# RETROSPECTIVE CRIMINAL PUNISHMENT UNDER THE GERMAN AND AUSTRALIAN CONSTITUTIONS#

GREG TAYLOR*

## I. THE ISSUE

German jurisprudence on retrospective criminal laws contains a number of valuable ideas which are a result of Germany's experience with their own war criminals and with the shootings at the Berlin Wall. These ideas can be used to remove the uncertainty in Australian law[1] as to the constitutionality of retrospective criminal laws, which has existed owing to the lack of a clear majority in favour of their validity or invalidity in *Polyukhovich v Commonwealth*.[2] There is no such uncertainty in relation to retrospective non-criminal laws; their validity is not attacked from any side,[3] although those supporting a prohibition on retrospective criminal laws have not justified this distinction convincingly.[4] In the final analysis, German law suggests that the view that retrospective criminal laws are always invalid in Australia because

# The author is grateful to Professor Michael Detmold, Rosemary Owens and the anonymous referees for their comments on earlier drafts of this article, and to Herr stud iur Jochen Weller for supplying material. The research on German law which forms the basis of this article was conducted while the author was studying at the Philipps-Universität, Marburg, Germany, as Sir George Murray Scholar of the University of Adelaide, and with the assistance of a grant from the St Peter's Collegians' Tertiary Students' Care Trust. The author thanks those bodies for their support.

* Lecturer, Law School, University of Adelaide.

1 See, for example, L Zines, *High Court and the Constitution*, Butterworths (4th ed, 1997) p 210; G Williams, *Human Rights Under the Australian Constitution*, Oxford (1999) p 216. However, Gummow J seems to think that there was no such doubt as to the Court's holding in the case: *Nicholas v R* (1998) 193 CLR 173 at 234, per Gummow J; see also at 259 n 353 and 260f n 358, per Kirby J.

2 (1991) 172 CLR 501 ("*The War Crimes Act Case*").

3 *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 237, 256. For the English approach see *Heil v Rankin* [2000] 2 WLR 1173 at 1190, 1192f.

4 See the discussion of this point in L Zines, note 1 *supra*, p 211.

they amount to some kind of contravention of the doctrine of separation of powers cannot be maintained.

In a recent article, Professor Markesinis QC asks, towards the end of his discussion, "why have I focused on German law?".[5] I propose to ask this question at the beginning rather than at the end. Why, then, focus on German law to decide whether retrospective criminal laws would be offensive to the Australian Constitution? It is tolerably clear that Anglo-Australian constitutional law will not stand a wholesale importation of continental European doctrines,[6] and this article does not advocate the contrary. But Australia should keep an open mind about the possible lessons to be learnt from other Western democracies and should not attempt to be a uniquely Australian constitutional island.[7]

Furthermore, the issue of retrospective criminal laws remains important in Australia. It is not just the case that there has recently been publicity about alleged war criminals entering Australia, and calls for their prosecution. It has also recently been suggested that the doubts about the constitutionality of retrospective legislation at the federal level raised in the *War Crimes Act Case* could be extended to the States as well,[8] which, given the primary responsibility of the States in our federal system for criminal law, would be a major step. In addition, as *Nicholas v R*[9] and recent, albeit arguably, retrospective Victorian legislation[10] show, the issue of retrospectivity will not simply go away even if no further prosecutions in Australia for war crimes or crimes against humanity[11] occur. It is therefore important to get the law right. Any outside assistance that is available should be welcomed.

Nevertheless, an Australian lawyer reading the German Constitution in the hope of discovering what it provides about retrospective criminal laws might doubt that a focus on German law in this area could be very profitable: the law there appears to be quite clear. Article 103 II of the *Basic Law*, the German Constitution that came into force on 23 May 1949,[12] provides:

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5 B Markesinis, "Privacy, Freedom of Expression, and the Horizontal Effect of the *Human Rights Bill*: Lessons from Germany" (1999) 115 *LQR* 47 at 86.

6 *Leask v Commonwealth* (1996) 187 CLR 579 at 594f, 600f, 615f; but see *Levy v Victoria* (1997) 189 CLR 579 at 645f.

7 See A Marfording, "Federalism and Judicial Review in Germany: Lessons for Australia?" (1998) 21 *UNSWLJ* 155 at 155f.

8 M Bagaric and T Lakic, "Victorian Sentencing Turns Retrospective: The Constitutional Validity of Retrospective Criminal Legislation after *Kable*" (1999) 23 *Crim LJ* 145. It is assumed here, on the basis of the arguments adduced in that article, that the arguments for the existence of a prohibition of retrospective State criminal laws are at least no stronger than those in relation to retrospective Commonwealth criminal laws and that they do not therefore require separate treatment.

9 (1998) 193 CLR 173.

10 See M Bagaric and T Lakic, note 8 *supra*.

11 For reasons of space, the distinction between war crimes and crimes against humanity - which is more important in international law than in prosecutions for homicide under domestic law - is not always drawn below; rather, the general term "war crimes" is used for both categories.

12 For further historical background and references see, for example, E Eberle, "Public Discourse in Contemporary Germany" (1997) 47 *Case Western LR* 797 at 800-4.

> An act can be punished only if it was an offence against the law before the act was committed.[13]

There is no express exception to this prohibition. However, appearances are deceptive. This article will show that the country that has had to cope, owing to its history in this century, with repeated instances of retrospective criminal laws has developed an interesting unwritten natural law exception to this express constitutional provision for the worst class of cases - such as war crimes. German law recognises that there is a tension between, on the one hand, what might be called the systemic or formal requirements of justice embodied in rules such as the rule against retrospectivity and, on the other, substantive justice requiring the punishment of those who commit offences. When the acts are especially pernicious, such as war crimes, it may be necessary to place the demands of substantive justice above those of systemic or formal justice. But there is in every case a choice: the issue is not a simple one in which all the arguments point one way. This was not appreciated by all the Australian Judges in the *War Crimes Act Case*.

Nor has it been appreciated by all Australian scholars. Sometimes, those opposed to the constitutionality of retrospective laws cite the provisions of international instruments such as art 15 of the *International Covenant on Civil and Political Rights* as evidence that such laws are generally condemned by the international community.[14] It is extraordinary, however, that so little attention is paid to art 15 II, which provides:

> Nothing in this article shall 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 the community of nations.

The *European Convention on Human Rights*, which prohibits retrospective criminal laws in art 7, contains, in art 7 II, another very similar example of such an exception.[15] And art 11 II of the *Universal Declaration of Human Rights* states that no-one shall be punished for "any act or omission which did not constitute a penal offence, under national *or international* law, at the time when it was committed" (emphasis added). Exceptions based on the intrinsic and

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13 Translation in E Hucko (ed), *The Democratic Tradition: Four German Constitutions*, Oxford (1987) p 239.

14 See, for example, H Roberts, "Retrospective Criminal Laws and the Separation of Judicial Power" (1997) 8 *PLR* 170 at 180 n 137; M Bagaric and T Lakic, note 8 *supra* at 155 n 80, 157.

15 On the status of the principle against retrospectivity in international courts see *R v Kirk* [1984] EuGH 2689; *SW v United Kingdom*, Eur Court HR, judgment of 22 November 1995, Series A no 335-B; *CR v United Kingdom*, Eur Court HR, judgment of 22 November 1995, Series A no 335-C; P Albrecht, S Kadelbach, NJ 1992, 137, 142; G Dannecker, *Das intertemporale Strafrecht [Intertemporal Criminal Law]*, JCB Mohr (1993) pp 177-81, 253; G Gornig, NJ 1992, 4, 12; RH Graveson, MDR 1947, 278, 278f; M Kenntner, NJW 1997, 2298, 2298-300; W Kiesselbach, MDR 1947, 2, 3-5; V Krey, *Keine Strafe ohne Gesetz [No Punishment Without Written Law]*, de Gruyter (1993) pp 104-9; HC Maier, *Die Garantiefunktion des Gesetzes im Strafprozeßrecht [The Guarantee Function of Written Law in Criminal Procedure]*, Centaurus (1991) p 5; T Maunz, G Dürig (eds), *Grundgesetz Kommentar [*Basic Law *Commentary]*, CH Beck (loose-leaf, 32nd service, October 1996), art 103 II, p 57f; G Stratenwerth, *Strafrecht Allgemeiner Teil I: Die Straftat [Criminal Law General Principles I: the Offence]*, Carl Heymann (3rd ed, 1981) p 42; GL Williams, *Criminal Law: The General Part*, Stevens (2nd ed, 1961) pp 576-8; PJ Winters, *Deutschland Archiv* 30, 696.

universally recognised incorrectness of an act do, in fact, have a long history in the story of the prohibition of retrospective laws; they can be traced as far back as ancient Rome.[16]

This is not an article about international law or Australia's obligations to the international community, nor about the extent to which acts can constitute crimes under international law and who has jurisdiction to try them.[17] Rather, it is assumed that, as in the *War Crimes Act Case*, defendants will be prosecuted under domestic law in accordance with an Act of Parliament. However, it is clear that art 15 II and provisions like it were inserted as exceptions to the general prohibition of retrospective criminal laws to allow prosecutions for war crimes and crimes against humanity such as those involved in the *War Crimes Act Case*.[18] This simply reflects the tension between procedural and substantive justice referred to above. It is extraordinary, therefore, that some scholars should attempt to condemn Australia's war crimes trials by referring to art 15 without mentioning its second paragraph.

However, as will be shown below, war crimes are not the only situations in which such an exception is applicable. In East Germany, citizens wishing to flee to the West were shot on sight by the border guards along the Berlin Wall and the border between East and West Germany. The aim was to prevent the loss of citizens that had occurred before the Wall was built on 13 August 1961. Before that date, approximately 2.7 million East Germans (including 811 judges and lawyers and 752 University lecturers) had left East Germany to live in the West. That was about one-sixth of the total population.[19]

After reunification on 3 October 1990, the German authorities decided that not only those who gave the orders to shoot, but also those who carried out those orders should be prosecuted under German domestic law.[20] Generally the prosecutions were for manslaughter (or, in the case of those who ordered the killings rather than carried them out, acting as an accessory to manslaughter), as murder is reserved in Germany for a miscellaneous selection of the worst cases of intentional killing; most intentional killings under German criminal law are

16 See, for an example of such an exception in ancient Rome, W Hassemer in *AK-StGB*, p 140f; V Krey, note 15 *supra*, p 49f; J Pföhler, *Zur Unanwendbarkeit des strafrechtlichen Rückwirkungsverbots im Strafprozeßrecht in dogmenhistorischer Sicht [On the Inapplicability of the Prohibition of Retrospective Criminal Legislation in the Law of Criminal Procedure from the Point of View of Doctrinal History]*, Duncker & Humblot (1988) pp 88, 90f; H Schreiber, *Gesetz und Richter: Zur geschichtlichen Entwicklung des Satzes* nullum crimen, nulla poena sine lege *[Written Law and the Judge: On the Historical Development of the Principle* nullum crimen, nulla poena sine lege*]*, Alfred Metzner (1976), pp 18-20; G Stratenwerth, note 15 *supra*, p 41.

17 For recent discussions of this question, see *R v Bow Street Magistrate; Ex parte Pinochet* [1999] 2 WLR 827 at 840, 923; *Nulyarimma v Thompson* (1999) 96 FCR 153.

18 For a brief survey, see A Eide et al (eds), *The Universal Declaration of Human Rights: A Commentary*, Oxford (1992) p 182f.

19 C Kleßmann, *Zwei Staaten, eine Nation: Deutsche Geschichte 1955-1970 [Two States, one Nation: German History 1955-1970]*, Bundeszentrale für politische Bildung (1988) p 321.

20 Not under international law, on which see KA Adams, "What is Just?: The Rule of Law and Natural Law in the Trials of Former East German Border Guards" (1993) 29 *Stanford JIL* 271 at 281-7.

manslaughter only.[21] Murder and manslaughter were, needless to say, also offences under East German law. Therefore, as long as the lower of the two states' maximum penalties was applied, there was no question of retrospectively creating a criminal offence or of imposing retrospectively a higher penalty.[22]

It is otherwise, however, with the alleged defence to these crimes proffered by the accused. They say that their acts were supported at the time of their commission either by an unwritten defence based on the practice of the East German state or by the provisions of s 27 of the *Law on the State Border of East Germany* of 25 March 1982,[23] which authorised the use of armed force to prevent the commission of an act that "under the circumstances appeared to be a serious offence".[24] Without becoming bogged down in the technicalities of a now-defunct and always somewhat malleable legal system,[25] it is safe to say that attempting to leave East Germany illegally was clearly an offence[26] for which long prison sentences were routinely given.[27] If this defence existed, the retrospective abolition of it, or a failure to apply it, would, the accused claim, contravene the principle against retrospectivity.

As mentioned above, there is no express exception in the German Constitution of 1949 to the prohibition on retrospective criminal punishment. In the Berlin Wall cases, however, the courts have revived the natural law exception to the rule against retrospective criminal legislation that had been developed shortly after the War to deal with the far greater violations of human rights committed by the Nazi regime. These topics, the reasoning of the German courts and the reactions of scholars can, for reasons of space, only be summarised here. But they are more than worthy of the attention of the Australian legal community as it continues to grapple with the question of whether Australian law does truly contain a prohibition of retrospective criminal laws.

There are, of course, generally good reasons for avoiding retrospective criminal laws, and I certainly do not wish to argue that retrospectivity should

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21 (West) German *Criminal Code*, ss 211, 212. Under s 211, murder is committed only if there is also present one of the *Mordmerkmale* - indicia of murder - such as the use of generally dangerous means or unnecessary cruelty or some particularly objectionable *modus operandi* (such as taking advantage of the victim's lack of reason to suspect deadly force) or motive (such as the sheer desire to kill, sexual motives, greed, etc). Other cases are manslaughter only.

22 BGHSt 41, 101, 112.

23 *Gesetzblatt der DDR [Government Gazette of the German Democratic Republic]*, 29 March 1982 at 201.

24 "... *die sich den Umständen nach als ein Verbrechen darstellt*".

25 C Starck, VVDStRL 51, 7, 15-18; R Wassermannn, NJW 1997, 2152, 2153.

26 From 1968, under s 213 of the East German *Criminal Code*, which provided for prison sentences of up to eight years for illegally crossing a border (and in earlier years under other provisions).

27 D Schultke, "Das Grenzregime der DDR: Innenansichten der siebziger und achtziger Jahre [The Border Regime of the GDR: A View from the Inside in the 1970s and 1980s]" in *Aus Politik und Zeitgeschichte* B 50/97, 05 December 1997 at 48f; S Wolle, *Die heile Welt der Diktatur: Alltag und Herrschaft in der DDR 1971-1989 [The Happy World of Dictatorship: Everyday Life and Rule in the GDR 1971-1989]*, Bundeszentrale für politische Bildung (1998) p 283f.

become the rule rather than the exception. People should generally[28] be able to rely on the law as it was expressed to be when they acted. Furthermore, the criminal law is drained of its deterrent content in relation to an individual act if the law becomes known only after that act has occurred. These trite propositions,[29] however, are, as German experience shows, not always sufficient reasons for avoiding retrospectivity, because in some rare cases more important values can be marshalled in favour of retrospectivity.

## II. AUSTRALIAN LAW

### A. The Presumption Against Retrospectivity.

In the first place, there is the common law presumption against the retrospective operation of statutes. This expresses the expectation that Parliament will not usually infringe basic principles by punishing people for past events, and that, if it wants to do so in the exceptional case, it will make its intention crystal clear. Moreover, criminal laws - like other laws, to which the presumption also applies - are often enacted without an express indication that they apply only to future cases, although this is almost always quite clear from the context. The presumption gives effect to this tacit intention.

There is no doubt of the existence of this presumption of statutory interpretation. It does not seek to restrict the will of the legislature, but to determine what the legislature intended. The legislature's usual intention is ascribed to it unless some reason for doing otherwise is shown.[30]

The presumption applies not only to situations in which new offences are created, but also when the applicable penalty is altered and no contrary intention appears in the statute, at least according to Australian authority.[31] There is no such presumption in relation to laws concerning criminal procedure only,[32] but this concept is, for this purpose, construed narrowly and does not include, for example, the number of jurors required to agree in a verdict.[33]

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28 For arguments to the effect that the interests of reliance may sometimes support retrospective criminal laws, see C Hochman, "The Supreme Court and the Constitutionality of Retroactive Legislation" (1960) 73 *Harv LR* 692 at 693; A Palmer and C Sampford, "Retrospective Legislation in Australia: Looking Back at the 1980s" (1994) 22 *FLR* 217 at 248-50.

29 For a non-trite discussion of these principles and related matters see A Palmer and C Sampford, *ibid* at 218-34.

30 See, on the common-law presumption generally, cases such as *J Arnold v Neilsen* (1976) 9 ALR 191; *Samuels v Songaila* (1977) 16 SASR 397; *Daire v Stokes* (1982) 32 SASR 402 at 405, 409f; *Question of Law Reserved (No 2 of 1996)* (1996) 67 SASR 63 at 68-70; *Owen v South Australia; R v Owen* (1996) 66 SASR 251; DC Pearce, *Statutory Interpretation in Australia*, Butterworths (4th ed, 1996) pp 231f.

31 English authority differs on this point: see the discussion of English authority in *Samuels v Songaila* (1977) 16 SASR 397; *R v Dube* (1987) 46 SASR 118 at 121; *R v D* (1997) 69 SASR 413 at 424, 431; DC Pearce, note 30 *supra*, pp 231f. But see *Siganto v R* (1998) 73 ALJR 162; *R v Truong* [2000] 1 Qd R 663 at 669. New South Wales has regulated by statute the questions arising on adjustments of penalties: *Crimes (Sentencing Procedure) Act* 1999, s 19.

32 *Rodway v R* (1990) 169 CLR 515 at 519; *Nicholas v R* (1998) 193 CLR 173 at 198, 203, 212, 278f.

33 *R v Kidman* (1915) 20 CLR 425 at 437; *Newell v R* (1936) 55 CLR 707 at 711; *Rodway v R* (1990) 169 CLR 515 at 518-23; *Samuels v Songaila* (1977) 16 SASR 397 at 400f, 408.

However, the presumption offers no constitutional protection against retrospective laws if a Parliament is determined to enact such laws, for Parliament need only say the word and the presumption is rebutted. The question remains whether retrospective criminal laws in accordance with the clearly and unambiguously expressed will of the legislature are impermissible for constitutional reasons. If they are not, the presumption will have no work to do, at least in the criminal law. (As was mentioned above,[34] the validity of retrospective non-criminal laws is not attacked from any side, so they can be disregarded from now on.) It is this issue that was dealt with in the *War Crimes Act Case*.

## B. Australian Law Before the *War Crimes Act Case*.

The *War Crimes Act Case* was not the first case to consider this question. In *R v Kidman*,[35] the High Court of Australia confirmed the ability of the Commonwealth Parliament to enact retrospective legislation. This reflected the then-overwhelming consensus against the implication of rights into the meagre and unpromising text of the Australian Constitution. Furthermore, it was held that a restriction on Parliament's powers in this respect would represent a restriction on the sovereignty of Parliament within its assigned subject areas that would not reflect the sovereign quality of legislative power conferred by the Imperial Parliament.[36]

In *Kidman* it was pointed out expressly that the Australian Constitution, unlike the United States Constitution,[37] contains no express prohibition of retrospective criminal laws.[38] Therefore, the only question was as to legislative competence in accordance with normal federal doctrines. The majority concluded that the law involved in *Kidman* (which introduced the offence of conspiracy to defraud the Commonwealth into the *Crimes Act* 1914) was within power. It was stated that punishment under a retrospective criminal law could have the effect of deterring other potential future offenders. If, therefore, a Commonwealth law making the behaviour in question an offence was within power, a law creating the same offence retrospectively fell within the incidental power owing to this deterrent effect.[39] Ignoring issues of fairness, this seems, on the whole, to be right, at least to the extent that the mere promise of punishment by the legislature contained in a law that operates prospectively is perhaps less likely to deter others[40] than punishment under a retrospective law that has already been carried out, or at

34 Footnotes 3-4 and accompanying text.

35 (1915) 20 CLR 425.

36 *Ibid* at 459; J Goldsworthy, "Implications in Language, Law and the Constitution" in G Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 150 at 175f; G Kennett, "Individual Rights, the High Court and the Constitution" (1994) 19 *MULR* 581 at 592.

37 Art I ss 9 cl 3 and 10 cl 1.

38 Note 35 *supra* at 442, 463. The same point was made in the *War Crimes Act Case*, note 2 *supra* at 537, 648f, 720.

39 Note 35 *supra* at 443, 450f, 456f, 462.

40 Although admittedly not the person punished in the first case in which the law concerned is applied retrospectively, who had *ex hypothesi* no reason to fear the retrospective punishment when committing the offence: *Samuels v Songaila* (1977) 16 SASR 397 at 399f.

least pronounced, and is thus clearly more than an idle threat.[41] Whether it is fair, as distinct from effective, to proceed in this fashion is clearly, on the *Kidman* view, a matter for Parliament, not the courts.

It is significant that in *Kidman* only Griffith CJ, who thought that the Commonwealth could not enact retrospective criminal laws, based his judgment neither on the nature of retrospective laws as such, nor on considerations of human or other implied rights, but on technical constitutional reasons relating to the extent of the implied powers of the Commonwealth Parliament.[42] Even more revealing is the fact that His Honour, despite this view, did not declare the law challenged in *Kidman* invalid for retrospectivity: he held that this law was merely a codification of the already existing common law offence of defrauding the Commonwealth, and was thus merely declaratory and not in any real sense retrospective.[43]

Even Chief Justice Griffith's relatively mild objection to retrospectivity has not received much subsequent support. The State Supreme Courts have treated *Kidman* as authority for the proposition that retrospective laws are constitutionally valid[44] without referring to Chief Justice Griffith's reservations or considering whether they could be applied in appropriate cases to State laws.

## C. The War Crimes Act Case.[45]

The *War Crimes Act Case* is, as was stated above, the source of the doubts about the power of the Commonwealth Parliament, and possibly also, after the decision in *Kable v DPP (NSW)*,[46] of State Parliaments,[47] to enact retrospective criminal laws. It is well known[48] that the problem arose because the *War Crimes Act* 1945 had been amended to facilitate the prosecution of Australian residents who had allegedly committed war crimes and crimes against humanity in Europe during World War II. The amendments were so comprehensive that the Act was, in effect, a new enactment.

One of the accused under the Act thus amended was Ivan Timofeyevich Polyukhovich, a resident of South Australia, who was alleged to have been active in the War in the Ukraine. The Crown admitted that the acts in question had not been unlawful under any Australian law at the time of their commission.[49] The amended Act, however, rebutted the presumption against

41 GL Williams, note 15 *supra* at 580f, puts the opposite argument, relying on Hobbes; and see *ibid* at 600f.
42 Note 35 *supra* at 434.
43 *Ibid* at 436.
44 See, for example, *Nicholas v R* (1998) 193 CLR 173; *Winstone v Kelly* (1987) 46 SASR 461; *Owen v South Australia; R v Owen* (1996) 66 SASR 251.
45 Note 2 *supra*.
46 (1996) 189 CLR 51.
47 See M Bagaric, T Lakic, note 8 *supra*.
48 This short summary of the facts is adapted from the *War Crimes Act*, note 2 *supra* at 524f. See also G Triggs, "Australia's War Crimes Trials: A Moral Necessity or a Legal Minefield?" (1987) 16 *MULR* 382 at 382-5.
49 Note 2 *supra* at 523, 594-6.

retrospectivity in the clearest possible way.[50] Thus it was necessary to decide whether the Commonwealth Constitution permits retrospective criminal laws.

The formal justification for re-opening *Kidman* was that that case had not considered the question of retrospectivity in regards to the doctrine of separation of powers.[51] It might be thought unlikely that the Court would simply forget about that doctrine in the very year in which it was applied to restrict the powers of the Inter-State Commission.[52] Perhaps no-one in 1915 thought that the doctrine of separation of powers could possibly have any relevance to the question. At any rate, in the *War Crimes Act Case*, the Court declared the Act constitutionally valid. However, the Justices did not agree on the reasons for this result. There was no majority for the previously accepted position in favour of the constitutionality of retrospective criminal laws.[53]

The traditional *Kidman* view, which it is not necessary to re-state here, was represented by Mason CJ, Dawson and McHugh JJ. Justices Deane and Gaudron took the opposite view for reasons that will be more fully explored below. In summary, for the sake of clarity and at the risk of simplification, their Honours thought that a retrospective criminal law would be a breach of the doctrine of the separation of powers and would thus be invalid.

Justice Brennan would have held the law invalid, but for reasons relating to characterisation rather than to retrospectivity as such. While his Honour stated that it was strongly arguable that an Act that retrospectively punished Australian citizens would, on the authority of *Kidman*, be constitutional,[54] he also held that the Commonwealth did not have the necessary constitutional power to criminalise behaviour committed by foreigners in foreign countries. In His Honour's view, the vice of the law was not its retrospectivity, but its attempt to regulate matters which had no sufficient connection with Australia's international obligations or defence and thus could not be supported under s 51 (xxix)[55] or (vi). The lapse of time was relevant only to the question of characterisation; there is no support in this judgment for an independent prohibition of retrospectivity in Australian constitutional law based on the separation of powers.[56]

The fourth vote in favour of the validity of the Act was that of Toohey J. As will be discussed, his Honour was of the view that, although some retrospective laws were invalid, this law was not of that class.

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50 *Ibid* at 643.
51 *Ibid* at 626, 705.
52 *New South Wales v Commonwealth* (1915) 20 CLR 54 ("*The Wheat Case*").
53 See note 1 *supra*.
54 Note 2 *supra* at 554.
55 See now *Victoria v Commonwealth* (1996) 187 CLR 416 at 458 ("*The Industrial Relations Act Case*").
56 Note 2 *supra* at 588, 592f.

*(i) The Judgments of Justices Deane and Gaudron*

Although the judgments of Deane and Gaudron JJ do contain certain points of difference, or perhaps certain differences in emphasis,[57] for the purposes of this comparison with German law, they can be treated as substantially similar and considered together.

Their Honours began with the concept of the separation of powers. As they pointed out, it is well settled that, in Australia, only the courts can exercise federal judicial power.[58] It is also well settled that judicial power includes the power to determine whether an accused has contravened the criminal law.[59] Furthermore, it is not compatible with this accepted principle for Parliament to direct the courts to determine that a particular person or a particular group of persons is guilty under a retrospective (or prospective) law and to impose a penalty for the 'offence' thus 'proven'. Thus far, their Honours are in agreement with Mason CJ, Dawson and McHugh JJ,[60] and with the decision of the Privy Council in *Liyanage v R.*[61] Such a law would, after all, not be directed against a yet-to-be-determined group of offenders but against a person or persons determined in advance. It would thus be a legislative judgment against that person or those persons, and the judicial 'trial' to 'determine' guilt would be nothing more than a show trial.[62]

Justices Deane and Gaudron, however, go one step further: although the legislature did not, in the *War Crimes Act* 1945 as amended, identify the persons who were to be punished, there is, they say, still an intrusion into the judiciary's sole area of responsibility because the judiciary, without the retrospective law, would inevitably have to conclude that, in the absence of a law that existed and criminalised the accused's conduct at the time it was committed, the accused had committed no crime. The retrospective law changes this position and makes a finding of guilt inevitable, which shows that the inviolability of judicial power is infringed. This was said to be the case even if the accused insists on a trial to prove his or her innocence and the trial is held in the normal way and according to the normal rules to determine whether the (retrospectively) declared requirements of the law are fulfilled.[63] In such a case, only the appearance of judicial power exists; the question of guilt or innocence is said to have been already determined in advance by the law. In other words, the legislature exceeds

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57 See T Blackshield and G Williams, *Australian Constitutional Law and Theory: Commentary and Materials*, Federation (2nd ed, 1998) p 1147; G Lindell, "Recent Developments in the Judicial Interpretation of the Australian Constitution" in G Lindell (ed), note 36 *supra* 34 at 34; C Parker, "Protection of Judicial Process as an Implied Constitutional Principle" (1994) 16 *Adel LR* 341 at 346f.

58 Note 2 *supra* at 607.

59 *Ibid* at 610. See, for example, *Chu Khing Lim v Minister* (1992) 176 CLR 1 at 27f; L Zines, note 1 *supra*, p 187f.

60 Note 2 *supra* at 536, 647-51 and 721.

61 [1967] AC 259. See also the comprehensive survey of authority by Fitzgerald P (dissenting) in *Laurance v Katter* [2000] 1 Qd R 147 at 159-84; *Rann v Olsen* (2000) 172 ALR 395 at 429.

62 G Kennett, note 36 *supra* at 592.

63 Note 2 *supra* at 612-14, 704-6.

proper bounds by trespassing on judicial functions if it enacts a retrospective law.[64] These arguments are by themselves not convincing, and indeed

> seem[] to amount to a mere assertion that retroactive laws are invalid. Obviously such a law may produce, and is intended to produce, a result different from one where there is no retroactive operation. The issue of validity cannot be resolved merely by pointing out this difference. To assert that all the features of a trial under a prospective law are essential to the judicial process begs the question before the Court.[65]

Every criminal law, retrospective or not, influences to some degree the process of a criminal trial. Otherwise, the legislature would hardly bother to enact them. It cannot be that every law that interferes in some way with curial processes is invalid; for a law abolishing grand juries,[66] for example, clearly interferes with the Court's processes. Rather, the question which is completely missed by Deane and Gaudron JJ is not whether the law affects the process of the Court in some way, but whether it does so in an impermissible way - a way that is truly inconsistent with the separation of powers.

There is no indication that, in this case, the separation of powers had truly been infringed. This law did not mention any person or group of persons (such as "all the members of the *Waffen-SS*") as a group that was to be singled out for punishment regardless of guilt in a manner that would have been offensive to the *Liyanage* principle. That is not to say that the boundary is always easy to draw, but this law was quite clearly on the constitutional side of the boundary. No Court was directed, in the manner of a Bill of attainder, to find anyone 'guilty' of an offence merely on the basis of identity and without further investigation of the true facts.[67] Rather, criminal liability depended on whether the person concerned had in fact committed certain acts proscribed by law; determining this issue is the usual function of the criminal courts.[68] There was, therefore, no difference relevant to the separation of powers between this law and a hypothetical law with the same contents enacted on 3 September 1939. Whether the accused was guilty of proscribed acts or not was to be determined, in a substantive as well as a formal sense, by the courts.[69] Although some may think that "democracy provided cold comfort to those such as Ivan Polyukhovich",[70] the historical fact

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64 *Ibid* at 613, 706f.

65 L Zines, note 1 *supra*, p 211; see also H Roberts, "A Judicially Created Bill of Rights?" (1994) 16 *Syd LR* 166 at 169-72.

66 Such as South Australian Act No 10 of 1852. This Act was one of the many enactments held by Boothby J to be *ultra vires* the Provincial legislature - not, however, because of any infringement of the separation of powers, but because of its repugnancy to the law of England. See South Australian Parliamentary Papers, no 154/1861, pp 3-5, 13f; no 142/1864, pp 47, 56, 61; no 5/1866-7, pp 1f; RM Hague, *The Judicial Career of Benjamin Boothby*, unpublished (1992) p 77. The cure, if necessary at all, was effected by the *Colonial Laws Validity Act* 1865 (Imp) ss 2, 3 and 5.

67 S McMurtrie, "The Constitutionality of the *War Crimes Act* 1991" (1992) 13 *Statute LR* 128 at 146-8; AT Richardson, "*War Crimes Act* 1991" (1992) 55 *MLR* 73 at 78. On the nature and illegality of Bills of attainder, see the interesting discussions in L Zines, note 1 *supra*, pp 206-10; T Campbell, "Democratic Aspects of Ethical Positivism" in RM Hague and J Goldsworthy (eds), *Judicial Power, Democracy and Legal Positivism* (2000) 3 at 32.

68 *Nicholas v R* (1998) 193 CLR 173 at 186-91.

69 Note 2 *supra* at 649, 721f. See also *ibid* at 234.

70 H Roberts, note 14 *supra* at 183.

is that the Australian courts provided somewhat more comfort to Mr Polyukhovich. The jury determined, in this case, that Mr Polyukhovich was not guilty, thus removing any possible doubt that the courts were free, as they should be under the principle of separation of powers, to determine the guilt or innocence of an accused person in accordance with the law.

It may well be that the principle of the separation of powers is the only principle under the Australian Constitution which could possibly be used, however improbably, to justify a decision that retrospective criminal laws are unconstitutional. But there is a difference between favouring the prohibition of retrospective laws and being able to justify it under accepted principles of Australian constitutional law.[71] It is not good enough just to decide that retrospective criminal laws should be declared unconstitutional and then to cast about for a principle to justify that conclusion. That is not what is generally accepted as judicial process.

Finally, the consequence of the view of Deane and Gaudron JJ would be that, if a person in Australia were truly guilty of war crimes or crimes against humanity, and retrospective laws were the only means of ensuring just punishment, that person would have to go unpunished. Surely the doctrine of separation of powers, which deals with the relations between the various arms of government, does not require that consequence. "That a civilised legal system can contemplate with equanimity not punishing Nazi war criminals is almost beyond belief."[72] And it should be noted, although this article does not concern itself with international law, that Australia might be in breach of its international obligations if it found itself unable to prosecute those who have committed acts that are crimes under international law.[73]

### *(ii) Justices Dawson and Toohey*

Justice Toohey's view was somewhat more sophisticated. In his Honour's opinion, a retrospective criminal law could be invalid "if the law excludes the ordinary indicia of judicial process. Such a law may strike at the heart of judicial power: see *Liyanage v The Queen*".[74] Using this criterion, Toohey J came to the conclusion that the law was valid because it criminalised acts that were morally reprehensible and were generally subject to a criminal penalty in the civilised world, not just in this or that country or just in the Ukraine.[75] To that extent, the law was not retrospective at all, except to the extent that it allowed trials in Australian courts of offences committed elsewhere.

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71 L Zines, note 65 *supra*, p 172.

72 AT Richardson, note 67 *supra* at 87.

73 *Nulyarimma v Thompson* (1999) 96 FCR 153 at 161f; A Mitchell, "Genocide, Human Rights Implementation and the Relationship between International and Domestic Law: *Nulyarimma v Thompson*" (2000) 24 *MULR* 15 at 45 (although this author should not necessarily be taken to agree with other points made on that page).

74 Note 2 *supra* at 689.

75 *Ibid* at 691.

It remains, however, unclear precisely where his Honour would draw the line between permissible and impermissible retrospectivity.[76] In the passage just quoted he mentions the *Liyanage* doctrine, which is, of course, accepted constitutional law. If the boundary lies here, his Honour's view is not substantially different from the previously accepted law. But his Honour also emphasised the fact that this law punished conduct that was not generally considered acceptable and was already the subject of a criminal penalty, even if not an Australian one, when it was committed. It may be that he intended to make this the sole criterion of validity, although I do not read his judgment in this sense. It is quite possible that other considerations might save other laws. It is equally possible, however, that his Honour considered *Liyanage* to be just one example of a retrospective law that unacceptably interfered with judicial power.

Although the matter is far from clear, it seems that, for Toohey J, the boundary between validity and invalidity lies somewhere between the war crimes legislation, that penalised undoubtedly morally abhorrent acts, and *Liyanage*. It would seem to be necessary to take all relevant aspects of the law into account before a final judgment about the constitutionality of retrospective laws could be made to the satisfaction of Toohey J. Having regard to his Honour's comments in *Nicholas v R*,[77] however, it does at least seem clear that he would not lightly come to the conclusion that a retrospective law is unconstitutional.

Justice Dawson too referred to the general undesirability of retrospective laws and to the fact that the acts alleged against Mr Polyukhovich were reprehensible when committed. But it is clear from his Honour's reasons that he did not mean to set up any criterion of invalidity based on whether acts were reprehensible or not. He clearly took the view that the sovereign Parliament is, under the law, the judge of when retrospective laws are exceptionally justifiable; being able to legislate retrospectively is a consequence of Parliament's sovereignty.[78] But that makes only three Judges - Mason CJ, Dawson and McHugh JJ - who endorsed the *Kidman* view.

The position in Australia is thus uncertain. Can German law help us to resolve this uncertainty? Both the history of the German prohibition of retrospectivity and its current application are of assistance in this respect.

## III. GERMAN LAW

### A. A Brief History.

Although the Prussian codification known as the *Preußisches Allgemeines Landrecht*, which was conceived during the reign (1740-1786) of the enlightened despot Frederick the Great, contains a prohibition of retrospective criminal

76 L Zines, note 65 *supra*, p 172.
77 Note 68 *supra* at 202f.
78 Note 2 *supra* at 642-5, 649.

laws[79] as result of the Enlightenment's concern with human freedom and rational criminal punishment,[80] the prohibition did not become part of the constitutional law of the whole of Germany until the foundation of the Weimar Republic after the defeat in World War I and the abolition of the Monarchy.[81]

A constitutional prohibition of retrospective criminal laws appeared in art 116 of the *Weimar Constitution* of 11 August 1919.[82] Article 116 deviated, for no discernible reason, from the wording of the *Criminal Code* of 1871. Section 2 of the *Criminal Code*, as it existed then, stated that no 'penalty' (*Strafe*) might be imposed retrospectively. Article 116, however, gave protection against retrospective 'punishability' (*Strafbarkeit*), which caused many (but by no means all) commentators to conclude that only the retrospective creation of an offence would be unconstitutional, not a retrospective increase in penalties for an already existing offence. That would affect the 'penalty', but not the 'punishability'.[83] This ambiguity was just what the enemies of fundamental rights were looking for.

## B. The Nazi Period.

There is no need to expatiate on the fate of the Weimar Constitution's guarantees of basic rights after the Nazi takeover on 30 January 1933. Admittedly, the prohibition on retrospective laws was never formally repealed. But even before the related prohibition on the creation of offences by analogy

79 Introduction, ss 14-21.

80 G Dannecker, note 15 *supra*, pp 99-101; V Krey, note 15 *supra*, pp 7f; J Pföhler, note 16 *supra*, pp 237-9; H Schreiber, note 16 *supra*, pp 85-9. Interestingly, an article written during the Nazi years went to great pains to maintain the opposite (H von Weber, ZStW 56, 653, 670), doubtless so that Frederick the Great was not associated with anything as suspect as human rights.

81 H Jescheck, W Ruß, G Willms, *Strafgesetzbuch: Leipziger Kommentar [Criminal Code: the Leipzig Commentary]*, de Gruyter (10th ed, 1985) p 5. See A Ransiek, *Gesetz und Lebenswirklichkeit: das strafrechtliche Bestimmtheitsgebot [The Written Law and the Real World: the Certainty Clause in the Criminal Law]*, von Decker (1989) p 11f.

82 Reproduced in E Hucko (ed), note 13 *supra*, p 175.

83 G Dannecker, note 15 *supra*, pp 162f; Düringer, JW 1919, 701, 702; L Gruchmann, *Justiz im Dritten Reich 1933-1940: Anpassung und Unterwerfung in der Ära Gürther [The Justice System in the Third Reich 1933-1940: Conformity and Submission in the Gürther Era]*, R Oldenbourg (1988) pp 827-9; H Jescheck, *Lehrbuch des Strafrechts: Allgemeiner Teil [Textbook of Criminal Law: General Part]*, Duncker & Humblot (5th ed, 1996) p 132 n 21; H Jescheck, W Ruß, G Willms, note 81 *supra*, p 5; L Käckell, ZStW 41, 680, 684; V Krey, note 15 *supra*, p 25f; H Rüping in *Bonner Kommentar zum Grundgesetz [The Bonn Commentary on the* Basic Law*]*, (Heidelberg, 1997) Art 103 II, p 7; W Sax, "Grundsätze der Strafrechtspflege [Basic Principles of Criminal Law]" in KA Bettermann, HC Nipperdey, U Scheuner (eds), *Die Grundrechte: Handbuch der Theorie und Praxis der Grundrechte [The Basic Rights: Handbook of the Theory and Practice of the Basic Rights]* (2nd ed, 1972) 909 at 1004; H Schreiber, note 16 *supra*, pp 181-3; G Werle, *Justiz - Strafrecht und polizeiliche Verbrechensbekämpfung im Dritten Reich [The Justice System - Criminal Law and Police Efforts to Suppress Crime in the Third Reich]*, de Gruyter (1989) p 75.

was repealed in 1935,[84] the prohibition of retrospectivity had ceased in fact to be part of the fabric of German law. It remained as a facade until the bitter end of Nazism in 1945, but was constantly overridden by the legislature.[85]

The first instance occurred shortly after the *Reichstag* fire of March 1933, when the death penalty was retrospectively reintroduced for arson, high treason and other offences; the law (known as the *lex van der Lubbe* after its chief victim, the main defendant in the *Reichstag* trial) was enacted on 29 March 1933 with retrospective effect to 31 January 1933.[86] This law was enacted under the infamous[87] *Enabling Law*,[88] pushed through the *Reichstag* on 24 March 1933, which enabled the government to enact laws by decree, even laws overriding the Constitution in most respects.[89] But in any case, the Supreme Court (the *Reichsgericht*) agreed with the minority opinion among scholars, according to which the word *Strafbarkeit* in art 116 did not protect from retrospective increases in penalty.[90] Van der Lubbe was accordingly beheaded after being found guilty by the *Reichsgericht* of burning down the *Reichstag*.[91]

The *Reichsgesetzblatt* (or *Reich* Government Gazette) contains numerous other examples of retrospectivity, and not just in relation to the level of penalty. The most grotesque example was the *Law to Prevent Highway Robbery by Car*

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84 RH Graveson, MDR 1947, 278, 278; L Gruchmann, note 83 *supra*, p 851; G Grünwald, ZStW 76, 1, 2; W Hassemer in *AK-StGB*, p 143; H Freiherr von Hodenberg, SJZ 1947, 113, 118; H Jescheck, note 83 *supra*, p 132; H Jescheck, W Ruß, G Willms (eds), note 81 *supra* at 5f; V Krey, note 15 *supra*, pp 31f; HC Maier, note 15 *supra*, pp 4f; U Meyer-Cording, JZ 1952, 161, 162; W Naucke, *"Die Mißachtung des strafrechtlichen Rückwirkungsverbots 1933-1945: zum Problem der Bewertung strafrechtlicher Entwicklungen als „unhaltbar"* [The Flouting of the Prohibition on Retrospective Criminal Laws from 1933 to 1945: on the Problem of Describing Developments in the Criminal Law as 'unsustainable']" in N Horn (ed), *Europäisches Rechtsdenken in Geschichte und Gegenwart: Festschrift für Helmut Coing zum 70. Geburtstag [European Legal Thought in the Past and Today:* Festschrift *for Helmut Coing's 70th Birthday]*, vol 1 (1982) 225 at 226; H Rüping, note 83 *supra*, Art 103 II, pp 7f; W Sax, note 83 *supra* at 993; E Schmidt, *Einführung in die Geschichte der deutschen Strafrechtspflege [Introduction to the History of German Criminal Law]*, Vandenhoeck & Ruprecht (3rd ed, 1965) pp 434f; G Werle, note 83 *supra*, pp 160-4; H Wrobel and I Renlen (eds), *Strafjustiz im totalen Krieg: aus den Akten des Sondergerichts Bremen 1940 bis 1945 [The Criminal Justice System in Total War: From the Files of the Bremen Special Court, 1940-1945]*, vol 1, Freie Hansestadt Bremen (1991) pp 11f.

85 RH Graveson, MDR 1947, 278, 278; L Gruchmann, note 83 *supra*, p 829; H Jescheck, note 83 *supra*, p 132 n 21; V Krey, note 15 *supra*, p 30; E Schmidt, note 84 *supra*, p 430; H Schreiber, note 16 *supra*, pp 197, 199; G Werle, note 83 *supra*, p 75.

86 *Reichsgesetzblatt [*Reich *Government Gazette]* 1933 vol I, p 151; G Dannecker, note 15 *supra*, pp 174f; L Gruchmann, note 83 *supra*, pp 764, 826-9; H Hillesmeier (ed), *"Im Namen des Deutschen Volkes!": Todesurteile des Volksgerichtshofes ["In The Name of the German People!": Death Sentences of the People's Court]*, Luchterhand (2nd ed, 1982), p 31; W Naucke, note 84 *supra* at 227; G Werle, note 83 *supra*, pp 73-5.

87 But valid according to the Federal Constitutional Court (BVerfGE 6, 309, 331) - not because it was in accordance with the Weimar Constitution, but because it was a revolutionary act which succeeded in establishing itself in fact.

88 *Gesetz zur Behebung der Not von Volk und Reich [Law to Remove the Distress of People and* Reich*]*, *Reichsgesetzblatt* 1933 vol I, p 141.

89 OLG Hamm, MDR 1947, 203, 205. See also note 85 *supra*.

90 H Jescheck, note 83 *supra* at 132 n 21; H Wagner, "Das Strafrecht im Nationalsozialismus [Criminal Law in National Socialism]" in FJ Säcker, *Recht und Rechtslehre im Nationalsozialismus [Law and Legal Doctrine in National Socialism]* (1992), p 147; G Werle, note 83 *supra*, p 75.

91 L Gruchmann, note 83 *supra*, p 829.

*Traps*, which had two-and-a-half years' retrospective operation.[92] The very last Nazi criminal law, the *Ordinance on the Criminal Law of the Home Guard*, enacted on 24 February 1945, was expressed to have come into force on 18 October 1944.[93] German experience under the Nazis may be summarised, and a long list of retrospective criminal laws avoided, by saying that retrospective criminal laws were not exceptional, but part of everyday life in the Third Reich.[94]

## C. The Reintroduction of the Prohibition.

After the end of the War, the Allies forbade those few native legislative bodies that had survived the general collapse as well as those that they created to legislate retrospectively.[95] At the same time, the Allies enacted retrospective laws for the punishment of war criminals - the most famous example is Law No 10 of the Allied Control Council.[96]

The Allies' behaviour may seem somewhat confusing, even hypocritical,[97] if one forgets both the indescribable enormity of the crimes committed by the Nazis[98] and the fact that it was not the Allies who had recently and massively misused the ability to legislate retrospectively. It is, at all events, clear that the Allies were exercising supreme sovereignty in relation to Germany[99] and could therefore override any provision of German law including, to the extent that it still existed,[100] the Weimar Constitution in general and art 116 in particular.[101] Furthermore, their legislation was justified by the principles soon to be

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92 *Reichsgesetzblatt* 1938 vol I, p 651; G Dannecker, note 15 *supra*, p 175; L Gruchmann, note 83 *supra*, p 841; V Krey, note 15 *supra*, pp 30f; U Meyer-Cording, JZ 1952, 161, 162; W Naucke, note 84 *supra* at 227-33; B Pieroth, Jura 1983, 122, 124; E Schmidt, note 84 *supra*, p 436; H Schreiber, note 16 *supra*, p 199.

93 *Reichsgesetzblatt* 1945 vol I, p 34; G Werle, note 83 *supra*, p 479.

94 W Naucke, note 84 *supra* at 226.

95 *Kontrollrat Proklamation Nr 3 vom 20.10.1945 [Control Council Proclamation No 3 of 20.10.1945]*, reproduced in *Amtsblatt der Militärregierung Deutschland - Britisches Kontrollgebiet [Government Gazette of the Military Government of Germany - British Zone]*, No 5; *Gesetz Nr 1: Aufhebung des nationalsozialistischen Rechts [Law No 1: Repeal of National Socialist Law]*, Art IV.7, reproduced in *Amtsblatt der Militärregierung Deutschland - Amerikanische Zone [Government Gazette of the Military Government of Germany - US Zone]*; G Gornig, NJ 1992, 4, 11f; W Hassemer in *AK-StGB*, p 143; H Freiherr von Hodenberg, SJZ 1947, 113, 118; H Jescheck, note 83 *supra*, pp 132f; V Krey, note 15 *supra*, pp 34f; B Pieroth, JuS 1977, 394, 395f; W Sax, note 83 *supra* at 993; H Schreiber, note 16 *supra*, p 201.

96 H Jescheck, W Ruß, G Willms (eds), note 81 *supra*, p 6; M Kenntner, NJW 1997, 2298, 2299; V Krey, note 15 *supra*, pp 34, 66-71, 112.

97 H Jescheck, W Ruß, G Willms (eds), note 81 *supra*, p 6; W Kiesselbach, MDR 1947, 2, 2.

98 M Kenntner, NJW 1997, 2298, 2299.

99 For further details see FA Mann, "Germany's Present Legal Status Revisited" (1967) 16 *ICLQ* 760 at 764f.

100 This is a difficult question of constitutional law which it is not necessary to discuss here. The German courts have not measured the validity of Nazi laws against the basic rights guaranteed by the Weimar Constitution, partly because of uncertainty about the extent to which some of its provisions continued to exist and partly because of express suspensions of those rights by legislation in the Nazi era.

101 *R v Bow Street Magistrate; Ex parte Pinochet* [1999] 2 WLR 827 at 908; OGHSt 1, 1, 4f; OLG Hamm, MDR 1947, 203, 205; RH Graveson, MDR 1947, 278, 278; S Zimmermann, JuS 1996, 865, 867.

expressed in provisions such as art 15 II of the *International Covenant on Civil and Political Rights*.

## D. The Basic Law.[102]

There are no difficulties in determining why the prohibition of retrospective criminal laws, quoted at the start of this article, was made part of the Constitution in 1949. It was, of course, a reaction to the massive abuse of retrospective legislation during the Third Reich.[103] As the Federal Constitutional Court has put it, the aim was "to allow the tried and tested, traditional principle *nulla poena sine lege* to recover its honoured place".[104]

Those who drafted the *Basic Law* were of course aware of the need to avoid the many defects of the Weimar Constitution which had led to its collapse. It is therefore all the more surprising that the word *Strafbarkeit* ('punishability'), which had caused so much uncertainty about the coverage of Article 116, reappeared in the corresponding provision in the *Basic Law*, art 103 II.[105] This time it appears to have been assumed that *Strafbarkeit* included protection against the raising of the penalty, which was extremely dubious on semantic grounds as well as in the light of the history described above.[106] However, the courts have turned semantic ambiguity into legal clarity and it is now accepted, not least because of the history of the prohibition in the 1930s, that art 103 II prohibits retrospective increases in penalty as well as the retrospective creation of offences.[107]

## E. Article 103 II as Part of the Constitutional System.

It may or may not be apparent from the text of art 103 II that it includes more than a prohibition of retrospective laws. In fact, it is settled that it includes three further norms applicable to criminal law-making: first, the prohibition on non-statutory offences (which might also be called the 'written laws clause');

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102 On the German State Constitutions, which were first in point of time as the Allies re-built the almost completely destroyed German system of government from the bottom up, see H Schreiber, note 16 *supra*, pp 201f.

103 G Dannecker, note 15 *supra*, p 3; K von Doemming, RW Füßlein, W Matz, *Entstehungsgeschichte der Artikel des Grundgesetzes [The Drafting History of the Articles of the Basic Law]*, JöR nF, 1951, 41; G Grünwald, ZStW 76, 1, 17; M Kenntner, NJW 1997, 2298, 2298; V Krey, note 15 *supra*, p 100; B Pieroth, Jura 1983, 122, 124; H Schreiber, note 16 *supra*, p 11; R Wassermann in *AK-GG*, pp 1208f. On the re-introduction of the prohibition into the provisions of the *Criminal Code*, see H Schreiber, note 16 *supra*, p 204.

104 BVerfGE 25, 269, 287.

105 The translation of art 103 II quoted above does not use 'punishability' for reasons of clarity.

106 There were other minor syntactic differences between art 116 and art 103 II: BVerfG (Kammer), NJW 1994, 2412, 2412; W Strauß, SJZ 1949, Sp 523, 523. See also on this theme BVerfGE 25, 269, 287f; K von Doemming, RW Füßlein, W Matz, note 103 *supra*, pp 741-3; V Krey, note 15 *supra*, pp 99-101; H Rüping note 83 *supra*, Art 103 I, p 2; H Schreiber, note 16 *supra*, pp 202-4.

107 BVerfGE 25, 269, 286; H Rudolphi et al, *Systematischer Kommentar zum Strafgesetzbuch* (Berlin, loose-leaf, 26th service June 1997), s 1, p 3; H Schreiber, note 16 *supra*, p 212.

secondly, the specificity clause; and, thirdly, the prohibition on drawing analogies from existing offences as a basis for further criminal offences.[108]

These three additional norms do not just appear in the same paragraph of the *Basic Law*; they are also substantively related to each other and to the prohibition on retrospective criminal laws. The prohibition on non-statutory offences, which does not rule out the creation of non-statutory defences operating in favour of the accused, would clearly be incompatible with the use of analogy to create offences in the manner with which we are familiar in the common law world,[109] and to define their elements and outer limits in borderline cases. Needless to say, the prohibition on non-statutory offences also rules out the recognition of common law offences as distinct from offences contained in a criminal code. Analogy must, by its nature, have some retrospective effect, as it occurs in cases that come before a court and therefore with facts that must already have occurred. The specificity clause demands that laws should have a certain degree of precision. Obviously, complete precision is unattainable, but there should not be any need for the retrospective drawing of analogies, and the elements of an offence should be clearly stated in the text of the law.[110]

Of course, the prohibition of retrospective laws is not merely the servant of other constitutional principles. It has its own substantive role in the system. But it should be seen in the context in which it appears in the German system, as part of an interconnecting set of rules designed to ensure the certainty of the criminal law and its control by the democratically elected legislature in a way that is not entirely appropriate in jurisdictions where common law offences exist.

For the sake of completeness it is necessary to mention that in Germany there is a prohibition of retrospective civil as well as criminal laws, to which there are several exceptions which it is not necessary to detail here.[111] The civil prohibition, unlike the prohibition of retrospective criminal laws, is an unwritten principle. It is derived from principles that have no direct equivalent in

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108 See BVerfGE 71, 108, 114f; BVerfG (Kammer) NJW 1994, 2412, 2412; F Haft, JuS 1975, 477, 477; W Hassemer in *AK-StGB* p 143; H Jescheck, W Ruß, G Willms, note 81 *supra*, p 4; V Krey, note 15 *supra*, pp 109f; P Kunig (ed), *Grundgesetz-Kommentar* [Basic Law *Commentary*], Münch/Kunig (3rd ed, 1996), p 803; HC Maier, note 15 *supra*, p 6; J Pföhler, note 16 *supra*, p 29, H Rüping, note 83 *supra*, Art 103 II, p 5; R Schmitt, "Der Anwendungsbereich von § 1 Strafgesetzbuch (Art 103 Abs. 2 Grundgesetz) [The Area in which s 1 of the *Criminal Code* (Art 103 para 2 of the *Basic Law*) Applies]" in T Vogler (ed), *Festschrift für Hans-Heinrich Jescheck zum 70. Geburtstag* [Festschrift *for Hans-Heinrich Jescheck's 70th Birthday*] (1985) 223 at 223f; W Straßburg, ZStW 82, 948, 948.

109 The most infamous example of this is *Shaw v DPP* [1962] AC 220, on which see, for example, J Popple, "Right to Protection" (1989) 13 *Crim LJ* 251 at 257f. See also A Ransiek, note 81 *supra*, p 8; H Rudolphi et al, note 107 *supra*, s 1, p 7; H Schreiber, JZ 1973, 713, 715. It has recently been said that "[i]n the business of criminal offences, the common law is past child bearing": *Lipohar v R* (1999) 168 ALR 8 at 64, per Kirby J.

110 BVerfGE 14, 174; BVerfGE 26, 41; BVerfGE 32, 346; N Groß, GA 1971, 13, 16; A Ransiek, note 81 *supra*, pp 8f; W Straßburg, ZStW 82, 948, 949f; H Tröndle, *"Rückwirkungsverbot bei Rechtsprechungswandel? Eine Betrachtung zu einem Scheinproblem der Strafrechtswissenschaft* [Prohibition on Retrospectivity when the Case Law Changes? An Essay on an Illusory Problem in Criminal Law Scholarship]" in *Festschrift für Eduard Dreher* [Festschrift *for Eduard Dreher*], de Gruyter (1977), pp 135f. See also note 108 *supra*.

111 See, for example, BVerfGE 30, 367, 385f.

Australian constitutional law, and, as discussed above, there is no suggestion that Australian law contains such a principle.

## IV. THE 'RADBRUCH FORMULA'

### A. Nazi Crimes.

We have seen that one of the most urgent tasks in re-establishing German criminal jurisprudence after the nightmare of Nazism was the re-introduction of the rule against retrospectivity. At the same time, however, it was necessary to punish war criminals and those who had committed the horrific crimes against humanity perpetrated by the Nazi regime. This was so even if the acts concerned had been authorised at the time by the 'will of the *Führer*', itself treated as a source of law in the Nazi period,[112] or by another law.

In other countries, this need to ensure the punishment of war criminals led to the introduction of exceptions to the principle against retrospectivity along the lines of art 15 II of the *International Covenant on Civil and Political Rights*.[113] In Germany, however, the principal task was to establish not the exception, but the rule. The Weimar Constitution had contained the rule, but no exception; and so it was with art 103 II. However, the courts have created an exception to resolve the consequent tension between systemic/formal and substantive justice.[114] It is referred to as the 'Radbruch formula' after the pre-War Social Democratic Justice Minister Gustav Radbruch.[115] Radbruch's formula stated that

> the conflict between justice and certainty in the law can be solved by granting to the positive law, backed by legislative enactments and power, primacy even when its contents are unjust and inappropriate - unless the positive law's denial of justice reaches such an unbearable extent that the law must be considered to be 'illegal law' and has to give way to justice ... when justice is not even a goal aimed at, when equality, which is the core of justice, is deliberately ignored in laying down positive law, then a law is not just 'illegal law' but does not even have the nature of law at all.[116]

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112 G Werle, "'We Asked for Justice and We Got the Rule of Law': German Courts and the Totalitarian Past" (1995) 11 *South African Journal of Human Rights* 70 at 72.

113 M Kenntner, NJW 1997, 2298, 2298.

114 On this tension, see BVerfGE 2, 380, 403-5; BVerfGE 3, 225, 237; BVerfGE 15, 313, 319f; R Alexy, *Mauerschützen: Zum Verhältnis von Recht, Moral und Strafbarkeit [Soldiers at the Wall: On the Relationship between Law, Morality and Punishment]*, Vandenhoeck & Ruprecht (1993) p 35; G Grünwald, MDR 1965, 521, 523; G Grünwald, ZStW 76, 1, 17f; K Grupp, NJ 1996, 393, 398; M Kenntner, NJW 1997, 2298, 2298; V Krey, JR 1995, 221, 227; V Krey, ZStW 1989, 838, 871f; K Lüderssen, ZStW 104, 735, 756f; H Rüping, note 83 *supra*, Art 103 III, pp 8f; H Schreiber, ZStW 80, 348, 366; K Vogel, JZ 1988, 833, 834f.

115 On Radbruch the man, see A Kaufmann, NJW 1995, 81; HLA Hart, "Positivism and the Separation of Law and Morals" (1958) 71 *Harv LR* 593. For a brief work on this topic by Radbruch in English translation, see G Radbruch, "Five Minutes of Legal Philosophy" in J Feinberg and H Gross (eds), *Philosophy of Law* (3rd ed, 1986) 109 at 109f.

116 G Radbruch, SJZ 1946, 105, 107. The expression in the original for 'illegal law' is *unrichtiges Recht*, which could also be translated as 'incorrect law' or 'false law'. See also KA Adams, note 20 *supra* at 301-6.

It was easy to think of examples of such laws in 1946, when these words were written.

Indeed, one of the chief criminals, hanged at Nuremberg, justified the retrospective laws enacted under his regime in a similar way - and by an appeal to Jewish history:

> How often have we heard that it is a grave injustice to punish an act under a law that was not in force when the act was committed. What, even if the act was prohibited when it was done, as it contravened the demands of social ethics? Was it not precisely the most essential prohibitions ("Thou shalt not kill") that were once brought into force without the threat of punishment attached?[117]

But this eloquent justification for the retrospective punishment of the most evil acts has not remained bereft of support by other, less objectionable jurists. Despite the lack of an express exception to art 103 II, which came into force, along with the rest of the *Basic Law*, on 23 May 1949, German courts have continued to apply the 'Radbruch formula' to justify punishment in accordance with retrospective criminal laws to cases reaching the courts, or based on facts that occurred, after 23 May 1949. The courts recognise, in other words, an unwritten exception to the general prohibition of retrospectivity. They have pointed out that, while it may be difficult in some cases to draw the line between cases in which it is and is not appropriate to declare a law to have been 'illegal', the worst crimes of the Nazis, and thus any laws that appeared to support them, clearly lie on the far side of any possible boundary.

There is, as the courts used to say fairly frequently in the early years after the War, the natural law, which the state cannot repeal.[118] The principles of natural law, say the courts, are applicable everywhere and are known to everyone, which means that a retrospective law providing for the punishment of Nazi atrocities is only in the formal, but not in a substantive sense retrospective.[119] The deeds in question were wrong at the time they were committed under natural law, which, the courts hold, overrides all legislation.[120] The Federal Constitutional Court has confirmed that this use of natural law is consistent with art 103 II, although, of course, not every Nazi law has the high degree of injustice that enables the courts to dismiss it as 'illegal law'.[121] It has said that the measuring-stick to be used is "the nature and possible contents of law"[122] and, of course, the 'Radbruch formula'.[123]

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117 H Frank, *Nationalsozialistisches Handbuch für Recht und Gesetzgebung [National Socialist Handbook on Law and Legislating]*, Zentralverlag der NSDAP (1935) p 1322.

118 OGHSt 1, 1, 4f; OGHSt 2, 231, 232f; OGHSt 2, 269, 272f; BGHSt 1, 91, 98f; BGHSt 2, 173, 177; BGHSt 2, 234, 237-9; BGHSt 3, 357, 362f.

119 BGHSt 2, 234, 239.

120 OGHSt 2, 231, 232f; BGHSt 1, 391, 398f. On the question whether a perpetrator can be said to have appreciated the wrongfulness of the acts, see BGHSt 3, 110, 127; BGHSt 3, 357, 366; KA Adams, note 20 *supra* at 302f. On perversion of the course of justice by Nazi judges, see BGHSt 3, 110, 116-119; G Grünwald, ZStW 76, 1, 4-6. On cases involving denunciations: BGHSt 3, 110, 116-118; OLG Hamm, MDR 1947, 203; OLG Bamberg, (1951) 64 *Harv LR* 1005; H Freiherr von Hodenberg, SJZ 1947, 113.

121 BVerfGE 6, 132, 198-200; BVerfGE 6, 309, 332; BVerfGE 6, 389, 414f.

122 BVerfGE 6, 309, 332; see BVerfGE 6, 389, 414f.

123 BVerfGE 6, 132, 198.

It is generally accepted in Germany that retrospectivity is justified in relation to the worst crimes of the Third Reich: in this case, the formal procedural rules of the criminal law, which in most cases serve the rule of law and thus also, in the final analysis, contribute to the attainment of objective justice, have to give way to the need for punishment and the demands of material/substantive justice. Doing substantive justice is, after all, also a goal of the rule of law, which the prohibition of retrospectivity is meant to serve.[124]

As discussed above, the Allies, who were not subject to art 103 II (either because it did not exist until after they legislated or because it applies only to German legislative bodies), enacted, in the interests of substantive justice, some retrospective criminal laws to deal with crimes against humanity and war crimes. That was how the Nuremberg trials could take place, for example, to the extent that they required a retrospective application of law.[125] Although a scholarly consensus on the precise rationale for these laws has never been reached, this would seem to be a question of secondary importance given the clear need for them and the immense amount of evil there was to punish.[126] Again, this is a case either of retrospective laws justified by the clear demands of substantive justice or of laws that are, in truth, not retrospective because they merely give effect to the natural law that applied all along and made other laws inconsistent with it invalid. The result is the same, and, in relation to the Nazi era, uncontroversial.[127]

It is true that legal positivists, with whose position the present author has much sympathy, would preserve a minimum of candour and regularity in the legal system by insisting on the repeal of the laws concerned rather than allowing them to be merely ignored as 'illegal law' as if they had never existed.[128] This has generally not occurred. Although objectionable Nazi laws have of course been repealed, I am not aware that this has been expressed to occur retrospectively, and the courts have not implied any such intention either. But the fact that any such repeal, express or implied, would have to occur retrospectively means that, as far as the topic dealt with here is concerned, the difference between these two camps is considerably reduced: either natural law is taken to have invalidated the statutes when enacted, although that was of course not something that in practice could be enforced or even necessarily known at the time, but can be enforced and appreciated only in hindsight; or

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124 OLG Hamm, MDR 1947, 203, 205; RH Graveson, MDR 1947, 278, 280; G Grünwald, ZStW 76, 1, 6; G Radbruch, SJZ 1947, 131, 134; A Wimmer, SJZ 1947, 123, 127-9. But see R Dreier, JZ 1997, 421, 432.

125 See KA Adams, note 20 *supra* at 275-9; G Triggs, note 48 *supra* at 391.

126 M Kenntner, NJW 1997, 2298, 2298.

127 On this question, see OLG Hamm, MDR 1947, 203, 205; G Gornig, NJ 1992, 4, 7; H Jescheck, W Ruß, G Willms, note 81 *supra*, p 6; A Kaufmann, NJW 1995, 81, 81; W Kiesselbach, MDR 1947, 2, 2; K Lüderssen, ZStW 104, 735, 767; S McMurtrie, note 67 *supra* at 143-6; W Naucke, note 84 *supra* at 241-4; B Pieroth, VVDStRL 51, 91, 104; G Radbruch, SJZ 1947, 131, 134; GL Williams, note 15 *supra*, pp 577f; A Wimmer, SJZ 1947, 123, 124-6; S Zimmermann, JuS 1996, 865, 867; and see note 128 *infra*. On the question of the applicability of the statute of limitations, see, for example, BVerfGE 25, 269; H Arndt, JZ 1965, 145; J Berlit, DRiZ 1965, 89.

128 G Dannecker, note 15 *supra*, pp 267-71; L Fuller, "Positivism and Fidelity to Law - A Reply to Professor Hart" (1958) 71 *Harv LR* 630 at 649; HLA Hart, *Concept of Law*, Oxford (2nd ed, 1994) pp 209-12; HLA Hart, note 115 *supra*; S Zimmermann, JuS 1996, 865, 866f.

alternatively, the statutes must be invalidated retrospectively by a positive law. In either case there is a clear element of retrospectivity in what the courts do.

## B. The Berlin Wall and Other East German Phenomena.

The application of the 'Radbruch formula' to various acts committed under the aegis of the former 'German Democratic Republic', East Germany, has in the last few years been anything but uncontroversial. The reason is simple: although East Germany was a state not based on the rule of law as that term is generally understood,[129] it was not responsible for anywhere near the same enormities as the Nazi regime.[130] It is not necessary to describe here how the criminal law of the Federal Republic has been technically adapted so that it can apply in eastern Germany to crimes committed before reunification.[131]

## C. The Berlin Wall Cases in the Federal Constitutional Court.

As discussed above, the German legal system is now faced with prosecutions under domestic law of those who did the shooting at the Berlin Wall and the inner-German border. Many were young conscripts with little choice but to serve their turn of border duty,[132] although the politicians and generals who gave the orders have also had their day in court. All these defendants claim that the practice of the East German state or various of its laws justified the acts that they did, and that this amounts to a defence in law. Do these defences, even if they are valid according to the ordinary canons of criminal law, pass the 'Radbruch formula' test? For if they do not, there is no need to determine the precise scope of East German practice or law; it has to be disregarded as a grave offence to human rights.

As far as the legal system is concerned, the answer to these questions was provided by the decision of the Federal Constitutional Court dated 24 October 1996,[133] according to which the prohibition of retrospective laws does not prevent prosecutions, despite the alleged defences based on the practice of the

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129 BVerfG (Kammer), NJW 1998, 2587, 2588; R Dreier, "Gesetzliches Unrecht im SED-Staat? Am Beispiel des DDR-Grenzgesetzes [Injustice by Means of Written Law under the Rule of the Communist Party of East Germany? The Case of the East German *Border Law*]" in *Festschrift für Arthur Kaufmann* [Festschrift *for Arthur Kaufmann*], CF Müller (1993) 58 at 58f; M Frommel, "*Die Mauerschützenprozesse - eine unerwartete Aktualität der Radbruch'schen Formel* [Prosecutions of the Soldiers at the Wall - the Radbruch Formula unexpectedly becomes relevant again]" in *Festschrift für Arthur Kaufmann*, CF Müller (1993) 86; B Pieroth, VVDStRL 51, 91, 97; C Starck, VVDStRL 51, 7, 15-17; R Wassermannn, NJW 1997, 2152, 2153; R Wassermannn, RuP 1999, 101, 104f.

130 BGHSt 41, 101, 107, 109; R Alexy, note 114 *supra*, pp 6, 23; J Arnold, JuS 97, 400, 401; G Dannecker, Jura 1994, 585, 590f; G Gornig, NJ 1992, 4, 14; W Gropp, NJ 1996, 393, 396; J Limbach, DtZ 1993, 66, 68; H Ott, NJ 1993, 337, 339; M Pawlik, GA 1994, 472, 473; B Pieroth and T Kingreen, JZ 1993, 385, 390; J Polakiewicz, EuGRZ 1992, 177, 181; H Rittstieg, DuR 1991, 401, 407, 413. But see R Dreier, note 129 *supra* at 58f; J Polakiewicz, EuGRZ 1992, 177, 186.

131 Articles 315-315c of the *Introductory Law to the Criminal Code* contain the main details.

132 D Schultke, note 27 *supra* at 49-53.

133 BVerfGE 95, 96. This decision is available on the Internet, together with a somewhat indifferent and unhelpful English translation of the headnote, available at <http://www.uni-wuerzburg.de/dfr/bv095096.html>.

state at the time and various East German laws about illegal border crossing and the use of weapons to prevent it.[134] The 'Radbruch formula' has re-emerged.

Criminal defences as a class, whether written or unwritten, are certainly not exempt from the protection afforded by the prohibition of retrospectivity, which prohibits their retrospective abolition or weakening.[135] But the Federal Constitutional Court, in a sophisticated and convincing analysis, has held that in prohibiting retrospective criminal punishment, the Constitution assumes the state's criminal laws are enacted by a legislature which is bound to respect the long list of basic rights set out in arts 1 to 19 of the *Basic Law*, and which is also required to respect other basic principles such as the rule of law and democratic control of legislation.[136]

It is the existence and enforcement of a catalogue of basic rights as a whole, rather than the precise details of the rights laid down, that is important in the Court's view. Laws enacted by a legislature that is bound by such a catalogue could not deviate too much from the basic demands of substantive justice. Thus, the tension between substantive and systemic or formal justice could never be so great that the former would be preferred to the latter. But the situation is otherwise when the laws or practices concerned are those of a legal system unable to effectively protect basic rights, such as that of East Germany. When such laws or practices require the perpetration of gross injustice, it cannot be assumed that there is a firm basis for the citizen's reliance on their lack of amenability to retrospective change.[137] Therefore, the protection in art 103 II against retrospective punishment for carrying out those laws or practices does not apply. In the Court's words:

> The legal situation under which the Federal Republic has to apply its criminal powers to the law of a state that respected neither democracy, the separation of powers, nor the rule of law can lead to a conflict between the essential provisions of the Basic Law relating to the rule of law and the absolute prohibition of retrospectivity under Article 103 II. The strict protection against retrospectivity found in Article 103 II is justified by the special reliance interest which is attributable to the criminal law when it is enacted by a democratically elected legislature that is bound to respect basic rights. The reliance interest ceases to exist if another state, while laying down norms of criminal law for the most serious criminal acts, at the same time excludes liability by means of defences in certain areas by demanding, over and above the written norms, such criminal acts and, by encouraging them, gravely infringes the norms of human rights generally accepted in the international community. By doing so, the state commits extreme acts of state-sponsored injustice which can only remain unpunished as long as the state responsible for them exists in fact.

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134 See note 23 *supra*.

135 BVerfGE 95, 96, 131f; BGHSt 39, 1, 27f; R Dreier, note 129 *supra*, pp 67f; V Erb, ZStW 108, 266, 266, 274f; W Gropp, NJ 1996, 393, 394; A Kaufmann, NJW 1995, 81, 83; H Rittstieg, DuR 1991, 404, 411.

136 In relation to the democratic control of legislation, see *Kruger v Commonwealth* (1997) 190 CLR 1 at 105-7, per Gaudron J.

137 BVerfGE 95, 96, 132f.

> In this very unusual situation, the need for substantive justice, which includes the need to respect internationally recognised human rights, prohibits the application of such defences. The reliance interest protected by Article 103 II must take second place.[138]

As discussed above, the 'Radbruch formula' accepts that the laws even of an unjust government do contribute in a basic sort of way to the maintenance of law and order and thus deserve some minimum of respect. But the rule against retrospectivity cannot be applied to soldiers at the Berlin Wall if that would permit grave injustices perpetrated by the state to be perpetuated. The Court held that the infringement of generally accepted human rights involved in the placing of the preservation of human life below the state's interest in preventing the flight of its citizens means that the prohibition on retrospectivity cannot be applied. Substantive justice takes priority, in this instance, over systemic/formal justice.[139] When ordered to shoot unarmed civilians trying to cross the Wall, the soldiers at the Berlin Wall should therefore have said with Antigone:

> Nor did I think your edict had such force
>
> that you, a mere mortal, could override the gods,
>
> the great unwritten, unshakeable traditions.[140]

Just as after the War, this does not mean that the soldiers are punished under principles that were developed only after they did the acts concerned: these natural law considerations, said the Court, belong to the core area of law which is not susceptible of alteration by the state and which existed when the soldiers shot the would-be escapees. As will be discussed below, this is far from uncontroversial. But Antigone saw this too, and justified the non-applicability of the prohibition on retrospective laws in the following way. Referring to the principles of natural law, she said:

> They are alive, not just today or yesterday:
>
> they live forever, from the first of time,
>
> and no-one knows when they first saw the light.[141]

The only significant technical difference between the soldiers at the Wall and some of the crimes committed by the Nazis is that, in East Germany, what the soldiers did was already an offence under East German law; it was necessary only to disregard - retrospectively - the alleged defence based on the practice of the state or the border law in accordance with the principles previously discussed.[142]

## D. The Principle in Practice: the Berlin Wall in the Criminal Courts.

The decision of the Federal Constitutional Court outlined above followed a long tradition of the ordinary (that is, non-constitutional) courts of (West)

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138 BVerfGE 95, 96, 133 (translation by the author of this article).
139 BVerfGE 95, 96, 133, 136.
140 Sophocles, "Antigone" in R Fagles (Tr), *The Three Theban Plays*, Penguin Books (1982) p 64.
141 *Ibid*, p 64.
142 BVerfGE 95, 96, 136f.

Germany. Not only have the courts said similar things in relation to Nazi crimes, they had also, before the fall of the Wall in November 1989, said similar things about East German cases and applied the 'Radbruch formula' to those cases.[143] But only after the fall of the Wall could enough cases spring up for the criminal courts' rulings in these cases to form a settled body of law as they now do.[144] Both before and after the decision of the Federal Constitutional Court of 24 October 1996, the criminal courts have refused to apply East German law that grossly contravenes human rights.[145]

One of the leading cases in the Federal Supreme Court, the highest criminal Court in the land, describes the effect of applying the 'Radbruch formula' thus:

> A criminal defence reflecting a state practice that justified the intentional or reckless killing of persons who desired only to cross the German-German border without using arms and without jeopardising any other values generally protected by the law must be disregarded in applying the law. For such a defence, which would give to the prohibition on crossing the border priority over the individual's right to life, is inapplicable owing to its plain and insupportable infringement of basic principles of justice and human rights protected by international law.[146]

This delimitation of the bounds of the principle as applied to these cases shows that some exceptions to the general rule are possible. If, for example, an armed person attempts to cross the border, the illegality of shooting back will not be plain.[147] A similar approach is taken to deliberately shooting at a refugee's legs.[148] But it is said to have been obvious, even to an indoctrinated young border soldier, that shooting in the circumstances illustrated in the quotation was an infringement of basic human rights and that the consciousness of wrongfulness required by the criminal law thus existed.[149] This, however, applies only to the shooting itself; neither the very tight emigration laws of East Germany nor the criminal offences created in conjunction with them nor the criminalisation of criticism of the border regime itself can, it is said, be invalidated by the 'Radbruch formula'.[150]

The somewhat vague nature of the 'Radbruch formula' was criticised after the War, but given the enormity of Nazi crimes this was not really much of a problem; those crimes did not fall close to any borderline. However, the courts are aware of the fact that the East German offences do fall somewhat closer to the borderline and that a more precise measuring-stick is accordingly needed.

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143 OLG Düsseldorf, NJW 1979, 53, 63; OLG Düsseldorf, NJW 1983, 1277, 1278; LG Stuttgart, NJW 1964, 101, 101f; M Frommel, note 129 *supra*, p 87; W Gropp, NJ 1996, 393, 393; G Grünwald, JZ 1966, 633; V Krey, JR 1980, 45, 49. See also KA Adams, note 20 *supra* at 299f.

144 BGHSt 44, 68, 72; A Kaufmann, NJW 1995, 81, 84; E Schlüchter, G Duttge, NStZ 1996, 457, 457 n 2.

145 BGHSt 39, 1, 15; BGHSt 39, 168, 175-85; BGHSt 39, 353, 370f; BGHSt 40, 113, 116f; BGHSt 40, 218, 232; BGHSt 40, 241, 244; BGHSt 41, 101, 105-7, 111; BGHSt 41, 157, 164f; BGHSt 41, 247, 257; BGHSt 42, 65, 70f.

146 BGHSt 40, 241, 244. The relationship between the 'Radbruch formula' and norms of international law will be considered in more detail below.

147 BGHSt 42, 356, 361f.

148 BGH, NStZ 1993, 488, 489.

149 BVerfGE 95, 96, 140-3; BGHSt 39, 1, 34; BGHSt 39, 168, 175, 185; BGHSt 40, 113, 116f; BGHSt 41, 101, 110; LG Stuttgart, NJW 1964, 101, 104f. See also note 120 *supra*.

150 BGHSt 40, 272, 278; BGHSt 41, 247, 259; BGHSt 44, 68, 72. But see BGH, NJW 1997, 2609, 2610; G Küpper, H Wilms, ZRP 1992, 91, 93.

This is provided by the various international treaties that have grown up since the War on human rights and which the Berlin Wall and the associated shootings clearly contravened[151] - the most obvious example is art 13 II of the *Universal Declaration of Human Rights*.[152]

In addition, the courts have developed the practice of interpreting East German laws in a 'human-rights-friendly' manner by making full use of any toe-hold for human rights that may have existed in East German law.[153] This method, which has been perhaps most criticised of all,[154] partly because it involves a retrospective change in judicial interpretation of the law compared to the East German practice,[155] had not at the time of writing received the imprimatur of the Federal Constitutional Court and will thus not be discussed further here.

Both those who gave the orders and those who carried them out are punishable.[156] In the result, seventy-eight accused have received prison sentences for shootings at the Wall, and of those sixty-seven received suspended sentences.[157] On 12 January 2000, a three-Judge panel of the Federal Constitutional Court refused leave to appeal to the most famous of those imprisoned, Egon Krenz, formerly and briefly Head of State of East Germany at the time the Wall fell. The Court's reason was that its previous decisions on shootings at the Berlin Wall had clarified the law and were not to be departed from. Accordingly, Krenz's complaint had no prospect of success.[158] His unsuspended sentence for ordering shootings at the Wall as a member of the Politburo in the years up to 1989 was six and a half years, which he has now begun to serve. However, he has a good chance of having half his sentence

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151 See, for example, BVerfGE 95, 96, 135; BGHSt 40, 30, 41f; BGHSt 40, 241, 244-8; BGHSt 41, 101, 105, 109; BayVerfGH, NJW 1961, 1619, 1619; LG Stuttgart, NJW 1964, 101, 102; K Amelung, JuS 1993, 637, 640; R Dreier, JZ 1997, 421, 426.

152 "Everyone has the right to leave any country, including his own, and to return to his country.": quoted in I Brownlie, *Basic Documents in International Law*, Clarendon (4th ed, 1995) p 258.

153 BGHSt 39, 1, 24-30; BGHSt 39, 168, 175-85; BGHSt 40, 30, 40-2; BGHSt 40, 241, 250; BGHSt 40, 272, 278f; BGHSt 41, 101, 110-112; BGHSt 41, 157, 161-3; BGHSt 44, 207, 209.

154 R Alexy, note 114 *supra*, pp 10-12, 14f, 30; K Amelung, JuS 1993, 637, 638f; G Dannecker, Jura 1994, 585, 591f; R Dreier, JZ 1997, 421, 426f; V Erb, ZStW 108, 266, 267f; W Fiedler, JZ 1993, 206, 208; M Frommel, note 1299 *supra*, pp 84f; W Gropp, NJ 1993, 393, 395; K Günther, StV 1993, 18, 19-23; J Herrmann, NStZ 93, 118, 118-20; G Jakobs, GA 1994, 1, 7 fn 25, 9; P Kunig, note 108 *supra* at 832; O Luchterhandt, "Was bleibt vom Recht der DDR [What's Left of East German Law]" in E Schmidt (ed), *Vielfalt des Rechts - Einheit der Rechtsordnung [Diversity of Law within One Legal Order]* (1994) 184 at 184-8; K Lüderssen, ZStW 104, 735, 748; B Pieroth, VVDStRL 51, 91, 97f; J Renzikowski, ZStW 106, 93, 102, 120; B Schlink, NJ 1994, 433, 434-6; C Starck, VVDStRL 51, 7, 14, 17f, 142; S Zimmermann, JuS 1996, 865, 870f.

155 G Dannecker, Jura 1994, 585, 592; M Frommel, note 129 *supra*, p 90f; J Herrmann, NStZ 93, 118, 120.

156 See further BGHSt 44, 204 on the extent to which accessories could take advantage of unobjectionable criminal defences, such as withdrawal from attempt, if the principal offender, acting on the order of the accessory, was responsible for the withdrawal.

157 R Wassermannn, RuP 1999, 101, 102.

158 BVerfG, 2 BvQ 60/99 vom 12.1.2000, available at <http://www.bundesverfassungsgericht.de>. According to a report in the *Berliner Morgenpost* of 22 March 2000, a panel (*Kammer*) of the Federal Constitutional Court had on the previous day refused leave to appeal to four former border guards who had been sentenced to several years' imprisonment each. According to the report, the Court essentially repeated the rulings described in the text. A copy of the panel's decision was not available to the author at the time of writing.

converted to a suspended sentence in exercise of the prerogative of mercy, as has happened to the former commander of the border troops, who also received six and a half years.[159]

## E. Other Cases.

For various reasons, no other cases of retrospective or apparently retrospective punishment for offences committed under the East German dictatorship have caused nearly as much controversy in the courts. It would appear at first glance that any punishment of a German from East Germany would have to be retrospective if conducted under (West) German law, but for technical reasons that is not always the case. For example, West German law always contained long prison sentences for East German spies if their conduct had or was intended to have results on West German territory.[160] The Federal Constitutional Court has, however, prevented the appearance and the reality of 'victors' justice' by exempting some spies from punishment on other grounds.[161] And while working within East Germany as a spy for the East German secret police was not as such an offence under (West) German law, it often led to the commission of offences. For example, throwing the victim into prison generally constituted the crime of "bringing a person under political suspicion" under s 241a of the *Criminal Code*. This paragraph had been inserted into the Code in the 1950s precisely for the purpose of providing in advance for punishment in these cases, in the expectation of imminent reunification.[162]

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159 *Der Spiegel*, 2/2000, 10 January 2000 at 52.

160 *Criminal Code*, s 9 I 2nd half-sentence.

161 BVerfGE 92, 277, 325-37. See BGHSt 39, 206; BGHSt 43, 129, 142-5; BGH, NJW 1997, 668; BGH, NJW 1997, 670; P Albrecht, S Kadelbach, NJ 1992, 137, 142, 145; G Dannecker, note 15 *supra*, p 287; P Huber, Jura 1996, 301, 304-7; H Jarass, B Pieroth, *Grundgesetz für die Bundesrepublik Deutschland: Kommentar* [Basic Law of the Federal Republic of Germany: *Commentary*], CH Beck (4th ed, 1997) p 940; G Leibholz, H Rinck, D Hesselberger, *Grundgesetz Kommentar* [Basic Law *Commentary*], Dr Otto Schmidt (3rd ed, 1993) p 74; R Lippold, NJW 1992, 18, 23-5; E Schlüchter, G Duttge, NStZ 1996, 457, 458-60; T Maunz, G Dürig (eds), note 15 *supra*, Art 103 II, pp 63f; K Volk, NStZ 1995, 367. But see H Arndt, NJW 1991, 2466, 2467; H Arndt, NJW 1995, 1803, 1803f; CD Classen, NStZ 1995, 371, 371f; CD Classen, JZ 1991, 713, 718; B Simma, K Volk, NJW 1991, 871, 874f; HC Maier, NJW 1991, 2460, 2461-4.

162 BGHSt 40, 125; BGHSt 42, 275; BGH, NJW 1997, 2609. See BVerfG (Kammer), DtZ 1996, 341; G Grünwald, StV 1991, 31, 34f; R Lippold, NJW 1992, 18, 25; E Reimer, NStZ 1995, 83. For similar examples from the Nazi period see BGHSt 3, 110, 116-18; OLG Hamm, MDR 1947, 203; OLG Bamberg, note 120 *supra*. And see the interesting debate between L Fuller, note 128 *supra*, and HLA Hart, note 115 *supra*; see also L Fuller, *The Morality of Law*, Yale (revised ed, 1969), pp 245-53, reprinted in J Feinberg, H Gross, note 115 *supra* at 111-14; HO Pappe, "On the Validity of Judicial Decisions in the Nazi Era" (1960) 23 *MLR* 260; R Alexy, "A Defence of Radbruch's Formula" in D Dyzenhaus (ed), *Recrafting the Rule of Law: Limits of the Legal Order* (1999); J Rivers, "The Interpretation and Invalidity of Unjust Laws" in: D Dyzenhaus (ed), *ibid.* For a prosecution that failed for reasons of the immunity of the Head of State, see *Re Honecker* (1984) 80 ILR 365; BGHSt 33, 97. After the Wall had fallen, Honecker was put on trial but released as too sick and near to death to stand trial: BerlVerfGH, NJW 1993, 515.

Finally, the much indulged in practices of electoral fraud[163] and perversion of the course of justice[164] were already included in the offences created by the East German *Criminal Code*. Accordingly, there is no question of retrospectivity when German law is now applied, provided the maximum penalties under the old East German laws are not exceeded. As in the case of the soldiers at the Wall, if perversion of the course of justice led to a serious breach of human rights such as the imprisonment of the innocent, any alleged defence based on the practice of the State has to be ignored owing to the 'Radbruch formula'.[165]

## F. The Scholars' Views.

The decisions in the Berlin Wall cases have set off a storm of scholarly criticism, some negative and some positive.[166] A summary of the scholarly reaction is attempted here in order to indicate how very controversial this exception is.[167]

Perhaps the first objection to be considered is that raised by Hobbes, who favoured the creation of a total or partial excuse for those acting under the orders of the legislature, the executive or other superiors.[168] A modern name for this doctrine, which certainly did not save those accused at Nuremberg,[169] is "reliance on the practice of the state". The soldiers at the Wall thus had the right to consider the state's orders to be legal, valid, and perhaps even morally unobjectionable, and to act accordingly.[170] The problem with this argument is that reliance is generally only protected in German law if the interest thus

163 There were 'elections' in East Germany along Soviet lines with 'unity lists' set down and results rigged by the Communist party. See BVerfG (Kammer), NJW 1993, 2524; BGHSt 43, 183; S Höchst, JR 1992, 360; K Lüderssen, ZStW 104, 735, 760f; F Schroeder, NStZ 1993, 216, 218.

164 BGHSt 40, 30, 40-2; BGHSt 40, 169, 178f; BGHSt 41, 157, 161-5; BGHSt 41, 247, 253, 268-77; BGHSt 41, 317, 321, 330ff; BGHSt 44, 275, 298; BGH, NJW 1998, 248; R Dreier, JZ 1997, 421, 431; G Grünwald, StV 1991, 31, 36; H Jarass, B Pieroth, note 1611 *supra*, pp 939f.

165 BVerfG (Kammer), NJW 1998, 2585, 2585f; BVerfG (Kammer), NJW 1998, 2587, 2588f.

166 R Alexy, note 114 *supra*, pp 29f; K Amelung, JuS 1993, 637, 642; K Amelung, NStZ 1995, 29, 30; K Günther, StV 1993, 18, 23; A Kaufmann, NJW 1995, 81, 84; V Krey, JR 1980, 45, 49; G Küpper, H Wilms, ZRP 1992, 91, 93; J Limbach, DtZ 1993, 66, 68f; E Schmidt-Bleibtreu, F Klein, *Kommentar zum Grundgesetz [Commentary on the* Basic Law*]*, Luchterhand (8th ed, 1995) pp 1321, 1324. Calling for even more retrospectivity: R Wassermannn, RuP 1999, 101.

167 See also the bibliography in H Jescheck, note 83 *supra*, p 11 n 5.

168 T Hobbes (ed R Tuch), *Leviathan*, Cambridge (1991) pp 208-11.

169 For some suggested differences between Nuremberg and the border guard trials, see M Goodman, "After the Wall: The Legal Ramifications of the East German Border Guard Trials in United Germany" (1996) 29 *Cornell ILJ* 727 at 743-9.

170 R Alexy, note 114 *supra*, p 11; H Jarass, B Pieroth, note 161 *supra*, p 939; FL Lorenz, JZ 1994, 388, 393; M Pawlik, GA 1994, 472, 474f; B Pieroth, VVDStRL 51, 91, 97f; B Schlink, NJ 1994, 433, 436; T Maunz, G Dürig (eds), note 15 *supra*, Art 103 II, p 63. But see G Dannecker, note 15 *supra*, p 271f; M Frommel, note 129 *supra*, p 83. See also BGHSt 39, 353, 360.

protected is worthy of legal protection.[171] A state practice contrary to basic canons of human rights jurisprudence does not seem to be such an interest.[172] Given that the desire for reunification was a basic premise of (West) Germany's constitutional law before the Wall fell,[173] it may even be questioned whether reliance on the continued existence of the East German state should be protected.[174] At any rate, the *Criminal Code* of East Germany contained express provisions[175] (for international consumption only) denying immunity on the basis of superior orders commanding the defendant to commit acts that contravened basic human rights.[176]

As discussed above, the courts accept that such contraventions did take place at the Wall, but there are commentators who do not and thus doubt the applicability both of the 'Radbruch formula' and of the East German provision just mentioned. Article 13 II of the *Universal Declaration of Human Rights*[177] and similar instruments do not conclude the matter, for there are breaches of human rights that are not basic or fundamental. Whether the shootings at the Berlin Wall were such basic or fundamental breaches is said not to be a question for intuitive decision,[178] but intuition must play some role here. Those who deny the existence of infringements of basic human rights can at least point to the undisputed fact that the acts committed in the name of East Germany were nowhere near as shocking as those committed in the name of the Third Reich. They also emphasise what all sides concede: that in the interests of legal certainty, the application of the 'Radbruch formula' must be confined to extreme exceptions.[179] One commentator distrusts what he calls the "triumphal march of case-by-case justice" which ignores larger principles of justice.[180] It is emphasised that the rule against retrospectivity will be of no use at all unless it is

171 BGHSt 39, 1, 30; BGHSt 39, 260, 270f; BGHSt 41, 101, 111f; BGHSt 42, 275, 282; G Dannecker, Jura 1994, 585, 592f; V Erb, ZStW 108, 266, 280; T Lenckner et al, *Strafgesetzbuch Kommentar* [Criminal Code *Commentary*], CH Beck (23rd ed, 1988), p 48; M Frommel, note 129 *supra*, p 91; J Herrmann, NStZ 93, 118, 120; P Huber, Jura 1996, 301, 306; U Klug JZ 1965, 149, 151; R Lippold, NJW 1992, 18, 25; H Schreiber, ZStW 80, 348, 350, 359-61; R Schmitt, note 108 *supra* at 230; H Tröndle, note 110 *supra* at 122. For an interesting argument on this point, see A Palmer and C Sampford, note 28 *supra* at 230-2.

172 V Erb, ZStW 108, 266, 280. See also K Letzgus, NStZ 1994, 57, 59f.

173 BVerfGE 36, 1.

174 J Herrmann, NStZ 29, 118, 120; O Luchterhandt, note 1544 *supra* at 189f.

175 Section 95 of the East German *Criminal Code*. This provision, unlike those considered by M Goodman, note 169 *supra*, pp 749-51, extended beyond international crimes (such as genocide) to include other acts that violated basic human rights.

176 R Alexy, note 114 *supra*, p 21; M Pawlik, GA 1994, 472, 473; J Polakiewicz, EuGRZ 1992, 177, 181, 186; C Starck, VVDStRL 51, 7, 143; PJ Winters, note 15 *supra* at 693, 695.

177 See note 152 *supra*.

178 R Alexy, note 114 *supra*, pp 24f. See HLA Hart, note 128 *supra*, p 209.

179 BVerfGE 3, 225, 232f; OGHSt 2, 269, 269; BGHSt 41, 101, 107f; BGHSt 41, 247, 257; R Alexy, note 114 *supra*, p 4; R Dreier, note 129 *supra*, at 69; W Gropp, NJ 1996, 393, 397; H Ott, NJ 1993, 337, 339. See *Francome v Mirror Group Newspapers* [1984] 1 WLR 892 at 897, 901.

180 V Krey, JR 1995, 221, 227; V Krey, ZStW 1989, 838, 871f.

applied in the very cases in which it leads to the 'wrong' result, that is, to allowing crimes to go unpunished.[181]

Further opponents of the courts' decisions point to the existence of the *Border Law* of East Germany, which, unlike the border restrictions, only came into force in 1982,[182] and maintain that only acts committed in contravention of its provisions[183] should be punished.[184] The obvious objection to this is that that *Law* was never more than a cynical facade, created for the benefit of international public opinion, and would thus be an absurd measuring-stick for any just legal system,[185] especially given that it provided that human life was to be spared "if possible"[186] in preventing violations of the border laws. Now that East Germany has gone, there is no need to perpetuate the injustices of its legal system.[187]

For good reasons, virtually no-one agrees with the view, expressed in somewhat extravagant rhetoric by Jakobs, that East Germany's crimes have simply been surpassed by events and do not deserve even the smallest degree of attention by the legal order today.[188] In greater numbers are the commentators who reject the 'Radbruch formula' not just in this case, but in all cases as a legal criterion of invalidity. One scholar maintains that the rule against retrospectivity is an absolute law of nature which is self-evidently true,[189] although this is asserted rather than proved[190] (and not only in Germany). A less extreme view than this, which has its roots in positivism rather than natural law theories about retrospectivity, is that art 103 II is not the start of the journey for justice under the Constitution, but its end point.[191] But this argument does not really deal with the Federal Constitutional Court's out-flanking manoeuvre which neatly combines both positivism based on the Constitution and natural law considerations, the two traditions in which this debate has traditionally been

181 W Gropp, NJ 1996, 393, 398; B Pieroth, VVDStRL 51, 91, 103f; B Schlink, NJ 1994, 433, 436; H Schreiber, JZ 1973, 713, 713.

182 See note 23 *supra*; BGHSt 39, 353, 366f; R Dreier, note 129 *supra* at 66; G Jakobs, GA 1994, 1, 4; O Luchterhandt, note 12954 *supra*, p 185.

183 For example, s 27 V, which provided firstly that human life was "to be spared if possible" when using weapons at the border, secondly that weapons were not to be used against young people and women "if possible", and thirdly that first aid was to be given "having regard to the necessary security precautions".

184 KA Adams, note 20 *supra* at 297-9, 313f; R Alexy, note 114 *supra*, p 21f; R Dreier, note 129 *supra* at 66-8; W Gropp, NJ 1996, 393, 397f; H Jarass, B Pieroth, note 161 *supra* at 939; K Lüderssen, ZStW 104, 735, 739f; J Polakiewicz, EuGRZ 1992, 177, 179, 189f; H Rittstieg, DuR 1991, 401, 409, 421.

185 M Frommel, note 129 *supra*, pp 82, 85f; O Luchterhandt, note 154 *supra*, p 185; C Starck, VVDStRL 51, 7, 17f.

186 See note 183 *supra*.

187 K Lüderssen, ZStW 104, 735, 741f.

188 G Jakobs, GA 1994, 1. See K Lüderssen, ZStW 104, 735, 742.

189 W Naucke, note 84 *supra* at 244-6.

190 H Schreiber, note 16 *supra*, p 209. See also note 15 *supra*.

191 R Dreier, JZ 1997, 421, 432; J Polakiewicz, EuGRZ 1992, 177. See A Palmer and C Sampford, note 28 *supra* at 277.

conducted.[192] The Court says that, as part of the Constitution, art 103 II applies only within a legal order committed to certain basic principles of justice, such as those expressed in the basic rights guaranteed by the German Constitution.

Further objections are raised by those who point out that there is no statutory basis for the 'Radbruch formula' and who refuse to regard it as obviously correct.[193] For others, art 103 II is a strict rule of law which admits of no exceptions whatsoever.[194] Still others take exception to the vagueness of the formula,[195] while one commentary objects to the loss of foreseeability in the legal system caused by the application of the formula.[196] Another finds the Federal Constitutional Court's arguments "untidy".[197] It is hard not to have some sympathy for this point of view, as the relationship between the 'Radbruch formula' and the need for basic rights to justify a prohibition of retrospectivity is not thoroughly explored by the Court. What precisely does a catalogue of basic rights have to contain to satisfy the Court's test, and how does this relate to the precise wording of the formula? As stated above, the Court relied on the existence and enforcement of rights under the *Basic Law* rather than on the precise content of the rights, but there comes a point when a catalogue of rights is so meagre or so badly enforced that it no longer suffices. However, in the case at hand this does not really undermine the Court's argument to any great extent. Whatever the precise requirements of the rule are, the (West) German system for the protection of basic rights clearly did satisfy them, and the East German system clearly did not.

Finally, some scholars reject the application of international human rights treaties which the courts have used to pin down the exact content of the 'Radbruch formula'. Some treaties, it is said, came into force only after some of the shootings occurred.[198] Other commentators refer to the fact that the treaties themselves permitted exceptions to their general standards of human rights,[199] although this argument overlooks the fact that East German law made what should have been fairly rare exceptions into regularly applied rules. The Wall itself was a general prohibition of leaving the country, not a mere exceptional measure for a few renegades or criminals.[200] Still other scholars, however, view the freedom to leave one's own country as a non-basic human right.[201] This

192 For an excellent summary of the debate and further references, see L Lustgarten, "Taking Nazi Law Seriously" (2000) 63 *MLR* 128 at 130-2. See also the discussion in R Alexy, note 162 *supra*, and J Rivers, note 162 *supra*. For a recent discussion of the place of morality in positivism and further references, see J Coleman, "Constraints on the Criteria of Legality" (2000) 6 *Legal Theory* 171.

193 J Arnold, JuS 1997, 400, 402; G Jakobs, GA 1994, 1, 11f. See HLA Hart, note 128 *supra*, pp 209-12.

194 G Dannecker, Jura 1994, 585, 585; G Dannecker, K Stoffers, JZ 1996, 490, 492; P Kunig, note 108 *supra* at 832; T Maunz, G Dürig (eds), note 15 *supra*, Art 103 II, p 63.

195 K Amelung, JuS 1993, 637, 640; R Dreier, JZ 1997, 421, 429.

196 G Dannecker, K Stoffers, JZ 1996, 490, 492.

197 B Pieroth, VVDStRL 51, 91, 168 ('*unsauber*').

198 R Dreier, JZ 1997, 421, 425.

199 R Alexy, note 114 *supra*, p 16f; R Dreier, note 129 *supra* at 64; G Grünwald, StV 1991, 31, 37; H Ott, NJ 1993, 337, 341f; B Pieroth, VVDStRL 51, 91, 98; J Polakiewicz, EuGRZ 1992, 177, 184f.

200 K Amelung, JuS 1993, 637, 640; M Goodman, note 1619 *supra* at 755; J Polakiewicz, EuGRZ 1992, 177, 186.

201 H Ott, NJ 1993, 337, 341f. See R Alexy, note 114 *supra*, p 27; G Grünwald, StV 1991, 31, 37.

objection is supported by the argument that not even (West) German law contains an unrestricted right to leave the country. Nor do the legal systems of other Western countries. For example, criminals serving prison sentences cannot generally leave,[202] and sometimes people trying to leave (West) Germany have been shot at.[203] But this did not occur simply because they were trying to exercise their right to leave the country, nor as a regular practice backed by a wall and orders to shoot on sight.

The most popular argument, perhaps, is that the international treaties relied on by the Court had not been ratified by the 'People's Chamber', the rubber-stamp East German Parliament, and thus did not enjoy any status in East German domestic law.[204] Disappointingly, few commentators have recognised that the Court was not saying at all that these human rights treaties were part of East German domestic law; rather, they were a means of defining the content of the supra-positive natural law which is not dependent on the state for recognition.[205]

The most convincing of all objections to the current jurisprudence lies outside the scope of constitutional law and therefore of these reflections. This objection is that the criminal courts should have investigated whether the necessary element of personal guilt existed in relation to young, indoctrinated border soldiers, who might not necessarily have been able to recognise the wrongfulness of their acts to the extent demanded by German criminal law.[206] If they fall under this heading, they would be treated in the same fashion as, for example, minors[207] or those labouring under an unavoidable error of law resulting in a lack of appreciation of the wrongfulness of an act.[208] Such people, although they commit offences, are exempted from punishment because their level of personal guilt is not sufficient.

It may well be that, as one commentator suggests,[209] the Federal Constitutional Court in its decision of 24 October 1996[210] was hinting to the criminal courts that

202 But see *International Transfer of Prisoners Act* 1997 (Cth).

203 R Alexy, note 114 *supra*, p 10; K Amelung, JuS 1993, 637, 639; R Dreier, note 129 *supra*, p 66; H Ott, NJ 1993, 337, 340f, 343; J Polakiewicz, EuGRZ 1992, 177, 184f; H Rittstieg, DuR 1991, 404, 417-20.

204 R Alexy, note 114 *supra*, pp 16f; K Amelung, JuS 1993, 637, 641; G Dannecker, Jura 1994, 585, 590f; R Dreier, JZ 1997, 421, 425; M Goodman, note 169 *supra* at 751-6; W Gropp, NJ 1996, 393, 395f; G Grünwald, StV 1991, 31, 39; P Kunig, note 108 *supra* at 832; H Ott, NJ 1993, 337, 340f; M Pawlik, GA 1994, 472, 474; B Pieroth, VVDStRL 51, 91, 98; H Rittstieg, DuR 1991, 404, 417.

205 K Amelung, NStZ 1995, 29, 30. See R Dreier, JZ 1997, 421, 426; W Gropp, NJ 1996, 393, 396; A Palmer and C Sampford, note 28 *supra* at 250.

206 R Alexy, note 114 *supra*, pp 35-8; K Amelung, NStZ 1995, 29, 30; J Arnold, JuS 1997, 400, 404; G Dannecker, Jura 1994, 585, 593f; R Dreier, JZ 1997, 421, 430; M Frommel, note 129 *supra* at 92; W Gropp, NJ 1996, 393, 396f; H Jarass, B Pieroth, note 161 *supra* at 939; J Polakiewicz, EuGRZ 1992, 177, 187. See O Luchterhandt, note 154 *supra*, p 189.

207 *Criminal Code*, s 19 (persons under 14 years are minors under German criminal law).

208 *Ibid* s 17. In practice, this particular exemption is very rarely applied.

209 J Arnold, JuS 1997, 400, 402. See OLG Bamberg, note 120 *supra* at 1007; KA Adams, note 20 *supra* at 308f.

it agreed with this objection, which fell outside the Court's constitutional jurisdiction. On the constitutional level, then, the principle seems clear enough, despite the numerous objections of the legal academics. Like those who committed Holocaust atrocities, those involved in the shootings at the Berlin Wall can be prosecuted despite an element of retrospectivity, because of the gravity of the blows dealt to human rights.

## G. The Separation of Powers and the German Prohibition of Retrospective Laws.

As discussed above,[211] the Federal Constitutional Court cited the lack of an effective separation of powers in the East German legal system as one of the defects in its legal system that justified the decision to override the requirements of art 103 II in relation to shootings at the Berlin Wall. Nevertheless, it did not say that the separation of powers was a reason for the existence of the prohibition of retrospectivity, or that the prohibition was in some way a consequence of the separation of powers. The separation of powers was just one of the basic legal assumptions made by the *Basic Law* which had to be considered in deciding whether another part of the *Basic Law*, art 103 II, could be applied in the unique situation facing the Court. One is reminded of the basic assumptions made by the drafters of the Australian Constitution, such as the assumption that the common law applies in Australia, which are themselves devoid of constitutionally enforceable content.[212]

The Federal Constitutional Court expressly stated, in the passage referred to, that art 103 I is a consequence of "the special reliance interest which is attributable to the criminal law when it is enacted by a democratically elected legislature that is bound to respect basic rights". The justification for the rule against retrospectivity in Germany thus has nothing to do with the separation of powers: it has everything to do with the existence of a catalogue of basic rights in the Constitution and the reliance interest.

The Federal Constitutional Court certainly did not suggest that the separation of powers, as it now exists in Germany, prevented the retrospective abolition of the alleged defences on which those accused of shooting at the Wall relied. If it had been of that view, it could not have permitted the prosecutions to proceed at all, for the separation of powers is an enforceable principle of the German constitutional system too.[213]

The Court mentioned the separation of powers because the East German Constitution contained - again, for international consumption - a catalogue of

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210 See BVerfGE 95, 96, 142f. The Court stated that the criminal courts had not considered whether "the individual soldier, having regard to his education, indoctrination and other circumstances, was beyond doubt capable of recognising the illegality of his acts". However, the Court recognised that the criminal courts had dealt with the question of recognition of wrongfulness to some extent. They had held that even indoctrinated soldiers should have been able to recognise the wrongfulness of killing unarmed refugees at the border, and this was a sufficient consideration of the problem for constitutional purposes.

211 Note 138 *supra*.

212 O Dixon, "The Common Law as an Ultimate Constitutional Foundation" (1957) 31 *ALJ* 240; *Australian Capital Television v Commonwealth* (1992) 177 CLR 106 at 135.

213 See *Basic Law*, Art 20 II 2.

basic rights. But these were empty words because of the lack of an independent judiciary. Thus, the absence of an effective separation of powers was part of the context in which the protection of basic rights was insufficient and the reliance interest normally protected by art 103 II accordingly did not arise.

Under the German system, the courts in effect decide when the prohibition of retrospective legislation rather than the 'Radbruch formula' is to be permitted to operate. Prosecution under a retrospective law which is saved by the 'Radbruch formula' is a joint effort involving the legislature to enact the law, the executive to prosecute, and the courts to permit the law to be carried into effect under the formula (or, in the case of the Berlin Wall, to refuse to allow a proffered defence to be applied). The German courts do not refuse to allow retrospective prosecutions. Rather, they decide when such prosecutions are permissible. It is impossible to extract, from that situation, a strict separation of powers precluding retrospective prosecutions because they infringe the independence of the courts.

Not only the courts, but also some German scholars have considered whether the rule against retrospectivity can be derived from, or exists in order to support, the separation of powers. It is clear enough that the other principles derived from art 103 II, including the prohibition on non-statutory offences, the specificity clause and the prohibition on drawing analogies, are most certainly servants of the principle of separation of powers. They ensure that the right to make criminal laws is restricted to Parliament and, within the limits of its regulation making powers, to the executive government; and they prevent usurpation by the courts of the legislature's law-making function by, for example, creating common-law offences.[214] But it is not possible to draw the conclusion from this that the fourth component of art 103 II, the prohibition on retrospectivity, must also serve the same purposes. Different components of art 103 II may serve different purposes.[215]

The addressee of the prohibition of retrospectivity is the legislature, which already enjoys the exclusive right to authorise criminal laws in accordance with other norms. The prohibition does not seek to prevent the courts or the executive from exceeding their functions. The ability of the executive, for example, to contribute to criminal legislation by regulation is circumscribed by other laws[216] and, so far as those laws allow the executive government to make regulations in the criminal law, the executive is of course also caught by the prohibition of retrospectivity.[217]

The prohibition determines the ways in which the legislature may exercise the functions conferred on it by other laws. The conferral of functions occurs logically prior to the determination of the way in which those functions can be exercised. First comes the authorisation to make laws, and, subsequent to this, the prohibition on making them in a particular manner.

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214 BVerfGE 71, 108, 114; BVerfGE 78, 374, 382; BVerfGE 95, 96, 113.

215 BVerfGE 45, 363, 371; BVerfGE 48, 48, 56f; BVerfGE 75, 329, 333; G Dannecker, note 15 *supra*, p 250f; G Grünwald, ZStW 76, 1, 16; V Krey, note 15 *supra*, p 1f; A Ransiek, note 81 *supra*, pp 40-4.

216 In Germany, by the *Basic Law*, art 80 I.

217 T Maunz, G Dürig (eds), note 15 *supra*, Art 103 II, p 52.

The opinion of scholars such as Ransiek and Rudolphi, who contend that the prohibition of retrospectivity does not exist to support the separation of powers, therefore seems to be correct.[218] The prohibition is a result of principles of German law which have equivalents, if at all, only in Australian constitutional practice, and not in the textually-grounded constitutional norms from which alone, according to cases such as *Lange v ABC*[219] and *McGinty v Western Australia*,[220] implications may be drawn. The two most important German norms that support the prohibition against retrospectivity are the prohibition on arbitrary state action by the withdrawal of a norm on which the citizen could rely,[221] and the need to uphold the rule of law by ensuring that the law has an acceptable degree of certainty and reliability.[222] Incidentally, these are the same principles from which the unwritten prohibition of non-criminal retrospectivity, which we refuse to accept in Australia, is derived.

Admittedly, caution must be exercised in comparative constitutional law at this level of detail in order to ensure that like is compared with like.[223] However, there is no reason to think that the doctrine of separation of powers, which is part of the common inheritance of all Western democracies, might vary so dramatically between Australia and Germany that an enquiry about whether it supports a prohibition of retrospectivity is valueless. There is no special feature of the German system which affects such a comparison with Australian law. If, then, the doctrine of separation of powers is not even one of the pillars supporting an express prohibition of retrospective criminal statutes in the

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218 A Ransiek, note 81 *supra*, pp 40-4; H Rudolphi et al, note 107 *supra*, s 1, p 3. See B Haffke, *Das Rückwirkungsverbot des Art 103 II bei Änderung der Rechtsprechung zum materiellen Recht, zugleich ein Beitrag zum Problem des Strafbarkeitsbewußtseins [The Prohibition on Retrospective Criminal Law in Article 103 para 2 when Substantive Case Law Changes, together with a Contribution on the Problem of Consciousness of Criminal Guilt]*, (PhD thesis, Göttingen 1970) p 125; P Kunig, note 108 *supra* at 822. But see V Krey, note 15 *supra*, p 133.

219 (1997) 189 CLR 520 at 566f.

220 (1996) 186 CLR 140 at 168-70, 182f, 231-6, 284f.

221 G Dannecker, note 15 *supra*, p 4; F Haft, JuS 1975, 477, 477; H Jescheck, W Ruß, G Willms, note 81 *supra*, p 5; P Kunig, note 108 *supra* at 822; B Pieroth, VVDStRL 51, 91, 102f; A Ransiek, note 81 *supra*, pp 40-4; T Maunz, G Dürig, note 15 *supra*, Art 103 II, p 17; H Schreiber, note 16 *supra*, pp 215, 219; H Schreiber, ZStW 80, 348, 362-4; A Wimmer, SJZ 1947, 123, 126. See V Krey, note 15 *supra*, p 133. In earlier times, protection not just from arbitrary legislation but from arbitrary judges was desired.

222 BVerfGE 1, 264, 280; BVerfGE 3, 225, 237f; BVerfGE 63, 343, 356f; BVerfGE 78, 374, 382; BVerfGE 95, 96, 131; P Albrecht, S Kadelbach, NJ 1992, 137, 146f; G Dannecker, note 15 *supra*, p 4; V Erb, ZStW 108, 266, 275f; G Grünwald, ZStW 76, 1, 17f; B Haffke, note 218 *supra*, pp 120-3; W Hassemer in *AK-StGB*, p 151; H Jescheck, note 83 *supra*, p 138; H Jescheck, W Ruß, G Willms, note 81 *supra*, p 5, 15f; V Krey, note 15 *supra*, p 132; P Kunig, note 108 *supra* at 822; U Meyer-Cording, JZ 1952, 161, 164-7; B Pieroth, Jura 1983, 122, 123; B Pieroth, JuS 1977, 394, 396; B Pieroth, JZ 1984, 971, 976; B Pieroth, VVDStRL 51, 91, 102f; O Ranft, JuS 1992, 468, 470; A Ransiek, note 81 *supra*, pp 40-4; H Rudolphi et al, note 107 *supra*, s 1, pp 3, 5; H Rüping, note 83 *supra*, Art 103 II, pp 9f, 25; E Schmidt-Bleibtreu, F Klein, note 166 *supra*, p 1321; H Schreiber, note 16 *supra*, pp 213f; H Schreiber, JZ 1973, 713, 715; H Schreiber, ZStW 80, 348, 350; W Straßburg, ZStW 82, 948, 948; R Wassermannn in *AK-GG*, pp 1223-5. See BVerfGE 2, 380, 396, 403; BVerfGE 13, 261, 271; H Schreiber, JZ 1973, 713, 713 and *Shaw v DPP* [1962] AC 220 at 281, per Lord Reid (dissenting).

223 DP Kommers, "The Jurisprudence of Free Speech in the United States and the Federal Republic of Germany" (1980) 53 *Southern Cal LR* 657 at 657f.

German Constitution, it is hard to see how, in Australia, we could build an entire edifice upon it.

## V. CONCLUSIONS

German experience shows us that the prohibition of retrospective criminal laws is not an end in itself but a means to achieving justice. In exceptional circumstances, it has to give way to the need to punish those responsible for the worst type of offences.

Justices Deane and Gaudron are without any experience in a system with an express catalogue of human rights, in which clashes between numerous rights must be dealt with constantly, and which accepts that very few rights, if any, are absolute. It is only to be expected, therefore, that neither Deane J nor Gaudron J considered the argument we have discovered in German jurisprudence – that any prohibition on retrospective laws will, in certain cases, contradict the demands of substantive justice. This is due to the fact that the prohibition on retrospective laws will prevent some people from being prosecuted for offences not because they are morally free of blame, but because the legal system was not properly set up when they did what they did. There is thus a tension between the ideal of fidelity to law and the need to prosecute those who have committed what everyone agrees are extremely wicked acts. German law shows us that, even in the face of an express constitutional prohibition of retrospective criminal laws, there are good arguments in extreme cases for recognising an exception.

As was mentioned above, art 15 II of the *International Covenant on Civil and Political Rights* and art 11 II of the *Universal Declaration of Human Rights* contain an express exception along the lines of the implied one developed by the German courts to cover war crimes and the shootings at the Berlin Wall. There would therefore be every reason to apply at least this exception in Australia, even if there was the blanket prohibition of retrospective laws which can allegedly be derived from the doctrine of separation of powers. It may be that Justice Toohey's judgment in the *War Crimes Act Case* shows some awareness of this point. And if such an exception can be made to the express German prohibition of retrospective criminal laws, it should certainly exist in Australia, where there is no such express prohibition. However, further and more detailed comparison with German law suggests that the opinions of those Australian judges who entirely rejected a prohibition of retrospective criminal laws are preferable.

German experience reveals that it is clearly compatible with the judicial function for courts to decide when exceptional circumstances justify retrospective criminal liability. The doctrine of separation of powers is also part of German constitutional law, but there is no indication that the courts there consider it incompatible with their functions to determine whether the 'Radbruch formula' should be applied in a particular case. So far from its being a contravention of the separation of powers for the courts to apply a retrospective law, the German courts have the last word on when they apply.

However, there is no need for us to go to that extreme in Australia, because here there is no express prohibition of retrospective laws to which the courts might have to create an exception. It is sufficient for us to note that the separation of powers does not prevent the enforcement of retrospective criminal laws. That being the case, there is nothing to stop a Parliament from enacting such laws as long as it stays within the powers conferred upon it. And for broader historical reasons, in Australia the power to determine when exceptional circumstances do justify the creation of retrospective criminal offences is lodged in Parliament rather than in the courts. This does not merely reflect the fact that there is no express prohibition of retrospective criminal laws in Australia. It is also in accordance with the broader Australian constitutional tradition of protecting rights under "the common law in association with the doctrine of parliamentary supremacy".[224]

Moreover, there is no reason to think that Parliament is not aware of the need for caution in this area. Although no one could say that Australian Parliaments have in the recent past enacted no laws that might be thought to infringe basic human rights, they have generally taken very seriously their responsibility not to enact retrospective criminal laws without a very good reason indeed. This is not just something that anyone who remembers the public debate before the enactment of the war crimes legislation can confirm from personal experience, it has also been confirmed by a recent and most comprehensive study.[225]

History provides us with another justification for concluding that there is no prohibition of retrospective criminal laws in Australia. Now if the existence of a rule against retrospectivity were absolutely essential in the Australian system, it might be possible to accept that it is implied in the Australian Constitution, like the principle of separation of powers to protect the independent means of determining disputes among the constituent entities of the Federation.[226] But if Australian history shows that there is no real need for a prohibition of retrospective laws, it is easy to justify the conclusion that no such prohibition actually exists.

When the *Basic Law* was enacted in Germany in 1949, there was every reason to include a prohibition on retrospective criminal laws. The Nazi legislature had infringed the prohibition on retrospective laws in a way that did not serve, but contradicted the demands of substantive justice. Retrospective criminal laws had become almost an accepted part of the everyday legislative armoury instead of the rare exception. And as discussed above, retrospective laws had been used as a means of oppression and persecution. There is just no such history whatsoever in Australia. Rather, there is every reason to believe that the legislature appreciates the exceptional nature of retrospective criminal laws; is determined not to use them as a means of working substantive injustice; and will enact them only after democratically legitimated consideration of all the pros and cons,

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224 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106 at 136.

225 A Palmer and C Sampford, note 28 *supra*; the minuscule volume of retrospective criminal laws is referred to at 236-7.

226 At least, this rather than any concept of individual rights was the original justification for the doctrine: H Roberts, note 14 *supra* at 175f.

including the need to use retrospective criminal legislation only in the clearest of cases.

Nor should it be forgotten that the presumption against retrospectivity, applied with due rigour and a concern for basic principle, removes any danger that the legislature might enact a retrospective law by mischance, accidentally, or without considering the question thoroughly.

Whether an express prohibition of retrospective criminal laws in the Australian Constitution is desirable is, under s 128 of the Constitution, a question for the electors. But given Australia's history, it is not surprising that there is no such express prohibition there already, in contrast to Germany's Constitution. Nor should one be implied based on the doctrine of the separation of powers.

## APPENDIX - ABBREVIATIONS

The following abbreviations of German sources are used in the above article:

AK-GG: the *Alternative Commentary on the* Basic Law
AK-StGB: the *Alternative Commentary on the* Criminal Code
BayVerfGH: the Bavarian Constitutional Court
BerlVerfGH: the Berlin State Constitutional Court
BVerfG(E): (decisions of the) Federal Constitutional Court
BGH(St): (decisions in criminal matters of the) Federal Supreme Court
DRiZ: *Deutsche Richterzeitung*
DtZ: *Deutsch-deutsche Rechtszeitschrift*
DuR: *Demokratie und Recht*
EuGRZ: *Europäische Grundrechte-Zeitschrift*
GA: *Goltdammers Archiv für Strafrecht*
JöR nF: *Jahrbuch des öffentlichen Rechts* (neue Folge)
Jura: *Jura*
JuS: *Juristische Schulung*
JW: *Juristische Wochenschrift*
JZ: *Juristenzeitung*
Kammer: a chamber of the BVerfG, set up to decide whether the Court will hear a case (approximately the same as the High Court constituted by two or three Justices to hear special leave applications)
MDR: *Monatsschrift für Deutsches Recht*
NJ: *Neue Justiz*
NJW: *Neue Juristische Wochenschrift*
NStZ: *Neue Zeitschrift für Strafrecht*
OGHSt: decisions of the Supreme Court in criminal matters
OLG: (approximately) Court of Appeals
LG: (approximately) District/Supreme Court at first instance

RuP: *Recht und Praxis*
SJZ: *Süddeutsche Juristenzeitung*
StV: *Strafverteidiger*
VVDStRL: *Proceedings of the Conference of German Teachers of Public Law*
ZRP: *Zeitschrift für Rechtspolitik*
ZStW: *Zeitschrift für die gesamte Strafrechtswissenschaft*

Journal titles are italicised but not translated owing to the difficulty of doing so accurately and informatively.

In German citation practice, the abbreviation comes first; it is followed by the volume number, which is separated from the page number on which the item begins by a comma. Further commas followed by numbers identify the precise page to which reference is made. The year is not cited. Thus "BVerfGE 95, 96, 133, 135" is the German equivalent of "95 BVerfGE 96 at 133, 135".