. The only choice is to either accept the rule of a bad, unfair or harmful law in the name of legal stability, or reject its application and take its harm and injustice towards the society into consideration. People and particularly lawyers, must realize clearly that in spite of the existence of some considerably unfair and harmful laws for the public, we must not accept their rule or recognize their legal nature. One value in the positive law indicates that the presence of law is better than its absence due to creating stability at minimum. However, legal stability is not the only and defining value, which must be carried out by the law. There are two other values together with legal stability and these are expediency and justice. In this hierarchy of values expediency must hold the last place when common benefit is dealt. “Justice is not merely what is useful for the people” [1]. Eventually, it is justice, which makes legal stability and aspires to justice that is beneficial for people. Legal stability, which is characteristic to all applicable laws, stands in between

the expediency and justice. Both common benefit (the state) and justice require legal stability. In Radbruch's opinion, their conflict is actually a conflict between a fake justice and a real one. The idea of justice is absolute though formal. Thus, it is generally mandatory. Like the legal stability, it is a supra party demand. However, the state depends on legal views and party positions; in terms of law how much these demands should be prioritized over others, or to what extent we can sacrifice expedience or justice to the interests of legal stability or vice versa. The common mandatory elements of universally acknowledged legal idea are justice and stability and the relativist element is not only the expediency but also, the subordinal interrelation among these three elements [2].

Although Fascist laws were disguised under the forms of legal norms, they did not possess the most essential feature of justice: aspiration to justice. There are cases when the existing laws are so unjust and harmful that they can hardly be considered as norms which possess legal character. Still, what can be the evidence in order to claim it? This can be the fact that

“there are some much more respected legal principles than any other legal regulation. In this case, the law that contradicts these principles do not function “[1]. Radbruch refers the combination of these principles as natural law. Each of these principles raised doubts, but now, as he points out, the importance of these principles is unquestionable because their content in the Declaration of Fundamental Human and Civil Rights has been firmly outlined over the centuries. In place of laws the Fascist law and its type had assigned the norms which were deprived to the universal principles of freedom, justice and humanity. They were mere manifestations of power and its enactment. Criminal law cannot be considered as justice even if it possesses positivity because it lacks the essence of justice. In the actual law the positivity and legitimacy of law do not coincide with each other, though positive law can ensure the realization of the legal values like legal stability and expediency. Thus, we can conclude that stability, discussed not in formal but material terms, must comply with the idea of justice; it must be the proper means of implementation of the idea of law.

*ფილოსოფია*

## ზოგადი ფილოსოფიური წანამძღვრები გუსტავ რადბრუხის მიხედვით

### ი. შიოშვილი

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(წარმოდგენილია აკადემიის წევრის რ. მეტრეველის მიერ)

სამართლის ფილოსოფია, რადბრუხის გაგებით, ფილოსოფიის ნაწილია. მას აუცილებლად მიაჩნია განიხილოს მისი ზოგადი ფილოსოფიური წანამძღვრები. ის აღნიშნავს, რომ მისი მოსაზრებანი ეფუძნება ვალდებულების, რიკერტის და ლასკის შეხედულებებს. რადბრუხის აზრით, ჩვენი სიცოცხლისეული გამოცდილება ფორმირდება ობიექტურად არსებული მოცემულობით, რომელიც წარმოადგენს „ნედლ გადაუმუშავებელ მასალას“ და რომელშიც სინამდვილე და ღირებულება ქაოტურად გადაჯაჭვულია ერთმანეთში და მათ შორის არ არის მოწესრიგებული ურთიერთკავშირი. ჩვენ აღვიქვამთ ადამიანებსა და საგნებს, რომელთაც აქვთ ან არ აქვთ ღირებულება. გონების უპირველეს ამოცანად მას მიაჩნია აუცილებლობა, გამოეყოთ საკუთარი „მე“ მოცემულობისაგან, დაუპირისპიროთ საკუთარი თავი მას და ამით გამოეცალკეოთ ღირებულება სინამდვილისაგან. გონება სწავლობს ზოგჯერ გამორთოს თავისი შემფასებელი ცნობიერება, ხან მიზანმიმართულად გამოიყენოს იგი. ამით ჩვენ თავდაპირველად არაცნობიერად ქაოსიდან წარმოვქმნით „ბუნების-სამეფოს“, რადგან ბუნება სხვა არაფერია, თუ არა ობიექტურად არსებული გარემო, მოცემულობა, რომელიც თავისუფალია შეფასებებისაგან. როცა გონება აღგენს ღირებულებათა განსაზღვრულ შკალას და მათ ურთიერთკავშირს, იგი, როგორც „ღირებულებათა სამეფო“, უპირისპირდება „ბუნების სამეფოს“. ამ ზოგადი პრინციპებიდან გამოსული, რადბრუხი ამტკიცებს, რომ სამართალი უნდა გავიგოთ იმ კატეგორიების ჩარჩოებში, რომლებიც ღირებულებას მიეკუთვნება. სამართალი, მისის აზრით, არის კულტურის ელემენტი, ანუ ფაქტი, რომელიც ღირებულებას მიეკუთვნება. სამართლის ცნება შეიძლება განისაზღვროს, როგორც „მოცემულობა“, რომლის საზრისი არის სამართლის იდეის რეალიზება [2]. რამდენადაც სამართლის იდეა ღირებულებათა სამყაროს მიეკუთვნება, მისი შემეცნება, მისი შემოწმება შეიძლება მხოლოდ განსაკუთრებული შეფასებითი განხილვის მეთოდით. ეს სამართლის ფილოსოფიის ამოცანაა. რაც შეეხება სამართალს, როგორც სინამდვილეს, როგორც კულტურის ელემენტს, მისი აზრით, იგი მიეკუთვნება, „სამართლის თეორიის“ კვლევის საგანს. რადბრუხი სამართლის ფილოსოფიას უწოდებს მეცნიერებას სამართლის ღირებულების შესახებ. რაც შეეხება სამართლიანობის იდეას, როგორც იდეას, რადბრუხს იგი ესმის კანტიანური აზრით, ე.ი. როგორც სრულყოფილების ცნება, რომელსაც შეიძლება მიუახლოვდეთ, მაგრამ სრულად ვერ განვაზოცხლებთ. იგი შეიძლება იყოს პოზიტიური სამართალშემოქმედების წყარო და სამართლებრივი რეალობის შეფასების კრიტერიუმი.

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