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Axiology of Law – from General to Specific Philosophy of Law*

Aksjologia prawa – od ogólnej filozofii do konkretnej filozofii prawa

ABSTRACT

An axiology as a theory of values takes an important place not only in general philosophy but in legal philosophy as well. Jurisprudence and law cannot ultimately be axiologically neutralised since the relationship between law and values is of a primary, eternal, necessary and immanent character. The author discusses this phenomenon on the example of Gustav Radbruch's legal philosophy. In his opinion when one writes about Radbruch as a philosopher of law, one should make five very important reservations: firstly, Radbruch was a representative of Neo-Kantianism; secondly, it was not Neo-Kantianism 'in general', but a specific variant called Baden Neo-Kantianism (south-German, Heidelberg-based); thirdly, Radbruch was not a philosopher 'in general', as he was interested in Neo-Kantianism transplanted to the philosophy of law; fourthly, we may currently notice a great comeback of the philosophy of Kant (e.g. J. Habermas, J. Rawls, O. Höffe), but this phenomenon should be precisely distinguished from Neo-Kantianism as the temporally and spatially determined philosophical direction of the *fin de siècle* period; fifthly, if one can even speak of some kind of axiological turning point in the evolution of Radbruch's philosophical views, it is 1933 rather than 1945.

Keywords: axiology; philosophy of law; legal values; Gustav Radbruch; Neo-Kantianism

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INTRODUCTION

In the discourse that currently takes place in law and legal practice, the term 'axiology' has recently become widespread, being mentioned in any possible form and related to the search for the value of law and values in law.[1] At the same time, the issue ceased to be solely within the domain of law theoreticians and philosophers of law, as it actually spilled throughout the law as a whole. A typical example can be the extensive two-volume study in axiology of administrative law published a few years ago, and slightly later also of civil law and economic public law,[2] but there are much more such examples, in very different areas and at an even higher level of detail – from e.g. constitutional axiology, to human rights axiology, to the axiology of public procurement law.[3] Given the extent of this phenomenon, it is difficult not to reflect on its causes, but also on some deeper justification behind it. Jurisprudence and law cannot ultimately be axiologically neutralised,[4] since the relationship between law and values is of a primary, eternal, necessary and immanent character.

Since it is not only about moral/ethical values, we have expanded the field of our interests beyond the field of pure ethics of law towards the role of values in law in general, thus towards the axiology of law. The ethics of law plays a dominant role here, but still it is not the only one. Ultimately, therefore, it is about the role of values in law in general, including, but not limited to, the role of moral/ethical values.

However, such detailed discussions should always be anchored in and based on certain general findings of philosophy *in genere* and of theory and philosophy of law *in specie*. In contemporary legal scholarship, the term 'ethics of law' is associated with a certain type of general reflection on law. A typical example is the proposal put forward by a contemporary German scholar, Dietmar von der Pfordten[5] – looking for the basis of the distinction of general reflection on law between legal theory and philosophy of law, he points to inspiration that may come from the philosophy of Immanuel Kant and his critique of pure reason and critique of practical reason. From this point of view, legal theory approaches law as it is (the domain

[1] For example, see M. Dudek, M. Stępień (eds.), *Aksjologiczny wymiar prawa*, Kraków 2015; M. Zajęcki, *Aksjologiczna interpretacja prawa (studium z metodologii i teorii prawa)*, Warszawa 2017.

[2] J. Zimmermann (ed.), *Aksjologia prawa administracyjnego*, vol. 1–2, Warszawa 2017; J. Pisuliński, J. Zawadzka (eds.), *Aksjologia prawa cywilnego i cywilnoprawna ochrona dóbr*, Warszawa 2020; A. Powałowski (ed.), *Aksjologia publicznego prawa gospodarczego*, Warszawa 2022.

[3] For example, see M. Florczak-Wątor, *Aksjologia Konstytucji Rzeczypospolitej Polskiej*, [in:] *Argumenty i rozumowania prawnicze w konstytucyjnym państwie prawa. Komentarz*, eds. M. Florczak-Wątor, A. Grabowski, Kraków 2021, pp. 61–89; J. Zajadło, *Jaka aksjologia praw człowieka?*, "Państwo i Prawo" 2019, no. 11, pp. 3–29; P. Nowicki, *Aksjologia prawa zamówień publicznych. Pomiędzy efektywnością ekonomiczną a instrumentalizacją*, Toruń 2019.

[4] K. Pałecki (ed.), *Neutralization of Values in Law*, Warszawa 2013.

[5] D. von der Pfordten, *Rechtsethik*, München 2011.

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of theoretical reason), while philosophy of law approaches law as it should be (the domain of practical reason). Be that as it may, the philosophy of law is thus about the discovery of certain values in law using practical reason, and thus about more than just the ethics of law, it is rather about the broader category of the axiology of law. The proposal of von der Pfortden mainly concerns methodological findings within legal sciences, whereas we are concerned with the search for links between axiology as a branch of philosophy, law as a carrier of certain values and the practice of the legal profession as the necessary practical embodiment of these values.

Thus, it seems necessary first to establish what axiology is and, secondly, what its specific role in jurisprudence is, and this in all dimensions of law – its making, application, interpretation, validity and observance. The set of issues is so extensive that our considerations at the level of general philosophy would have to be limited to basic knowledge, while at the level of legal theory and philosophy to an exemplary indication of such a system of thought in which the problems of values play a central role and which, at the same time, can be creatively used both at the level of general reflection on law and in detailed legal dogmatic disciplines and sub-disciplines.

We omit the first aspect because at the elementary level it is quite well known – interested readers can be referred to studies of an encyclopaedic and lexicographic nature, where both the concept of axiology and its subject matter are explained precisely as a philosophical sub-discipline. For example, let us point to the following synthetic definition: "Axiology (Greek: *axios* – of value; *logos* – theory, science) is one of the fundamental branches of philosophy (philosophy of value) or a set of questions concerning values and valuation, forming part of general metaphysics, human philosophy and theory of knowledge; if ethics and aesthetics are understood as theories of moral and aesthetic values, they can be considered specialized parts of axiology".[6]

In the second aspect, Neo-Kantianism on the one hand, and Gustav Radbruch's evolving philosophy of law on the other served as an example. Although very significant, it is only an example. Lawyers working on law axiology could also look for other sources of inspiration and reach out to the works of contemporary law philosophers such as Ronald Dworkin, Lon L. Fuller or last but not least Herbert L.A. Hart. Therefore, of course, one can reasonably ask why Neo-Kantianism and why Radbruch? Neo-Kantianism because I think no other philosophical direction devoted so much space to the issue of values and at the same time no other one had such a huge influence on the contemporary philosophy of law. Radbruch, on the other hand, because values are at the core of his philosophy of law, and the way in which they are linked to law has a universal methodological value and is still surprisingly up to date.

[6] A.B. Stępień, *Aksjologia*, [in:] *Leksykon filozofii klasycznej*, ed. J. Herbut, Lublin 1997.

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WORLD OF VALUES OF NEO-KANTIANISM

When one writes about Radbruch[7] as a philosopher of law, one should, in my opinion, make five very important reservations: firstly, Radbruch was a representative of Neo-Kantianism; secondly, it was not Neo-Kantianism 'in general', but a specific variant called Baden Neo-Kantianism (south-German, Heidelberg-based); thirdly, Radbruch was not a philosopher 'in general', as he was interested in Neo-Kantianism transplanted to the philosophy of law; fourthly, we may currently notice a great comeback of the philosophy of Kant (e.g. J. Habermas, J. Rawls, O. Höffe), but this phenomenon should be precisely distinguished from Neo-Kantianism as the temporally and spatially determined philosophical direction of the *fin de siècle* period[8]; fifthly, if one can even speak of some kind of turning point in the evolution of Radbruch's philosophical views, it is 1933 rather than 1945.

If something in Radbruch's writings has been kept up to this day, applies in particular to some of his philosophical concepts: first of all, the pre-war idea of law expressed in the security-purpose-justice triad,[9] modified after 1933 and supplemented after 1945 with the concept of statutory lawlessness and supra-statutory law (the so-called Radbruch formula).[10] All his other achievements – of a criminal law scholar, politician, literature and art historian, etc. – are mainly of historical significance. However, if we try to transpose Radbruch's philosophical concepts into our contemporary political and legal problems, we must remember that in such a situation we are dealing only with an interpretation and sometimes even overinterpretation of his views – their essence remains rooted in the realities of the era in which they were created. This applies both to the core of Radbruch's philosophy of law, which was formed at the end of the Wilhelmine Period and in the political reality of the Weimar Republic, and to the concepts of statutory lawlessness and supranational law built upon that core, which in turn responded to the challenges of the first years after the Second World War.

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[7] Radbruch's studies cited below come mainly from the 20-volume edition of his works; to simplify the footnotes they are referred to hereinafter as GRGA with the number of appropriate volume.

[8] S.L. Paulson, *Einleitung*, [in:] *Neukantianismus und Rechtsphilosophie*, eds. R. Alexy, L.H. Meyer, S.L. Paulson, G. Sprenger, Baden-Baden 2002, p. 11.

[9] J. Zajadło, *Bezpieczeństwo – celowość – sprawiedliwość*, "Gdańskie Studia Prawnicze" 2002, vol. 9, pp. 233–248.

[10] Idem, *Formuła Radbrucha. Filozofia prawa na granicy pozytywizmu prawniczego i prawa natury*, Gdańsk 20011, especially pp. 271–305. According to S.L. Paulson (*On the Background and Significance of Gustav Radbruch's Post-War Papers*, "Oxford Journal of Legal Studies" 2006, vol. 26(1), pp. 17–40), post-war Radbruch's writings, including in particular his famous formula, should also be interpreted, on the one hand, on the backdrop of Neo-Kantianism, an on the other, in the historical context.

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In the history of philosophy, the period at the turn of the 20th century is inextricably linked with Neo-Kantianism, which was a reaction to the crisis of German idealist philosophy under the slogan of a 'return to Kant' (*Rückkehr zu Kant*).[11] According to a general encyclopaedic definition, "Neo-Kantianism was the name given to the group of German philosophical schools that were most influential between 1870 and 1920, and were characterised by their rejection of irrationalism, speculative naturalism and positivism. Representatives of Neo-Kantianism believed that philosophy could become a science (and not just one of many views of the world) if it refreshed the spirit of Kant's philosophy, which they regarded as a propaedeutic to metaphysics and all other philosophical disciplines".[12] This philosophical direction was internally very complex and, according to M. Szyszkowska, "it would be unjustified and superficial to treat Neo-Kantianism as a uniform and unambiguously defined doctrine".[13] From the point of view of its influence on the philosophy of law, two schools were particularly significant: the so-called Marburg Neo-Kantianism associated with Otto Liebmann, Albert Lange, Hermann Cohen, Paul Natorp and Ernst Cassirer, and the so-called Baden neo-Kantianism created by Kuno Fischer, Wilhelm Windelband and Heinrich Rickert.[14] The element that particularly made these two trends distinct from each other was, above all, the axiological issues, neglected (or rather: formalised) by the representatives of the Marburg School, and emphasised by Heidelberg Neo-Kantianism – so not surprisingly the latter is sometimes referred to as axiological Neo-Kantianism. In the context of the philosophy of law, the Marburg version was promoted above all by Rudolf Stammler, while the Heidelberg version was promoted by Radbruch.[15] Neo-Kantianism, especially Marburg Neo-Kantianism, was committed to thinking in 'pure', 'logical', 'content-less' terms. No wonder that Hans Kelsen's 'pure science of law' also grew out of this philosophical stem. However, the problem is quite complex: Kelsen used certain Marburg School elements (especially the transcendental method), but one can also see in his philosophy of law the strong influence of the Heidelberg direction. The incorporation of the theory of values into Neo-Kantianism by Windelband, Rickert and especially Emil Lask resulted in these pure logical forms of thought having been filled with a certain content. Within

[11] For more on this topic, see M.A. Wiegand, *Unrichtiges Recht. Gustav Radbruchs rechtsphilosophische Parteienlehre*, Tübingen 2004, pp. 19–60; R. Alexy, L.H. Meyer, S.L. Paulson, G. Sprenger (eds.), *op. cit.*, passim.

[12] T. Honderich (ed.), *Encyklopedia filozofii*, vol. 2, Poznań 1999, p. 615.

[13] M. Szyszkowska, *Neokantyzm. Filozofia społeczna wraz z filozofią prawa natury o zmiennej treści*, Warszawa 1970, p. 22.

[14] See T. Honderich, *op. cit.*, p. 615 ff.

[15] H. Alwart, *Recht und Handlung: die Rechtsphilosophie in ihrer Entwicklung vom Naturrechtsdenken und vom Positivismus zu einer analytischen Hermeneutik des Rechts*, Tübingen 1987, pp. 44–49.

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the framework of general philosophy, this still allowed the relative coexistence of the two schools, whereas in the area of philosophy of law it was a fundamental difference which resulted in going in completely different directions. It all depended on how far the philosophers of law coming from Neo-Kantianism formulated the consequences resulting from the potential conflict between the positive law and the idea of law: "It was as early as Stammler who called the 'positive law' a certain 'attempt at just law'. However, while from his point of view the failure of this attempt does not lead to a violation of the 'nature of the law' by unjust regulations, Radbruch came dangerously close to the natural-law ethical reasoning, which was originally even forbidden in Neo-Kantianism".[16] However, without understanding the difference between the Marburg and Heidelberg schools, it is not possible to understand why Radbruch could, despite appearances, easily move to a position of natural law after the war without changing other assumptions of his philosophy of law. Some elements that allowed such modifications, resembling contemporary theories of legal argumentation (especially legal hermeneutics), had been intrinsic in his system from the very beginning. The essence of the dispute also explains many questions of understanding the contemporary paradigms of positivist and non-positivist law theory, even if they do not have direct reference to Neo-Kantianism in the strict sense. What currently determines the content of these paradigms is not about contrasting the order of positive law with the objectively valid normative order (law of nature), but rather the identification of the nature of the relationship between law and morality. In modern philosophy, this takes the form of either a thesis about the separation of law and morality (the *Trennungsthese* as a symbol of the positivist attitude) or a relationship between them (the *Verbindungsthese* as a symbol of the non-positivist attitude).[17] From the perspective of Radbruch's views, however, one thing is important here: Radbruch was influenced by Heidelberg Neo-Kantianism, but his relationship with this philosophical direction consists not only in adapting and interpreting the writings of its authors, but actually in co-creating and consequently co-authoring, at least in the area of philosophy of law. Szyszkowska, when presenting various forms of Neo-Kantianism, distinguishes also a relativistic form and writes that "it comes from Simmel, and found its full expression in Radbruch's philosophy".[18]

Radbruch's basic philosophical and legal assumptions are based on Heidelberg Neo-Kantianism.[19] Influenced by Windelband and Rickert, he primarily adopts the division of sciences into nomothetic sciences (natural sciences, *Naturwissen-*

[16] *Ibidem*, p. 48 ff.

[17] R. Alexy, *Begriff und Geltung des Rechts*, Freiburg–München 1994, especially p. 39 ff.

[18] M. Szyszkowska, *Neokantyzm*..., p. 28.

[19] R. Dreier, S.L. Paulson, *Einführung*, [in:] *Rechtsphilosophie. Studienausgabe*, ed. G. Radbruch, Heidelberg 2003, p. 238.

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schaften), which generalise, and idiographic sciences (humanities and history, *Kulturwissenschaften*), which individualise.[20] They study reality based on different modalities – the natural world is a world of deterministic imperative (*Müssen*), while the cultural world is a world of ought (*Sollen*). In Radbruch, the idiographic character of legal sciences leads to certain logical and methodological consequences: he treats law as an object and product of culture, and consequently his iusnaturalism also relies more on the 'law of culture' than on the 'law of nature'.[21] It also draws from Neo-Kantianism, especially from Heinrich Levy, the methodological dualism of being (*Sein*) and ought (*Sollen*), of the real world and the world of values. Due to the axiological references in Heidelberg Neo-Kantianism, the separation of being and ought is admittedly not as radical as in the Marburg School, but it nevertheless exists, especially in the epistemological sphere. This will find expression in Radbruch's philosophy of law in, first timid and later more categoric, attempts to overcome this dualism – for there appears first a methodological trialism of the values of the idea of law (legal security, purpose, justice) and the aims of law (individualism, supraindividualism, transpersonalism),[22] and then a concept of the nature of things considered by some to be a kind of crowning achievement of the philosophy of law in question.[23] Influenced by Lask, he introduces the problem of the value of law and, consequently, the problem of the relationship between the idea of law and the concept of law, as well as the antinomies and conflicts of values within the idea and aims of law.[24] Finally, he takes a relativist position, following the influence of Max Weber.[25] Values and value judgments are historically and socially determined, we can make rational choices about them and admit to them (*sich bekennen*), but we cannot definitely know them (*erkennen*).[26] In the unfinished afterword to *Rechtsphilosophie*, cited above, he explicitly points to Weber as the source of inspiration for his epistemological relativism. For Weber, however, relativism did not mean, as it did for Radbruch, ethical nihilism: "Although he believed that values could not be justified, he was not a nihilist. He understood politics as

[20] T. Honderich, *op. cit.*, p. 616, 387 ff.

[21] For more on this topic, see H. Durth, *Der Kampf gegen das Unrecht. Gustav Radbruchs „Theorie eines Kulturverfassungsrechts"*, Baden-Baden 2001.

[22] R. Dreier, S.L. Paulson, *op. cit.*, p. 237; A. Kaufmann, *Rechtsphilosophie*, München 1997, p. 169.

[23] A. Kaufmann, *Gustav Radbruch. Rechtsdenker, Philosoph, Sozialdemokrat*, München–Zürich 1987, p. 85, 91.

[24] For more details on this topic, see K. Seidel, *Rechtsphilosophische Aspekte der „Mauerschützen"-Prozesse*, Berlin 1999, p. 61 ff.; M. Wiegand, *op. cit.*, pp. 61–100.

[25] On Radbruch's relativism, see L.H. Meyer, *'Gesetzen ihre Ungerechtigkeit wegen die Geltung absprechen'. Gustav Radbruch und der Relativismus*, [in:] *Neukantianismus…*, pp. 319–361.

[26] R. Dreier, S.L. Paulson, *op. cit.*, p. 238. For more details on this topic, see H. Dreier, *Die Radbruchsehe Formel – Erkenntnis oder Bekenntnis*, [in:] *Staatsrecht in Theorie und Praxis. Festschrift für Robert Walter zum 60. Geburtstag*, ed. H. Mayer, Wien 1991, pp. 117–135.

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a process of value implementation, and political conflicts also as a struggle for values".[27] Radbruch later transferred this understanding of relativism to the area of law – he subordinated the idea of law to the realisation of certain values: "The concept of law is a cultural concept, i.e. a notion about value-oriented reality, a reality whose meaning is to serve values. *Law is a reality whose meaning is to serve the values of law, the idea of law* [italicised in the original]".[28]

These names – Windelband, Rickert, Lask, Levy, Weber – show how Radbruch's philosophy of law was influenced by the above-mentioned 'spirit of Heidelberg'.

In the field of general philosophy, Radbruch referred in particular to the views of Windelband and Rickert, while in the field of law philosophy he was primarily influenced by Lask. In his fundamental works, the author himself points to the sources of his inspiration: in *Grundzüge der Rechtsphilosophie* (1914) these include Windelband, Rickert and Lask (as far as philosophers are concerned) and Georg Jellinek (as far as lawyers are concerned);[29] while in *Rechtsphilosophie* (1932), the names of Windelband, Rickert and Lask appear, with particular attention to the latter.[30] Radbruch's contact with Heidelberg Neo-Kantianism began around 1903, when he met Lask in the autumn of that year – he had never studied philosophy in a formal sense, but at that time he even planned to write a second doctoral dissertation in this field. Radbruch himself admitted that he had never even known of the existence of such a direction before. In a letter to Karl Engisch dated 21 September 1941, he later regretted that, because of his ignorance, he could not use the achievements of the Baden school during the period of writing the habilitation dissertation, which affected the methodology adopted therein.[31] The greatest influence on the later philosophical concepts of Radbruch was especially Lask, who very creatively adapted Windelband's and Rickert's views for the purposiveness of the philosophy of law. In a letter dated 24 December 1904, Radbruch wrote to Hermann Kantorowicz that Lask had opened to him a "new world of philosophical and legal thinking".[32]

Radbruch himself believed that the second half of the 19th century brought a decline in the philosophy of law, because the *Allgemeine Rechtslehre* (general legal science) was a science that empirically analysed individual legal norms and

[27] Z. Krasnodębski, *Przedmowa. Weber po komunizmie*, [in:] M. Weber, *Polityka jako zawód i powołanie*, Kraków 1998, p. 27.

[28] G. Radbruch, *Rechtsphilosophie*, GRGA, vol. 2, p. 255.

[29] *Ibidem*, p. 13.

[30] *Ibidem*, p. 221.

[31] Idem, GRGA, vol. 18, p. 179, item 194. Cf. K. Seidel, *op. cit.*, p. 65, note 31.

[32] G. Radbruch, GRGA, vol. 17, p. 57, item 59. See also, with respect to close contacts with Lask, idem, *Der innere Weg*, GRGA, vol. 16, p. 217, and the letter to parents of 4 March 1905, GRGA, vol. 17, p. 59.

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institutions, not a philosophical reflection aimed at clarifying the concept of law and grounds of its validity. In a letter to Giorgio Del Vecchio he later wrote on 5 September 1949 that until Stammler we were actually dealing with "a total disappearance of the German philosophy of law".[33] Radbruch highly appreciated Stammler's contribution to a revival of the philosophy of law, but at the same time went in a completely different direction.[34] The fundamental differences between the two authors are, however, perfectly understandable due to their different philosophical background – as we remember, Stammler based his views on the 'formal-logical' Marburg Neo-Kantianism, while Radbruch remained in the circle of 'material-axiological' Heidelberg Neo-Kantianism.[35] This is especially true in the field of axiology. Thus, Stammler's ideas seemed too formalistic to Radbruch, because "there is little of philosophical-legal substance in Stammler due to the influence of ascetic axiological purity".[36]

The starting point for Radbruch, like Neo-Kantianism in general, is the methodological dualism of being and ought, nature and ideal, reality and value, *Sein* and *Sollen*. The essence of this position is the recognition that ought statements (*Sollen*) cannot be derived by induction from reality (*Sein*), but only by deduction from other ought statements (*Sollen*). As a result, they are not subject to proof and justification in terms of bivalent logic, truth and falsity. In Marburg Neo-Kantianism, this distinction was fundamental and insurmountable, whereas the representatives of Heidelberg Neo-Kantianism sought to bridge the two worlds in axiology. Radbruch's philosophy of law, moreover, underwent a very characteristic evolution in this respect. In *Grundzüge der Rechtsphilosophie* (1914),[37] the author still opted for strict adherence to the so-called methodological dualism (*Methodendualismus*). Later, in *Rechtsphilosophie* (1932), Radbruch modified and enriched his position and moved to a position referred to in the literature as so-called methodological trialism (*Methodentrialismus*),[38] which much better reflected the intentions of the founders of Heidelberg Neo-Kantianism.

In an attempt to overcome the methodological duality of the worlds of being and ought, Radbruch introduces the concept of the world of culture and places it between nature and ideal. Referring to the division introduced by Windelband

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[33] Idem, GRGA, vol. 18, p. 312, item 336.

[34] For example, see idem, *Rudolf Stammler. Zum siebzigsten Geburtstag*, GRGA, vol. 16, p. 53 ff.; idem, *Rechtsphilosophie*, GRGA, vol. 2, p. 249 ff.

[35] A. Kaufmann, *Gustav Radbruch – Leben und Werk*, GRGA, vol. 1, p. 73 ff.

[36] Radbruch in a review about G. del Vecchio, *Lezioni di Filosofia del Diritto*, GRGA, vol. 3, p. 257.

[37] G. Radbruch, GRGA, vol. 2, p. 22 ff.

[38] *Ibidem*, p. 230, note 2, and p. 251. For more details on this topic, see J. Kim, *„Methodentrialismus" und „Natur der Sache" im Denken Gustav Radbruchs – zugleich Quellenstudien zu ihren kulturphilosophischen Vorfragen bei Windelband, Rickert und Lask*, Diss. Freiburg 1966.

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and Rickert, he classified legal sciences as the so-called *Kulturwissenschaften*, not the so-called *Naturwissenschaften*, and consequently the law as such was for him a cultural phenomenon hung between reality (experience) and value (ideal).[39] In support of this thesis, the following very poetic statement by Radbruch is most often quoted in literature[40]: "(…) all this creates our culture, this intermediate sphere between the dust of the Earth and the stellar world; it creates a state of human aspirations and human creativity between a state of nature and real existence, and an ideal state of longing. Lying between the innocent peace of nature and the sublime peace of the ideal, this world of culture is a world full of sin, anxiety, and, on the other hand, full of hope and faith, a world of our struggle of action. In this way we would regard law as a cultural phenomenon, a human creation, having on the one hand the weight of an earthly thing, and on the other the flight to the upper zones".[41] Therefore, Radbruch's philosophy of law provides a multifaceted approach to the world – the author clearly distinguishes between the worlds of nature, culture and ideas. It also adds the world of religion to this, but currently the latter does not concern law, either as a social fact or as an ideal. For in the world of religion, we find "a confirmation of everything that exists, a smiling positivism that says 'Yes' and 'Amen' about all things",[42] because it overcomes the rift between the world of nature and world of ideal, an optimistic affirmation of life.[43]

The inspiration from Windelband, Rickert and especially Lask makes the problem of value and valuation a central problem in Radbruch's philosophy of law. The author identifies three areas in which there is a philosophical assessment from the point of view of values: logic, ethics and aesthetics. In the world of ideas, they are matched respectively by the values of truth, goodness and beauty.[44] The problem of values and valuation has its reference point in each of the four above-mentioned worlds, but differently in each of them. On the basis of nature, culture, idea and religion, Radbruch distinguishes four different attitudes towards values. In the case of reality, being, nature, we are dealing with the attitude of being 'value-blind' (*wertblinde Haltung*) or, in other words, 'free from values' (*wertfreie Haltung*). Regarding culture, Radbruch formulates the concept of attitude 'relating to value'

[39] J. Stelmach, R. Sarkowicz, *Filozofia prawa XIX i XX wieku*, Kraków 1998, p. 73; I. Gołowska, *Antynaturalistyczna filozofia prawa Gustawa Radbrucha*, [in:] *Studia z filozofii prawa*, ed. J. Stelmach, Kraków 2001, p. 150.

[40] As in, e.g., M. Szyszkowska, *Zarys filozofii prawa*, Białystok 2000, p. 214 ff.; R. Tokarczyk, *Historia filozofii prawa*, Kraków 2000, p. 305.

[41] G. Radbruch, *Einführung in die Rechtswissenschaft*, GRGA, vol. 1, p. 220 (as cited in Polish edition *Wstęp do prawoznawstwa*, Warszawa 1924).

[42] Idem, *Rechtsphilosophie*, GRGA, vol. 2, p. 225.

[43] M. Szyszkowska, *op. cit.*, p. 215.

[44] G. Radbruch, *Rechtsphilosophie*, GRGA, vol. 2, p. 222, 279.

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(*wertbeziehende Haltung*).[45] Culture (including law) is suspended between the real world and the ideal world. Even though it never reaches its ideal, its rationale is to strive for the realisation of ideal values. In the legal sciences, concepts are built and substantiated through two different paths. The general concept of law is created by an inductive comparison of the various expressions of law occurring in reality – from this perspective, law is, according to Radbruch, "the entirety of rules governing coexistence between people".[46] However, this is not a justification for the validity of law, since the author derives that concept from the idea of law by way of a deduction. According to this view, law is "a reality the sense of which is to serve the value of law, the idea of law".[47] This is very important from the point of view of the concepts of statutory lawlessness and supra-statutory law proposed after the war (the so-called Radbruch formula), since it turns out that even before 1933 Radbruch linked inherently law with justice: "The concept of law cannot be defined any more than as something (*Gegebenheit*), the sense of which is the realisation of the idea of law. A law may be unfair (*summum ius – summa iniuria*), but it is the law only if its sense is to be just".[48] This is similar to the second part of the later Radbruch formula (*Verleugnugsthese*) – if the purposiveness and meaning of a law is to be unjust, then it is not the law. In the world of ideas, attitude towards values is expressed in Radbruch's view as a 'valuing attitude' (*bewertende Haltung*). In terms of the philosophy of law, this means assessing the law from the point of view of the degree of its closeness as a cultural creation to the values found in the world of ideal. Hence, Radbruch described philosophy of law as 'valuation-based approach to law', as 'the science of just law'.[49] Finally, in the world of religion, there is an attitude of 'overcoming values' (*wertüberwindende Haltung*). This sphere remains somewhat beyond Radbruch's philosophical interest, because law is wholly replaced by a community based on 'all-embracing love'.[50]

Radbruch attributed appropriate kinds of approach to law to individual attitudes towards values. In his private copy of *Grundzüge der Rechtsphilosophie*, the author added a handwritten footnote stating that the 'value-related' attitude is characteristic of legal sciences (*Rechtswissenschaft*), while the 'value-based' attitude is typical of philosophy of law (*Rechtsphilosophie*).[51] As regards the attitude of 'value overcoming', characteristic of religion, he uses the term 'absolute meaning of law' and

[45] *Ibidem*, p. 221 ff.
[46] *Ibidem*, p. 261.
[47] *Ibidem*, p. 255.
[48] *Ibidem*, p. 227.
[49] *Ibidem*, p. 230. The same position was taken by Radbruch also after 1945 in *Vorschule der Rechtsphilosophie*, GRGA, vol. 3, p. 137 ff.
[50] *Ibidem*, p. 228, 251, 325.
[51] Idem, GRGA, vol. 2, p. 53, note 55. Cf. B. Kastner, *Goethe in Leben und Werk Gustav Radbruchs*, Heidelberg 1999, p. 122.

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refers to Leo Tolstoy, whose views he regarded as "the most noble form of anarchism".[52] In another place, the author also used the term 'religious philosophy of law' (*Religionsphilosophie des Rechts*)[53]. At the item 'attitude of value-blindness', Radbruch entered 'vacat', although according to B. Kastner he could point to the sociology of law (*Rechtssoziologie*).[54]

By considering philosophy of law as the science of just law (*Lehre vom richtigen Recht*), Radbruch was, of course, directly referring to Stammler,[55] but with one very important difference. In his view, the philosophical approach to law as a cultural phenomenon must not be limited to descriptive reflection alone, but must also take on a normative meaning.[56] This is understandable, since we have in this sphere the value-oriented attitude (*bewertende Haltung*) consisting in assessing the degree to which law as a human creation is compatible with law as an idea. The main problems of philosophy of law thus understood are consequently the concept, purpose and validity of law (*Begriff, Zweck und Geltung des Rechts*),[57] seen through the prism of its idea. Here, however, as in the case of Kelsen, we can see a certain paradox of Radbruch's ideological relationship with Neo-Kantianism. According to von der Pfordten, both Kant himself and the representatives of Heidelberg Neo-Kantianism did not actually use the category of the idea of law (*Rechtsidee*) at all, but rather used the term 'concept of law' (*Rechtsbegriff*). As a result, the idea of law, paradoxically, has a Hegelian rather than a Kantian origin, while Radbruch himself took it over from Stammler as a representative of Marburg Neo-Kantianism rather than from Lask as a representative of Heidelberg Neo-Kantianism.[58]

According to K. Seidel,[59] the reference to the descriptive and normative functions of philosophy of law results in that Radbruch presented a very integrated concept of philosophy of law – encompassing both the theory of law (theoretical philosophy) and the ethics of law (practical philosophy).[60] Moreover, as he wrote to Karl Jaspers on 7 June 1914, his intention had always been to develop a coherent system and not

[52] G. Radbruch, GRGA, vol. 2, p. 63.

[53] Idem, *Rechtsphilosophie*, GRGA, vol. 2, p. 325 ff.

[54] B. Kastner, *op. cit.*, p. 122, note 27.

[55] H. Lecheler, *Unrecht in Gesetzesform? Gedanken zur „Radbruch'schen Formel"*, Berlin–New York 1994, p. 5 ff. He came across Stammler's philosophy of law as early as during his studies in Berlin and, according to some researchers, it is Stammler from whom he later adopted the dualism of being and ought.

[56] G. Radbruch, *Grundzüge der Rechtsphilosophie*, GRGA, vol. 2, p. 24.

[57] *Ibidem*, p. 46.

[58] D. von der Pfordten, *Die Rechtsidee bei Kant, Hegel, Stammler, Radbruch und Kaufmann*, [in:] *Value Pluralism, Tolerance and Law*, ed. Shing-I-Liu, Taipei, Taiwan 2004, pp. 333–379.

[59] K. Seidel, *op. cit.*, p. 74.

[60] D. von der Pfordten, *Was ist und wozu Rechtsphilosophie?*, "Juristen Zeitung" 2004, vol. 4, pp. 157–166.

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just to address particular philosophical questions.[61] Although in 1933 Max Ernest Meyer called Radbruch's *Rechtsphilosophie* "more an essay than a system", but it was a rather isolated opinion.[62] According to Arthur Kaufmann, Radbruch's philosophy of law is a system, but not a 'closed-ended' system in the sense of classical German idealism. On the contrary, his philosophical proposals are as a rule open to rational discourse, and this is why perhaps they are surprisingly up to date.[63] On the other hand, we must admit that in contemporary German science there have still been attempts to identify the essence of philosophy of law and answer the question whether it is part of legal or philosophical sciences. According to R. Alexy, we are dealing here with the application of a specific method, i.e. general reflection (philosophy), to a specific matter (law). This approach seems very close to Radbruch's concept. Von der Pfordten, on the other hand, notes that any attempt to classify philosophy of law either as part of philosophy or of legal sciences (as, in his opinion, Radbruch and his student Kaufmann) does not fully reflect its essence.[64]

The 'valuing attitude' characteristic of the world of ideal causes that Radbruch has made the idea of law and the antinomy within it the central point of his philosophical-legal system. This stems also from the methodology adopted by the author. Initially, Radbruch did not rule out the possibility of formulating the concept of law by induction by comparing various phenomena, but only recognised that the concept constructed in such a way could not be philosophically justified. Therefore, in his opinion, such definitions should be created in a deductive manner, departing from the idea of law. Later, in his *Vorschule der Rechtsphilosophie* (1948), he rejected the possibility of developing the concept of law by induction at all: "The concept of law is of an *a priori* nature and can only be created deductively".[65]

ELEMENTS OF THE IDEA OF LAW

Methodological trialism adopted by Radbruch is also transferred to the idea of law, which – like the world (excluding the world of religion) – has a three-element structure: justice (*Gerechtigkeit*), purposiveness (*Zweckmäßigkeit*) and legal security (*Rechtssicherheit*). According to Kaufmann, in political reality they are matched by authority, benefit and guarantee of the state.[66] As a result, "various periods are characterised by putting greater emphasis on one of these elements", and to define

[61] G. Radbruch, GRGA, vol. 17, p. 175, item 184.

[62] See A. Kaufmann, *Gustav Radbruch – Leben und Werk*..., p. 75, note 249.

[63] *Ibidem*, p. 75.

[64] Cf. D. von der Pfordten, *Was is und wozu*..., pp. 157–166; R. Alexy, *The Nature of Legal Philosophy*, "Ratio Juris" 2004, vol. 17(2), pp. 156–167.

[65] G. Radbruch, GRGA, vol. 3, p. 150.

[66] A. Kaufmann, *Gustav Radbruch – Leben und Werk*..., p. 75.

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the relationship between them "is the task to be solved each time by particular political systems".[67] Radbruch's concept is based on acceptance of the possibility that there are internal antinomies between individual elements of the idea of law. However, these are not destructive antinomies that lead to the self-destruction of the legal system. On the contrary, the dialectical nature of these conflicts should lead to the constant improvement of the legal system and, in particular, to an optimal adaptation of its form and content to the conditions of time of its adoption, application, interpretation, validity and observance. If one were to consider this three-element idea from the point of view of the well-established stereotype of Radbruch-positivist, it would seem at first glance that the principle of legal security and resulting inherent value of legalism should be of fundamental importance. Indeed, in a situation of conflict between the *Rechtssicherheit* and *Gerechtigkeit*, the author gives priority to the former, because he considers ensuring order and peace to be the fundamental task of law. From the political point of view, this positivist accent in the concept in question resulted from, as we have seen in the example of Radbruch's biography, the necessity to defend the democratic constitutional order of the Weimar Republic; but at the philosophical and legal levels, stemmed from the accepted axiological and epistemological relativism.[68] However, a careful analysis of all the three elements of the idea of law and the interrelations between them leads to the conclusion that it is not the formally understood justice (equality) and legal security (peace), but purposiveness filled with substantive content which is precisely the "core of Radbruch's philosophy of law".[69] It should be kept in mind, however, that this purposiveness was for Radbruch also a kind of justice (the common good).[70]

The problem of purposiveness is also closely connected with the issue of relativism, which is of paramount importance for the philosophical and legal system at issue. However, it is necessary to further explain what Radbruch actually understood by the terms *Gerechtigkeit*, *Zweckmäßigkeit* and *Rechtssicherheit* in his works until 1933. This problem is not so simple and obvious as it would seem, because Radbruch is not always precise in his statements[71] and sometimes uses the terminology quite freely.

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[67] M. Szyszkowska, *op. cit.*, p. 210; similarly R. Tokarczyk, *op. cit.*, p. 306.

[68] However, these two perspectives – political and philosophical – are very closely linked (as held by J. Wróblewski, *Relatywistyczne teorie prawa*, "Państwo i Prawo" 1963, no. 8–9, p. 209, 212).

[69] A. Kaufmann, *Gustav Radbruch – Leben und Werk…*, p. 77; similarly F. von Hippel, *Gustav Radbruch als rechtsphilosophischer Denker*, "Süddeutsche Juristen-Zeitung" 1950, vol. 5(7), col. 470.

[70] In Polish literature, Radbruch is interpreted in this way, following A. Kaufmann, by J. Potrzeszcz, *Sprawiedliwość jako idea prawa*, [in:] *Teoretycznoprawne problemy integracji europejskiej*, ed. L. Leszczyński, Lublin 2004, pp. 65–76.

[71] K. Seelmann, *Gerechtigkeit, Rechtssicherheit, Zweckrationalität*, [in:] *Rechtsphilosophische Kontroverse der Gegenwart*, eds. P. Siller, B. Keller, Baden-Baden 1999, pp. 109–122.

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This last remark applies especially to the concept of justice, which Radbruch uses in very diverse meanings and does not always clarify which one he uses at any given time. Sometimes it is synonymous with equality in the formal sense, in other places it appears as an element of security and purposiveness, while sometimes it replaces the whole idea of law. In the latter case, it plays the role of the ideal value of law (as truth in logic, goodness in ethics and beauty in aesthetics).[72] According to B. Kastner, Radbruch uses the concept of justice in a broader and narrower sense.[73] In the broader sense, justice is synonymous with the idea of law in general and in this sense it appears above all in the late,[74] especially post-war,[75] works of Radbruch. In the narrower sense, on the other hand, justice has a formal character and is synonymous with the principle of equality for Radbruch. In this, the author operates within the traditional Aristotelian concept of justice, especially the classical division into corrective justice (*iustitia commutativa*) and distributive justice (*iustitia distributiva*). Therefore, according to Radbruch, justice in the narrower sense is only a 'form of law', and its content, which is within the domain of the second element of the idea of law, i.e. purposiveness, cannot be determined based on this justice.[76] Radbruch only changed his position on this issue in *Vorschule der Rechtsphilosophie* (1948), where he concluded that the content of individual legal norms could nevertheless be derived from the principle of justice.[77]

Of course, one can ask why Radbruch stirs up all this terminological fuss at all, which in practice may cause unnecessary interpretive doubts and misunderstandings. After all, it was sufficient to confine itself to consistently using the category of the idea of law and formally understood justice functioning within it. It seems that the explanation of this problem lies in Radbruch's idea of internal antinomy of the *Rechtsidee*, and in particular manners of solving them in favour of one of its elements. In his pre-war works, Radbruch prioritised the principle of legal security (*Rechtssicherheit*) because he considered that the fundamental task of the legal system was to ensure social order and peace. Equating justice in the broad sense with the idea of law meant that such a solution to the problem of antinomy could never be discredited as absolute injustice. Even though the rule of formal justice has been sacrificed in favour of the rules of purposiveness and legal security, other elements of the idea of law, and thus justice in a broader sense, were still preserved. In his post-war studies, Radbruch continued to work on a three-element concept of law, but at the same time modified his previous position slightly by reversing the order

[72] A. Kaufmann, *Rechtsphilosophie*..., p. 151 ff., especially the diagram on p. 155.
[73] B. Kastner, *op. cit.*, p. 239.
[74] As in G. Radbruch, *Rechtsphilosophie*, GRGA, vol. 2, p. 256, 260.
[75] Cf. idem, *Vorschule der Rechtsphilosophie*, GRGA, vol. 3, p. 155.
[76] Idem, *Rechtsphilosophie*, GRGA, vol. 2, p. 259, 278.
[77] Idem, GRGA, vol. 3, p. 144.

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of that reasoning: "Instead of the rule of law based on formal legality, he finally adopted the concept of substantive justice of law, permeated with humanitarian purposiveness and providing a sense of legal certainty to society".[78]

Thus, while in his post-war work Radbruch brought justice understood in substantive terms to the fore,[79] earlier such a role in his philosophical and legal system was played by the second element of the idea of law, i.e. the principle of purposiveness (*Zweckmäßigkeit*). It determines the content of legal norms, but in itself, as an element of the idea of law, is neutral in a moral sense. Radbruch uses the concept of 'purposiveness' in a very specific sense, deviating both from the colloquial understanding of the term and from the meaning given to it in the philosophy of law by Rudolf Ihering. Purposiveness in this sense does not lead to an evaluation of the accomplishment of purposes as defined and therefore cannot be subjected to negative or positive verification, because for Radbruch it is a supra-empirical part of the idea of law and not the opposite of the absence of purposiveness. Positive law is, from this point of view, always purposive because it always has a certain content – in this sense, it cannot be 'purposeless' because it is never 'contentless'. This approach to purposiveness was a consequence of extreme relativism, and that is why Radbruch began to gradually modify it after 1933.

The link between the purposiveness of law and its content led Radbruch to define the objects of regulation which can be given absolute character: individual human personalities, collective human works and human works. Since law is an element of the world of culture, certain cultural approaches (*Kulturauffassungen*) correspond with the absolute objects of regulation, setting out possible purposes of law: individualistic, supra-individualistic and transpersonal. In the realm of specific regulation, this later translates into a system of law that emphasises an individual personality (*Persönlichkeit*), nation (*Nation*) or culture (*Kultur*). According to Kaufmann, this triad can also be transposed into Radbruch's science of political parties:[80] the individualist position is reflected by the programmes of liberalism, democratism and socialism, the counterpart of supraindividualism is the programme of conservatism, while transpersonalism seems to be the closest to corporatism in the sense of 'occupational group-based state system' (*berufständische Staatsordnung*).[81] It may seem most surprising that the individualistic position is attributed both to liberalism and democratism and to socialism at the same time. For example, E. Wolf considers socialism to be supra-individualistic rather than individualistic. In

[78] R. Tokarczyk, *op. cit.*, p. 307.

[79] On the other hand, he has never specified its content in more detail, except for a general reference to the idea of human rights.

[80] G. Radbruch, *Rechtsphilosophische Parteienlehre*, GRGA, vol. 2, p. 290 ff.

[81] A. Kaufmann, *Gustav Radbruch – Leben und Werk…*, p. 77 ff., note 275 – Radbruch himself did not find an appropriate political designatum for transpersonalism, but in the opinion of Kaufmann, who referred to Karl Larenz, corporationism seems to be closest.

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my opinion, however, Kaufmann is right when he claims that such an interpretation is a misunderstanding and does not take into account Radbruch's specific approach to socialism. According to Radbruch's view, the difference between liberalism and socialism was not a difference in the intended purpose, but a difference in the method of achieving it. From this point of view, relativism led Radbruch to both socialism and liberalism: "The result of thwarting the irrational and non-rational powers, the release of the inherent ideological force of the idea, the leap from necessity to freedom – is called socialism by Radbruch. This is the way in which relativism is linked by Radbruch with socialism. But at the same time relativism provides a critical scale for evaluating positive law and the requirements to be met by positive law. Relativism, granting the State the power to pass laws, at the same time restricts it by obliging it to respect certain freedoms of the subjects: freedom of thought, freedom of science, freedom of religion and freedom of press. Relativism in Radbruch's system is therefore connected with liberalism".[82] According to H. Welzel, this part of Radbruch's philosophy of law was an attempt aimed at "rationalising the party relations of the Empire and the Weimar Republic",[83] even if in certain points this attempt was too idealistic and not in line with the reality.

What has received quite fundamental criticism about Radbruch in literature concerned, above all, the ideal character of the values of individualism, supraindividualism and transpersonalism, and especially the distinct and adversarial character of individual elements of this triad. In practice, it is never the case that the system of law reflects only one of those values and therefore embodies either freedom, power or culture. The problem is so obvious that this point of Radbruch's philosophy is criticised even by supporters of his system as a whole, such as F. von Hippel or Kaufmann.[84] However, while von Hippel merely makes a number of critical remarks, Kaufmann tries to complement the concept *a fortiori*. It seems that the result of this effort would probably correspond to the intentions of Radbruch himself. According to Kaufmann, the individual, the whole and the human works (*Individuum*, *Gesamtheit*, Werk) and the corresponding values of freedom, power and culture (*Freiheit*, *Macht*, *Kultur*) are not exclusive but are closely interconnected and complementary. Therefore, the ideal purpose of law is human being as a whole, in various aspects of their personality – as an autonomous being, purpose of the world and a heteronomic being (*autonomes Wesen*, *Zweck dieser Welt*, *heteronomes Wesen*), or, in other words, as an individual, a member of society and a cultural entity (*Individuum*, *Sozialperson*, *Kulturträger*).[85] Radbruch's concept of purposes of law is very vague at this point – this applies in particular to the

[82] M. Szyszkowska, *op. cit.*, p. 216.
[83] H. Welzel, *Naturrecht und materiale Gerechtigkeit*, Göttingen 1990, p. 188, note 28.
[84] F. von Hippel, *op. cit.*, col. 474.
[85] A. Kaufmann, *Rechtsphilosophie…*, p. 155.

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concept of 'transpersonalism'. It is not very clear what the author really intends to say, and the best proof of this is that Radbruch himself cannot determine the type of political party with 'transpersonalistic' goals in its programme. The problem is also the subject of dispute in modern literature. According to M.A. Weigand, e.g., Kaufmann is wrong when he links Radbruch's 'transpersonality' with the individual understood in the categories of cultural entity (*Kulturträger*). In his opinion, 'transpersonalism' in Radbruch is not connected with the entity, but with the object of culture treated in terms of all human works (*Werkkultur*).[86] As a result, it is also not known whether 'transpersonalism' is to be a projection of an ideal state and law implementing human culture, or on the contrary – a synonym of a kind of hypertotality in which the individual ceases to have any meaning.

INTERNAL MORALITY/AXIOLOGY OF LAW – CONCLUSION

The above considerations about the Neo-Kantianism and Radbruch's philosophy of law may seem *prima facie* to be very far from the main subject-matter of this volume, but in my view these are just appearances. In fact, for lawyers seeking a connection between law and ethics (or more broadly, the relationship between law and values, or the axiology of law), the concept of a three-element idea of the law should be very inspiring. This applies to all three components of this triad – in the sphere of justice, of course, ethical elements will be dominant, but already at the level of legal certainty and purposiveness of law we enter into a broader sphere of law axiology, where there are also other values, not necessarily having some purely moral meaning, if any.

Reducing the issue of values almost exclusively to the ethical sphere can sometimes give rise to misunderstandings, including terminological ones. A typical example is the famous concept of 'inner morality of law' by Fuller – contrary to the name of his theory setting out a necessary outline of the idea of law, this author actually points to several values, of which not all have an ethical dimension.

The result of the famous dispute between Hart and Fuller was the creation of two most widely read philosophical-legal works of the 20th century – *The Concept of Law*[87] by the former and *Morality of Law*[88] by the latter. Fuller's work seems particularly interesting from the point of view of the main subject hereof. The author formulated therein the concept of the so-called internal morality of law, which is actually a collection of certain legal truisms, which could be described for the purposes of our book as *minima iuridica*.

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[86] M.A. Wiegand, *op. cit.*, p. 166 ff.
[87] H.L.A. Hart, *Pojęcie prawa*, Warszawa 1998.
[88] L.L. Fuller, *The Morality of Law*, New Haven–London 1969.

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In Fuller's view, law must meet eight basic conditions of internal morality.[89] When we look at them a little closer and confront them with Latin legal terminology, it turns out that each of them can be attributed a legal maxim known from the past. Thus, it must be stated that the ethic of law (or more broadly, the axiology of law) is not an invention of the present, but is rooted in the entire European legal culture since the dawn of history.

Firstly, law must be general, which, from the point of view of legal theory, we can attribute to the required general and abstract nature of legal norms. Roman jurisprudence used to say exactly the same, as we can indirectly derive this conclusion from two sentences: *Ex his, quae forte uno aliquo casu accidere possunt, iura non constituuntur* (Celsus, *Digesta* 1.2.3: "Laws are not made for those instances which can happen only once") and *Iura non in singulas personas, sed generaliter constituuntur* (Ulpianus, *Digesta* 1.3.8: "Laws are made not for the sake of particular persons, but for all"). This is so because law does not exhaust itself in one-off acts, but should apply to recurring situations – this also expresses the essence of legal norms as abstract norms. The more frequent these situations are, the more, on the one hand, the role and authority of the law as a regulator of social relations grows through the process of application, and on the other hand, the level of its functionality through the process of interpretation increases. In this sense, the applicable law develops with the development of social relations. However, it is also about the hypothesis (circumstance-describing component) of the legal norm, thus, among other things, the definition of the circle of addressees to whom it is addressed. From this point of view, the legal norm should be general, i.e. it should refer not to individually designated persons, but to a potentially unlimited circle of addressees. Only the two above-cited maxims combined capture the essence of the legal norm as a general and abstract norm. In practice, there is so-called incidental special legislation implemented in the form of a single application act, but such laws are only exceptions confirming the rule.

Secondly, the law must be published. This time we have a maxim not from Roman sources, but from Thomas Aquinas' *Summa Theologiae*: *Lex non obligat nisi promulgata* ("The law does not apply unless published"), but its deeply legal sense has not lost any of its validity. Moreover, the obligation to officially publish the content of a legal act (Latin: *promulgatio*) must now be regarded as an intrinsic element of the democratic state ruled by law. Fuller considered the requirement to promulgate legal acts to be part of the internal morality of law for two reasons: first, the addressees of the norm must be able to know what the law requires from them; secondly, it is only in this way that citizens can check whether the authorities also comply with the law. The requirement of promulgation as a condition for the application of law means that the citizen must be given a possibility to learn about

[89] *Ibidem*, pp. 38–77.

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the content of the legal norm and not that he will actually know it. This is also the position of the Polish Constitutional Tribunal: "The promulgation of the Act is made by the publication of its text in the Journal of Laws (…), so other manner is not sufficient to make the content of the Act public (…), it is necessary not only to publish a given issue of the Journal of Laws, but also to make it available, and thus at least to disseminate it (…). On the other hand, it is irrelevant whether the addressees of a normative act have made use of the possibility of consulting the text of the normative act properly promulgated".[90] However, it is not irrelevant how a legal act is promulgated. However, this problem was already known in antiquity – Suetonius presents the following fact from the life of Caligula in *The Twelve Caesars*. This Emperor imposed once very unfair taxes and did not initially announce his decision publicly. When the people got outraged, Caligula announced his decision, but he wrote the text in very small letters and hung it in an invisible alley so that no one could rewrite it.

Thirdly, law should not have retroactive effect, which is not difficult to associate with the very popular formula *Lex retro non agit* (C. 1.14.7: "Law does not operate retroactively"). In judicial decisions, this sentence is by far the most cited Latin term and is associated with the question of retroactivity of law.[91] It is assumed that in the Polish legal language it was popularized by Roman Law scholar Stanisław Wróblewski, a lawyer living in the late 19th and early 20th centuries.[92] The problem of retroactivity of law is described in legal theory as follows: "The legal norm (…) is intended to influence someone's conduct, and this is possible only with respect to future conduct. A norm which prohibits or imposes something to be done in the past would be extremely absurd, because such a prohibition or obligation would not be enforceable. It is possible, however, that a norm imposes legal consequences to be linked to events which have taken place in the past, i.e. before the norm entered into force. In such situations, the norm determines the conduct that is possible to be performed, but that conduct is linked to events or states which occurred before it entered into force and over which we no longer have any control. Such norms are called retroactive".[93] Let us add, however, that the common use of the maxim *lex retro non agit* entails probably the largest number of misunderstandings and distortions. The categorical nature of its wording suggests that law indeed never actually operates retroactively, and more specifically, that it may never operate retroactively. On the contrary, although the postulate of non-retroactivity of law is a general and

[90] As cited in M. Zubik, *Konstytucja III RP w tezach orzeczniczych Trybunału Konstytucyjnego i wybranych sądów*, Warszawa 2008, p. 602.

[91] W. Wołodkiewicz, *Europa i prawo rzymskie. Szkice z historii europejskiej kultury prawnej*, Warszawa 2009, pp. 401–438.

[92] W. Dajczak, T. Giaro, F. Longchamps de Bérier, *Warsztaty prawnicze. Prawo rzymskie*, Kraków 2012, p. 24.

[93] S. Wronkowska, *Podstawowe pojęcia prawa i prawoznawstwa*, Poznań 2003, p. 55.

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commonly-accepted principle, it is not absolute in nature and, therefore, the law itself provides for a number of exceptions to it. For example, one might mention Article 3 of the Polish Civil Code: "The Act has no retroactive effect unless this results from its wording and purpose". These misunderstandings and distortions are most likely to stem from the fact that the *lex retro non agit* principle, which is of particular importance in criminal law, is sometimes unjustifiably sought to extend to the entire legal system. While even in criminal law, the absolute nature of that principle is limited solely to the framework set out in Article 42 (1) of the Polish Constitution: "Only a person who has committed an act prohibited by a statute in force at the moment of commission thereof, and which is subject to a penalty, shall be held criminally responsible. This principle shall not prevent punishment of any act which, at the moment of its commission, constituted an offence within the meaning of international law" (cf. also Article 1 § 1 of the Polish Criminal Code: "Criminal liability shall be imposed only on the person who commits an act prohibited under penalty by a statute in force at the time of its commission"). Let us also note that, in fact, even under criminal law, of the absolute character is not so the principle of *lex retro non agit* in general but, if anything, only the principle of *lex severior poenalis retro non agit* (a more severe criminal law does not have retroactive effect) – in other words, a more lenient law (*lex benignior*, *lex mitior*) may be retroactive. In the case law of the Polish Constitutional Tribunal, the principle of *lex retro non agit* appears relatively often in the context of so-called acquired rights. In recent years, the best evidence to demonstrate the problems arising from the principle of *lex retro non agit* may be the controversial resolution of the Polish Supreme Court of 20 December 2007 (I KZP 37/07, OSNKW 2007, vol. 12, item 86) and the judgment of the Polish Constitutional Tribunal of 27 October 2010 (K 10/08, Journal of Laws 2010, no. 205, item 1364). The literature critically analysed these judgments through the prism of various Latin maxims, which confirms the validity and timelessness of the legal wisdom contained therein.[94] On the other hand, it should be emphasised that in another judgment (of 3 October 2001, K 27/01, OTK 2001, no. 7, item 209), the Polish Constitutional Tribunal recognised this principle as "an essential element of the legal culture of modern civilised states, and as an essential component of the constitutional order of contemporary constitutional systems".[95]

Fourthly, law should be clear. Roman jurists put it similarly: *In legibus magis simplicitas quam difficultas placet* (Inst. 2.23.7: "Simplicity in laws is better than complexity"). Originally, this maxim was used in the Justinian's *Institutes* in the very specific context of Roman succession law. On the other hand, however, it is

[94] For example, see J. Zajadło, *Glosa do wyroku Trybunału Konstytucyjnego z dnia 27 października 2010 r. (sygn. akt K 10/08)*, "Przegląd Sejmowy" 2011, no. 2, pp. 163–171.

[95] As cited in W. Dajczak, T. Giaro, F. Longchamps de Bérier, *op. cit.*, p. 24.

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worth noting that elsewhere: "The idea of the simplicity and elegance of law occurs frequently in the statements of Roman jurists".[96] Nowadays, it is possible to give this directive a more universal sense and to link it in general to the postulate of clarity of law as an element of rational legislative methodology. Fuller, as part of his conception of internal morality of law, rightly argues that "the desideratum of clarity represents one of the most essential ingredients of legality, [and] obscure and incoherent legislation can make legality unattainable by anyone, or at least unattainable without an unauthorized revision which itself impairs legality".[97] It should also be emphasised that in contemporary constitutionalism, the postulate of clarity of law is not only a philosophical-legal pipe dream, but constitutes an important element of legal certainty within a democratic state ruled by law, as the Polish Constitutional Tribunal has repeatedly pointed out. After all, the ultimate point is that: *Leges ab omnibus intellegi debent* (C. 1.14.9: "Laws should be comprehensible to all"). This passage from the Code of Justinian postulated the intelligibility of law for all, and referred to the emperors' interpretation in case of ambiguity. And in a later period: "The thinkers of the Age of Enlightenment were particularly fond of the idea of intelligibility of law. They criticised Roman law for its inconsistency, which allowed for far-reaching interpretation. Criticising the Justinian codification and the doctrine that grew out of it, they used to invoke as a model of ideal legislation the Law of the Twelve Tables, which could be memorised even by children".[98] In modern legal theory and philosophy, it is recognised that intelligibility of law is one of the criteria for assessing its quality. According to the provision of § 6 of the Polish Rules of Legislative Technique: "The provisions of a law shall be drafted in such a way that they express the intentions of the legislature accurately and in a manner that is comprehensible to the addressees of the norms contained therein". Therefore, *Simplicitas legibus amica* (I. 3.2.3: "Simplicity is the friend of laws"). Ultimately, it is not only about the internal morality of law, but also about its aesthetics.[99]

Fifthly, the legal system should not contradict itself. At this point, of course, it is difficult to cite a sentence that would directly reflect this postulate of Fuller's internal morality of law. However, it is easy to explain: Roman jurists did not think about law in terms of a legal system in the modern sense, and their jurisprudence was based rather on cases. However, it is possible to find some substitutes that would at least indirectly prove that the Romans perceived the problem of contra-

[96] W. Wołodkiewicz (ed.), *Regulae iuris. Łacińskie inskrypcje na kolumnach Sądu Najwyższego Rzeczypospolitej Polskiej*, Warszawa 2010, p. 34.

[97] L.L. Fuller, *op. cit.*, p. 63.

[98] W. Wołodkiewicz (ed.), *op. cit.*, p. 38 ff.

[99] J. Zajadło, *Estetyka – zapomniany piąty człon filozofii prawa*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2016, no. 4, pp. 17–30.

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dictions in the law. For if we treat the issue of contradictions in the system not only in terms of logical contradictions, but also praxeological and functional ones, then the following sentence can serve as an example of such a maxim: *Cessante ratione legis cessat ipsa lex* (Papinianus, *Digesta* 35.1.72.6: "When the reason for a law ceases, the law itself ceases"). This maxim is actually a medieval gloss to the relevant fragment of Papinianus and originally had a specific meaning in the succession law.[100] It changed its nature and meaning later on, and today it cannot be understood literally – on the basis of the current constitutional concept of the sources of law, the cessation of the reason for issuing a law does not automatically cause the law itself to lose its binding force. What is needed is the intervention of the legislature and the issuance of a new law repealing the previous one. There is, however, another aspect of the above-mentioned problem, pointing to the profound wisdom contained in this maxim, and especially to the issue of the purpose of law in the context of the legal policy pursued by the state. This is not so much about the automatic loss of binding force by such an act, but rather about the sense of continuing to maintain it in the legal system. According to another maxim: *ratio legis est anima legis* (the reason of the law is the soul of the law), a law loses its 'soul' (*anima legis*) when the 'reason for its issuance' (*ratio legis*) ceases to exist. Therefore, it may also be about the rationality of applying the provision in a specific and at the same time very peculiar case – no wonder that the principle of *cessante ratione legis cessat ipsa lex* was directly referred to in the contemporary philosophy of law in such a context by, e.g., Fuller in his famous imaginary case concerning cannibalism among a group of cavers buried in a cave (*The Case of Speluncean Explorers*, "Harvard Law Review" 1949, vol. 62, p. 620). Another problem, however, is the loss of legal force by a legal norm as a result of the actual and prolonged cessation of its application – *desuetudo*. As a side note, it is worth mentioning that *ratio legis* is the most frequently used Latin phrase in the case law of the Polish Supreme Court, in most cases, however, the Supreme Court asks not so much about the reason for behind the law concerned, but rather about its meaning or the meaning of its individual provisions. In this respect, another sentence has not lost its relevance: *Sensum, non verba spectamus* (Ulpianus, D. 34.4.3.9: "Let us look at the meaning, not at the words").

Sixthly, law cannot expect us to do the impossible. It is difficult to find a maxim that would directly correspond to this point of Fuller's internal morality of law. However, on a subsidiary basis, one can use the principle formulated in Roman law of obligations, which is also confirmed in the Polish Civil Code (Article 387 § 1, Article 475 § 1): *Obligatio impossibilium nulla est* (Celsus, *Digesta* 50.17.185: "The obligation to provide the impossible is non-existent"). It expresses a common-sense intuition, which we should also apply to the law in general; there is no reason for

[100] W. Wołodkiewicz (ed.), *op. cit.*, p. 70 ff.

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the legislature to ignore it when implementing its legislative *fiat*. As Fuller writes: "A law commanding the impossible seem such an absurdity that one is tempted to suppose no sane lawmaker, not even the most evil dictator, would have any reason to enact such a law. Unfortunately the facts of life run counter to this assumption. Such a law can serve what Lilbume called 'a lawless unlimited power' by its very absurdity; its brutal pointlessness may let the subject know that there is nothing that may not be demanded of him and that he should keep himself ready to jump in any direction".[101]

Seventhly, law should be durable and stable: *Meliora liqua quam nulla lex* ("Better any law than no law at all") and *Melius est ius deficiens quam ius incertum* ("Better no law than an uncertain law"). Here we are dealing with two maxims that seemingly contradict each other. This is all the more so because one of them uses the concept of law in the sense of *lex* and the other in the sense of *ius*. Having taken a closer look, however, it may turn out that this contradiction is only apparent, as each of these maxims contains profound legal wisdom, but each one *cum grano salis* (Latin: with a grain of salt). The first points to the immanent value of law in general – in this sense, some law is better than no law, since even 'any' law creates a minimum of legal security. On the other hand, however, perhaps no law is better than an uncertain law, since 'uncertain' regulation undermines the necessary authority of the law. Thus, *misera est vita, ubi ius est vagum aut incertum* (life is miserable when law is vague or uncertain).

And finally, eighthly, the fundamental principle of the state ruled by law should be that their bodies comply with the law. A commentary on this postulate of Fuller's internal morality of law would be what we have already written in chapter eleven commenting on the relevant passage of Cicero's *oratio pro Cluentio*. But it is worth supplementing this with another maxim, since it seems particularly relevant: *Politia legibus, non leges politiae adaptandae* ("Politics should adapt to laws, not laws to politics"). The principle of the primacy of law over politics expressed in this maxim is a profound wisdom and, in fact, should be the basis of a modern democratic state ruled by law. In practice, unfortunately, it is subject to numerous instrumental constraints from politicians. Indeed, the clash between law and politics repeatedly becomes a threat to the very idea of law, understood as a harmony between security, purposiveness and justice. The concern comes mainly from the fact that it is, after all, politicians who, on the one hand, make politics and, on the other hand, in a representative democracy, decide in the final instance on the shape and content of legal norms. This can inevitably give rise to two very serious dangers: firstly, the sometimes *ad hoc* and opportunistic, and sometimes even long-term primacy of politics over law; secondly, the instrumentalisation of law for the sake of politics. The idea of constitutionalism, including judicial review of the constitution-

[101] L.L. Fuller, *op. cit.*, p. 70 ff.

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ality of laws, is nowadays regarded as the basic guarantee protecting us from such dangers. This is because the Constitutional Tribunal should be (*sic*!) the ultimate guardian that safeguards against the once commonly accepted omnipotence of the legislature as a law-making, but also political body. Of course, one may ask who in turn reviews the Constitutional Tribunal itself and quotes the maxim of the Roman poet Juvenalis, author of *Saturae* (Iuvenalis, *Saturae* 6, 347–348): *Quis custodiet ipsos custodes?* ("Who will guard the guards themselves?)". The poet's point was that, in an age of moral decline, putting guards around an unfaithful wife does not, of course, give us any guarantee that she will not cheat on us just with them. We can, however, transfer this maxim to political-legal relations – if state authorities are organised hierarchically, the question of control of its highest levels always arises, and this question can also be asked with respect of the constitutional court. These doubts, however, were clarified at one time very aptly by a well-known US Supreme Court judge, Robert Jackson. In his concurring opinion in *Brown v. Allen*, 1953, he put it as follows: "We [as the Supreme Court] are not final because we are infallible, but we are infallible only because we are final".

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ABSTRAKT

Aksjologia jako teoria wartości zajmuje ważne miejsce nie tylko w filozofii ogólnej, lecz także w filozofii prawa. Prawoznawstwo i prawo nie mogą być ostatecznie neutralne aksjologicznie, gdyż związek między prawem a wartościami ma charakter pierwotny, wieczny, konieczny i immanentny. Autor omawia to zjawisko na przykładzie filozofii prawa Gustawa Radbrucha. Jego zdaniem, pisząc o Radbruchu jako filozofie prawa, należy poczynić pięć bardzo ważnych zastrzeżeń. Po pierwsze, Radbruch był przedstawicielem neokantyzmu. Po drugie, nie był to neokantyzm „w ogóle", tylko specyficzny wariant zwany neokantyzmem badeńskim (południowoniemiecki, oparty na Heidelbergu). Po trzecie, Radbruch nie był filozofem „w ogóle", gdyż interesował go neokantyzm przeszczepiony do filozofii prawa. Po czwarte, można obecnie zauważyć wielki powrót filozofii Kanta (np. J. Habermas, J. Rawls, O. Höffe), ale zjawisko to należy dokładnie odróżnić od neokantyzmu jako zdeterminowanego czasowo i przestrzennie kierunku filozoficznego okresu fin de siècle. Po piąte, jeśli w ogóle można mówić o jakimś przełomie aksjologicznym w ewolucji poglądów filozoficznych Radbrucha, to jest to raczej rok 1933 niż 1945.

Słowa kluczowe: aksjologia; filozofia prawa; wartości prawne; Gustav Radbruch; neokantyzm