Ex Post Justice, Legal Retrospection, and Claim to Bindingness

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José de Sousa e Brito had, and continues to have, a remarkable role in Portuguese legal philosophy and and in its development. Besides being the author of very important contributions, he influenced several generations to study legal philosophy.

For me he is a very close friend: more than fifty years ago, we arrived together at university and, during life, always kept in touch. I had a propensity for the so-called general theory of law, but it was José Brito who drove me to try to get some philosophical load. In addition, he forced me to, interrupting hard legal practice, write, now and then, on more important matters, by inviting me or convincing me to address colloquia or intervene in other events.

Such was the case of part of the present paper. More than ten years ago, he organized a *Forum on Constitutional Law and Comparative Jurisprudence*. It was held at Arrábida, Portugal, in June 1998. The subject matter given to me was *transitional jurisprudence*. Assuming that someone else would come bringing a general and comparative perspective, I concentrated on the Portuguese experience that followed the 1974 revolution. Although quite a significant amount of time, and much more now, had already elapsed, the experience allowed raising relevant theoretical issues I wanted to deal with. The initial idea was to include the text for publication in the set of the *forum* papers. Publishing of the whole of the papers was first delayed and, afterwards, abandoned. My paper stayed, for a while, more or less forgotten. Later I made further research and got more information on the post non-punishment situation that I refer below. I now publish it with added references to the *Berlin Wall* cases and a discussion of Alexy's "claim to correctness theory" and of his argument for the use of the Radbruch formula. Since the text was originally drafted in English, in English it has been completed and remains.

It is a pleasure and an honour, as an *amicus* from the heart, to contribute to José Brito's *Liber Amicorum*.

I. Introduction

1. Since the eighties, events such as the movement from authoritarian to democratic regimes in Latin America, specially in Uruguay, Argentina, Brazil and

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Chile, the break-down of socialist bureaucratic systems, with the symbolic fall of the Berlin Wall, and, closer to us in time, the extraordinary change in South Africa brought to the attention of political and legal theory the phenomena which, for some time now, a Portuguese author characterized in general terms and referred to as constitutional transition[1].

One may say that such facts play, in recent times, a role similar to the ones that have been played before, respectively for political and for legal theory, by the Russian revolution of 1917 and by the German "spartakist" revolution of 1918 — although what can be called the modern legal theory of revolution had started before, with the studies of Santi Romano[2] and of Adolf Julius Merkl[3]. In the meantime, other events have occurred, which the theory of revolution or of constitutional transition has to absorb: during or in the aftermath of World War II, the fall of Nazism and of Fascism, as well as *libération;* afterwards, the so-called south European revolutions or transitions — Portugal, Greece and Spain. And let us also not forget the remarkable movement of self-determination of colonial peoples[4].

2. The Portuguese Revolution of 1974 shares, with some more recent experiences, the feature that the predecessor regime was authoritarian (right wing) and that the outcome has been (pluralistic) democracy. In other respects, however, it was closer to older experiences. It has been an internally conflictive revolution, where pluralistic democracy appeared not only as a result of the overthrow of the former dictatorship, but also as the outcome of a struggle, internal to the revo-

[1] Jorge Miranda, *Manual de Direito Constitucional*, II, 2nd ed., Coimbra, 1983, p. 67, and now 6th ed., Coimbra, 2007, pp. 160 ff.. For the author, constitutional transition means the replacement of the "material" constitution (*"constituição material"*) within the procedures for constitutional amendment. Afterwards, the use of the expression was generalised, but without a precise meaning and somehow as synonymous to political transition. See, f.e., Luca Mezzetti, *Le Democrazie Incerte, Transizioni costituzionali e consolidamento della democracia in Europa Orientale, Africa, America Latina, Asia,* Torino, 2000. In political science, people speak even of *"transitology"* — see *Révue Française de Science Politique*, 50:3-4 (2000), under the title "Les Transitions Démocratiques — Regard sur l'état de la «Transitologie»".

[2] "L'instaurazione di fatto di un ordinamento costituzionale e sua legittimazione", *Archivio Giuridico*, LXVIII (1901), included in the collectanea of the author's writings *Scritti Minori*, I, Milano, 1950, pp. 107 ff.. Later on, "Rivoluzione", *in Frammenti di un Dizionario Giuridico*, Milano, 1947, pp. 220 ff..

[3] "Die Rechtseinheit des österreichischen Staates. Ein staatsrechtliche Untersuchung auf Grund der Lehre von der *lex posterior*", in *Archiv des öffentlichen Rechts*, 37 (1918), included in the collectanea *Die Wiener rechtstheoretischer Schule*, Schriften von Hans Kelsen, Adolf Merkl, Alfred Verdross, ed. by Klecatsky, Marcic, Schambeck (*WrS*), Frankfurt *et al.*, I, 1968, pp. 1115 ff.. Later on, "Das Problem der Reschtskontinuität und die Forderung des einheitlichen rechtlichen Weltbildes", *Zeitschrift für öffentliches Recht*", 5:4 (1926), included in *WrS*, II, 1968, pp. 1267 ff..

[4] On the relationship between self-determination and revolution, see Miguel Galvão Teles and Paulo Canelas de Castro, "Portugal and the Right of Peoples to Self-Determination", *Archiv des Völkerrechts*, 34:1 (1996), pp. 3 ff.. The most extraordinary recent achievement on self-determination is the independence of East Timor (2002). In the original paper (1998), I had addressed "to the sceptical a word of "realistic" hope for East Timor", fortunately fulfilled in the meantime. On East Timor's self-determination, see Miguel Galvão Teles, "Timor Leste", *Dicionário Jurídico da Administração Pública*, 2nd Supplement, Lisboa, 2001, pp. 569-674.

lutionary process, between revolutionary projects[5]. What could be called the messianic conception of revolution still played a strong role in the Portuguese events from 1974 to 1976, and the original version of the 1976 Constitution showed strong marks of it, which were deleted afterwards through successive constitutional amendments — in 1982, 1989 and 1997[6].

3. Procedures of deep political change — revolutions or constitutional transitions –, when the legitimacy of the prior regime is denied, always raise delicate questions of criminal justice[7]. The subject of attention is normally post punishment. At least a temptation always exists, and often with quite good reasons, for the new regime to prosecute and punish past facts which were not punishable at the time when they were practiced or have not *de facto* been punished.

In what regards *ex post* justice the question, however, is not only retroactive or, more generally, *post punishment*, it is also *post non-punishment*. Specially if the prior regime was a dictatorship, criminal punishment, particularly in the form of imprisonment, would (at least when the policy did not go as far as to undertake massive killings) have become a normal means of political control. The first expression of liberation will be the opening of the prison gates. So happened in Portugal — not without reservations on its extent coming from some members of the newly appointed *Junta de Salvação Nacional*, in particular from the newly appointed President of Republic, General Spínola. The common way used to legally "clean" the past, in this respect, is *amnesty*.

The cleaning of the past by way of non-punishment does not raise, by itself, *value* difficulties: even if there is retroactivity, the *rule of law* does not oppose the retroactivity of more favourable criminal laws. On the contrary, traditionally it even requires it — and so stand the provisions of the current Portuguese Constitution, since its original text. But it raises a *characterization* issue. Is it really amnesty which cleans the past for those who have fought against the old regime and that, from the point of view of the former law, or of its practice, have committed criminal offences?

[5] See Miguel Galvão Teles, "A Revolução Portuguesa e a Teoria das Fontes de Direito", in Mário Batista Coelho (ed.), *Portugal, o Sistema Político e Constitucional, 1974-87,* Lisboa, 1988, pp. 561-606.

[6] The constitutional amendments of 1992 and of 2001 have been minor ones, made in order to allow Portugal to ratify the Maastricht Treaty (the 1992 amendment) and the Rome Statute on the International Criminal Court (the 2001 amendment). The 2005 amendment is again a minor one, making possible referenda on European Union treaties. The constitutional amendment of 2004 is substantive and highly debatable but does not cover the matters referred to in the text.

[7] See, f.e., Bruce Ackerman, *The Future of Liberal Revolution*, New Haven and London, 1992; Carlos Santiago Nino, *Radical Evil on Trial*, New Haven and London, 1996; A. James McAdams (ed.), *Transitional Justice and the Rule of Law in New Democracies*, Notre Dame and London, 1997; Ruti Teitel, *Transitional Justice,* Oxford, 2000; and Jon Elster (ed.), *Retribution and Reparation in the Transition to Democracy*, Cambridge, 2006. There is even an *International Journal of Transitional Justice*, Oxford, starting in 2007.

4. A fundamental issue that I wish to deal with is *characterization* — logically prior to the evaluation of whether there should, or not, be post punishment or post non-punishment.

Law is a set of facts and rules — extended in time, I will add — but it is also a set of problems (located in time as well). And, if I may recall Max Salomon's theory of law, rules are (also) answers to problems[8].

For many years now, I claim that revolutionary events (and I shall add transitional events) raise specific legal problems and that there are specific answers to these problems, both of which people are normally not aware of. I am returning (shortly), although within a somehow different field, to the kind of issues I have dealt with some time ago, in an article on *past unconstitutionality*[9].

I agree that something like a *transitional jurisprudence* is needed[10]. But I argue that it requires a temporal theory of law and conceptual instruments, which were not available, relating to problems and to fields of answers. Among such conceptual instruments, two are particularly important: referring to a problem (or to a set of problems), the issue-concept of *relevance of past force of past law*; referring to a field of answers, the concept of *legal retrospection*.

5. As in the other countries and situations, in Portugal, in the aftermath of the 1974 Revolution, issues of *post punishment* and of *post non-punishment* — let us call them that, in broad terms — have been raised, although not with a particular fertility. I shall shortly analyze some of the cases related to the Portuguese Revolution, considering only the criminal kind of punishment. Let me make clear that I have not conducted, in this respect, a detailed research. For cases of post punishment, I will consider only those which were brought to the Constitutional Commission. Afterwards, I shall refer to the German *Berlin Wall* cases, for analytical comparison.

6. Allow me still some remarks, before proceeding.

The first one is personal. My knowledge of criminal law is most rudimentary. However, my purpose is not to produce criminal law theory. Criminal law is taken just as a subject, although particularly sensitive, both to suggest and to test a wider reasoning.

The second refers to the Portuguese revolution, which, from a legal point of view, extended from 25 April 1974 (when the old regime was overthrown) until

[8] Max Salomon, *Grundlegung zur Rechtsphilosophie*, 2nd ed., Berlin, 1925. See also Baptista Machado, *Âmbito de Eficácia e Âmbito de Competência das Leis*, Coimbra, 1970, pp. 225 ff..

[9] "Inconstitucionalidade Pretérita", in Jorge Miranda (ed.), *Nos Dez Anos da Constituição*, Lisboa, 1987, pp. 267-343.

[10] Ruti Teitel, *Transitional Justice cit.*, pp. 11 ff. and 213 ff..

25 April 1976 (when the new constitution came into force) — precisely two years. In spite of having been internally conflictive and of the claim made for a spontaneous legality production, the revolutionary process was, in certain respects, somehow legalistic. In particular, as from almost the beginning a distinction was kept between constitutional and ordinary laws. The main constitutional statute (a provisional constitution) was Constitutional Law 3/74, of 14 May, deeply amended by Constitutional Law 5/75, of 14 March, which created the Council of the Revolution.

Article 1 of Law 3/74 "maintained in force" the rules of the authoritarian Constitution of 1933 which were not contrary to the *Program of the Armed Forces Movement*. Among the preserved rules of the 1933 Constitution, Article 8 (9) established the principle of *nullum crimen nulla pœna sine lege prævia*. Article 29 of the 1976 Constitution maintained and reinforced the principle (together with the clarification that it does not prevent internal punishment under the general principles of international law in force at the time of the facts) and added the mandatory retroactivity of the most favourable criminal laws[11].

The 1976 Constitution established a partially concentrated system of control of the constitutionality of the laws in their application to particular cases, by means of an appeal to the *Constitutional Commission*, which acted in such context as a court. The Constitutional Commission also had advisory powers within the "abstract" control of constitutionality, made by the Council of the Revolution. A full Constitutional Court was only created by the Constitutional Amendment of 1982 (together with the extinction of the Council of the Revolution), and was only installed in 1983.

Another comment refers to the *Berlin Wall* cases. I am obviously less familiar with their environment and shall try to avoid much detail. The importance of the cases for this paper's subject is that, in addition to representing a quite significant experience within the framework of a very sophisticated legal thought, a relationship has been established between them and the Radbruch formula, which is often presented as an answer to the post punishment issue.

Finally, it should be noted that "*ex post* justice" just means punishment when before there has not been and would not have been punishment, or non-punishment when there has been or there would have been punishment. A *view* of the past is needed for *ex post* justice, but such view does not necessarily imply retroactivity.

[11] See, in particular, José de Sousa e Brito, "A Lei Penal na Constituição", in Jorge Miranda (ed.), *Estudos Sobre a Constituição*, II, Lisboa, 1978, pp. 197 ff., and Castanheira Neves, "O Princípio da Legalidade Criminal", in *Digesta*, I, Coimbra, 1995, pp. 349 ff..

II. Some cases

A. *Description of Portuguese cases*

7. Let us refer some cases, regarding first *post punishment* issues and, second, *post non-punishment* issues.

a. Cases relating to post punishment issues

(i) *Law 8/75*

8. The dictatorship had a political police, which took several successive names: among others, Polícia de Vigilância e de Defesa do Estado (P.V.D.E.), Polícia Internacional e de Defesa de Estado (P.I.D.E.), Direcção-Geral de Segurança (D.G.S.). Let us call it just PIDE. It was extinguished immediately after the 25 April 1974.

In July 1975, the Council of the Revolution, on the basis of the powers granted by Constitutional Law 5/75, of 14 March, issued a *constitutional statute,* namely Law 8/75, of 25 July, which, stating that *PIDE* had really been an organization for political and social terrorism and that institutionalized crime was its reason of existence, incriminated the simple fact of having belonged to *PIDE* in certain kinds of functions (essentially, directive and investigating). Former prime-ministers and home ministers were also incriminated, on the basis of direct responsibility for *PIDE*, as well as informers. The highest penalty was imprisonment from 8 to 12 years, but extraordinary mitigation, under the general terms of law, was admitted. The power to adjudicate belonged to the military courts (Constitutional Laws 16/75, of 23 December, and 18/75, of 26 December).

Article 309 of the 1976 Constitution maintained Law 8/75, with constitutional force. But it allowed ordinary law to specially provide on extraordinary mitigation. Under such authorization, Decree-Law 349/76, of 13 May, still from the Council of the Revolution (which kept transitory legislative powers until 14 July 1976), reduced substantially the legal level of punishment in cases where a wide range of circumstances were verified. Later, Law 1/77, of 12 January, from the Assembly of the Republic, amended such decree-law, reducing the possibility and excluding the necessity of mitigation.

9. The fact that Law 8/75 was a statute having constitutional form and force prevented, in principle, the argument of unconstitutionality. At least in one case one military court, invoking Bachof's text *Verfassungswidrige Verfassungsnormen?*[12],

[12] Otto Bachof, *Normas Constitucionais Inconstitucionais?*, 1951, Port. transl., Coimbra, 1977.

claimed that such law, because of retroactivity, was contradictory to "reinforced" constitutional norms (or to supra-constitutional norms)[13]. But the Supreme Military Court dismissed the argument and the Constitutional Commission never questioned the validity of Law 8/75[14]. The issues which the Constitutional Commission ruled were those of the constitutionality of Decree-Law 349/76 and of Law 1/77.

In what relates to Decree-Law 349/76, during one phase the majority of the Constitutional Commission considered it unconstitutional insofar as the level of extraordinary mitigation became mandatory, but constitutional insofar as it became possible[15]. During a second phase, after the appointment of a new member and the change of position of another, the majority in the Commission was displaced and the decree-law was considered constitutional in its full extent, as regards extraordinary mitigation[16]. Such understanding was confirmed by the Opinion no. 9/79, in which the Constitutional Commission considered unconstitutional just one minor provision of Decree-Law 394/76[17]. Law 1/77 (an ordinary law) had always been judged unconstitutional by the Constitutional Commission on the basis of unfavourable retroactivity, precisely because of Decree-Law 349/76[18].

10. A number of former *PIDE* officers were punished under Law 8/75, but with quite low penalties, by means of the extraordinary mitigation accorded pursuant to above referred decree-law[19].

The incrimination of *PIDE* officers under Articles 1 to 4 of Law 8/75 was explicitly without prejudice to other possible incriminations under general cri-

[13] Somehow in the same sense Castanheira Neves, *A Revolução e o Direito*, Lisboa, 1976, p. 7.

[14] See, on Law 8/75, the Opinion no. 9/79 from the Constitutional Commission (*Pareceres da Comissão Constitucional*, vol. 8, pp. 3 ff.). The Commission did not take a formal position on the issue, but in dealing, both in the Opinion and in the judgments referred to below, with the issue of the constitutionality of Decree-Law 349/76 and of Law 1/77 it has always assumed the validity of Law 8/75. When adhering to the European Convention on Human Rights, the Portuguese Republic made a reservation to Article 7, referring to Law 8/75.

[15] Judgment no. 94, of 6 April 1978, Appendix to the *Diário da República* of 29 December 1978 (see also *Boletim do Ministério da Justiça*, 276 (1978), p. 107).

[16] Judgment no. 99, of 26 April 1978, Appendix to the *Diário da República* of 29 December 1978 (see also *Boletim do Ministério da Justiça*, 276 (1978), p. 127) and, among others, Judgment no. 120, of 21 November 1978, Appendix to the *Diário da República* of 8 May 1979.

[17] Note (14) above. It should be noticed, however, that one of the grounds for extraordinary mitigation (good services as a member of *PIDE*), referred to by Decree-Law 349/76 (Article 6, 6th), seemed clearly unconstitutional, because it was totally inconsistent with the *ratio* of Law 8/75 and of Article 309 of the Constitution. And one could also ask whether, in general, the degree of mitigation established by Decree-Law 349/76 and, as a consequence, the terms in which were created what, in Portugal, we call "privileged criminal offences" were consistent with the *ratio* of Law 8/75. The first issue has been dealt with in the Opinion no. 9/79 (including dissenting opinions). The majority accepted the constitutionality, but within a restrictive interpretation of the "good services as a member of PIDE", considering only, as possible mitigating circumstances, those acts which were not of persecution and intimidation and were outside the specific functions of a political police.

[18] See, among others, the judgments referred to in notes (15) and (16).

[19] On the tendency for "limited criminal sanction" in "transition", see Ruti Teitel, *op. cit.*, pp. 46 ff..

minal law (Article 6 (2)). Military public prosecution, however, normally preferred the easy charge of someone having been in office, dealing with his actions only for the purpose of the measure of the penalty[20]. One case of autonomous charge and punishment is, however, well known: the murder, in 1965, in Spanish territory, of the opposition candidate having run for the Presidency of Republic in the elections of 1958, General Humberto Delgado, and of his secretary[21].

(ii) *Decree-Law 74/75 and Judgment no. 117 of the Constitutional Commission*

11. Under French Napoleonic influence, Portugal adopted, long ago (much earlier than the Salazar's regime), although with some interruptions, the system of the so-called *administrative guaranty*[22]. This meant that criminal proceedings against Administration officers, regardless of their level, for acts practiced within their functions, could not continue without authorization from the Home

[20] Note that, under the Criminal Code of 1886, in force until the end of 1982, torture was not an autonomous criminal offence. The act of torturing was criminal only by reference to "general" criminal types: coercion, offences to physical integrity…

[21] The Prosecution charged for the murder several former members of *PIDE*, including the former *PIDE* Director-General and Deputy Director-General, and a well known former inspector, Rosa Casaco. However, the 2nd Territorial Military Court of Lisbon, in its very controversial judgment of 27 July 1981, ruled that *PIDE*'s purpose was, by attracting the General to a meeting with a fake Portuguese Colonel near the border, to sequestrate him, bring him to Portugal and arrest him, and that there was no evidence of a directive for killing (even if «necessary» only). The Court considered also proved that the murders would have resulted from an individual action of just one *PIDE* agent, Casimiro Monteiro, when the General became aware that the meeting was a trap (the *PIDE* unit was comprised of four members, under the command of inspector Rosa Casaco). Several connected criminal offences, including the disguising of the corpses, were declared covered by the statute of limitations for criminal proceedings. From the seven defendants, only three were present in Court and one (the former *PIDE* Director-General) died during the trial. The four others, including Casimiro Monteiro and Rosa Casaco, were judged *in absentia*. All the defendants (alive at the time) were convicted for the fact of having belonged to *PIDE*; Casimiro Monteiro also for the two murders; and some of the other defendants, including Rosa Casaco, for forgery and destruction of public documents. In spite of the judgment, there has always been a wide belief, supported by evidence, that at least some of the *PIDE*'s brigade members had a directive to kill, maybe if «necessary» only, and that they fulfilled it. In 1998, Rosa Casaco came to Lisbon and gave an interview to a major Portuguese newspaper (*O Expresso, Revista*, 14 and 21 February 1998) arising commotion in the public opinion and wide protest. He had been convicted to eight years imprisonment and he had never served the penalty, in spite of arrest warrants issued against him and of extradition requests, never answered. However, in a 1990 decision the Supreme Military Court considered that part of the penalty imposed had terminated and the remaining part would terminate, if there was no change in the situation, in 1996 (statute of limitations for penalties). The Supreme Military Court, by a majority judgment of 25 February 1999, declared that it was bound by the 1990 ruling. Appeal has been made to the Constitutional Court, but it was dismissed on the basis that the rules on *res judicata* in criminal proceedings applied (rightly or wrongly) by the Supreme Military Court were not unconstitutional (Judgment no. 366/2001, *Acórdãos do Tribunal Constitucional*, vol. 50, p. 879). Another case of autonomous charge and punishment is the murder, in 1961, of the member of the Portuguese Communist Party Architect Dias Coelho, also by a *PIDE* officer. Again, the judgment, by the 1st Territorial Military Court of Lisbon, dated 5 January 1977, has been quite controversial, because it ruled that the *PIDE* officer had no intention to kill, just to harm and arrest. The decision is published in *Sub Judice*, 25 (2003), pp. 117 ff.. The street in Lisbon where José Dias Coelho was shot now bears his name.

[22] Marcello Caetano, *Manual de Direito Administrativo*, I, 10th ed., Coimbra, 1973, rep. 1991, p. 38 ff..

Minister (or from one of his local deputies). Under a dictatorship, lacking freedom of press, this constituted a quite significant means of impunity.

Decree-Law 74/75, of 21 February, abolished the administrative guaranty, and it ordered the reopening of criminal proceedings where administrative guaranty had been granted, the period for the statute of limitations of criminal proceedings not running as from the moment of the closing of the proceedings until their reopening.

A member of the (common) police had, in 1965, shot an escaped (common) prisoner. Authorization to go forward with the proceedings was denied. After Decree-Law 74/75 proceedings were reopened. But a judge ruled that the provision of the decree-law tolling the time limitation period was unconstitutional and declared that the time limit had elapsed. The matter came to the Constitutional Commission, through (mandatory) appeal. The Commission, by its judgment no. 117, of 7 November 1978[23], unanimously decided that the statute of limitations was covered by the constitutional prohibition of retroactivity in the criminal field and confirmed the judge's ruling on the issue of unconstitutionality.

(iii) *Decree-Law 44062, Decree-Law 272/75 and Judgment no. 158 of the Constitutional Commission*

12. The *Legião Portuguesa (Portuguese Legion)* was a paramilitary fascist kind of force created in 1936, legally defined as a *"patriotic organization comprised of volunteers having the purpose of improving the moral strength of the Nation and of co-operating in its defence against the enemies of the motherland and of social order"*.

Decree-Law 44062, of 28 November 1961, established for the members of the *Legion* a quite extraordinary criminal status. Not only were they granted special forum (the Military Courts), but both the legal notions of self-defence or of lawful defence[24] and of due obedience were extended. Furthermore, even if there was excess in the so-called lawful defence, a penalty exemption could be granted by the court (Article 30).

The *Portuguese Legion* was abolished just after Revolution. Decree-Law 272/75, of 2nd June, repealed Decree-Law 44062 and determined the reopening of the proceedings, only for matters of law, where lawful defence had been declared or a penalty exemption granted under such decree-law and established also retroactive tolling of the time limitation period.

[23] Appendix to the *Diário da República* of 31st December 1979, p. 28.

[24] For the reasons to use "lawful defence" (in Portuguese, "*legítima defesa*"), instead of "self-defence" (expression which excludes third parties defence), see Carlos Santiago Nino, *op. cit.*, p. 173.

13. As always happened on this date every year, the *Portuguese Legion* was, together with the police, patrolling the streets in Lisbon during the 1st of May 1963. One member of the *Legion* shot and killed a woman in a car. The Military Court was not able to declare lawful defence. But, by majority (at least one of the judges had the courage of opposing), the Court granted a penalty exemption.

After Decree-Law 272/75 the case was referred to the Military Courts. The Supreme Military Court ruled that the provisions of such decree-law were unconstitutional. The Constitutional Commission, by its judgment no. 158, of 13 June 1979, confirmed the ruling of the Supreme Military Court, on the basis both of the constitutional principle of irrectroactivity of unfavourable criminal laws and of the constitutional principle of *ne bis in idem*, regarding acquittal judgments (Article 29 (5) of the Constitution)[25].

b. Cases relating to post non-punishment issues

14. Just after the Revolution, an amnesty was granted for political crimes, as defined by Article 39 of the Code of Criminal Procedure in force at the time, including crimes against the internal security of the State (such was the preferred legal characterization used by the former special courts to convict the opponents of the *regime*), as well as disciplinary offences of the same nature (Decree-Law 173/74, of 26 April). A new amnesty was issued on May 2nd (Decree-Law 180/74) for some military criminal offences, including desertion (the main addressees being those who refused to fight in the colonial war).

15. The notion of political crime was quite undetermined and the absence of enough specification by Decree-Law 173/74 allowed room for doubts, in particular when common criminal offences of certain kinds were also involved. Well known cases were the "attack" on the Bank of Portugal dependency in Figueira da Foz, the "detour" of a TAP airplane, both actions committed by L.U.A.R. (*Liga de União e de Acção Revolucionária*), as well as the Santa Maria ship seizure.

A new Decree-Law (259/74, of 15 June) formally extended the amnesty to all common crimes having a political goal, occurred until 25 April 1974 (this day included) and attributed to members of anti-fascist organizations.

With this extension, all cases were quickly solved, except one.

16. The case was the following:

On the 1st January 1962, at 2.00 a.m., a *coup* against the *regime* was launched, with an assault on the barracks of Beja. The *coup* failed. Some of the participants were imprisoned by the political police. Other participants, direct and indirect,

[25] Appendix to the *Diário da República* of 31st December 1979, p. 68.

took refuge at the Brazilian Embassy in Lisbon. One of the insurgents, Maximino Serra, after having been hidden for a while, came also to the Embassy (in the boot of the ambassador's car, without the ambassador being aware of it).

By the beginning of 1959, General Humberto Delgado, having good reasons to believe that he would be imprisoned[26], had taken refuge precisely at the Brazilian Embassy in Lisbon. He was granted diplomatic asylum by Brazil. However, the Portuguese Government refused to recognise it and to issue a safe-conduct. The case opened a diplomatic crisis between the two countries, solved by the General's departure to Brazil fulfilling the Portuguese law requirements, but with the intermediation of a representative of the Brazilian Ministry of Foreign Affairs and the accepted presence of a Brazilian journalist[27].

After participants in the Beja *coup* arrived at the Embassy, Brazil granted them diplomatic asylum and again a diplomatic crisis was opened. This time, the Portuguese Government refused to allow the persons involved to, even informally, leave the Portuguese territory, but tried to limit the damages by charging only four of the some fifteen refugees directly or indirectly linked with the Beja *coup* that stayed at the Embassy. Of those four, just one, a young officer, Manuel Pedroso Marques, was convicted[28].

[26] The general had just been deprived by the military authorities of his military condition. Under democracy, Humberto Delgado posthumously recovered such condition and was elevated to Marshal of the Armed Forces, together with his corpse's transfer to the National Pantheon in Lisbon (1990).

[27] Humberto Delgado, *A Tirania Portuguesa* (org. of Iva Delgado, Carlos Pacheco, Alfredo Caldeira and Santos Carvalho), Lisboa, 1995, pp. 31 ff.; Álvaro Lins, *Missão em Portugal*, Rio de Janeiro, 1960, Lisboa, 1974. For the Portuguese Government's point of view at the time, see Franco Nogueira, *Salazar*, vol. V (1958--1964), Porto, 1984, pp. 41 ff.. Álvaro Lins was the Ambassador of Brazil to Portugal who granted the asylum and his behavior was remarkable. In late 1959, the until then Minister of Foreign Affairs, Negrão de Lima, replaced Álvaro Lins at the Embassy in Lisbon. The difficult diplomatic relationship of Portugal with the Latin American countries was aggravated by the diplomatic asylum granted, a little bit later, by Argentina to captain Henrique Galvão, who escaped from hospital where he was imprisoned, by Venezuela to Manuel Serra and to major Luís Calafate, involved in the 1959 *Sé* (Cathedral) *coup*, and by the Brazilian Embassy to other people implicated in the same *coup* (see Franco Nogueira, *op. cit.*, V, pp. 48-49, 53-57, 66-67, 72-74, and Irene Flunser Pimentel, *A História da PIDE*, Lisboa, 2007, pp. 229 and 233). General Delgado came back to Portugal, clandestinely, at the time of the Beja *coup*, in order to lead the insurrection, if the attack on the Beja barracks was successful. Manuel Serra was the first leader of the Beja putsch.

[28] Eighty-six persons, starting with Maximino Serra's brother, Manuel Serra, were charged, sixty-nine having been convicted. From those who took refuge at the Brazilian Embassy, were charged, in addition to Pedroso Marques, but acquitted, Francisco Veloso (a lawyer, now deceased, who, later on, had a quite significant position in the banking system), Lígia Monteiro (a psychiatrist, now deceased too, who married Francisco Veloso, having had a child from him when they were at the Embassy) and Mariana Esteves, a nurse. Pedroso Marques was sentenced to three years in prison. It should be noted that the Court's decision was rendered in July 1964, already after the military *coup* in Brazil (31st March 1964). But the Brazilian Government, respecting South American tradition, maintained the diplomatic asylum. By September 1964, Pedroso Marques secretly left the Brazilian Embassy in Lisbon as well as the Portuguese territory and went to France, where he was the first Portuguese to be granted territorial political asylum. Later he departed to Brazil. He came back to Portugal after the revolution and played an important role in the media. I thank Colonel Manuel Pedroso Marques for the information he has given me regarding not only his personal case but, in general, the refuge at the Brazilian Embassy. I also thank the *Instituto de História Contemporânea* of the *Faculdade de Ciências Sociais e Humanas*, from the *Universidade Nova de Lisboa*, which put at my disposal a copy of the Lisbon Plenary Court judgment regarding the Beja *coup*. See now Fernando Rosas *et al.*, *Tribunais Políticos*, Lisboa, 2009, pp. 174 ff..

Maximino Serra, having gotten information that he would be one of those subject to trial, left secretly the Brazilian Embassy in October 1963, before charges were filed and the trial started. He went with a friend to the aero club of Torres Vedras, of which his friend, who had a *brevet*, was an associate. They asked for and were given a plane to go to Albufeira, in the Algarve, and to return[29]. They went to Albufeira, where they refuelled. But, instead of coming back to Torres Vedras, they took the direction of Tanger and landed there. They delivered the plane to the Moroccan authorities.

For the reasons referred to below, Maximino Serra was not charged for his participation in the Beja *coup*. Instead, he and the friend who flew the plane were judged *in absentia*, by the common Court of Torres Vedras, in 1964, and sentenced to the penalty of two years, seven months and a half of prison each, for the crimes of embezzlement regarding the plane and of clandestine emigration[30].

The Portuguese authorities tried to obtain Maximino Serra's extradition, concealing, for that purpose, his involvement in the Beja *coup*[31]. But both the requested countries, Morocco and Canada, refused the extradition.

After the revolution, Maximino Serra came back to Portugal from exile. The arrest warrant, issued as a consequence of his conviction, had not been revoked. He was notified of the 1964 Court decision and arrested. He argued that the offence was covered by the 1974 amnesties. In any event, and without prejudice, he applied for a new trial, since he had been convicted *in absentia*, and to wait for the trial in freedom. Both last applications were granted, but the Court did not pronounce on the amnesty claim. The fact of the Court having enforced the arrest warrant without applying immediately the amnesty was a cause of public indignation, expressed by the press of the time.

Following the trial, Maximino Serra was now acquitted[32]. The reasons were technical. Clandestine emigration was no longer a crime and the Court considered that the legal type of the embezzlement would require an intention of appropriation, and not only of *usus*, of the plane, which did not exist[33]. As regards the amnesty, the Court stated that, since there was no criminal offence, it was unnecessary to determine on the issue[34].

[29] Curiously, the plane belonged to the Portuguese Government…

[30] Judgment of 22 October 1964, proceedings no. 1363/63.

[31] The 1978 judgment, referred to below, formally recognised that Maximino Serra took part in the *coup*.

[32] Judgment from the Torres Vedras Court of 21st April 1978, proceedings no. 1363/63.

[33] One of the judges disagreed with the characterization of the facts and with the grounds for the acquittal. In his opinion, the facts would correspond to fraud: it was declared to the aero club that the purpose was to go to Albufeira and to come back, the authorization for the use of the plane being obtained that way. Maximino Serra's acquittal would have been justified just by the fact that it was not him who asked for and got the authorization to use the plane.

[34] I thank very much Maximino Serra for all the information he gave me, relating to his case and also, in general, to the Beja *coup*, as well as for the documents he put at my disposal.

B. *Short analysis of the Portuguese cases*

17. Let us proceed to a very short analysis of the cases referred to above.

The *PIDE* and the *administrative guaranty* cases are quite easy. In the second one, the Constitutional Commission just applied the constitutional rule of non-retroactivity of unfavourable criminal laws. The only issue was whether the rule covered or not the statute of limitations for criminal proceedings. The Commission adopted a wide understanding of the principle *nullum crimen nulla pœna sine lege prævia* and the answer was affirmative. In the *PIDE* cases, the Constitutional Commission refused to apply the constitutional norm of non-retroactivity of unfavourable criminal laws to Law 8/75 just because it was a statute enacted with constitutional force, maintained as such by the 1976 Constitution. Very simply, Law 8/75 included a derogation to such norm. But when considering Law 1/77 — an ordinary one — the Commission did not hesitate in judging it unconstitutional, on the basis of unfavourable retroactivity.

The Constitutional Commission took a strictly constitution abiding attitude.

18. The *Legion* case was much more complex.

The Supreme Military Court and the Constitutional Commission did not deal with the statute of limitations because, depending on the characterization of the criminal offence, the time barrier might not have occurred. The Constitutional Commission dealt with two issues: firstly, retroactivity of the norms excluding "extended" lawful defence and the possibility of penalty exemption; secondly, the *ne bis in idem* rule.

Let us forget the last point. We can reshape the law and the case in such terms that the man would be for the first time under trial. Regarding the first issue, apparently the Constitutional Commission just made again a strict application of the constitutional principle of non-retroactivity of unfavourable criminal laws. I guess, however, that two successive *preliminary questions* have been overlooked.

19. If one would evaluate Decree-Law 44062 on the basis of the rules of the 1976 Constitution, it would certainly be considered as contrary to them, for a number of reasons, one of which is inconsistency with the principle of equality, established in Article 13. Article 293 (1) of the original version of the 1976 Constitution, today Article 290 (2), states that ordinary laws prior to the Constitution continue in force, provided that they are not contrary to the Constitution or to its principles. Decree-Law 44062 would hence not have survived at least the entry into force of the Constitution. Furthermore, the *Portuguese Legion* had been legally extinguished just after the revolution. Nevertheless, one may correctly argue that the issue is not whether Decree-Law 44062 was in force in 1976, or in 1975 or in 1974, but in 1963, when the *Legion* member shot the woman.

However, the 1933 Constitution had also a provision on equality: Article 5. It was not as strong as Article 13 of the 1976 Constitution is, but it existed. Furthermore, the 1933 Constitution forbade courts from applying laws having contents contrary to it, which meant that such laws were considered void or, at least, legally ineffective. Certainly, the 1933 Constitution was a semantic one, in Loewenstein's terminology, and courts seldom complied with their duty of not applying the laws contradictory to the Constitution — specially in politically sensitive cases. The Military Court which granted penalty exemption to the *Legion*'s member did not even ask whether Decree-Law 44062 was unconstitutional. But why should courts, after 1974 or after 1976, disregard such inconsistency between the provisions of Decree-Law 44062 and Article 5 of the 1933 Constitution?

We are in the field of *past unconstitutionality,* that is, of the unconstitutionality by disregard of a constitutional norm no more in force. My answer to the question would be that such inconsistency should not have been disregarded, even in a criminal case, specially because Article 5 of the 1933 Constitution, although perhaps hypocritically, protected a value recognized and protected also by the 1976 Constitution[35].

20. We may however imagine that Article 5 of the 1933 Constitution was interpreted in such terms that the provisions of Decree-Law 44062 should be considered as permitted; or that there was no reference in the 1933 Constitution to the principle of equality.

Why should courts, after the Revolution or after the 1976 Constitution, acknowledge that the relevant provisions of Decree-Law 44062 were legally in force in 1963? Because they had been bindingly enacted by the institutions of the prior regime? How, if the Revolution's and the 1976 Constitution's vision is that the dictatorship had usurped the rights and powers of the people? Because the laws of the prior regime were effective? Should that, however, be enough, when everybody admits that foreign laws contradictory to public policy ("international public order", as we use to say in continental European doctrine) are to be disregarded?

Let things rest just like that, under interrogation, and proceed to post non-punishment.

21. Leaving aside the Portuguese law requirements for characterising embezzlement as a criminal offence, the issue, in the case of *the non returned plane*, consisted in whether it was covered or not by the 1974 amnesties. Should the Court be convinced that the facts were comprised in the amnesty, it would not need

[35] "Inconstitucionalidade Pretérita", *cit.*, pp. 317 ff.. What is said in the text regards the merits of the case. Another issue is whether the Constitutional Commission was competent for a control of constitutionality on the basis of the 1933 Constitution. I think that only common courts had such competence (*op. cit.*, pp. 307 ff.).

to enforce the arrest warrant and to proceed to the substance of the case. The Court's discomfort with applying amnesty derived clearly from the circumstance that, by using the plane, the person was not engaging in an action with a direct political goal. He was rather running away from the police because he had carried out an action, this one yes, but only this one, with a direct political goal (the participation in the Beja *coup*). In any event, let us assume that the facts relating to the plane's use were not covered by amnesty. And let us assume, too, that, under the applicable law, embezzlement did not require the intention of appropriation and was satisfied with a use beyond authorisation or without restitution or that the dissident judge's understanding got the majority within the court and the defendant was Maximino Serra's friend. A question would remain. It is the following: the risk of being "caught" by the political police (oneself or someone else) generated or not some kind of *necessity* capable of justifying the facts involved or, in any event, generated a justification, whether necessity or not, of the facts?

Asking this question from inside the legal system *de facto* in force at the time of the use of the plane was nonsense. Only from an external point of view — I will add, an *external* and *committed* point of view, that is, from the point of view of a *rebuttal statement* — could justification have been argued. But what, before the successful revolution, was an external committed point of view became, after it, an internal point of view, for the past. That is why, after the revolution, the question, as an internal question, makes sense, whatever the answer (and mine would be categorically yes, there was justification).

22. One may go further in questioning. Is it really the amnesties granted in April, May and June 1974 that have "cleaned" the attempts against the former regime as criminal offences?

I will not even try to enter into the theory of amnesty. For such purpose, I refer to a remarkable article of José de Sousa e Brito[36] and to the superb Constitutional Court's judgment no. 444/97, which, as the judge in charge of the case, he drafted[37]. It is enough to note that, in "normal" amnesty, even in the so-called corrective amnesty, it is assumed that, without the amnesty, the facts constituted crimes (or other kinds of offences) and should continue to be considered as such.

At least in the crimes against the internal security of the State, the specific protected value or "legal good" (*bem jurídico*) was the former *regime*. From the revolutionary and post-revolutionary perspective, however, such *regime* is not a *value*, but a *non-value*, not a *good* but an *evil*. How can the attempts against the prior *regime* be considered as offences, from the new perspective?

Maybe one has to state that the so-called amnesties of this kind are just *declaratory*, authoritatively acknowledging that there is no fulfilment of the "criminal

[36] "Sobre a Amnistia", *Revista Jurídica*, Nova Série, 6 (1986), pp. 1535 ff..
[37] Judgment no. 444/97, of 25 June, *Acórdãos do Tribunal Constitucional*, vol. 37, p. 289.

type", or that there is justification, as the case may be. It is quite curious to note that Decree-Law 727/74, of 19 December, relating to the facts occurred during the Indian invasion of Goa in 1961, instead of talking of amnesty, states that the penalties applied to officers and soldiers are made void.

C. *The Berlin Wall cases and their comparison with the Portuguese cases*

23. In order to try to stop the flow of persons from East Germany to the Federal Republic of Germany (FRG), the German Democratic Republic (GDR) built, on August 1961, the so-called Berlin Wall[38]. A system of protection was organized and developed, involving armed border guards and, later, anti-personnel mines and automatic-fire systems. Many people attempting to cross the border to West Berlin were killed, either shot by border guards, or by triggering mines or automatic fire-systems.

After the German unification, several border guards as well as former GDR rulers and high ranking officials were brought to trial, mostly in the Berlin Court (Berlin *Landesgericht*). Proceedings against Erich Honecker were stopped, on age and health grounds[39]. But border guards and some other rulers and officials were convicted.

I shall not go into details regarding each of the several cases. The cases are identified and described in particular by Alexy[40] and by Vassalli[41] and I will concentrate on the issue of the exclusion of retroactivity regarding criminal laws, established in article 103 (2), of the *Grundgesetz*, relating, in particular, to justification grounds. I shall leave aside other issues, such as the one of the mediate authorship (*mittelbar Täterschaft*)[42] or the one of causality relating to omissions by collective bodies[43].

[38] Really, if my memory is correct, there were two walls with, in between, on the East Berlin side, an open field.

[39] Berlin VerfGH, 19.01.1993, *Juristenzeitung* 5/1993, pp. 259 ff.. The basis for accepting the constitutional complaint has been the value of human dignity. Honecker was 81 years old and suffered from liver cancer. He died in 1994.

[40] "Mauerschützen. Zum Verhältnis von Recht, Moral und Strafbarkeit", 1993, now in Alexy/Koch/L. Kuhlen/H. Rüßmann, *Elemente einer juristischen Begründungslehre*, 2003, pp. 469 ff..; and *Der Beschluß, des Bundesverfassungsgericht zu den Tötungen an der innerdeutschen Grenze vom 24 Oktober 1996*, Hamburg, 1997, which I have consulted in the Castilian translation, "Derecho Injusto, Retroactividad y Principio de Legalidad Penal, la doctrina del Tribunal Constitucional Federal alemán sobre los homicidios cometidos por los centinelas del Muro de Berlín", in *DOXA, Cuadernos de Filosofia del Derecho*, 23 (2000), pp. 197 ff..

[41] Giuliano Vassali, *Formula di Radbruch e diritto penale*, Milano, 2001, pp. 79 ff..

[42] I believe that the matter has been the subject of important developments in German criminal law theory, which I did not follow. I just note that, in Portugal, the theme of mediate authorship has been the subject matter of two master theses by young lawyers of the law firm (Morais Leitão, Galvão Teles, Soares da Silva & Associados) of which I am a partner: João Matos Viana ("*A autoria na criminalidade de empresa*", Faculty of Law of the University of Lisbon, 2008) and Ana Rita Duarte de Campos ("*A determinação da autoria singular no domínio da criminalidade de empresa*", Faculty of Law of the University of Lisbon, 2008).

[43] Dealt with in the *Politbüro* case, BGH, 5 StR, Urt. v. 6. November 2002 (where the defendants were convicted). From a private law perspective, the case has been considered in the most remarkable book of Paulo

24. The legal framework was, in broad terms, the following:

By the Unification Treaty (*Einigunsgsvertrag*), between the FRG and the GDR, signed on 31st August 1990, approved by the parliaments of both States in September and which entered into force on the 3rd October 1990, the GDR was extinguished and its people and territory incorporated in the FRG, through the incorporation of *Länder* just constituted. Pursuant to the Treaty, Article 315 (1) of the *Introductory Act to the Penal Code* (EGStGB), on "validity of criminal law for the facts perpetrated in the German Democratic Republic", together with § 2 of the Penal Code, to which it refers, determines the application of the law that was in force in GDR to most of the crimes committed in its territory, except if the FRG law is more lenient.

Homicide constituted obviously a criminal offence both under GDR and FRG law. The main issue was whether, according to GDR law, a justification ground existed for the murders and whether such a possible justification ground was relevant for a court's decision to be taken after the German unification.

The justification grounds invoked related to GDR's political conception and practice and to the provisions of the People's Police Act (*Volkspolizeigesetz*), 1968, and of the State Borders Act (*Staatsgrenzengesetz*), 1982.

Para. 17 (2), of the *Polizeigesetz* allowed the use of firearms to prevent the imminent perpetration or the continuation of a serious crime or to prevent the escape or effect the re-arrest of a person suspected of having committed a crime[44].

Mota Pinto, *Interesse Contratual Negativo e Interesse Contratual Positivo*, Coimbra, 2009, vol. I, pp. 667-668, *footnote* 1901.

[44] Para. 17 (2) stated that the use of firearms was allowed:

"(a) to prevent the imminent commission or continuation of an offence which appears, according to the circumstances, to constitute

— *a serious crime against the sovereignty of the German Democratic Republic, peace, humanity or human rights*
— *a serious crime against the German Democratic Republic*
— *a serious crime against the person*
— *a serious crime against public safety or the State order*
— *any other serious crime, specially one committed through the use of firearms or explosives;*

(b) to prevent the flight or effect the re-arrest of persons

— *who are strongly suspected of having committed a serious crime or who have been arrested or imprisoned for committing a serious crime*
— *who are strongly suspected of having committed a lesser offence, or who have been arrested, taken into custody or sentenced to prison for committing an offence, where there is evidence that they intend to use firearms or explosives, or to make their escape by some other violent means or by assaulting the persons charged with their arrest, imprisonment, custody or supervision, or to make their escape jointly with others*
— *who have received a custodial sentence and been incarcerated in a high-security or ordinary prison;*

(c) against persons who attempt by violent means to effect or assist in the release of persons arrested, taken into custody or sentenced to imprisonment for the commission of a serious crime or lesser offence."

Sub-paras. (3) and (4) added:

"(3) The use of firearms must be preceded by a shouted warning or warning shot, save where imminent danger may be prevented or eliminated only through targeted use of the firearm.

(4) When firearms are used, human life should be preserved wherever possible. Wounded persons must be given first aid, subject to the necessary security measures being taken, as soon as implementation of the police operation permits.

According to the *Grenzengesetz* the use of firearms was justified to prevent the imminent perpetration or the continuation of an offence which appears in the circumstances to constitute a serious crime or in order to arrest a person strongly suspected of having committed a serious crime[45].

25. Proceedings started in State courts (*Landgerichten*), normally the Berlin one, and, almost always, defendants were convicted. Appeals were made to the Federal Supreme Court (*Bundesgerichthof* or *BGH*), which confirmed the convictions.

The main issue concerned, as referred to above, the justification grounds invoked by the defendants. There was some difference between rulers and border guards and between "personal" shooting and the action of mines or automatic fire arms, as regards the formulation of the claimed justification grounds and the way the courts dealt with them.

For rulers, the only possible justification ground was a policy, shared with the other States belonging to the Warsaw Pact, of preventing, *at all costs*, the flow of people to the West, together with the recognition of such justification by State practice, expressed in the lack of prosecution. The border guards, in addition to such ground, invoked § 27 of the *Grenzgesetz*, 1982, and § 17 of the *Volkspolizeigesetz*, 1968.

26. In what refers to the guards cases, the BGH dismissed the argument for justification grounds on a double, and, at least apparently, cumulative basis. One consisted in the appeal to the Radbruch formula or, more precisely, to one part of such dual formula, corresponding to the so-called "intolerability" formula, combined with the invocation of the international protection of human rights. Relevant for such purpose were in particular the Universal Declaration of Human Rights, voted by the GDR, and the United Nations International Covenant on Civil and Political Rights, ratified by the GDR on November 1974. The Radbruch "intolerability" formula says that *"statute must yield to justice"* when *"the conflict between statute and justice reaches a so intolerable degree"* that statute becomes "flawed law" or, better, "lawless law"[46]. The instruments of assertion and protection of human rights offer criteria to specify the contents of the too

[45] What has been translated, notably by E.C.H.R., as serious crime (*Verbrechen,* as opposed to *Vergehen*) was defined in the GDR Penal Code as *"attacks dangerous to society against the sovereignty of the German Democratic Republic, peace, humanity or human rights, war crimes, offences against the German Democratic Republic and deliberately committed life-endangering criminal acts"* and *"other offences dangerous to society which are deliberately committed against the rights and interests of citizens, socialist property and other rights and interests of society, which constitute serious violations of socialist legality and which, on that account, are punishable by at least two years' imprisonment or in respect of which, within the limits of applicable penalties, a sentence of over two years' imprisonment has been imposed".*

[46] On the Radbruch formula, see below no. 33.

undetermined Radbruch formula, by expressing a universal juristic conviction[47]. In addition to what regards the right to life, the Supreme Court emphasized Article 12 (2 and 3), of the Covenant, relating to the freedom of movement to other countries[48].

The second kind of argument used by the Supreme Court consisted in that the law of the GDR was susceptible to a "human rights friendly" interpretation (*menschenrechtlichefreundliche Gesetzauslegung*). According to the GDR Constitution, its provisions prevailed over statute and never did the GDR try to adopt a doctrine similar to the Nazi one regarding sources of law. Article 30, § 1, of the GDR Constitution establishes that *"the person and liberty of every citizen of the German Democratic Republic are inviolable"*.

Although the right to life was not explicitly mentioned, it should be considered to be comprised by the protection to personhood. § 27 of the *Grenzgesetz* could be interpreted in conformity with Articles 6 and 12 of the Covenant on Civil and Political Rights. An interpretation of the *Polizeigesetz* and of the *Grenzgesetz* in conformity with the Constitution and with international law, and taking into account proportionality, excluded grounds of justification for the guards' behaviour.

It was this second kind of argument that the Supreme Court specifically used to state that the punishment of the border guards was not contrary to the prohibition of retroactivity of criminal law enshrined in Article 2 of the Penal Code and in Article 103 (2) of the *Grundgesetz*.

Referring to the members of the GDR's National Defence Committee, the later defined the policy regarding the border protection. It was it that determined or co-determined (together with other political bodies) the policy of prevention, at all costs, of border trespassing. The Court considered its members mediate authors of the deaths. Regarding the State practice, the Court just declared that it was incapable of justifying the facts, because it involves a manifest and unbearable offence to elementary determinations of justice and of human rights protected by international law[49]. And reference was made to the Court judgments concerning the border guards.

[47] Note that, In its judgment of 3 November 1992 (BGHSt 39, 1, Judgement 5 StR 370/92), the Supreme Court emphasized that the transposition of the Radbruch formula's use made in the aftermath of the fall of Nazism to the cases at stake was not simple, *"because the killing of people at the internal German border* (innerdeutschen Grenze) *was not equivalent to the national socialist mass murder"*.

[48] Article 12 reads:

"1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country".

[49] BGHst 40, 218, judgment of 26 July 1994. See also the judgment of 8 November 1999.

27. Article 103 (2) of the *Grundgesetz* establishes:

> "An action may be punished only if it was determined by a law as a criminal offence before the action was committed"[50].

Several convicted former members of the National Defence Committee, as well as one border guard, filed constitutional complaints with the Federal Constitutional Court (*Bundesverfassungsgericht*), on several grounds, mainly on the alleged offence of Article 103 (2). By decision of October 1996[51], the Constitutional Court considered:

a) The prohibition of retroactivity of the criminal norms includes the need to acknowledge the justification grounds recognized at the time of the facts, at least if granted by statute (the Court did not deem necessary to pronounce on whether the rule *nullum crimen sine lege prævia* imposes also the acknowledgment of unwritten grounds of justification);

b) The retroactivity prohibition is, within its scope, *absolute*, fulfilling its rule-of-law role on fundamental rights protection through a strict formalization;

c) However, the rule somehow lies on the presupposition of a rule-of-law statutory issuance, based upon democratic legitimacy, separation of powers and bindingness by fundamental rights;

d) The relationship with such presupposition is not of a kind as to imply that the rule becomes inapplicable when it is not verified — non verification of the presupposition just diminishes the value of the basis of trust on which Article 103 (2) relies;

e) The special basis of trust that justifies the prohibition of retroactivity *"no longer obtains where the other State statutorily defines certain acts as serious criminal offences while excluding the possibility of punishment by allowing grounds of justification covering some of those acts and even by requiring and encouraging them notwithstanding the provisions of written law, thus gravely breaching the human rights generally recognised by the international community. By such means those vested with State power set up a system so contrary to justice that it can survive only for as long as the State authority which brought it into being actually remains in existence".*

At this point, the Constitutional Court refers to the Radbruch formula.

Later, some other former GDR rulers also filed a constitutional complaint with the Federal Constitutional Court, which, by a decision of 21 July 1997, dismissed it in summary terms, referring to the 1996 judgment[52].

[50] *"Eine Tat kann nur bestraft werden, wenn die Strafbarkeit gesetzlich bestimmt war, bevor die Tat begangen wurde".*

[51] BVerfG 95, 96, Judgment 2 BvR 1851, 1853, 1875, 1852/94 of 24 October 1996.

[52] EuGRZ 1997, 413, Judgment 2 BvR 1084/97.

28. Article 7 (1) of the European Convention on the Protection of Human Rights and Fundamental Freedoms determines:

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed[53].

Some of the persons convicted by the German Courts filed complaints with the European Court of Human Rights (E.C.H.R.), giving rise to the *Streletz, Kessler and Krenz v. Germany*[54] and *K.-H.W. v. Germany* cases[55], both decided by the Great Chamber judgments of 22 March 2001. The difference between the two cases lies in that, in the first one, the claimants were former members of the National Defence Committee[56], whilst, in the second, the claimant was a former border guard. Except for what concerns that difference, the reasoning of both judgments is similar and similar, in any event, are the conclusions[57].

The claim was the one of breach of above referred Article 7 (1) of the European Convention on Human Rights.

The E.C.H.R. decided that the German courts judgments did not infringe the *nullum crimen sine lege prævia* rule. Such conclusion was based not on a presupposition limiting the conditions of the rule's application nor on overpositive criteria of the Radbruch's formula kind. Rather it is grounded, similarly to what happened with some part of the German Supreme Court decisions, on the consideration that the law of the German Democratic Republic allowed for an interpretation according to which to prevent the crossing of the border did not justify neither, in general, the use of anti-personal mines and of automatic fire--systems, nor, in particular, murders. The European Court underlined that, in the German Democratic Republic, statutes were submitted to the Constitution, that dignity and liberty of persons were solemnly affirmed by the latter, that the Criminal Code provided for *"the merciless punishment of crimes against… peace, humanity and human rights…"*, and that both the *People's Police Act* and the *State Borders Act* allow the use of firearms only to prevent the commission or the continuation of a serious crime, the crossing of the border being charac-

[53] Paragraph 2 adds that *"this article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according the general principles of law recognized by civilised nations"*. When ratifying the Convention, the Federal Republic of Germany made the reservation that *"it will only apply the provisions of Article 7 paragraph 2 of the Convention within the limits of Article 103 paragraph 2 of the Basic Law of the German Federal Republic. This provides that any act is only punishable if it was so by law before the offence was committed"*.

[54] Applications nos. 34044/96, 35532/97 and 44801/98.

[55] Application no. 37201/97.

[56] They had also other functions: Streletz was deputy Minister of Defence from 1979 to 1989; Kessler had been Minister of Defence from 1985 to 1989; and Egon Krenz became the Secretary General of the SED and the President of the Council of State from October to December 1989.

[57] I shall normally quote from the judgment on the first case.

terised as a serious crime only in very limited cases. The Judgment stressed: *"… the courts of (…) a State, having taken the place of those which existed previously, cannot be criticised for applying and interpreting the legal provisions in force at the material time in light of the principles governing a State subject to the rule of law"*.

The most delicate point referred to whether justification was granted by unwritten law. The Court recognised that there was a practice of "protection at all costs" of the border between the two Germanies, on the basis of reason of State.

> However, the Court points out that the reason of State thus pleaded must be limited by the principles enunciated in the Constitution and legislation of the GDR itself; it must above all respect the need to preserve human life, enshrined in the GDR's Constitution, People's Police Act and State Borders Act, regard being had to the fact that even at the material time the right to life was already, internationally, the supreme value in the hierarchy of human rights.

In the first of the two cases, the applicants were, themselves, among the authors of the policy at stake. In the second case, the circumstance that right to life was involved excluded, in the Court's evaluation, the possibility of justification. The judgment stated:

> The Court considers that a State practice such as the GDR's border-policing policy, which flagrantly infringes human rights and above all the right to life, the supreme value in the international hierarchy of human rights, cannot be covered by the protection of Article 7 § 1 of the Convention. That practice, which emptied of its substance the legislation on which it was supposed to be based, and which was imposed on all organs of the GDR, including its judicial bodies, cannot be described as "law" within the meaning of Article 7 of the Convention.

In short, the practice was illegal, not law building[58].

29. The Radbruch formula had already been applied by the German Courts prior to its use in the *Berlin Wall* cases. The Federal Constitutional Court invoked it in several proceedings, one of which, very famous, relating to the citizenship of an exiled and, in the meantime, deceased Jew lawyer[59].

The Federal Supreme Court used the Radbruch formula in several cases, whether implicitly or explicitly, some concerning private law, some criminal law. As

[58] Note that, whilst in the *Streletz, Kessler and Krenz v. Germany* case, the E.C.H.R. decision has been unanimous, in the *K.-H.W. v. Germany*, within 17 votes, there were three dissident opinions, one of them of the Portuguese judge Irineu Barreto. He argued that, in what concerns the border guards, the requirements of foreseeability and accessibility were not satisfied and he invoked that statute of limitations should have excluded criminal judgment for a fact occurred in 1972.

[59] BVerfGE, 23, 98, Judgment 14 February 1968.

regards the latter, for instance, in a judgment of 29 January 1952[60], concerning the transportation of Jews form Württemberg to the East, the Supreme Federal Court expressly stated that the State did not have an unlimited power to define what is lawful and what is not, as, irrespective of the differences between the different jurisdictions, there is a core of lawfulness (*ein gewisser Kernbereich des Rechts*) which can not be damaged and is binding in spite of any statute or decision. The Court further stated that any law which did not pursue objectives of justice and human dignity shall be deemed as non-law (*unrecht*). In a decision of 12 February 1952[61], concerning a German officer who was the prosecutor in special courts set out in concentration camps which led to the death of many people, the Supreme Federal Court stated that the mere resemblance of court was not enough for such special courts to be considered real courts, given that certain minimum legal requirements should also be met; should also be met. In a judgment of 19 December 1952[62], regarding an officer responsible for the transportation of Jews to Riga, the Supreme Federal Court considered that the Defendant's behaviour could not be justified, as he should have known about the lawless legal nature of the purposes of its action, which disrespected binding principles of legality and humanity.

30. In Germany, ever since the end of the World War II, a practice was developed in order to allow retroactive changes and postponements in the statutory limitations' periods.

Before 1949, statutes at the occupied zones contained provisions which suspended the statute of limitations for crimes committed during the National-Socialist regime. The application, from 1949 on, of the German Penal Code of 1871 led to the same result. However, in 1965, because of the delay in the procedures, it was considered necessary to further extend the suspension. Consequently, an act which provided for the suspension of statute of limitations periods for crimes subject to life imprisonment from 8 May 1945 to 31 December 1949 was adopted[63]. The issue of the compatibility of this statute with the provision of the German Federal Constitution concerning the principle of legality and the prohibition of retroactive punishment (article 103 (2)) came to the German Constitutional Court, which pronounced on it by Judgment of 26 February 1969[64]. According to it, the principle of legality contained in the Constitution implies only that the citizens know the behaviour which is punishable and the penalty which may be applied, but it has no consequences as to the provisions on statutory limitations. As the Court stated, "*the prescription period lea-*

[60] BGHSt 2, 234, Judgment 1 StR 563/61.
[61] BGHSt, 2, 173, Judgment 1 StR 658/51.
[62] BGHSt, 3, 357, Judgment 1 StR 2/52.
[63] Act of 13 April 1965.

ves criminalisation untouched" and given that "(…) *is not something, upon which a perpetrator, who violates the law, possesses any alienable, protected claim*". In 1979, the statute of limitations concerning World War II common murders was abolished and abolishment applied retroactively.

The same problem was raised as to the crimes committed in the GDR. Pursuant to the Unification Treaty, article 315a of the Introductory Act to the Penal Code states that the law of GDR applies to the statute of limitations periods which had already run before the unification; instead the crimes regarding which statute of limitations period had not already elapsed should be considered suspended until 3 October 1990, and, from then on, the relevant provisions of the Federal Penal Code of FRG should apply. Article 315a was further amended in 1993[65], as to suspend, from 1949 until 1989, the statute of limitations periods, even when elapsed, of crimes not prosecuted in East Germany for political reasons, as well as to postpone the criminal statutes of limitation periods. The statutes were once more postponed in 1997[66].

Such provision was also submitted to the Federal Constitutional Court, which, by decision of 26 November 2003[67], considered that no violation of article 103 (2) of the Constitution existed, based on the same grounds as the 1969 judgment.

Worth of notice in matters of retroactive application of provisions on statutory limitations is also a decision of the E.C.H.R. of 18 October 2000[68], as the Court dismissed an application regarding the possible violation of article 7 of the Convention by a Belgian law. A similar position was adopted by the Opinion 523/2009 of the European Commission for Democracy through law (Venice Commission)[69].

31. If one wishes to compare the cases arisen in Portugal, during the seventies, and in Germany, during the nineties, and the way Courts dealt or could have dealt with them, it is necessary to start by trying to see what is common and different in the two situations.

In Portugal there has been a clear rupture of legality, a revolution in the juristic sense of the word. A new political-legal system started based on itself, with the Movement of Armed Forces and the "Junta de Salvação Nacional", the former

[64] BVerfG 25, 269, Judgment 2 BvR 15 23/68.

[65] Act of 16 March 1993 and of 27 September 1993.

[66] Act of 22 December 1997.

[67] BVerfG Judgment 2 BvR 1247/0.

[68] E.C.H.R., *Coëme and others v Belgium*, Application Number 32492/96; 32547/96; 32548/96; 33209/96; 33210/96.

[69] "Amicus Curiae *Brief for the Constitutional Court of Georgia on the retroactivity of statutes of limitation and the retroactive prevention of the application of a conditional sentence"*, prepared by Mr. James Hamilton (Irish Substitute Member) and Ms. Maria Fernanda Palma (Portuguese Member) and approved by the Venice Commission at its 78th Plenary Session (Venice, 13-14 March 2009).

bodies having been extinguished. The constituent power was clearly an original one. In no way does the revolutionary and post-revolution law find justification in pre-revolutionary law; neither may pre-revolutionary law be conceived as recognizing future revolutionary law.

The revolution and post-revolution law, in particular the Constitution, refuse the legitimacy of the prior regime. In this respect, the Constitution preamble is quite clear:

> On 25 April 1974, the Armed Forces Movement, setting the seal on the Portuguese people's long resistance and interpreting its deep-seated feelings, overthrew the fascist regime.
> The liberation of Portugal from dictatorship, oppression and colonialism represented a revolutionary change and an historic new beginning in Portuguese society.
> The Revolution restored fundamental rights and freedoms to the people of Portugal. In the exercise of those rights and freedoms, the people's legitimate representatives have met to draw up a Constitution that meets the country's aspirations.

In what regards Germany, the procedure was quite different and not only because a State was extinguished, through incorporation in another State. Change started by popular uprising, in 1989, but it continued inside the established bodies. Firstly, a constitutional amendment was approved, modifying the political structure through multiparty system. Elections were held to the *Volkskammer*, won by the Christian-Democratic Party, "twin" to the majority party in Western Germany. The procedure for unification was accelerated and on 31st August the *Einingungsvertrag* was signed. In September, it was approved by the parliaments of both States, through procedures fulfilling the prerequisites for constitutional amendment. Prior to it, a GDR constitutional amendment, to come into force with the coming into force of the Unification Treaty, at a moment just logically prior, recreated the federate States (*Länder*) in GDR. The *Einingungsvertrag* came into force on the 3rd October 1990.

It may be disputed whether the constituent power exercised by the former East German People, through the *Länder*, was or was not an original power and in which sense. Whatever the answer, it is quite clear that the *Grundgesetz*, in its application to the territory of the former GDR, does not find grounds in the GDR law. The version of the Fundamental Law preamble, following the *Einigungsvertrag* shows it:

> Inspired by the determination to promote world peace as an equal partner in a united Europe, the German people, in the exercise of their constituent power, have adopted this Basic Law.
> Germans in the Länder of Baden-Württemberg, Bavaria, Berlin, Brandenburg, Bremen, Hamburg, Hesse, Lower Saxony, Mecklenburg-Western Pomerania, North Rhine-Westphalia, Rhineland-Palatinate, Saarland, Saxony, Saxony-Anhalt, Schleswig-Holstein, and Thuringia have achieved the unity and freedom of Germany in free self-determination. This Basic Law thus applies to the entire German people.

The situation has some similarity (in inverse terms) to the cases of *devolution*: the Constitution is granted by the colonial State, but, with independence, the link with such power is cut.

Furthermore, it seems that the legitimacy of former GDR authority is not recognised within the new framework, because of the lack of pluralistic democracy and the lack of compliance with the rule-of-law requirements. The Unification Treaty's rules on rehabilitation of persons persecuted by political reasons (Article 17) and on the review of judicial decisions and revocation of administrative acts contrary to the rule-of-law principles (Articles 18 and 19) are quite significant. In particular, Article 17 talks of the victims from the "*SED* (*Socialistische Einheit Deutschlands Partei*) *lawless regime* (*SED-Unrechts--Regime*)".

The Portuguese post-revolution law says nothing specific about the force, in the past, of the past law. It just declares, in what was originally Article 293 (2) and is now Article 290 (2), similarly to Article 123 (1) of the *Grungesetz*, that ordinary law prior to the entering into force of the Constitution continues, provided it is not contrary to the Constitution or to the principles established in it. This, however, refers to overstaying in force of former law.

In Germany, and in what relates to criminal law, Article 315 of EGStGB determines GDR's law applicability, in principle, to the facts prior to the coming into force of the *Einigungsvertrag* perpetrated in the GDR's territory.

32. One fundamental difference between what occurred in Portugal and in Germany is that, in Portugal, as referred to above, a statute was issued, with constitutional force, retroactively incriminating the members of the political police by the simple fact of having exercised certain kind of functions. It did not happen in Germany with respect to STASI.

In practical terms, members of the Portuguese political police were in fact prosecuted in a significant number, although punished with quite low penalties. The reaction concentrated on them. I don't know what really happened in Germany[70].

To the best of my knowledge, the Radbruch formula has never been invoked in a Portuguese court. However, as mentioned, something of the kind was argued: the unconstitutionality of constitutional norms. The claim referred precisely to Law 8/75, incriminating the PIDE officers, because of its retroactivity. But the Constitutional Commission never accepted the argument.

Quite curiously, outside Law 8/75 Portuguese courts were inflexible.

[70] According to Roland Schissau (*Strafverfahren Wegen MfS-Unrechts*, Berlin, 2006, pp. 26-27), there is no precise information on the number of investigating proceedings concerning criminal offences committed by the Ministry for State Security, taking into account the diversity of actions considered and its different characterization in each State. See also John O. Koehler, *Stasi, The Untold Story of the East German Secret Police*, Boulder, 1999, pp. 11 ff..

The typical example is the *administrative guaranty* case. I don't criticize the Constitutional Commission's understanding of the non-retroactivity rule in criminal law, including in its scope the statute of limitations, even regarding pre-revolution facts. The point is that there is a strong difference with German practice. The difference is explainable, on the one hand, by the German experience of having to deal with the horror of Nazi crimes and, on the other hand, by the somehow "absorbing" or "neutralizing" effect, in Portugal, of Law 8/75.

Beyond this, I believe that, when it came to justification grounds and penalty exemptions (the *Legion* case), the Portuguese courts' attitude was narrow-minded. I admit that the *non bis in idem* rule was too strong an obstacle. But, as referred to above, the Constitutional Commission invoked also non retroactivity and did not make a review of the constitutionality of the provisions in the past.

In this respect, German case law is much more fertile.

Finally, we have the Portuguese case of the *non returned plane*. The court decision has been, to say the best, irrelevant (except for the defendant). But the case was fabulous.

III. Theoretical Framework

A. *Radbruch, Alexy, and the Radbruch Formula*

33. The seminal legal philosophical reaction to the horrors of Nazism and of World War II came from Gustav Radbruch. It opened by a very short text, a letter to students, "five minutes of legal philosophy" ("*Fünf Minuten Rechtsphilosophie*"[71]), which starts with a comparison between the soldier's statement *"orders are orders"* and the jurist statement *"law is law"*. Whilst it is recognised that the soldier's duty of obedience ceases in the face of an order to commit a crime, the second statement is employed without limitation. It was this statutory positivist conception that would have left people and lawyers defenceless against the most arbitrary, cruel and criminal laws. Radbruch came again to the issue of legal validity and of the relationship between security and justice in two articles, one of 1946 — "*Gesetzliches Unrecht und übergesetzliches Recht*" ("Statutory lawlessness and supra-statutory law")[72], another of 1947 — "*Gesetz und Recht*" ("Statute and Law")[73] — and in a text entitled *"Vorschule der Rechtsphilosophie"* ("Propedeutic of Legal Philosophy"), also from 1947[74].

[71] Gustav Radbruch, *Gesamtausgabe* (Arthur Kaufmann, ed.), Heidelberg, vol. 3 (*Rechtsphilosophie* III), 1990, pp. 78 ff..

[72] *Gesamtausgabe,* vol. 3, pp. 83 ff.; English translation by Stanley Paulson *in Oxford Journal of Legal Studies*, 26:1 (2006), pp. 1 ff., together with "Fünf Minuten Rechtsphilosophie".

[73] *Gesamtausgabe*, vol. 3, pp. 96 ff..

[74] *Gesamtausgabe,* vol. 3, pp. 122 ff..

Radbruch belonged to the so-called neo-kantian Baden school of thought, being a highly creative follower of Windelband, Rickert and Lask. His latter position before Nazism was expressed in the *Rechtsphilosophie* (1932)[75]. The framework was the values philosophy (*Wertphilosophie*) and the philosophy of culture (taking culture as the "link" between "reality" and value). Legal science should consider law as a "cultural fact", that means as "reality" (*Wirklichkeit*) referred to value[76]. "Law is the "reality" having the meaning of being at the service of the legal value, of the idea of law"[77]. The basis of the idea of law is the idea of justice, which is an absolute value, not derivable from any other[78]. Justice is, however, an incomplete value[79], to be completed by the goal of law and balanced by security, all the three being included in the idea of law. The latter is unifying, but also internally antinomic[80].

In 1932, Radbruch asserted that only from a *relativist* perspective could the questions about the goal of law be answered. Such goal is contingent and depends on convictions, ideology, circumstances… Variable would also be the relative weight of each of the legal values. Radbruch characterised his position as *philosophical relativism*, understood as "the system of all systems"[81]. Furthermore, relativism was the logical presupposition of democracy[82].

In the aftermath of World War II Radbruch concentrated his criticism on *statutory positivism*, trying to attribute practical consequences to such criticism[83]. The synthesis is expressed in a most famous passage of the "Statutory lawlessness" article, known as the *Radburch formula*:

> The conflict between justice and legal certainty may well be resolved in this way: the positive law, secured by legislation and power, takes precedence even when its content

[75] I have used the German edition of the *Rechtsphilosophie*, 1932 version, *in* Ralf Dreier and Paulson (ed.), *Studienausgabe*, C. F. Müller, Heidelberg, 1999, which includes, in addition to articles referred to above, a draft *postscript* to the book. I have also used a Portuguese translation of *Rechtsphilosophie*, by Luís Cabral de Moncada, *Filosofia do Direito*, Coimbra, 1st Portuguese ed., Coimbra, 1934, and 6th (last) Portuguese edition, Coimbra, 1979. This last Portuguese edition includes some changes, inserted in the 4th German posthumous edition by Erik Wolf, as well as, in appendix, some of the Radbruch texts from after the end of war. Quotations are made by reference to the above referred German edition and to both the 1st and the 6th Portuguese editions. Since, besides chapters, the book is divided in paragraphs numbered in sequence, which did not change, paragraphs will also be mentioned.

[76] *Rechtsphilosophie*, pp. 11-12; 1st Port. ed., pp. 11-13, 6th Port. ed., pp. 44-46 (§ 1).

[77] *Op. cit.*, p. 34; 1st Port. ed., p. 46, 6th Port. ed., p. 86 (§ 4).

[78] *Op. cit.*, pp. 34-35; 1st Port. ed., pp. 46-47, 6th Port. ed., pp. 86-87 (§ 4).

[79] Here, the words are mine, not from Radbruch.

[80] *Op. cit.*, pp. 73-77; 1st Port. ed., pp. 103-110, 6th Port. ed., pp. 159-168 (§ 9).

[81] *Op. cit.*, p. 30; 1st Port. ed., pp. 39-40, 6th Port. ed., pp. 77-78 (§ 3).

[82] *Op. cit.*, p. 4; 1st Port. ed., p. 2, 6th Port. ed., pp. 36-37 (Prologue).

[83] It is immaterial to discuss whether between the Radbruch's positions before and after Nazism the relationship is of rupture, of development or of continuity (see a synthesis and references in Hidehiko Adachi, *Die Radbruchsche Formel*, Baden-Baden, 2006, pp. 13-14; see also, claiming some continuity, Stanley Paulson, "On the Background and Significance of Gustav Radbruch's Post-War Papers", *Oxford Journal of Legal Studies*, 26:1 (2006), pp. 18-20). That there are many important differences between those positions is for me quite clear. Beyond that, the issue is one of degree and really does not matter, except for the question of what happened to relativism and of whether relativism is susceptible of limits, and of which kind.

> is unjust and fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as "flawed law" ("*unrichtiges Recht*"), must yield to justice. It is impossible to draw a sharper line between the cases of statutory lawlessness and statutes that are valid despite their flaws. One line of distinction however can be established with utmost clarity: where there is not even an attempt at justice, where equality, the core of justice, is deliberately denied in the issue of positive law, then statute is not only "flawed law" ("*unrichtiges Recht*"), but it lacks the very nature of law. For law, including positive law, cannot be otherwise defined then as a system and an institution whose meaning is to serve justice[84].

As a matter of fact, the text includes two formulas, the so-called "intolerability formula", corresponding to the first part, and the "denial formula", corresponding to the second[85]. It is the first that is normally mentioned as the Radbruch formula and to which the German Courts' judgments explicitly or implicitly referred to. But it was on the basis of the second that Radbruch denied in the whole Nazi law the dignity of "valid law" (*geltendes Recht*)[86].

34. Post-war Radbruch line of thought was somehow adopted by Lon Fuller, arguing for a inner morality of law[87], and criticised by Hart. Regarding specifically Radbruch and the case of a wife denouncing her husband to Nazi authorities, Hart stated:

> Many of us might applaud the objective — that of punishing a woman for an outrageously immoral act — but this was secured only by declaring a statute established since 1934 not to have the force of law, and at least the wisdom of this course must be doubted. There were, of course, two other choices. One was to let the woman go unpunished; one can sympathize with and endorse the view that this might have been a bad thing to do. The other was to face the fact that if the woman were to be punished it must be pursuant to the introduction of a frankly retrospective law and with a full consciousness of what was sacrificed in securing her punishment in this way[88].

Hart insisted in the separation of law and morals as corresponding to the distinction between law as is and as it should be[89]. A quite interesting polemics developed between Hart and Lon Fuller[90].

[84] "Gesetzlisches Unrecht…" *cit.*, *Gesamtausgabe*, p. 89; Paulson's translation *in Oxford Journal cit.* p. 7.

[85] For instance, Arthur Kaufmann, "Die Radbruchsche Formel vom gesetzlichen Unrecht und vom übergesetzlichen Recht in der Diskussion um das im Namen der DDR begangene Unrecht", *Neue Juristische Wochenschrift*, 48 (1995), p. 82.

[86] *Ibid.*, p. 89.

[87] In particular, *The Morality of Law*, 2nd ed., New Haven and London, 1964, specially pp. 33 ff..

[88] "Positivism and the Separation of Law and Morals", included in Hart, *Essays in Jurisprudence and Philosophy*, Oxford, 1983, p. 76. The description of the case made in the text of the article was not totally correct, as Hart himself states in the publication made in the *Essays* (p. 75, footnote 43). But it is relevant as a hypothetical case.

[89] "Positivism…" *cit.*, p. 49 ff..

[90] See, on the Hart's side, in addition to the above referred article, *The Concept of Law*, 2nd ed., Oxford, 1994, specially pp. 285 ff., and *Postscript*, pp. 244 ff.. and 268 ff., and "Lon Fuller: The Morality of Law"

35. It is by reference to separation or, perhaps better, to separability between law and morals that, in a 1989 article, Alexy opened his pleading against legal positivism[91]. As from the beginning, the Radbruch formula played a fundamental role. And it is this role which interests us more.

Already in the 1989 article (which was a preparation of *Begriff und Geltung des Rechts*), Alexy referred to the Radbruch formula as basis of an "argument of injustice". And he mentioned several decisions of the German Courts, some on criminal matters (to part of which a reference has been made above[92]), where the Radbruch formula was invoked or applied[93].

The *Berlin Wall* cases obviously called his attention. In his 1993 text, already mentioned[94], he strongly applauded the *Bundesgerichtshof*'s judgment of 3 November 1992, the applause being limited to the part where the Court used the formula. On the contrary, he was critical of the decision's reasoning specifically related to Article 103 (2) of the *Grundgesetz*, because of admitting the possibility of a "human rights friendly interpretation" of GDR law.

Alexy criticized heavily the Federal Constitutional Court's decision of 1996, insofar as it admitted that there was no offence of Article 103 (2) of the *Grundgesetz*, again because GDR law was susceptible of a "human rights friendly interpretation", according to which to prevent the border's crossing would not constitute justification. He claims that positive law is comprised not only of the literal tenor of the legal provisions but also of an interpretive practice. To interpret the GDR law in new terms, through an *"a posteriori* interpretive manoeuvre", would mean a covered (*verdeckte*) retroactivity, worse than an *open* one[95].

Regarding the Federal Constitutional Court judgment, the author argues that what it should have said to express its position with respect to the rule of Article 103 (2) of the *Grundgesetz* would be not simply that such rule is strict or absolute, but that it is *conditionally* strict or absolute. The condition would result from an exception added to the rule relating to special justification grounds of an unjust State protecting extremely unjust law[96].

Alexy's argument is that, according to the Radbruch formula, there is no retroactivity whatsoever, because the provisions granting the alleged justification

(1965), *Essays… cit.*, p. 343 ff.; from Fuller's side, "Positivism and Fidelity of Law — a reply to Professor Hart", included in J. Finnis, *Natural Law*, vol. II, *Aldershot et al.*, 1991, pp. 309 ff., and *The Morality of Law* cit., 2nd ed., Part V — "A Reply to Critics", pp. 187 ff..

[91] "On necessary relations between Law and Morality", *Ratio Juris*, 2:2 (1989), pp. 167 ff.. See an important criticism by Bulygin ("Alexy's Thesis of the Necessary Connection between the Law and Morality") and Alexy's answer ("On the Thesis of a Necessary Connection between Law and Morality: Bulygin's Critique"), both *in Ratio Juris*, 13:2 (2000), pp. 133 ff. and 138 ff..

[92] *Supra*, no. 29.

[93] Article *cit.*, pp. 173 ff..

[94] "Mauerschützen…", see above footnote 40.

[95] "Mauerschützen…", pp. 486-487; "Derecho injusto…", pp. 202 and 206-207. I don't know of any comment by Alexy relating to the E.C.H.R. judgments, but it would for sure be negative.

[96] "Derecho injusto…", pp. 215 ff..

ground are void *ab initio*, as per lawlessness. The courts, by not acknowledging the justification ground, would not be changing retroactively the legal situation, rather they would just be verifying what the legal situation was at the time of the facts[97].

B. *The Radbruch Formula, relevance of past force of past law, and legal retrospection*

36. My point is that, after the "re-foundation" (let us, for the time being, use that word, without compromise) of a legal system, the recourse to something of the Radbruch's formula kind, as an autonomous natural law or moral criterion (i.e., a criterion independent of positive law), regarding the application of past law even to facts time located before the "re-foundation", is unnecessary.

In what concerns the past, the idea that the Radbruch formula appears as necessary is based on a naïve misunderstanding — although quite common, almost universal.

When a new ultimate ground for legal bindingness is introduced in some space or when recourse is made, in some space, to a new ultimate ground, when a new *basic norm* is introduced — through, I argue, a constitutive *reverse reference* by a *lex originaria*[98] — former law has no more, by itself and from the perspective of the new law, ground for bindingness. Such lack of ground is reinforced, if possible, when the new law makes a negative judgment on the legitimacy of the authority that issued the former law.

The applicability, after a new *lex originaria* (more precisely, a *lex nova*), of past law, even regarding facts time located in the past, depends on the new law. Certainly, past law has been effectively practised. Nonetheless, the matter is not of effectiveness but of bindingness. And, by itself, past law no longer has title to be dealt with as binding law. Nobody can go back into the past. But judgments in a point in time depend upon the relevance attributed to past events.

37. At this stage, some conceptual refinement and a taxonomy become necessary. Deep political changes normally involve also legal and in particular constitutional "changes". Very often such "changes" occur without respecting the established procedures; sometimes they do respect them (possibly as a result of a political agreement). The first important thing, from a legal point of view, is whether there is or not a *lex originaria* (which, from an extended temporal point

[97] "Mauerschützen…", pp. 488-489; "Derecho injusto…", pp. 218 ff..

[98] That means, through the invocation of a non-posed norm by a normative act as its foundations. See my "Revolution, *Lex Posterior* and *Lex Nova", in* Elspeth Attwooll (ed.), *Shaping Revolution,* Aberdeen, 1991, pp. 75-76.

of view, appears as a *lex nova*), that is, a law which claims a *pure justification* and not a justification provided by another (positive) norm[99].

If the *lex nova* arises out of the established procedures, we will have a *break of legality*. The break of legality may be *total* — and, legally, we will have *revolution* — or *partial*. We may reserve the word *transition* (*constitutional transition*) for the cases where the *lex nova* arises within the established procedures (or within the essentials of the established procedures). *Devolution*, with the creation of new states, is a kind of transition. *Constitutional charters* are also, or may be, examples of transition. Anyway, transition requires that there be a new title and, therefore, a *lex nova*[100].

In a transition, the future law is somehow recognizable by the former law and there may be continuity from an *ex ante* point of view. In the break of legality there is no such recognizability and no continuity from an *ex ante* perspective.

Revolution always involves the *denial* of the legitimacy of the past authority. Transition may involve it or not and, therefore, be linked, or not, with a *subsequent rebuttal* of past legitimacy. The denial may be pure or restorative. Restoration may be understood in *strict* — coming back to the law prior to the denied regime — or just in *broad* terms — coming back to the kind of legitimacy prior to the denied regime[101].

In Portugal, in 1974, we had a revolution. In Germany, in 1990, we had, as regards the former GDR and for the reasons referred to above[102], a constitutional transition with denial of the legitimacy of the past authority.

38. When a *lex nova* is introduced two (at least) kinds of issues arise. One relates to the former law continuing, or not, in force, governing subsequent facts. Such issue is well known. But there is necessarily another one, which I have called the issue of the *relevance of the past force of past law*, referring to the relevance of such past force, relating to past facts, after the *lex nova*[103]. As from a *lex nova*, and from its point of view, the ground for legal validity is the one it claims, to

[99] On the concept of *lex nova*, see Miguel Galvão Teles, "Revolution, *Lex Posterior* and *Lex Nova" cit.*, pp. 77 ff..

[100] It is the introduction or not of a *lex nova* that allows the distinction between a partial *break of legality* or a *constitutional transition* and a mere unconstitutional constitutional amendment which consolidates. Note that, as long as the main principles of a constitution are considered at least as implicit limits to constitutional revision, constitutional transition may be understood to imply an unconstitutional constitutional amendment, even when it fully respects the procedural requirements for the purpose (Jorge Miranda, *op. cit.*, II, 4th ed., pp. 221 ff. and "Revisão Constitucional", *Dicionário Jurídico da Administração Pública*, 2nd Supplement, Lisboa, 2001, pp. 534-535). The point is that, irrespective of consolidation, the recourse to a *lex nova* makes such possible unconstitutionality irrelevant from its point of view.

[101] I return here, with some adjustments to accommodate constitutional transitions, to the taxonomy made in "O Problema da Continuidade da Ordem Jurídica e a Revolução Portuguesa", *Boletim do Ministério da Justiça*, 345 (1985), p. 33.

[102] *Supra*, no. 31.

[103] "Inconstitucionalidade Pretérita", *cit.*, pp. 280 ff. Searching for a word closer to the one ("*atendibilidade*") that I have used in Portuguese, one could also say "*attendability*" of past force of past law.

which past law does not lead back. In some respects, past law is in a situation similar to foreign law[104]. At a first stage, at least, former law, as regards *lex nova*, is not *lex prior*, but *vetus lex*.

This issue is preliminary to the one of the overstaying in force of past law, because only for law that may be dealt with as binding law in the past is there a reason to ask whether it should stay in force. It is also preliminary to the matters of the so-called inter-temporal law, because, in order to answer the question of which law is applicable, it is necessary to have past law or to know what past law is. Such priority does not exist only regarding the act of questioning, since the issue of the relevance of the past force of past law assumes the possibility of it being applicable, under the inter-temporal law criteria.

In practical terms, it is impossible to entirely refuse relevance to the past force of past law. Not only is it unfeasible to open a full vacuum, to be filled by retroaction, or by gaps' integration, but there are also strong reasons of protection of trust involved. We may even say that the extent of past law the relevance of which in the past is admitted tends to be larger than the extent of past law which overstays in force. For instance, my general submission for Portugal after the 1974 Revolution and the 1976 Constitution is that past force of past law is relevant insofar as it does not attempt against the constitutional public order (constitutional public policy)[105].

39. What is, however, the basis for the relevance of past force of past law?

I think that there are two kinds of possible grounds. One is *recognition* by the new law of the past force of past law; another is *new title* given by the new law to past law, for the past. What the basis is in each case depends, in principle, on the judgment of the new law regarding the legitimacy of the former authority. After a revolution or after a transition with subsequent denial of legitimacy we will have *new title* for past law, based just upon its past effectiveness; after a partial break or a transition of another kind we will have *recognition*. Although past legitimacy is not denied, recognition becomes necessary because, after the *lex nova*, even the past authority of law has to be led to it, in order to be relevant after it. Restoration is always linked in part with denial and in part with recognition.

It has to be noted that, as opposed to what happens, in principle, with regard to the issue of overstaying in force of past law, the relevance of past force does not refer only to the law *de facto* in force at the moment of the break or of the transition, but to all past law, with the only limitation arising from practical significance. Since the judgment on the past may be different according to the segments involved, one may have new title for a part or for parts of past law and

[104] "Inconstitucionalidade Pretérita", *cit.*, pp. 301 and 320-323. See the comments by Rui Moura Ramos, in *Da Lei Aplicável ao Contrato de Trabalho Internacional*, Coimbra, 1991, footnote 438, pp. 291 ff..

[105] "Inconstitucionalidade Pretérita", *cit.*, pp. 320-323.

recognition for others. It is this which, in my view happened in Portugal: new title for the law of the dictatorship, recognition for that of the first Republic. In Germany, one would have new title for the GDR law, as well as for the National-Socialist law, recognition for the Weimar law. From one point in time backwards, however, one may say that there is recognition simply for *historical indifference*[106].

40. With respect to prior rules or practices intolerably unjust, it is enough, for them to be inapplicable, even to past facts, for the new law not to give them title.

Alexy argues that acknowledging the invalidity of intolerably unjust norms is the only way for not applying them without retroactivity. The answer is that it does not make sense to give title to a past rule which will be invalid. Anyway, if title was given, the invalid norm would be the one attributing title to past law in such domain. One could ask if this was not the case, in Germany, of Article 315 (1) of the Introductory Act to the Penal Code. However, the provision may be subject to an interpretation according to which title is not given to rules establishing grounds of justification intolerably unjust, and German Constitutional framework requires such an interpretation.

Without discussing, for the moment, the status of the Radbruch formula, this one could only be useful regarding provisions issued subsequently to the *lex nova*. Leaving aside international law, to punish the murderers of the Holocaust, as well as the perpetrators of the actions referred to above (no. 29), it would be enough, since murder was a criminal offence even under Nazi law, to consider that title was not given by post-Nazi law to the Nuremberg Acts and to the *Führer*'s orders as past law, as well as to "due" obedience to orders involving criminal offences (and may be, in particular cases, to other provisions of the same kind). Hart was not at all right in saying that it would be of no wisdom to declare a statute established since 1934 not to have force of law. After the fall of Nazism, it had not such force even for the past (without the need of this being declared).

Furthermore, the Radbruch formula would not be able to justify the solution of the post non-punishment cases, when specific provisions, in particular amnesty, are not issued or are not wide enough. The formula tolls norms, it is not usable for re-interpreting past provisions within a new framework, nor to provide criteria for filling gaps.

41. I am not saying whether courts should or not punish, or in which cases they should, or should not. We had the opportunity to see that the trends adopted by the Portuguese and the German courts work quite different. The point is that, if one says that a prior rule was invalid when the invalidity was not recognized by

[106] Miguel Galvão Teles, "Revolution, *Lex Posterior* and *Lex Nova*", *cit.*, p. 79, and "Temporalidade Jurídica e Constituição", *in 20 Anos da Constituição de 1976, Studia Iuridica* 46, Coloquia-5, University of Coimbra, 2000, p. 44.

the former practice, punishing subsequently the action always affects trust. Punishment can only be justifiable regarding facts totally repugnant to a reasonable ethical (I do not say moral) conscience, in particular those characterizable, as from Kant, as of *radical evil*[107], specially when non-punishment resulted from a "contingent" or "privileged" (for some) situation.

42. The answer to the problems relating to past law and past facts after a *lex nova* requires a procedure which I have named *legal retrospection*[108].

A terminological and conceptual warning is necessary. In the English legal language, very often retroactivity is called retrospectivity. I use here the word retrospection with a somehow different sense. Legal retrospection may include retroactive provisions, but it is not restricted to them. And not every retroactive provision corresponds to legal retrospection, in the meaning I am giving to the words.

Legal retrospection presupposes that the (claimed) ground of legal validity of past law does not lead, by itself, to the *lex nova*. It operates at different levels. And, until the limit of historical indifference, it is based upon and acts through a judgment of the new law on the legitimacy of past authority and on the contents of past law.

At a first tier, legal retrospection decides on recognizing or on denying and giving title (and on whether to recognize or to deny and give title) to past force of past law, as well as on their extent. Through such recognition or title given, the unity of the legal system is somehow retrospectively reconstructed. The parts of past law which are not covered by recognition or new title are not retroactively repealed. They are just not recognized or given title.

At a second level, legal retrospection introduces a new evaluative framework, for the past, in which the former law has now to be shaped, interpreted and applied to cases located in the past. Such new evaluative framework may be and often will be based upon the former practice of rebuttal of the grounds of past law and upon a judgment on the legitimacy of such rebuttal. This is why the risk of being caught by the political police of a dictatorship may raise an issue of necessity and why fighting against the former regime (as an exercise of a claimed right to rebellion, retrospectively acknowledged by the new law) may even become a justification for criminal offences other than those against the security of the State. One mode of this second tier legal retrospection regards application of law in the sanctionatory field and may express itself by putting an end to a practice of impunity, in particular through the omission of prosecution. Interpretation in a new evaluative framework and application of rules not applied before correspond to two ways of reviewing the past, and happened in Germany in the *Berlin Wall* cases.

[107] See Carlos Santiago Nino, *Radical Evil on Trial, cit.*.
[108] "Inconstitucionalidade Pretérita", *cit.*, p. 282.

Finally, legal retrospection operates through retroactive provisions, whether to fill gaps or not. Some of these provisions may be restorative of justice. Only those retroactive provisions corresponding to a review of the past on the basis of a *lex nova* belong to legal retrospection.

At the first two levels, the contents and the effects of legal retrospection are somehow independent of specific provisions. And, at such levels, legal retrospection, regardless of its contents, corresponds to a practical necessity, insofar as it answers *necessary questions*. On the contrary, with regard to the third level, one can only say that, upon breaks of legality or constitutional transitions, there is a *special propensity for retroactivity*, the degree of which depends on the way the *lex nova* is introduced (such propensity is particularly high in revolutions), on the contents of the first level judgment on past law and on the fields at stake (criminal law being particularly sensitive and reluctant to retroaction).

Legal retrospection presupposes the introduction of a *dominant point-of-reference* (perhaps a *meta-point-of-reference*) in time, required and determined by the *lex nova*'s claim, from which not only the future is commanded but the past reviewed.

What is being said assumes a certain level perspective, let us say State level. If one takes a higher level perspective — international law — the specificity of *lex nova* is lost and the succession of norms becomes linear. In such situation, what, from State perspective, is non recognition or no title given to past law converts, from the higher perspective, into retroactivity. In a certain way, international law is the ultimate protection against *ex post* punishment, within the limits that it establishes.

C. *Claim to correctness, claim to legitimate authority, and claim to bindingness*

43. As from the "*Theory of Legal Argumentation*" (*Theorie der juristischen Argumentation*)[109], in 1978, Alexy refers to an *Anspruch auf Richtigkeit*[110], translated to English by *claim to correctness*[111].

[109] Frankfurt aM., English translation by Ruth Adler and Neil MacCormick, Oxford, 1989. I shall quote by the English translation. For German, I have used the 3rd ed. (unchanged), 1996.

[110] *Theorie…*, p. 34.

[111] *A Theory…*, p.16 — among many other places. *Claim to correctness* for *Anspruch auf Richtigkeit* appears also in the translation, by Bonnie Paulson and Stanley Paulson, of *Begriff und Geltung des Rechts,* Fankfurt aM., 2nd ed., 1994 (*The Argument from Injustice*, Oxford, 2002). Alexy himself, in the articles directly written in English, uses *claim to correctness*. However, *claim to rightness* for *Anspruch auf Richtigkeit* appears in the translation, by William Rehg, of Habermas' *Faktizität und Geltung*, 2nd ed., Frankfurt aM., 1992, f.e. p. 32 (*Between Facts and Norms*, Cambridge, Mass., 1996, f.e. p. 16). Both translations seem to be accurate. But the choice of *correctness* may express a purpose of putting emphasis on a procedural aspect. See Alexy, "Probleme der Diskurstheorie", in *Recht, Vernunft, Diskurs*, Frankfurt aM., 1995, pp. 109 ff., specially pp. 118 ff..

> The claim to correctness involved in the assertion of any legal statement is the claim that, subject to the constraints set by [the applicable] legal conditions, the assertion is rationally justifiable[112].

Alexy states that "individual legal norms and individual legal decisions as well as legal systems as a whole necessarily lay claim to correctness". For legal systems the claim to correctness presents, at a first level, a classifying significance (a system of norms that neither explicitly nor implicitly makes the claim is not a legal system) and, at a second level, a qualifying significance (legal systems that fail to satisfy the claim are "legally defective legal systems"). An exclusively qualifying significance is attached to the claim to correctness of individual norms and individual legal decisions: "(t)hese are legally defective if they do not make the claim to correctness or if they fail to satisfy it"[113].

The significance of the claim to correctness is located within the "participant's perspective"[114].

In an article entitled "Law and Correctness"[115], Alexy subjects the notion of claim to correctness to further analysis. He distinguishes a subjective and an objective or "official" raising of the claim, the second being implied in a "participant's perspective" in the legal system. The addressees are institutional — those who are the addressees of the legal acts — and non institutional (everyone who takes a "participant's perspective" in a legal system). The raising of a claim to correctness in issuing an institutional legal act (legislative acts, judgments and administrative acts) is always connected to a non-institutional act of asserting that the legal act is substantially and procedurally correct. Correctness implies justifiability. The claim to correctness therefore includes not only a mere assertion of correctness but a guarantee of justifiability. A third element is the expectation that all addressees of the claim will accept the legal act as correct as long as they are reasonable.

In his reply to Raz's argument that "nothing can be learned from the correctness thesis about the nature of law" and considering specifically the "bandit system" example[116], Alexy argues that, differently from the bandits' claim, the claim to correctness is "a claim that is addressed to all", "to be acceptable to all who take the point of view of the legal system in question". "This means that law is an enterprise that is intrinsically connected with the idea of objectivity". "Raising a claim to correctness *qua* objectivity does not, as such, imply raising a claim to moral correctness. If, however, one adds certain premises that are not easily contested, the claim to moral correctness is indeed implied"[117].

[112] *A Theory…*
[113] *The Argument…*, pp. 35-36.
[114] *The Argument…*, p. 25.
[115] M.D.A. Freeman (ed.), *Current Legal Problems*, vol. 51 (1998), Oxford, pp. 205 ff..
[116] *The Argument…*, pp. 33-34.
[117] "An Answer to Joseph Raz", *in* George Pavlakos (ed.), *Law, Rights and Discourse, the Legal Philosophy of Robert Alexy*, Oxford and Portland, 2007, pp. 49-50. As to Raz, "The argument from Justice, or how not to reply to Legal Positivism", *ibid.*, pp. 17 ff..

One can or, as he now prefers to say, *could* endorse the correctness thesis and nevertheless continue to adopt positivism. However the correctness thesis would lead to the argument from injustice and this one would be decisive against legal positivism.

Alexy refers the argument from injustice to individual norms and to legal systems. As regards individual norms, he uses a distinction between two versions of the relationship between law and morals: in a *strong* version, "a norm is legal only if it is moral"; in a *weak* version, "legal character (…) is forfeited only if the conflict between law and morality reaches an "intolerable", that is, an extreme degree"[118]. It is according to such weak version that the Radbruch formula would apply.

In what concerns legal systems and assuming a claim to correctness (otherwise we would not even have a legal system), Alexy excludes that the whole of the norms of a rogue State be dealt with as lawless. Imagining the case of a dictatorship where a part of the norms would be unjust in the extreme, some others unjust, but not in the extreme, others neutral and the remainder just, only the first norms would, according to the Radbruch formula, be invalid — and so it should be[119].

The author refers to a dilemma formulated by positivists: either moral principles are made applicable by law, and they will become part of the law, or they are not recognised by law and, very simply, they are not legally obligatory. He answers:

"The solution to this dilemma lies in defining moral principles and arguments which legally have to be recognised by a legal obligation for their recognition which solely derives from their substantial correctness and correctness only connects them to law"[120].

One who accepts the thesis that extreme injustice is not law has bid farewell to positivism[121].

44. I don't wish to come here into the issue of the relationship between concept and nature of law nor into the dispute between positivism and non positivism. In this last respect, people are too concerned with labels and even sub-labels, relating to distinctions specially within positivism (theoretical and ideological positivism[122], exclusive and inclusive, positive and negative positivism). There is however one point that I must make.

The philosophical tradition, at least in the European continent, was to consider law and morals as different species of a common gender. The gender was said, in the German language, *Sittlichkeit*, and the species were *Recht* and *Ethik*. This

[118] *The Argument…,* pp 47-49.
[119] *Ibid*, in particular pp. 66-67.
[120] "Law and Correctness", *cit.*, pp. 218.
[121] "An Answer to Joseph Raz", p. 51.
[122] This one quite important, but somehow forgotten. I guess that it has been formulated for the first time by Bobbio (*Il Positivismo Giuridico*, Torino, 1979, pp. 265 ff.). See also Nino, *La Validez del Derecho*, Buenos Aires, 1985, pp. 62 ff..

is what we find in Kant, in Fichte, in Jakob Fries. As, in other languages, morals or the equivalent word were normally used to refer to the species opposed to law, I prefer to denote the gender as *Ethics*.

A quite clear distinction between law and morals seems to have been established by Thomasius[123]. Inside law, the relevant distinction was between natural law and positive law. The difference between law and morals referred or to the external and internal aspects of the action or, as from Fichte, to the distinction between inter-subjectivity (later, developed to *alterity*) and subjectivity. The practical question consisted in whether law could impose what was morally forbidden or forbid what was morally due. A negative answer would have to be based on a natural law rule.

The issue of supra-positive criteria applicable in the field of law was a problem of whether there is something such as natural law and of its relationship with positive law. Suddenly, references to natural law started to disappear and natural law talk was replaced by moral talk. For instance, people frequently speak of *moral rights* as opposed to legal rights. The reason is very probably that reference to natural law is understood as implying the acceptance of an *absolute* and even of *timelessness*, whilst the allusion to morals does not necessarily require it. But what precisely distinguishes morals from law is that, even though morals, too, involves duties towards others, only law grants entitlements.

There is no such thing as moral rights. The expression contains a contradiction in terms. But the talk about moral rights shows the existence of something as a *non institutional legal discourse*. Often such discourse is private[124], but it may also be public. It is enough to look at international law to become aware of it. The right of colonial peoples to self determination started by a discourse that claimed such right and by actions on the basis of it, before it was acknowledged by positive law[125]. And, more importantly, the discourse of rebellion is a legal discourse (against a particular positive law).

45. Now, why should current intolerably unjust provisions not be applicable by judges? And, if they are not applicable, why only those that are intolerably unjust and not all the ones very much unjust or simply unjust?

It seems that Alexy takes the contents of the first part of the Radbruch formula for granted. However, it is not axiomatic. Case law? In some countries yes…

[123] See, f.e., António Truyol y Serra, *Historia de la Filosofia del Derecho y del Estado*, II, Madrid, 1975, pp. 272 ff..

[124] If, f.e., A makes a promise to B without the written form required by the law of the country and B argues that, despite the lack of form, he is entitled to A fulfilling his promise, he is making a legal claim, even though he would be unsuccessful in court and he is aware of it. And, in the event B has in his possession something of which A is the owner and refuses to give it to him until he fulfils the promise, B is justifying his action by a law discourse, although not recognized by courts.

[125] Miguel Galvão Teles and Paulo Canelas de Castro, "Portugal and the Right of Peoples to Self-Determination", *cit.*, pp. 5-7.

but always, or, at least, almost always, regarding past provisions and past facts. As shown above, there is an alternative way, even compelling, to deal with such past situations. Alexy states that individual norms which do not satisfy the claim to correctness are defective norms. Why are they applicable? Or why are only some of them not applicable or not valid?

To understand how the Radbruch formula appears, we have to take into account Radbruch's departing point. In his *Rechtsphilosophie*, he started by saying that for the judge, always subject to the interpretation of law and at the service of the positive legal system, "legal claimed bindingness is equivalent to real bindingness". He has the professional duty to acknowledge the bindingness of law, whatever his convictions, and to apply and enforce it[126]. For the author, the formula was created to constitute a restriction to the equivalence between "legal claimed bindingness" (validity) and "real bindingness".

Apparently, Alexy, somehow as Radbruch himself, operates within a balance of reasons and values. The question is of the legitimacy of such balance, taking into account that it involves statutes and must be made by judges. Judges, at least normally, take their authority from statute. And several legal systems contain provisions of the kind of Article 8 (2) of the Portuguese Civil Code, which, referring to judges, states that "*the duty of obedience to statute cannot be removed on the pretext of the legal provision's contents being unjust or immoral*". At a first glance, the situation could be different in Germany, where, according to the famous Article 20 (3) of the *Grundgesetz*, jurisdiction is bound by statute and law (*Gesetz und Recht*). The Radbruch formula could, therefore, be introduced by way of the Constitution… But, for Alexy's benefit, let us assume that such is not the case. Let us reason with regard to legal systems that do not have a provision of the kind of Article 20 (3) of *Grundgesetz* or that even include one of the kind of Article 8 (2) of the Portuguese Civil Code.

We come to the issue of the judges' position in legal systems. The crucial feature is the ultimate *circularity* of such position, resulting, in particular, from their *Kompetenz-Kompetenz*[127]. The courts are bound by law. But they decide on what the law is, including the law that determines their powers. Therefore, it is not impossible to say, on the basis of a second level ethical discourse, that, *according to law*, some statutes are invalid — although the issue may be also construed as conscious objection by judges. Anyway, the point is that, following such line, doctrine can only elaborate guidelines. In any event, why should judges stop at extreme injustice and not go until "very strong" injustice? Everything depends on the judges' wisdom and, very specially, on judge's courage.

[126] *Rechtsphilosophie,* p. 85; 1st Port. ed., pp. 121-122, 6th Port. ed., pp. 181-182 (§ 10).

[127] Miguel Galvão Teles, "A Competência da Competência do Tribunal Constitucional", in *Legitimidade e Legitimação da Justiça Constitucional* (*Colloquium* for the 10th anniversary of the Constitutional Court), Coimbra, 1995, pp. 105 ff..

46. Another point, this one decisive, is that the claim to correctness is incapable of, at least alone, justifying the law's claim not only to bind judges but also to bind people in general.

Raz argues that law claims legitimate authority[128], and he is right.

The notion of authority may, for this purpose, be considered as relating to two interlinked things: roughly, either the "*institutions*" that issue law, although in the exercise of powers granted by law (until a basic norm), and execute it; or the set of norms (including rules and principles). The claimed authority may refer to both, but the relationship is not totally symmetrical: at least customary norms do not come from an "authority". However, authority is claimed for them. It is the authority of *law* that is of direct relevance for the following reasoning[129].

I shall not discuss here Raz's theory of exclusionary reasons. What is of importance is that the authority of law is practical authority and this one is "authority with power to require action"[130]. Authoritatively requiring action means that the authoritative "determinations" are binding. The authority of law involves the *bindingness* of the legal norms. Claiming (legitimate) authority means claiming the bindingness of the law to which authority refers.

There are two ways to try to conceive legal duty: one is, as a burden, based on threat, as an *onus*, compliance with which avoids an evil. The second way is to construct the legal obligation as an ethical duty (I don't say a moral duty). Here, I just state that my understanding is the second. A legal duty involves an appeal to free will. Nothing of what our legal systems are — notably as regards the principle of guilt in criminal law — can be comprehended otherwise. Only conceiving duty as an ethical structure can sanction be understood.

On this basis, it is nonsense or pleonasm to talk of a *legal* duty to obey the law. In normal circumstances, nobody would refer to a duty of obeying morals. In law, as well as in morals, the duty is to do this or that; and it is a consequence of the rule's bindingness. Obviously, on a second tier discourse we may question bindingness either of a particular moral rule or of a legal one. But it is bindingness, not a duty of obedience, which is at stake[131].

[128] See, in particular, "Law and Authority", *in The Authority of Law*, Oxford, 1979, pp. 3 ff.; "Authority and Justification", *in* Raz (ed.), *Authority*, Oxford, 1990, pp. 115 ff.; "Authority, Law and Morality", *in Ethics in the Public Domain*, Oxford, 1995, pp. 210 ff.; *Between Authority and Interpretation*, Oxford, 2009.

[129] The late Neil MacCormick emphasized that "there is no entity "law" which is capable of performing speech acts of this sort". The claim would be of the law-maker ("Why law makes no claims?" *in* George Pavlakos (ed.), *Law… cit*, pp. 59 ff.). See Alexy's answer (*ibid*, pp. 333-335). Those who claim authority are those who make the law, who execute it and who adjudicate, as well as people who, f.e., sue other people. One could say that (legitimate) authority is claimed *for* the law.

[130] "Authority and Justification" *cit.*, p. 115.

[131] Regarding the question of "whether there is a legal obligation to obey the law", Raz answers that "the obligation exists, but it is hardly ever mentioned, for it is the shadow of all the specific legal obligations" ("The Obligation to Obey: Revision and Tradition", in *Ethics in the Public Domain cit.*, p 342). It is true that in legal practice seldom people speak of a legal duty of obedience to law. But the assertion is not valid for legal philosophy: it is enough to think of Hobbes or of Kant. The idea of a general legal duty of obedience ultima-

The claim to authority of law, within a certain space and time, referring roughly to a set of acts (or facts) and of norms (or prescriptions), may justify legal bindingness, because each claim determines, by itself, the norms (or prescriptions) for which authority is claimed. They are those arising from particular sources and not others. Differently, the contents of the claim to correctness takes for granted the norms to which it refers. It will, at least, never be enough to justify bindingness, since it could apply also to a myriad of norms — even of non-issued norms. At the maximum, correctness or, better, rightness may establish limits to bindingness claims, potentially justified, in positive terms, otherwise.

47. Law claiming bindingness is indispensable to justify adjudication and sanctions. We are, however, facing just a claim, which can be accepted or recognised or not. *Committed statements*, as opposed to the *detached statements*[132], do not reduce to *endorsement statements*. They include also *rebuttal statements*[133]. It is here that the second part of the Radbruch formula, the *denial* formula, takes all its meaning.

When a claim to bindingness is contested, one comes to a second tier state of nature[134]. This, however, is a matter for another opportunity.

tely corresponds to a conception of law strictly imperativist (wrong, in my view) where normative or prescriptive acts, in general, are taken as brute facts, to which, not anymore a habit, but a duty of obedience refers (see my "Temporalidade Jurídica…" *cit*. pp. 51-53). To the contrary, it makes sense to mention a *moral* duty of obedience to law, because its ground presents itself as necessarily autonomous in relation to the bindingness or the claimed bindingness of a legal system. The point is that there is no entitlement whatsoever corresponding to a moral duty of obedience to law.

[132] Raz, *The Concept of a Legal System*, 2nd ed., Oxford, 1980, Postscript, pp. 234 ff.; "Legal Validity", in *The Authority of Law*, *cit.*, pp. 153 ff..

[133] Miguel Galvão Teles, "State of Nature, Pure Republic and Legal Duty of Obedience (Some reflections regarding Kant's legal and political philosophy)", in *Ética e o Futuro da Democracia*, Lisboa 1998, p. 168.

[134] See my "State of Nature…" *cit*, pp. 169 ff., and "Liberdade de Consciência e Liberdade *Contra Legem*", *Estudos em homenagem ao Prof. Inocêncio Galvão Telles*, pelos seus 90 anos, Coimbra, 2007, pp. 930 ff..