# I CONGRESSO INTERNACIONAL DE JUSTIÇA E MEMÓRIA – I CIJUM

## DITADURAS NA AMÉRICA LATINA E NO MUNDO II

D615
Ditaduras na América Latina e no mundo II [Recurso eletrônico on-line] organização I Congresso Internacional de Justiça e Memória (I CIJUM): Universidade de Itaúna - Itaúna;

Coordenadores: Wiliander França Salomão, Gustavo Henrique Maia Garcia e Fernando Antônio Tavares - Itaúna: Universidade de Itaúna, 2023.

Inclui bibliografia
ISBN: 978-65-5648-921-6
Modo de acesso: www.conpedi.org.br em publicações
Tema: Enfrentando o legado das ditaduras e governos de matriz autoritária.
1. Direito. 2. Justiça. 3. Memória. I. I Congresso Internacional de Justiça e Memória (1:2024 : Itaúna, MG).

CDU: 34

# I CONGRESSO INTERNACIONAL DE JUSTIÇA E MEMÓRIA – I CIJUM

## DITADURAS NA AMÉRICA LATINA E NO MUNDO II

---

## Apresentação

Recientemente se llevó a cabo el importante evento presencial brasiliano, Congreso Internacional de Justicia y Memoria (I CIJUM), esto es, el 02 de diciembre de 2023 y que tuvo como temática: “Enfrentando el legado de dictaduras y gobiernos autoritarios”. El mismo que fue organizado por la Universidad de Itaúna (UIT), a través de su Programa de Pos- graduación en Derecho, con el apoyo del Consejo Nacional de Investigación y Pos-graduación en Derecho (CONPEDI).

Es de resaltar plausiblemente la temática elegida para el mismo. Ello, en tanto que, si no se tiene memoria de lo ocurrido o no se aprende de lo vivido, lo que corresponde penosamente es, repetir los hechos acaecidos, tantas veces, hasta cuando se haya asimilado las enseñanzas dejadas por la historia.

Por ello, la historia es la ciencia que se encarga del estudio de los eventos y procesos del pasado y presente. Para esto, hace una recopilación de documentos o pruebas de los fenómenos sociales y culturales que permiten su reconstrucción y su análisis. Su objetivo principal es estudiar, indagar, comprender e interpretar lo que ha ocurrido en la humanidad, para así entender y aprender de esos hechos y por supuesto no repetir los errores que han ocurrido.

Pero quizá el elemento más significativo por el que aprender historia es importante es que esta materia ayuda a pensar. Las vueltas que han dado las sociedades desde la prehistoria hasta la actualidad han profundizado en la diversidad, en la contradicción, en el uso del poder para imponer y conocer cuáles han sido esos caminos nos ayuda a consolidar nuestro propio criterio sobre la sociedad. Algunos teóricos señalan que la historia es como una rueda de molino que siempre vuelve. Conocer nuestra identidad como personas y sociedades y encaminar nuestros pensamientos hacia esa diversidad son las claves para forjarnos un futuro mejor.

Conocer la historia no nos hará infalibles, ni evitará la reiteración de errores, ni nos anticipará el mañana; pero gracias al estudio de la historia podremos pensar críticamente nuestro mundo y tendremos en nuestras manos las herramientas para entender las raíces de los procesos actuales y los mapas para orientarnos en las incertidumbres del futuro. Desatender la historia

no nos libra de ella, simplemente regala el control. Las personas somos seres narrativos e históricos; ambos rasgos son intrínsecos a nuestra identidad.

Al hablar de historia, resulta imperativo dejar constancia, que, para entender y aprender de la misma, es preciso atender una mirada trifronte. Esto es, que es necesario abordarla desde el enfoque del pasado, del presente y del futuro.

Así, el presente evento se sitúa en el enfoque de lo ocurrido en el pasado, a efectos de aprender de ello y como consecuencia, nutrirse del aprendizaje respectivo. Dicho de manera específica: entender la historia, para no solamente no olvidarla, sino que, además, para garantizar que las dictaduras y gobiernos autoritarios, no vuelvan a repetirse o tener un mejor desempeño en rol fiscalizador de la población al gobierno de turno. Para finalmente, lograr o garantizar el abrace de la justicia.

Y es que la universidad, no solamente tiene por quintaescencia, la investigación y retribución de ciencia y tecnología hacia la población (además, de constituirse en un derecho fundamental, reconocido en la Constitución Política). Entonces, la universidad debe generar conciencia, análisis, para luego de ello, ejercer de manera inmejorable el control del Estado, a través del acertado ejercicio de los derechos fundamentales, a la transparencia y acceso a la información pública, a la rendición de cuentas, a no deber obediencia a un gobierno usurpador, a la protesta ciudadana pacífica sin armas, por citar solo algunos.

Ello, sin dejar de lado la trascendencia del método histórico en la investigación. Y es que sin investigación no existe vida universitaria, equivaldría a una estafa, a “jugar a la universidad”.

El método histórico es propio de la investigación histórica y con él se pretende, a partir del estudio y análisis de hechos históricos, encontrar patrones que puedan dar explicación o servir para predecir hechos actuales (pero nunca a corto plazo). Y se caracteriza por: i) Inexistencia de un único método histórico, ii) No genera predicciones a corto plazo, iii) Busca no solo contar la manera en que sucedieron los acontecimientos del pasado, también se centra en establecer hipótesis sobre por qué llegaron a suceder, lo que hace que muchos no consideren la historia como una ciencia al uso, ya que no establece absolutos, iv) Sus investigaciones se basan en fuentes de la época ya sean libros, documentos, diarios, enseres personales, v) Deben contrastarse las fuentes utilizadas y cerciorarse de que son realmente veraces.

Por ello, la historia se escribe constantemente a medida que vamos encontrando nuevos hallazgos. Hallazgos de los que debe quedar constancia, como expone el escritor Oscar

Wilde: “El único deber que tenemos con la historia es reescribirla”. Y Posiblemente, la razón de mayor peso para la importancia de la historia sea que, al conocerla y estudiarla, nos permite aprender a pensar y razonar por nuestra cuenta. Mientras más conocemos qué sucedió antes de nuestro tiempo, y cómo hemos llegado a la actualidad, con más argumentos contaremos para llegar a conclusiones propias con base en ello. Una habilidad que sin duda constituye un aprendizaje en diferentes aspectos de nuestras vidas.

En ese orden de ideas, deviene en imprescindible conocer, analizar la historia, para poder defender la democracia, el libre desarrollo de los pueblos, por ejemplo. Aunque, si bien es cierto, no necesariamente es lo mejor, es lo mejor que tenemos. Y los problemas de la democracia, deben ser enfrentados con más y mayor democracia.

Lo señalado no resulta ser de aplicación sencilla o menor, puesto, que por filosofía se sabe que el ser humano es marcadamente anti democrático, en vista de su naturaleza jerárquica y territorial.

En consecuencia, la relevancia que reviste el presente Congreso Internacional, cobra mayores ribetes y trascendencia.

Amerita, resaltar el rotundo éxito y tremenda acogida, por parte de conferencistas y asistentes. Es de apostrofar también, la masiva recepción de los casi 200 capítulos que formarán parte de los e- Book respectivos.

Por ello, felicitamos muy de sobremanera a los señores miembros de la Coordinación General, Profesores Dres. Faiçal David Freire Chequer, Márcio Eduardo Senra Nogueira Pedrosa Morais, Fabrício Veiga Costa, Deilton Ribeiro Brasil y Secretaria Executiva Dres. Caio Augusto Souza Lara y Wilson de Freitas Monteiro.

Así también, expreso mi profundo agradecimiento a mi amigo, el renocido jurista, Dr. Deilton Ribeiro Brasil, por haberme extendido la generosa invitación a elaborar las presentes líneas, a modo de presentación.

Finalmente, hacemos votos, a efectos que se continúen llevando a cabo eventos de tan gran trascendencia, como el bajo comentario, con el objetivo de fomentar la investigación, mejorar el sentido crítico de los estudiantes, procurar mejores destinos y plausible evolución de los pueblos, evitar nuevas dictaduras, gobiernos autoritarios, entre otros; sobre todo, en estos tiempos en los que la corrupción se ha convertido de manera muy preocupante y peligrosa, en un lugar común.

Arequipa, a 19 de enero de 2024

JORGE ISAAC TORRES MANRIQUE

Decano de la Facultad de Derecho de la Universidad de Wisdom (Nigeria). Consultor jurídico. Abogado por la Universidad Católica de Santa María (Arequipa). Doctorados en Derecho y Administración por la Universidad Nacional Federico Villarreal (Lima). Presidente de la Escuela Interdisciplinaria de Derechos Fundamentales Praeeminentia Iustitia (Perú). Autor, coautor, director y codirector de más de ciento veinte libros, en diversas ramas del Derecho, desde un enfoque de derechos fundamentales e interdisciplinario, publicados en 15 países. Codirector de los Códigos Penales Comentados de Ecuador, Colombia, Chile y Panamá.

# ANÁLISE DA TEORIA DA INJUSTIÇA EXTREMA DE GUSTAV RADBRUCH APLICADA A CASOS JUDICIAIS DO III REICH

## ANALYLISIS OF GUSTAV RADBRUCH'S THEORY OF THE EXTREME INJUSTICE APPLIED TO JUDICIAL CASES OF THE III REICH

**Alexandre Rodrigues dos Santos** [1]
**Isabela Cunha da Silva** [2]

**Resumo**

O presente trabalho científico tem por tema a análise da teoria de Radbruch sobre a injustiça extrema no direito, especificamente sobre sua aplicação pelos tribunais alemães a um caso ocorrido sob a ditadura nacional-socialista alemã. Tem por finalidade, ainda, analisar se tal teoria foi conveniente e adequada para combater a instrumentalização do direito como ferramenta de injustiça. Após a análise, conclui-se que a teoria de Radbruch mostrou-se, pelo menos em parte, adequada ao fim que se propôs, se revelando ferramenta jurídica importante para combater injustiças extremas no direito, superando a lógica positivista.

**Palavras-chave:** Injustiça extrema, Radbruch, Nacional-socialismo alemão

**Abstract/Resumen/Résumé**

This scientific paper undertakes the analysis of Radbruch's extreme injustice theory applied to law, especially its enforcement by the German Court on a case that occurred during the german National-socialist dictatorship. Its intent is, furthermore, to analyse whether this theory was convenient and suitable to battle the instrumentalization of law as a tool of injustice. After investigation, the conclusion is that Radbruch's theory showed, at least partially, adequate to its aimed goal, revealing to be an important legal tool to oppose extreme injustices in law, overcoming the positivist logic.

**Keywords/Palabras-claves/Mots-clés:** Extreme injustice, Radbruch, German national socialism

[1] Law undergraduate at Universidade Federal de Minas Gerais

[2] Law undergraduate at Universidade Federal de Minas Gerais

## 1. FIRST CONSIDERATIONS

The current research aims to analyse the application of the extreme injustice theory, as formulated by Gustav Radbruch, to the injustices perpetrated during German National Socialism. It is the jurist's duty, while dealing with an opposition between positivism and non-positivism, to analyse the practical and theoretical possible consequences of the adoption of either one of these positions. Therefore, it is convenient to study the applications of the aforesaid theory to the nazi regime, due to the extreme circumstances of the occasion, that put to question the law regiment.

In usual situations, the law must be an instrument for society to reach a common welfare, especially by providing security, allowing the existence of society in harmonious convenience, as well as working for justice. However, paraphrasing Radbruch, the German National Socialism knew how to trap their followers, both soldiers and jurists. In this way, law was also used as a tool and instrument of injustice under that regime.

Indeed, the Third Reich is prolific in presenting us with laws that few would dare not to classify as extreme injustice. Such laws included those that expropriated Jewish properties and the famous Nuremberg laws, amongst many other examples. However, especially in the post-war period, there are cases of judicial decisions that appealed to a supra-legal right to rectify such injustices, abandoning positivist logic.

Therefore, the question about the conflict that may exist between formally valid laws and the demands of justice arises. Positivists, such as prominent authors like Hans Kelsen, attribute great value to the formal legal system, without admitting the need for a necessary conceptual connection between law and morality. However, this line of thought may weaken principles of justice, as it validates totalitarian and unjust legal systems, once they are positivized (Kelsen, 1934).

To solve this complex problem, it is fundamental to analyse the diversity of theories about the nature of law, each with different consequences. For the purposes of this research, we shall limit to consider Radbruch's theory and how it relates law to injustice.

Regarding the research methodology, this expanded summary used, based on the classification by Gustin, Dias, and Nicácio (2020), the legal-social methodological approach. As for the generic type of research, the historical-legal type was chosen. In turn, the reasoning developed in the research was predominantly dialectical. Regarding the research genre, theoretical-bibliographic research was adopted.

## 2. RADBRUCH'S EXTREME INJUSTICE THEORY

Robert Alexy, a renowned German jurist, classifies theories regarding the nature of law into two broad categories: judicial positivism and judicial non-positivism. The first class of theories supports the separation thesis, according to which there is no necessary conceptual connection between law and morality. The theories of the second class, on the contrary, advocate the connection thesis, according to which there is a necessary conceptual connection between law and morality (Alexy, 2002).

Radbruch's point of view, substantiated in his work Philosophy of Law, is greatly influenced by Hans Kelsen, Georg Jellinek, and Max Weber. However, his thinking seems to have shifted in several aspects after the war. Due to that, the argument of extreme injustice can be clearly classified, within Alexy's division, as non-legal positivism, as will be seen below (Paulson, 2019).

Radbruch adopted a tripartite concept of law, of which essential elements are legal security, suitability for purposes and justice. Justice, understood as an element of law, coincides with equality and consists both in compensatory justice (absolute equality) and in distributive justice (relative or proportional equality). Suitability to the primary purposes of the law, however, involves certain valuation and the adoption of a certain worldview.

In his thinking before the war, Radbruch attributed great value to legal security, even going so far as to assert that judges, when applying the law, should only ask themselves 'what is legal, but never whether it is also just.' However, after the reformulation of his thinking, Radbruch softens his doctrine, accepting that legal security can yield to justice when the injustice of a particular law is so extreme that it can no longer be considered a valid law (Radbruch, 1950).

In this sense:

> The conflict between justice and legal security was resolved with the primacy of sanctioned positive law, even if its content is unjust and inadequate to benefit the population, unless the contradiction between legal security and injustice reaches such an intolerable level that law, as an unjust law, must yield to justice (Radbruch 1946, quoted by Paulson, 2019). Free translation[1].

[1] Originally: "El conflicto entre justicia y la seguridad jurídica se resolvió com la primacía del derecho positivo sancionado, aun cuando por su contenido sea injusto e inadecuado para beneficiar al pueblo, hasta que la contradccón entre la seguridad jurídica y la justicia alcance uma medida tan intolerable que el derecho, em tanto derecho injusto, deba ceder a la justicia." (Paulson, 2019)

Therefore, within the same classification as Alexy, Radbruch is clearly positioned with non-legal positivism. In fact, accepting that the injustice of a norm can invalidate it, even if only in extreme cases, is already accepting the necessary conceptual connection between morality and law. Now it remains to evaluate the application of this doctrine to cases where severe injustices have actually occurred, in order to verify its suitability for the pursuit of a law that enforces justice.

## 3. THE APPLICATION OF THE EXTREME INJUSTCE THEORY IN GERMAN COURTS TO THE NAZI REGIME

The Nuremberg Laws, also known as the Racial Laws of Nuremberg, were a set of three laws enacted by the Nazi Regime. The two most important laws were the Reich Citizenship Law and the Law for the Protection of German Blood and German Honor. The first of these laws defined who could be considered a German citizen based on racial criteria, and the second regulated marriage relationships between Jews and Germans, prohibiting such unions. Based on the Reich Citizenship Law, the 11th Decree was issued on November 25, 1941, revoking the citizenship of emigrated Germans in its second paragraph . For that, the case of a German lawyer who emigrated to Amsterdam shortly before World War II and was deported from there in 1942 was submitted to the German Constitutional Court (Bundesverfassungsgericht). With an unknown fate, he was presumed dead.

The claimants needed an inheritance certificate, which was denied by the District Court of Wiesbaden, as German inheritance law was not applicable. In 1968, the German Constitutional Court ruled in favour of the claimants, basing their decision on the manifested injustice of the Nazi law. Here is the reasoning behind the decision:

> Law and justice are not at the legislator's disposal. The idea that a 'constitutional legislator can dictate everything according to his whim' would mean a regression to the mentality of a legal positivism devoid of value , that has long been overcome in legal science and practice. It was precisely the time of the National Socialist regime in Germany that taught us that the legislator can also establish injustice (BVerfGE [Federal Constitutional Court] 3, 225 (232)). Accordingly, the Federal Constitutional Court confirmed the possibility of denying to 'legal' provisions of the National Socialists its validity as a law, since they go against fundamental principles of justice so blatantly that a judge intending to apply them or acknowledge their legal effects would be pronouncing injustice, not law (BVerfGE 3, 58 (119); 6, 132 (198)). The 11th Decree infringed these fundamental principles. In it, the contradiction between this provision and justice reached such an unsustainable level that it was considered nulo ab initio (cf. BGH, RzW [German Supreme Court Decisions on Restitution Law], 1962, 563; BGHZ [Federal Court Decisions in Civil Cases] 9, 34 (44); 10, 340 (342); 16, 350 (354); 26, 91 (93)). This decree did not become effective because it had been applied for a few years or because some of those affected by 'denaturalization' declared themselves, at the time, to be resigned or in

> agreement with the National Socialist measures. Once established, an injustice that blatantly violates the constituent principles of law does not become law by its application and observance (BVerfGE, 1968, quoted by Alexy 2002).

Consequently, it is evident the application of Radbruch's theory in the decision, especially in asserting that the decree in question clearly violated fundamental principles of justice and that, due to this serious contradiction, the same decree was never valid, with the court adopting a non-positivist position.

## 4. FINAL CONSIDERATIONS

Due to the inexorable reality of the existence of injustices perpetrated by the legal system itself, especially under tyrannical regimes, the need to combat them arises . It is important to highlight that it has to be done in the field of law itself, through an appropriate legal theory, even if it challenges the positivist system.

Radbruch's theory of extreme injustice has proven to be a crucial example of this possibility, reconciling the demands of legal security and justice, which cannot be neglected. In our research, particularly, the example of the German Constitutional Court demonstrated this, enabling the court to address a case that would be extremely challenging from the perspective of legal positivism.

In conclusion, Radbruch's theory is suitable for its intended purpose, presenting a highly useful legal conception, though the criticisms can be raised against. Indeed, one could point out the difficulty in defining the limits of what would be considered extreme injustice and the possibility of excessive subjectivity in the legal system, resulting in a loss of legal security. Nonetheless, it appears that the theory under examination is consistent, at least in cases where the injustice of a norm becomes evident to common sense, although it is fundamental to emphasise the need for further study and refinement of the methodology to reach more perfectly and harmonically the purposes of law.

## 5. BIBLIOGRAPHIC REFERENCES

PAULSON, L. STANLEY. **La Filosofía del derecho de Gustav Hadbruch y tres ensayos posguerra de Gustav Radbrugh**. Marcial Pons: Madrid, Barcelona, Buenos Aires, São Paulo 2019

KELSEN, HANS. **Introduction to the problems of legal theory: a translation of the first edition of the Reine Rechtslehre or Pure Theory of Law.** (1934) Oxford: Claredon Press, 1997

ALEXY, ROBERT. **The Argument From Extreme Injustice: A Reply To Legal Positivism.** Oxford: Claredon Press, 2002.

RADBRUCH, GUSTAV. **Legal Philosophy, in The Legal Philosophies of Lask, Radbruch, and Dabin.** Cambridge: Harvard University Press, 1950

Bundesverfassungsgericht, 23, 98 (1968), access : https://www.servat.unibe.ch/dfr/bv023098.htm