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## Finding legal approaches to dealing with the past after the fall of communism from the perspective of legal theory and comparative law

### 1. "Communist crimes" and recent trials dealing with them

The application of the rule of law in assessing acts committed by individuals during a dictatorship, either in its name or at least with its tacit approval, involves first and foremost identifying as clearly as possible the acts that require legal reassessment after a political transformation. This reassessment comes from the perspective of the rule of law, which had been systematically violated under the dictatorship. In post-communist Poland, the question of what constitutes a "communist crime" was addressed in the 1998 Act on the Institute of National Remembrance, which legally defined the term:

Communist crimes, within the meaning of the Act, are acts committed by functionaries of the communist state during the period from 17 September 1939 to 31 July 1990, consisting in or in connection with the use of repression or other forms of human rights violations against individuals or groups of the population, constituting offences under the Polish criminal law in force at the time of their commission.<sup>1</sup>

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<sup>1</sup> Article 2(1) of the Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation (consolidated text), Journal of Laws No. 155, item 1016.

In recent years, the period for communist crimes under the Polish Act has been extended. Originally set from 17 September 1939, the day of the Soviet Union's invasion, it has now been pushed back to 8 November 1917, the day after the October Revolution in Tsarist Russia, when Poland had not been reinstated as a state. In legal terms, this extension creates an internal contradiction. According to the principle prohibiting the retroactive effect of criminal law, the legal definition does not introduce new criminal offences into the Polish Penal Code. Rather, it expressly refers to Polish criminal legislation in effect at the time the offences were committed. However, in 1917, before Poland regained independence, no Polish Penal Code existed. This highlights how politics and law can clash when the political will treats the law merely as an instrument that can be changed at will.

Despite these contradictions, the Polish legal concept of communist crimes aligns with those in other post-socialist countries. For example, German jurisdiction defines communist crimes as offences committed under the laws of the socialist era, either directly or indirectly sanctioned by the socialist state leadership or the communist party. These crimes were not prosecuted under the criminal law of the time.

Similar to Poland, where the legal concept of "communist crimes" primarily serves to prevent the permanent blocking of prosecution due to statutes of limitations, Germany enacted similar laws in the 1990s to suspend the statute of limitations for offences that were not prosecuted during the socialist era solely for political reasons. However, unlike in Poland, the suspension in Germany is limited to the period during which the socialist state authorities held power – from 11 October 1949 to 2 October 1990, the day before German reunification and the final day of the legal existence of the GDR.<sup>2</sup> Acts under the responsibility of the Soviet Union or the Soviet Communist Party are excluded and have never been subject to German criminal prosecution. Furthermore, only the most serious and reprehensible type of homicide under German law, murder, is not subject to a statute of limitations.

As a result, a trial in Berlin in 2024 saw an 80-year-old former STASI officer accused of killing a Polish citizen Czesław Kukuczka. He allegedly shot Kukuczka in the back from two metres away at a Berlin border crossing in March 1974. In 2023, the Berlin public prosecutor's office determined that the case was not simply a time-barred

See also: T. Lachowski, *Zmiany legislacyjne w przedmiocie likwidacji instytucji przedawnienia wobec zbrodni komunistycznej jako element działań zmierzających do przekształcenia modelu rozliczeń z komunistyczną przeszłością w Polsce po 2015 roku* [Eng. *Legislative changes relating to abolition of the statute of limitations for communist crimes as part of efforts to transform the model of settling accounts with the communist past in Poland after 2015*] [in:] *Zbrodnie komunistyczne. Odpowiedzialność państwa oraz jednostek* [Eng. *Communist crimes. Responsibility of the State and of individuals*], ed. P. Grzebyk, Wydawnictwo Instytutu Wymiaru Sprawiedliwości, Warszawa 2022, pp. 162–163.

<sup>2</sup> Art. 315a (5) of the Introductory Act to the German Criminal Code (BGBl. I S. 469; 1975 I S. 1916; 1976 I 507), last amended 27 March 2024 (BGBl. 2024 I Nr. 109). See also: K. Marxen, G. Werle, M. Vormbaum, *Die strafrechtliche Aufarbeitung von DDR-Unrecht. Eine Bilanz* [Eng. *Criminal-law settling of accounts with GDR in-justice. A balance sheet*], 2<sup>nd</sup> ed., De Gruyter, Berlin 2020, pp. 279–280.

homicide, but a murder, due to the insidious nature of the killing.<sup>3</sup> In Prague, a trial was held in 2023 against a former Czechoslovak Interior Minister Vratislav Vajnar, who was held responsible for the killing of fugitives at the Czechoslovak-Austrian border. One case in the indictment involved a young man from East Germany who was denied the opportunity to study music because his father was an academic. The 18-year-old attempted to flee to the West across the Czechoslovak-Austrian border in 1986. Just before reaching Austria, he was attacked by border guard dogs and bled to death. However, before the trial concluded, Vajnar died in August of last year, maintaining until his death that he had no knowledge of the border killings. At least 280 fugitives were killed at the Czechoslovak border, but only *four* perpetrators have been convicted. In contrast, a former commander of the Czechoslovak border troops received a military funeral as recently as 2015.<sup>4</sup>

Meanwhile, in Poland, the limitation periods for communist crimes that had not yet expired was lifted at the last minute in 2020, following an initiative by the Institute of National Remembrance.<sup>5</sup> However, this cannot obscure the fact that most of the perpetrators are now either dead or no longer fit to stand trial.

In Poland, one of the presumably last trials ever in European post-socialist states for communist crimes during the Stalinist era came to an end in 2025 due to the death of the defendant, the former Supreme Court judge Bogdan Dziecioł (1928–2025). In March 2024, he was sentenced at first instance by the Military District Court in Warsaw to five years' imprisonment and five years' deprivation of public rights for committing 'communist crimes' and 'crimes against humanity'. This trial was the first of its kind since the end of communism in Poland. As a former member of the three-judge panel at the Air

<sup>3</sup> R. Janicki, *Były oficer operacyjny służby bezpieczeństwa NRD (Stasi) skazany za zabójstwo obywatela polskiego na przejściu granicznym pomiędzy NRD a Berlinem Zachodnim* (komunikat prasowy rzecznika IPN) [Eng. *Former East German security service (Stasi) operations officer convicted of murdering a Polish citizen at a border crossing between the GDR and West Berlin* (press release by the spokesperson of the Polish Institute of National Remembrance)], IPN, 14.10.2024, <https://ipn.gov.pl/pl/dla-mediow/komunikaty/204501,Byly-oficer-operacyjny-sluzby-bezpieczenstwa-NRD-Stasi-skazany-za-zabojstwo-obyw.html> (accessed: 18.01.2025).

<sup>4</sup> L. Palata, *Former minister on trial for border deaths in communist era*, In Focus, 25.05.2023, <https://www.dw.com/en/former-minister-on-trial-for-border-deaths-in-communist-era/a-65697901> (accessed: 25.07.2025); BR24 Redaktion, *Aus für Prozess wegen Grenztoten: Angeklagter Ex-Minister tot* [Eng. *End of trial over border deaths: Accused former minister dead*], BR24, 21.06.2023, <https://www.br.de/nachrichten/bayern/aus-fuer-prozess-wegen-grenztoten-angeklagter-ex-minister-tot,Thns4G0> (accessed: 25.07.2025); M. Allweiss, K. Materna, *Die Aufarbeitung der Grenztoten des Eisernen Vorhangs ist zäh* [Eng. *The process of coming to terms with the deaths at the Iron Curtain border is a tough one*], Deutschlandfunk Kultur, 17.07.2023, <https://www.deutschlandfunk-kultur.de/tschechien-und-die-grenztoten-die-aufarbeitung-ist-zaeh-dlf-kultur-4832c178-100.html> (accessed: 18.01.2025).

<sup>5</sup> Act of 15 July 2020 on amending the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation, Journal of Laws of 2020, item 1273. However, communist crimes that were already time-barred under previous statutes of limitation and were punishable by a maximum prison sentence of five years were excluded from this abolition of the statute of limitations, so only the more serious communist crimes can no longer be time-barred since the aforementioned law came into force on 31 July 2020. T. Lachowski, *Zmiany legislacyjne...*, pp. 163–166.

Force Military Court in 1952, Dzięcioł was jointly responsible for a Stalinist quick trial that sentenced 23-year-old military pilot Edward Pytko (1929–1952) to death. Pytko had attempted to flee the communist People's Republic after being pressured by the Polish secret service to spy on his fellow pilots. Posthumously, he has been rehabilitated in 1993. His former judge Bogdan Dzięcioł died one month before his appeal hearing scheduled 32 years after the rehabilitation of Pytko.<sup>6</sup> Due to the death of Dzięcioł in March 2025, the Supreme Court in Warsaw discontinued the appeal proceedings in April 2025.<sup>7</sup>

## 2. The conflict between statute and justice: Kelsen versus Radbruch

Of course, prosecuting communist crimes is not the only legally possible response to such acts in today's rule of law, as evidenced by the posthumous rehabilitation of victims of communist crimes. Addressing the needs of victims, not just perpetrators, is crucial, with rehabilitation and compensation playing an important role. However, in this discussion, I will focus specifically on criminal law,<sup>8</sup> as it raises unique legal and even philosophical questions.

As is well known, criminal prosecution under the rule of law must adhere to the *nul-la poena sine lege* principle – the prohibition against retroactive criminal prosecution.

In West Germany at the end of the 1970s, a well-known politician who had sentenced German soldiers who deserted during World War II to death defended himself with the following words: "What was then [i.e., during the Nazi era] according to law cannot be wrong today."<sup>9</sup> From a political and moral standpoint, this statement is

<sup>6</sup> M. Mikowski, *Jedyny taki proces. Sąd Najwyższy osądzi stalinowskiego sędziego, który skazał na śmierć młodego pilota* [Eng. *The only trial of its kind. The Supreme Court will judge a Stalinist judge who sentenced a young pilot to death*], "Rzeczpospolita", 29.01.2025, <https://www.rp.pl/sady-i-trybunaly/art41738521-jedyny-taki-proces-sad-najwyzszy-osadzi-stalinowskiego-sedziego-ktory-skazal-na-smierc-mlodego-pilota> (accessed: 30.01.2025). Dzięcioł, in the beginning of 2025 perhaps the last judge from the Stalinist era still alive, was quoted in Polish public media, such as in the aforementioned Internet edition of the daily newspaper "Rzeczpospolita" from 29 January 2025, with the following words in English translation of the author of this chapter: "There are many ways to improve courts' jurisprudence, but (...) it is an old truth (we judges remember it) that a proper personnel policy is an important guarantee of the correctness of jurisprudence and full judicial independence. The conclusion from this is concrete: a judge who consciously disobeys the party line and does not respect the applicable law (including martial law decrees) should be dismissed immediately."

<sup>7</sup> M. Mikowski, *Sąd Najwyższy wydał wyrok w sprawie mordu sądowego. Decyzja nie mogła być inna* [Eng. *The Supreme Court has issued a ruling on judicial murder. The decision could not have been otherwise*], "Rzeczpospolita", 16.04.2025, <https://www.rp.pl/sady-i-trybunaly/art42133251-sad-najwyzszy-wydal-wyrok-w-sprawie-mordu-sadowego-decyzja-nie-mogla-byc-inna> (accessed: 25.07.2025).

<sup>8</sup> The monograph of M. Krotoszyński (*Modele sprawiedliwości tranzycyjnej* [Eng. *Models of transitional justice*], Wydawnictwo UAM, Poznań 2017) takes a broader perspective, systematically examining all forms of transitional justice, also beyond criminal law, from a global perspective.

<sup>9</sup> T. Fischer, M. Lorenz, *Lexikon der „Vergangenheitsbewältigung“ in Deutschland. Debatten- und Diskurs-geschichte des Nationalsozialismus nach 1945* [Eng. *Lexicon of "settling accounts with the past" in Germany. History of debate and discourse on National Socialism after 1945*], 2<sup>nd</sup> ed., Transcript, Bielefeld 2009, p. 204;



scandalous and was merely self-justification by the former military judge after Germany's political transformation in 1945. However, from a legal theoretical perspective, legal positivism leads to the same conclusion as the one expressed by this perpetrator from the dictatorship era:

A legal norm is not valid because it has a certain content (...), but because it is created in a certain way (...) determined by a presupposed basic norm. For this reason alone does the legal norm belong to the legal order whose norms are created according to this basic norm. Therefore any kind of content might be law. There is no human behavior which, as such, is excluded from being the content of a legal norm.<sup>10</sup>

This statement was made by Hans Kelsen, the most prominent representative of legal positivism in 20<sup>th</sup> century, in his *Pure Theory of Law*.<sup>11</sup> Despite personally becoming a victim of German National Socialism due to his Jewish heritage and democratic convictions – leading him to emigrate to the USA<sup>12</sup> – Kelsen explicitly emphasized, even in relation to the two worst forms of totalitarianism in the 20<sup>th</sup> century:

From the point of view of jurisprudence, the law under Nazi rule is a law. We can regret it, but we cannot deny that it was law. The law of the Soviet Union is law! We can detest it, just as we detest a poisonous snake, but we cannot deny that it exists. That means that it is legally valid. That is the essence [of law].<sup>13</sup>

From the perspective of consistent legal positivism, only individually provable crimes of excess, which were not covered by the law during the time of totalitarianism and dictatorship, and are not time-barred, can be prosecuted today.

In contrast, after 1945, Gustav Radbruch famously argued the opposite in legal theory with his so-called Radbruch formula, which actually consists of two parts.<sup>14</sup> Radbruch developed these formulas shortly after World War II, modifying his earlier views expressed in his seminal work *Rechtsphilosophie (Legal philosophy)*, published in 1932,

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W. Wette, *Der Fall Filbinger*, Vortrag zu der Veranstaltung „Was Unrecht war, kann nicht Recht sein!“ [Eng. *The case of Filbinger*. Lecture at the event 'What was wrong cannot be law!'], Saal des Historischen Kaufhauses in Freiburg i. Br., 14. September 2003, <https://web.archive.org/web/20060312154532/http://www.vauban.de/pub/wette.pdf> (accessed: 18.01.2025).

<sup>10</sup> H. Kelsen, *Pure theory of law*, trans. M. Knight, The Lawbook Exchange, Clark 2005, p. 198.

<sup>11</sup> See also: T. Aydin, *Gustav Radbruch, Hans Kelsen und der Nationalsozialismus. Zwischen Recht, Unrecht und Nicht-Recht* [Eng. *Gustav Radbruch, Hans Kelsen and National Socialism. Between law, flawed law, and non-law*], Nomos, Baden-Baden 2020, pp. 266–267.

<sup>12</sup> T. Aydin, *Gustav Radbruch*..., pp. 42, 266, 267.

<sup>13</sup> Kelsen in a transcribed contribution to a conference discussion on natural law, printed in: F. Schmölz, *Das Naturrecht in der politischen Theorie* [Eng. *Natural law in political theory*], Springer, Wien 1963, p. 148, translated by the author of this paper.

<sup>14</sup> G. Vassali, *Radbruchsche Formel und Strafrecht. Zur Bestrafung der „Staatsverbrechen“ im postnazistischen und postkommunistischen Deutschland* [Eng. *Radbruch's formula and criminal law. On the punishment of 'state crimes' in post-Nazi and post-communist Germany*], De Gruyter, Berlin 2010, pp. 7–13, 69–115, 161–172,

just before the rise of the German dictatorship.<sup>15</sup> Although Radbruch had consistently argued that even morally flawed laws were legally binding, he made two crucial exceptions after the war. According to his first formula, now known as the “intolerability formula” (*Unerträglichkeitsformel*)<sup>16</sup>, the

conflict between justice and legal certainty may well be resolved in this way: The positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as ‘flawed law’, must yield to justice.<sup>17</sup>

This was a significant shift for Radbruch personally. Before 1945, like Kelsen, he had refused to allow any exceptions to the legal validity of the law, regardless of its content, though based on different reasoning. He and many other proponents of the legal positivism dominant in the early 20<sup>th</sup> century<sup>18</sup> – in Germany and beyond – were acutely aware that in a modern society, characterized by deep political and ideological divisions and a lack of commonly recognized values, any exception to the validity of law could jeopardize legal certainty and, by extension, the rule of law.

As a follower of philosophical neo-Kantianism, which maintained a strict separation between facts and moral or legal judgements, Radbruch did not believe it was possible to establish objective universal values on the foundations of law through scientific methods.<sup>19</sup> While this relativism of values allowed the individual to believe in values, it denied the possibility of these values being objectively justifiable as binding for all, thus becoming the philosophical basis of legal positivism. On this basis, Radbruch argued in the second edition of *Legal philosophy*, published in 1932, that the *absolute validity of state law* as a guarantee of legal certainty would be the price to pay for the *relative validity of values in terms of justice*:

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263–288, also on the application of the Radbruch’s formulae to state crimes committed under communist rule in East Germany (1945–1989).

<sup>15</sup> W. Friedmann, *Gustav Radbruch*, “Vanderbilt Law Review” 1960, vol. 14, pp. 191–209, <https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=3941&context=vlr> (accessed: 10.08.2025); A. Fijalkowski, *Retrospective justice: Post-communist Germany and Poland in comparative perspective* [in:] *Transitional criminal justice in post-dictatorial and post-conflict societies*, eds. A. Fijalkowski, R. Grosescu, Intersentia, Cambridge 2017, pp. 31–33.

<sup>16</sup> R. Alexy, *Mauerschützen. Zum Verhältnis von Recht, Moral und Strafbarkeit* [Eng. *Lethal force by border troops at the inner German border. On the relationship between law, morality and criminal liability*] [in:] *Elemente einer juristischen Begründungslehre* [Eng. *Elements of a legal theory of reasoning*], eds. R. Alexy, H. Koch, L. Kuhlen, H. Rüßmann, Nomos, Baden-Baden 2003, p. 469, footnote 3.

<sup>17</sup> G. Radbruch, *Statutory lawlessness and supra-statutory law (1946)*, trans. B. Litschewski Paulson, S.L. Paulson, “Oxford Journal of Legal Studies” 2006, vol. 26, no. 1, p. 7, <https://doi.org/10.1093/ojls/gqi041>.

<sup>18</sup> R. Valadão, *Rechtspositivismus und Nationalsozialismus. Entstehung, Widerlegung und Überwindung der Positivismuslegende* [Eng. *Legal positivism and National Socialism. The emergence, refutation and overcoming of the positivism legend*], Duncker & Humblot, Berlin 2024, pp. 151–155, 160–163.

<sup>19</sup> *Ibidem*, pp. 116–119.

The individual conscience usually will, an properly may, deem an offense against positive law more objectionable than the sacrifice of the individual's own legal conviction, but there may be 'shameful laws' which conscience refuses to obey. (...) To be sure, 'every lawyer always ought to deem best any existing legal constitution and, if it is amended by superior authority, then the one succeeding it' (Kant). The judge, charged with interpreting and serving the positive legal order, ought not to know any but the juridical doctrine of validity (...). It is the professional duty of the judge to validate the law's claim to validity, to sacrifice his own sense of the right to the authoritative command of the law, to ask only what is legal and not if it is also just. To be sure, the question may be raised whether this very duty of the judge, this *sacrificium intellectus*, this devotion in blank of one's own personality to a legal order the future changes of which one cannot even anticipate, is morally possible. But however unjust the law in its content may be, by its very existence, it has been, it fulfils one purpose, viz., that of legal certainty. Hence the judge, while subservient to the law without regard to its justice, nevertheless does not subserve mere accidental purposes of arbitrariness. Even when he ceases to be the servant of justice because that is the will of the law, he still remains the servant of legal certainty. We despise the parson who preaches in a sense contrary to his conviction, but we respect the judge who does not permit himself to be diverted from his loyalty to the law by his conflicting sense of the right. For the dogma is of value only as an expression of faith, while the law is of value not only as a precipitation of justice but also as a guarantee of legal certainty, and it is preeminently as the latter that it is entrusted to the judge.<sup>20</sup>

This famous passage from Radbruch's 1932 *Legal philosophy* remains one of the most compelling justifications of legal positivism today because it argues with an indisputable value: the value of legal certainty. In cases of doubt, Radbruch subordinates all other values to this principle, even the minimum of substantive justice within the applicable law. What sets Radbruch's justification apart, however, is that he does not embellish or idealize this subordination of justice and morality. Unlike Hans Kelsen, arguably the most consistent and rigid representative of legal positivism, Radbruch was already concerned before 1945 with the concrete consequences of his theoretical standpoint for the individual judge. This concern is encapsulated in the concept of *sacrificium intellectus* – the intellectual sacrifice, which, in truth, is also a moral sacrifice. For the sake of legal certainty, and contrary to his own personal convictions, the judge is compelled to uphold what he considers to be a deeply unjust judgment, simply because the legislative will – whether democratically constituted or not – demands it.

However, the quote above also shows that in 1932, Radbruch envisioned a judge who at least feels the dilemma of the discrepancy between a personal sense of justice on the one hand and unjust state law on the other. Such a judge does not apply the unjust law mechanically, like an opportunistic tool of the legislator – Montesquieu's

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<sup>20</sup> G. Radbruch, *Legal philosophy [1932]* [in:] *The legal philosophies of Lask, Radbruch, and Dabin*, trans. K. Wilk, Harvard University Press, Cambridge 1950, pp. 118–119.

*bouche de la loi*<sup>21</sup> – without independent thought. This practical and personal dilemma for the individual judge is not addressed by other legal positivists, nor is the issue of legal reckoning with the past after a change of political system. For legal positivists, the question does not even arise: what was legal yesterday cannot be wrong today, at least not in a legal sense.

For Radbruch, this question had not yet emerged in 1932, one year before Hitler's dictatorship began in Germany and seven years before the onset of the Nazi regime's reign of terror across Europe. Until 1933, when Radbruch himself became a victim of the Nazi regime, he could not have imagined the rise of unscrupulous judges, opportunists, lackeys, or even glorifiers of the dictatorship. He certainly could not have foreseen a criminal state that would call pure arbitrariness "law." As a committed democrat, social democrat, and temporary German Minister of Justice,<sup>22</sup> Radbruch could not yet imagine that the German state – where the concept of the formal rule of law (*Rechtsstaat*) had begun to take root in the late 19<sup>th</sup> century, even before democracy was established<sup>23</sup> – would transform into a band of robbers in the 20<sup>th</sup> century. Over 1,500 years earlier, St. Augustine, drawing from his own experiences, made similar theoretical conclusions about the state in his *De civitate Dei* (413–426):

What else are empires, then, if they lack justice, but great bands of robbers? After all, gangs of robbers are no different from small empires.<sup>24</sup>

When Radbruch realized after 1933 that the so-called modern state of the 20<sup>th</sup> century could become a "band of robbers" due to its centralized administrative apparatus and advanced technological capabilities – much more cruelly and lethally than Augustine

<sup>21</sup> Montesquieu, *De l'esprit des lois* [Eng. *The spirit of legal statutes*], vol. 1, London 1777, p. 327: "Mais les juges de la nation ne sont (...) que la bouche qui prononce les paroles de la loi; des êtres inanimés, qui n'en peuvent modérer ni la force ni la rigueur." [Eng. "But the judges of the nation are (...) merely the mouthpiece that pronounces the words of the law; inanimate beings who can moderate neither its force nor its severity."]

<sup>22</sup> Radbruch, who was a social democrat member of parliament in the first German Republic from 1920 to 1924, was German Minister of Justice for a short time in 1921/22 and as such was responsible for an important reform of legislation in the interests of a humane and non-discriminatory society. These included a special penal code for juveniles in 1923, which emphasized education rather than punishment, as well as the first-time admission of women to the judiciary and higher judicial service, which the Nazis immediately abolished in 1933; A. Kaufmann, *Gustav Radbruch: Rechtsdenker, Philosoph und Sozialdemokrat* [Eng. *Gustav Radbruch: legal thinker, philosopher and social democrat*], Piper, München 1987; I. Mohr, *Gustav Radbruch als Reichsjustizminister (1921–1923)* [Eng. *Gustav Radbruch as Reich Minister of Justice (1921–1923)*], Forum Berlin, Berlin 2004; G. Spengel, *Gustav Radbruchs politischer Weg* [Eng. *Gustav Radbruch's political path*] [in:] *Gustav Radbruch als Reichsjustizminister (1921–1923)* [Eng. *Gustav Radbruch as Reich Minister of Justice (1921–1923)*], ed. I. Mohr, Friedrich-Ebert-Stiftung, Berlin 2004, pp. 23–34.

<sup>23</sup> C. Mecke, *The „Rule of Law“ and the „Rechtsstaat“ – a historical and theoretical approach from a German perspective*, "Studia Iuridica" 2019, vol. 79, p. 34; R. Valadão, *Rechtspositivismus und Nationalsozialismus...*, pp. 142–143.

<sup>24</sup> Augustinus, *De civitate Dei*, vol. 1: *Lib. I–XIII*, recogn. B. Dombart, A. Kalb, Teubner, Stuttgartiae 1981, Lib. 4: "Remota itaque iustitia quid sunt regna nisi magna latrocinia? Quia et latrocinia quid sunt nisi parva regna?"

could ever have imagined in the 5<sup>th</sup> century AD – he concluded, through his first formula, that extreme state injustice could justify a departure from legal positivism. Incidentally, there are few legal philosophers who have publicly revised the core of their theory based on historical experience, as Radbruch did.

However, as a philosopher of law and criminal law scholar, Radbruch was fully aware that applying the so-called intolerability formula could be highly problematic in individual cases. He openly acknowledged the challenge of determining when “the conflict between statute and justice” has reached “such an intolerable degree”, that the statute, as “flawed law”, must yield to justice;<sup>25</sup> and when it has not yet reached that threshold.

This makes Radbruch’s second formula, today called “denial formula” (*Verleugnungsformel*)<sup>26</sup>, particularly significant. It circumvents the issue of application of the first formula, while also differing substantially in its underlying premises:

It is impossible to draw a sharper line between cases of statutory lawlessness and statutes that are valid despite their flaws. One line of distinction, however, can be drawn with utmost clarity: Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely “flawed law”, it lacks completely the very nature of law. For law, including positive law, cannot be otherwise defined than as a system and an institution whose very meaning is to serve justice. Measured by this standard, whole portions of National Socialist law never attained the dignity of valid law.<sup>27</sup>

In other words, according to the second Radbruch formula, where state power is entirely arbitrary, there is no law. For judges living under a dictatorship without effective judicial independence, the difference between the two Radbruch formulae may seem less significant. Neither formula protects a judge in such a regime – like today’s Russia – from personal consequences of refusing to apply laws that violate human rights. The personal risk of disobedience for reasons of conscience falls solely on the judge.

However, after a political transformation from dictatorship to democracy, the distinction between the two formulas becomes crucial. The second Radbruch formula is easier to apply than the first one, which requires the judge to assess whether the breach of justice is intolerable in the given case. The second formula, however, simply requires proof of complete state arbitrariness,<sup>28</sup> which Radbruch argued cannot be considered law, even if the dictatorship calls it so. Arbitrariness is not only injustice, but a complete absence of law, which at the very least requires equal treatment. The

<sup>25</sup> G. Radbruch, *Statutory lawlessness...*, p. 7.

<sup>26</sup> R. Alexy, *Mauerschützen...*, p. 469, footnote 3.

<sup>27</sup> G. Radbruch, *Statutory lawlessness...*, p. 7.

<sup>28</sup> Cf. R. Dreier, *Gesetzliches Unrecht im SED-Staat? Am Beispiel des DDR-Grenzgesetzes* [Eng. *Legal injustice in the SED state? The example of the GDR border law*] [in:] *Strafgerechtigkeit. Festschrift für Arthur Kaufmann* [Eng. *Justice in criminal law. Commemorative publication for Arthur Kaufmann*], eds. F. Haft et al., Müller, Heidelberg 1993, pp. 57–58 relating to application problems of Radbruch’s second formula.



historical example Radbruch likely had in mind in 1946 was the racist Nazi legislation that differentiated between human beings on the one hand and Jews on the other.<sup>29</sup>

The strength of the second formula, however, is also its limitation. It only applies to the most extreme cases of arbitrary state power, like the Nazi rule between 1933 and 1945, and generally does not address cases of serious human rights violations under communist dictatorships. This is why, during the prosecution of communist crimes in Germany after 1989, the second so-called “denial formula” was never applied – only Radbruch’s first formula was used.

### 3. European jurisdictions after 1989 in dealing with communist crimes

The reason Radbruch’s first formula could be applied in German jurisprudence after 1989, unlike after 1949, was that Germany, unlike other socialist countries, saw not only the disappearance of state socialism, but rather of the whole state, the GDR, in 1990. This left jurisprudence mainly in the hands of West German judges who were personally unencumbered by the past. However, these judges did not see a basis for applying Radbruch’s second formula to communist crimes in Germany. Instead, they had to distinguish between lesser injustices, which were not prosecuted after 1989, and extreme injustices, which were prosecuted based on Radbruch’s formula, because “the conflict between statute and justice” reached “such an intolerable degree that the statute, as ‘flawed law’” had to “yield to justice.”<sup>30</sup>

This is why German courts denied that the degree of intolerability had been exceeded in cases of lesser restrictions, such as those on freedom of movement, expression, assembly, and association.<sup>31</sup> On the other hand, the – limited – natural law approach of Radbruch’s formula permitted prosecution in particularly serious cases of human rights violations. For example, under German socialist law, killing was generally prohibited, but in some extreme cases, such as to prevent someone’s escape to the West, targeted killings were authorized.<sup>32</sup> This interpretation of the law was also upheld by

<sup>29</sup> Cf. the judgment of the German Constitutional Court of 14.02.1968 (Court reference number: 2 BvR 557/62) that in the National Socialist dictatorship the “attempt to physically and materially destroy certain parts of one’s own population, including women and children, according to ‘racial’ criteria (...) has nothing in common with law and justice”. The deprivation of citizenship on the basis of Jewish origin already denied the principle of equal treatment always associated with law; it is an expression of pure arbitrariness, i.e. the antithesis of law. Cf. R. Valadão, *Rechtspositivismus und Nationalsozialismus...*, pp. 52–54.

<sup>30</sup> G. Radbruch, *Statutory lawlessness...*, p. 7.

<sup>31</sup> K. Marxen, G. Werle, M. Vormbaum, *Die strafrechtliche Aufarbeitung...*, pp. 82, 299.

<sup>32</sup> *Ibidem*, pp. 24–29, 281, 301; A. Bormann, K. Küpper, F. Schroeder, *Die rechtliche Aufarbeitung der kommunistischen Vergangenheit in Deutschland* [Eng. *Legal settling of accounts with the communist past in Germany*] [in:] *Die rechtliche Aufarbeitung der kommunistischen Vergangenheit in Osteuropa* [Eng. *Legal settling of accounts with the communist past in Eastern Europe*], eds. F. Schroeder, H. Küpper, Peter Lang, Frankfurt



the European Court of Human Rights.<sup>33</sup> In other post-socialist countries, the prosecution of communist crimes in comparable cases was either rejected entirely, in line with Kelsen's approach,<sup>34</sup> or justified using international law arguments. Specifically, courts in these countries often invoked violations of the European Convention on Human Rights of 1950<sup>35</sup> and the International Covenant on Civil and Political Rights of 1966,<sup>36</sup> both of which were gradually ratified by post-socialist states to gain better international recognition, but usually with little practical effect within the countries themselves. The Hungarian Constitutional Court, for instance, rejected the legal provision suspending the statute of limitations for crimes not yet time-barred, deeming it a violation of the prohibition of retroactivity and inconsistent with the rule of law.<sup>37</sup> Instead, Hungarian criminal courts based the prosecution of the most serious communist crimes on charges of "crimes against humanity" and "war crimes," as defined by the Nuremberg War Crimes Tribunal of 1946.<sup>38</sup> The Soviet occupation of Hungary was categorized as a permanent state of war in this context.<sup>39</sup>

From a legal theory perspective, these approaches are problematic, even though they are supported by Article 7 of the European Convention on Human Rights:<sup>40</sup> "This

a. M. 2010, pp. 79, 82 *et seq.*; J. Limbach, *Möglichkeiten und Grenzen des Rechtsstaats bei der Aufarbeitung diktatorischer Vergangenheiten* [Eng. *Possibilities and limits of the rule of law in legal settling of accounts with dictatorial pasts*] [in:] *Recht und Gerechtigkeit. Die strafrechtliche Aufarbeitung von Diktaturen in Europa* [Eng. *Law and Justice. Legal settling of accounts with dictatorships in Europe*], ed. J. Ganzenmüller, Böhlau, Köln 2017, p. 29; S. Kirste, *Rechtliche Vergangenheitsbewältigung. Ein Beitrag des Rechts zur Vergangenheitsgerechtigkeit in rechtsphilosophischer Perspektive* [Eng. *Legal settling of accounts of the past. A contribution of law to legal settling of accounts with the past from the perspective of legal philosophy*], "Jahrbuch des öffentlichen Rechts der Gegenwart. Neue Folge" 2021, vol. 69, p. 17.

<sup>33</sup> *Strafrecht in Reaktion auf Systemunrecht. Vergleichende Einblicke in Transitionsprozesse*, vol. 5, eds. A. Eser, J. Arnold, Edition iuscrim, Freiburg i. Br. 2002, p. 7.

<sup>34</sup> T. Pintarić, *Die rechtliche Aufarbeitung der kommunistischen Vergangenheit in Kroatien* [Eng. *Legal settling of accounts with the communist past in Croatia*] [in:] *Die rechtliche Aufarbeitung...*, p. 113.

<sup>35</sup> The Convention for the Protection of Human Rights and Fundamental Freedoms, drafted by the Council of Europe was signed 4 November 1950 and came into force on 3 September 1953.

<sup>36</sup> International Covenant on Civil and Political Rights, adopted by United Nations General Assembly Resolution 2200A (XXI) on 16 December 1966, but only came into force on 23 March 1976.

<sup>37</sup> *Strafrecht in Reaktion...*, pp. 6–7; H. Küpper, *Die rechtliche Aufarbeitung der kommunistischen Vergangenheit in Ungarn* [Eng. *Legal settling of accounts with the communist past in Hungary*] [in:] *Die rechtliche Aufarbeitung...*, pp. 304–306.

<sup>38</sup> D. Segesser, *Der Tatbestand Verbrechen gegen die Menschlichkeit* [Eng. *The offence of crimes against humanity*] [in:] *NMT. Die Nürnberger Militärtribunale zwischen Geschichte, Gerechtigkeit und Rechtsschöpfung* [Eng. *NMT. The Nuremberg Military Tribunals between history, justice and the creation of law*], eds. K. Priemel, A. Stiller, Hamburger Edition, Hamburg 2013, pp. 586–604.

<sup>39</sup> J. Udvaros, *Ungarn* [Eng. *Hungary*] [in:] *Strafrecht in Reaktion...*, pp. 301–308; H. Küpper, *Die rechtliche Aufarbeitung...*, pp. 271–322 (307 *et seq.*).

<sup>40</sup> In Germany, as part of the legal settling of accounts with the communist past, the Bundestag and the Federal Government lifted the reservation on the validity of Art. 7 para. ECHR in Germany, which previously had been in place since 1952 and until then only allowed the European provisions of the ECHR to apply only within the narrower limits of the prohibition of retroactivity under the German constitution (Art. 103 § 2 GG). K. Marxen, G. Werle, M. Vormbaum, *Die strafrechtliche Aufarbeitung...*, pp. 324 *et seq.*

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 recognised by civilised nations.”<sup>41</sup> The restriction on retroactive criminal law enforcement, justified in the name of “general principles of law recognized by civilised nations,” highlights the dilemma of the rule of law when it comes to prosecuting crimes committed under a previous regime.<sup>42</sup>

In the context of trials dealing with homicides at the former German-German borders, German jurisprudence also formulated an alternative “human rights-friendly interpretation” of legal provisions from authoritarian state systems such as those in post-Stalinist socialist states, which excludes the application of Radbruch’s formula. During the post-Stalinist period, and especially in the final decade of the Warsaw Pact’s existence, constitutional guarantees for the individual and apparent restrictions on state power (e.g., the proportionality requirement in the use of firearms in the 1982 German Border Act<sup>43</sup>), increasingly aligned with Western and international laws. As mentioned earlier, socialist states, in contrast to Nazi Germany, ratified international human rights agreements like the International Covenant on Civil and Political Rights for reasons of prestige.<sup>44</sup>

However, the interpretation and application of these laws by socialist state judiciary and administrative bodies differed radically from those in democratic constitutional states,<sup>45</sup> namely they always favoured state authorities, at the expense of the life and freedom of the individual. For example, in the GDR, the targeted killing of a defenceless fugitive who could not be prevented from crossing the border except by killing was interpreted by officials as compliant with the principle of proportionality, which was formally included in the GDR’s border law. In contrast, according to democratic constitutional interpretation practice, the targeted killing of a fugitive can never be considered proportionate if the sole purpose is to prevent an illegal border crossing.

This, raises the same legal question in the current assessment of communist crimes: should today’s Court’s judgment be based on the GDR’s interpretation practices from that time, or should it reflect today’s constitutional practices? Legal theorist Robert Alexy argues against the German legal tradition, stating that interpreting terms like “proportionality” in socialist-era laws, such as those concerning the use of firearms in border protection,

<sup>41</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4.4.1950) as amended by Protocol No. 15 as from its entry into force on 1 August 2021, Council of Europe, European Treaty Series – No. 5.

<sup>42</sup> A. Fijalkowski, *Retrospective justice...*, pp. 23–26, 35–40.

<sup>43</sup> R. Alexy, *Mauerschützen...*, p. 476.

<sup>44</sup> G. Werle, M. Vormbaum, *Transitional Justice. Vergangenheitsbewältigung durch Recht* [Eng. *Dealing with the past through law*], Springer, Berlin 2018, pp. 56 *et seq.*

<sup>45</sup> P. Bohata, *Die rechtliche Aufarbeitung der kommunistischen Vergangenheit in der Slowakischen Republik und in der Tschechischen Republik* [Eng. *Legal settling of accounts with the communist past in the Slovak Republic and in the Czech Republic*] [in:] *Die rechtliche Aufarbeitung...*, p. 233; A. Fijalkowski, *Retrospective justice...*, pp. 30–31.

based on today's understanding of the rule of law amounts to a "hidden retroactive effect" that is even more problematic than an open retroactive effect in criminal law.<sup>46</sup>

Legal positivism, as espoused by theorists like Hans Kelsen, who is particularly influential in the legal theory of post-socialist states, tends to avoid these difficult questions, but legal positivism is *morally* problematic when it is dealing with serious human rights violations. This leads to a dilemma. The difficulty of addressing this dilemma is reflected not only in the very different judgments rendered even within the same state but also in the relatively low penalties imposed, even for homicides. This is particularly evident in Germany, which holds a unique position among post-socialist states because, after the dissolution of the socialist German state, an almost entirely unencumbered West German judiciary – criticized by East German observers as 'victor's justice'<sup>47</sup> – conducted the criminal proceedings following reunification. Unlike all other post-socialist countries<sup>48</sup>, Germany saw almost no elite continuity in politics, state administration, or the judiciary after 1990, which contrasts sharply with the situation after 1945.<sup>49</sup>

Despite this, out of 75,000 investigations by public prosecutors involving 100,000 defendants in Germany, only 753 resulted in final convictions.<sup>50</sup> Convictions were largely limited to the most serious offences against life and health, such as border killings and forced doping in competitive sports – acts that often had lifelong health consequences for the victims that continue to this day.<sup>51</sup> However, this also presup-

<sup>46</sup> R. Alexy, *Mauerschützen...*, pp. 478–481, 487. Cf. K. Marxen, G. Werle, M. Vormbaum, *Die strafrechtliche Aufarbeitung...*, pp. 29–31 with reference to further criticism by legal scholars. What is not disputed, however, are the findings of German courts on the unlawfulness of killings by mines and automatic firing systems at the border. There was no legal basis for this even under GDR law (*ibidem*, p. 31).

<sup>47</sup> A. Bormann, H. Küpper, F. Schroeder, *Die rechtliche Aufarbeitung...*, p. 62.

<sup>48</sup> Cf. G. Vassali, *Radbruchsche Formel...*, pp. 229–235 with a short overview. In particular in Hungary, there is even an "unbroken elite continuity" (H. Küpper, *Die rechtliche Aufarbeitung...*, pp. 273, 308–313). Also in Bulgaria the lustration failed in the public sphere (S. Ivanova, *Die rechtliche Aufarbeitung der kommunistischen Vergangenheit in Bulgarien* [Eng. *Legal settling of accounts with the communist past in Bulgaria*] [in:] *Die rechtliche Aufarbeitung...*, pp. 21–23, 30–39). It was completely omitted in Croatia (T. Pintarić, *Die rechtliche Aufarbeitung...*, p. 115). In Romania, too, there has been no general scrutiny of public sector employees with regard to their involvement in the Securitate secret service. Political initiatives by Justice Minister Monica Macovei to introduce vetting procedures, at least for judges and public prosecutors, were declared unconstitutional by the Constitutional Court (A. Bormann, *Die rechtliche Aufarbeitung der kommunistischen Vergangenheit in Rumänien* [Eng. *Legal settling of accounts with the communist past in Rumania*] [in:] *Die rechtliche Aufarbeitung...*, pp. 174 *et seq.*). In the 1990s, Czechoslovakia was therefore one of the few post-socialist countries in which a review of the past of judges and public prosecutors took place. In the Czech and Slovak Federal Republic between 1990 and 1992, 33% of judges and 63% of public prosecutors had to leave the service (P. Bohata, *Die rechtliche Aufarbeitung...*, pp. 253–257). On lustration in Poland, which has been stepped up considerably since 2007, cf. T. Vries, *Der rechtliche Umgang mit der Vergangenheit in der Republik Polen* [Eng. *Legal settling of accounts with the communist past in Poland*] [in:] *Die rechtliche Aufarbeitung...*, pp. 141–151.

<sup>49</sup> A. Bormann, H. Küpper, F. Schroeder, *Die rechtliche Aufarbeitung...*, pp. 85–91.

<sup>50</sup> K. Marxen, G. Werle, M. Vormbaum, *Die strafrechtliche Aufarbeitung...*, p. 293.

<sup>51</sup> *Ibidem*, pp. 265 *et seq.* pointing out that there was not a single acquittal in cases of forced doping. The conviction rate in cases of violent offences at the border was also above average.

posed that there was criminal liability under both GDR and West German law, with the German Unification Treaty<sup>52</sup> stipulating that only the “mildest law”<sup>53</sup> of the two legal systems in terms of punishment could be applied.<sup>54</sup>

Interestingly, among other post-socialist states of Central and Eastern Europe, Poland<sup>55</sup> stands out as a leader in criminal investigations, with 387 indictments against nearly 600 individuals, contrary to the myth of the “thick line” that sought to close the chapter on communist crimes.<sup>56</sup> Nevertheless, the trend across most states that have prosecuted communist crimes – unlike Russia, Belarus, Georgia, Bulgaria, or Croatia – is a narrowing of criminal prosecutions to focus primarily on the most serious human rights violations. This shift can be attributed to a partial waiver of punishment by the state. In Germany, for example, former political dissidents often express frustration that although they fought for justice against socialist oppression, all they got in today’s Germany was the rule of law, but not the justice they fought for.<sup>57</sup>

#### 4. Final conclusion: Limits of the rule of law in dealing with former communist crimes

From a human perspective, the bitterness of former political dissidents is absolutely understandable. This is where the law reaches its limits. While the rule of law can prevent the most egregious injustices committed by the state against individuals, it can never fully deliver complete justice. And if it tried to do so, it would only create new injustices.

It is our responsibility to prevent such injustices by safeguarding the democratic constitutional state, because – and that is my short definition of the rule of law – the political end, the political will, even the democratically legitimized will, be it from the left or the right of the political spectrum, does not justify all means! I believe this is the key lesson we can draw from the global history of communist crimes in the 20<sup>th</sup> century<sup>58</sup> today!

<sup>52</sup> Treaty between the Federal Republic of Germany and the German Democratic Republic on the Establishment of German Unity = Vertrag zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands (31 August 1990), Bundesgesetzblatt = BGBl. II, p. 885, 889.

<sup>53</sup> Section 2 (3) German Penal Code and Art. 103 (2) Basic Law of the Federal Republic of Germany in conjunction with Art. 315 (1) Introductory Act to the German Criminal Code and Art. 8 Unification Treaty between the Federal Republic of Germany and the German Democratic Republic. Cf. K. Marxen, G. Werle, M. Vormbaum, *Die strafrechtliche Aufarbeitung...*, p. 480.

<sup>54</sup> K. Marxen, G. Werle, M. Vormbaum, *Die strafrechtliche Aufarbeitung...*, p. 279.

<sup>55</sup> A. Fijalkowski, *Retrospective Justice...*, pp. 40–45; *idem*, *Transitional criminal justice: The Polish way* [in:] *Transitional criminal justice...*, pp. 118–120.

<sup>56</sup> T. Lachowski, *Zmiany legislacyjne...*, p. 167.

<sup>57</sup> A. Bormann, H. Küpper, F. Schroeder, *Die rechtliche Aufarbeitung...*, p. 62.

<sup>58</sup> Cf. S. Courtois, *The black book of communism: crimes, terror, repression*, trans. J. Murphy, M. Kramer, Harvard University Press, Cambridge, Mass. 2001; with the first monumental attempt to compile all the crimes worldwide committed during the 20<sup>th</sup> century in the name or with the justification of communism.

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## Abstract

**Christoph-Eric Mecke**

### **Finding legal approaches to dealing with the past after the fall of communism from the perspective of legal theory and comparative law**

The paper deals with the question of legal punishment of crimes, in particular crimes against life and freedom, which were committed in the former socialist states of Central and Eastern Europe in the name of the State or at least with its tacit approval. This question is discussed in the paper from the perspectives of legal theory and comparative law.

After clarifying the concept of "communist crimes", which in countries such as Poland is even a legal concept of applicable law, the first part of the paper examines the legal-theoretical and legal-philosophical problems of criminal penalties for massive human rights violations committed under the laws of the socialist era. As legal-theoretical polar opposites in this regard, it presents the position of Gustav Radbruch with his two famous formulae and the position of Hans Kelsen's legal positivism. It points out that in the case of communist crimes only the first of Radbruch's two formulae, the "intolerability formula" can be applied.

The perspective of comparative law is the subject of the second part of the paper. It shows that the spectrum of criminal-law dealing with the communist past since 1989 ranges from a relatively

systematic legal prosecution of at least the most serious human rights violation, for example in the cases of homicides at the former inner German border, to complete non-prosecution by the judiciary of Eastern European states such as Russia, Belarus, Georgia, Bulgaria or Croatia. Where criminal prosecution took place, the question arose not only of the statute of limitations, but also of the *nulla poena sine lege* principle. This principle, which is based on the rule of law, is not only important with respect to the validity of statutory law during the communist era, but also with regard to the different interpretative practices of courts in the former socialist states.

**Keywords:** legal reassessment of communist crimes, post-socialist states of Central and Eastern Europe, Kelsen's legal positivism, Radbruch's two formulae, rule of law, *nulla poena sine lege*