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**[verso/odd pages: Retrospective Justice: Post-Communist Germany and Poland]**

**Chapter 1**

**RETROSPECTIVE JUSTICE:   
POST-COMMUNIST GERMANY AND POLAND   
IN COMPARATIVE PERSPECTIVE[[1]](#footnote-1)\***

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*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.[[2]](#footnote-2)*

*Writing the recent history of the Central and Eastern part of Europe is unlike the work of the Western historian, who can turn to published sources, contemporary reports, memoirs by participants and eyewitnesses, whose work is embedded in solid, mostly normalized and consolidated public memory. Usually it is not the historian who is the messenger there, unlike the less fortunate part of the world, where the message is, more often than not, bad news. The recent history of Central and Eastern Europe is the history of bad times.[[3]](#footnote-3)*

This chapter examines the similarities and differences of the legal discourses on the prohibition of retroactive laws within the European human rights framework. It also 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. It begins by setting out key legal definitions in national and regional legal frameworks in order to determine what underpins the prohibition on retroactive laws. An examination of key German, Polish and European jurisprudence reveals that the legal narratives on retrospective justice run parallel and in opposite directions, revealing cracks in consensual histories that bring historical sensibility and issues into sharp relief. Retrospective justice in post-Communist Europe contributes a defined set of problems to the field of transitional justice, beginning with the challenges posed by statutes of limitations and ending with unfinished narratives on select chapters of Communist histories.

**RESEARCH QUESTION**

This chapter examines the similarities and differences of the legal discourses on the prohibition of retroactive laws within the European human rights framework. It also 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 loathsome. The fall of Communism in 1989 evokes a different chronicle, where the nature of the crime justifies a re-assessment of retroactive laws and punishing people – usually former political leaders and other state agents – for acts that undermine human rights. These accounts are inextricably enmeshed with accompanying dominant historical narratives. These narratives involve different agents and ‘relationships of entanglement’ or ‘multiple narratives of history and memory’.[[4]](#footnote-4) In this context retrospective justice is considered an important feature of civil liberties, which, in turn, forms an essential part of the transitional justice narrative, which is concerned with the way in which post-dictatorial or post-conflict societies legally respond to past human rights atrocities. In order to appreciate the meanings of retrospective justice within the transitional criminal justice discourse, in terms of justice and historical narratives, it is important to look at selected case studies, where discourses pick up and develop themes that are peculiar to the specific country’s experience.

If certain events have been haunted by the persistent need to know, on the part of a given society, it also has been understood metonymically. In other words, an event can be read as part of a country’s history, where all citizens form a large family as they are connected to the particular crime or event, as victims or perpetrators or both.[[5]](#footnote-5) Retrospective justice takes on an additional meaning that imbricates with the relevant agents and histories.

Foucault cautions us that memories and histories are always in real or potential conflict with other histories and memories.[[6]](#footnote-6) Discourse helps to draw out contested aspects of memories and histories. In other words, a discourse on law informs politics; politics affect our perceptions of justice and potentially the law. An important dimension of this chapter is to examine 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 raised by a particular groups or agents, rather than present a coherent narrative or reconcile a variety of approaches.

The chapter begins by setting out key legal definitions in national and regional legal contexts in order to determine what underpins 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 masterpiece of the Council of Europe, and has played an important role in the development of human rights’ protection in Europe. The ECHR has come to comprise a regional human rights agenda that, together with the European Court of Human Rights, has engaged with the most fundamental issues of jurisprudence to meet its objective of human rights’ protection. The chapter outlines the context that frames retrospective justice and the importance of permitting the law, i.e. punishment, to work backwards, based on human rights arguments and historical narratives peculiar to Communist histories. The chapter specifically examines the German and Polish experiences, in particular the *Border Guards* cases. It also discusses the lifting of judicial immunity of judges who applied the law retrospectively during the martial law period in Poland. The legal reasoning of these cases and the endorsement of the German courts’ decision by the European Court of Human Rights (ECtHR) best illustrates two aspects relevant to our discussion: (1) the failure of legal positivism in the context of post-Communist Europe and (2) how reference to the German experience by certain countries reveals important questions about natural justice and fidelity of law. The legal narratives on retrospective justice run parallel and in opposite directions, but more importantly they reveal cracks in consensual histories that bring historical sensibility and issues into sharp relief. Retrospective justice in post-Communist Europe contributes a defined set of problems to the field of transitional justice, beginning with the challenges posed by statutes of limitations and ending with unfinished narratives on select chapters of Communist histories.

**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*.[[7]](#footnote-7) In another common law country, the United States, the Constitution forbids the federal government and states from passing *ex post facto* laws (1, ix, 3 and 1, x, 1).

For Europe, this principle of legality is enshrined in Article 7 of the ECHR,[[8]](#footnote-8) 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 comprise a prohibition on 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 European Court of Human Rights in *Achour* v *France*, where “the criminal law must not be extensively construed to an accused’s detriment”.[[9]](#footnote-9)

The terms ‘criminal offence’ and ‘penalty’ in Article 7 have autonomous meanings and are independent from the characterisation under domestic law. Following the *Engel* criteria,[[10]](#footnote-10) concerning a criminal offence, the Court has emphasised 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.[[11]](#footnote-11) Similar conditions apply to what constitutes as a penalty. In *R* *v* *B (RG)*, 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.[[12]](#footnote-12) The Court, as seen in *Welch*, scrutinises measures with a view as to whether they are a penalty.[[13]](#footnote-13) Punishment must not be excessive to the defendant’s detriment; this is further supported in cases such as *Adamson*.[[14]](#footnote-14) 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.[[15]](#footnote-15) The Commission held that the order was not a penalty for the offences committed before the Act’s implementation, but rather one for the later offences. Moreover, 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;[[16]](#footnote-16) this reasoning was followed in *R* v. *Bowker*.[[17]](#footnote-17) 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 the law was changed and the sentence replaced by an indeterminate sentence and he was refused discretionary release.[[18]](#footnote-18) It was held that the indeterminate life sentence constituted 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 do so over a period of time. In contrast to judicial decisions, which apply the law to persons, laws in this sense are different. A law is couched in general terms and 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*.[[19]](#footnote-19) It is also one that follows the thought of key thinkers in legal philosophy, such as 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.[[20]](#footnote-20) 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 Court of Human Rights is likely to find that the certainty requirement has been satisfied. This acceptance of the necessary flexibility in legal rules is found in the matrimonial rape case of *SW* v. *United Kingdom* where 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.[[21]](#footnote-21)

To sum up, the Court is careful to ensure that the law does not work backwards in the area of criminal law, as that would offend its timeless cornerstone. The ECtHR 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 ECtHR’s approach seems to imply a balanced contemplation of what bolsters the measure at hand, whether it is punitive or preventive. The Court recognises that laws must be in tune with the dynamic nature of society in terms of relations, views on punishment for example, and what is concerned a crime.

**1.1 EUROPEAN** **CONTEXT AND GERMAN CASE STUDY**

Textbooks on European human rights law will remind its readers that the ECHR was drafted in the outcome of the Second World War. This was a time 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.[[22]](#footnote-22) Pre-war Europe (1918-1939) was a period of great legal innovation, but also of political uncertainty that would eventually cut any creativity short.[[23]](#footnote-23) The change of political regimes in Central and Eastern Europe following the collapse of Communism in 1989 was also an extreme period, owing to the nature of the changeover to democratic rule. It is not surprising that these political transformations were often accompanied by a strong desire to bring to justice those responsible for the worst excesses of the old regime. This also resonates with the situation following the fall of the Nazi regime in 1945, when the international community developed the ‘Nuremberg principles’, which permitted individuals to be prosecuted for ‘crimes against humanity,’ even if they had not been criminal according to Nazi legislation and practice. These principles, as such, are expressed in the second paragraph of Article 7. Notably in *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 reverse its case law and adopt a wider interpretation of Article 6 of the Nuremberg Statute. Papon’s defence argued that this 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.[[24]](#footnote-24)

Two cases concerning the regulation of the security apparatus of the Berlin Wall are of great relevance to the transitional justice narrative, both concerning East Germany and both regarded as highly contentious rulings nationally and internationally. 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 state economy restructured according to the socialist planned economy.[[25]](#footnote-25) Eventually an intra-German border was created between east and west, some 69 miles long, 23 of which ran through Berlin, to separate the GDR from the Federal Republic of Germany. 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.[[26]](#footnote-26) 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 wider western world about the GDR's formidability.[[27]](#footnote-27) The Wall was patrolled by border guards, usually young in age without vast personal or professional experience, and having undergone intense indoctrination. They were told to stop anyone trying to escape with force. In most cases people would attempt to flee at night. If the guards noticed someone trying to escape warning calls would be made. If the calls and warning shots were ignored, the guards fired 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.[[28]](#footnote-28) There are many heart-breaking stories of individuals and families attempting to escape the GDR.[[29]](#footnote-29) It is worth noting that the GDR boasted one of the most extensive secret police networks in order to control all aspects of public and private lives of its citizens, the hallmark of a totalitarian state.[[30]](#footnote-30)

In 1990, with unification, the border guards and another higher officials involved in the decisions to use force were criminally prosecuted. Once liability was established charges were drafted against higher officials as well, so as not to appear to stop with the guards. In actual fact, 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 who is 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. The answer to the question was to be decided by the courts. The omission is striking in light of 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.[[31]](#footnote-31) It is worthwhile to note that the courts were mainly composed of West German jurists.[[32]](#footnote-32) 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.

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.[[33]](#footnote-33) In fact, when the appeals eventually reached the German Federal Constitutional Court (FCC), the FCC first held that the prohibition of retroactivity, found in Article 103 of West German Constitution, was absolute. The answer lay in the application of the certain formula in order to identify the gross injustice[[34]](#footnote-34) of the GDR regime that was accompanied by the abuse of force and the restriction of movement at the intra-German border.

To be sure, the convictions of the individuals, both border guards and high officials, may have satisfied some observers. It should be noted that between October 1990 and February 1997 some 78 persons were sentenced and 45 acquitted.[[35]](#footnote-35) But the cases raised some very serious problems under German constitutional law (1949 Basic Law) and under the principle prohibiting retroactive punishment. As noted above, the aim of this principle is 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”.[[36]](#footnote-36) 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, 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.[[37]](#footnote-37) One key law, the 1982 Border Law, was enacted to provide statutory basis for the Wall and made it legal for the border guard to employ deadly force at the border to prevent a felony. Under the GDR criminal code many attempts to escape over the wall were felonies. And, as noted above, soldiers were hardly ever prosecuted or disciplined for using deadly force at the Wall. Instead, they were rewarded.[[38]](#footnote-38)

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 found 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”. The same principle was 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 came to demonstrate the clash between two principles: the principle of justice that holds that reprehensible acts should be subjected to criminal punishment and that no act should go unpunished without a legal prohibition that was in effect at the time the act was committed.[[39]](#footnote-39)

In his seminal examination of the cases, Quint identifies the common themes that bound these judgments rendered by the German Federal Supreme Court 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. In fact the courts adopted a blend of both approached 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 Supreme Court (the *Bundesgerichtshof*, or BGHSt) argued that a proper interpretation of GDR law could in fact criminalise the shootings at the Wall.[[40]](#footnote-40) 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.[[41]](#footnote-41)

For some critics, although the GDR Constitution contained numerous basic rights this particular interpretation ‘embodied a radical revision of GDR legal history.’[[42]](#footnote-42) The Communist Party would never have allowed such an interpretation.[[43]](#footnote-43) 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.[[44]](#footnote-44) The Court's interpretation saw the GDR Constitution as a western (and West German) document; its ruling was upheld by the FCC, which refused to review the findings of the lower courts.[[45]](#footnote-45) 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 about justice and the criminal liability of Nazi officials.[[46]](#footnote-46) 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 Communist officials.[[47]](#footnote-47) 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 a Law Professor 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.[[48]](#footnote-48)

When revisiting and reflecting on the aspects of the German Nazi regime, Radbruch was also engaging with critical legal and jurisprudential questions. Radbruch argued that the principle of non-retroactivity was one of many. He 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 the time (1933-1945) reached this unbearable limit so to justify regarding it as invalid or incorrect law.[[49]](#footnote-49) 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 Nazi, 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.[[50]](#footnote-50) 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”.[[51]](#footnote-51) In other words, the misapplication is a question of what is unjust (*unrichtiges Recht*) and resulting in unequal justice.[[52]](#footnote-52)

The debates arising from the Radbruch formula were also deliberated famously in the Hart-Fuller correspondence of the 1950s, which continues to resonate to present day.[[53]](#footnote-53) One of the key aspects of their debate went to the heart of the 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 identified the general ‘ingredients’ that comprise the legal system, Fuller views the law as possessing an internal morality that determines its order.[[54]](#footnote-54) 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. The ‘legal imagination’ that is required is in effect the application of law in an effort to reclaim the “original social function of law”.[[55]](#footnote-55) 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”.[[56]](#footnote-56)

The formula also raises problems, 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,[[57]](#footnote-57) others contend that the GDR offences reached the threshold that justifies retroactive prosecution and punishment under the Radbruch formula.[[58]](#footnote-58) 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.[[59]](#footnote-59) However, the German court 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.[[60]](#footnote-60) In the case concerning the accountability of higher officials, the FCC 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 leader Eric Honecker, was not going to crystallise.[[61]](#footnote-61) 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 European Court of Human Rights, 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.[[62]](#footnote-62) 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.[[63]](#footnote-63)

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 such as the ‘Shootings at the Berlin Wall Case’ is the question of whether the criminal law applicable to GDR at the times that the shootings took place and whether its application to the crime is more or less severe than its Federal German Republic counterpart.[[64]](#footnote-64) 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.[[65]](#footnote-65) The GDR ratified the ICCPR in 1974, which entered into force in 1976, but failed to pass the transforming law.[[66]](#footnote-66) 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 between the 1960s until the fall of the Berlin Wall. 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 *Streletz* 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).[[67]](#footnote-67)

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’.[[68]](#footnote-68) 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”.[[69]](#footnote-69) On the issues of foreseeability and knowledge, the European Court of Human Rights’ 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 from East Berlin and who posed no threat to life and limb, so clearly breached any principle of proportionality that it was foreseeable that it violated the legal prohibition on killing.[[70]](#footnote-70)

In *Streletz* there were three separate concurring opinions by Justices Loucaides, Zupančič, and Levits. In his opinion, Justice Loucaides held that “the actions for which the applicants were convicted did constitute at the material time not only criminal offences under the domestic German law but also under international law”.[[71]](#footnote-71) He did not see the need for the Court to expand on domestic law provisions when it was clear that the actions constituted violations in international law. Drawing inspiration from the works of key legal philosophers, such as von Feuerbach, von Liszt and Beccaria, Justice Zupančič, contended that “[i]t is important to understand that this judgment does not rely on Article 7(2) or on the concept of an “international offence” in Article 7(1)”.[[72]](#footnote-72) For Justice Levits no other solution, than the decision that was rendered by the ECtHR, was possible. The justice cautioned, however, that the application of the law must be done in a manner that does not damage the core of the democratic state.[[73]](#footnote-73) The concurring opinions pointed to the peculiar nature of the East German regime that would serve as a basis to hold certain Communist Party officials accountable, i.e. as the architects of the security apparatus framework of the Berlin Wall that led to so many deaths. Some of these issues, however, resulted in a different position on the part of several of the same justices who wrote partly dissenting opinions on the *K.-H.W*. case. For example, Justice Loucaides, in his concurring opinion, held that the case did not warrant a different approach from the ECtHR’s position in *Streletz*. Moreover, Justice Loucaides referred to the case of the International Criminal Tribunal of the former Yugoslavia, namely to justify the way in which a single attack can qualify as a crime against humanity.[[74]](#footnote-74) He used this to show how this view was already expressed in customary international law in the late 1960s and early 1970s, which culminated in the adoption of key international legal instruments, such as UN Resolution 3074 (XXVIII), which concerned the state’s obligation to conduct a thorough investigation of war crimes and crimes against humanity as a key component of the protection of human rights. The position would later result in the creation of other resolution-based initiatives motivated by the international community’s commitment to bring perpetrators of war crimes and crimes against humanity to justice.[[75]](#footnote-75)

In *K-H.W.* there were two dissenting opinions. It is worth considering these positions, in particular in light of Judge Bratza’s uncertainty about foreseeability, referred to above. Justice Barreto also expressed doubt. He questioned whether the criteria of foreseeability under Article 7(1) was satisfied, arguing

in my opinion, to take the view that the applicant, who was at the time a young soldier of 20, should have foreseen that his conduct could be held to constitute intentional homicide in the circumstances of the present case is to go beyond the conditions which, according to settled case-law, govern the interpretation of Article 7 of the Convention; the foreseeability required of the law in issue must be assessed by the yardstick of a normal person at the same time and in the same place as the applicant.

Justice Barreto could accept that the applicant firmly believed that his actions were justified. He also considered one of the more contentious views adopted by the German courts, namely that the actions constituted a humans rights violation. He reflects that

it should not be forgotten that what is important is the question whether, at the time when it was committed, the offence was, according to the GDR’s Criminal Code, a crime against “human rights”…In that connection, although the gradual develoment of the concept of “crimes against human rights” since 1972 cannot be denied, even in a country like the GDR, I still find it inconceivable that a plausible interpretation of that concept as it stood at the time of the offence could include the applicant’s action. I also find it difficult to accept that the interpretation of the concept had developed sufficiently for it to be possible to conclude, notably with the assistance of judicial interpretation, that at least by the month of February 1987, when the limitation period expired, the applicant’s action constituted a “crime against human rights”. According to the dominant ideology at the time in the GDR, and to the world view and outlook on life which prevailed there, the applicant’s action, though regrettable, as I must reiterate, was regarded not as a crime but as a praiseworthy deed.[[76]](#footnote-76)

After going on to critique the manner in which the period statutes of limitations was extended, which, in his view, violates Article 7, Justice Barreto concludes “the applicant, who was then a young man without maturity or independence, and who had been indoctrinated in accordance with the dominant ideology, was rather the victim of a regime”.[[77]](#footnote-77)

A partly dissenting opinion was also issued by Justice Pellonpää, who was joined by Justice Zupančič. Both compared the *K.-H.-W*. case to *Streletz* and found differences along the lines of those responsible for the system (Communist Party officials) and the victims (border guards). They too found that the criteria of foreseeability could not have been fulfilled, “unlike the applicants in *Streletz, Kessler and Krenz*, the present applicant cannot be held responsible for the “contradiction between the principles laid down in the GDR’s Constitution and its legislation ... and the repressive practice” (see paragraph 63 of the judgment)”.[[78]](#footnote-78) Furthermore, the justices were not convinced by arguments of individual criminal responsibility owing to the uniqueness of the East German system. Also, they found inconsistencies in German court practice.

I am no more persuaded that the applicant’s individual criminal responsibility under international law could be based on other sources, such as comparative considerations. Although the GDR border-control system was in many respects unique, the use of deadly force has been tolerated – to varying degrees – in democratic societies as well […] Nor do I find convincing arguments for the conclusion (see paragraph 105) that the right to life as guaranteed in general human-rights instruments created, as of 1972, individual criminal responsibility for the kind of act committed by the applicant.[[79]](#footnote-79)

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). Radbruch himself recognised the dilemma that a soldier faces, but his view is uncompromising.

‘An 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.[[80]](#footnote-80)

The cases also reveal the relevance of the period of statute of limitations in the German narrative; whether the actions were illegal at the time of commission continues to be a contentious issue. 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.

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’.[[81]](#footnote-81) 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.[[82]](#footnote-82) 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.[[83]](#footnote-83) The Court also had to consider how statutory limitations should be treated under Article 7. The Court held that Article 7 does not catch the gradual clarification of the criminal law through judicial interpretation, as long as it is consistent with the essence of the office and is reasonably foreseeable. As the applicant was a commanding military officer, it should have been foreseeable that his actions would constitute war crimes 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.[[84]](#footnote-84)

Sometimes, it appears as if a court oversteps its boundary, which, in the eyes of some, becomes the ‘dispenser of transitional justice’.[[85]](#footnote-85)

The next section discusses Polish developments, and shows well the complexities of the problem at hand. Not only are cases such as the Border Guards distinct to Germany, there are specific moral and legal dilemmas 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.

**1.2 POLISH CASE STUDY:THE MARTIAL LAW CASE**

*Politics should conform to the law and not law to politics.[[86]](#footnote-86)*

The collapse of Communism in 1989 brought with it a call for the law to work backwards that indicated the desire of some states and their respective populace to address the demand for retributive justice.[[87]](#footnote-87) 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 or consider 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 as lenient in its approach to retroactivity.[[88]](#footnote-88) 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’.[[89]](#footnote-89) Aptly noted by Přibáň, both states underwent a “more gradual and evolutionary transition”,[[90]](#footnote-90) 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. 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. As noted elsewhere in this volume (see Elbasani and Lipinski and Fijalkowski, in this volume), 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.

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*).[[91]](#footnote-91) Brzezinski observes that by 1992 the Tribunal had established and reaffirmed the rule-of-law clause as comprising, *inter alia*, prohibiting retroactive laws.[[92]](#footnote-92) 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. In sum, 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, such as Nazi or Stalinist (see chapter 10 for a discussion about Lithuanian developments). The narratives also show the consequences of unresolved grievances. At this juncture it is worthwhile to consider one Polish case that fits into the transitional justice narrative, in particular the relevance of the *Border Guards* cases and the on-going issues arising from the Radbruch formula.

In December 2007, the Polish Supreme Court heard a case concerning a Supreme Court Resolution that effectively excluded criminal and disciplinary liability of judges who rendered decisions on the basis of the martial law decree. The Resolution was the result of an initiative brought by the Chief Commission for the Prosecution of Crimes against the Polish Nation (*Głowna Komisja Ścigania Zbrodni przeciwko Narodowi Polskiemu*) at the Institute of National Remembrance (*Instytut Pamięci* Narodowej) to bring criminal charges against Supreme Court judges, now retired, for the alleged commission of Communist crimes in the application of the martial law decree. Significantly, the case concerned the retroactivity of the effect of the martial law decree, which was not published in the *Dziennik Ustaw* (Polish Official Gazette) until several days after it took effect. It is important to note that under Article 4 of the ICCPR no derogations from Article 15, even under martial law, are allowed. This factor, and the relevant provisions found in the 1952 Polish Constitution, was considered by the Supreme Court.[[93]](#footnote-93)

The Supreme 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* *Panstwa*), the only organ that had that competence. In the Court’s eyes, the issue of retroactivity did not exist, supported by the 1969 Criminal Code (Article 121) 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,reprimanded 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. [[94]](#footnote-94) The Resolution does little to restore public trust and security to ensure that laws are not arbitrary and retroactive. 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. At the time of writing there have been no such prosecutions noted.

The case was eventually referred to the Constitutional Tribunal. The ruling was far from unanimous – out of 14 judges, six dissented. 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 judgment is fascinating, owing to the 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 (see Fijalkowski in this volume).

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, Article 10, and Article 42(1) of the present 1997 Constitution, and to Article 7 ECHR (Dz. U. of 1993, No. 61, item 284) and Article 15 ICCPR (Dz. U. of 1977, No. 38, item 167). The Tribunal had to determine the conformity of Article 80(2b), first sentence, of the Act of 27 July 2001 on the Law on the Organisation of Common Courts (Journal of Laws - Dz. U. No. 98, item 1070, as amended) to the extent to which the term ‘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 1952 was in force (Dz. U. No. 33, item 232, as amended) applied retroactive criminal provisions. 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 to Article 7 ECHR (Dz. U. of 1993, No. 61, item 284) and Article 15 ICCPR (Dz. U. of 1977, No. 38, item 167). 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 Łetowska, who was Poland's first Ombudsman (1987-1992), argued that an erroneous procedural decision should not be corrected by another wrong answer. The Tribunal’s ruling meant that its competence over a specific procedural issue concerning judges in the common courts was extended. Łetowska saw this as a potential infringement upon the separation of powers. Judicial independence was potentially jeopardised as Supreme Court Resolutions were brought under the Tribunal’s competence. In her opinion, Łetowska bemoaned the fact that a 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 concerning guilt and the second relating to unjust laws. However, the issue at hand is much simpler than the question faced by Radbruch. In fact, most 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. [[95]](#footnote-95) Łetowska is the only judge to discuss coming to terms with the past at great length. She hints at the issue becoming politicised. She calls upon using Radbruch and takes great pains to distance herself from the majority opinion and stressing that her dissent does not imply support for the decision rendered by the Supreme Court. For Łetowska, the way forward is application of Radbruch's formula in 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.[[96]](#footnote-96)

Some commentators argue that decisions such as the one rendered by the Supreme Court reveal an old order that remains hidden away within a valid legal framework while its legitimacy is based on an old constitution and an old legal order.[[97]](#footnote-97) Nowhere are the issues more contentious than in cases dealing with retroactivity. In this vein, and as raised in this volume (see the chapters by Černič and Fijalkowski, respectively), political and indeed legal discourses on the subject have indicated that judges should take responsibility of applying unjust laws. Instead, the Polish 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. This is due to the usual reasons that some crimes go unpunished in any society, but for the specific reason that those crimes were inspired, mandated and tolerated by the state, and limitation periods were allowed to expire in order to grant impunity.[[98]](#footnote-98) It is an issue that ranks as one of the most constitutionally important and it haunts “legislative bodies, constitutional courts, politicians and the public”.[[99]](#footnote-99) 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.[[100]](#footnote-100) As the Polish 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.

As part of the notion of substantive justice are international human rights norms.[[101]](#footnote-101) A court then is either faced with a justification based on how general principles of justice overrode positive law at the time the acts were committed, or acknowledging that the principles of justice are applied retrospectively by the present legal framework. 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 on whether a state is monist or dualist. As the East German example shows, the failure to enact a statute transforming international law into domestic law does not necessarily reach the expected conclusion that the norms do not apply. However, as shown in the Polish case, the answer is not entirely straightforward.

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 system for the purposes of achieving a particular result today”.[[102]](#footnote-102) According such reinterpretations that would likely not have been allowed under dictatorships should be rejected. The compelling position is one that is taken by Radbruch: 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.

In this vein it is important to note the power that political officials in a nascent and evolving political arena possess. How far the public is allowed into the public debate about legal processes dealing with the past forms part of the developing sphere of freedom of speech and may shape relevant policy.[[103]](#footnote-103) While the Court 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.*

1. \* This chapter has been adapted from ‘Retroactive Laws and Notions of Retrospective Justice: key aspects of the German and Polish experiences’, *Frontiers of Legal Research*, vol. 1, 2013, pp. 1-24. I am grateful to Sigrun Larsen for her invaluable comments. [↑](#footnote-ref-1)
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3. Rev Istvan, *Retroactive Justice,* Stanford, CA, USA, Stanford University Press, 2005, p. 3. [↑](#footnote-ref-3)
4. Anderson Steve F., *Technologies of History: Visual Media and the Eccentricity of the Past,* Hanover, NH, USA, Dartmouth College Press, 2011, p. 3. [↑](#footnote-ref-4)
5. Etkind Alexander et al., *Remembering Katyn*, London, Polity, 2012, pp. 8–9. [↑](#footnote-ref-5)
6. Foucault Michel, *The Archaeology of Knowledge*, London, Tavistock, 1969. [↑](#footnote-ref-6)
7. [1974] 59 Cr App Rep 149, 151 and 152. [↑](#footnote-ref-7)
8. See <http://human-rights-convention.org/the-texts/> (last accessed 10 April 2014). Article 15 of the International Covenant on Civil and Political Rights contains similar provisions. See International Covenant on Civil and Political Rights available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (last accessed 10 April 2014). [↑](#footnote-ref-8)
9. Application no. 67335/01, [2007] 45 EHRR 9 (29 March 2006), para. 41. [↑](#footnote-ref-9)
10. *Engel & Others* v. *The Netherlands*, application nos. 5100/71, 5101/71, 5102/71, 5354/72, and 5370/72), 8 June 1976, Series A no. 22 [1979–1980] 1 EHRR 647 (8 June 1976). [↑](#footnote-ref-10)
11. See *Lawless v* *United Kingdom (No. 3)*, application no. 33257 [1979–1980] 1 EHRR 15 (1 July 1961). [↑](#footnote-ref-11)
12. [2010] 1 Cr App R 19. [↑](#footnote-ref-12)
13. *Welch* v. *United Kingdom*, application no. 17440/90,[1995] ECHR 4 (9 February 1993). [↑](#footnote-ref-13)
14. *Adamson* v. *United Kingdom*, application no. 42293/98, [1999] ECHR 192 (26 January 1999). [↑](#footnote-ref-14)
15. [1998] EHRLR 90. [↑](#footnote-ref-15)
16. [2004] 1 WLR 2278. [↑](#footnote-ref-16)
17. [2007] EWCA Crim 1608. [↑](#footnote-ref-17)
18. Application no. 2196/04, [2008] ECHR 143(12 February 2008). [↑](#footnote-ref-18)
19. *Tyrer* v. *United Kingdom*, 5856/72[1978] ECHR 2 (25 April 1978). [↑](#footnote-ref-19)
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21. [1996] 21 EHRR 363, paras. 36/34. [↑](#footnote-ref-21)
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23. Fijalkowski Agata, *From Old Times to New Europe*, Aldershot, Ashgate, 2010. [↑](#footnote-ref-23)
24. Application no. 54210/00, (15 November 2001). See also *Konovov v* *Latvia*, application nos. 36376/04, (24 July 2008). [↑](#footnote-ref-24)
25. *Questions on German History: ideas, forces, decisions from 1800 to the present*, Bonn: Bundestag Publications' Section, 1992. [↑](#footnote-ref-25)
26. See Rosenberg Tina, *The Haunted Land: Facing Europe's Ghosts After Communism,* New York: Vintage Books, 1996. [↑](#footnote-ref-26)
27. *Ibidem*. [↑](#footnote-ref-27)
28. See Quint Peter E., 'Judging the Past: The Prosecution of East German Border Guards and the GDR Chain of Command', *The Review of Politics*, vol. 61/1999, pp. 303–329. [↑](#footnote-ref-28)
29. *Ibidem*. See also Quint Peter E., *The Imperfect Union: Constitutional Structures of German Unification,* Princeton: Princeton University Press, 1997. Concerning West German constitutional law and doctrine see Kommers david p., *The Constitutional Jurisprudence of the Federal Republic of Germany*. Durham, NC, Duke University Press, 1989. [↑](#footnote-ref-29)
30. See Funder Anna, *Stasiland*, London: Granta, 2003 and *The* *Lives* *of* *Others* (directed by Florian Henckel von Donnersmarck, 2006). [↑](#footnote-ref-30)
31. Quint Peter E., ‘Judging the Past’, *loc. cit*. [↑](#footnote-ref-31)
32. *Ibidem*, p. 310. [↑](#footnote-ref-32)
33. *Ibidem*. [↑](#footnote-ref-33)
34. See Künzler Adam, 'Judicial Legitimacy and the Role of Courts: Explaining the Transitional Context of the German Border Guard Cases', *Oxford Journal of Legal Studies,* vol. 32/2012, pp. 1–33. [↑](#footnote-ref-34)
35. Rudolf Geiger, ‘The *German Border Guards Cases* and International Human Rights’, *European Journal of International Law*, vol. 9/1998, pp. 540–549. [↑](#footnote-ref-35)
36. Quint Peter E., *loc. cit.*, ‘Judging the Past’, p. 309. [↑](#footnote-ref-36)
37. *Ibidem*. See Jakobs Günther, ‘Vergangenheitsbewältigung durch Strafrecht? Zur Leitungsfähigkeit des Strafrechts nach eimen politischen Umbruch,’, in Isensee Josef, ( ed.), *Vergangenheitsbewältigung durch Recht*, Berlin, Duncker and Humboldt, 1992, pp. 37-64; Laskowski Silke, ‘Unrecht – Strafrecht – Gerechtigkeit: Die Probleme des Rechtsstaats mit dem DDR-Unrecht’, *Juristische Arbeitsblätter*, vol. 26/1994, pp. 151-166; and Dreier Horst, ‘Gustav Radbruch und die Mauerschützen’, *Juristen Zeitung*, vol. 52/1997, pp. 421-434. [↑](#footnote-ref-37)
38. *Ibidem*. [↑](#footnote-ref-38)
39. *Ibidem*, p. 310. [↑](#footnote-ref-39)
40. See ‘Shootings at the Berlin Wall Case’, BGHst Band 39 S.1. The judgment can be found with an English translation along with the original German case transcript in Youngs Raymond, *Sourcebook on German Law*, London, Cavendish, 2002 , pp. 620-681. [↑](#footnote-ref-40)
41. *Ibidem*. [↑](#footnote-ref-41)
42. *Ibidem*, p. 312 and Künzler Adam, *loc. cit*. [↑](#footnote-ref-42)
43. *Ibidem*. [↑](#footnote-ref-43)
44. Künzler Adam, *loc. cit*. [↑](#footnote-ref-44)
45. Quint Peter E., *loc. cit.*, ‘Judging the Past’. [↑](#footnote-ref-45)
46. Quint Peter E., *loc. cit.*, ‘Judging the Past’ and Paulson Stanley L., ‘Lon L. Fuller, Gustav Radbruch and the “Positivist Theses”, *Law and Philosophy*, vol. 13/1994, pp. 313-359. [↑](#footnote-ref-46)
47. See Sadurski Wojciech, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*, Dordrecht, Springer, 2005. [↑](#footnote-ref-47)
48. Quint Peter E., *loc. cit.*, ‘Judging the Past’and by the same author, ‘The Border Guards Trials and the East German Past - Seven Arguments’, *American Journal of Comparative Law*, vol. 48/2000, pp. 541-572. See also Paulson Stanley L., *loc. cit*. [↑](#footnote-ref-48)
49. See, for example, Caldwell P.C., *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory and Practice of Weimar Constitutionalism*, Durham, NC, Duke University Press, 1997; Jacobsen A. and Schlinck B. ( eds.), *Weimar: A Jurisprudence of Crisis*, trans. B Cooper., Berkeley, CA, University of California Press, 2000, in particular pp. 1-39, 41-65; and Nicholls, .J., *Weimar and the Rise of Hitler*, 3rd edn., Houndmills, Macmillan, 1991. [↑](#footnote-ref-49)
50. Quint Peter E., *loc. cit.*, ‘Judging the Past’ and ‘The Border Guards Trials’. [↑](#footnote-ref-50)
51. See Alexy Robert, ‘In Defence of Radbruch’s Formula’, in Dyzenhaus david (ed.), *Recrafting the Rule of Law: The Limits of Legal* Order, Oxford, Hart, 1999, p. 16. [↑](#footnote-ref-51)
52. Přibáň Jiří, *Legal Symbolism: On Law, Time and European Identity*, Aldershot: Ashgate, 2007, p. 151. [↑](#footnote-ref-52)
53. Hart Herbert L.A, “Positivism and the Separation of Law and Morals”, *Harvard Law Review*, vol. 71/ n. 4 / 1958, pp. 593-629; Fuller Lon L., “Positivism and Fidelity to Law – A Replay to Professor Hart”, *Harvard Law Review*, vol. 71/ n. 4 / 1958, pp. 630 – 672. See also Fuller Lon, *The Morality of Law*, Yale University Press, 1969; Hart Herbert L.A., *The Concept of Law*, Oxford, Oxford University Press, 1997. [↑](#footnote-ref-53)
54. *Ibidem*. [↑](#footnote-ref-54)
55. Přibáň Jiří, *op. cit*., p. 151. [↑](#footnote-ref-55)
56. *Ibidem..*, p. 152. [↑](#footnote-ref-56)
57. Quint Peter E., *loc. cit.,* ‘Judging the Past’. [↑](#footnote-ref-57)
58. *Ibidem.* [↑](#footnote-ref-58)
59. *Ibidem*. [↑](#footnote-ref-59)
60. See ‘Shootings at the Berlin Wall Case’, BGHst Band 39 S.1. The judgment can be found with an English translation along with the original German case transcript in Youngs Raymond, *Sourcebook on German Law*, London, Cavendish, 2002 , and Quint Peter E., *loc. cit.*, ‘Judging the Past’and *idem*, ‘The Border Guards Trials’. [↑](#footnote-ref-60)
61. See Rosenberg Tina, *op. cit*. [↑](#footnote-ref-61)
62. Application nos. 34044/96; 44801/98, [2001] ECHR 230 (22 March 2001). [↑](#footnote-ref-62)
63. Application no. 37201/97, [2001] ECHR 229 (22 March 2001). [↑](#footnote-ref-63)
64. See ‘Shootings at the Berlin Wall Case’, BGHst Band 39 S.1. The judgment can be found with an English translation along with the original German case transcript in Youngs Raymond, *Sourcebook on German Law*, London, Cavendish, 2002, p. 621. [↑](#footnote-ref-64)
65. Ratification was another point of contention. It was argued that the ICCPR was not law, as it was never ratified. [↑](#footnote-ref-65)
66. See ‘Shootings at the Berlin Wall Case’, BGHst Band 39 S.1. The judgment can be found with an English translation along with the original German case transcript in Youngs Raymond, *Sourcebook on German Law*, London, Cavendish, 2002, p. 649. [↑](#footnote-ref-66)
67. [2001] ECHR 230. [↑](#footnote-ref-67)
68. [2001] ECHR 229. See also ‘Shootings at the Berlin Wall Case’, BGHst Band 39 S.1. The judgment can be found with an English translation along with the original German case transcript in Youngs Raymond, *Sourcebook on German Law*, London, Cavendish, 2002, p. 625. [↑](#footnote-ref-68)
69. Para. 75. [↑](#footnote-ref-69)
70. [2001] ECHR 229, concurring opinion Bratza. [↑](#footnote-ref-70)
71. [2001] ECHR 230, concurring opinion Loucaides. [↑](#footnote-ref-71)
72. *Ibidem*. [↑](#footnote-ref-72)
73. *Ibidem*, concurring opinion Levits. [↑](#footnote-ref-73)
74. *Ibidem*, concurring opinion Loucaides. [↑](#footnote-ref-74)
75. Shelton Dinah, *Regional Protection of Human Rights, Vol. 1*, Oxford, Oxford University Press, p. 456. [↑](#footnote-ref-75)
76. [2001] ECHR 229, para. 4. [↑](#footnote-ref-76)
77. *Ibidem*, para. 6 [↑](#footnote-ref-77)
78. *Ibidem*. [↑](#footnote-ref-78)
79. *Ibidem*. The ECtHR referred to a 1988 decision (BGHSt 35, 379) rendered by the German Federal Court of Justice , which acquitted a customs officer who had fired in a life-threatening manner at a person on a motorcycle trying to escape controls at the German-Dutch border, on the ground that he was objectively entitled to suspect that the persons fleeing were serious drug offenders or had a comparable reason for fleeing. [↑](#footnote-ref-79)
80. Radbruch Gustav, ‘Five Minutes of Legal Philosophy (1945)’, trans. Litschewski Bonnie and Paulson Stanley L., *Oxford Journal of Legal Studies*, vol. 1/2006, pp. 13-15, at p. 13 [↑](#footnote-ref-80)
81. *Ibidem*. See Antrill Simon, ‘Nulla Poena Sine Lege in Comparative Perspective', *Public Law*, 2005, pp. 107-131. [↑](#footnote-ref-81)
82. *Kononov* .*Latvia*, application no. 36376/04, [2008] ECHR 695 (24 July 2008). Joint dissenting opinion of judges Fura-Sandstrőm, Davíd Thór Bjőrgvinsson and Ziemele, para. 3. Note Grand Chamber decision [2010] ECHR 667 (27 January 2011) that reversed the Chamber’s ruling. Also *Korberly* v. *Hungary*, application no. 9174/02, [2007] ECHR 848 (19 September 2008) and *Jorgic* v. *Germany*, application no. 74613/01 [2007 ] ECHR 583 (12 July 2007). [↑](#footnote-ref-82)
83. [2010] ECHR 667 (27 January 2011) that reversed the Chamber’s ruling. [↑](#footnote-ref-83)
84. Buyse Antoine and Hamilton Michael (eds.), *Transitional Jurisprudence and the ECHR: Justice, Politics and Rights,* Cambridge,Cambridge University Press, 2011, pp. 131-170. [↑](#footnote-ref-84)
85. *Korbely* v. *Hungary*. See also *Ibidem.* [↑](#footnote-ref-85)
86. Zajadło Jerzy, ‘*Ius, lex* i Tybunał Konstytucyjny’ (*Ius*, *lex* and the Constitutional Tribunal’, in *Współczesne problemy prawa* (Contemporary Legal Problems), collection dedicated to Prof. Jerzy Młynarczyk, A. Polańska et al.,( eds.), Gdynia, Higher School of Administration and Business, 2011, p. 87 [↑](#footnote-ref-86)
87. The development could be attributed to the increasing important of international human rights in Latin and South America. See Skaar Elin, *Judicial Independence and Human Rights in Latin American: Violations, Politics, and Prosecution*, New York, Palgrave Macmillan, 2011. [↑](#footnote-ref-87)
88. Fijalkowski Agata, *op.cit*. [↑](#footnote-ref-88)
89. Přibáň Jiří, *op. cit*. 143. [↑](#footnote-ref-89)
90. *Ibidem.* See also Bozóki, András (ed.), *The Round Table Talks of 1989: the Genesis of Hungarian Democracy* (Budapest: CEU Press, 2002). [↑](#footnote-ref-90)
91. Judgment from 22 August 1990, K 7/90, pp. 50–51. [↑](#footnote-ref-91)
92. Brzezinski Mark, *The Struggle for Constitutionalism in Poland*, (New York,: St Martin’s Press, 1998, p. 171. [↑](#footnote-ref-92)
93. The Court revisited a question raised in 1992, when hearings were initiated against Jaruzelski. 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 (Polish Official Gazette) until several days after it took effect*. [↑](#footnote-ref-93)
94. See Grabowska Barbara, 'Bezprawie normatywne' (Unjust Norms), at prawczlowieka.edu.pl (last accessed 8 January 2013). [↑](#footnote-ref-94)
95. The dissenting judges were Ewa Łetowska, Bohdan Zdziennicki, Stanis**ła**w Biernat, Adam Jamroz, Marek Mazurkiewicz, and Mirosław Wyrzykowski. [↑](#footnote-ref-95)
96. K 10/08, judgment 27 October 2010, para. 18. [↑](#footnote-ref-96)
97. Podgorecki Adam and Olgiati Vittorio, (eds.), *Totalitarian and Post-Totalitarian* Law, Dartmouth, Ashgate, 1996. [↑](#footnote-ref-97)
98. See Sadurski Wojciech *op. cit*. [↑](#footnote-ref-98)
99. Přibáň *op.cit.*, at p. 150. [↑](#footnote-ref-99)
100. *Ibidem.* [↑](#footnote-ref-100)
101. Quint Peter E., ‘Judging the Past,’ *loc. cit.* [↑](#footnote-ref-101)
102. *Ibidem.*, ‘The Border Guards Trials’, *loc. cit.*, at p. 563. [↑](#footnote-ref-102)
103. The Court has recognised that the public’s interest must be considered when the restricting a debate about the past as an important element of transition. See Buyse and Hamilton, *op. cit.* [↑](#footnote-ref-103)