Radbruch’s *Rechtsstaat* and Schmitt’s Legal Order: Legalism, Legality, and the Institution of Law

Mireille Hildebrandt*

**Abstract**

This article forages the fruits of Radbruch’s *Legal Philosophy* of 1932, taking into account his writings after the horrors of National Socialism in Germany. This contribution builds on the findings of my chapter concerning Radbruch’s inquiry into the origins of the criminal law, in *Foundational Texts in Modern Criminal Law*. In that chapter I present the rise of the sovereign state as a precondition for a Rule of Law that institutes a balancing act between the different powers of the state. In the current article I briefly present the rise of the Rule of Law in the course of the nineteenth and twentieth centuries, exemplified by the rise of the German *Rechtsstaat*, the French *État de Droit* and the Anglo-American *Rule of Law*. This provides the background for a discussion of the contribution that Radbruch’s antinomian concept of law can make to a better understanding of the difference between legalism and legality. I argue that a mistaken view on legality informs the prevalent confusion around the notion of the Rule of Law. The investigation is complemented with the introduction of a procedural conception of both law and the Rule of Law, taking the discussion beyond formal and substantial conceptions of both. Finally, I integrate an analysis of Schmitt’s keen attention to the institution of law, observing that legalism and legality align with different institutionalizations, different legal orders and different modes of existence of law and the Rule of Law.

I. Introduction

Radbruch’s legal philosophy is a complex refinement of a particular strand of neo-Kantian philosophy,¹ which understands concepts such as law, state, punishment, or property as inherently value-laden concepts. Radbruch believes that such concepts can only be properly understood if they are related to the idea that informs them. Contrary to rationalist natural law thinkers this idea is not a universal value that can be defined outside the context of its inception. For Radbruch these concepts are *Kulturbegriffe* (cultural concepts) that describe a value-laden reality, and the task of the legal philosopher is to

---

* Professor of Smart Environments, Data Protection and the Rule of Law at the Institute of Computing and Information Sciences (iCIS), Science Faculty, Radboud University Nijmegen; Professor of Technology Law and Law in Technology at the Research Group of Law, Science, Technology and Society Studies (LSTS) at the Faculty of Law and Criminology, Vrije Universiteit Brussel; and Associate Professor of Jurisprudence at the Erasmus School of Law, Rotterdam, the Netherlands. I want to thank the participants of the CAL workshop in Toronto in August of 2014, and notably thank Markus Dubber for his suggestion to confront Radbruch with Dicey’s understanding of the Rule of Law.

clarify the values that give meaning and significance to the reality they inform. Radbruch’s antinomian conception of law shows that law in a constitutional democracy is a fundamentally contradictory phenomenon that implies a reiterative balancing act between the values of legal certainty, justice and expediency. The shifting emphasis on either of these values is not arbitrary but operates on the nexus of the concept of law, the idea that gives direction to its interpretation, and on the societal needs these values serve. Radbruch’s postwar emphasis on justice as potentially overruling legal certainty has led some to interpret his postwar writings as a return to natural law and a change in his position. However, in his seminal text on the origin of criminal law of 1938 Radbruch already found that the arbitrary power of the pater familias to punish his serfs entailed that the jurisdiction within the household of the pater familias should be understood as a pre-legal order, closer to administration than to law. In line with this, we should expect that insofar as absolute sovereignty allows for arbitrary rule, Radbruch would have qualified it as a non-legal order, even before his experience of Nazi brutality.

In this article, my aim is to uncover the added value of Radbruch’s understanding of law for contemporary debates on both law and the Rule of Law. First, I will briefly present the rise of the Rule of Law in the course of the nineteenth and twentieth centuries, exemplified by the rise of the German Rechtsstaat, the French État de Droit and the Anglo-American Rule of Law. This provides the backbone for my discussion of how Radbruch’s antinomian concept of law helps to better understand the difference between legalism and legality. In fact, I often find that legality is defined as legalism, and I believe this triggers the prevalent confusion around the notion of the Rule of Law. Building on, for instance, Waldron, I will argue that we need a procedural concept of both law and the Rule of Law, to get a better picture of the difference between legalism and legality, taking the discussion beyond the dichotomy of formal and substantial conceptions. Finally, to substantiate the pivotal role of procedure, I integrate an analysis of Schmitt’s keen attention to the institution of law, observing—however—that legalism and legality align with different institutionalizations, different legal orders and different modes of existence of law and the Rule of Law.

---


4 E.g., Jacques Chevallier, L’État de droit (2010); The Legal Doctrines of the Rule of Law and the Legal State (James R. Silkenat et al. eds., 2014). The latter contains a trove of both mainstream and controversial understandings of the Anglo-American concept of the Rule of Law and the continental European concept of the Rechtsstaat, detailed by authors from across both types of legal traditions.

5 I capitalize the Rule of Law, not merely to pay my respects, but to prevent confusion with the connotation of a particular rule/norm of law, cf. Jeremy Waldron, The Concept and the Rule of Law, 43 Ga. L. Rev. 1, 1 n.1 (2008).
II. The Rise of the Rule of Law

A. Germany: Substantive and Formal Conceptions of the Rechtsstaat

The term Rechtsstaat was inspired by Kant’s legal and political philosophy. It became part of nineteenth-century German constitutional doctrine during the transition from the Prussian state to the unification of the German empire. The term, however, referred to two distinct conceptions within constitutional doctrine, developed by two leading scholars deeply involved with the so-called Polizeiwissenschaft. The latter term translates as “science of police,” but it is not merely about how police constables regulate daily life or struggle against criminal conduct. Rather, this “science of police” developed a scientific understanding of how to construct and sustain an effective administration, close to what we would now consider “policy science.” The liberal professor of political science and law von Mohl was mainly concerned with the limitation of internal sovereignty and the protection of individual rights and liberties. In his monumental Die deutsche Polizeiwissenschaft nach den Grundsätzen des Rechtsstaates he defends the idea that in a Rechtsstaat, the Polizei—the administration—must be exercised under the Rule of Law. This is usually understood as entailing substantive requirements for a state to qualify as a Rechtsstaat. The conservative constitutional law professor Stahl, however, was mainly concerned with the need to rationalize the relationship between citizen and state in order to achieve policy objectives regarding the welfare of society. In his monumental Die Philosophie des Rechts nach geschichtlicher Ansicht, he outlines those tasks of the government (Polizei) that should remain outside the scope of judicial review (Justiz)—the reason being that the administration requires the freedom to act unhindered in order to serve and expand the general interest. Whereas he situates private law and criminal law in the domain of Justiz, administration—for Stahl—is not a matter of law at all. This implies that citizens cannot call their government’s administration to account in a court of law.

Von Mohl is said to defend a substantive conception of the Rechtsstaat, that aligns the demands of justice with those of legal certainty and expediency. He advocated a constitutional state that protects the negative liberty of its citizens and refrains from interventions that violate individual rights. This implies that to qualify as a Rechtsstaat the normative content of the constitution must be taken into account, and notably the

---

6 On the transition from formal to substantive conceptions of the German Rechtsstaat, the French État de Droit and the Anglo-American Rule of Law in the course of the nineteenth and twentieth centuries, see Chevallier, supra note 4. On the development of the German formal and substantive conceptions of the Rechtsstaat, see id. at 16-23; see also Rainer Grote, The German Rechtsstaat in a Comparative Perspective, in The Legal Doctrines of the Rule of Law and the Legal State, supra note 4, at 193.


8 Robert von Mohl, Die Polizei-Wissenschaft nach den Grundsätzen des Rechtsstaates (1866).

protection that is effectively provided against both misdeeds of other citizens and oppression by the state itself. Stahl is said to defend a formal conception of the Rechtsstaat that separates the domain of justice (where the state must indeed respect the negative liberties of its citizens) from that of police (where the state enjoys unrestricted positive freedom to maximize the general interest). Under the formal conception, to qualify as a Rechtsstaat the domain of police should not be brought under the control of justice. Since in that view, ultimately, the decision on what belongs in the realm of police is up to the state, subjects of the state are dependent on the arbitrary rule of whoever holds the place of the sovereign. Because the domain of police is the domain of administration, this basically reduces sovereignty to administration.

It is critical to note that from a historical perspective the term police-state first refers to eighteenth-century absolutism, including the reign of the enlightened despotism of, for instance, Frederick the Great. Taking into account von Stahl’s separate domain of Polizei (administration), which was meant to provide a productive positive freedom for the state to serve the general interest, we can observe a clear continuity between eighteenth-century Polizeistaaten and the beginnings of the welfare state in nineteenth-century Germany.

The follow-up of the debate between von Mohl and Stahl can be traced in the positions taken by the twentieth-century legal philosophers Kelsen (Austrian), Schmitt and Radbruch (German). Kelsen tried to get rid of the authoritarian connotations of the sovereign by rethinking the state as constituted by the law which is also its product, thus emulating the concept of the legal norm and creating an a-historical and a-political, highly systemized perspective on the law. The mutual constitution of state and law, nevertheless, assumed an intrinsic dependence on formal, legally constituted authority that tied Kelsen to the formal conception of the Rechtsstaat. Schmitt, unlike Kelsen, highlighted the pre-legal decision that grounds any legal order, thus prioritizing the decisionist aspect of a legal order over and above its normative aspect. This entailed a rejection of the sterile formality of Kelsen’s legal state, without, however, engaging with von Mohl’s substantive requirements. Kelsen ends up with the purest form of a highly sophisticated legalism, at the same time providing a wonderful abstract representation of a pyramidal legal system where every legal rule—and thus any competence to act—ultimately depends on the vanishing point at the top. Schmitt rejects such legalism as naïve, but ends up with a highly sophisticated as well as brutal decisionism. Even the highly complex hierarchical reciprocities of suzerainty acknowledged the need to legitimize one’s rule in terms of the res publica, thus rejecting any such thing as a purely arbitrary occupatio. Below we will encounter Schmitt’s ultimate position, which was basically a rejection of his own earlier


decisionism, seeking refuge in what he coined “concrete order thinking.” Radbruch refused to reduce law to either Kelsen’s normativism or Schmitt’s decisionism, though he clearly acknowledged their importance. In the constitutive aims of the law, he integrated formal as well as substantial requirements, while leaving room for both liberalist and socialist purposes for the law. On the instrumentality or purposiveness of the law, Radbruch was a convinced relativist. As is well known, he did, however, draw the line against fascist instrumentalization of the law. In the third section of this article we will further situate Radbruch’s so-called antinomian concept of law between and beyond formal and substantive conceptions of law.

B. France: État Légal and État de Droit

The idea that a constitutional state depends on formal requirements, most notably that it requires legal grounds in a Parliamentary Act for any of its interventions, can be traced back to nineteenth-century France (and to the English notion of the Rule of Law, see below). The popular sovereignty that was at the heart of postrevolutionary France implied that the democratic legislator representing the nation was the only source of law. This introduced the nineteenth-century French doctrinal notion of the État Légal, which was opposed to the eighteenth-century État Police of the Ancien Régime. From the point of view of the État Légal the state is bound by previously enacted legal norms without regard for their normative content. Unlike Stahl’s conception of the Rechtsstaat, however, adherents to the État Légal did not accept a separate domain for the state’s interventions outside enacted law. Nevertheless, they did not accept the idea of courts overruling the nation as represented in Parliamentary Acts. Though French doctrine, unlike the German doctrine of the separation of Polizei and Justiz, denied the administration any leeway to operate outside the imperatives of the legislator, the interventions of administrative bodies and officials were to be reviewed in special administrative procedures. Decisions taken by public authorities on behalf of the nation (services publiques) were seen to be of a different kind than those of ordinary citizens, requiring review by the authority that took the decision, or its immediate hierarchical superior. This kind of internal review or appeal, and the concomitant assumption that government authority cannot be called to account on the basis of a common law that defines the legitimate mutual expectations of citizens, was considered a gruesome violation of the Rule of Law by lawyers on the other side of the Channel, such as Dicey. As with Germany, developments in France show a clear continuity with the État de Police of the Ancien Régime. Under the latter, the domain of police covered the whole realm of government, while the État Légal was instituted by a popular sovereignty that—in line with a specific understanding of democracy—made government officials relatively immune against the appeals of individual citizens. Though, as we will see below, even the English Rule of Law was tested by increased government activism to promote the general interest, common law protection against government violations of fundamental rights seemed—according to some—better equipped to deal with the

---

12 Chevallier, supra note 4, at 23-33.
ramifications of the welfare state than the interventions of nineteenth-century German Polizei and French police. After the Second World War the notion of the État de Droit emerged,\textsuperscript{13} acknowledging that law is both more and less than the enactments of the democratic legislator, introducing independent judicial review and a more substantive test of interventions by the state—based on a human rights doctrine that is often associated with a substantive conception of the Rule of Law. The French notion of the État de Droit actually comes close to the German substantive conception of the Rechtsstaat and to similar conceptions of the Rule of Law in the context of Anglo-American law. It may be, however, that in the latter context the notion of a procedural conception of the Rule of Law better describes what is at stake, complementing the dichotomy of formal and substantive conceptions.

C. England: The Rule of Law and the Role of Courts

In his Lectures Introductory to the Study of the Law of the Constitution (1885), Dicey formulated the Rule of Law as follows:

\begin{quote}
We mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land. In this sense the Rule of Law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.

We mean in the second place, when we speak of the “Rule of Law” as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.

There remains yet a third and a different sense in which the “Rule of Law” or the predominance of the legal spirit may be described as a special attribute of English institutions. We may say that the constitution is pervaded by the Rule of Law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts; where under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principle of the constitution.\textsuperscript{14}
\end{quote}

In other words, after establishing that punitive interventions depend on the decision of an ordinary court, Dicey goes on the clarify that public authorities are subject to the common law, just like everyone else. He pays specific attention to the French system of

\textsuperscript{13} The transition from the État Légal to the État de Droit was prepared by Léon Duguit, Law in the Modern State (Frida & Howard Laski trans., 2013) (1919); Raymond Carré de Malberg, Contribution à la théorie générale de l’état, spécialement d’après les données fournies par le Droit constitutionel français (1920); Adhémar Esmein, Histoire de la procédure criminelle en France et spécialement de la procédure inquisitoire depuis le XIIIe siècle jusqu’a nos jours (1882); Maurice Hauriou, La gestion administrative: étude théorique de droit administratif (1899).

administrative appeal, which he finds appallingly out of touch with the equality before the law that inheres in the English adherence to the common law. In his “Development of Administrative Law in England” of 1915 Dicey actually laments the fact that the increase in tasks and competences of government departments has resulted in an administrative law that resembles, though it is by no means equivalent to, the French droit administratif. The critical consequence of all this is the transfer of quasi-judicial competences from common law courts to government departments that are bound to take into account requirements of expediency and the own interests of public service. As Tamanaha observed, Dicey’s analyses of the erosion of the Rule of Law are deeply entwined with his concerns about the activist nature of the welfare state, which—as in Germany and France—creates a large domain of seemingly unchecked freedom for the administration. Dicey writes, “Such tranference of authority saps the foundation of the Rule of Law which has been for generations a leading feature of the English Constitution.”

This connects with the third sense of the Rule of Law, quoted above, where Dicey celebrates the fact that the English Constitution does not depend on the will of a legislator who imposes a set of general rules in one stroke, but on a series of decisions of ordinary courts on the rights of individuals against their government. From Dicey’s perspective, the fact that England has an unwritten Constitution that derives from legal remedies employed by private citizens against encroachments on their fundamental rights by government authorities confirms the spirit of liberty that—according to Dicey—pervades English society.

This reminds us of Montesquieu’s emphasis on an independent judiciary as the hallmark of political freedom and personal safety, which—in Montesquieu’s mind—are two sides of the same coin. Both depend on a moderate government, which, in turn, depends on countervailing powers. The Rule of Law, in his view, is not merely a matter of a sovereign willingly binding itself to the law. Rather, the Rule of Law is guaranteed by one power stopping the other from gaining a monopoly. The most adequate metaphor that comes to mind is that of Odysseus resisting the lure of the Sirens. Odysseus, wishing to have the pleasure of hearing the Sirens’ song without succumbing to their destructive lure, decides to tie himself to the mast of his ship. However, he does not achieve the freedom to have his cake and eat it too merely by self-binding. To prevent himself and his mates from untying the ropes that keep him in check, he waxes their ears to make sure that they will not respond to his pleas or commands to free him from his self-induced captivity. In the face of the temptations of those in power, the Rule of Law cannot be contingent on self-binding alone; it requires a system of checks and balances to prevent power-imbalances between citizens and the state.

---

Let me now turn to Radbruch’s core contribution to legal philosophy with an analysis of his antinomian concept of law, conducted against the background of the rise of the Rule of Law in Germany, taking note of relevant differences with its rise in France and England. In doing so I take the position that discussing the concept of law requires a keen eye for the Rule of Law, which is—of course—not obvious.18

III. Radbruch’s Antinomian Conception of Law

A. Concept and Idea of Law

In his Legal Philosophy,19 Radbruch takes a stand against the idea that law is given or can be exhaustively determined before its application. By declaring upfront that we must distinguish between the concept and the idea of law, while explaining how the one is contingent upon the other, he creates a middle ground to sustain the tension between what law aims to achieve (the idea of law) and how it should be understood (the concept of law, that is, however, connected with the values inherent in the idea of law). This may seem overly artificial, inferred from the complexities of a neo-Kantian School that has little import today, but it may also remind us of the fragile nature of the conceptualization of something that is constitutive for our societal order. We may indeed be tempted to take the law as a given instead of recognizing its artificial, constructive and value-laden character. I dare say that Radbruch’s epistemology displays a keen sensitivity to the mode of existence of modern law as a construction that is contingent upon the primacy of text and interpretation, and thus closely aligned with the affordances of the printing press.20

According to Radbruch, the idea of law is justice,21 in the broad sense of that term. This broad notion of justice brings together three values that may be incompatible in concrete situations: Gerechtigkeit (distributive and reciprocal justice, fairness, equality), Zweckmässigkeit (purposiveness, expediency, instrumentality) and Rechtssicherheit (legal certainty, the positivity of law). By creating a tension between the concept (description) and the idea (ends) of law, Radbruch ensures that though in specific cases the realization of these three values is often obstructed by their situated incompatibility, to qualify as law a practice must at least be seen to strive for such realization. His later rejection of Nazi

---

18 I am in good company, however, cf. Waldron, supra note 5.


20 Mireille Hildebrandt, A Vision of Ambient Law, in Regulating Technologies 175 (Roger Brownsword & Karen Yeung eds., 2008); Mireille Hildebrandt, Smart Technologies and the End(s) of Law: Novel Entanglements of Law and Technology (forthcoming 2015).

21 Cf. Jacques Derrida, Force of Law: The “Mystical Foundation of Authority,” 11 Cardozo L. Rev. 920 (1990), which recognizes that law cannot achieve justice, though it can only be understood in terms of its ambition to achieve justice. The combination of ambition (aiming for justice) and modesty (we cannot claim to have achieved it) determines the tension between concept and idea of law.
law as law confirms this simple criterion: a legal system that does not even strive to treat equal cases equally, as for instance in the case of racial discrimination, can no longer qualify as law.\textsuperscript{22}

B. Justice, Legal Certainty and Instrumentality\textsuperscript{23}

Justice in the narrow sense means, for Radbruch, distributive justice or equal treatment. This brings him close to Rawls’s famous Theory of Justice,\textsuperscript{24} which builds the entire architecture of a just legal system on the ideas of liberty and fairness. Both Radbruch and Rawls understand equality, fairness and justice in terms of geometric proportionality, rather than suggesting that we may simply determine what constitutes equal treatment from an objective point of view. Radbruch remarks that

\begin{quote}
while justice directs us to treat equals equally, unequals unequally, it does not tell us anything about the viewpoint from which they are to be deemed equals or unequals in the first place; moreover, it determines solely the relation, and not the kind, of the treatment.\textsuperscript{25}
\end{quote}

He continues:

Both questions may be answered only be referring to the purpose of the law. Thus to justice there was added, as a second element of the idea of law, expediency or suitability for a purpose.\textsuperscript{26}

This, however, introduces a relativist notion into the realm of the law, since—according to Radbruch—the purpose of the law cannot be determined by the law itself, and depends on different notions of the general interest. In his chapter on the instrumentality, or expediency, of the law, he distinguishes between three types of purposes which the law can serve: individual \textit{freedom}, collective \textit{well-being} and artistic or scientific \textit{accomplishment}. In his opinion, each polity will have to decide what type of society, collective or community it wishes to constitute, aiming for a \textit{society} that celebrates individual liberty, a \textit{collective} striving for the highest common good or a \textit{community} that works to achieve excellence in science or art. Distributive justice can only become operational from the perspective of a particular type of purpose, which engages the instrumentality and expediency of the law. Equal treatment will have a different meaning when law serves the goals of liberalism, than when it serves the goals of collective well-being. This entails that distributive justice in the realm of individual liberty has different implications than in the realm of public utility, which reminds us of the different rationalities of the domains of \textit{Justiz} (individual

\begin{itemize}
\item \textsuperscript{22}Gustav Radbruch, Five Minutes of Legal Philosophy (1945), 26 Oxford J. Legal Stud. 1, 13-15 (Bonnie Litschewski Paulson & Stanley L. Paulson trans., 2006).
\item \textsuperscript{23}This part of the paper builds on my analysis in Hildebrandt, Indeterminacy, supra note 11; see also Paulson, supra note 2.
\item \textsuperscript{24}John Rawls, A Theory of Justice (2005).
\item \textsuperscript{25}Radbruch, Legal Philosophy, supra note 19, at 107.
\item \textsuperscript{26}Id. at 107-08.
\end{itemize}
liberty) and Polizei (general welfare) in their nineteenth-century manifestations. Obviously, however, liberal democracies combine these goals, making the law contingent upon differential views of the public good. In line with that Radbruch notes that

> [t]he law as the order of living together cannot be handed over to disagreements between the views of individuals; it must be one order over all of them.27

This introduces the need for legal certainty:

> The certainty of the law requires law to be positive: if what is just cannot be settled, then what ought to be right must be laid down; and this must be done by an agency able to carry through what it lays down.28

This is where Radbruch suggests that at some point

> [i]t is more important that the strife of legal views be ended than that it be determined justly and expeditiously. The existence of a legal order is more important than its justice and expediency, which constitute the second great task of the law, while the first, equally approved by all, is legal certainty, that is, order, or peace.29

In the section on legality and legalism (below), I will return to this point as it marks Radbruch’s acuity in relation to legal order as a precondition for both justice and purposiveness. First, however, we must establish whether these quotes justify labelling Radbruch as a legal positivist in the traditional sense of formal legal positivism, keeping in mind that caring for the positivity of the law is not a prerogative of formal legal positivists. Though the rise of internal and external sovereignty is constitutive for the positivity of law,30 it does not exhaust the meaning or the validity of law. However, in his prewar writings, Radbruch’s understanding of law seems to favor legal certainty as the most crucial and distinctive element of the law. Referring, in a footnote, to Schmitt, he writes:

> The order of living together cannot be left to the particular conceptions of law of individual citizens, as different people may well have contradictory ideas, requiring a unitary regulation from a supra-individual position . . . . If nobody can establish what is just, somebody must decide what should be lawful, and positive law should fulfil the assignment, to end the contradictory conceptions of law by means of an authoritative verdict. The positivity of the law must depend on a will that can impose itself against any contradictory conception of law.31

Clearly, Radbruch views sovereignty as constitutive for positive law. His reference to Schmitt suggests that positive law cannot be reduced to distributive or reciprocal justice,

---

27 Id. at 108.
28 Id.
29 Id.
30 Hildebrandt, Origins, supra note 11.
31 Radbruch, Rechtsphilosophie, supra note 19, at 179 (translation Mireille Hildebrandt [MH]); cf. Radbruch, Legal Philosophy, supra note 19, at 116-17. The footnote reads (translation MH): “Carl Schmitt has qualified such an understanding of legal validity as decisionism. He situates it most clearly with Hobbes [auctoritas, non veritas facit legem], cf. ‘Die drei Arten des rechtswissenschaftlichen Denkens,’ 1954, p. 27 and 35 [at the same instance decisionism and normativism].” This footnote has been added by the editor of the 1950 edition. It was taken from Radbruch’s handwritten notes in the 1932 edition. See Radbruch, Rechtsphilosophie, supra note 19, at 9.
without, however, concluding that positive law has no relationship to what is just. As mentioned above,32 in his discussion of the antinomian character of the idea of law, he explains how legal certainty, justice and purposiveness cohere. Though justice and legal certainty require equal treatment, they cannot provide the measure or nature of the treatment, for which we need an understanding of the purpose of the treatment, and a decision. After observing that the purpose of law (which he qualifies as the public good, whichever way it is conceived) is a matter of differing opinions, he concludes that this calls for a decision on the content of the law that is binding even on those who would not agree. This conclusion confirms the priority of legal certainty— as in the text quoted above—and I will now quote the original German text to highlight the intricate nuances in his usage of German that get lost in translation:

Die Sicherheit des Rechts fordert Positivität des Rechts: wenn nicht festgestellt werden kann, was gerecht ist, so muß festgesetzt werden, was rechtens sein soll und zwar von einer Stelle, die, was sie festsetzt, auch durchzusetzen in der Lage ist.33

It seems that Radbruch agrees with Schmitt that any order is always better than no order, and that law in the end depends on the power to decide and enforce the law when agreement on its content cannot be reached. This, of course, regards both the decision of a legislator to enact a law despite dissensus on its content and the decision of a court to interpret a source of law in a way that one of the parties or current legal doctrine would reject. How does this position Radbruch in the minefield between formal and substantive conceptions of the Rechtsstaat, and how does it situate him in relation to legalism and legality?

Let me say, first, that I am not interested in discussing whether or not Radbruch was a legal positivist. This, to me, is a stalemate discussion, which would require measuring Radbruch against the yardstick of the morality thesis and the separation thesis,34 whether they are understood to be mutually exclusive as well as jointly exhaustive, as partly overlapping, or as leaving room for a third way out.35 The problem is that the morality

32 Radbruch, Legal Philosophy, supra note 19. Radbruch speaks of Zweckmäßigkeit (purposiveness, expediency, instrumentality), which should however not be understood as effectiveness per se. It concerns an orientation towards the public good, which can be defined in different ways, depending on one’s political views. See Der Zweck des Rechts (The Purpose of Law), in Radbruch, Rechtsphilosophie, supra note 19, at 146-55. In later work he speaks of the Gemeinnut als Ziel des Rechts (common interest as the purpose of law). See Radbruch, Legal Philosophy, supra note 19, at 336.

33 Radbruch, Rechtsphilosophie, supra note 19, at 169 (italics in the original) (differentiating between feststellen and festsetzen to emphasize the difference between consensus on the basis of a free discussion and a decision that has force of law; and differentiating between festsetzen and durchsetzen to emphasize the fact that law is not only about enacting legislation but also about being capable of enforcing law).

34 It is usually claimed that the morality thesis determines that the validity of positive law does not depend on its moral worth, while the separation thesis determines that law and morality should be separated due to the separation of powers in the political realm. A more productive perspective can be found in David Dyzenhaus, The Genealogy of Legal Positivism, 24 Oxford J. Legal Stud. 39 (2004).

35 Cf. Leawoods, supra note 2, who reduces Radbruch’s position to one for “normal” times and one for “emergency.” This makes a lot of sense, but it adds little to our understanding of the richness of his concept of law for “ordinary” times. See also Paulson, supra note 2.
thesis usually reduces to a particular understanding of natural law, whereas natural law has its own rather diverse history. The separation thesis is meant to exhaust the meaning of law in reference to its positivity, often reduced to its dependence on the authority of the state. Radbruch indeed highlights the critical importance of positive law and its alignment with the power of the state to ensure its effectiveness, but he is not a “positivist” in the sense of entirely reducing law to legal certainty. Already in 1932 he writes that

"[f]inally, too, it will appear that even the validity of positive law that is unjust and wrong cannot be maintained unqualifiedly, hence the question of validity may be considered not only from the standpoint of legal certainty but also that of justice and expediency."

This firmly establishes his argument for the antinomian character of his legal philosophy. His understanding of law should not be pressed into the mould of either natural law, which in his own words “tried to conjure the entire contents of the law out of the formal principle of justice and at the same time therefrom to derive the validity of law,” or positivism, which “saw only the positivity and certainty of the law and caused a long standstill in the systematic examination of the expediency, not to mention the justice, of enacted law, for decades nearly silencing legal philosophy and legal policy.”

He emphasizes the historical and cultural nature of the shifting prominence of certainty, justice and expediency, notably referring to enlightened despotism, which “sought to raise the principle of expediency to sole dominion, unhesitatingly pushing aside justice and legal certainty in its administration of law by cabinet fiats.” Radbruch maintains that the problem resides in the one-sidedness of attempts to reduce the aims of all to one, not in the contradiction that is inherent in their eventual incompatibility in a particular situation. Trying to resolve the tension leads to insecurity, injustice or/and ineffective law, whereas the antinomian character of the idea of law should instead lead to the discernment and acuity required to decide a legal issue in the face of actual incompatibilities.

Paulson has argued that in his prewar Legal Philosophy Radbruch seems to differentiate between the duty of the legislator to enact equal protection, based on justice only, and the duty of the court to apply a valid statute even if he thinks it is unjust, based only on legal certainty. Paulson has suggested that Radbruch corrects this mistake in his postwar writings, where he finds that in extraordinary circumstances, such as twelve years of Nazi rule, the judge should discriminate between a legal statute that is unjust and one that is not even directed to justice. However, as abundantly illustrated above, this is precisely Radbruch’s point in his earlier text: whereas a judge should not determine what

36 Tamanaha, supra note 15, at 11 (on natural law with Cicero), 18-19 (on natural law with Aquinas), 28 (on legislation as codification of natural law in the late Middle Ages and the beginnings of modernity), 47-59 (on natural law and Locke, Montesquieu and the Federalist Papers).

37 Radbruch, Legal Philosophy, supra note 19, at 111.

38 Id.

39 Id.

40 Paulson, supra note 2, at 496 (on the judge), 500 (on the legislator and on the idea that Radbruch’s later emphasis on justice was the correction of the mistake).
law is just or unjust, statutes that are not even aimed at achieving justice can no longer be qualified as law.

Radbruch’s celebration of the antinomian idea of the law goes against the grain of the so-called formal conception of the Rechtsstaat as advocated by Stahl, because Stahl’s conception creates a domain where expediency rules. Radbruch’s concept must similarly reject the formal conception of the Rechtsstaat as advocated by Kelsen, because it mistakenly ignores the relevance of both morality and expediency for the constitution of law. Similarly, though Radbruch acknowledges the role of the decision of the sovereign in the significance he attaches to the positivity of the law, his antinomian idea of law goes beyond Schmitt’s priority for the decision over the norm. This is interesting, because in the end Radbruch turns Schmitt inside out: in his postwar writings he posits the possibility of an extraordinary situation that requires a judge to qualify a statute as non-law that refutes application, which would require the judge to decide on the exception.41

IV. Legalism and Legality

A. The Procedural Enactment of the Rule of Law

I have always felt unease with Foucault’s analysis of the law, notably in his magnificent La vérité et les formes juridiques,42 because he somehow stops his examination of the judicial trial after confronting the inquisitorial procedure, never arriving at the fair trial. Even in Discipline and Punish, he opposes the pervasive normalization generated by disciplinary practices with the rhetoric of Enlightenment thinking to unmask the latter as an impotent discourse. But he fails to pay any sustained attention to the actual workings of constitutional protections of due process, the fair trial, or the criminal law principle of legality. It seems that he mistakes law for legalism, taking for granted that modern law got stuck in nineteenth-century formalism and positivism. Foucault’s analyses are pivotal, however, in taking the perspective of how law actually operates in terms of process and procedure, instead of restricting the conceptualization to sterile exercises at the most general level of analysis.

In his discussion of the importance of procedure for the Rule of Law, Waldron has emphasized the curious fact that legal philosophers tend to restrict the discussion on the Rule of Law to a choice between substantive and formal conceptions.43 He defines formal conceptions as those focused on the form of legal norms, taking Fuller’s principles of the inner morality of the law as a prime example: generality, publicity, prospectivity, intelligibility, consistency, practicability, stability and congruence. Though Fuller qualifies his principles as “procedural,” Waldron notes that he actually means that they are not

41 Radbruch, supra note 22.


substantive. Only the last principle pays some attention to the institutional dimension that interfaces the existence of abstract rules (whether formal or substantive) with guarantees of an impartial and independent adjudication. It seems as if the Rule of Law is largely seen as a matter of either substantive matters of justice (e.g., respect for private property, prohibitions of torture, individual liberty and democratic self-determination) or formal matters of legal certainty (generality, publicity, prospectivity, etc.). In reference to Dicey’s emphasis on the role of ordinary courts, Waldron argues that procedural and institutional elements may be far more conclusive for the Rule of Law than the emphasis on either formal or substantive conditions. This is interesting also because Waldron finds that the lack of attention to the role of an independent tribunal, a fair hearing and other procedural safeguards diminishes our understanding of the Rule of Law, and—indeed—of law itself:

For my part, I do not think we should regard something as a legal system absent the existence and operation of the sort of institutions we call courts. By courts, I mean institutions that apply norms and directives established in the name of the whole society to individual cases and that settle disputes about the application of those norms. And I mean institutions that do this through the medium of hearings, formal events that are tightly structured procedurally in order to enable an impartial body to determine the rights and responsibilities of particular persons fairly and effectively after hearing evidence and argument from both sides.44

Discussing how both Hart and Raz define the institutions that decide on the application and interpretation of the law, Waldron observes that they seem to believe that procedural safeguards “are relevant to law only at an evaluative level, not at the conceptual level.”45 Instead, Waldron argues that “[t]here is a distressing tendency among academic legal philosophers to see law simply as a set of normative propositions and to pursue their task of developing an understanding of the concept of law to consist simply in understanding what sort of normative propositions these are. But law comes to life in institutions.”

Building on Waldron and others,46 I believe that the debate on the meaning of the Rule of Law has been mystified by framing its interpretation as either formal or substantive. Formal conceptions are then associated with legalism (that is often equated with legality),47 whereas substantive conceptions are often associated with moral

44 Id. at 12.

45 Id. at 11 (the citation refers to Raz, but basically repeats Waldron’s previous critique of Hart).


47 Neil MacCormick, The Ethics of Legalism, 2 Ratio Juris 184, 184 (1989) (“With all faults, legalism is a prerequisite of free government.”). Judith N. Shklar, Legalism (1964) criticized legalism as committing to a conservative ideological worldview, mainly because of its belief that “complying with rules is a moral mode of being in the world.” Robin West, Reconsidering Legalism, 88 Minn. L. Rev. 119, 122 (2003).
legitimacy. This nicely ties in with a mistaken understanding of Radbruch’s view on law. It should be clear that I am not impressed with adherents to the transformation thesis who equate his early emphasis on the positivity of the law with positivism and legalism, while equating his postwar writings with a belated confession to the attractions of natural law that fits well with a moralistic understanding of legal legitimacy. What then, is the difference between legalism and legality, and how does it fare between substantial and formal understandings of law and the Rule of Law?

Legalism makes the legitimacy of lawful interventions dependent on pre-existing legal rules, *whatever their content*, meaning that governmental interventions require a formal legal ground that justifies the intervention. A more developed version of such legalism would fare well with Fuller’s principles; generality, publicity, prospectivity, intelligibility, consistency, practicability, stability and congruency are all focused on reliability, comprehensibility, foreseeability and the certainty they provide. Unlike legalism, legality does not restrict itself to the requirement of a legal competence to perform governmental interventions, based in or on an Act of Parliament. A discerning conception of legality entails that the law both constitutes and limits competences for governmental intervention, while constitution and limitations take root in the antinomian interplay of justice, legal certainty and purposiveness. This translates into various types of balancing acts that are, themselves, constrained by the demands of justice, certainty and purposiveness. The circularity that thus pervades legal development is not vicious but virtuous; not complacent but productive. It triggers acuity and discernment with regard to legal decision making instead of thinking in terms of mechanical applications of existing law. In case of measures that infringe fundamental rights, the balancing act will, for instance, require the legislator, the administration, and the court to investigate: first, the legitimacy of the aim that is targeted; second, the necessity of the intervention and its proportionality in relation to the legitimate aim; and third, the attribution of a sufficiently specific legal competence that renders such interventions foreseeable and contestable, and stipulates adequate legal safeguards. The latter demonstrates the legality-requirement; meaning that a legal ground both constitutes and limits a specific governmental competence. Those familiar with the case law of the European Court of Human Rights (ECtHR) will recognize the triple test for governmental measures that infringe human rights such as privacy. The point here is to detect where legality differs from legalism. Legality, in this sense, refers to justice (proportionality), to legal certainty (the legal ground in positive law, with the necessary safeguards) and purposiveness or expediency (the legitimate aim of the intervention, the requirement of effective remedies). Legalism, instead, reduces all this to the correctly enacted legal ground, which may or may not offer any protection, leaving the subject of government interventions dependent on a rule by law instead of the Rule of Law. Even if the sovereign that rules by law is the nation or the Parliament, legalism leaves individual subjects without effective remedies against arbitrary rule. This does not accord with

---

Radbruch’s perspective and in point of fact explains why he believes that law should tame sovereignty. The Rule of Law is not merely about self-binding, which would equate with eighteenth century enlightened despotism (which was essentially rule by law). As his investigations into the origin of the criminal law demonstrate, to qualify as law instead of administration, legality demands that sovereignty be subdivided into countervailing powers. This, however, implies that the protection offered by the principle of legality against arbitrary rule by law will depend on effective remedies that organize the state’s adherence to the Rule of Law. This confirms the need to rethink conceptions of law in terms of their institutional requirements, determining how decisions about the application of legal norms are to be organized and embedded in concrete legal orders.

B. Norm, Decision and Institution of Law

Legality, as distinct from legalism, cannot be defined as either a purely formal or a purely substantive conception of law. It does not reduce to law’s positivity, nor to its instrumentality or to substantive morality. The core concept of proportionality that defines the aim of the balancing act that is implied in the legality principle refers to a decision that is the outcome of a contradictory procedure. Under the Rule of Law, decisions on issues of law are not prepared in the mind of a single person; they are not the result of a singular inner monologue. The balancing act should be performed on the cutting edge of an adversarial debate, to make sure that all the relevant voices are heard and taken into account, even if a particular point of view is rejected. Precisely because the idea of law is antinomian, in concrete cases the legal effect of prevailing legal conditions will often depend on incompatible requirements of justice, certainty and instrumentality. That is, the interpretation of the legal conditions that are claimed to be relevant and applicable is the outcome of a decision, which should, however, be informed by careful consideration of alternative views on the interplay between facts and law. In that sense, legality does not so much refer to proportionality as a form of rational calculation, which is basically a mental act, but to adequate procedural settings, division of tasks and attribution of roles. Legality presumes and therefore requires a “mise en scène” that prevents one party from systematically overruling the other, and quite clearly this entails a pivotal role for the courts as an independent actor capable of safeguarding the contestability of both the framing and the actual implementation of government intervention (even if that intervention concerns the enforcement of a civil injunction or the transfer of property). In that sense legality is not only visible in the triple test of the right to privacy in the European context, but also in the procedural constraints that make legal claims in civil or criminal cases contestable in a court of law (the right to a fair trial in art. 6 of the ECHR).

49 In Anglo-American parlance this would be “adversary procedure,” organized in a somewhat different fashion than the contradictory procedure in continental law systems.

50 Cf. Waldron, supra note 43, at 6, who sums up a set of procedural safeguards very similar to those of art. 6: “a hearing by an impartial tribunal . . . ; a legally-trained judicial officer, whose independence of other
Though it should be clear by now that legality cannot be equated with legalism, we still need to answer the question of how it relates to enacted law. If legality refers to the procedural enactment of the Rule of Law, we need to establish which type of procedural enactment does and which type does not institute and sustain the Rule of Law. Surely, legality does not agree with just any type of procedure. In his magnificent *Du procès pénal*, the French judge and legal scholar Salas developed the elements for an interdisciplinary theory of legal procedure, notably in relation to punitive sanctions.\(^{51}\) Salas distinguishes three models of legal procedure: mediation, inquisition and the equitable procedure. To compare these models he elicits four elements that structure the debate that is at the core of legal procedure: “the third” (a person or institution) that should create middle ground between the adversaries; the relationship between written and oral proceedings; the claim that initiates the procedure; and, finally, the judgment that re-aligns the facts and the legal norms that are at stake.

Mediation is at stake in societies without a state monopoly on law-making and violence; as such it seems irrelevant for legality in the context of a state. What Salas calls the inquisitorial procedure is closest to the kind of procedural enactment that accords with an early strand of legalism, a pure rule *by law of a sovereign ruler*. Here, “the third” is a magistrate who speaks in the name of an undivided sovereign to which he is hierarchically subordinate (he is not a mediator, but also not independent). This magistrate investigates the incriminated subject on the basis of written documents and pre-existing legal norms without creating any distance between accuser and accused, or even between judge and accused. In fact, both the judge and the prosecutor impose themselves on the accused, and often the functions of judge and prosecutor are in the hand of the same magistrate. The claim that initiates the procedure may be hidden or changed during the proceedings, though at some point it may be forced upon the accused in the form of a confession. Finally, the judgment is applied to the subject by means of a potentially arbitrary interpretation of the law, meant to mold the facts into the relevant legal norms and vice versa, until the accusation can be transformed into a conviction. This type of inquisitorial procedure demonstrates how the legal certainty that seems to derive from the application of written legal norms can be turned inside out if the process of application is not organized on the basis of contestation, and if the roles of parties and decision maker are not assigned in a way that prevents inequality of arms between the parties or unwarranted bias on the side of the judge. It reminds us that if the accused is agencies of government is assured; a right to representation by counsel and to the time and opportunity required to prepare a case; a right to be present . . . ; a right to confront witnesses against the detainee; a right to an assurance that the evidence presented by the government has been gathered in a properly supervised way; a right to present evidence in one’s own behalf; a right to make legal argument about the bearing of the evidence and about the bearing of the various legal norms relevant to the case; a right to hear reasons from the tribunal when it reaches its decision, which are responsive to the evidence and arguments presented before it; and some right of appeal to a higher tribunal of a similar character.”

not given the standing she needs to resist either the evidence as presented or the law as interpreted—or both—the court gains a dangerous monopoly.

When discussing the equitable procedure, Salas notes that here “the third” is independent of the government and impartial in relation to the parties. The claim that initiates the procedure is known to the defendant and defines the proceedings. Though the preparations of the trial may consist of written documents, only the evidence that has been disclosed during trial can be used as proof, with the possibility of contestation by the defendant. Finally, a conviction is only possible on the basis of a prior law that is sufficiently clear as well as ambiguous to provide both certainty and contestability. The equitable procedure is directly linked with legality, in the sense that the competence to punish depends on its own contestability in a court of law.

Procedural enactment of the Rule of Law seems to require a specific type of institutionalisation, to enable the making and application of legal norms, which includes the decisions made by legislators and courts on what legal norms will apply under what conditions and circumstances. It should be obvious, but it is nevertheless crucial, that legal norms and legal decisions are contingent upon the institutions they inform, demanding close attention to the actual affordances of such institutions. Though I believe that Radbruch’s neo-Kantian concept of law both assumes and produces a specific type of institutionalisation, this only becomes visible in his “other” work, notably on the origins of criminal law in the class of serfs, as discussed elsewhere.52

To highlight the connection between a procedural conception of both law and the Rule of Law and specific institutionalizations of the law, I end this inquiry with a reference to Schmitt’s 1934 introduction to three types of legal thinking.53 Whereas most legal and political philosophers are aware of Schmitt’s decisionism, few scholars discuss his postwar conversion to an institutional theory of law. His first type of legal thinking concerns thinking in terms of rules or statutes, and lays claim to impersonal and objective thinking; he labels this as normativism. The second type concerns thinking in terms of determinations or decisions (Entscheidungsdenken), which he qualifies as personal; he labels this as decisionism. Interestingly, Schmitt finds that legal positivism is a hybrid that fuses normativism with—often hidden—decisionism. With the third type he introduces an alternative understanding of law under the heading of “concrete order thinking” (konkretes Ordnungsdenken). He defines a concrete order as suprapersonal, and emphasizes its organic character. Such a concrete order, he finds, is given but also subject to growth and it incorporates the norms it generates and by which it is defined, as well as the decisions it generates and that ground it. The organic metaphor is meant to oppose the artificiality

52 Hildebrandt, Origins, supra note 11.


54 Schmitt, supra note 53, at 12.
suggested by legal positivism, which emphasizes the man-made character of positive law (thus endorsing a kind of decisionism).55

Those familiar with Schmitt’s earlier take on sovereignty may be surprised to find that in the end Schmitt opts for “concrete order thinking” as the most appropriate form of legal thinking. Though he agrees with Hobbes that a decision may spring from a normative void and a concrete un-order, his new position highlights that stability and continuity cannot be trusted within a purely decisionist framework. Though Schmitt is still keenly aware that “sovereign is he who decides on the exception,” he also admits that the “peace, security and order of a societas civilis”56 that is instituted by the sovereign’s decision require a tangible order. Such order shapes the relationships between people in a concrete society under the aegis of real leadership, binding people on the basis of heartfelt “honor, obedience, discipline and loyalty.”57 Considering Schmitt’s well-known loyalty to Nazi Germany, the reader will not be surprised that Schmitt openly refers to the important insights gained from the movement of National Socialism, and to the pivotal contributions of a concrete Führer, capable of inspiring his people to act as loyal and morally responsible elements of a Volksganzen.58

We may be tempted to dismantle Schmitt’s position as fascist, dangerous and unworthy of further investigation. However, the reader may have noticed that Radbruch made a handwritten note in his 1932 edition of Legal Philosophy,59 where he explicitly refers to this particular text, noting that Schmitt depicts the positivity of the law as dependent on, or at least related to, decisionism. This is interesting, as it shows that Radbruch studied and appreciated Schmitt’s analysis of legal thinking without in any way endorsing Schmitt’s position with regard to Nazi Germany. I believe, therefore, that it may be worthwhile to investigate whether Schmitt’s analysis of legal positivism and his newly found “concrete order thinking” could—perhaps paradoxically—leverage the procedural enactment of the Rule of Law, discussed above.

For Schmitt, the problem with legal positivism is its adherence to an entirely artificial, constructed law, disentangled from both its historical roots and the concrete societal fabric which it seeks to regulate. One could take this a little further and suggest that Schmitt criticized—avant la lettre—the regulatory paradigm that has somehow convinced many of today’s lawyers to frame their own subject in terms of regulation, highlighting a voluntarist and instrumentalist understanding of law. The regulatory paradigm actually derives from cybernetics and policy science, and views law as a mere

55 This seems to compare well with Hayek’s position as expounded by Waldron, supra note 43, at 23, where Waldron criticizes some scholars for their “mythic reverence for common law, not conceived necessarily as deliberately crafted by judges, but understood as welling up impersonally as a sort of resultant of the activity of courts,” taking Hayek as an example.
56 Schmitt, supra note 53, at 24.
57 Id. at 52.
58 Id. at 49.
59 Radbruch, Rechtsphilosophie, supra note 19.
instrument to order society. It reduces law to its purposiveness and thus comes close to a Polizeiwissenschaft: how to intervene in such a way that a desirable outcome is achieved (economic growth, full employment, redistribution of income, a high level of education or whatever). The hybrid of normativism and decisionism that makes for legal positivism (in the eyes of Schmitt) actually invites activism on the side of both the legislator and the courts, well aware that they both have the competence to “decide the law.” In the end, such legal positivism digs its own grave, since regulators will soon find other, less burdensome, types of instruments to achieve their policy goals. Where in the context of the Rule of Law the whole point of having a positive law is to turn power into competence, entailing an operation that is simultaneously constitutive and limitative, the doctrine of legal positivism has little to say about what goals the law will serve and what safeguards it will offer. This all depends on the sovereign that imposes its will by means of the law, whether this sovereign is the democratic legislator or an enlightened despot. In the end, this sovereign can opt for other means to impose its will. Nudging people into compliance, or applying techno-regulation to induce certain behaviours are just two contemporary examples of a regulatory paradigm that has no necessary relationship with legality and the Rule of Law. Schmitt’s critique of legal positivism is in part very much to the point. However, his solution is hampered by his own quest for a single point of reference. His depiction of “concrete legal order thinking” is indebted to the French legal scholar Hariou, the antagonist of the famous legal positivist Duguit. Hariou did not develop a legal theory, but investigated legal practice, in particular that of administrative law, by studying the decisions of the French Conseil d’État, the highest administrative court. Interestingly, Schmitt emphasizes Hariou’s notion of a situation établie, which he translates as “a normal, stabilized situation” (an inversion of his definition of the sovereign decision). The situation établie is the core concept of Hariou’s theory of the institutions, according to Schmitt, and in the case of administrative law this “normal, stabilized situation” entails the ordering of instances of appeal, the hierarchy of offices, their autonomy, inner checks and balances, inner discipline, honour and professional secrecy. For Schmitt this concrete legal ordering rises above the a-historic, abstract legal

60 See the excellent article by Julia Black, Critical Reflections on Regulation, 27 Austl. J. Legal Phil. 1 (2002), whose working definition of “regulation” as “the intentional activity of attempting to control, order or influence the behaviour of others” (id. at 19) has become the canonical reference.

61 Radbruch, Legal Philosophy, supra note 19, at 205 (“But if the legal certainty it establishes is the basis of the current state-power’s right to create law, it must also be the limit of that power.”).


63 Schmitt, supra note 53, at 46.

64 Id.
norm as well as the highly personal decision, and goes way beyond their hybridization in legal positivism. It is more powerful, more trustworthy, more sustainable and, finally, more real. And, finally, Schmitt concludes that the state, rather than being a system of norms or the source of a pure sovereign decision, must be understood as the institution of institutions, the order of all other orderings, in which “all autonomous institutions find their protection and their order.”65 If this sounds like Hegel, the reader will not be surprised that for Schmitt, Hegel’s legal and political philosophy is, indeed, one of the most forceful examples of the “concrete order thinking” he embraces. The state, with Hegel, is not a legal norm, nor a singular decision, but a Gestalt that brings together both reason and ethics, in the form of an “individual totality”;66 “order of orders, institution of institutions.”67

V. End(s)

Let us return once more to Radbruch. It is clear that for Radbruch the artificiality of positive law is not a problem to be solved, but a consequence of the concrete incompatibility of the aims of the law, coupled with the fact that people will not agree on what should be the purpose of their society, collective or community. The artificiality is a productive, creative outcome of human adversity. The constructive nature of law—from Radbruch’s perspective—does not concord with a legal positivism that reduces law to the legal certainty of positive law (what Schmitt saw as the hybrid concoction of normativism and decisionism). On the contrary, the challenge to compatibilize the aims of positivity with those of justice and instrumentality is what triggers construction and reconstruction. This is an ongoing process and it cannot be taken for granted—as Radbruch testified after his experience of Nazi rule. At some point, the lawyer—whether judge or legislator—must acknowledge that the procedural enactment of legal code or case law fails to even aim for justice and legal certainty and instrumentality. At that point the lawyer is called upon to decide on the exception: to deny validity to what looks like positive law. Not because of her own moral preferences but because law has been separated from the values that enable us to qualify a statute or verdict as law.

The productive nature of artificial, positive law, however, does not, in itself, protect individual citizens against injustice. Even if artificial law is explained in terms of the choices that must be made when justice and legal certainty, or justice and instrumentality, or legal certainty and instrumentality are incompatible in concrete situations, we need institutional arrangements to see to it that reasonable choices are made. We need to make sure that such incompatibility is not used as an argument to push for an agenda that allows for decisions with a bias against vulnerable adversaries or, simply, for decisions biased to protect the interests of already privileged groups. This requires a situation établie with effective countervailing powers, checks and balances, and

65 Id. at 47.
66 Id. at 38.
67 Id. at 39.
equitable procedures. Contrary to Schmitt’s suggestion, this *situation établie* cannot be understood and preserved on the basis of its concrete reality; to be sustainable it requires keen attention to the normative framework it embodies and the backing of sovereign power. Norm, decision and institution are mutually constitutive or interdependent. On top of that, to qualify as law, their interplay should vouch for the ends of justice, legal certainty and the law’s own instrumentality, in all modesty.