

**TRANSITIONAL JUSTICE:
THE GERMAN EXPERIENCE AFTER 1989**

Stefanie Ricarda Roos / Rule of Law Program
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Lecture No. 4

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INTRODUCTION

One of the most difficult questions to be answered by a country in transition from a totalitarian/authoritarian regime to a democracy based on the rule of the law is how the society shall deal with the atrocities and injustices of the former regime. In this context the question arises, in particular, whether the abuse of power by the previous government and its agents shall be criminally prosecuted. Twenty years after the collapse of the communist/socialist regimes in Central and Eastern Europe, there still is no clear-cut answer to this question of transitional justice – and, most likely, there will never be. After reunification in 1989, Germany's criminal justice response to state crimes in what had been Eastern Germany (in particular the many deadly shootings at the German-German boarder) presents a vivid case study thereof: The reactions to that response have been highly controversial, with criticism supplied by representatives of both Eastern and Western Germany. One of the key arguments against the chosen criminal justice approach was based on the rule of law—which transitional justice mechanisms, oddly enough, are supposed to promote.

The work of the Rule of Law Program South East Europe of the German Konrad-Adenauer-Stiftung in the field of transitional justice is, among others, based on the belief that how a country deals with its past (in particular through means of criminal law and prosecution) plays an important role in the creation of its legal culture. This in turn forms part of the cultural order of an entire society. *Jutta Limbach*, former President of the German Federal Constitutional Court, has described this as follows:

“The purpose of criminal proceedings is to clarify that the members of a government cannot decide on their own what is right and what is wrong, *i.e.* what is just and what is unjust. The arbitrariness of state authorities would be supported if politicians and functionaries were discharged from any criminal responsibility for the injustice their decisions might cause. Each state authority is restrained by certain boundaries, in particular those rules which are essential for the orderly and dignified coexistence of human beings, *i.e.* the fundamental norms of rule and morals.”¹

Each country has to develop its own legal culture and order. The legal culture and order of one country cannot be transformed from one country to another. The same holds true for the transitional justice mechanisms applied by a country,

1 *Jutta Limbach*, „Strafrecht und politische Verbrechen“, in: „Im Namen des Volkes“ – Macht und Verantwortung der Richter, 1999, pp. 39 – 68 (68). Translation by the author.

which are an important element in the formation of a legal culture as described above. Even so, countries in transition can learn from the experience of others with similar pasts, and make use of those experiences. The Rule of Law Program South East Europe (*RLP SEE*) has, since its establishment in 2006, supported and encouraged dialog and trans-national experience-sharing on transitional justice topics both within the countries of South East Europe, and between that region and Germany. One of the various projects of the *RLP SEE* in this field was the German-Romanian Criminal Law Conference, which the Rule of Law Program, in co-operation with the German-Romanian Lawyers' Association, organized in Bucharest (Romania) in March 2007. In the panel entitled "Dealing with the Past by Means of Criminal Law in Germany and Romania," the two expert panellists tried to answer the difficult question of what role criminal law can possibly play in dealing with state crimes and system injustice, and to describe the limitations of criminal justice, in particular as imposed by the rule of law.

The publication at hand, *Rechtsstaat* in Lectures – Lecture No. 4: Transitional Justice - The German Experience After 1989, is the revised lecture presented by *Markus Rau* in the above-mentioned panel. It is by no means an exhaustive analysis of criminal justice policies applied by Germany, after the fall of the Berlin Wall in 1989, as it dealt with the communist regime of former Eastern Germany. Rather, it is a description and critical appraisal of the legal justifications used by the most prominent German Courts (the Federal Court of Justice and the Federal Constitutional Court) as well as the European Court of Human Rights in Strasbourg for holding those responsible for the killings at the inner-German border legally accountable. The legal approaches chosen by the aforementioned courts included a "natural law approach", a "teleological approach", and a "rule of law approach", respectively. All three courts argued that the conviction on the basis of criminal law of the border soldiers and those politicians who managed the border regime was not in violation of the fundamental rule of law principle of non-retroactivity of the law as guaranteed by, *inter alia*, the German Constitution and the European Convention on Human Rights. The lecture at hand clearly points to the difficulty of any legal and philosophical interpretation – as strong and well-founded as it may seem – when it comes to abiding by this fundamental rule of law principle, critically assesses the weaknesses of the jurisprudence of said courts, and makes reference to the criticisms levelled at the latter.

The application of criminal law (and its limitations) in reaction to state crime and system injustice poses a challenge that extends beyond the German political and justice systems in the years following reunification. Rather, it raises complex legal and political questions for any society which confronts past state crimes and system injustice in the context of democratic transitions. Hopefully the lecture at

hand will be widely circulated and discussed in a way which inspires well-informed policy choices that ease transitions to democratic regimes based on the rule of the law.

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TRANSITIONAL JUSTICE: THE GERMAN EXPERIENCE AFTER 1989

Markus Rau²

I. INTRODUCTION

In its almost 60 year history, the Federal Republic of Germany twice faced the task of reconciling with its past - in German referred to as 'Vergangenheitsbewältigung'.³

After 1945, German 'Vergangenheitsbewältigung' concerned dealing with the crimes committed by the National Socialist regime during the years between 1933 and 1945, in particular during World War II.⁴ As early as before the end of World War II, the USA, Great Britain and the Soviet Union had agreed upon extradition of members of the German army (*Wehrmacht*) and the National Socialist Party (NSDAP) who were responsible for the crimes to the countries where the crimes had been committed. A joint tribunal of the Allies would try the major war criminals. To this end, shortly after the capitulation of Nazi Germany in May 1945, the Allies established the International Military Tribunal (IMT) in Nuremberg which tried 24 of the most important captured leaders of Nazi Germany. The trial was

2 Markus Rau, *Attorney at Law; Associate of Freshfields Bruckhaus Deringer, Berlin (Germany)*. The article is the updated English language version of a lecture presented in Bucharest (Romania) on 10 March 2007 as part of the German-Romanian Criminal Law Conference, which was organized by the Rule of Law Program South East Europe of the Konrad-Adenauer-Stiftung and the German-Romanian Lawyers' Association. Any views expressed are personal. The author can be contacted at markus.rau@gmx.de.

3 See, e.g., Horst Dreier, 'Verfassungsstaatliche Vergangenheitsbewältigung', in: Peter Badura (ed.), *Festschrift 50 Jahre Bundesverfassungsgericht* 159 (2001); Thorsten Eitz/Georg Stötzel (eds.), *Wörterbuch der „Vergangenheitsbewältigung“: Die NS-Vergangenheit im öffentlichen Sprachgebrauch* (2007); Torben Fischer/Matthias N. Lorenz (eds.), *Lexikon der „Vergangenheitsbewältigung“ in Deutschland. Debatten- und Diskursgeschichte des Nationalsozialismus nach 1945* (2007); Rolf Grawert, 'Vergangenheitsbewältigung. Bemerkungen zu neueren Geschichten über Staat und Verfassung, Rechtstheorien und Rechtswissenschaften', in: 42 *Der Staat* 437 (2003); Waldemar Hummer/Jelka Mayr-Singer, 'Der „deutsche Sonderweg“ bei der Aufarbeitung von SED-Unrecht: Vergangenheitsbewältigung durch Strafjustiz', 54 *Neue Justiz* 561 (2000); Josef Isensee (ed.), *Vergangenheitsbewältigung durch Recht. Drei Abhandlungen zu einem deutschen Problem* (1992); Markus Rau, 'Deutsche Vergangenheitsbewältigung vor dem EGMR - Hat der Rechtsstaat gesiegt?', in: 54 *Neue Juristische Wochenschrift* 3008 (2001); Peter Reichel, *Vergangenheitsbewältigung in Deutschland: Die Auseinandersetzung mit der NS-Diktatur von 1945 bis heute* (2nd ed. 2007).

4 As to the following see Ingo Müller, *Furchtbare Juristen. Die unbewältigte Vergangenheit unserer Justiz*, at 204-299 (1987).

held from November 14, 1945 to October 1, 1946.⁵ In the countries which had been occupied by Nazi Germany, the war criminals were charged and convicted wherever the authorities could locate them.

Initially, the re-established German judiciary was restricted to prosecuting crimes *by Germans against Germans*. In this context, the German judiciary rendered several startling judgments resulting in intense public discussions. Thus, the Regional Court (*Landgericht*) of Lübeck convicted a journalist to five years in prison because he had assaulted a police officer then fled when a military court sentenced him to death in December 1943. The Higher Regional Court (*Oberlandesgericht*) of Kiel confirmed the conviction in 1947, arguing:

'The official action by a prison officer which is executed dutifully is always lawful (...). Therefore, the convict must endure execution of the judgment when the decision has become final.'⁶

In short: the journalist was punished for absconding from being executed by the Nazi regime.

After the founding of the Federal Republic of Germany in 1949, the Allies relinquished their authority of the prosecution of Nazi criminals and gave this power to the 'new' state - including the prosecution of crimes that had been committed abroad and against foreign nationals. However, in one of its first acts, the German Parliament enacted an amnesty for all crimes committed during the Nazi era that would have been punished with up to one year of imprisonment. Later, in 1954, another law was passed guaranteeing exemption from punishment for all crimes that had been committed 'under the influence of the exceptional circumstances of the breakdown during the time between October 1, 1944 and July 31, 1945 in the assumption of an official or legal duty, in particular a command'. Furthermore, the German Parliament decided or accepted respectively, that all Nazi era crimes apart from murder became time-barred before 1960.

In those cases in which trials took place, the German courts were often not willing to assign clear responsibilities. A particularly grotesque case is reported by Ingo Müller in his book *Furchtbare Juristen* ('Horrible Jurists'):

5 A second set of trials concerning the so-called 'lesser' war criminals was conducted under Control Council Law (*Kontrollratsgesetz*) No. 10 at the Nuremberg Military Tribunals (NMT).

6 Cited in Müller, *supra* note 3, at 242 (all translations by the author).

'The judges awe to name somebody a "murderer" brought forth strange fruits. The Regional Court of Hannover for example convicted a Nazi criminal who personally had committed several murders as "aider and abettor to murder", i.e. as mere helper of the principal offender. And his superior who had given him the respective commands and whom the court consequently would have had to designate as "principal offender" was convicted by the court as "instigator". As there was no other actor apart from those two, the murders remained "offences without offenders".⁷

The failures and inconsistencies in the process of coming to terms with the Nazi past may be one of the reasons why, after the collapse of the German Democratic Republic (GDR) in 1989, the Federal Republic of Germany displayed a particular eagerness in prosecuting those bearing responsibility in the East German regime. Thus, as Bernhard Schlink, Professor of public law at Humboldt University of Berlin and renowned novelist, stated in his inaugural lecture in 1994:

'No country, in the process of coming to terms with its communist past, has placed so much emphasis on criminal law as Germany. The political claim for criminal law settlement of murder, torture, deprivation of liberty and perversion of justice committed in order to back the system is known from all formerly communist countries. However, it is often made only quietly and never as loud as in Germany.⁸

At the same time, the difficulties in coping with system injustice by way of criminal prosecution have become more than apparent. Taking the example of the Berlin Wall killings, I will now elaborate on this in some more detail. In the 1990's, the Berlin Wall killings dominated the legal discussion in Germany far more than any other issue. The prohibition of ex post facto criminal laws (*strafrechtliches Rückwirkungsverbot*), as laid down in Article 103 para. 2 of the German Basis Law,⁹ was at the heart of the debate.

7 *Id.*, at 250.

8 Bernhard Schlink, *Rechtsstaat und revolutionäre Gerechtigkeit. Antrittsvorlesung 14. April 1994 - Vergangenheit als Zumutung. Öffentliche Vorlesung 20. April 1995*, at 3 (1996).

9 'An act may be punished only if it was defined by a law as a criminal offence before the act was committed.'

II. THE BERLIN WALL KILLINGS AND RESPECTIVE TRIALS AFTER 1989

With the construction of the Berlin Wall on August 13, 1961 and the reinforcement of security installations (anti-personnel mines, automatic-fire systems) along the inner-German border, the GDR reacted to the continuing flow of fugitives after the founding of the two German states. Until today, the exact number of people who died trying to reach the West at the inner-German border has remained unclear. According to the Centre for Contemporary Historical Research in Potsdam, at least 136 came to death in the immediate context of the GDR border security system. As of August 7, 2008, this is the interim balance from a research project initiated by the Documentation Centre Berlin Wall and the Centre for Contemporary Historical Research.¹⁰ Other sources propagate even higher death tolls. More than half of the killings occurred in the first five years after the construction of the Berlin Wall. The victims were primarily young men between 16 and 30 years of age. The last victim lost his life in March 1989.

Shortly after Germany's reunification, the Regional Court of Berlin held the first trial of the killings at the inner-German borders.¹¹ Criminal charges were directed against both the GDR border soldiers and those politically responsible for the GDR border regime. Further trials followed.¹² The Federal Court of Justice (*Bundesgerichtshof*) confirmed the convictions.¹³ Subsequently, in a landmark decision in October 1996, the Federal Constitutional Court (*Bundesverfassungsgericht*) ruled that the convictions did not conflict with the Basic Law.¹⁴ Two further decisions in 1997¹⁵ and 2000¹⁶ upheld the Court's ruling. In addition, the European Court of Human Rights in Strasbourg decided in 2001 that the European Convention on Human Rights (ECHR)¹⁷ did not oppose the convictions.¹⁸

¹⁰ The results of the project are available at the internet under: <<http://www.berliner-mauer-dokumentationszentrum.de/de/rtf/Ergebnisse%20August%202008.pdf>>.

¹¹ See *Regional Court of Berlin*, 47 *Juristenzeitung* 691 (1992).

¹² See, e.g., *Regional Court of Berlin*, 12 *Neue Zeitschrift für Strafrecht* 492 (1992).

¹³ See, e.g., *Federal Court of Justice*, 46 *Neue Juristische Wochenschrift* 141 (1993); 47 *Neue Juristische Wochenschrift* 2708 (1994).

¹⁴ *Federal Constitutional Court*, 50 *Neue Juristische Wochenschrift* 929 (1997).

¹⁵ *Federal Constitutional Court*, 24 *Europäische Grundrechtezeitschrift* 413 (1997).

¹⁶ *Federal Constitutional Court*, 53 *Neue Juristische Wochenschrift* 1480 (2000).

¹⁷ *Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, European Treaty Series (ETS) No. 5.*

¹⁸ *European Court of Human Rights, Streletz, Kessler and Krenz v. Germany, judgment of 22 March 2001 (app. nos. 34044/96, 35532/97 and 44801/98); K.-H. W. v. Germany, judgment of 22 March 2001 (app. no. 37201797).*

The trials concerning the killings at the inner-German border lasted until the end of 2004. On November 9, 2004, exactly 15 years after the opening of the Berlin Wall, the Regional Court of Berlin rendered its final decision. All in all, the Court imposed eleven prison sentences and 44 suspended sentences. In 35 cases, the sentence was one of acquittal. Among the convicts were, inter alia, the former members of the GDR's National Defence Council Heinz Kessler, Fritz Streletz and Hans Albrecht, the former members of the Political Bureau of the Socialist Unity Party's Central Committee Hans-Joachim Böhme and Werner Lorenz as well as the former President of the GDR's Council of State Egon Krenz.

III. THE ARGUMENTS BY THE COURTS

What was the legal basis for the verdicts decided by the lower courts and upheld by the Federal Court of Justice, the Federal Constitutional Court and the European Court of Human Rights?

1. Legal Background

Following Germany's reunification, Article 315 of the Introductory Act to the Criminal Code, introduced by the Unification Treaty, together with Section 3 of the Criminal Code, provided that for acts committed by GDR citizens inside GDR territory, the applicable law was in principle that of the GDR. The law of the Federal Republic of Germany was applicable only if it was more lenient than GDR law.

The conviction of GDR border soldiers and those politically responsible for the GDR border security system corresponded in principle to several relevant provisions of the GDR criminal legislation. Section 112 of the GDR Criminal Code proscribed a prison sentence of ten years to life for murder. Section 22 para. 1 of the GDR's Criminal Code contemplated the offence of participation (*Teilnahme*) in an offence, and in particular incitement (*Anstiftung*) to commit one. However, the adjudicated had submitted several affirmative defences. Inter alia, based on the grounds of justification provided for in Section 17 of the GDR's People's Police Act and Section 27 of the GDR's State Borders Act, coupled with Section 213 of the GDR's Criminal Code, they argued that they had acted in accordance with the law of the GDR. Moreover, they affirmed that they had never been prosecuted regarding that account in the GDR.

Section 17 of the GDR's People's Police Act stated that the use of firearms was justified, inter alia, to prevent a serious crime against the GDR, public safety, or state in order to prevent the flight or re-arrest of persons who were strongly

suspected of having committed a serious crime. Save where imminent danger might be prevented or eliminated by targeted use of a firearm, a shouted warning or warning shot should precede an armed response. Human life should be preserved wherever possible. According to police operation, and as soon as police operation permitted, the wounded persons were to be given first aid and necessary security measures. Under Section 20 para. 3 of the GDR's People's Police Act, these provisions were also applicable to members of the National People's Army, i.e. the military of the GDR.

Section 27 of the GDR's State Borders Act provided that the use of firearms was the most extreme measure entailing the use of force against the person. Notwithstanding the prior use of mechanical aids or their success, firearms must be used only as a last resort to physical force. In addition, only when shots aimed at objects or animals had not produced the desired result was the use of firearms permitted. The use of firearms was also justified to prevent the imminent commission or continuation of an offense which appeared under the circumstances to constitute a serious crime. It was also justified in order to arrest a person strongly suspected of having committed a serious crime. In principle, the use of firearms required a preceding shouted warning or warning shot, save where imminent danger might be prevented or eliminated only through the targeted use of the firearm. Firearms could not be used when the life or health of third parties might be endangered, when based on outward appearances, the persons were children, or the shots would have impinged on the sovereign territory of a neighbouring state. Indeed, if possible, firearms should not be used against juveniles or female persons. When firearms were used, human life should be preserved where possible. Wounded persons had to be provided with first aid, subject to the implementation of necessary security measures in order to protect others.

In addition, by virtue of various orders and service instructions, the GDR's authorities had provided that the border soldiers were fully responsible for the preservation of the inviolability of the state border in their sector; in all cases, 'border violators' should be arrested as adversaries or, if necessary, 'annihilated'. According to Section 213 of the GDR's Criminal Code, any person who illegally crossed the border of the GDR or, contravened provisions which regulated the temporary authorisation to reside in and/or transit through the GDR, would be punished by a custodial sentence of up to two years, a suspended sentence with probation, imprisonment or a fine.

2. Three Approaches

Despite the aforementioned provisions, orders and service instructions under GDR law, the courts adjudicating the inner-German border killings opined that the conviction of the border soldiers and those responsible for the border security system was indeed possible. In particular, the courts held that any such conviction did not violate the prohibition of ex post facto criminal laws guaranteed by Article 103 para. 2 of the Basic Law or Article 7 para. 1 ECHR, respectively.¹⁹ In doing so, the courts followed three different approaches.

a) The 'Natural Law Approach'

The Federal Court of Justice more or less openly adopted a natural law approach which had already been implemented during the process of reconciliation with the Nazi past:

'A ground of justification assumed at the time of the offence may (...) be disregarded due to a breach of higher ranking law if it expresses an obvious gross violation of basic principles of justice and humanity; the violation must be so grave that it infringes the legal opinions common to all peoples and being related to the value and dignity of man (...). The conflict between the positive law and justice must be so unbearable that the law as false law has to give way to justice. With these formulations (...) it was tried, after the end of the national socialist tyranny, to designate the most severe violations of law. The transfer of these considerations to the case at hand is not easy as the killings of people at the inner-German border cannot be equated to the national socialist mass murder. However, the comprehension reached then still holds true, i.e. that in the assessment of offences being committed on instruction of the state, one has to bear in mind whether the state has transgressed the outer limits set to him according to the common opinion in every country.'²⁰

In this context, the Federal Court of Justice also referred to international human rights law in order to help determine at what point today a state infringes upon a person's fundamental rights and provide evidence to support a world-wide conviction of the legal community.

19 Article 7 para. 1 ECHR reads: '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.'

20 Federal Court of Justice, 46 *Neue Juristische Wochenschrift* 141, at 144-145 (1993).

b) The 'Teleological Approach'

By contrast, the Federal Constitutional Court's starting point was the object and purpose of the prohibition of ex post facto criminal laws:

'The strict prohibition of ex post facto laws finds (...) its justification, in a state governed by the rule of law, in the particular foundation of confidence that backs criminal laws when they are adopted by a democratic legislator being bound to the basic rights. This particular foundation of confidence ceases to exist when the other state adopted criminal laws for the most severe criminal wrongs but excluded criminal liability in part through grounds of justification by way of calling upon (...) such criminal wrongs and abetting them, thus severely disregarding the human rights generally accepted in the international legal community. In doing so, the bearer of governmental authority set extreme state injustice which may hold its ground only so long as the governmental authority being responsible virtually exists.

In this particular situation, the command of material justice which also implies acceptance of the international human rights forbids the application of such a ground of justification. The strict protection of confidence by Article 103 para. 2 of the Basic Law must step back then. Otherwise, the administration of criminal justice in the Federal Republic would conflict with its premises resulting from the principle of the state governed by the rule of law. The citizen who is subject now to the penal power of the Federal Republic is refused to invoke such a ground of justification (...).²¹

c) The 'Rule of Law Approach'

Finally, the European Court of Human Rights was of the opinion that the interpretation of relevant GDR law, when based on constitutional principles and other GDR legal provisions, would determine the criminal liability of the GDR border soldiers and those politically responsible for the GDR border security:

'Section 17 of the People's Police Act and section 27 of the State Borders Act (...) listed exhaustively the conditions under which the use of firearms was authorised and further provided, in subsections 4 and 5 respectively: "When firearms are used, human life should be preserved

²¹ *Federal Constitutional Court, 50 Neue Juristische Wochenschrift 929, at 930-931 (1997).*

where possible. Wounded persons must be given first aid." Section 27(1) provided: "The use of firearms is the most extreme measure entailing the use of force against the person." Section 27(4) stated: "If possible, firearms should not be used against juveniles." In addition, Article 119 of the Criminal Code defined the offence of failing to lend assistance to a person in danger (...).

These provisions, which therefore expressly included the principle of proportionality and the principle that human life must be preserved, should also be read in the light of the principles enshrined in the Constitution of the GDR itself. Article 89 § 2 of the Constitution provided: "Legal rules shall not contradict the Constitution"; Article 19 § 2 provided: "Respect for and protection of the dignity and liberty of the person are required of all State bodies, all forces in society and every citizen"; lastly, Article 30 §§ 1 and 2 provided: "The person and liberty of every citizen of the German Democratic Republic are inviolable" and "citizens' rights may be restricted only in so far as the law provides and when such restriction appears to be unavoidable" (...).

Moreover, the first chapter of the Special Part of the GDR's Criminal Code provided: "The merciless punishment of crimes against ... peace, humanity and human rights ... is an indispensable prerequisite for stable peace in the world, for the restoration of faith in fundamental human rights (...) and the dignity and worth of human beings, and for the preservation of the rights of all" (...).

In the light of the above-mentioned principles, enshrined in the Constitution and the other legal provisions of the GDR, the Court therefore considers that the applicants' conviction by the German courts, which had interpreted the above provisions and applied them to the cases in issue, does not appear at first sight to have been either arbitrary or contrary to Article 7 § 1 of the Convention.²²

Thus, the Court followed an approach which the Regional Court of Berlin had previously taken in one of its first judgments on the killings at the Berlin Wall. In this judgment, the Regional Court had argued:

²² *European Court of Human Rights, Streletz, Kessler and Krenz v. Germany, judgment of 22 March 2001 (app. nos. 34044/96, 35532/97 and 44801/98), at §§ 60-62, 64; see also European Court of Human Rights, K.-H. W. v. Germany, judgment of 22 March 2001 (app. no. 37201797), at §§ 54-57, 59.*

'An act that gives the appearance of respecting the principle of a state governed by the rule of law (...) must be interpreted according to the principle of a state governed by the rule of law. Such an interpretation of the State Borders Act being possible (...), there is no reason to doubt the legal effectiveness of that Act.'²³

IV. ASSESSMENT

What can be said about this jurisprudence?

First, it is striking that although the courts concurred in the final decision, three completely different approaches were taken. More importantly, however, none of the approaches followed by the courts are really convincing. Therefore, not surprisingly, the jurisprudence concerning the killings at the Berlin Wall have been subject to massive criticism among large parts of German legal scholarship.

As far as the Federal Court of Justice's natural law approach is concerned, the objections are obvious. The reliance on natural law is always just a stopgap solution. In a state governed by the rule of law, the courts are better advised to apply the positive law instead of drawing on extra-legal ideas of material justice. The Federal Court of Justice's reference to international human rights law only seemingly brings about a gain in rationality. For one, just like the basic rights enshrined in the national constitutions, the international human rights are characterized by a certain semantic openness, leaving room for interpretation. Secondly, according to the traditional view, national law that contravenes international law does not become invalid. This also holds true for the peremptory norms of international law (*jus cogens*).²⁴ The idea of natural law being 'interpreted' in the light of international human rights law undermines this traditional relationship between national and international law.

The Federal Constitutional Court's solution to refer to the object and purpose of the prohibition of ex post facto criminal laws is much more subtle and rooted in the law's own rationality. However, the idea that the prohibition of ex post facto criminal laws finds its justification in the particular foundation of confidence that supports democratically legislated criminal laws and, thus is somehow bound to the basic rights, is disputable. Historically, this connection is probably not well-founded. The prohibition of ex post facto criminal laws developed independently of the democratic system of government as we know it today. Arguably, its

²³ *Regional Court of Berlin*, 12 *Neue Zeitschrift für Strafrecht* 492, at 494 (1992).

²⁴ See *Stephan Hobe and Christian Tietje*, 'Schießbefehl an der DDR-Grenze und ius cogens. Zur Nichtigkeit des § 27 Grenzgesetz unter völkerrechtlichen Aspekten', 32 *Archiv des Völkerrechts* 130 (1994).

application is not dependent upon how an act came into force. Moreover, the idea of worthiness of confidence is alien to the strict prohibition of ex post facto criminal laws.²⁵

The most problematic approach is the one undertaken by both the European Court of Human Rights as well as the Regional Court of Berlin in its early jurisprudence on the Berlin Wall killings.²⁶ As former Professor of public law at University of Bonn, Josef Isensee rightly argued with regard to the Regional Court of Berlin's jurisprudence, the GDR's criminal law must not be interpreted through the unhistorical glasses of the present in which the principle of the state governed by the rule of law applies. It is not the mere textual identity of an isolated criminal norm that corresponds to the prohibition of ex post facto criminal laws, but the content of the norm in the context of the whole state system, i.e. in the real constitution of the polity.²⁷ Similarly, in his inaugural lecture at Humboldt University of Berlin, Bernhard Schlink stated:

'To regard as valid law not what is accepted and practiced as law but what *should* be accepted and practiced as law deprives the notion of law of one of its essential dimension: reality.'²⁸

And:

'The reduction of the notion of law (...) has consequences that are hardly compatible with the state governed by the rule of law. For the dimension of reality, the dimension of validity in reality encloses the generality of law. Law is valid when it is generally accepted and practiced.'²⁹

For that reason, the Federal Court of Justice decisively held that it is essential to determine how those responsible for the interpretation and application of the relevant provisions of GDR law understood them at the time of the offences. Methodologically, this demands an intrinsic systemic interpretation of the GDR law which must take into consideration the interpretive practice of the competent authorities. Yet, as the Federal Constitutional Court stated, the precedence of

25 For a detailed critique of the Federal Constitutional Court's position see Horst Dreier, 'Gustav Radbruch und die Mauerschützen', 52 *Juristenzeitung* 421 (1997).

26 As to the following see also Rau, *supra* note 2, at 3010-3012.

27 Josef Isensee, in: *id.*, *supra* note 2, 91, at 106.

28 Schlink, *supra* note 7, at 9.

29 *Id.*, at 10.

the preservation of the inviolability of the state border over the protection of life characterized this interpretive practice.³⁰

Furthermore, the interpretation of the positive law must not put into question the very characteristics that constitute the political identity of a society. In a state which is not governed by the rule of law, it is politics which determines the border between the legal and political systems. Regarding the evaluation of the killings at the inner-German border, this means:

'The events subsequent to the opening of the Berlin Wall have demonstrated that the SED regime was only viable under the condition of a closed and guarded border. To interpret the positive law of the GDR in a way that it actually criminalized the shooting of fugitives would give it a content according to which it declared illegal its own existence prerequisites. This transgresses the area of specific legal-dogmatic interpretation.'³¹

In other words, the GDR's legal order was forced to prevent the criminalization of the inner-German border's killings because the existence of the GDR was dependent on the border regime. This means that, in the final analysis, an interpretation of the relevant provisions of the GDR law according to which the killings at the inner-German border were indeed criminalized would play down the perverted character of the GDR's legal order.

V. CONCLUSION

The prohibition of ex post facto criminal laws is not opposed to the principle of a state governed by the rule of law. Rather, it is one of its expressions. The process of reconciling the past by way of criminal prosecution conflicts with the prohibition of ex post facto criminal laws and, consequently, with the principle of a state governed by the rule of law. The example of the trials of the killings at the Berlin Wall demonstrates that the criminal prosecution of system injustice has its limits. This does not mean that coming to terms with the past is not possible. A viable alternative to criminal prosecution is the establishment of truth and reconciliation commissions as has occurred in Guatemala or South Africa.

³⁰ *Federal Court of Justice, 46 Neue Juristische Wochenschrift 141, at 144 (1993).*

³¹ *Michael Pawlik, 'Das positive Recht und seine Grenzen', in: Kurt Seelmann (ed.), Aktuelle Fragen der Rechtsphilosophie 28, at 32 (2000).*

A society in transition, unwilling to renounce the sharp sword of criminal prosecution, may wish to consider a constitutional amendment to partially suspend the prohibition of ex post facto criminal laws. Using the example of the GDR past, let me end with Bernhard Schlink's summary of the pro and contra of such a constitutional amendment:

'Control Council Law No. 10 abolished the prohibition of ex post facto criminal laws for crimes against humanity. Why not give revolutionary justice such a place in the normality of a state governed by the rule of law? Why not a suspension of the prohibition of ex post facto criminal laws for coping with the communist past?

A respective constitutional amendment would be constitutionally possible. The constitutional debate, whether the constitution should be amended, would be more adequate to the question of whether coping with the communist past by way of criminal prosecution is wanted, and how much of it and to what price, than the questionable arguments by the criminal courts. However, what could be brought forward, in such a constitutional debate, in favour of a respective constitutional amendment? Both general and special prevention cannot be claimed in favour of it. Victor's justice and defeated's exculpation are not worthy of a constitutional amendment.³²

³² Schlink, *supra* note 7, at 16-17.



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The Konrad-Adenauer-Stiftung is a German political foundation which advocates, through numerous projects of consultancy and dialogue worldwide, the establishment and consolidation of democracy and the rule of law, as well as the protection of fundamental human rights. In 1990 the Konrad-Adenauer-Stiftung created its Rule of Law Program, a cross-national effort which added rule of law advocacy to its worldwide projects. The foundation thereby committed itself to support:

- » rule of law structures and basic institutional elements of a constitutional state, such as a fully functional constitutional adjudication system, including the legal reconciliation with a country's pre-democracy past;
- » the separation of powers, in particular a strong, accredited, and independent judiciary;
- » the protection of basic and human rights through both substantial and procedural law;
- » the enhancing of regional alliances, if these can contribute to the protection of the rule of law and democracy.

In 2006, the Konrad-Adenauer-Stiftung initiated a regional Rule of Law Program for South East Europe which is based in Bucharest (Romania). The Rule of Law Program South East Europe is active in 10 countries, namely Albania, Bosnia-Herzegovina, Bulgaria, Croatia, Kosovo, Macedonia, Montenegro, Romania, the Republic of Moldova, and Serbia. Dealing with the communist/socialist past of the countries in South East Europe by legal means has represented one of the main focus of this program's work. The present publication is part of the Rule of Law Program's efforts in this field.

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