

RETROACTIVE LAWS AND NOTIONS OF RETROSPECTIVE JUSTICE: KEY ASPECTS OF THE GERMAN AND POLISH EXPERIENCES

Agata Fijalkowski^{[a],*}

^[a] Senior Lecturer, Law School, Lancaster University, United Kingdom.

*Corresponding author.

Address: Lancaster University Law School, Bowland North, Lancaster, LA1 4YN, United Kingdom.

Email: a.fijalkowski@lancaster.ac.uk

Received 4 February 2013; revised 3 March 2013; accepted 10 March 2013.

Abstract

This paper examines the similarities and differences of the legal discourses on the prohibition of retroactive laws within the European human rights framework, and more broadly, a temporal framework that accompanies questions of historical injustice. The paper considers the significance of the notion of retrospective justice in post-1989 Europe, and more specifically in Germany and Poland. From a criminal law perspective the idea of punishing people for an act that was not a crime at the time of commission is regarded as reprehensible. However, a different temporal narrative was evoked with the fall of Communism in 1989 that was based on responses to atrocities committed during the Second World War. The paper outlines the legal context that frames retrospective justice, nationally and regionally, and considers the importance of permitting the law to work retroactively. By examining certain aspects of the German and Polish experiences, the paper concurs that retrospective justice in post-Communist Europe contributes a specific set of problems to the field of transitional justice, none of which sit comfortably with one solution, and all of which demonstrate that narratives on select chapters of Communist histories remain unfinished. The narratives also show that transitional criminal justice has taken on a permanent character in legal discourses, in which retrospective justice takes on a dynamic meaning.

Key words: Retrospective justice; Retroactive laws; Transitional justice; East Germany; Poland; Border guards; Martial law; Judicial immunity; European Court of Human Rights; Gustav Radbruch; Polish constitutional tribunal

Agata Fijalkowski (2013). Retroactive Laws and Notions of Retrospective Justice: Key Aspects of the German and Polish Experiences. *Frontiers of Legal Research*, 1(1), 1-24. Available from <http://www.cscanada.net/index.php/flr/article/view/10.3968/j.flr.1929663020130101.203> DOI: 10.3968/j.flr.1929663020130101.203

*The recent history of Central and Eastern Europe is the history of bad times.*¹

MAIN RESEARCH QUESTIONS AND ISSUES

This paper examines the similarities and differences of the legal discourses on the prohibition of retroactive laws within the European human rights framework, and more broadly, a temporal framework that accompanies questions of historical injustice. The article considers the significance of the notion of retrospective justice in the post-dictatorial period (post-1989) in Europe, and more specifically in Germany and Poland. From a common law perspective, for example, the idea of punishing people for an act that was not a crime at the time of commission is regarded as reprehensible. From a temporal perspective, the idea of criminal law working backwards goes against principles underpinning the rule of law, because it is arbitrary and uncertain. However, transitional justice provides another lens from which to view the criminal law working retrospectively. A different temporal narrative was evoked with the fall of Communism in 1989, where the nature of the crime justifies a re-assessment of retroactive laws and punishment of people – usually former political leaders and other officials, who committed human rights violations, are inextricably entangled with accompanying dominant historical narratives. These narratives involve different agents and ‘relationships of entanglement’ or ‘multiple narratives of history and memory.’² In this specific context, retrospective justice is considered an important feature of civil liberties, which then becomes a critical part of the transitional criminal justice narrative that is broadly concerned with the way in which post-dictatorial or post-conflict societies legally respond to past human rights atrocities.³ In order to appreciate the meanings of retrospective justice within the transitional criminal justice discourse, in terms of justice and historical narratives within a temporal framework, it is important to look at specific case studies, where discourses pick up and develop themes that emerge in relation to specific countries and other European states.

Certain events have been haunted by the persistent need to know, on the part of a given society, which gives the occurrences a metonymic understanding.⁴ In other words, an episode can be read as part of a country’s history, where all citizens form a large family because they are connected to the specific event. They can be victims or perpetrators or both, the latter an ambiguous context that is representative of both criminality and victimhood.⁵ Retrospective justice takes on an additional meaning that imbricates with the relevant agents and histories where time emerges in related narratives, in relation to unresolved grievances, the mourning period, the legal process, and/or the punishment.

¹ ISTVAN REV, *RETROACTIVE JUSTICE* 3 (Stanford University Press 2005).

² STEVE F. ANDERSON, *TECHNOLOGIES OF HISTORY: VISUAL MEDIA AND THE ECCENTRICITY OF THE PAST* 3 (Dartmouth College Press 2011).

³ Discussed in RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 27-67 (Oxford University Press 2000).

⁴ *REMEMBERING KATYN* 8-9 (Alexander Etkind et al. eds., Wiley 2012).

⁵ *Ibid.*

According to Foucault, memories and histories are always in real or potential conflict with other histories and memories.⁶ Discourses are examined to draw out contested aspects of memories and histories. In other words, a discourse on law informs politics; politics affect our perceptions of time, justice and potentially the law. An important dimension of this paper is to investigate which legal processes had a dialogue with, rather than an opposition to, official historical discourses and individual recollections. The aim is to address a set of problems addressed by a particular group or agent, rather than present a coherent narrative or even reconcile diverse approaches.

The paper starts by setting out key legal definitions in national and regional legal frameworks in order to determine what comprises the prohibition on retroactive laws. Article 7 of the 1950 European Convention on Human Rights (ECHR) is critical to the discussion. The ECHR is the masterwork of the Council of Europe, and has played an important role in the development of human rights' protection in post-Communist Europe. The product of the Council of Europe, the ECHR has come to comprise a regional human rights framework that, together with the European Court of Human Rights (ECtHR), has engaged with the most fundamental issues of jurisprudence to meet its objective of human rights' protection. Interestingly, in the area of retrospective justice the ECHR and accompanying case law has featured more prominently in some countries, and not in others. The paper outlines the context that frames retrospective justice and the importance of permitting the law, i.e. punishment, to work retroactively, based on human rights arguments and historical narratives peculiar to Communist histories. It specifically examines the German *Border Guards* cases. The legal reasoning of the national courts in these cases, later considered in two key cases by the ECtHR, effectively illustrates two things relevant to our discussion: (1) the context of post-1989 Communist Europe and the failure of legal positivism and (2) the existence of fissures in the discourses about natural justice and fidelity to the law that is uncovered when certain states refer to and use the German experience as a blueprint in formulating their own approach to retrospective justice. The discussion turns to Poland and presents an overview of its position on retrospective justice, before examining a recent ruling of the Polish Constitutional Tribunal from 2010. The case concerns the lifting of judicial immunity of judges who applied the law retrospectively in the martial law period (1981-1983) and raises pertinent questions about law and justice that are at the centre of the *Border Guards* cases. The legal and historical narratives on retrospective justice in relation to these two periods run in parallel and opposite directions, and importantly reveal cracks in consensual histories that bring clarity to historical sensibility and issues. In this fashion, the paper concurs with the contention that retrospective justice in post-Communist Europe contributes a defined set of problems to the field of transitional justice,⁷ none of which sit comfortably with one solution, and all of which demonstrate that narratives on select chapters of Communist histories remain unfinished, and in this way, support the contention that transitional criminal justice has taken on a permanent character in the law, in which retrospective justice takes on a dynamic meaning.

⁶ MICHEL FOUCAULT, *THE ARCHEOLOGY OF KNOWLEDGE* (Tavistock 1969).

⁷ See Adam Künzler, *Judicial Legitimacy and the Role of Courts: Explaining the Transitional Context of the German Border Guard Cases*, 32 OXFORD J.L.S., 1-33 (2012).

KEY DEFINITIONS

Criminal law is based on the principle of individual guilt. How it is used as a tool to confront past injustice reveals seemingly irreconcilable questions related to the criminal law essentially working backwards. This does not sit easily with the maxim *lex retro non agit* (from after the action) – a cornerstone of criminal law and a building block of the rule-of-law state for both common and civil law countries. For the common law lawyer, the principle of *nullum crimen, nulla poena sine lege*, ‘only the law can define a law and prescribe a penalty,’ has a long history as the fundamental cornerstone of criminal law, as stated by Lord Reid in *Waddington v Miah*:

There has for a very long time been a strong feeling against making legislation, and particularly criminal legislation, retrospective...I use retrospective in the sense of authorising people being punished for what they did before the Act came into force.⁸

For Europe, this principle is found in Article 7 of the ECHR 1950,⁹ which comprises two key paragraphs:

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations.

In general, Article 7’s two dimensions prohibit the legislature and courts from creating or extending the law to criminalise acts or omissions that were not illegal at the time of their commission or omission, or to increase a penalty retroactively. It also expects the law to be clearly defined, as stated by the ECtHR in *Achour v France*, where ‘the criminal law must not be extensively construed to an accused detriment.’¹⁰

Two key terms, ‘criminal offence’ and ‘penalty,’ in Article 7 have autonomous meanings, adhering to the *Engel* criteria.¹¹ The Court emphasises that the nature of the offence itself and the nature and severity of the sentence, which can be imposed, have relevance for classification in the national law.¹² These conditions apply to what constitutes as a penalty.¹³ The ECtHR closely scrutinises measures with a

⁸ *Waddington v Miah* 59 Cr App Rep 149, 151 and 152 (1974).

⁹ European Convention on Human Rights art.7 1950, available at: <http://human-rights-convention.org/the-texts/> (accessed 1 February 2013). Article 15 of the International Covenant on Civil and Political Rights contains similar provisions. See <http://www2.ohchr.org/english/law/ccpr.htm> (accessed 1 February 2013).

¹⁰ *Achour v. France* 45 EHRR 9, para. 41(2007).

¹¹ *Engel and others v. The Netherlands*, apps. 5100/71, 5101/71, 5102/71, 5354/72, and 5370/72, Series A no. 22 [1979-1980] 1 EHRR 647 (8 June 1976).

¹² See *Lawless v. United Kingdom* (No. 3) 1 EHRR 15 (1979-1980).

¹³ In *R. v. B* (RG) 1 Cr App R 19 (2010), for example, it was held that an order in 2003 extending a licence to a sentence of imprisonment for an offence committed 1 October 1991 did not amount to imposing a heavier penalty than was available at the time the offence was committed because the licence was a preventative measure and not a punitive one.

view as to whether they are a penalty.¹⁴ Punishment must not be disproportionate to the defendant's detriment.¹⁵ However, in *Taylor v. United Kingdom* the European Commission held that the imposition of a confiscation order for offences committed before as well as those committed after the legislation in force was not in violation of Article 7.¹⁶ The Commission considered that the order was not a penalty for the offences committed before the Act's implementation, but rather one for the later offences. In *R. (Uttley) v. Secretary of State for the Home Department* the House of Lords held that the maximum penalty within Article 7 referred to the one that could have been imposed by the domestic court at the time of conviction, and not the one that would probably have been imposed;¹⁷ this reasoning was followed in *R. v. Bowker*.¹⁸ In *Kaftaris v. Cyprus*, a prisoner had been given the life sentence for murder, which in practice involved a 20-year fixed-term sentence. Later an amendment to the law resulted in the sentence being replaced by an indeterminate sentence and, as a result, the applicant was refused discretionary release.¹⁹ The indeterminate life sentence was held to be a breach of Article 7 as the scope and level of execution of the life sentence was not formulated with sufficient precision at the time of his sentence.

The notion of 'law' presents other challenges and implies a rule of general application. Laws regulate the conduct of the public or a segment of society and operate over a period of time. In contrast to judicial decisions, which apply the law to persons, laws in this framework are different. As such, a law assumes some degree of vagueness that requires interpretation before being applied to particular circumstances, which the ECtHR accepts in both the Article 7 context and in respect of its pervasive concept of law. In this sense the law should be provided the scope to evolve, an element that was recognised by the Court in *Tyrer*.²⁰ It is also one that follows the thought of key thinkers in legal philosophy, such as H.L.A. Hart and his theory on the 'open-textured' nature of law as being necessary to ensure that rules be interpreted according to a policy that provides for discretion; in this way laws are not overly rigid and able to develop with time and changing contexts, which adhere to the spirit of the ECtHR's jurisprudence.²¹ Hart's theories are important features of the discussion found later in this paper. The danger is that individuals will end up being convicted on the basis of new developments or applications of the law, which could not be foreseen. Where general words in a statute have been interpreted by courts and a settled body of case law created, the ECtHR is likely to find that the requirement of certainty has been satisfied. Importantly, this flexibility in legal rules is found in the matrimonial rape case of *SW v. United Kingdom* where

¹⁴ *Welch v. United Kingdom*, app. 17440/90, (9 February 1993).

¹⁵ *Adamson v. United Kingdom*, app. 42293/98, 26 January 1999.

¹⁶ *Taylor v. United Kingdom* EHRLR 90 (1998).

¹⁷ *R. (Uttley) v. Secretary of State for the Home Department* 1 WLR 2278 (2004).

¹⁸ *R. v. Bowker* EWCA Crim 1608 (2007).

¹⁹ *Kaftaris v. Cyprus* 49 EHRR 35 (2009).

²⁰ *Tyrer v. United Kingdom*, 5856/72 ECHR 2 (1978)

²¹ H.L.A. HART, *THE CONCEPT OF LAW* (Clarendon 1961). For a critical discussion on Hart's notion of the open-textured nature of the law see Frederick Schauer, *On Open Texture of Law*, VIRGINIA PUBLIC LAW AND LEGAL THEORY RESEARCH PAPER NO. 2011-35 (2011), available at SSRN: <http://ssrn.com/abstract=1926926> or <http://dx.doi.org/10.2139/ssrn.1926926> (last accessed 8 March 2013).

the Court said:

There will always be need for elucidation of doubtful points and for adaptation to changing circumstances...Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.²²

In conclusion, the Court is careful to ensure that the law does not work retroactively in the area of criminal law, as that would offend the timeless cornerstone of the criminal law. The Court is concerned that terms such as criminal offence and penalty are clear within the member states' national laws according to its own pervasive principles. The Court's approach implies a balanced contemplation of what underpins the measure at hand, whether it is punitive or preventive. It acknowledges that laws respond to the dynamic nature of society in terms of relations, views on punishment for example, and what is considered a crime.

TRANSITIONAL JUSTICE CONTEXT

In addition to the European human rights regime, a brief examination of time in the transitional justice context is needed. A comparative perspective is essential to our understanding of transitional justice, if we are to give it any meaning; setting key questions in a comparative and contextual context reveals useful similarities and important differences. In this respect both East Germany and Poland share the common experience of Communist rule, and a set of questions that present themselves in relation to the repressive aspects of the predecessor regime and arise during transition to a democracy and within the context of time.²³ It is generally understood that the paradox of time informs the overall feeling that obligations stemming from transitional justice weaken over time.²⁴ This occurs when new circumstances take over that postpone transitional reparation for past injustices. Experience, however, shows that this is not true. There are many examples of survivors, from atrocities committed during the Second World War, or from the former Communist states and Soviet bloc countries, continuing to receive or make claims for remedies, or seek the truth of the event.²⁵ The notion of time in transitional justice entails a variety of narratives, beginning with those stemming from the Nuremberg legacy from 1948 to the present day.

As we shall see shortly, the application of the Radbruch formula, a theory conceived in reply to the atrocities of the Second World War to more recent cases of

²² *SW v. United Kingdom* 21 EHRR 363, paras. 36/34 (1996)

²³ *TRANSITIONAL JUSTICE IN EASTERN EUROPE AND FORMER SOVIET UNION* (Lavinia Stan, ed., Routledge 2008). See John P. Burgess, *Coming to Terms with the East German Past*, *FIRST THINGS* (March 1992), available at <http://www.firstthings.com/article/2008/01/003-coming-to-terms-with-the-east-german-past-16> (last accessed 28 February 2013) and JIŘÍ PRIBÁŇ, *LEGAL SYMBOLISM: ON LAW, TIME AND EUROPEAN IDENTITY* 141-163 (Ashgate 2007).

²⁴ See TEITEL, *supra* note 3.

²⁵ *RETHINKING THE RULE OF LAW AFTER COMMUNISM* (Adam Czarnota et al. eds. CEU Press 2005); WOJCIECH SADURSKI, *RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POSTCOMMUNIST STATES OF CENTRAL AND EASTERN EUROPE* (Springer 2005).

egregious human rights violations, shows the timeless element of a concept of meta-justice that is rooted in natural justice and scholarly approaches to the study of the genealogy of transitional justice.²⁶ These objectives both complement and fulfil opposite objectives in transitional criminal justice, and, in relation to the debates about the relationship between national and international developments and entanglements, the concerns have shifted from accountability to truth versus justice, or official histories to access to historical records, in a key phase in the timeline of transitional justice.²⁷ Temporality comes into play with respect to closure, a key element of the national approaches and scholarly discussions in the post-1989 period.²⁸

Political change is a constant feature in the stories and that also has an effect on the conditions of justice. What emerges, and will be shown in this paper, is that different notions of justice emerge in reply to specific political realities. A good example of this is the way in which various measures have attempted to address Stalinist-era injustices, ranging from creating specific legal definitions, such as Stalinist crimes; connecting a shared experience, such as Stalinism, to ask for a re-evaluation of crimes against humanity and genocide; or the acceptance or rejection of criminally prosecuting former leaders of the predecessor regime. The truth of an event is underpinned and indeed at times driven by punishment. With the passage of time, the question has been viewed as an inheritance of a moral legacy and the manner in which the successor state and generation deals with its predecessor's crimes. Eventually, with inevitable practicalities, such as the death of perpetrators and victims, the form a redress assumes is largely symbolic, which could facilitate a successor state's reply to old obligations and legacies and secure its political identity over time. In this way, we can argue that there is a paradox of time that includes features of closure, remembering, forgetting, amnesia and memorialisation. These discourses have an effect on transitional justice and its key agents.

GERMAN CASE STUDY

Textbooks on European human rights law will remind readers that the ECHR was drafted in the outcome of the Second World War, when it was likely that those responsible for drafting Article 7 would have had developments in Germany in mind as well as other parts of Europe in the 1930s, when newly imposed totalitarian regimes passed retroactive laws, making criminal without warning, acts which had been lawful under democratic rule.²⁹ The legal innovations of pre-war Europe (1918-1939) were cut short, but legal templates survived to be consulted in more recent times.³⁰ The change of political regimes in Central and Eastern Europe following the

²⁶ See Künzler, *supra* note 7; Peter E. Quint, *The Border Guards Trials and the East German Past - Seven Arguments*, 48 A.J.C.L 541-572 (2000). See also Stanley L. Paulson & Lon L. Fuller, *Gustav Radbruch and the Positivist Theses*, 13 LAW AND PHILOSOPHY, 313-359 (1994); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARVARD L.R. 593-629 (1958) and Lon. L. Fuller, *Positivism and Fidelity to Law - A Reply to Professor Hart*, 71 HARVARD L.R., 630-672 (1958).

²⁷ Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARVARD H.R.J. 69-94 (2003).

²⁸ *Ibid.* See also PRIBÁŇ, *supra* note 23.

²⁹ See R.C.A. WHITE & C. OVEY, JACOBS, WHITE AND OVEY; *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (Oxford University Press 2010).

³⁰ AGATA FIJALKOWSKI, *FROM OLD TIMES TO NEW EUROPE* (Ashgate 2010).

collapse of Communism in 1989 was also an extreme period, owing to the nature of the changeover to democratic rule. These political changes were often accompanied by a strong desire to bring to justice those responsible for the worst excesses of the old regime, resonating with the situation following the fall of the German Nazi regime in 1945, when the international community developed the 'Nuremberg principles'. These principles permitted individuals to be prosecuted for acts so heinous as to be classified as 'crimes against humanity',³¹ even if these same acts had not been criminal according to Nazi legislation and practice. The position is expressed in the second paragraph of Article 7. In the key case of *Papon v France*, the Court rejected the applicant's argument that at his trial for war crimes it had been a breach of Article 7 for the Court to adopt a broader interpretation of Article 6 of the Nuremberg Statute, which removed the need to prove intent as part of an accessory to such a crime to serve as an instrument of the Nazi's totalitarian policy.³²

East Germany, or the German Democratic Republic (GDR) came into existence in 1949. It was the culmination of two opposing political and military blocs, west and east, driven by the United States and Soviet Union respectively, that resulted in the GDR being increasingly dominated by the Communists alone and the state economy restructured according to the socialist planned economy.³³ Eventually an intra-German border was created between east and west. The border was some 69 miles long, 23 of which ran through Berlin, and separated the GDR from the Federal Republic of Germany. Its construction was started in 1961. The Wall that was to separate east from west, lasted until the borders were opened in the evening of November 1989.³⁴ The Wall was an on-going project, with modifications made on a regular basis and at great cost in order to stop East Germans from fleeing west and to send a message to West Germany and the wider western world about the GDR's formidability.³⁵ Border guards, usually young and without vast personal or professional experience, and having undergone intense indoctrination, patrolled the Wall. They were instructed to stop anyone trying to escape, with force. When it did occur, it was at night. If the guards noticed someone trying to escape, warning calls would be made. Failure to heed calls and warning shots risked the guards firing automatic weapons, with fatal results. In one case, the victim was hit in the back as he had one hand on the top of the wall.³⁶ There are many heart-breaking stories of individuals and families attempting to escape the GDR.³⁷ Alongside this, it is

³¹ See TEITEL, *supra* note 3, at 31-33.

³² *Papon v. France* App. 54210/00, (15 November 2001). See also *Konovov v. Latvia*, app. 36376/04, (24 July 2008).

³³ QUESTIONS ON GERMAN HISTORY; IDEAS, FORCES, DECISIONS FROM 1800 TO THE PRESENT (Bundestag Publications' Section, 1992). Concerning West German constitutional law and doctrine see DAVID P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY (Duke University Press 1989).

³⁴ See TINA ROSENBERG, THE HAUNTED LAND; FACING EUROPE'S GHOSTS AFTER COMMUNISM (Vintage Books 1996).

³⁵ *Ibid.*

³⁶ See Peter E. Quint, *Judging the Past: The Prosecution of East German Border Guards and the GDR Chain of Command*, 61 THE REVIEW OF POLITICS 303-329 (1999).

³⁷ *Ibid.* See also PETER E. QUINT, THE IMPERFECT UNION; CONSTITUTIONAL STRUCTURES OF GERMAN UNIFICATION (Princeton University Press 1997). See Inga Markovits, *Review Essay: Reconcilable Differences: On Peter Quint's The Imperfect Union*, 47 THE AMERICAN J.L.L. 189-217 (1999).

worth noting that the GDR boasted one of the most extensive secret police networks (*Staatssicherheit*, or *Stasi*) in order to control all aspects of public and private lives of its citizens, the hallmark of a totalitarian state.³⁸

Part of the unification process initiated in 1990 comprised an investigation into the decision-making process concerning the regulation of the intra-German border, in particular whether criminal liability could be established in relation to the illegal use of force. Equally important, in terms of criminal charges and criminal prosecutions, was for the new German regime not to appear to stop with the border guards.

The 1990 Unification Treaty did not indicate how acts that had been exempted from punishment in the GDR would be addressed under the applicable law that was to be in force in a reunified Germany. The German legislature did not include an amendment that the constitutional provision, the principle of *lex retro non agit*, could not be applied to exclude the punishment of anyone guilty of an act or failure to act which at the time it was committed was punishable according to principles generally recognised in human rights law. A striking omission, considering the country's transition following the Second World War, with the creation of the International Military Tribunal and other related trials of former Nazi officials.³⁹ In the end, the answer to the question was to be decided by the courts.⁴⁰ The courts rejected the solution that any punishment of the border guards would be retroactive and, as such, unconstitutional, which would lead to their acquittal. This left open the possibility for the defendants to be convicted, where the courts could rule that the convictions would not be retroactive. The courts could also hold that even if the convictions were retroactive, the prohibition against retroactivity is not absolute and can be overcome in exceptional situations.⁴¹

Eventually, the border guards were put on trial for homicide. Criminal liability was determined through inter-temporal criminal law, in other words, the norms of either the former GDR law or West German law. Many believed that the force used was justified under GDR law.⁴² In fact, when the appeals eventually reached the German Federal Constitutional Court (FCC), it first ruled that the prohibition of retroactivity, found in Article 103 of West German Constitution, was absolute. The answer lay in the application of a certain formula in order to identify the gross injustice⁴³ of the GDR regime that was accompanied by the abuse of force and the restriction of movement at the intra-German border.

Between October 1990 and February 1997 some 78 persons were sentenced and 45 acquitted.⁴⁴ The cases raised some very serious problems under German constitutional law (known as the 1949 Basic Law) and under the principle prohibiting retroactive punishment. As noted above, the aim of this principle is

³⁸ See ANNA FUNDER, *STASILAND* (Granta 2003) and *The Lives of Others* (directed by Florian Henckel von Donnersmarck, 2006).

³⁹ Quint, *supra* note 36, at 310.

⁴⁰ It is worthwhile to note that the courts were mainly composed of West German jurists. *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ See Künzler, *supra* note 7.

⁴⁴ Rudolf Geiger, *The German Border Guards Cases and International Human Rights*, 9 *EUROPEAN J.I.L.* 540-549 at 541 note 3 (1998).

to stop a state from punishing political enemies or others arbitrarily 'by creating new rules applicable to events in the past or by punishing without any rule at all.'⁴⁵ The essence of this principle relates to one of trust. At its root is the absence of arbitrariness with respect to the rules to be applied to acts committed in the past and present. The idea is key in the post-totalitarian law discourse, where legal narratives are concerned with themes of uncertainty, fear and terror – all three elements motivating the measures that aim to restore or establish a democratic system based on the rule of law – in which these main aspects of repressive and arbitrary rule are absent.

Some scholars argue that the border guards' convictions violate this principle of non-retroactivity because, under the GDR law applicable at the time, the guards' acts may have been legal in many instances.⁴⁶ One key law, for example, was the 1982 Border Law. The law provided the statutory basis for the Wall and made it legal for the border guard to employ deadly force at the border to prevent an escape, many of which were classed as felonies. And, as noted above, soldiers were hardly ever prosecuted or disciplined for using deadly force at the Wall.⁴⁷

The position of the court required careful thinking, as the prosecution for an act that was legal when it took place could involve the imposition of retroactive punishment. This principle is enshrined in Article 103(2) German Basic Law, which states that 'an act can only be punished if its criminality was determined by law before the act was committed' and included in the 1990 Unification Treaty that set out the legal framework for the accession of the GDR into the Federal Republic, noted above. The response to this criticism was that the GDR's border regime reflected the numerous injustices of the regime. For these voices, it was important to criminally punish these acts. So, the *Border Guards* cases reflected the clash between two principles: the first holding that reprehensible acts should be subjected to criminal punishment and the second that no act should go unpunished without a legal prohibition that was in force at the time the act was committed.⁴⁸

In his seminal examination of the cases, Quint identifies the common themes that bound these judgments rendered by the German Federal Court of Justice together and, in doing so, showed the delicate and in many ways insurmountable hurdles that seemed to obstruct the moral case of seeking justice, without violating the maxim of retrospective justice.⁴⁹ In fact the courts adopted a blend of both approaches to address the clash outlined in the previous paragraph. These themes concerned the meaning of justice and punishment, as well as adhering to procedural legality in the criminal law. The German Federal Court of Justice (the *Bundesgerichtshof*, or BGH), as the court of last resort (or supreme court, on all criminal and civil law matters), argued that a proper interpretation of GDR law

⁴⁵ Quint, *supra* note 36 at 309.

⁴⁶ *Ibid.* Künzler, *supra* note 7; Günther Jakobs, *Vergangenheitsbewältigung durch Strafrecht? Zur Leitungsfähigkeit des Strafrechts nach einem politischen Umbruch*, in VERGANGENHEITSBEWÄLTIGUNG DURCH RECHT 37-64 (Josef Isensee ed. Duncker and Humboldt, 1992), Silke Laskowski, *Unrecht – Strafrecht – Gerechtigkeit: Die Probleme des Rechtsstaats mit dem DDR-Unrecht*'26 JURISTISCHE ARBEITSBLÄTTER 151-166 (1994) and Horst Dreier, *Gustav Radbruch und die Mauerschützen*, 52 JURISTEN ZEITUNG 421-434 (1997).

⁴⁷ At times they were rewarded. Quint, *supra* note 36 at 304.

⁴⁸ *Ibid.*, p. 310.

⁴⁹ *Ibid.*

could in fact criminalise the shootings at the Wall.⁵⁰ This approach suggests that the actions would never have been prosecuted under the GDR. The retroactivity question could be addressed, however, if the acts were already criminal under GDR law at the time they were committed. In order to reach this result the courts considered the Border Law, which, as noted above, provided the statutory basis for the use of force at the Wall. The Court's approach was rigid and it held that the statute denied the border guards defence, incorporating human rights in its argument, which meant, in turn, that relevant provisions of the 1969 (amended 1974) GDR Constitution needed to be interpreted. Identifying provisions related to the right to life, the Court argued that the GDR constitution provided for an implicit right to life that was applicable in most cases. The constitutional right, along with other considerations, had a limiting effect on the defence available to the guards under the Border Law.⁵¹

For some critics, although the GDR Constitution contained numerous basic rights, this particular interpretation 'embodied a radical revision of GDR legal history.'⁵² The Communist Party would never have allowed such an interpretation.⁵³ But the Court referred to other provisions in the GDR Constitution, justifying this approach by establishing that the GDR constitution possessed validity outside Communist Party orders and state practice. The Court interpreted the Border Law through this constitutional lens, referring to the principle of proportionality (relevant to the use of force), to argue that the Border Law did not permit the use of deadly force against an unarmed person peacefully trying to flee across the border. Not surprisingly, this approach has troubled a number of commentators, who do not see any justification for this approach, finding that the GDR would have to have changed its identity to accommodate the human rights interpretation.⁵⁴ The Court's interpretation saw the GDR Constitution as a western (and West German) document; its ruling was upheld by the CC, which refused to review the findings of the lower courts.⁵⁵ The rejection of the retroactive application of the law was a rescue mission that entailed the lifting out of a specific notion of justice from a draconian legal framework (it was perceived as such) based on a creative interpretation that drew its inspiration from a meta-justice framework.

In discussing the second approach concerning the absolute nature of retroactivity, Quint recalled the work of Gustav Radbruch, the eminent German legal philosopher, known for his compelling writings on justice and the criminal liability of Nazi officials.⁵⁶ The Radbruch interpretation, or formula, is one that has been identified, in varying degrees, by post-Communist constitutional courts when adjudicating cases concerning human rights abuses committed by former

⁵⁰ See the 'Shootings at the Berlin Wall Case', BGHst Band 39 S.1 (1992). The English translation of the judgment, along with the original German case transcript, can be found in RAYMOND YOUNGS, SOURCEBOOK OF GERMAN LAW 620-681 (Cavendish, 2002).

⁵¹ *Ibid.*

⁵² *Ibid.*, p. 312 and Künzler, *supra* note 7.

⁵³ *Ibid.*

⁵⁴ Künzler, *supra* note 7.

⁵⁵ Quint, *supra* note 26, 556-557.

⁵⁶ See Quint, *supra* note 26, and Paulson, *supra* note 26.

⁵⁷ See Sadurski, *supra* note 25, at 249-262, discussing retroactive extensions of statutes of limitation.

Communist officials.⁵⁷ It is not difficult to see why the arguments are so compelling and appealing to scholars setting key questions in a temporal perspective. Radbruch was Professor of Law at the University of Heidelberg who played an important role in post-war legal thinking in Germany. Originally, Radbruch embraced the legal and jurisprudential school of legal positivism, which supported the view that the rules set down by the authorities of the state constitute law, regardless of how one evaluates the content of those rules. This interpretation was revisited following the Second World War, when Radbruch contemplated the idea that the acts of the Holocaust and other acts could go unpunished on the grounds that they were positive laws under the Nazis and that their punishment would be prohibited under the doctrine of non-retroactivity.⁵⁸

When revisiting and reflecting on the aspects of the German Nazi regime, Radbruch was also engaging with critical legal and jurisprudential questions. He argued that the principle of non-retroactivity was one of many and agreed that it is a strong principle, but that it must be weighed against other principles of justice. According to him, the principle is resilient enough to prevail under most circumstances, even in the case of some unjust statutes. But the principle could be overcome if the contradiction between the statute and justice reaches an unbearable degree where the statute constitutes incorrect law. This is an important part of his theory. Much of the legislation enacted at time (1933-1945) reached this unbearable limit to justify regarding it as invalid or incorrect law.⁵⁹ In a stark move away from legal positivism, Radbruch called upon a concept of meta-justice, or higher principles of justice, when arguing for accountability on the part of officials, in this case German Nazis, for human rights atrocities. For the legal theorist, norms lose their legal character or legal validity when they are unjust, even if they are socially effective and legally enacted.⁶⁰ For Radbruch, in this context the law is not only wrong, but possesses no legal quality. It is in this fashion that Radbruch rejected legal positivism as a failure: his formula heralds the influence of natural law in German jurisprudence. It is based on approving the retrospective application of a higher principle of justice in situations where the 'contradiction between positive law and justice reaches an intolerable level.'⁶¹ In other words, the misapplication is a question of what is unjust (*unrichtiges Recht*) and resulting in unequal justice.⁶²

The debates arising from the Radbruch formula were also deliberated famously in the Hart-Fuller correspondence of the 1950s, which continues to resonate to the present day.⁶³ One of the key aspects of their debate went to the heart of the

⁵⁸ Quint, *supra* notes 26 and 36.

⁵⁹ See, for example, P.C. CALDWELL, *POPULAR SOVEREIGNTY AND THE CRISIS OF GERMAN CONSTITUTIONAL LAW; THE THEORY AND PRACTICE OF WEIMAR CONSTITUTIONALISM* (Duke University Press, 1997); WEIMAR; A JURISPRUDENCE OF CRISIS 1-39, 41 -65 (A. Jacobson and B. Schlink, eds., B Cooper trans., University of California Press 2000) and A.J. NICHOLLS, *WEIMAR AND THE RISE OF HITLER* (Macmillan, 3rd ed. 1991).

⁶⁰ Quint, *supra* notes 26 at 543-552 and 36 at 314-320.

⁶¹ See Robert Alexy, *In Defence of Radbruch's Formula*, in *RE-CRAFTING THE RULE OF LAW: THE LIMITS OF LEGAL ORDER* 16 (David Dyzenhaus, ed. Hart Publishing 1999).

⁶² PRIBÁŇ, *supra* note 23 at 152.

⁶³ See Hart, *supra* note 26 at 618-621 and Fuller, *supra* note 26 at 644-648. See also Kif Augustine Adams, *What is Just?: The Rule of Law and Natural Law in the Trials of Former East German Border Guards*, 29 *STANFORD J.L.L.* 271-314 (1993) and Manfred J. Gabriel, *Coming to Terms with the East German Border Guards Cases*, 38 *COLUMBIA J. TRANS. L.* 376-418 (1999).

meaning of law. If laws are meant to organise society, then rules are the signposts as to what is legal and what the consequences are of illegal actions. Both Hart and Fuller examine the substance and order of the rules. Where Hart identifies the general ingredients that comprise the legal system, Fuller views the law as possessing an internal morality that determines its order.⁶⁴ Such a measuring tool requires the law to be transparent and non-retroactive. This latter feature, on the surface, might seem to run counter to the Radbruch formula. In fact, it is because the rule of law is at stake that retrospective justice is justified in special situations that are characterised by historical and political distortions. According to Příbáň, the 'legal imagination' that is required is in effect the application of law in an effort to reclaim the 'original social function of law.'⁶⁵ Fuller's position in fact answered the dilemma that post-dictatorial regimes faced when seeking to prosecute crimes committed by the predecessor regime, the risk remained that the rule of law would be undermined in the process, if the acts themselves were not considered criminal at the time of their commission. Fuller advanced the view that retrospective justice supports the 'constitutive principle of the rule of law' that 'all crimes shall be prosecuted even if they may be treated as legal acts by a tyrannical power.'⁶⁶

The formula also raises problem, as it provides scant guidance in determining what reprehensible act justifies retroactive prosecution and punishment. So, while some commentators argue that the transgressions of the GDR were not comparable to the vast war crimes and mass genocide of the German Nazi regime, which justified the application of the formula,⁶⁷ others contend that the GDR offences reached the threshold that justifies retroactive prosecution and punishment under the Radbruch formula.⁶⁸ As a means to resolve these questions, the courts refer to key international human rights instruments to help explain which past violations can give rise to present prosecution under the Radbruch formula. So, if GDR officials violated important provisions of the international human rights instruments, these violations are likely to be sufficiently serious to justify present prosecution. In this way, Radbruch's formula becomes more tangible because it is located in specific legal instruments.⁶⁹ However, the Federal Court of Justice uses the formula to find the true law or heart of the GDR Constitution, arguing that it was perverted by a corrupt regime and state practice.⁷⁰ In the case concerning the accountability of higher officials, the FCC, as noted above, utilises the formula as a weighing exercise to show that there are stronger considerations of justice that take priority over non-retroactivity.

The *Border Guards* cases symbolised the repressive nature of the East German regime, and the pursuit of justice was especially stressed after it was clear that the criminal prosecution of leading Communist officials, such as the GDR's former

⁶⁴ *Ibid.*

⁶⁵ PRÍBÁŇ, *supra* note 23, at 151.

⁶⁶ *Ibid.*, p. 152

⁶⁷ Quint, *supra* note 26.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ 'Shootings at the Berlin Wall Case', BGHst Band 39 S.1, in YOUNGS, *supra* note 50 at 659, 661 and Quint, *supra* note 26 at 557-559.

⁷¹ See ROSENBERG, *supra* note 33.

leader Eric Honecker, was not going to crystallise.⁷¹ When other post-Communist states began to contemplate legal measures dealing with the past, the East German cases were examined closely as a sort of blueprint. The judgments were marked out for the application of natural law, relevant for two reasons. First, it was a powerful comment about legal positivism and its failure and inadequacy to resolve questions about justice emerging from post-Communist legal orders. Secondly, the application of the Radbruch formula was one of hope – the hope to see justice done in the face of serious human rights abuses. It was a call for a fidelity to the law. In this narrative, at a practical level, states could look to two important sources: national developments, in the form of what was occurring in neighbouring states, and international human rights law, specifically the ECHR. Radbruch arguably could not have foreseen that East German law would be interpreted through a West German lens, or that his theory would become such an integral temporal formula.

At the ECtHR, the East German border guards (and their superiors) were heard in two applications against Germany. The Court examined whether it was compatible with Article 7(1) for the courts of a unified Federal Republic to convict men, for actions which the applicants argued had not been criminal according to the law and practice of the GDR. The three applicants in the case of *Streletz, Kessler and Krenz v. Germany* had held senior posts in the East German regime.⁷² Owing to their role, they had participated in decisions made by higher officials concerning the GDR's border-policing regime. As such, they shared responsibility for the deaths of a number of individuals who had attempted to escape to West Berlin between 1971 and 1989 and who had been killed by shots discharged by East German border guards or as a result of land mines. The applicant in the case of *K.-H.W.* had served as a soldier in the GDR border guard. In 1973, as a twenty-year-old officer, he fatally shot a person attempting to swim to West Berlin.⁷³

Interestingly, the German courts, which convicted the applicants, did not reply to the argument that the acts in question had amounted to 'crimes against humanity' or had been criminal according to the general principles of international law. In fact, the main thread that runs through a case like the *Shootings at the Berlin Wall* is the question of whether the criminal law applicable to the GDR at the times that the shootings took place is more or less severe than its Federal German Republic counterpart.⁷⁴ The latter was chosen as the basis for conviction, and as discussed above, the courts held that the crimes had been prohibited by GDR law on the dates they were committed, relying on the fact that the GDR had signed the 1966 International Covenant for Civil and Political Rights (ICCPR), which guarantees, *inter alia*, the right to life and the freedom of movement, and enacted a number of statutory provisions protecting the right to life and restricting the use of lethal force to the prevention of serious crime.⁷⁵ The GDR ratified the ICCPR in 1974, which entered into force in 1976, but 'neglected to use the agreement in accordance with Art. 51 of the DDR [GDR] Constitution as an opportunity for internal statutory

⁷² *Streletz, Kessler and Krenz v. Germany* 33 EHRR 751 (2001)

⁷³ *K.-H.W. v. Germany* 36 EHRR 1081(2003)

⁷⁴ 'Shootings at the Berlin Wall Case', BGHst Band 39 S.1, in YOUNGS, *supra* note 50 at 621.

⁷⁵ Ratification was another point of contention. It was argued that the ICCPR was not law, as it was never ratified.

amendments and have it 'confirmed' on this occasion by the People's Chamber in accordance with the said constitutional provision.⁷⁶ It is important to note that the events in the *K.-H.W.* case took place before the ratification of the ICCPR.⁷⁷

The practice of the East German authorities, however, for which the applicants in *Streletz* were partly responsible, was to encourage border guards to disregard the legislation and to annihilate border violators. It is important to recall that throughout its existence the East German regime denied its populace freedom of movement. The Wall as a response to the wave of persons escaping west, and preventing escapes was high on the agenda in terms of border control; the preventive actions and crimes that are considered in this discussion occurred from the 1960s until the fall of the Berlin Wall in November 1989. In the event of a successful crossing, the guards on duty could expect to be the subject of an investigation by the military prosecution, calling into question the role of duress.

In the same case, the Court observed that GDR statute law, together with the provisions of the international treaties, had provided a clear prohibition on disproportionate and arbitrary killing. As such, the applicants could not argue that, in light of GDR state practice, their conviction as accessories to murder had not been foreseeable, since they themselves had to a great degree been responsible for the discrepancy between the legislation and practice. The treatment of knowledge has been a point of contention between scholars as to the harshness of the decision to uphold the conviction (albeit a milder sentence, following GDR law, was applied) and whether the decision itself was legally sound (as a re-interpretation of GDR law).⁷⁸

The Court's finding of no violation to Article 7 in the *K.-H.W.* case appears somewhat severe when placed in the context set out above. Three of the seventeen judges in the European Court of Human Rights' Grand Chamber dissented. The applicant had been a young and junior soldier, who had undergone a process of indoctrination and also been ordered to protect the border 'at all costs.'⁷⁹ In terms of knowledge, this entailed the information that he would be subject to an investigation if he allowed a fugitive successfully to escape from East Germany. However, the Court held that the GDR statute was accessible to all, and that 'even a private soldier could not show total, blind obedience to orders which flagrantly infringed not only the GDR's own legal principles but also internationally recognised human rights.'⁸⁰ On the issues of foreseeability and knowledge, the ECtHR's Justice Nicolas Bratza opined

I accept...that the situation in the GDR was such that the applicant could hardly have foreseen at the time that his actions would result in his prosecution for the offence of intentional homicide. But this is a very different question from the one facing the Court, namely whether the applicant could reasonably have foreseen that his actions amounted to such an offence. While this question may be open to differing opinions, I can find no reason to depart from the considered opinion of the national courts that opening fire on a defenceless person, who was attempting to swim away

⁷⁶ 'Shootings at the Berlin Wall Case', BGHst Band 39 S.1, in YOUNGS, *supra* note 50 at 649.

⁷⁷ See MAGDALENA FOROWICZ, *THE RECEPTION OF INTERNATIONAL LAW IN THE EUROPEAN COURT OF HUMAN RIGHTS* 175-179 (Oxford University Press, 2010).

⁷⁸ *K.-H.W. v. Germany* 36 EHRR 1081(2003)

⁷⁹ 'Shootings at the Berlin Wall Case', BGHst Band 39 S.1, in YOUNGS, *supra* note 50, at 625.

⁸⁰ *K.-H.W. v. Germany* 36 EHRR 1081(2003), para. 75.

Retroactive Laws and Notions of Retrospective Justice: Key Aspects of the German and Polish Experiences

from East Berlin and who posed no threat to life or limb, so clearly breached any principle of proportionality that it was foreseeable that it violated the legal prohibition on killing.⁸¹

To recall Radbruch

[a]n order is an order', the soldier is told. 'A law is a law', says the jurist. The soldier, however, required neither by duty nor by law to obey an order whose object he knows to be a felony or misdemeanour, while the jurist – since the last of the natural lawyers died out a hundred years ago – recognizes no such exceptions to the validity of the law or to the requirement of obedience by those subject to it.⁸²

The two cases play an important role in the transitional justice narrative, shown in their complexity because of the number of agents involved, including the guards, victims and victims' families, and national governments (then and present). The cases are used in current discourses in Poland and other European states. But the European Court ruling does not do justice to the specific legal narratives that can be identified in the German courts' reasoning, which were upheld by the European Court of Human Rights.

In this further development of this question in the post-1989 period, one already identifies in the *Streletz* judgment the balancing exercise that is undertaken by the Court with respect to Article 7. It is clear that the Court is in favour of such prosecutions with the view of meeting the objectives of an 'effective political democracy.'⁸³ An additional point in favour of prosecutions is related to the right to life of the victims of the shootings. It is also worth noting the decision of *Kononov* to show the significance for certain states and regions, such as the Baltic States.⁸⁴ In May 1944, Kononov, together with a partisan group, attacked a village on the grounds that the inhabitants were suspected of collaborating with the Nazis. The details of the attack are violent, and several villagers were killed. Kononov was viewed as a war hero in Soviet Latvia and it was a shock to him and others when he was prosecuted for war crimes in the 1990s. A highly politicised case in Latvia and Russia by the time it reached the Grand Chamber of the Court, the decision showed that the key source of tension for the principle of retrospective justice rests with foreseeability and knowledge. In this case the Court had to decide whether, at the time of the offence, international law provided a legal basis to convict Kononov for war crimes and whether he could have foreseen that his actions would make him guilty of those offences. The Court also had to consider how statutory limitations should be treated under Article 7. As noted above in the case of *SW*, in relation to Article 7, the ECtHR does not reject the gradual clarification of the criminal law through judicial interpretation, as long as it is consistent with the essence of the offence and is reasonably foreseeable. As the applicant was a commanding military officer, it should have been foreseeable that his actions would constitute war crimes

⁸¹ *Ibid.*

⁸² Gustav Radbruch, *Five Minutes of Legal Philosophy* 1 (1945)(trans. Bonnie Litschewski and Stanley L. Paulson), 1 OXFORD J.L.S, 13-15, (2006).

⁸³ *Ibid.* See Simon Atrill, *Nulla Poena Sine Lege in Comparative Perspective*, PUBLIC LAW 107 – 131 (2005).

⁸⁴ See *Korberly v. Hungary*, app. 9174/02, (19 September 2008) and *Jorgic v. Germany*, app. 74613/01, (12 July 2007).

for which he could be criminally prosecuted. The majority was not concerned that the relevant international laws, on which the national law was based, were not published in the Soviet Union, including Latvia, which was a part of the USSR, as Latvia SSR, at the time. Because international law does not prescribe a time limit to war crimes the conviction was effected by a statute of limitations. Buyse notes that

each transition from a repressive regime to more democratic forms of government has led to new perspectives in a country's history. The power struggle between the new and old powers produces different narratives of the oppressor and the oppressed, about the significance of key events and persons and more broadly about right and wrong.⁸⁵

Sometimes, it appears as if a court oversteps its boundary, which, in the eyes of some, becomes the 'dispenser of transitional justice.'⁸⁶ The cases of *Papon* and *Kononov* illustrate how biographies once considered reputable may become criminalised as retroactive extensions to statutes of limitations⁸⁷ continue to be debated and are shaped by political and historical narratives about events that bind post-dictatorial societies. Sometimes the

transitional context thus does not seem to affect the case law on historical debates. Rather the effect works the other way around: the Court squarely positions such debates under the protective scope - and high level at that - of the freedom of expression...[t]his means in practice that the European Convention on Human Rights supports the shift in transitional societies from a single state-directed perspective on the past to a plurality of voices.⁸⁸

Not only are cases such as the *Border Guards* distinct to Germany, there are specific moral and legal dilemma's that arise and that are peculiar to transitional justice narratives found elsewhere. It is clear, however, that it is a specific set of problems that accompanies these narratives. The next section discusses Polish developments, and shows well the complexities of the problem at hand.

POLISH CASE STUDY

The collapse of Communism in 1989 brought with it the call for law to work backwards that indicated the desire of some states and their respective populace to address the demand for retributive justice.⁸⁹ One of the hurdles the states faced was the statute of limitations, which meant that the only way to open these cases would be to revoke the periods of limitations themselves. Such a move would mean that certain acts that were officially legal under the Communist regime should be now regarded as illegal *ex post facto*. Poland has been described by some scholars

⁸⁵ TRANSITIONAL JURISPRUDENCE AND THE ECHR: JUSTICE, POLITICS AND RIGHTS 131-170 (Antoine Buyse and Michael Hamilton, eds., Cambridge University Press 2011).

⁸⁶ *Korbely v. Hungary*. ECHR app. 9174/02, (2008). See also James Sweeney, 'Freedom of Religion and Democratic Transition', in *ibid*, 103-130 at 124, also Michael Hamilton and Antoine Buyse, 'Introduction', *ibid*, 7-8 and *ibid*, 138-141. On biographies, see Catherine Epstein, *The Politics of Biography* 128 DAEDALUS 1-30 (1999).

⁸⁷ To use Sadurski's phrase, *supra* note 25.

⁸⁸ BUYSE and HAMILTON, *supra* note 84 at 141.

⁸⁹ The development could be attributed to the increasing important of international human rights in Latin and South America. See ELIN SKAAR, *JUDICIAL INDEPENDENCE AND HUMAN RIGHTS IN LATIN AMERICA: VIOLATIONS, POLITICS AND PROSECUTION* (Palgrave Macmillan 2011).

as lenient in its approach to retroactivity.⁹⁰ In actual fact, both Poland and Hungary have been treated by commentators as being 'more liberal and reform-minded than other post-communist countries and undoubtedly represented the first group of countries in which round-table talks played a central role'.⁹¹ Aptly noted by Příbáň, both states underwent a 'more gradual and evolutionary transition,'⁹² as compared to the sudden political transformations that characterised the transitions of former Czechoslovakia, East Germany, or at the extreme, Romania. In these latter cases the regime held on to power until the very last minute that was usually accompanied by violence. It is true that Poland had the 1989 Round Table Talks that would influence retrospective justice, specifically with respect to holding former Communist officials criminally liable for past injustices. In other words, one could argue that the pace of reform in this area was piecemeal, to the dismay of many who hoped to seek justice for Communist crimes.⁹³ As noted elsewhere at the Round Table Talks, the Polish judiciary took its cue from the government in adopting a policy of a thick line (*gruba kreska*) approach to itself. The historical narratives concerning Communist rule and post-Communist transitions about who assumed and relinquished power continued to be dictated, to a certain extent, by the former Communist regime.

Retroactivity of a law may not have been expressly provided for in the Polish Constitution at the time, but quickly became one of the fundamental components of the rule of law, as interpreted by the Constitutional Tribunal (*Trybunał Konstytucyjni*).⁹⁴ Brzezinski observes that by 1992 the Tribunal had established and reaffirmed the rule-of-law clause as comprising, *inter alia*, prohibiting retroactive laws.⁹⁵ Moreover, the Tribunal also defined certain areas not protected by the rule-of-law clause, such as rights obtained in an unjust manner and crimes committed during the Stalinist period. Since then, the Tribunal has developed additional procedural and institutional components. These Polish narratives concerning retrospective justice show the ways in which discourses are used for different and opposite purposes. In other words, history affects the discourses where different historic moments influence narratives, or even opt in favour of legislation that addresses specific periods and crimes; in Poland this occurred with respect to Nazi or Stalinist crimes.⁹⁶ The narratives also show the consequences of unresolved grievances.

The next section addresses a Polish case, rarely discussed in the English language, which fits into the transitional justice narrative, in particular the relevance of the *Border Guards* cases and the on-going issues arising from the application of the Radbruch formula.

⁹⁰ FIJALKOWSKI, *supra* note 30, in particular 117-172.

⁹¹ PRIBÁŇ, *supra* note 23, at 143.

⁹² *Ibid.* See also THE ROUND TABLE TALKS OF 1989; THE GENESIS OF HUNGARIAN DEMOCRACY (A. Bozoki ed., CEU Press 2002).

⁹³ See, for example, Stan, *supra* note 23, at 76-101 and Adam Czarnota, Between Nemesis and Justitia: Dealing with the Past as a Constitutional Process, in Czarnota et al., *supra* note 25 at 123-129.

⁹⁴ Judgment of the Polish Constitutional Tribunal (Trybunał Konstytucyjni), K 7/90, pp. 50-51 (22 August 1990).

⁹⁵ MARK BRZEZINSKI, THE STRUGGLE FOR CONSTITUTIONALISM IN POLAND 171 (St Martin's Press, 1998).

⁹⁶ See FIJALKOWSKI, *supra* note 30, at 117-172.

MARTIAL LAW CASE

*'Politics should conform to the law and not law to politics.'*⁹⁷

In December 2007, the Polish Supreme Court was asked to respond to legal questions brought by the disciplinary court that was convened to hear the appeal of the prosecutor from the Chief Commission for the Prosecution of Crimes against the Polish Nation (*Główna Komisja Ścigania Zbrodni przeciwko Narodowi Polskiemu*),⁹⁸ against the refusal to waive judicial immunity of a judge, now retired, so he could be charged with the commission of Communist crimes (in relation to the adjudication of criminal cases under the martial law decree). An expanded seven-judge bench of the Supreme Court considered whether a request to waive judicial immunity could be regarded as 'obviously unfounded' (*oczywiście bezzasadne*). The crux of the legal question, as asserted in the Resolution, is found in the legal position as it was then, namely under the Polish People's Republic (1945-1989). It is a separate issue if those judges interpreting the provisions of the 1952 Constitution regarded their conclusion as obvious or whether they reached it through judicial interpretation.⁹⁹ Significantly, the case considered the retroactivity of the effect of the martial law decree, which was not published in the *Dziennik Ustaw* (Journal of Laws) until several days after it took effect. It is important to note that under Article 4 ICCPR no derogations from Article 15, even under martial law, are allowed. This factor was considered alongside the relevant provisions found in the 1952 Polish Constitution by the Supreme Court.¹⁰⁰

The Supreme Court acknowledged that Poland had several international law obligations arising from the ICCPR, which was ratified by the state in 1977.¹⁰¹ It noted that Articles 4 (emergency situations) and 15 (applicable crimes) were the key constitutional provisions. The Court, relying on research on supremacy of international law, argued that at that time Poland did not have international law obligations (under the ICCPR), as it was not incorporated into the domestic law further to the Council of State (*Rada Państwa*), the only organ that had that competence. In the Court's eyes, the issue of retroactivity did not exist, a factor that

⁹⁷ Jerzy Zajadło, *Ius, lex i Tybunał Konstytucyjny (Ius, lex and the Constitutional Tribunal)*, in *WSPÓLCZESNE PROBLEMY PRAWA (CONTEMPORARY LEGAL PROBLEMS)* 87 (A. Polańska et al., eds., Gdynia Higher School of Administration and Business 2011). The edited volume is dedicated to Prof. Jerzy Młynarczyk.

⁹⁸ The Commission is part of the Institute of National Remembrance (*Instytut Pamięci Narodowej*), and is its criminal investigation service. Further details are available at: <http://ipn.gov.pl/en/about-the-institute/structure/offices/chief-commission-for-the-prosecution-of-crimes-against-the-p> (last accessed 8 March 2013).

⁹⁹ Supreme Court Resolution from 20 December 2007, I KZP 37/07, OSNKW no. 12.2007, item 86.

¹⁰⁰ The Court revisited a question raised in 1992, when hearings were initiated against the country's last Communist leader General Wojciech Jaruzelski (Jaruzelski was Head of State until 1990). Imposing martial law was not a crime, as the Polish Constitution allowed martial law when the security of the state was endangered. The question was whether the state was indeed in danger; thus the charges were based on technicalities. The first charge found that only Parliament could call martial law, not the State Council, as had been done. The second charge found that the decree was not published in the *Dziennik Ustaw* (Journal of Laws) until several days after it took effect.

¹⁰¹ International Covenant on Civil and Political Rights, 1966, available at: <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en> (last accessed 8 January 2013).

was supported by Article 121 of the 1969 Criminal Code and the 1952 Constitution. The Court rejected the argument that judges had an obligation at that time to review the constitutionality of the provision.

The 2007 decision was extensively critiqued; one key commentator in the area, Jerzy Zajadło, criticised the Court for not taking the opportunity to rule that judges had the moral responsibility to maintain fidelity to the law and be accountable for the application of unjust laws.¹⁰² On the surface, it appears that the Resolution does little to restore public trust and security to ensure that laws are not arbitrary and retroactive. On the other hand, it could be argued that the law at the time did not prohibit retroactive application of the law. Importantly, the state was not based on the rule of law as understood in its contemporary context of legal certainty and the non-arbitrary application of the law, transparency, and due process. It should be noted that the Resolution did not form an obstacle in the criminal prosecution of judges who committed crimes against humanity in the application of the martial law decree retroactively.

The case was eventually referred to the Constitutional Tribunal. The ruling was far from unanimous – out of 14 judges, six dissented on the grounds the case was outside the jurisdiction of the Tribunal. The fact that almost half of the judges dissented points to the complexity and far-reaching consequence of the case. The intricacy of the case rests with the issue of judicial immunity becoming a constitutional matter, further to the relevant procedural law, and the manner in which the case was framed as a legal question to the Tribunal. The dissenting judges argued that it was a matter for the courts as a case concerning the application of the law. The judgment is fascinating, not least owing to its political and historical context, but also because it questions the normative basis of judicial decisions. Scholars have maintained that judges adjudicating cases during the martial law period would not have been immune to the consequences the decision would have on the civil liberties and lives of the defendants.¹⁰³ This paper focuses on issues that underpin and are hidden in the background of the case (which is not meant to diminish its importance) that concern law and justice and that links the position of one of its dissenting judges.

Not surprisingly, the context of the case (lifting immunity of judges who broke the maxim of *lex retro non agit*) provoked a contentious ideological and political debate. The Tribunal rendered its judgment in October 2010. For the Tribunal, it was a case concerning: Article 7 (concerning the function of public authorities), Article 10 (concerning the separation of powers), and Article 42(1) (concerning retroactive law)

¹⁰² See Barbara Grabowska, *Bezprawie normatywne (Unjust Norms)*, available at <http://www.prawaczlowieka.edu.pl/index.php?orzeczenie=1a16327c0d874646ac918dada4ce6e12cbe77074-b0> (last accessed 1 February 2013).

¹⁰³ See Andrzej Rzepliński, *Przystosowanie ustroju sądownictwa do potrzeb państwa totalitarnego w Polsce w latach 1944-1956 (Adapting the Administration of Justice to the Needs of the Totalitarian State in Poland in the Period 1944-1956)*, PRZESTĘPSTWA SĘDZIÓW I PROKURATORÓW W. POLSCE LAT 1944 – 1956 9-37 (CRIMES OF JUDGES AND PROSECUTORS IN POLAND FROM 1944-1956 (W. Kulesza & A. Rzepliński, eds., Instytut Pamięci Narodowej, 2000). See also, ANDRZEJ RZEPLIŃSKI, SĄDOWNICTWO W. POLSCE LUDOWEJ: MIĘDZY DYSPOZYCYJNOŚCIĄ A. NIEZAWISŁOŚCIĄ (THE JUDICIARY IN PEOPLE'S POLAND: BETWEEN COMPLIANCE AND INDEPENDENCE (Pokolenie 1989).

of the present 1997 Constitution; Article 7 ECHR¹⁰⁴ and Article 15 ICCPR,¹⁰⁵ where the Tribunal had to determine the conformity of the first sentence of Article 80(2b), of the Act of 27 July 2001 on the Law on the Organisation of Common Courts¹⁰⁶ to the extent to which the reference 'obviously groundless motion for permission to hold a judge criminally liable' includes a motion for permission to hold a judge criminally liable with regard to a judge who, while adjudicating on criminal cases at the time when the Constitution of the People's Republic of Poland of 22 July 1952¹⁰⁷ was in force applied retroactive criminal provisions. In other words, as these are statutory provisions, the question was whether they should be understood in such a way that the obvious groundlessness of a motion for permission to hold a judge criminally liable encompasses issues which require substantial interpretation of the Act to the principle of specificity of legal provisions, which arises from Article 2 (rule of law clause) of the 1997 Constitution. The Tribunal held that Article 80(2b) is inconsistent with Article 2 of the 1997 Constitution and not inconsistent with Article 7, Article 10, and Article 42(1) of the present 1997 Constitution, and with Article 7 ECHR and Article 15 ICCPR. In other words, the Tribunal's decision on the issue makes the challenged provision concerning competence a constitutional matter, when in fact it is an issue that has no normative content. The ruling did not comment on the substance of the Resolution.

One of the dissenting judges, Ewa Łętowska, who was Poland's first Ombudsman (1987-1992), asserted that an erroneous procedural decision should not be corrected by another wrong answer. By extending the Tribunal's competence over a specific procedural issue concerning judges in the common courts, Łętowska saw it as a potential infringement upon the separation of powers (and ultimately, judicial independence as it brought Resolutions into the Tribunal's competence). In her opinion, Łętowska bemoaned the fact that bad law will force the Tribunal to step into matters that are not in its competence, in an effort to fill in the gaps that it itself had created. Presumably, this would imply the Supreme Court was not able to make a bold move away from a positivist application of the law. The Tribunal had the opportunity to make its position clear with respect to the Supreme Court Resolution, and its inability to squarely address two questions: the first related to guilt and the second concerning unjust laws. The issue at hand is much simpler than the question faced by Radbruch.¹⁰⁸ In fact, several of the Tribunal's judges rejected the position of the Supreme Court that applying laws retroactively was a principle that did not exist at the time.¹⁰⁹ As asserted by Grabowska in her commentary in the 2007 case, retroactive laws have their place in the spirit or soul of the law (*duchu prawa*), in the sense that they assume a basic foundation of civil liberties.¹¹⁰ In this narrative Fuller's fidelity of law takes on a poignant resonance in relation to the transparency of the law.

¹⁰⁴ Dz. U. (Journal of Laws), 1993, No. 61, item 284.

¹⁰⁵ Dz. U. (Journal of Laws), 1977, No. 38, item 167.

¹⁰⁶ Dz. U. (Journal of Laws), 2001, No. 98, item 1070, as amended.

¹⁰⁷ Dz. U. No. 33, 1952, item 232, as amended.

¹⁰⁸ Zajadlo, *supra* note 97.

¹⁰⁹ The dissenting judges were Ewa Łętowska, Bohdan Zdziennicki, Stanisław Biernat, Adam Jamroz, Marek Mazurkiewicz, and Mirosław Wyrzykowski.

¹¹⁰ Grabowska, *supra* note 102.

Łętowska takes great pains to distance herself from the majority opinion, stressing that her dissent does not imply support for the resolution rendered by the Supreme Court. Łętowska is the only judge to discuss coming to terms with the past at great length. She hints at the issue becoming politicised. Her dissenting opinion recalls Radbruch, in particular the significance of knowledge and foreseeability within the meta-justice framework. For Łętowska, the way forward is the application of Radbruch's formula as a whole: as an issue of unlawfulness and an issue of the lack of guilt where

this fragment of the formula is less popular in the legal discourse. If I had grounds to believe that revoking [judicial] immunity would bring about diligent, insightful assessment which would be free from any bias or opportunism, with regard to issues concerning immunity, I would opt, in similar situations, for a stance that would be clear-cut: revocation of immunity (due to actual unlawfulness) and the perspective of objective and unbiased adjudication on a specific act (guilt). Neither the Resolution of the Supreme Court, Ref. No. I KZP 37/07, nor the judgment of the Constitutional Tribunal, to which I submit my dissenting opinion, incline me to believe that, in such a case, we would arrive at a balanced and fair effect of Radbruch's formula in its extensiveness.¹¹¹

Some commentators would argue that certain decisions, such as the one rendered by the Supreme Court, reveal an order that remains hidden away within a valid legal framework while its legitimacy is based on an old constitution and an old legal order.¹¹² Retrospective justice is an issue that is intrinsically linked to trust in the state and the continuity of the law in discontinuity with the past. In this vein, political and indeed legal discourses on the subject have indicated that judges should take responsibility for applying unjust laws.¹¹³ Instead, the ruling creates a situation of uncertainty – it is not clear what will happen if a move is made to lift judicial immunity of a judge who had adjudicated under martial law and rendered unjust verdicts.

CONCLUDING REMARKS

The post-Communist legal systems continue to be confronted with unpunished offences of the past being time barred not for the usual reasons that some crimes go unpunished elsewhere, but for the specific reason that those crimes were inspired, mandated and tolerated by the state, as a result of which limitation periods were allowed to expire.¹¹⁴ The temporal aspect of retrospective justice has instigated several legal narratives that concern justice and how to achieve it by lifting it out of the framework of criminal law and its limiting clauses, without damaging the democratic potential of a state and its intention to secure the rule of law. It is an issue that ranks as one of the most constitutionally important and it haunts

¹¹¹ Case concerning Supreme Court Resolution from 20 December 2007, K 10/08, judgment, para. 18 (27 October 2010).

¹¹² Concerning old orders that remain concealed behind valid legal frameworks see discussions in *TOTALITARIAN AND POST-TOTALITARIAN LAW* (Adam Podgórecki and Vittorio Olgiati, eds., Ashgate 1996).

¹¹³ See Grabowska, *supra* note 102.

¹¹⁴ See Sadurski, *supra* note 25.

'legislative bodies, constitutional courts, politicians and the public.'¹¹⁵ As shown, the classic framing of the question was conducted by Radbruch and later taken up by Hart and Fuller in their famous debate from the 1950s. It was in these debates that the role of law reasserted its original social function after experiencing severe damage.¹¹⁶ As this case has shown, another substantive legal question arises from a peculiar situation that concerns judicial immunity and the application of laws retroactively, which, as demonstrated above, goes against the cornerstone of criminal law. The element of time, i.e. non-retroactivity, however, can be overcome, as the temporal feature also exists with respect to the meta-justice narrative that outweighs the arguments for non-retroactivity and permits the application of the Radbruch formula.

As part of the notion of substantive justice are international human rights norms.¹¹⁷ A court then is faced with a justification based on how general principles of justice overrode positive law at the time they were committed or whether it acknowledges that the principles of justice are applied retrospectively by the present legal framework, the latter dependent very much on the context of the time. Clearly the relationship between international law and the domestic law of a state remains a highly complex question, with differing positions. A great degree depends on the rules adopted by the state itself, and these are likely to distinguish between the effect of customary international law and treaties, whether they are self-executing, depending on whether a state is monist or dualist. As the East German example shows, the failure to enact a statute transposing international law into domestic law necessarily reaches the expected conclusion that the norms do not apply. However, as shown in the Polish case, the answer is not entirely straightforward.

Where it is the case that the crimes are not core offences in international law, it is unclear whether international law can override domestic law. The court then might have to reinterpret past law with a present day lens, which results in a situation where the offence is admittedly an offence even with a dictator's lens, or the legal framework of the regime is identified as bad, or in other words, not a rule-of-law state. Unfortunately the past lens is more often than not directed by politics. Quint notes 'the greatest clarity and candor are achieved when it is acknowledged that it is not really possible to go into past legal systems and change the principles of those legal systems for the purposes of achieving a particular result today.'¹¹⁸ Rendering such reinterpretations that would likely not have been allowed under dictatorships should be rejected. The compelling position is one that is taken by Radbruch, in that there are certain values that are more important than the retroactivity principle. This position, as noted by Quint, is the most candid as it focuses on present day legal principles. However, both case studies in this paper support the position that each situation has its own peculiar set of problems and respective histories with which to reckon.¹¹⁹ It is important to note is that the aspect of civil liberties and human rights within the transitional criminal justice narrative on the question of retrospective justice introduces a more permanent character to transitional justice. What Teitel

¹¹⁵ PRIBAN, *supra* note 23, at 150.

¹¹⁶ *Ibid.*

¹¹⁷ Quint, *supra* note 36 at 318-320.

¹¹⁸ Quint, *supra* note 26, at 563.

¹¹⁹ See Künzler, *supra* note 7.

has aptly termed 'transitional justice all the time' takes in an added meaning as we observe the manner in which the transitional justice discourse has shifted from what was perceived as exceptional (a post-dictatorial or post-totalitarian period) to a more normal state of affairs owing to the vulnerability of what is being tested, i.e., key principles and values that are part of the meta-justice narrative.¹²⁰ Teitel observes '[a]s a jurisprudence associated with political flux, transitional justice is related to a higher politicization of the law and to some degree of compromise in rule-of-law standards.'¹²¹ In this vein it is important to note the effect of the power of political officials on discourses and policy in a nascent and evolving political arena. How far the public is allowed into the public debate about legal processes dealing with the past forms part of the evolving sphere of freedom of speech and may shape relevant policy.¹²² While the ECtHR places the historic debates under the protective umbrella of the freedom of speech, emphasising the 'plurality of voices', the national debate might reposition a judgment to suit its reading of the past, as shown in more recent developments, such as in *Kononov*. In the Polish experience, martial law and the history of the Polish judiciary discloses institutional tensions and conflicting legal philosophical positions. It will continue to be debated between competing legal, historical and political narratives.

¹²⁰ Teitel, *supra* note 27.

¹²¹ *Ibid.*, *supra* note 27, at 91.

¹²² The Court recognises that the public's interest must be considered when restricting a debate about the past as an important element of transition. See BUYSE and HAMILTON, *supra* note 82 at 138-141.