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Radbruch's Formula revisited: The 'Lex Injusta Non Est Lex' Maxim in constitutional democracies

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According to German legal philosopher Gustav Radbruch, laws that are substantively unjust to an intolerable degree should not be regarded as legally valid, even if they were promulgated according to stipulated procedure. Radbruch's Formula (as his position has been termed) contradicts the central tenet of legal positivism, according to which the existence of laws does not necessarily depend on their merit.[1] While some legal positivists suppose that legal invalidity based on the content of particular laws is a central tenet of natural law theory,[2] natural law theorists such as John Finnis opine that the *lex injusta non est lex*[3] maxim has been no more than a subordinate theorem of classical natural law theory.[4] In Finnis's view, unjust laws give rise to legal obligation "in a legal sense."[5]

Radbruch's Formula is a limited endorsement of the *lex injusta* maxim in relation to laws that are unjust to an intolerable degree. I shall argue that Radbruch's Formula is relevant for constitutional democracies. Regardless of whether the *lex injusta* maxim is a subordinate theorem of natural law theory, and regardless of whether Radbruch affirmed unchanging natural law at any stage of his writing, there are sound reasons why Radbruch's Formula, interpreted in my proposed version as a natural law doctrine, forms an essential part of democratic constitutionalism. Crucially, Radbruch's Formula is strongly consistent with the most persuasive premise of democratic constitutionalism. I shall make the case for the legal invalidity of intolerably unjust laws, relying on broad historical consensus to explicate the idea of intolerable injustice.

In Part I, contrary to Finnis's view, I shall explain how Radbruch's Formula, which connects legal validity with moral validity, sits neatly within natural law theory,[6] all aspects of legal obligation and different types of moral obligations considered. In Part II, I shall delve into why Radbruch's Formula is necessary and justifiably invoked in the context of democratic constitutionalism, even in the hardest case where a written constitution contradicts it. By arguing based on the consistency of the premises of Radbruch's Formula and democratic constitutionalism, I shall not attempt in this article to persuade those who reject democratic constitutionalism, but address those who endorse it. In Part III, I shall explain why the reference to broad historical consensus to discern what counts as intolerable injustice is conceptually sound and prudent, even though natural law theory is founded on objective morality. Referring to such consensus also addresses the twin fears of judicial oligarchy and legal uncertainty that plague the judicial invocation of Radbruch's Formula to strike down legislation passed by a democratically elected local legislature. In Part IV, I shall examine whether the reference to

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[1] John Austin, *The Province of Jurisprudence Determined* (Hackett, 1998) at 184; HLA Hart, *The Concept of Law,* 2d ed (Clarendon Press, 1994) at 185-86; Hans Kelsen, *The Pure Theory of Law* (The Lawbook Exchange, 2002) at 198-99.
[2] Hart, *supra* note 1 at 207-12.
[3] Henceforth, 'the *lex injusta* maxim.'
[4] John Finnis, *Natural Law and Natural Rights*, 2d ed (Oxford University Press, 2011) at 351-52.
[5] *Ibid* at 357.
[6] This shall be broadly understood as the theory of law which connects posited laws with the law of reason or objective morality, as propounded by such as Aquinas and Finnis.

broad historical consensus sits uneasily with the notion of subsidiarity, another concept favored by some natural law theorists, insofar as it possibly overrides local moral consensus. In the conclusion in Part V, I reiterate my overall objective to demonstrate that the treatment of unjust laws within Radbruch's Formula, with judges authorized to strike down laws in constitutional democracies in the case of intolerable injustice but not otherwise, presents us with a neatly cohesive position within natural law theory, all aspects of natural law theory considered.

I. Legal and Moral Obligations in Natural Law Theory

As Radbruch's Formula is a limited endorsement of the *lex injusta* maxim, I shall argue that Radbruch's Formula is to be preferred over Finnis's view that unjust laws retain legal validity in the legal sense. I shall first explicate Radbruch's Formula. Next, I shall parse the debate between Robert Alexy, who attempts to explicate Radbruch's Formula, and Finnis, to examine what the bone of contention is. I shall add to Alexy's case for Radbruch's Formula. Finally, I shall explain how Radbruch's position on legal invalidity sits cohesively with the natural law notion of collateral moral obligations.

(a) Radbruch's Formula

While some opine that Radbruch's position changed after his experience with the Third Reich, Paulson suggests that Radbruch was always disinclined towards legal positivism.[7] Radbruch defends a "basal criterion" of justice in the concept of law, noting that "law is the reality whose meaning (*Sinn)* is to serve justice."[8] He emphasizes that judges are bound to the letter of the law. This emphasis is a response to the judiciary's politicization of their decisions by claiming to decide by reference to the spirit of the law. The reference allowed judges to favor the old constitutional monarchy over the new democracy, and later, Nazism.[9] Viewed as a limited critical response, Radbruch's insistence on judges being bound by statutory law is consistent with his basal criterion of justice. Indeed, Radbruch views public benefit, justice, and legal certainty as three values of law.[10] Paulson argues that Radbruch altered his position only insofar as he accorded undue weight to legal certainty prior to the Third Reich and therefore revised his view to accommodate the importance of the commitment to justice.[11] He subsequently ranks justice over legal certainty and the purposiveness of the law in serving public benefit. The notion of public benefit can be twisted to serve political ends and is ranked last. This is in contrast to the previous ranking amongst the three components of law as if the components are 'simply a reflection of a particular historical epoch, changing with the times."[12]

Applying his formula to situations such as the Nazi regime,[13] Radbruch endorses the necessary connection between law and morality insofar as intolerably unjust laws are not valid laws:

> The conflict between justice and legal certainty may be resolved in this way: The positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between

[7] Stanley L Paulson, "Statutory Positivism" (2007) 1:1 Legisprudence 1 at 11-12.
[8] Stanley L Paulson, "On the Background and Significance of Gustav Radbruch's Post-War Papers" (2006) 26:1 Oxford J Leg Stud 17 at 19, 27.
[9] *Ibid* at 33-35.
[10] Gustav Radbruch, "Five Minutes of Legal Philosophy" (1945) translated by Bonnie Litschewski Paulson & Stanley L Paulson, (2006) 26:1 Oxford J Leg Stud 13 at 14.
[11] Stanley L Paulson, "Radbruch on Unjust Laws: Competing Earlier and Later Views" (1995) 15:3 Oxford J Leg Stud 489 at 499-500.
[12] Paulson, *supra* note 8 at 40.
[13] Paulson, *supra* note 11 at 497.

> statute and justice reaches such an intolerable level that the statute, as 'flawed law', must yield to justice. It is impossible to draw a sharper line between cases of statutory lawlessness and statutes that are valid despite their flaws. One line of distinction, however, can be drawn with utmost clarity: Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the law is not merely 'flawed law', it lacks completely the very nature of law. For law, including positive law, cannot be otherwise defined than as a system and an institution whose very meaning is to serve justice.[14]

It should be noted that there is some debate over whether Radbruch provided two formulae—one concerning intolerable injustice, and the second having been referred to as the "disavowal formula" concerning the circumstance when equality is disavowed by law.[15] Not all agree that there are two formulae. Rivers, for example, takes the view that there is one formula and Radbruch is writing about the difficulty judges face in determining when the line of intolerable injustice has been crossed.[16] For our purposes, as the focus is on a conceptualization of Radbruch's Formula as a natural law doctrine, we do not have to resolve the question of whether there is one formula with a precise elaboration in the second half, or two formulae. In any case, though the reference is to 'flawed law' rather than 'non-law' in the earlier part of the formula, I take the view that Radbruch's intention is clear—that justice prevails in the case of a law that is intolerably unjust. This means that the import of the first part is that the law loses its legal status. Intolerably unjust laws are not legally valid. Thus, while the second part refers to a law that disavows equality not being "merely 'flawed law'" but "[lack] completely the very nature of law," this does not suggest that the 'flawed law' in the first part does not lead to legal invalidity. Instead, while 'flawed law' *in general* may not lose its legal validity, laws that are flawed in that particular manner—being intolerably unjust—"lacks completely the very nature of law." The second part merely clarifies a clear instance of intolerable injustice—when equality is disavowed.

Alexy, in his defense of Radbruch's Formula, labels it as a 'non-positivistic' position, instead of calling it a natural law position. The reason may be two-fold, though Finnis points out that this seems to concede that positivism is the default position.[17] Not every natural law theorist affirms the *lex injusta* maxim; also, Radbruch's affirmation of natural law theory is uncertain. Paulson notes that Radbruch is not a classical natural law theorist. References to a "suprastatutory law" are not to unchanging and universal principles of classical natural law theory, but to a "natural law with changing content."[18] Alexy lauds Radbruch's Formula, which he terms as inclusive non-positivism, as "[t]he only form of non-positivism that gives adequate weight to … both the principle of legal certainty and the principle of justice."[19] Posited law

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[14] Gustav Radbruch, "Statutory Lawlessness and Supra-Statutory Law (1946)" translated by Bonnie Litschewski Paulson & Stanley L Paulson, (2006) 26:1 Oxford J Leg Stud 1 at 7. Commentators have noted that this was in essence just revising his pre-war position to give primacy to justice, but in a limited context—when laws were intolerably unjust. See Frank Haldemann, "Gustav Radbruch vs Hans Kelsen: A Debate on Nazi Law" (2005) 18:2 Ratio Juris 162 at 167.

[15] *Ibid* at 166.

[16] Rivers, *infra* note 58 at 253.

[17] John Finnis, "Law as Fact and as Reason for Action: A Response to Robert Alexy on Law's 'Ideal Dimension'" (2014) 59:1 Am J Juris 85 at 96.

[18] Paulson, *supra* note 11 at 498.

[19] Robert Alexy, "Law, Morality, and the Existence of Human Rights" (2012) 25:1 Ratio Juris 2 at 6 [Alexy, "Law, Morality"] and Robert Alexy, "Some Reflections on the Ideal Dimension of Law and on the Legal Philosophy of John Finnis" (2013) 58:2 Am J Juris 97 at 108 [Alexy, "Some Reflections"].

must generally be respected. Exceptionally, posited law loses its legal validity when moral defects transgress the threshold of extreme injustice.[20]

(b) Legal and moral obligations

In contrast to Radbruch's Formula, according to Finnis, "a theory of natural law need not have as its principal concern … the affirmation that 'unjust laws are not law.'"[21] The principal concern of natural law theory is to identify the unchanging principles from which sound laws may be derived and explain the rulers' authority as founded on the furtherance of the common good through these laws.[22] The *lex injusta* maxim is at most a subordinate concern. Finnis says that the very reference within the natural law tradition of Augustine and Aquinas to "unjust *laws*" indicates they are legally valid, either because they are accepted by the courts or because, in the view of lawmakers, they satisfy the procedure laid down for making laws.[23]

It is possible, as Finnis suggests, that Aquinas, writing about law in a work on systematic theology, might have intended to mean only that laws in the secondary sense are not laws in the focal sense. This is an empirical question of Aquinas' intention. However, the argument that the reference to 'unjust laws' makes no sense as it is linguistically self-contradictory is less persuasive. It is plausible that the intended meaning is that unjust *purported* laws are not *truly* laws. Or, in Dworkinian terms, an unjust law in the pre-interpretive sense is not law in the interpretive sense.[24] Murphy observes that just as it is appropriate "to use the expression 'glass diamond' to describe something that is no diamond at all" as it has some features that "cause people to treat it as if it were a diamond," a law unbacked by decisive reasons for compliance "may well have some of the features of genuine law, most notably the proper pedigree." There is thus no self-contradiction in the maxim.[25]

Such linguistic minutiae aside, the crux is that Finnis agrees with the positivists that the identification of law does not require resort to moral argument.[26] This might have been surprising to some legal positivists such as Hart. Hart contrasts his view that legal validity does not turn on the law's moral content with the natural law view, which he thinks is revived in Germany after the Third Reich, according to which statutes that violate natural law are void.[27] In response to what he thinks is the natural law position, Hart opines that a concept of law which treats legality and morality as distinguishable questions, and which therefore includes even iniquitous laws, is superior to its opposite. In Hart's view, those from whom obedience is demanded by such laws would be compelled to address the question whether legal validity entails an obligation to obey.[28]

Finnis distinguishes law in its focal sense, posited for the common good of the community by a determinate and effective authority in accordance with regulative legal rules,[29] from law which lacks orientation towards the common good.[30] Injustice may be present in legal systems: rulers may be improperly motivated, officials may act in excess of their authority, procedures may be violated, or there may be substantive injustice, such as the denial of a human

[20] Alexy, "Law, Morality", *supra* note 19 at 6.
[21] Finnis, *supra* note 4 at 351.
[22] *Ibid* at 351.
[23] *Ibid* at 365 [emphasis added].
[24] Ronald Dworkin, *Law's Empire* (Belknap Press, 1986) at 65-66.
[25] Mark Murphy, *Natural Law in Jurisprudence and Politics* (Cambridge University Press, 2006) at 13-14.
[26] John Finnis, "The Truth in Legal Positivism" in Robert George, ed, *The Autonomy of Law: Essays on Legal Positivism* (Oxford University Press, 1996) 195 at 204-05.
[27] Hart, *supra* note 1 at 207-10.
[28] *Ibid* at 210-11.
[29] Finnis, *supra* note 4 at 276.
[30] *Ibid* at 352.

right.[31] Unjust laws give rise to "legal obligation in the legal sense." Finnis is of the view that authority is useless for the common good unless its stipulations are treated as exclusionary reasons or sufficient reasons for the subject to act upon, even though the subject may not have agreed that it is reasonable or serves the common good.[32]

Alexy regards Finnis's position as "super-inclusive non-positivism" that accords "an absolute priority of the real dimension over the ideal dimension."[33] The real dimension refers to law's authoritative issuance and social efficacy while the ideal dimension refers to what it ought to be, in terms of its service of justice and morality.[34] The connection between law and morality becomes a "qualifying connection" rather than a "classifying connection."[35] Finnis thinks his position is better regarded as "exclusive non-positivism," as he connects legal obligation in the moral sense with morality: unjust laws do not presumptively give rise to legal obligations in the moral sense.[36] A citizen may have a moral obligation to comply with unjust laws, such as when a wrongly motivated law is for the common good and compatible with justice, or if one is a person not in a group affected by the injustice of a law stipulating for unjust distribution.[37] Finnis opines that legal obligations in the moral sense, otherwise known as moral obligations presumed from the legal obligations, are equally the subject of jurisprudence. Arguments in such vein, which positivists seek to banish from the province of jurisprudence, are in fact often found on the lips of lawyers and judges.[38] In Alexy's view, this fails to give sufficient weight to the ideal dimension of law—what it ought to be—in cases of extreme injustice.[39] However, Finnis thinks the Alexy-Radbruch position over-simplifies the subject in failing to address legal obligation in the legal sense and that in the moral sense. He questions whether a bright line of intolerable injustice can be found, and notes that Alexy had to qualify his own position by suggesting that injustice short of the threshold would still result in legal defectiveness short of legal invalidity, which ends up as Alexy's take on a qualifying connection.[40]

If Finnis's theory concerns how laws can be justified, more so than whether they are valid,[41] it is a political theory[42] that guides political authorities in their formulation of laws. It sets an aspirational standard for them if they want moral obligations to arise presumptively

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[31] *Ibid* at 352-54.
[32] *Ibid* at 351-52.
[33] Alexy, "Some Reflections", *supra* note 19 at 107.
[34] More will be said later about these dimensions: see the text accompanying note 104.
[35] Robert Alexy, "The Dual Nature of Law" (2010) 23:2 Ratio Juris 167 at 176 [Alexy, "Dual Nature"]; Alexy, "Some Reflections", *supra* note 19 at 104-05. Finnis thinks that Alexy admits of the possibility of observers calling monstrously evil laws legally valid (Finnis, *supra* note 17 at 88-89) but notes that the central point of view should be that of participants (Alexy, "Some Reflections", *supra* note 19 at 109). Finnis opines that Alexy has failed to challenge Hart's thesis about the specifically legal point of view of Hart's participants, who correspond to Alexy's observers, who recognise as rules what is acceptable by the rule of recognition. Thus, positivists can say that their account of law facilitates an understanding of all perspectives, including that of Alexy's participants who are interested in legal ideals (Finnis, *supra* note 17 at 89).
[36] Finnis, *supra* note 17 at 104.
[37] Finnis, *supra* note 4 at 360.
[38] *Ibid* at 354, 357-58. A similar view is shared by Dyzenhaus, who notes that related questions of what the ideal of rule of law requires are equally legal and legal philosophical questions. See David Dyzenhaus, "The Grudge Informer Case Revisited" (2008) 83:4 NYU L Rev 1000 at 1031.
[39] Alexy, "Some Reflections", *supra* note 19 at 109.
[40] Finnis, *supra* note 17 at 105.
[41] He says that conceptual analysis may be unfruitful and he is more interested in justifying law. See Finnis, *supra* note 17 at 90.
[42] Philip Soper, "In Defense of Classical Natural Law in Legal Theory: Why Unjust Law is No Law at All" (2007) 20:1 Can JL & Jur 201 at 202. See also Murphy's distinction between natural law jurisprudence and natural law political philosophy in Murphy, *supra* note 25 at 1.

from legal obligations. I suggest, however, that the reluctance to link legal validity (in the legal sense) with moral validity stems from a concern with the rightful authority to pronounce on legal invalidity. Understandably, generally, there appears to be no good reason to substitute the judgment of one authority with another when determining the content of morality with which law is connected. Finnis himself notes that those who debate about whether injustice means one can amend or abandon well-established statutory or common law rules are debating about the constitutional order of institutions. They are making constitutional claims about the appropriateness of the judiciary intervening instead of leaving the development of law to the legislature (for statutes), for example.[43] It is unsurprising that, generally, a natural law theorist is reluctant to accord judges, over legislators and over judges higher up in the hierarchy, the mandate to pronounce that the content of natural law or morality is other than has been decided. Judges have no democratic mandate and special access to moral knowledge over the elected legislators or over judges higher up in the judicial hierarchy.

But concern over the lack of superior mandate and access on the part of judges provides no reason to relegate the *lex injusta* maxim. Nor should legal and moral validity be conceptually delinked to the extent Finnis suggests. Natural law theorists expect legislators or common law adjudicators to consider morality when making laws in good faith, when framing statutes or when developing common law, respectively. Finnis also observes that rulers have the responsibility of repealing rather than enforcing their unjust law, and distinguishes the position of citizens and officials while remaining vague about judges.[44] Given this trajectory, it makes more sense that natural law theory as a concept of law that links law and morality should be affirmed all the way through, with nuanced implications in the context of the final authority to pronounce on the content of morality and what constitutes injustice, and consequently, on the validity of laws challenged on the ground of their injustice. Only such an approach would give real bite to the expectation that legislators and common law adjudicators make laws by reference to morality. Unjust laws should not be viewed to give rise to legal obligation in the legal sense. While generally there may be no good reason to substitute the judge's view for the legislator's in relation to statutes, or a lower court judge's view for that of a higher court in relation to purported unjust common law precedents, a case may be made for judges to step in with regard to intolerably unjust laws, which are exceptional instances. These rare cases nevertheless highlight the value of treating the issue conceptually as one of the definition of, or test for, law, subject to the qualification that the authority question must be separately addressed.

The rightful authority to determine whether laws are just, and therefore, properly connected with morality, should be prudentially determined within the bounds of natural law theory. Broadly speaking, the structure in a reasonably just constitutional democracy lies within such limits. The elected legislature is primarily in charge of law-making, with the judiciary in charge in relation to common law. Within each sphere, the respective institution should decide on the content of laws, including what constitutes justice. Conceptually, even though only just laws give rise to legal obligations, democratically elected legislators may be presumed to have enacted just laws when they act within constitutional limits. Radbruch's Formula closes the gap in various exceptional scenarios, such as when a constitution is amended to authorise the enactment of intolerably unjust laws; when an intolerably unjust law or subsidiary legislation is passed in instances which can, apart from Radbruch's Formula, be regarded as within constitutional limits through constitutional interpretation; or when officials exercise their discretion under the law to commit acts of intolerable injustice. In such cases, judges should apply Radbruch's Formula to declare the constitutional amendment, the law, or the act (as the

[43] Finnis, *supra* note 4 at 356.
[44] *Ibid* at 362.

case may be) legally invalid, though they should not do so in cases short of intolerable injustice. Citizens who refuse to obey and officials who refuse to enforce an intolerably unjust law or order should not be punished by judges. In refusing to uphold such constitutional amendments or validate such laws or orders, judges are not violating their judicial oath to uphold the law. It also follows that judges lower down in the hierarchy may step in when judges higher up in the hierarchy uphold, apply, or enforce intolerably unjust constitutional amendments, laws, or acts. Such a position resolves the ambiguity over 'rulers' left open by Finnis, stays true to the conceptual connection between law and justice, and yet takes into account reasonable disagreement over what justice requires, with unelected judges stepping in only when the disagreement about what justice requires is not reasonable—when the laws enacted are intolerably unjust. In Parts II and III, I explain why this manner of allocation of authority is sound.

This does not mean that Radbruch's Formula is primarily about allocating authority through its prescription for judges, rather than a conceptual claim about law. This bears emphasizing as Brian Bix notes, contrariwise, that Radbruch's Formula is a prescriptive guide to adjudication, not a conceptual or theoretical claim applicable to all possible legal systems.[45] Even as Alexy presents it as a theory of law,[46] and even as Radbruch made a claim about the validity of individual norms, Bix says that Radbruch is motivated by his context of civil law codes where judges are bound to apply the law. The law is fully found in codes. It is difficult to argue that the judge might simply modify or refuse to enforce valid law.[47] Moreover, Bix points out that it "is decisive only in a small number of cases, but otherwise has little or no effect."[48] I argue that the better view is that it is Radbruch's concept of law that leads to his prescription for adjudication: after all, Radbruch clearly identifies justice as the object of law. Bix seems to have rejected the idea of Radbruch's Formula as a concept of law because, empirically, legislatures do make intolerably unjust laws[49] and judges do uphold unjust laws. In doing so, Bix starts from and ends within the positivistic conception of legal theory which deciphers what law is from social fact. If Radbruch's Formula is endorsed, empirical disjunction with social fact would be a practical defect and failure in the practice of the political institutions, not a crease in the theory of law. Or, as Alexy puts it, even if a positivistic stance is adopted in a particular jurisdiction, whether the theory is true or false remains universal: "A concept of law no more acquires a parochial nature by being adopted by a legal practice than does an astro-physical theory by being adopted by the scientific community or the public."[50] A court's decision may be "legally binding" insofar as enforcement follows, but "whether their decision is correct can only be decided in a … philosophical discourse" on the concept of law.[51]

Conceding the conceptual case lends to the danger that the conceptual link between law and morality is chipped away, with consequences on the prescriptive bite of natural law theory even as a political theory guiding law-making authorities on how to make laws that are properly justified. Moreover, the lack of conceptual link does not make sense. Soper notes that no political or moral philosopher would seriously defend the idea that citizens have a duty to obey regardless of the merits of the law. By insisting that a legal obligation exists, positivists are

[45] Brian Bix, "Radbruch's Formula and Conceptual Analysis" (2011) 56:1 Am J Juris 45 at 53.
[46] Brian Bix, "Robert Alexy, Radbruch's Formula and the Nature of Legal Theory" (2006) 37:2 Rechstheorie 139 at 142, 149.
[47] Bix, *supra* note 45 at 56.
[48] Bix, s*upra* note 46 at 143.
[49] Bix, *supra* note 45 at 53.
[50] Robert Alexy, "On Two Juxtapositions: Concept and Nature, Law and Philosophy. Some Comments on Joseph Raz's 'Can There Be a Theory of Law?'" (2007) 20:2 Ratio Juris 162 at 168.
[51] *Ibid* at 169.

saddling law with a claim that is unnecessary to account for current practice and has also been branded false by political theorists.[52]

(c) Moral obligation from a collateral source

Holding intolerably unjust laws to be legally invalid in the legal sense is compatible with Finnis's moral obligation from a collateral source, an idea also found in Aquinas' work. Radbruch's Formula is well-integrated within natural law theory.

A moral obligation can arise from a collateral source: one may have to comply with unjust laws to the degree necessary to avoid bringing the law as a whole into contempt. When one is seen by fellow citizens to disobey or disregard an unjust law, the effectiveness of the law in general or the general respect of citizens for the authority in question may be weakened.[53] A collateral moral obligation makes sense as Aquinas acknowledges that an unjust law derives from eternal law in some way, given that it is made by an authority ultimately in place by God's permission.[54] Finnis acknowledges that "rulers still have the responsibility of repealing rather than enforcing their unjust law"; "the citizen, or official, may meanwhile have the diminished, collateral, and in an important sense extra-legal obligation to obey it,"[55] though he admits that "the dilemmas faced by conscientious officials charged with the administration of unjust laws" are glossed over.[56]

If judges are to hold intolerably unjust laws to be legally invalid under Radbruch's Formula, as recommended in this article, a cohesive position can be achieved if no collateral moral obligation exists for the subjects of the law in the case of intolerably unjust laws. There are good reasons to hold that no collateral moral obligation arises in such instances. The presence of intolerably unjust laws in a legal system suggests such an extreme failure in the common good that the risk of the system being thrown into disrepute is worth accepting. A collateral moral obligation to upkeep the system no longer exists. There would therefore be a coincidence between the lack of legal obligation and the lack of *any* moral obligation towards such laws. A subject is morally justified to disobey an intolerably unjust law as there is no moral obligation of any kind. If prosecuted, the judge can similarly find that the person was under no legal obligation. This circumvents the need for judges to resign when they refuse to apply what they regard as law, since an intolerably unjust law is not law and does not give rise to legal obligation. Where injustice is present but not to an intolerable degree, judges cannot override legislative positing of law, even though conceptually there is no legal obligation arising from unjust laws. In such instances, there may also be a collateral moral obligation on the part of the citizen to obey, even if there is no presumptive moral obligation.

II. Democratic Constitutionalism

Given the context of Radbruch's formulation in response to the atrocities of the Nazi regime and its use in this regard,[57] some courts may shun Radbruch's Formula out of not wanting to equate the acts of a regime being judged with the acts of the Nazi regime.[58] On principle, there

[52] Soper, *supra* note 42 at 218.
[53] Finnis, *supra* note 4 at 361.
[54] Norman Kretzmann, "Lex Injusta Non Est Lex: Laws on Trial in Aquinas' Court of Conscience" (1988) 33:1 Am J Juris 99 at 115-16.
[55] Finnis, *supra* note 4 at 362.
[56] *Ibid*.
[57] Paulson, *supra* note 8 at 27-28.
[58] See the discussion of some instances in Julian Rivers, "Gross Statutory Injustice and the Canadian Head Tax Case" in David Dyzenhaus & Mayo Moran, eds, *Calling Power to Account: Law, Reparations, and the Chinese Canadian Head Tax Case* (University of Toronto Press, 2005) 233 at 241-44. In relation to East Germany see

may be less resistance to applying Radbruch's Formula in situations such as East Germany's transition to democracy when there is a need to recognize the limitation of a positivist notion of law in a previously authoritarian regime.[59] However, its applicability to democratic constitutional regimes is, at first blush, dubitable. On the one hand, there is no good reason why Radbruch's Formula should be limited to transitional situations, where a court after transition is assessing the purported laws of a previous regime. If there are limitations on the weight accorded to legal certainty in cases of intolerable injustice, such situations might occur apart from transitional situations. However, if the current regime has a written constitution which is stipulated to be its supreme law, in a non-transitional situation, there is concern that recourse to Radbruch's Formula would contravene the ideals of constitutional democracy.

Alexy suggests that judicial invocation of Radbruch's Formula is not undemocratic even though it would allow unelected judges to strike down as legally invalid what an elected legislature has enacted, particularly as we already accept judges' action in constitutional judicial review. He suggests that the appeal to democracy or separation of powers in order to reject judicial review in the case of intolerably unjust laws entails, on principle, a rejection of "any judicial review whatsoever over the legislator's commitment to fundamental rights."[60] Acceptance of constitutional judicial review[61] suggests that an elected legislature can be held to account by an unelected judiciary through invalidation of enacted laws.

Even if one agrees with Alexy that judicial power extends to constitutional judicial review to invalidate laws enacted by the legislature in some cases, invoking Radbruch's Formula involves different complexities. In jurisdictions where the constitution is supreme, there are some express rights for judges to refer to, whereas Radbruch's Formula is vague on what constitutes intolerable injustice. Also, judges in constitutional judicial review purport to give effect to the supreme law of the constitution, which is what the legislature is expected to conform to, whereas Radbruch's Formula—in form or in substance—may not have been incorporated into a written constitution. In a constitutional democracy, the electorate delegates to the legislature the authority to enact laws, subject to the constitution. But the electorate has not endorsed Radbruch's Formula.

Does Radbruch's Formula have a place in a constitutional democracy? A preliminary issue is whether Radbruch's Formula serves any purpose given that there is a constitution by which the legal validity of laws may be tested. Why not simply invoke the constitution? Section

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Russell Miller, "Rejecting Radbruch: The European Court of Human Rights and the Crimes of the East German Leadership" (2001) 14:3 Leiden J Int'l Law 653 at 653-63. Miller notes that Radbruch's Formula has not been used by the European Court of Human Rights, which chose to find, in similar cases on appeal from the German courts, that the use of firearms had been authorized only for serious crimes, and the acts of the accused persons were therefore not justified by various provisions of German law, with the result that Article 7(1) of the European Convention on Human Rights did not absolve them. But the European Court on Human Rights may have sought to avoid the political sensitivities in what would have been taken as an equation of East German crimes with Hitler's crimes, if Radbruch's Formula had been invoked.

[59] Manfred J Gabriel, "Coming to Terms with the East German Border Guards Cases" (1999) 38:2 Colum J Transnat'l L 375 at 417. While the killing in these cases was not equated with the mass murder during the Nazi regime (see also Rivers, *supra* note 58 at 249), in 1992, the Federal Supreme Court for Civil and Criminal Matters considered the validity of a provision of the East German Border Law authorizing a border guard to fire his weapon at persons fleeing at the Berlin Wall. They considered the actual practice of shooting in interpreting the scope of the law. They found that the issues were whether the state had gone beyond "the outermost limit set in every country as a matter of general conviction" and whether the conflict between positive law and justice was "intolerable": see Paulson, *supra* note 8 at 28.

[60] Robert Alexy, *The Argument from Injustice: A Reply to Legal Positivism* translated by Stanley L Paulson & Bonnie L Paulson (Oxford University Press, 2002) at 56.

[61] Alexy's writings on constitutional judicial review will not be discussed here as we are making a case for judicial review based on Radbruch's Formula. See, however, Robert Alexy, "Balancing, Constitutional Review, and Representation" (2005) 3:4 International Journal of Constitutional Law 572; Robert Alexy, *A Theory of Constitutional Rights* translated by Julian Rivers (Oxford University Press, 2002).

(a) addresses this issue. Secondly, if Radbruch's Formula serves particular purposes in a constitutional democracy, would it be legitimate to refer to Radbruch's Formula? Of particular concern is the situation when Radbruch's Formula comes to a head-on contradiction with the constitution. I shall make a positive case for judicial review based on Radbruch's Formula in sections (b) and (c). I shall address the question of legitimacy of reference by arguing that the apparent vagueness of Radbruch's Formula does not militate against its applicability and that Radbruch's Formula is in fact consistent with the premises of democratic constitutionalism. In section (d), I shall address a major misunderstanding of natural law theory that contributes to a disinclination of some towards constitutional judicial review, with consequent lack of receptivity towards Radbruch's Formula.

(a) Does a constitution render Radbruch's Formula otiose?

Through Radbruch's Formula, an unelected judiciary can refuse to uphold constitutional amendments or enacted laws that sanction intolerable injustice. It can also invalidate acts of officials exercising their discretion in ways purportedly under enacted laws to commit acts of intolerable injustice.

Where official exercise of discretion is concerned, judicial review of administrative action in the United Kingdom, for example, includes the ground of irrationality or 'Wednesbury unreasonableness.' A decision of a government body can be overturned if it is "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."[62] This high bar is similar in effect to Radbruch's Formula, particularly as it applies even though the enacted law may not delineate the scope of official power explicitly. Not only may there be no such express circumscription, the fact that express circumscription is taken as unnecessary suggests an assumed link between legally conferred powers and justice. Where discretion is open, the recognition of this link—at least insofar as irrational acts are not regarded as an exercise of power within legal limits—demonstrates how a concept similar to Radbruch's Formula in substance has perhaps already been imported through judicial action.

Similarly, there is leeway for judges engaged in constitutional judicial review of enacted laws to ensure that intolerably unjust laws are regarded as legally invalid for their failure to respect constitutional rights. For example, in a provision that guarantees that no one shall be deprived of life save in accordance with law, 'law' can be interpreted in a non-formalistic way to require more than compliance with procedures for enactment of law. Given that the meaning of 'law' necessarily implicates jurisprudential debates between legal positivism and natural law theory, it can be argued that 'law' refers to enactments that not only comply with procedural requirements but are also not intolerably unjust. Such an interpretation achieves the same effect of Radbruch's Formula. Alternatively, statutory injustice may be remedied by "radical reinterpretation" through "value-driven" approaches.[63] But despite the possibility of radical reinterpretation, Rivers observes that there may be instances, such as the enactment of straightforwardly discriminatory statutes, when one cannot avoid having to declare a statute legally invalid.[64] Another example is when the legislature has repealed a discriminatory statute, but not enacted any statute to provide for reparations to redress acts of injustice committed under the statute (such as the collection of taxes based on race alone) as was the situation in relation to the Chinese Immigration Act 1885 in Canada.[65] A declaration

[62] *Council of Civil Service Unions v Minister for the Civil Service* (1984), [1985] AC 374 (HL), Lord Diplock.
[63] Rivers, *supra* note 58 at 234.
[64] *Ibid*.
[65] This was challenged in *Mack v Attorney General of Canada* (2002), 60 OR (3d) 737 (CA). That the court did not consider invalidating the statute has been regretted (Rivers, *supra* note 58 at 251) though it has also been noted

of legal invalidity[66] in such a scenario would have rendered the collection of those taxes illegal, and necessitated some form of repayment (though this might not have been possible on the facts of the case, given that there was previously no consensus as to a norm against racial discrimination).

Probed more deeply, the choice between different interpretations of 'law' in a constitutional provision to circumscribe legislative powers and the circumscription of official power by a concept such as 'irrationality' involve an acceptance of the same natural law theoretical underpinning—that laws and the exercise of legal powers must be minimally just—as what underlies Radbruch's Formula. So, too, if one engages in radical reinterpretation by reference to principles of justice. I will not explore the underpinning in relation to official exercise of discretion in this article given that judicial review of administrative action merits separate consideration. As for the interpretation of the word 'law' in constitutional provisions, it bears noting that even if the requirement that laws not be intolerably unjust in Radbruch's Formula is imported in this manner, the same issues of legitimacy would arise as it would where Radbruch's Formula comes to a head-on confrontation with constitutional amendments that attempt to sanction intolerable injustice. An example of such a constitutional amendment is the amendment of the equality provision in a constitution to exclude a particular race. When the enacted laws (which on a formalistic reading of constitutional provisions would have been validated) and constitutional amendments have been democratically achieved, even though Radbruch's Formula is invoked in the limited case of intolerable injustice, its justification in light of democratic constitutionalism is called for.

Given that Radbruch's Formula or 'value-driven' interpretations engage the same debate over the jurisprudential underpinnings of the constitution which will be considered in the sections that follow, are there other techniques which might allow a circumvention of such jurisprudential debates or do they engage the same controversies? Four other options might be considered: entrenchment or eternity clauses, originalism, the basic structure doctrine, and a reference to customary international law norms. My view is that Radbruch's Formula is a superior option for protecting all from intolerable injustice.

Entrenchment or eternity clauses such as Article 79(3) of the Basic Law for the Federal Republic of Germany, for example, render certain portions of the constitution unamendable. If such a clause pertains to political settlements in post-conflict situations, it may hinder future development,[67] but if it serves to protect basic rights, it may be less objectionable. Indeed, Rivers suggests that Radbruch's Formula can be seen as the "unwritten analogue" to a clause as such, which protects the core content of fundamental rights and renders "the most extreme forms of injustice incapable of positive legal justification."[68] Radbruch's Formula, however, is still necessary if a constitution lacks such entrenchment. Moreover, even if constitutional rights are entrenched, insofar as they require judicial interpretation, the theoretical underpinnings of constitutional rights are still in issue, thus engaging the same debate. Finally, the reliance on

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that the constitutional and international norms against racial discrimination might not have been in existence at the time of the statute. See David Dyzenhaus & Mayo Moran, "*Mack v Attorney-General of Canada:* Equality, History, and Reparation" in David Dyzenhaus & Mayo Moran, eds, *Calling Power to Account: Law, Reparations, and the Chinese Canadian Head Tax Case* (University of Toronto Press, 2005) 3 at 10. The legislature repealed the statute, but there was no political will to provide redress. See David Dyzenhaus, "The Juristic Force of Injustice" in David Dyzenhaus & Mayo Moran, eds, *Calling Power to Account: Law, Reparations, and the Chinese Canadian Head Tax Case* (University of Toronto Press, 2005) 256 at 257.

[66] Contrast with the view of Dyzenhaus that such a law is better conceived of as punitive towards a class of individuals and therefore failing in Fuller's requirement of generality which is a requirement of the inner morality of law or the rule of law. See *ibid* at 270-76.

[67] Silvia Suteu, "Eternity Clauses in Post-Conflict and Post-Authoritarian Constitution-Making: Promises and Limits" (2017) 6:1 Global Constitutionalism 63 at 65-66.

[68] Rivers, *supra* note 58 at 240.

entrenchment clauses to set the limits for constitutional amendment is at its heart positivistic. It lacks the conceptual backing that Radbruch's Formula, viewed as a natural law doctrine, must draw upon.

Relying on an originalist understanding of the constitution, such as in the context of the US Constitution, to protect basic rights similarly suffers from some of these problems. It is dependent on the intent of the framers of the Constitution or its original meaning as understood by a reasonable person at that time, as the case may be, and is at the end of the day positivistic. It may be asked why historical convictions or will, or the reasonable person's understanding at that time, should matter.[69] The protection offered by Radbruch's Formula is rooted more soundly in law's conceptual connection with justice. In a strictly qualified manner, the *understanding* of what constitutes intolerable injustice can change over time. I should emphasize that, according to a moral realist understanding, the content of norms of justice do not change.[70] But given that Radbruch's Formula involves unelected judges stepping in to redress intolerable injustice, it requires judges to draw upon a broad historical understanding rather than count upon their own 'wisdom.' This will be explained in Part III.

The basic structure doctrine—the view that there exists a basic structure of the constitution that may not be amended, attributable to the Indian case of *Kesavananda Bharati v. State of Kerala*[71]—constitutes in essence an implied substantive limitation on the power of constitutional amendment. Insofar as the basic structure may extend beyond fundamental rights to principles and forms of government, much is left to judicial interpretation of the context of the particular constitution. There is perhaps more leeway for judicial overreach that conflicts with popular sovereignty. It is also positivistic. It contrasts with Radbruch's Formula which concerns only intolerable injustice, and is acontextual and universal.

The final option of resorting to customary international law norms to strike down statutes which are intolerably unjust in a manner that contradicts these norms is not necessarily available. In some cases, it may be possible to interpret statutes consistently with these norms. However, in a case of outright contradiction of customary international law norms by a statute, the issue arises as to which prevails. Within a positivistic framework, there is no particular reason why international law should be ranked higher within the state than statutes enacted by a state, from the perspective of the state, even though in the international sphere the state may have violated international law. In contrast, Radbruch's Formula, as a natural law doctrine, sets a limit on what laws may be enacted, requiring a minimal level of justice.

(b) Vagueness of Radbruch's Formula

While a constitution often has a bill of rights, the rights, even if express, call for interpretation. Interpretation often implicates the same controversies as are present in relation to Radbruch's Formula. The fact that Radbruch's Formula calls for judicial interpretation should not be an issue of concern. For example, both the Fifth and Fourteenth Amendments to the US Constitution contain a due process clause, which protects all persons from being deprived by life, liberty, or property "without due process of law." Issues can arise over whether non-natural persons are protected, whether the clauses imply the permissibility of the death penalty, the extent of 'liberty' protected, and whether due process refers to procedural requirements or is to be read more substantively. The vagueness in the scope of rights that makes it difficult to determine when they are infringed is not different in nature from the vagueness of Radbruch's

[69] As this issue is raised only tangentially in an article focused primarily on Radbruch's Formula as a natural law doctrine, I will not examine this in any detail, but acknowledge that it merits proper consideration for another time.
[70] See the text accompanying note 111.
[71] (1973) 4 SCC 225.

Formula in requiring a determination of what counts as 'injustice to an intolerable degree.' The latter implicates the same judicial interpretation skills and legal philosophical challenges as the former. Indeed, as observed in the preceding section, the interpretation of the reference to 'law' in a clause such as the Fifth and Fourteenth Amendments of the US Constitution implicates the jurisprudential debates between legal positivism and natural law theory.

(c) Legitimacy of Radbruch's Formula

A constitution may have a supremacy clause which declares it to be the supreme law of a nation state. From a jurisprudential perspective, regarding the constitution as the ultimate test of legal validity would be in line with Hart's framework of legal positivism. Even applying Hart's theory, though, a declaration of supremacy in a written document does not ipso facto constitute the rule of recognition. The internal point of view of the officials and possibly the populace is necessary for the finding of a rule of recognition.[72] Also, the supremacy clause[73] in the United States Constitution (US Constitution) can be seen as resolving the possible conflict between federal and state law, rather than as a statement of endorsement of legal positivism, which would be quite ineffectual without the accompanying social practice endorsing the formal document. More crucially, the contention between legal positivism and natural law theory cannot be settled by reference to social fact (such as the endorsement of the constitution by officials or the populace as the rule of recognition): at the heart of the debate is whether law is merely a social fact, or must accord with principles of morality.

When unpacked, what makes the constitution a legitimate point of reference in constitutional judicial review renders Radbruch's Formula, on principle, acceptable. It is my argument that those who accept democratic constitutionalism must consistently endorse Radbruch's Formula.[74] In advanced constitutional democracies which have moved well past the stage of authorship by the framers or the representatives of the people in a constitutional assembly and ratification by the people, the people's tacit adoption or acquiescence can be regarded as giving the constitution legitimacy.[75] Regarding the people's assent as significant stems from a fundamental belief in the equal moral worth of all. As such, the legitimacy of the constitution is founded on the idea of equal moral worth. Democratic constitutionalism respects equal moral worth of all persons, while Radbruch's Formula protects all persons from intolerably unjust laws that detract from equal moral worth or dignity. This is particularly evident in the second formulation[76] of Radbruch's Formula—the 'disavowal formula,' regarding the circumstance when equality is deliberately disavowed by positive law.[77] Aside from referring to when the need for legal certainty must give way to justice in cases of intolerable injustice, Radbruch's Formula continues by elaborating on a clear instance of intolerable injustice—where "there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law."[78] He also refers to "the equal

[72] Hart, *supra* note 1 at 116-17.
[73] US Const art VI, cl 2.
[74] Alexy makes a different case for human rights which represent the core of justice, as every injustice involves a violation of human rights (Alexy, "Law, Morality", *supra* note 19). But my case for acceptance of Radbruch's Formula in light of acceptance of democratic constitutionalism is a different one.
[75] Legitimacy is said to be greater in cases of authorship than ratification, and in turn for ratification over passive acceptance in the form of acquiescence, which is a "suboptimal form of legitimation." See Jeff King, "The Democratic Case for a Written Constitution" (2019) 72:1 Current Legal Problems 1 at 7-8).
[76] Paulson, *supra* note 8 at 26-27.
[77] Haldemann, *supra* note 14 at 166.
[78] Radbruch, *supra* note 14.

treatment of equals" as "the essential requirement of justice,"[79] and objects to "statutes that treated human beings as subhuman and denied them human rights."[80]

It is quite unlikely that unanimous assent to the constitution exists in fact at any point in time. Assent is at best offered by the majority in a jurisdiction. If a majority's assent is the point of reference because it is the best alternative to unanimous assent, in principle, majority vote should never be used to defeat the principle of equal moral worth. There should be an implied substantive limitation on constitutional amendment. This is in fact what Radbruch's Formula secures.

Democratic constitutionalism honours the choice of a free and equal people to delegate powers to government representatives subject to constitutional limitations. Its endorsement involves at its root an affirmation of the equal moral worth of persons. If so, a more ultimate reason for legitimacy than assent lies in the substantive conformity of the constitution with the equal moral worth of persons. If a constitution is amended by the people to validate an intolerably unjust law that deviates from equal moral worth, Radbruch's Formula has a stronger claim to legitimacy than the constitutional amendment because Radbruch's Formula secures the protection of equal moral worth. As a commentator notes, respect for human dignity, synonymous with moral worth, should not be conceived of as empty rhetoric, a substitute for individual autonomy, or a norm that counts as a legal value or principle to be weighed against other values or principles. It is a "substantive basic norm"—one which in fact underlies Radbruch's Formula.[81] Radbruch's Formula seeks to protect a minimal level of respect for human dignity by making it a "prerequisite for (legal) validity."[82] With the affirmation of human dignity, one does not begin or end with the question of what rights have been incorporated into the constitution.[83] That would have been primarily a positivistic analysis.[84] If Radbruch's Formula protects all from a procedurally compliant but unprincipled substantive amendment of the constitution that violates, through intolerably unjust laws, equal moral worth or dignity, Radbruch's Formula is justifiably invoked in such cases. To invoke it is to stay true to the indefeasible premise of democratic constitutionalism.

(d) A misconception as to natural law and constitutionalism

The attempt to draw out the implications of the natural law foundations of the US Constitution, for example, has been shrouded in controversy as well as misunderstanding. A natural law foundation of a constitution does not entail a wide scope of judicial review, including the right to override the decisions of the legislature based on unwritten rights. I shall examine the American controversy in this section for illustrative purposes to explicate what Radbruch's Formula does not entail.

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[79] *Ibid* at 8.
[80] *Ibid*.
[81] Mary Neal, "Respect for human dignity as 'substantive basic norm'" (2014) 10:1 Int'l J L Context 26 at 38-39.
[82] *Ibid* at 39.
[83] This is not commonly discoursed as such. Usually, the link between the constitution and a natural law understanding of rights is made through the argument that inherent uncreated rights have been recognised in the constitution. See, e.g., Juan Cianciardo, "The Culture of Rights, Constitutions and Natural Law" (2013) 8:2 J Comp L 267. For example, Alexy, writing about human rights that have been positivized into constitutional rights, took the view that the positivization did not cause human rights to "vanish." Rather, human rights remain "as reasons for or against the content that has been established by positivization and as reasons required by the open texture of constitutional rights." See Robert Alexy, "Constitutional Rights and Proportionality" (2014) 22 Revus: Journal for Constitutional Theory and Philosophy of Law 51 at 62.
[84] Alexy recognises that an accommodation of natural law in positive law is still legal positivism (Alexy, "Some Reflections", *supra* note 19 at 109-10). Finnis tends towards this as he requires the system itself to provide a juridical basis for regarding otherwise valid rules as legally invalid by virtue of their iniquity (Finnis, *supra* note 4 at 476).

An illustration is found in the United States Supreme Court decision in *Griswold v. Connecticut.*[85] The majority of the Court found a fundamental right to marital privacy in the emanations from the penumbras of various constitutional provisions.[86] It invalidated a Connecticut anti-contraception law. It reasoned that the Ninth Amendment noted that enumeration in the Constitution should not be construed to deny or disparage other rights retained by the people.[87] Despite the majority expressly declining to refer to the substantive due process jurisprudence, the dissenting judge, Justice Hugo Black, criticised the majority for its "natural law due process philosophy"[88] in the manner of the court in *Lochner v. New York*.[89] Justice Black noted that the Ninth Amendment, historically, was in the US Constitution to assure the people that the US Constitution was intended to limit the federal government to the powers granted expressly or by necessary implication. It should not be construed to broaden the powers of the court to strike down legislation. Further, he noted that affirming judicial review did not entail the court's power by the Due Process Clause or any other constitutional provision "to measure constitutionality by our belief that legislation is arbitrary, capricious or unreasonable, or accomplishes no justifiable purpose, or is offensive to our own notions of 'civilized standards of conduct.'" [90] The appraisal of the wisdom of legislation was in the power to make laws rather than to interpret them.[91]

As Robert George notes, Justice Black assumed that the law must have been invalidated by a supra-statutory natural law and criticised such reference. Yet, the framers of the US Constitution are understood to have rooted the US Constitution in natural law and natural rights.[92] The resolution of this contradiction between Justice Black and the framers lies in the fact that natural law does not require the decision in *Griswold*, and indeed, may suggest that it

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[85] 381 US 479 (1965) [*Griswold*].

[86] *Ibid* at 484. Justice Douglas opined that various cases suggested that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."

[87] This was especially the case with the judgment of Justice Goldberg, *ibid* at 488-94.

[88] *Ibid* at 515.

[89] 198 US 45 (1905) [*Lochner*]. This was despite the fact that the majority, through Justice Douglas, declined the invitation to use *Lochner* as their guide (see *Griswold , supra* note 85 at 481-82). In *Lochner,* freedom of contract was found to be guaranteed as part of the 'liberty' referred to in the due process clause. This had been criticised as the method by which judges imposed social and economic policies they favoured on the public. See Robert P George, "Natural Law, the Constitution, and Judicial Review" in Robert P George, *The Clash of Orthodoxies: Law, Religion, and Morality in Crisis* (ISI Books, 2001) 169 at 172.

The view that natural law might have suggested that there exists a right to marital privacy that supports an invalidation of an anti-contraceptive law is ironic as Aquinas' classical natural law recognises the preservation of species through procreation as natural. See, also, Kirk A Kennedy, "Reaffirming the Natural Law Jurisprudence of Justice Clarence Thomas" (1997) 9 Regent U L Rev 33 at 49.

[90] *Griswold*, *supra* note 85 at 520.

[91] *Ibid* at 513.

[92] George, *supra* note 89 at 173-74. It has been observed that the philosophical influence upon the founders was the classical natural law theorists rather than the Enlightenment thinkers. See Robert S Baker, "Natural Law and the United States Constitution" (2012) 66:1 Review of Metaphysics 105 at 113. There was also a reluctance to enumerate rights when the proposal for a charter of rights was rejected at the Philadelphia Convention, though a compromise was reached in the guarantees via the amendments. Baker notes that the phrasing in the First Amendment suggests that the rights are not created by the amendments but implies that they pre-exist the constitution. This contrasts with the expression, for example, in the French Declaration of the Rights of Man and of the Citizen, which focuses on state sovereignty and the law being an expression of general will, or the Venezuelan Constitution of 1811 which speaks of a renunciation of unlimited liberty and license and the social contract being an assurance to the individual of the enjoyment of his rights (Baker, *ibid* at 121-23). Notably, also, there is no contradiction between recognising the natural law foundations of the American Constitution and the rejection of judge-made constitutional law. See Baker, *ibid* at 130, citing *Bowers v Hardwick* 478 US 186 (1986). See also, Kennedy, *supra* note 89 at 47.

is not correctly decided.[93] George suggests that natural law permits a range of different answers as to the allocation of authority in different political regimes.[94] The exact scope of judicial review is underdetermined by reason (within natural law). The exact scope must be resolved prudentially by *determinatio* and also by the written constitution, and not directly by natural law itself.[95]

While George notes that the issue of the scope of judicial review must be resolved historically and textually, thereby seemingly rendering it a question of positive law,[96] it should be noted that George opines in a context when the choice falls within a range of reasonable answers. In contrast, if a particular constitution were to appoint a five-year-old sage as the final arbiter of what natural law requires in the determination of the scope of rights, this would surely fall outside the range of permissible answers according to natural law theory. The call to respect constitutionally appointed authority is a call to respect the authority that is not unreasonably allocated from the point of view of natural law. As George notes, fidelity to the rule of law imposes on public officials "in a *reasonably just* regime" the duty to respect constitutional limits.[97]

As George unequivocally notes in reply to James Fleming, Justice Black's "natural law due process jurisprudence" has "no necessary connection" to the natural law George affirms.[98] George does not think that judicial review includes the right to invalidate legislation where it does not "violate any norm fairly discoverable in the constitutional text, or … its structure, logic, or original understanding, on the basis of the judges' personal … beliefs about natural law and natural rights."[99] When the constitution leaves particular principles of natural law or natural rights unspecified, the question of the rightful authority under the constitution to resolve these principles is determined by the constitution, and in the case of the US Constitution, the authority is accorded to the institutions of democratic self-government.[100]

Radbruch's Formula is far narrower in scope than what can be caught under the substantive due process jurisprudence of *Lochner* or *Griswold*: it requires that laws not be intolerably unjust. Justice Black in relation to *Grisworld* criticised the striking down of laws based on a belief that they were "arbitrary, capricious or unreasonable, or accomplishes no justifiable purpose, or is offensive to our own notions of 'civilized standards of conduct.'"[101] 'Intolerably unjust' can potentially be expansively read. The ideal of respect for human dignity, the underlying foundation of democratic constitutionalism, arguably provides no limit to an expansive reading insofar as there can be debate as to what constitutes a violation of dignity. In Part III, I shall argue for the delineation of Radbruch's Formula by reference to broad historical consensus of norms, and explain why this offers a prudent solution as far as natural law theory is concerned, enabling us to avoid the problems of expansive reading. Thus, while democratic self-government through the legislature is generally endorsed through the US Constitution as George notes, Radbruch's Formula sets a limit to state action (such as legislative enactments and constitutional amendments) by requiring that there be no intolerable injustice. If there is intolerable injustice, it can be argued that as a matter of prudence under natural law, judges—less beholden to the pressures of popular sovereignty in a representative democracy—rightfully serve as the guardians of equal moral worth in very limited

[93] In particular, the idea of substantive privacy or the freedom from governmental interference in fundamental decisions is hardly likely to have the support of some natural law theorists.
[94] George, *supra* note 89 at 197-98.
[95] *Ibid* at 179.
[96] *Ibid* at 180.
[97] *Ibid* at 182 [emphasis added].
[98] *Ibid* at 195.
[99] *Ibid* at 197.
[100] *Ibid* at 203.
[101] *Griswold, supra* note 85 at 513.

circumstances. This is provided that the danger of expansive reading can be meaningfully addressed and curbed. What these circumstances are is the subject of the next Part.

III. Broad Historical Consensus

Alexy defends Radbruch's Formula, particularly, in its reliance on the notion of injustice to an intolerable degree, against the critique of moral relativism by reference to the existence of "broad consensus" on human and civil rights revealed through "the work of centuries."[102] Radbruch is of the view that there are "principles of law" that are "weightier than any legal enactment. A law in conflict with them is devoid of validity." These principles are known as "natural law" or the "law of reason." While their details are "open to question", "the work of centuries" has "established a solid core of them", and they enjoy "such far-reaching consensus in the so-called declarations of human and civil rights that only the dogmatic sceptic could still entertain doubts about some of them."[103]

Radbruch's Formula should be used to enforce only the minimal core of human rights. The implementation of what justice requires in posited law often involves the constructional implementation of general directives of justice in natural law: it is a matter of what Aquinas calls *determinatio* rather than deduction. A range of possibilities are consistent with what justice requires. The authority question, as noted in the preceding Part, is also a matter of *determinatio*. Letting the elected representatives, rather than unelected judges, decide what justice demands makes good sense. Moral norms, of which norms of justice are a subset, are accessible to all persons without special professional training. Ideally, the elected representatives, acting in good faith and consistently with the best premises of democratic constitutionalism, should seek to discern what is just and to make laws that are just.

Alexy's elucidation of law's dual nature helps us to appreciate that certainty would be unduly compromised if the judiciary were allowed to overturn legislative decisions whenever it differs from the legislature on what justice requires. Law has a real or factual dimension in its authoritative issuance and social efficacy. These serve legal certainty, which requires that norms of a system be determinate and observed to the greatest degree possible. Law also has an ideal dimension. The principle of correctness demands that the content of law be correct, and a connection of law's content with justice makes it correct.[104] Legal certainty (a formal principle) and moral correctness or justice (a substantive principle which Alexy refers to as "first-order correctness") stand in tension, but are aspects of law's dual nature. The right balance between the two aspects is a matter of "second-order correctness."[105] In Radbruch's Formula, an inclusive version of non-positivism,[106] the compromise to legal certainty is not severe given that only extreme injustice affects a law's validity.[107] This is in contrast to the position that Alexy terms 'exclusive non-positivism' which treats immoral rules as not legally valid. This is a position which Alexy says is held by Beyleveld and Brownsword. Alexy thinks

[102] Henceforth, 'broad historical consensus.'
[103] Radbruch, *supra* note 10 at 15-16.
[104] Robert Alexy, "Legal Certainty and Correctness" (2015) 28:4 Ratio Juris 441 at 441-42, 444.
[105] Alexy, "Dual Nature", *supra* note 35 at 174.
[106] Robert Alexy, "On the Concept and the Nature of Law" (2008) 21:3 Ratio Juris 281 at 288.
[107] Alexy, *supra* note 104 at 446; Alexy, "Dual Nature", *supra* note 35 at 177. Gabriel also notes that there is no need to explicate the requirements of justice; it is enough to know when there is extreme injustice. See Gabriel, *supra* note 59 at 406.

it strikes an incorrect balance between certainty and justice[108] and is tantamount to an over-idealization of law.[109]

By referring to the solid core of human rights, discerned from far-reaching consensus over centuries, judicial power to override what an elected legislature has decided is circumscribed. This circumscription is theoretically sound in terms of natural law. It is not merely pragmatic. Alexy notes that constitutional judicial review serves to ensure that constitutional rights are properly respected as the legislature may fail to ensure this, given the imperfection of democracy. But this claim is justified only if constitutional review is "an argumentative or a discursive representation of the people."[110]

The issue is whether broad historical consensus on what counts as 'intolerably unjust' reflects a discourse of the people, and why such discourse should be referred to if natural law theory takes a moral realist view of justice. According to moral realism, moral facts and properties exist which are independent of belief.[111] This means that agreement or disagreement about morality does not change the content of moral norms. But precisely because morality needs to be discerned for implementation, to move forward with the connection between law and morality requires the choice of some method of discernment of what justice requires. As moral norms are accessible to all persons by means of reason, reasoned deliberation over time can produce consensus on the content of moral norms. Broad historical consensus as to what justice *minimally* requires, that is, as to *when there is intolerable injustice*, has a good chance of approximating the content of objective moral norms if what is being discerned is a grassroots morality.

This is a highly imperfect approximation, given that constituents in any society might be affected by culture, mass media, social media, long time prejudices, governmental censorship, laws which shape societal norms, and so on. Moreover, constituents may influence one another by emotive exchanges rather than reasoned deliberation. These factors impinge on whether consensus is genuine and whether it emerged through deliberative discourse relying on reason. But local and current (or temporal) consensus, even if properly reflected by legislative representatives through the laws of a jurisdiction, has no better chance at approximating the content of objective morality than broad historical consensus, which is shared across many jurisdictions, over centuries. It has withstood the test of challenge over time. A sentiment shared for the time being because of some trigger event evoking people's sympathy for a norm does not suffice. The breadth of the consensus goes some way to ensuring that it is not merely cultural or the result of bias of some groups.

It would be hard to find comprehensive empirical surveys to indicate consensus over particular norms. Several options exist for a local judiciary seeking to invoke Radbruch's Formula and discern the broad historical consensus as to intolerable injustice. A possible solution is to embark on something more comprehensive than the comparative jurisprudence undertaken by judges when deciding cases. An examination of comparative jurisprudence is a

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[108] Alexy, "Dual Nature", *supra* note 35 at 176. See also Alexy, *supra* note 106 at 287. Notably, Alexy points out that the position that Beyleveld and Brownsword term 'idealism' has inbuilt checks which restrain the wide-ranging effects of injustice on legal validity. Their 'theory of restraint' stipulates for a collateral moral obligation to comply with immoral rules, and a provisional legal-moral obligation in the case of controversial rules, in order to balance the moral costs of compliance with the moral costs of non-compliance. Alexy does not agree with this mode of taking away legal validity but recreating a moral obligation as he thinks it is tantamount to treating the consequences of a mistake instead of curing the disease. See Robert Alexy, "Effects of Defects – Action or Argument? Thoughts about Deryck Beyleveld and Roger Brownsword's *Law as a Moral Judgment*" (2006) 19:2 Ratio Juris 169 at 171.

[109] Alexy, *ibid* at 173.

[110] Alexy, "Dual Nature", *supra* note 35 at 178. Much has been written on the duty of judges to listen in on the discourse of the populace; this subject will not be discussed in this article.

[111] Robert Audi, ed, *The Cambridge Dictionary of Philosophy,* 2d ed (Cambridge University Press, 1999) at 588.

monumental task. Undoubtedly, a selection would be based on accessibility of translated material. A better solution is to take the cue from jus cogens norms in international law. Indeed, the willingness to create the Nuremberg Tribunals to prosecute in the case of crimes against humanity has been said to reflect our tolerance for international norms trumping state law in the case of grave injustice.[112] While which norms are jus cogens may be debatable, genocide and crimes against humanity (such as slavery) are clear-cut cases today.[113] Indeed, given that genocide and crimes against humanity outrightly deny the equality of persons who are subjected to these forms of treatment, they are clear instances which fall within the second part of Radbruch's Formula, the 'disavowal formula.'[114]

An objection to relying on broad historical consensus might be that broad historical consensus in the past has approved of what is currently perceived as injustice, such as gender and racial discrimination. In the event that broad historical consensus does not exist to suggest a law is intolerably unjust, those arguing for overturning unjust laws must push for legislative reform instead. A problem, though, is whether a rogue judiciary could invoke Radbruch's Formula to overturn a local legislature's advancement towards justice[115] that goes against the grain of broad historical consensus. For example, centuries ago, there was no broad historical consensus against slavery. Could a local legislature's amendments to proscribe slavery and grant slaves freedom be challenged by slave owners and traders as intolerably unjust based on the prevailing broad historical consensus? Arguably, in such a scenario, given that Radbruch's Formula results only in the invalidation of intolerably unjust law, slave owners and traders at best would have made their case by suggesting that their property (slaves) was unjustly appropriated by the newly conferred legal status of their former slaves. But that is a difficult case to make by Radbruch's Formula as state appropriation of property is not considered intolerably unjust in those times. The fact that there was no broad historical consensus against slavery does not aid the case of the slave owners and traders as what they need to show is that there is a broad historical consensus against the deprivation of their property or trade. As this example illustrates, the case to be made on Radbruch's Formula would hinge on the actual legislation being challenged and the content of the norm that is alleged to be part of broad historical consensus. Radbruch's Formula can, in theory, be counter-productive and used to overturn local advancement towards justice in the face of a misguided broad historical consensus, but whether it can be successfully invoked would depend on whether the local advancement could be argued to be intolerably unjust. The example shows that the case is not so straightforward.

A qualification is in order in relation to the formation of a broad historical consensus as well as the emergence of jus cogens norms. The world has witnessed in the last few decades shifting norms in relation to the so-called 'culture war' issues such as marriage and family, some of which are not brought about by legislative reforms. Legislative representatives do not necessarily represent accurately grassroots morality, but judges have been criticized for judicial overreach in overturning legislative enactments through constitutional judicial review, such as in relation to abortion[116] and same sex marriage.[117] Of concern is how new legal norms which result from judicial action go on to shape public opinion and the moral norms in society. If broad historical consensus takes shape accordingly in future, their birth in grassroots morality

[112] Soper, *supra* note 42 at 213.
[113] They are also identified as within the jurisdiction of the International Criminal Court, Article 5, Rome Statute on the International Criminal Court, online: https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf (accessed on 23 July 2020).
[114] See the text accompanying note 77.
[115] Since the basis of Radbruch's Formula as part of natural law theory lies in moral realism, some changes may be viewed as advancement towards justice in the objective sense, even though this is contentious.
[116] See, e.g., *Roe v Wade* 410 US 113 (1973).
[117] See, e.g., *Obergefell v Hodges* 576 US 644 (2015).

is dubitable. As such, the argument decades down the road that a natural law theorist invoking Radbruch's Formula should discern what constitutes intolerable injustice by reference to broad historical consensus, particularly as revealed through jus cogens norms emerging from state practice, is less tenable.

IV. Tension With Subsidiarity?

Given my aim of demonstrating how Radbruch's Formula sits cohesively within natural law theory, a final question is whether adopting Radbruch's Formula is consistent with the doctrine of subsidiarity, embraced by natural law theorists.

The notion of subsidiarity is employed in European Union law, calling for the European Union to act only if the proposed action is better achieved at that level instead of that of the member states.[118] It serves as a check against tyranny[119] and respects democratic government, in that "what touches all should be approved by all" within practical limits.[120]

The Catholic basis for subsidiarity is different, lying in individual responsibility to flourish, as humans are created by God, and in an individual's need for various communities in order to flourish.[121] Prior to enunciation in papal encyclicals,[122] subsidiarity is foreshadowed in Aquinas' development of Aristotelian ideas of the responsibility of the *polis* in securing the good life, alongside smaller associations constituted to pursue particular social goods, such as clans and families.[123] Aquinas emphasizes the social nature of man, beyond the political nature

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[118] Article 5(3) of the Treaty on European Union online: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012M/TXT&from=EN (accessed on 23 July 2020). Commentators have suggested this idea is historically placatory, given the concerns of states upon joining the Union. See NW Barber, *The Principles of Constitutionalism* (Oxford University Press, 2018) at 189-90. See also Paul Craig, "Subsidiarity: A Political and Legal Analysis" (2012) 50:1 J Common Mkt Stud 72 at 73.

[119] That said, a weak central government can lend to oppression if dominant regions are, for example, racist, as was the case in the southern states within American federalism at one stage. See NW Barber, "The Limited Modesty of Subsidiarity" (2005) 11:3 European Law Journal 308 at 315.

[120] Barber, *supra* note 118 at 190-91.

[121] Pontifical Council for Justice and Peace, Compendium of the Social Doctrine of the Church http://www.vatican.va/roman_curia/pontifical_councils/justpeace/documents/rc_pc_justpeace_doc_20060526_compendio-dott-soc_en.html (accessed on 23 July 2020) at para 185 [Pontifical Council].

[122] The earliest rudimentary statement might have been from Pope Leo XIII, Rerum Novarum: Ecycncylical of Pope Leo XIII on Capital and Labor (1891) online: http://www.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum.html (accessed on 23 July 2020) at paras 12-14 and 35 when he emphasized the importance of the family and the individual, with the state interfering only to protect the common good or prevent injury. See Barber, *supra* note 118 at 198. Pope Pius XI emphasized that social activity ought to "furnish help to the members of the body social, and never destroy or absorb them." See Pope Pius XI, *Quadragesimo Anno:* Encyclical of Pope Pius XI on Reconstruction of the Social Order (1931) online: http://www.vatican.va/content/pius-xi/en/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno.html (accessed on 23 July 2020) at para 79, a point also noted by Pope John Paul when he suggested that a community of a higher order ought not interfere in the internal life of a community of a lower order, and should be supportive and coordinating all to the common good. See Pope John Paul II, Centesimus Annus (1991) online: http://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_01051991_centesimus-annus.html (accessed on 23 July 2020) at para 48. See Nicholas Aroney, "Subsidiarity in the Writings of Aristotle and Aquinas" in Michelle Evans & Augusto Zimmermann, eds, *Global Perspectives on Subsidiarity* (Springer, 2014) 9 at 10-11. See also Patrick McKinley Brennan, "Subsidiarity in the Tradition of Catholic Social Doctrine" in Michelle Evans & Augusto Zimmermann, eds, *Global Perspectives on Subsidiarity* (Springer, 2014) 29 at 35. The term 'subsidiarity' was coined by Italian Jesuit, Luigi Taparelli (Russell Hittinger, "The Coherence of the Four Basic Principles of Catholic Social Doctrine: An Interpretation" in *Pursuing the Common Good: How Solidarity and Subsidiarity can Work Together* (Pontifical Academy of Social Sciences, Acta 14, Vatican City 2008) 109 online: http://www.pass.va/content/dam/scienzesociali/pdf/acta14/acta14-hittinger.pdf (accessed on 23 July 2020).

[123] Aroney, *supra* note 122 at 13-18.

emphasized by Aristotle.[124] He values non-political human associations such as the family, religious communities, guilds, universities, and the like.[125] Simultaneous and separate membership of several private and public societies is prized[126] as a plurality of different communities, each with their own distinctive ends (or telos), is necessary for different aspects of human flourishing.[127] This justifies the principle of non-absorption.[128] Such communities, whether pre-existing the state or not, are not creatures of the state,[129] even though the state has a subsidiary function to supervise them to coordinate their functions to ensure they are oriented to the common good in their pursuit of their distinct ends.[130] The proper function of association is to help the participants to help themselves, hence the Latin *subsidium,* which means 'help', or to constitute themselves through the individual initiatives of choosing commitments. Some primary units such as the family pre-exist the state and its agents, which are the subsidiary organisation, which in turn pre-exists yet another subsidiary unit, which is a supranational organization or its agents.[131] A more primary unit is by no means deficient just because it requires *subsidium.*[132] The individual's relationship with the modern community within a state should never diminish the possibility of human flourishing, which might happen if the state assumed activities proper to individuals or private or small groups.[133]

In the context of human flourishing, subsidiarity concerns the propriety of a unit undertaking a particular task alongside the idea of the proper allocation of authority. It does not necessarily favour devolution of authority or decision by lower levels, closer to the individual.[134] The latter is motivated by the idea that those closest to the issue are most competent to understand and deal with it.[135] It is consequentialist in nature as it concerns the

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[124] This was an advancement over Aristotle's idea as Aristotle treated the political community as self-sufficient. See John Finnis, "Subsidiarity's Roots and History: Some Observations" (2016) 61:1 Am J Juris 133 at 138. See also Nicholas Aroney, "Subsidiarity, Federalism and the Best Constitution: Thomas Aquinas on City, Province and Empire" (2007) 26:2 Law & Philosophy 161 at 177-79. Indeed, subsidiarity has been regarded as incompatible with Aristotelian ideas which treated the city-state as primordial and did not grant autonomy to inferior levels. See Radu-Michael Alexandrescu, "Democracy and Subsidiarity" (2018) 10:2 Cogito: Multidisciplinary Research Journal 57 at 64.

[125] Aroney, *supra* note 122 at 20.

[126] *Ibid* at 22. From this, subsidiarity is anticipated by Aquinas. See Alexandrescu, *supra* note 124 at 68.

[127] Jonathan Chaplin, "Subsidiarity and Social Pluralism" in Michelle Evans & Augusto Zimmermann, eds, *Global Perspectives on Subsidiarity* (Springer, 2014) 65 at 69-70. The concern is not just with political units, but with social units that have dignity of their own. See David Golemboski, "Federalism and the Catholic Principle of Subsidiarity" (2015) 45:4 Journal of Federalism 526 at 540. See also, Pontifical Council, *supra* note 121 at para 187.

[128] Pontifical Council, *supra* note 121 at para 186.

[129] Chaplin, *supra* note 127 at 67.

[130] *Ibid* at 73.

[131] Maria Cahill, "The Origin of Anti-Subsidiarity Trends in the Regulation of the Family" (2013) 4 Int'l J Jurisprudence Fam 85 at 89.

[132] Russell Hittinger, "Social Pluralism and Subsidiarity in Catholic Social Doctrine" (2002) 16 Annales theologici 385 at 396.

[133] John F Kenney, "The Principle of Subsidiarity" (1955) 16:1 American Catholic Sociological Review 31 at 34. Subsidiarity guides the relation the individual has with the units within which they find themself. See Barber, *supra* note 118 at 200. High regard remains for individual freedom; see Robert A Sirico, "Subsidiarity and the Reform of the Welfare of the Nation State" in Michelle Evans & Augusto Zimmermann, eds, *Global Perspectives on Subsidiarity* (Springer, 2014) 107 at 111. Subsidiarity assists individuals and groups when they are unable to accomplish something on their own, with a view to achieving their emancipation by fostering freedom and participation through assumption of responsibility, according to Pope Benedict XVI. See Pope Benedict XVI, *Caritas in Veritate* (2009) at para 57.

[134] Golemboski, *supra* note 127 at 529, 535, 537; Hittinger, *supra* note 122 at 110.

[135] Sirico, *supra* note 133 at 108. As an aside, from a biblical perspective, higher levels are not more likely to be tainted with sin than the lower levels. See, e.g., the criticism by John Warwick Montgomery, "Subsidiarity as a Jurisprudential and Canonical Theory" (2002) 148 Law & Just—Christian L Rev 46 at 53.

most effective way to serve the common good.[136] The former, in contrast, limits but also empowers the state to act when appropriate.[137] It is unlikely that the human need for different communities in order to flourish can be understood as a universal need without reference to the natural law idea of flourishing—a thick conception of the good life,[138] as it also presupposes a pre-existing social ontology, with each unit having particular ontological commitments.[139] It can be contrary to individualist norms of liberal political theories,[140] though neither is free of "metaphysical baggage."[141]

Although some take the view that a more diverse society makes subsidiarity more needful,[142] this is only true if the notion of subsidiarity is the consequentialist one and if a central authority does not understand enough from the ground to prescribe solutions which take into account different interests. Generally, disengaged from human flourishing, the idea does not clearly circumscribe its own application. For example, *Roe v. Wade* has been criticized as an instance where the United States Supreme Court violated the principle of subsidiarity, invalidating a state's restrictive abortion laws.[143] However, divorced from an understanding of basic goods of human flourishing which may be damaged through individual acts, permissive laws in general might be thought to be congenial to the spirit of subsidiarity.

The precise issue for our resolution is whether deference by a state's judges to a broad historical consensus to invalidate local manifestly unjust laws is consistent with the notion of subsidiarity or its spirit. How subsidiarity features in the global order is a different issue, but it is pertinent for our consideration as there may be overlapping or analogous concerns. The objective is to discern if there can be principled consistency between how subsidiarity may support supranational authority and how it may nudge a state's judges to prefer a broad historical consensus over a local one.

In relation to the global order, George notes that a nation state alone cannot secure the conditions of the citizens' well-being without systematically coordinating activities with other states and without the active assistance of supranational institutions with powers to enforce multilateral agreements and international law.[144] Given today's problems, George takes the view that natural law can envisage the institution of a world government, with some

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[136] In large organisations, the process of decision-making is more remote from the initiative of most of those many members who will carry out the decision. Larger associations should not assume functions which can be performed efficiently by smaller associations; see Finnis, *supra* note 4 at 146-47.

[137] Paolo G Carozza, "Subsidiarity as a Structural Principle of International Human Rights Law" (2003) 97:1 Am J Juris 38 at 44.

[138] Andreas Follesdal, "Competing Conceptions of Subsidiarity" in James E Fleming & Jacob T Levy, eds, *Federalism and Subsidiary* (NYU Press, 2014) 214 at 219.

[139] Cahill, *supra* note 131 at 90.

[140] See, e.g., Robert K Vischer, "Subsidiarity as Subversion: Local Power, Legal Norms, and the Liberal State" (2005) 2:2 Journal of Catholic Social Thought 277 at 278.

[141] Golemboski, *supra* note 127 at 543. For example, Rawls's well-ordered society helmed by a disembedded authority addressed to individuals in a "direct and unmediated" manner is distinct from a community or an association that is envisaged by the model of subsidiarity with its embedded authority addressed to groups. See Maria Cahill, "Sovereignty, Liberalism and the Intelligibility of Attraction to Subsidiarity" (2016) 61:1 Am J Jur 109 at 123, 126-27.

[142] Robert A Sirico, "Subsidiarity, Society, and Entitlements: Understanding and Application'" (1997) 11:2 Notre Dame J L Ethics & Pub Pol'y 549 at 558.

[143] *Ibid* at 560.

[144] Robert P George, *In Defense of Natural Law,* rev ed (Oxford University Press, 2001) at 235. While Pope John XXIII's encyclical letter is cited with approval in relation to world government and subsidiarity, the general idea about coordination can be understood without particular religious beliefs. This is the basis under which they are being considered in this article. See Pope John XXIII, *Pacem in Terris: Encyclical of Pope John XXIII on Establishing Universal Peace in Truth, Justice, Charity, and Liberty* (1963) online: http://www.vatican.va/content/john-xxiii/en/encyclicals/documents/hf_j-xxiii_enc_11041963_pacem.html (accessed on 23 July 2020) at paras 140-41.

qualifications, to attend to environmental and economic problems and protect human rights. Where a state's action has impact outside its borders, it should not insist on being let alone on ground of sovereignty.[145] How much power should be concentrated in view of the need for centralization to serve the individual's flourishing and in view of the possible abuse of power[146] would be a matter of *determinatio*.[147] George acknowledges that conditions may change as to what subsidiarity requires: what is more appropriately dealt with at one level today may be better dealt with at a different level another day.[148]

In terms of states' legal proscriptions which may detract from perceived requirements of human dignity from the point of view of other states, subsidiarity in the natural law tradition requires that international authority respects cultural autonomy and permit cultural diversity. This is not an endorsement of cultural relativism. It acknowledges the diversity of basic human goods and the reasonable ways people in different cultures instantiate them.[149] This is in line with the margin of appreciation doctrine in European human rights law too. A centralized authority may lack the information to determine solutions for society in general,[150] and as such, should not too readily regard a local proscription by a state as detracting from human rights. But too much latitude to state authorities would detract from universality and the nomological nature of human rights.[151]

George takes the view that an international authority can legitimately forbid the violation of human rights (even if sanctioned by cultural norms), though what amounts to human rights is debatable.[152] Properly invoking subsidiarity in this context requires assessing whether the state has served the common good of its community. However, there may be no consensus, on an international or supranational level, on the common good that each state must serve within the state.[153] International institutions may be perceived as having limited legitimacy.[154] Moreover, the ideal of state sovereignty can conflict with what subsidiarity requires.[155] However, some argue the ideal of state sovereignty is empty of fixed or determinate content and there is a need for substantive values (well-provided for by subsidiarity) to delineate it.[156] Moreover, state centricity is premised on the recognition of states within international law. Yet the normative grounds for the criteria for recognition of states as "legitimate members of the community of states"—population, territory, and autonomy—are contentious, thus raising the question whether sovereign immunity is in the first place

[145] See Mattias Kumm, "Sovereignty and the Right to be Left Alone: Subsidiarity, Justice-Sensitive Externalities, and the Proper Domain of the Consent Requirement in International Law" (2016) 79:2 Law & Contemp Prob 239 at 245.
[146] George, *supra* note 144 at 236.
[147] *Ibid* at 238.
[148] *Ibid* at 240.
[149] *Ibid* at 242; see also Carozza, *supra* note 137 at 71.
[150] Sirico, *supra* note 133 at 114-15.
[151] William M Carter Jr, "Rethinking Subsidiarity in International Human Rights Adjudication" (2008) 30:1 Hamline J Pub L & Pol'y 319 at 330.
[152] George, s*upra* note 144 at 243.
[153] This is, strictly speaking, different from the issue of a common good at the international level, in relation to which Carozza notes the general difficulty in applying subsidiarity in the context of international law in view of the fragmentation of international law and the lack of a uniform, coherent notion of the common good. See Paolo G Carozza, "The Problematic Applicability of Subsidiarity to International Law and Institutions" (2016) 61:1 Am J Juris 51 at 55-60. There is no presumption in favor of localism or devolution as such, as subsidiarity calls for intervention and assistance as well as immunity and autonomy (*ibid* at 63).
[154] Markus Jachtenfuchs & Nico Krisch, "Subsidiarity in Global Governance" (2016) 79:2 Law & Contemp Probs 1 at 22-23.
[155] Carozza, *supra* note 153 at 61-62.
[156] Carozza, *supra* note 137 at 64-68. It has been argued that the idea of state sovereignty should be replaced with subsidiarity. See Mattias Kumm, "The Legitimacy of International Law: A Constitutionalist Framework of Analysis" (2004) 15:5 Eur J Int L 907 at 920-21.

justified.[157] Subsidiarity would require states to be responsive to the interests of citizens and human beings in general.[158] Opponents to the margin of appreciation doctrine applied by the European Court of Human Rights suggest that the non-intervention of the Court when it gives leeway to the states in relation to any impugned state policy makes sense only if the impugned policy truly benefitted from meaningful democratic deliberations.[159] In the event that an assessment can be made about the conditions of the state, whether it honors human dignity, and the capacity of its judiciary, a state can be found to be so inadequate that no "margin of appreciation" be accorded.[160]

In relation to the application of Radbruch's Formula within a state, there is no judicially enforceable legal principle based on subsidiarity, unlike in relation to the European Court's role.[161] Nor is our concern directly that of how international law would judge state law or whether an international authority would intervene.[162] More generally, some courts within a state have sought to incorporate human rights norms from international instruments while interpreting their constitution (without necessarily requiring broad historical consensus or the legislature to have done something intolerably unjust). For example, the Supreme Court of Israel in *Abu Masad v. Water Commissioner*[163] held that human dignity included a general right to water under Israel's Basic Law. The reference has been said to be an attempt to acquire legitimacy while expanding constitutional rights, even though from the point of view of subsidiarity the decision could be questioned.[164]

Three points can be gleaned from the preceding discussion as far as our different question of Radbruch's Formula is concerned. First, the rightful allocation of authority should be prudentially determined for specific issues, rather than generalized. Second, each determination is provisional insofar as changing conditions may suggest that one authority is better placed than another to honor what lies at the heart of subsidiarity. Third, and most importantly, how human flourishing is served lies at the heart of concern with subsidiarity. At the level of a state and its units, if a deliberative democracy truly exists, with active individuals and units in civil society, the norms that emerge may better reflect respect for equal moral worth, as the process itself involves all individuals and takes off from equal moral worth. If the conditions of a truly deliberative democracy are absent, and people are unthinking, passive, or swayed by a vocal minority, the norms shaped by individuals and smaller units are not necessarily to be preferred. Allowing broad historical consensus to determine the minimal core of norms that may not be derogated from is to deny decision at the local legislative level. But it is justifiable when broad historical consensus concerning what is intolerably unjust better protects human flourishing, over the elected legislature's determination of what counts as just.

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[157] Andreas Follesdal, "Subsidiarity and the Global Order" in Michelle Evans & Augusto Zimmermann, eds, *Global Perspectives on Subsidiarity* (Springer, 2014) 207 at 215-16.

[158] Andreas Follesdal, "The Principle of Subsidiarity as a Constitutional Principle in International Law" (2013) 2:1 Global Constitutionalism 37 at 61.

[159] Eyal Benvenisti, "The Margin of Appreciation, Subsidiarity and Global Challenges to Democracy" (2018) 9:2 Journal of International Dispute Settlement 240 at 240. Moreover, the way the margin of appreciation has been applied is difficult to square with subsidiarity, for example when a broader margin has been allowed when issues relate to protection of morals and national security, but less leeway has been applied to matters of discrimination, freedom of expression, or rights to family life. See Follesdal, *supra* note 138 at 214, 225.

[160] Carozza, *supra* note 153 at 65.

[161] See Gabriel A Moens & John Trone, "Subsidiarity as Judicial and Legislative Review Principles in the European Union" in Michelle Evans & Augusto Zimmermann, eds, *Global Perspectives on Subsidiarity* (Springer, 2014)157.

[162] Eric Heinze, "Equality: Between Hegemony and Subsidiarity" (1994) 52 Int Commission Jur Rev 56 at 56-65.

[163] Civil Appeal No. 9535/06.

[164] Itzchak E Kornfeld, "Constitutions, Courts, Subsidiarity, Legitimacy, and the Right to Potable Water" (2015) 21:2 Widener L Rev 257 at 271.

A final point from the perspective of when an international authority can act is also pertinent. Subsidiarity can also empower the central unit to act, particularly when the local authority cannot do so. It has been used to justify an international authority acting against the state in relation to crimes against humanity. The state's monopolization of coercive form and its setting of norms of behavior means that if its general authority is abused, only an external party can implement any sanction.[165] If Radbruch's Formula is invoked in such a limited range of cases, not only is the subsequent need for *subsidium* from the international authority averted, there is also neat consistency between the norm enforced internationally and the norm enforced locally. Therefore, the principle of subsidiarity would not militate against judicial review based on Radbruch's Formula.

V. Conclusion: A Neatly Cohesive Position

Much has been written about Radbruch's Formula. I have sought to explicate how Radbruch's Formula is relevant within a constitutional democracy as a natural law position, a subject which has not been adequately examined.

Radbruch's Formula renders laws that are unjust to an intolerable degree, as determined by broad historical consensus, legally invalid. It is to be preferred over the treatment of the *lex injusta* maxim as merely a subordinate concern of natural law theory. Radbruch's Formula is a neatly cohesive position that makes sense of, and takes seriously, the moral realism underlying natural law theory as well as the natural law foundations of democratic constitutionalism. Regarding intolerably unjust laws as losing their legal validity sits cohesively with natural law theory's collateral moral obligation to obey purported laws in order not to throw a system into disrepute: no collateral moral obligation to upkeep a legal system arises in the event of intolerably unjust laws. This frees subjects of the law, legally and morally, to disregard an intolerably unjust law, while authorizing judges to strike it down. Referring to broad historical consensus to determine what constitutes intolerable injustice, where the consensus is likely to have emerged through a grassroots morality, is neither contrary to moral realism nor to the idea of subsidiarity. Indeed, in the likely scenario of the coincidence between the norms enforced by international authorities at the level of international law (justified by the need for *subsidium*) and the norms enforced by the judiciary within a state based on Radbruch's Formula, Radbruch's Formula may help to avoid the need for international intervention.

[165] Richard Vernon, "Crime Against Humanity: A Defence of the "Subsidiarity" View" (2013) 26:1 Can J L & Jur 229 at 232-33.