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ARE WE FACING A CRISIS OF LAW? REFLECTIONS IN REFERENCE TO THE SO-CALLED CLAIM TO CORRECTNESS PROBLEM*

1. What is usually acknowledged as a topicality indication of Gustav Radbruch's legal philosophy is the theoretical interest in and the practical application of his ideas – known as the Radbruch formula[1] – on abominable law, statutory non-law and the refusal to apply it by public authorities, the judiciary in particular. It has been indicated that although Radbruch's ideas took the final shape in the aftermath of the Second World War under the influence of the Nazi government's lawlessness, the legal-philosophical foundations of his tenet had been developed much earlier. The alleged evolution of his theory from legal-positivist positions towards those of natural law, assuming it has really occurred, may only be seen as a certain shift of focus, making some of his theses look similar to the legal-positivist or natural law assertions. His ideas on law, in their entirety, form an original concept consistently developed throughout his life. This concept cannot be classified as belonging to one of the legal philosophy currents mentioned above[2].

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[1] *Vide* J. Zajadło, *Formuła Radbrucha. Filozofia prawa na granicy pozytywizmu prawniczego i prawa natury* [*Radbruch's Formula. Philosophy of Law between Legal Positivism and Natural Law*], (Gdańsk 2001) and id. *Odpowiedzialność za mur. Procesy strzelców przy murze berlińskim* [*Responsibility for the Wall. Trials of the Berlin Wall Border Snipers*], (Gdańsk 2003).

[2] *Vide* T. Chauvin, *Sprawiedliwość: między celowością a bezpieczeństwem prawnym. Ewolucja poglądów Gustawa Radbrucha*, [*Justice: between Utility and Legal Security. Evolution of Gustav Radbruch's Ideas*], "Studia Iuridica" 1999, Vol. 37, pp. 15–39. Generally, in the most up-to-date literature the *Umbruchthese*, which in contrast to the *Kontinuitätsthese* maintains that Radbruch's views were subject to a substantial change, namely a departure from legal positivism and turning to natural law, regains popularity, *vide* J. Zajadło, *Wprowadzenie: rewolucja czy ewolucja w poglądach Gustawa Radbrucha?* [*Introduction: Revolution or Evolution in Gustav Radbruch's Thought?*], (in:) P. Mochnaczewski, A. Kociołek-Pęksa (eds.), *Dobre prawo, złe prawo – w kręgu myśli Gustawa Radbrucha* [*Good Law, Bad Law – within a range of Gustav Radbruch's Ideas*], Warsaw 2009, pp. 14–15.

Working on this assumption, we can point to other than Radbruch's formula, elements in his philosophy of law which are still applicable and present in the recent discussion on the concept of law itself, its validity and application. What this means is basic to Radbruch's thought the distinction between the concept of law (*Rechtsbegriff*), the idea of law (*Rechtsidee*) and the relationship between the two. The solution accepted by Radbruch in this matter is very broadly applied by the representatives of the non-positivist concept of law. However, the solution may be ascribed a more general meaning, which manifests itself in the "claim to correctness problem" (*Anspruch auf Richtigkeit*)[3]. Such a claim has to be an element not only of law itself but also of all legal statements including acts of applying the law.

The point I will endavour to defend is that, out of the three interpretations of the claim to correctness problem, the one which refers not only to the correctness of legal order and law application acts, but also to lawyers' professional obligations and responsibility is the best justified. This is because such a view most fully addresses the challenges of modern law, which has become increasingly professional in character, but on the other hand more prone to factors typical to fully professionalised walks of life – to critical factors especially. The question of how much the interpretation is compatible with Radbruch's perspective, is beyond the scope of this analysis. However, some arguments suggesting higher degree of concordance will be presented.

2. A concept basic to Radbruch's thought – the distinction between law and the idea of law and their interrelation – is used by the representatives of the non-positivist view of law as a claim to correctness. The way in which it takes place and its consequences will be a part of my presentation of the three interpretations mentioned above. However, it is necessary to precede with formulating some comments on the non-positivist idea of law in general. It is Ralf Dreier and Robert Alexy who, out of many authors counted among non-positivists, are treated as being most representative of this current. While the former may be classified as a "precursor", the latter is regarded as a "leading representative"[4]. First of all it is worth noting that, even though their legal-philosophical ideas differ in many aspects, we may justify a joint analysis of the two by the fact that Alexy is Dreier's student and the latter explicitly accepted some modifications of the non-positivist conception proposed by his disciple[5]. It is important to remember that Alexy and

[3] R. Dreier, S. L. Paulson, *Einführung in die Rechtsphilosophie Radbruchs*, (in:) R. Dreier, S. L. Paulson (eds.), *G. Radbruch, Rechtsphilosophie. Studienausgabe*, Heidelberg 2003, p. 241.

[4] T. Gizbert-Studnicki, A. Grabowski, *Kilka uwag o niepozytywistycznej koncepcji prawa* [*A Few Remarks on the Non-positivist Conception of Law*], (in:) I. Bogucka, Z. Tobor (eds.), *Prawo a wartości. Księga jubileuszowa Profesora Józefa Nowackiego* [*Law and Values. Jubilee Book of Professor Józef Nowacki*], Kraków 2003, p. 56.

[5] A. Grabowski, *Prawnicze pojęcie obowiązywania prawa stanowionego. Krytyka niepozytywistycznej koncepcji prawa*, [*Legal Notion of the Legislated Law's Binding Force. A Critique of the Non-positivist Conception of Law*], Kraków 2009, p. 28. Part I of this work provides a funda-

Dreier are not the only representatives of this current[6], however, for the purposes of this presentation their theses will serve as a point of reference.

Secondly, Dreier and Alexy in developing non-positivist conception of law directly refer to Radbruch[7] and though they remain faithful to his ideas, they endavour to create the "third way", reaching beyond the dispute between legal positivists and natural law supporters. For instance, Sykuna writes: "Dreier's goal was not a complete division between positive law and the law of nature but – through applying in legal practice a minimum of natural law – only improvement of positive law"[8]. For this reason a number of doubts related to Radbruch's thought – who, depending on the perspective, seems either a legal positivist or a legal naturalist – concern also non-positivist conceptions. At the same time this marks the scope of our final conclusions and interpretations leading up to them because, in principle, the proposed interpretations are formed in relation to the basic premises of this current. Thus, it may be stated that the discussion will assume a perspective internal to the non-positivist conception. The question of the argumentation's validity for other theories of law depends on how much their foundations correspond to the ones assumed here.

Thirdly, the principal thesis of the non-positivist conception of law is the connection thesis (*Verbindungsthese*) juxtaposed with the positivist separation thesis (*Trennungsthese*) which thus concerns the relation of law and morality. According to non-positivists, there is a necessary notional connection between law and morality. This connection must be made explict in a definition of law. The aim of the definition is to make the non-positivist notion of law operational – in other words, to make this notion useful in practice – and to attain this goal, the authors assert that an element of bindingness must be included[9]. Therefore, they equate the notion of law with the notion of the law in force. Generally speaking, by validity of law they understand not only legal (formal) but also sociological (finitistic) and ethical (axiological) validity. A non-positivist notion of the binding force of the law, and thus of law itself, is contained within a triangle of the following: the correct enactment of law criteria, a minimum of social effectiveness

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mental discussion of the non-positivist conception of Dreier and Alexy, and for this reason was widely used in the present study. Thus, not in every case was it possible to refer to a particular passage; nevertheless, I have attempted to do so as much as attainable.

[6] A. Peczenik has to be mentioned here primarily, *vide* id., *Non-Positivist Conception of Law*, (in:) *Teoria prawa. Filozofia prawa. Współczesne prawo i prawoznawstwo* [*Theory of Law, Philosophy of Law. Modern Law and Jurisprudence*], Toruń 1998, p. 223 et al.

[7] A. Grabowski, *Prawnicze pojęcie*…, p. 15.

[8] S. Sykuna, *Ralf Dreier – prawo rozumowe* [*Ralph Dreier – a Rational Law*], (in:) J. Zajadło (ed.), *Przyszłość dziedzictwa. Robert Alexy, Ralf Dreier, Jürgen Habermas, Otfried Höffe, Arthur Kaufmann, Niklas Luhmann, Ota Weinberger: portrety filozofów prawa* [*The Future of Legacy. (...) Portraits of Legal Philosophers*], Gdańsk 2008, p. 77.

[9] *Ibidem*, p. 73; A. Grabowski, *Prawnicze pojęcie*…, p. 23 et al.

and a minimum of moral correctness[10]. This definition will be discussed in detail later in the text. Special emphasis will be placed on the notion of correctness and the claim to it present in such a definition of law.

Fourthly, due to mainly polemical character of the discussed concepion, non-positivists employ a very elaborate argumentation in support of their theories and definitions. Their arguments are not only analytical and normative but also empirical[11]. Literature presents these reasonings as three fundamental arguments, two of which – the argument from injustice (*Unrechtsargument*) and the argument from principles (*Prinzipienargument*) – have already been formulated by Dreier and then completed by Alexy with the argument from correctness[12]. It is impossible and pointless to examine these reasonings together with their detailed arguments here. What matters is that they use the claim to the correctness construct, more or less, as a certain quality not only of a legal system and specific legal norms, but also of law application acts. Since non-positivist arguments for a necessary relationship between law and morality refer to the claim, it is evident that this idea has a fundamental role in the whole conception. Therefore, the issue of how the claim is justified and then interpreted needs to be analysed.

3. One of obvious inspirations for Radbruch is the Neo-Kantianism of the "Baden School". The *a priori* nature of the idea of law in his theory of law is indicative of this influence[13]. Such a nature of the idea does not only mean that it takes its origin in reason, but also that it has regulatory qualities. Thus, the idea is in such a relation to reality in which it directs all cognitive and evaluative acts related to law. In consequence Radbruch describes law as a reality, whose sense is to realise the idea of law[14]. This means that all acts of law formulation and application are possible provided that they refer to this idea. Its complexity and axiological nature, which allows discerning in it the elements of legal security, formal justice and material appropriateness, does not change the fact that without referring to each of these elements, it is impossible to think of law[15]. Also, this fact cannot be changed by the possibility of the elements being realised in legal reality in varying degrees.

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[10] A. Grabowski, *Prawnicze pojęcie*…, pp. 17–20.

[11] It seems that the argument for non-positivist conception of law has been presented most comprehensively in the work by R. Alexy, *Begriff und Geltung des Rechts*, München 2002.

[12] A. Grabowski, *Prawnicze pojęcie*…, pp. 21–22, 32 et al.

[13] For further clarification, see M. Szyszkowska, *Neokantyzm. Filozofia społeczna wraz z filozofią prawa natury o zmiennej treści* [*Neo-Kantianism. Social Philosophy together with Law of Nature Philosophy of Variable Content*], Warsaw 1970.

[14] G. Radbruch, *Filozofia prawa* [*Philosophy of Law*], Warsaw 2009, p. 12.

[15] Quoting the existing, vast, literature on the idea of law in Radbruch, the relation between its elements and the cultural character of law itself would be pointless here. Basic bibliographical information *vide* J. Zajadło, *Dziedzictwo przeszłości. Gustaw Radbruch: portret filozofa, prawnika, polityka i humanisty* [*Legacy of the Past. Gustav Radbruch: the Portrait of a Philosopher, Lawyer, Politician and a Humanist*], Gdańsk 2007, especially pp. 90–116.

Since law is reality with the object of realising the idea of law, the notion of law used by Radbruch includes a reference to the idea of law. This notion departs from the popularised concept of law in its non-positivist form because such a reference gives to law a more limited scope. In other words, because values making the idea of law have an ethical quality, the concept of law becomes modifed by the ethics of law (*rechtsethisch modifizierte Rechtsbegriff*)[16]. Using the concept of law, understood in this way by the representatives of non-positivism and other conceptions means that various elements of Radbruch's philosophy of law are still valid. Modification of the notion of law, in principle, is not derived from the reference of the notion of law to the *a priori* idea of law, but it is derived from the qualities of language acts, whose content the notion of law comprises. Generally speaking, though the fundamental construction remains, the transcendental-logical perspective is replaced with the pragmatic-liguistic one.

What qualities of language acts concerning law have influence on the modifcation of the notion of law in a parallel way to the idea of law in Radbruch's philosophy? First of all, it is a dual structure of all speech acts, in which propositional and performative aspects may be distinguished. With every utterance the speaker expresses some content (propositional aspect) and, simultaneously, he expresses his relation to the content (performative aspect). For example, a descriptive utterance encompasses not only the content of this description, but also the speaker's conviction that this content corresponds with reality. Similarly, a normative utterance contains not only norms but also the speaker's conviction that the receiver should comply with them. A situation in which the speaker would utter a norm but, at the same time claim that the norm is not binding, is described as the "performative contradiction". Equivalent to that would also be a contention that the norm is unjust or that it cannot be rationally justified.

In normative utterances, the performative aspect of every statement is called the claim to correctness. Of course, this does not exhaust the whole performative nature of such utterances; it also matters what kind of action is performed: making a new law, court ruling or an administrative decision, for example. All these acts, regardless of whether they are general and abstract in nature or individual and specific, if they are to be treated as normative statements, they must include a claim to their correctness. Legal statements share this quality with all normative utterances. The meaning, with which legal reality is endowed by its reference to the idea of law, is thus replaced by including the claim to correctness in law's linguistic structure. In this way the problem of the *a priori* nature of law and its unclear status is solved because the claim to correctness is immanent to legal statements[17].

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[16] R. Dreier, *Recht und Moral*, (in:) *Recht – Moral – Ideologie. Studien zur Rechtstheorie*, Frankfurt am Main 1981, pp. 192–194.

[17] *Vide* a thourough critique of the performative contradition and of resonings based on it A. Grabowski, *Prawnicze pojęcie*…, pp. 145–167. Accepting this critique as valid would entail

4. In non-positivist conception, the first, most fundamental and the earliest interpretation of the claim to correctness is connected, not so much with the problem of defining the notion of law as with the issue of justifying legal statements. The definition of such, includes not only legal statements and acts of applying the law, but also jurisprudence statements and especially legal dogmas. Therefore, the discussion does not concern the justification of legal norms themselves, and for this reason the claim to correctness referring not only to some specific elements of a legal system, but also to the system as a whole is beyond the scope of this analysis. Alexy holds that rational justification of legal statements is possible. A means to realise this is a discourse which meets not only a number of conditions specific to all practical dicourses, but also conditions specific only to legal discourses. The claim to correctness of legal statements in this case means that, taking into account all limitations typical to legal discourse, rational justification of these statements is possible[18]. The claim, as an indispensable part of the performative aspect of every legal statement, has two functions in a legal discourse theory.

Primarily, the claim to correctness, as an immanent part of legal statements, allows Alexy to justify the validity of rules of the argumentative discourse itself. Most generally speaking, the reasoning is as follows: the claim to correctness entails the need to justify normative statements and for this justification, the existence of rules of justification is necessary. If one formulates a certain legal argument, for example an interpretation variant of a given norm, then one simultaneously claims that this argument is correct. To claim that, one has to be able to justify one's position and, for this, argumentative discourse rules are needed[19]. It does not matter in this reasoning whether one will be able to provide a convincing justification. In construing this argument Alexy refers to transcendental pragmatics of Karl-Otto Apel and to universal pragmatics of Jürgen Habermas, and thus lays himself open to a number of charges for this type of validation of practical rationality and discourse ethic[20].

Secondly, limited possibilities of satisfying the claim to correctness in legal discourses make it possible for Alexy to justify the point that it is a special case in a general practical discourse (*Sonderfallthese*). Among the limitations that should be respected in a legal discourse, a basic notion needs to be specified, namely being bound by the statute, or more widely, legislated law. Also, there

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the rejection of many legal non-positivist theses and conclusions of the present study. However, discussing this issue goes beyond the modest scope of this article.

[18] R. Alexy, *Theorie der juristichen Argumentation. Die Theorie des rationalen Diskurses als Theorie der juristischen Begründung*, Frankfurt am Main 1991, p. 34.

[19] A. Grabowski, *Prawnicze pojęcie*…, p. 106.

[20] *Ibidem*, p. 97 et al., p. 119. The author claims that R. Alexy succeded in proving the validity of discourse rules only in the instrumental sense. This is to say that the rules are valid if a goal, namely a correct solution to a practical issue, is assumed.

exists a necessity to abide by precedents, to take into account legal dogma constrictions, and the need for argumentation within practices of procedural law[21]. Therefore, though the claim to correctnesss in all practical discourses entails the obligation to justify one's own statements, and in this respect resembles making a promise, in legal discourses the claim is different than in general practical discourse in a sense that statements which the claim concerns are not simply rational but they can be rationally justified within law in force[22]. Such a presentation of the claim to correctness makes the rationality of legal argumentation relative to the rationality of legislation, which is not within the scope of interest of legal discourse theories[23].

5. Non-positivist theory of law is an answer to the problem left unsettled by the theory of legal discourse. Thus, the interpretation of the claim to correctness is to be complementary to the understanding of the concept, used in reference to justify legal statements. For instance, if the claim to correctness of a court statement may be completely satisfied only after fulfilling two conditions – realising an argumentative discourse according to its rules and providing the correctness of law which this statement is based on – then the claim to correctness of specific legal norms and of the legal system itself is complementary to the theory of legal discourse. But if it is assumed that law of necessity must be – at least to some extent – correct, and so the Kelsen claim that law may involve any content is renounced, then a question arises as to what it means and how such a concept of law differs from traditional law of nature theories[24].

First of all, it has to be noticed that non-positivist conception of law has more elements in common with legal positivism than with law of nature theories. What is meant here primarily is the "social thesis" of positivism, according to which legal norms are binding because either, they are a product of social custom, or, they fulfil criteria of law that arose from such custom. The similarity is clearly seen in the definition of law by Ralf Dreier, which states that law is: "the entirety of norms that belong to the constitution of a national or international normative system provided that this system is, by and large, socially effective and it contains at least a minimal ethical justification or a possibility thereof" and "of norms which are established in accordance with such a constitution if they, as such, have minimal social efficency or a chance of such efficency and minimal ethical justification or a possibility of such a justification"[25]. As it has been already mentioned, the non-positivist conception of law lies in a triangle of the following:

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[21] R. Alexy, *Theorie*..., p. 34.

[22] *Ibidem*, p. 264 et al., p. 271.

[23] *Ibidem*, p. 351.

[24] R. Alexy, *W obronie niepozytywistycznej koncepcji prawa* [*In Defence of Non-positivist Conception of Law*], "Państwo i Prawo" ["State and Law"] 1993, No. 11–12, pp. 34–35.

[25] A. Grabowski, *Prawnicze pojęcie*…, p. 18.

the criteria of correct enactment of laws, a minimum of social effectiveness and a minimum of moral correctness.

A more elaborate but essentially similar definition of law is given by Robert Alexy, who contends that law is: "a system of norms, which incorporates the claim to correctness, 2a) comprises the entirety of norms that belong to a generally socially effective constitution – norms which are not extremely unjust, 2b) and the entirety of norms that are established in accordance with the constitution – norms showing a minimum of social effectiveness or having a chance of such effectiveness, and these norms are not extremely unjust, 3) and to which belong also the rules and other normative arguments on which a procedure of applying law is based, or must be based, so that it provides the fulfilment of the claim to correctness"[26]. In this case, it is even more evident that the social thesis, characteristic of positivism, is also a part of the non-positivist conception of law. The essential difference is that non-positivists renounce the separation thesis and accept the idea of the necessary connection of law and morality not only on the application level – as it was in the legal discourse theory – but also on the validation level. It is worth noting that: "one of the basic non-positivist criteria which allows us to label a certain normative system "law" is the c o r r e c t n e s s c l a i m assumed by this system"[27]. It may even be said that removing the claim element from the conception makes it identical with positivism. Normative systems which renounce, or do not accept, the claim to correctness should be classified as non-law. Normative systems that accept the claim, but do not realise it, may be classified as law but only as flawed legal systems. When speaking of legal norms, there is a similarity to the case of court statements where, if they do not accept or do not realise the claim to correctness, they are defective legal norms. Therefore, the relationship between law and morality is of a qualifying nature[28]. In other words: "a legal system that resigns from the claim to correctness may be denied the quality of being law, and on the level of specific norms whose flagrant unjustness makes them devoid of the legal norm status"[29].

As previously mentioned, in a complex and elaborate reasoning for the non-positivist conception of law, three basic arguments are employed: the injustice argument, the correctness argument, and the principles argument. The first of them, referring to Radbruch's formula, claims that without minimal justice – and thus without the claim to correctness – there would be no legal system but only pure violence. This argument may be characterized by three assumptions. First,

[26] *Ibidem*, p. 19.

[27] *Ibidem*, p. 22.

[28] *Ibidem*, pp. 44, 123.

[29] M. Dybowski, *Robert Alexy – niepozytywistyczna filozofia prawa* [*Robert Alexy – Non-positivist Legal Philosophy*], (in:) J. Zajadło (ed.), *Przyszłość dziedzictwa. Robert Alexy, Ralf Dreier, Jürgen Habermas, Otfried Höffe, Arthur Kaufmann, Niklas Luhmann, Ota Weinberger: portrety filozofów prawa*, [*The Future of Legacy. (...) Portraits of Legal Philosophers*], Gdańsk 2008, p. 39.

it is based on the observer's perspective. Second, it assumes that a legal system is a system of norms (non-pragmatic view). Third, it searches for classifying connections between law and morality – for the criteria of law in general[30]. With these assumptions, there is no point in discussing the legal system if it does not meet minimal moral criteria; law necessarily has to include the claim to correctness.

Accepting this claim allows Alexy to formulate the next argument – this time referring to correctness itself. The argument is similar to the argument from injustice but uses different premises. It assumes the the participant's perspective, treats a legal system as procedures-acts (a pragmatic view) and searches for qualifying connections between law and morality – for the criteria of determining defective law. The argument's justification – as in the case of legal discourse theory – refers to the concept of performative contradiction, and therefore it cannot be discussed here. Significantly, the reasoning acknowledges that the claim to correctness applies not only to legal systems in their entirety, but also to specific legal norms. Not including or not fulfilling the claim by these norms does not deprive them of the quality of being law, but only allows classifying them as legally defective norms. However, this operation is only possible from the perspective of the legal system participant, when the system as a whole already includes the claim.

It may be said that non-positivist concept of law is meaningful only from the participant's perspective[31]. It means that the notion of the claim contains not only arguments of legal discourse participants, but also legal norms in every case where the arguments refer to them. For example, a judge making a ruling may assure its correctness only after meeting the conditions of justifying the rulings within a legal discourse and after verifying whether, in relation to legal norms on which the ruling is based, the conditions of justifying legal norms are met. Not meeting any of these conditions means that the ruling is defective. The judge must not only take responsibility for his ruling but also assume the legal system participant perspective, and, in a way, take responsibility for its content. Only then will he be able to judge whether the examined legal norm has a claim to correctness and whether the claim is fulfilled. It does not mean that the negative outcome of this assessment must result in derogation or denial of applying these norms – this rather depends on additional conditions resulting from a particular legal system or, as a last resort, allowing for the application of the Radbruch's formula.

Another argument for the non-positivist conception of law is the principles argument. In Dreier's version it encompasses three theses: on incorporating principles into a legal system as norms different in structure and validation from rules (*Inkorporationsthese*), on opening legal systems to moral arguments and standards by including principles (*Offenheitsthese*), and on weighing principles in order

[30] A. Grabowski, *Prawnicze pojęcie*…, p. 40 et al.

[31] R. Alexy, *W obronie*..., pp. 37–38.

to most fully realise moral values incorporated into a legal system by principles (*Optimierungsthese*)[32]. What is implied is that legal principles may be conveyed also in the language of values, and each value may be expressed as a principle (*Werttheorie*). For this reason principles may be described as optimising dictates, which oblige legal authorities to most comprehensively consider specific values articulated in principles and to weigh any conflicting values in their rulings.

Alexy frames this argument in a slightly different way, but from the point of view of this analysis the most important thing is that he accepts the equivalent to the weighing thesis, namely the coherence thesis (*Kohärenzthese*), which is so similar to Ronald Dworkin's proposal that it may also be named the thesis on integrity. According to it, "in a system of law, legal command necessarily obliges developing the system so that all principles taken into account are included and justly weighed", a system of law should be based on a coherent moral system[33]. In his later works Alexy replaces the coherence thesis with a new version of the correctness thesis (*Richtigkeitsthese*), which holds not only the claim to legal, but also to moral, correctness. Naturally, it is an argument for a necessary relationship between law and morality, but also for a justification for the inclusion of principles and normative arguments that serve fulfilling the claim to correctness, as outlined above, into a legal system. It this way the reasoning reaches the point at which a question arises: what is the meaning of the command to develop law by giving it a most correct moral system as a basis?

6. Accepting the command to develop a legal system so that it most fully corresponds with a coherent moral system at its foundation means the neccessity to work out the third interpretation of the claim to correctness. It seems that in order to realise the object of this dictate, it is not enough to understand this claim as a legal discourse participant's conviction of the correctness of his own argumentation and of the legal norms on which the reasoning is based, which is possible only after adopting the pragmatically interpreted perspective of the legal system participant. For example, as previously mentioned, a judge bringing out a verdict may provide for its correctness after meeting the verdict justification requirements in a legal discourse and after verifying whether in relation to legal norms, on which his ruling bases, the legal norms justification requirements are met. Not meeting either of these two conditions would result in the ruling being faulty. Thus, it does not yet follow that the legal system will be able to develop – to this end it is necessary to introduce an additional assumption, which makes the third interpretation of the claim to correctness.

The assumption is contained in a thesis saying that any development necessarily requires factors directing all actions, or as we may say in this example, all legal discourses. In the Kantian tradition regulative ideas are such directing

[32] A. Grabowski, *Prawnicze pojęcie*…, p. 36 et al.
[33] *Ibidem*, p. 47.

factors, giving cognitive and pragmatic discourses their final goal – the goal that will never be attained, though. The point of regulative ideas is to determine the unattainable ideal, which, however, has practical significance. In non-positivist conceptions of law, Alexy assumes that absolute correctness, being the goal of legal discourses, has the nature of a regulative idea. Whereas correctness that is referred to in rulings or in legal norms is of a discursive nature only[34]. He adds: "the idea of correct morality is a r e g u l a t i v e i d e a (in the Kantian meaning) and because of that the claim to correctness, within the argument from principles context, leads to an ideal dimension (...) of law necessarily connected with law as such"[35]. Unfortunately the suggestion is not explained further and it seems that, if based on it, the claim to correctness may have a third interpretation.

As mentioned above, the two previous interpretations of the concept mean that, for example, a judge must take responsibility not only for his ruling but, by assuming the legal system participant perspective, in some way also take responsibility for the system content. Only in this way will he be able to discern whether the considered norm includes the claim to correctness and whether the claim is fulfilled. According to the third interpretation, just participation in a legal practice entails taking responsibility for it and a duty of acting for its benefit, and hence its maintenance and development to realise the idea of law as a regulative idea. This view is present in the modern Kantian thought – described as Kant's philosophy transformation – in the transcendental pragmatics of Karl-Otto Apel, especially. In this perspective, the responsibility principle connects the ethic of an ideal communication community discourse with discourses of real community. The principle obliges the latter to most fully develop the ideals of the discourse ethics in daily practice[36]. Simultaneously, the responsibility principle relates two sections of ethics: formal and reflectively validated discourse ethics with historically worked out normative ethics. The responisbility principle links the two, but at the same time it validates and makes normative ethics necessary as long as it is

[34] *Ibidem*, p. 91.

[35] *Ibidem*, pp. 61–63.

[36] *Vide* primarily K.-O. Apel, *Das Apriori der Kommunikationsgemeinschaft und die Grundlagen der Ethik*, (in:) *Transformation der Philosophie, Band II, Das Apriori der Kommunikationsgemeinschaft*, Frankfurt am Main 1973; id., *Diskurs und Verantwortung. Das Problem des Übergangs zur postkonventionellen Moral*, Frankfurt am Main 1988; id., *Etyka dyskursu jako etyka odpowiedzialności – postmetafizyczna transformacja etyki Kanta* [*Discourse Ethics as Ethics of Responsibility – Post-methaphysical Transformation of Kant's Ethic*], "Principia" 1992, No. 5; id., *Wspólnota komunikacyjna jako transcendentalne założenie nauk społecznych* [*Communication Community as a Transcendental Assumption in Social Sciences*], (in:) A. Zeidler-Janiszewska (ed.), *Kultura współczesna. Teoria – Interpretacje – Krytyka* [*Modern Culture. Theory-Interpretations-Criticism*], Warszawa 1993; id., *Uniwersalistyczna etyka współodpowiedzialności*, (in:) J. Sekuła (ed.), *Idea etyczności globalnej* [*The Idea of Global Ethics*], Siedlce 1999. For a general and insightful discussion of these issues *vide* B. Sierocka, *Krytyka i dyskurs. O transcendentalno-pragmatycznym uprawomocnieniu krytyki filozoficznej* [*Criticism and Discourse. On Transcendental-pragmatic Validity of Philosophical Criticism*], Kraków 2003.

within bounds set by the principle. It may be said that responsibility, in its moral sense and in the case of lawyers, is a relation between legal reality – thus between legal discourses in which the claim to correctness of rulings and legal norms is present and fulfilled – and between the legal discouse ideal, in which absolute correctness is realised. This perspective includes the idea of law development through the effort of individuals taking part in legal practice. Such an interpretation of the claim to correctness, in which its acceptance – obligatory for a member of legal practice – of necessity entails moral responsibility for the entirety of the practice, should be provided with some additional commentary on the claim's philosophical and historical context.

The commentary may be sketched by formulating the following remarks. First, the principle may be understood as an element of legal ethics: a branch that is gaining more and more popularity but still has to precisely define the subject and the methodology. Although the standpoint I present is only a theoretical proposal at the moment, I assume that legal ethics is a branch of knowledge that concerns deontological, social and moral aspects of legal practice, whose role is a critical and reflective analysis of content and relationships between these aspects as planes of multidimensional legal ethic theory. The analysis is done with interdisciplinary methodology by applying methods proper to legal dogmatists, social sciences, philosophy of morality and philosophy of law[37]. Legal ethics involves three planes which include: professional obligations of lawyers resting with them because of their profession (deontological plane), values central to each legal profession which are set on the basis of legal professional roles (social plane), and moral principles common to all legal professions (moral plane).

To multidimensional theory of legal ethics, accepting moral responsibility as a priniciple of the highest plane – the moral – means meeting the criteria of critical and reflective theories. Critical, because it helps to analyse lawyers' professional roles and obligations as well as concrete actions by checking to what extent they contribute to the maintenance and development of the ideal community; to what extent they make it more rational. Reflective, because the responsibility principle, and the other planes' content become valid precisely in such a procedure and, additionally, because the critical analysis of roles and professional obligations of lawyers, from the responsibility principle perspective, is simultaneously the analysis of its own practical results and development of its criteria. Legal ethics is thus the ethics of responsibility, the object of which is the benefit of the discourse and of the community in which the discourse is held. For this reason, participation

[37] Such a presentation of legal ethics has been outlined initially in my article entitled: *Wieloznaczność w teorii etyki prawniczej* [*Ambiguity in the Theory of Legal Ethics*], (in:) H. Izdebski, P. Skuczyński (eds.), *Etyka prawnicza. Stanowiska i perspektywy* [*Legal Ethics. Standpoints and Perspectives*], Warszawa 2008, developed in my doctoral dissertation *Status of Legal Ethics*, Frankfurt am Main 2013.

in legal practice entails taking responsibility for it and taking on a duty of acting for its good, and therefore its maintenance and development[38].

Second, such an interpretation of the claim to correctness seems to comply with Radbruch's thought and, simultaneously, is almost absent in the non-positivist conception of law. The following fragment of Radbruch's reasoning on internal antinomy in law's idea between justice, legal security and appropriateness deserves special attention: "However, they are not contradictions of a destructive kind that would lead to the self-annihilation of law. Just the opposite, the dialectic nature of these conflicts should result in constant improvement of the legal system, and especially in optimal adjustment of its form and content to the conditions of time and place of its constitution, validity, and interpretation"[39]. It seems that, to Radbruch, the relation of legal reality and the idea of law was not limited to the validity question but was also related to the the development of law and its improvement. However. it is important to make a stipulation that he does not directly mention lawyers' responsibility for the law. He uses the concept of professional obligations, especially in relation to judges.

Radbruch uses the concept of judges' professional obligations allegedly related to some special role they have. In the pre-war period of his writing, he formulated the obligations primarily as the doctrine of binding judges with acts. According to it, "a professional obligation of judges is to put the claim to validity – contained in law – in force; their personal sense of justice must yield and make an offering to the authoritative legal command"[40]. Judges cannot directly refer to the idea of law and use the antinomy of values comprised in the idea. This activity is reserved for the participants of a democratic debate, in which law content is being established. This thought is also ascertained in the famous passage, in which Radbruch states that: "we disdain a priest who preaches contrary to his beliefs; however, we respect a judge who, in his faithfulness to an act, does not let himself be deluded by his own sense of law"[41]. It is worth adding that the perspective, in which the problem

[38] For further clarification, see P. Skuczyński, *Odpowiedzialność moralna jako podstawa etyki prawniczej. Rozważania w perspektywie transcendentalno-pragmatycznej* [*Moral Responsibility as a Foundation of Legal Ethics. A Discussion from the Transcendental-pragmatic Perspective*], (in:) A. Mróz, A. Niewiadomski, M. Pawelec (eds.), *Prawo – język – etyka* [*Law – Language – Ethics*], Warszawa 2010 and P. Skuczyński, *Moralność prawa i moralność prawników w koncepcjach dobrego prawa* [*Morality of Law and Morality of Lawyers in Good Law Conceptions*], (in:) P. Mochnaczewski, A. Kociołek-Pęksa (eds.), *Dobre prawo, złe prawo – w kręgu myśli Gustawa Radbrucha* [*Good Law, Bad Law – within a range of Gustav Radbruch's Ideas*], Warsaw 2009, pp. 162–185.

[39] J. Zajadło, *Dziedzictwo...*, pp. 99–100. *Vide* also U. A. Kosielińska-Grabowska, *Idea sprawiedliwości Gustawa Radbrucha* [*The Idea of Justice in Gustav Radbruch*], (in:) B. Wojciechowski, M. J. Golecki (eds.), *Rozdroża sprawiedliwości we współczesnej myśli filozoficznoprawnej* [*Crossroads of Justice in Modern Legal-philosophical Thought*], Toruń 2008, p. 83.

[40] G. Radbruch, *Filozofia...*, p. 92.

[41] *Ibidem*, p. 93. This passage is referred to as one of the most popular thoughts of Radbruch, *vide* J. Zajadło, *Dziedzictwo...*, pp. 16, 125.

is being analysed on the plane of professional duties and roles, and not on the plane of the concept and the idea of law, may also be included in a discussion of the evolution, or the revolution, in Radbruch's thought.

For it is claimed that the judge's obligation to observe acts and interdiction to make verdicts *contra legem* do not necessarily prove Radbruch's alleged positivism, especially the *Gesetzespositivismus* branch of positivism, since holding this assertion does not imply the thesis that only acts are law[42]. It may possibly be said that the obligation results in the fact that not all practical consequences have yet been drawn from the non-positivist philosophy of law[43].

But it may be equally stated that, taking into account various systemic and functional factors determining judges' role at that time, Radbruch considered assuring legal security as a central value of their profession. This is why he perceived judges' duties in such a way, and not in any other. However, when claiming after the war that: "lawyers and citizens must remember it well that laws which go beyond every measure of injustice and social noxiousness are p o s s i b l e – laws that should be denied not only validity but also all legal character"[44], he formulated an obligation to refuse the application of acts that are grossly unjust. The philosophy of law has not been changed – only the understanding of the judges' role.

It is important to bear in mind that such a perception of lawyers' professional roles is typical of the German tradition in legal ethics[45]. One of fundamental factors influencing its development was a constantly changing political situation, which time and again resulted in radical revaluations of the legal system. Starting with the Wilhelmian epoch, through the Weimar Republic and the Nazi totalitarianism, the liberation system of the Federal Republic and the communist totalitarianism – German lawyers used to find themselves in a completely new, totally different political situation every ten or fifteen years or every couple of decades. Every system change meant not only a crisis of law (*Rechtskrise*) but also a crisis of lawyers (*Juristenkrise*)[46] by making them face a dilemma. Atti-

[42] S. L. Paulson, *On the Background and Significance of Gustav Radbruch's Post-War Papers*, "Oxford Journal of Legal Studies" 2006, Vol. 26, issue 1, pp. 36–37. On possible reasons for aversion of Radbruch to judicial discretion in spite of his personal sympathies towards the 'Free Law School' and Herman Kantorowicz *vide* J. Zajadło, *Dziedzictwo...*, p. 47 et al.

[43] S. L. Paulson, *On the Background...*, pp. 32–33.

[44] G. Radbruch, *Pięć minut filozofii prawa* [*Five Minutes of Legal Philosophy*], (in:) *Filozofia prawa* [*Philosophy of Law*], Warsaw 2009, p. 243.

[45] *Vide* P. Skuczyński, *Tradycje etyki prawniczej a nowoczesne zawody prawnicze* [*Traditions of Legal Ethics and Modern Legal Professions*], (in:) P. Steczkowski (ed.), *Etyka, deontologia, prawo: konferencja naukowa "Etyka profesji prawniczych − wyzwania współczesności", Sieniawa, 15−17 listopada 2007 roku* [*Ethics Deontology Law (...)*], Rzeszów 2008, p. 365.

[46] B. Rüthers, *Recht und Juristen unter dem Sog und Druck wechselnder politicher Systeme*, (in:) *125 Jahre Rechtsanwaltskammer Frankfurt am Main, Oberlandesgericht Frankfurt am Main, Rechtspflege*, Frankfurt am Main 2004, pp. 95–98.

tudes in response to these dilemmas were varied and on the one hand included active involvement in re-building of a new political and systemic reality, but on the other a withdrawal from professional life or heroicly sticking to the values they believed in. However, he noticed that the latter attitude, sometimes referred to as "the sacrifice of one's own professional ethics"[47], was unpopular and that resigning from a professional career according to the dictates of one's own conscience was significantly less frequent among lawyers than among professionals working in administration[48].

7. In conclusion, it is important to note that the thesis on a necessary connection between the claim to correctness and the moral principle of responsibility, together with the thesis on the Radbruch's thought evolution – on the plane of his understanding of judges' professional role and obligations and not on the plane of legal philosophy – may form a basis for drawing an even more general conclusion. Namely, the Nazi period may be regarded as the time of a serious crisis of law in Germany. Seeing the professional role of judges in a restrictive manner and putting them under an absolute obligation to obey acts, together with a ban on assessing judges from the law's value perspective – all these facts only supported the tradition of professional ethics relying on obedience and professional roles and did not prevent the crisis. Reformulating the professional role of judges, imposing on them an obligation to consider the issue of laws' justness and to refer the law to the idea of law – all this is to make judges responsible in a moral sense and may help to avoid legal crises in future[49].

Such a conclusion, of course, as it has been emphasized on many occasions, is only a modern interpretation of Radbruch's thought and a complement within the frame of non-positivist conception, which, from the beginning, continues this thought. This is possible not only by means of a legal-philosophical analysis within this direction, but also through assuming the perspective of legal ethics – external to it – or more broadly speaking, by assuming the theory of professional ethics in general. It seems that including the problem of legal crises in the discussion is, from the point of view of the latter, by all means justified. According to the theory of professional ethics, assumed here, the sense of the moral principle of lawyers' responsibility for law as well as the related command to develop legal practice implies preventing situations in which irresponsible professional actions

[47] *Ibidem*, p. 118.

[48] K. Scheider, *Der deutsche Jurist als Bürokrat – Zur Beziehung zwischen der sozialen Role des deutschen Juristen und der Entwicklung der staatlichen Bürokratie*, (in:) W. Kaupen, R. Werle (eds.), *Soziologische Probleme juristischer Berufe*, Göttingen 1974, pp. 99–100.

[49] This would entail a slightly different interpretation of the *Wehrlosigkeitsthese* of Radbruch, most basically understood as a thesis blaming legal positivism for making German lawyers defenceless towards Nazism, *vide* J. Zajadło, *Formuła...*, p. 283 et al. According to the view proposed here, it is not entirely legal positivism that is to blame, but an inadequate interpretation of judges' professional role, which interpretation may be typical of legal positivism but not connected with it of necessity.

would result in critical phenomena at the macro level. Thus, answering the title question: "Are we facing a crisis of law?", it has to be said that only to the extent to which lawyers treat their work irresponsilbly, which is possible even when one accepts the claim to correctness but not all its ramifications.

To prove the argument correct, it is worth indicating that recent crises, especially economic ones, are caused by collapses within specific procedures – such as the professional audit in 2001 or professional investment banking in 2008 – that made up the whole economic system. And this is a significant difference from typical depressions stemming from overproduction. The differences stem from changes in the market economy – among other things, in supplanting the importance of ownership structure by managing personnel, increasing the role of planning and prediction of economic processes. These changes enhance the role of professionals. In all occupations, moral foundations of professional ethics, which are expressed in the principle of responsibility for one's legal practice, mean that in each professional activity not only its technical correctness, but also its relation to the whole of the practice and its development should be taken into account. If the thesis that the cause of modern economic depressions lies in ignoring this dimension of professional ethics is true, then it may be necessary to foster professional ethics as defined above, and to search its connections with the classical thesis on relationships between Protestant ethics and the origins of capitalist economy.

Regardless of the accuracy of the reflections outlining possible direction for further research, in conclusion it is worth emphasising the resulting fact connected with the role of Radbruch's thought in the above discussion. Radbruch's formula, however useful in solving quite modern problems, is first of all applied in situations in which legal order turns to the past, endavours to overcome the problems originating from totalitarian systems' legacy and from lawlessness related to such systems. In contradiction, lawyers' moral responisbility for law, its maintenance and development requires facing towards the future and making constant reflection on lawyers' professional obligations – of judges especially but, of course, not solely. The responsibility also involves studying how a particular way of fulfiling the obligation affects the entire legal practice or, in words that would probably be closer to Radbruch, the reality of law. With the theses presented in this paper holding true, his achievements would prove undeniably topical.

ARE WE FACING A CRISIS OF LAW? REFLECTIONS IN REFERENCE TO THE SO-CALLED CLAIM TO CORRECTNESS PROBLEM

Summary

What is usually acknowledged as a topicality indication of Gustav Radbruch's legal philosophy is the theoretical interest in and practical application of his ideas – known as the Radbruch's formula – on abominable law, statutory non-law and the refusal to apply it by public authorities, the judiciary in particular. The article's main argument is that we can point to other than Radbruch's formula elements in his philosophy of law which are still applicable and present in the recent discussion on the concept of law itself, its validity and application. What this means is basic to Radbruch's thought the distinction between the concept of law (Rechtsbegriff), the idea of law (Rechtsidee) and the relationship between the two. The solution accepted by Radbruch in this matter is very broadly applied by the representatives of the nonpositivist concept of law. However, the solution may be ascribed a more general meaning, which manifests itself in the "claim to correctness problem" (Anspruch auf Richtigkeit). Such a claim has to be an element not only of law itself but also of all legal statements including acts of applying the law. The point I endeavour to defend is that out of the three interpretations of the claim to correctness problem, the one which refers not only to the correctness of legal order and law application acts, but also to lawyers' professional obligations and responsibility is the best justified. This is because such a view most fully addresses the challenges of modern law, which has become increasingly professional in character, but on the other hand more prone to factors typical to fully professionalised walks of life – to critical factors especially. The question of how much the interpretation is compatible with Radbruch's perspective, is beyond the scope of this analysis. However, some arguments suggesting higher degree of concordance will be presented.

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KEYWORDS

Gustav Radbruch, Robert Alexy, claim to corectness, legal crisis, moral responsiliblity of lawyers

SŁOWA KLUCZOWE

Gustav Radbruch, Robert Alexy, roszczenie do słuszności, kryzys prawny, moralna odpowiedzialność prawników