Jurisprudence of Liberty

Second Edition

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The German Border Guard Cases: Natural Law and the Duty to Disobey Immoral Laws

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A jurisprudential problem

12.1 The circumstances giving rise to an individual's obligation to disobey laws that are incompatible with higher moral principles have been the subject of an enduring jurisprudential debate since the end of the Second World War. The Nuremberg trials attributed individual criminal responsibility for acts against humanity performed in obedience to superior orders or done pursuant to the laws of the regime holding power at the time at which they were committed. The trials imposed upon individuals a duty to disobey laws which are clearly recognisable as violating higher moral principles. This has become known as the 'Nuremberg Principle'.

12.2 The Nuremberg trials contributed to a revival of natural law thinking in post-war Germany. In its widest form, natural law theory holds that certain rights exist independently of the legal system and are incapable of abolition by legislative act. Any law purporting to violate these rights cannot command the obedience of citizens. In contrast, legal positivists support the separation of law and morals. They recognise constitutionally valid laws as legally binding upon citizens even if these laws infringe upon human rights.

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12.3 In the border guard cases, German courts were asked to consider the applicability of the 'Nuremberg Principle'. These cases are a direct consequence of German reunification, which occurred on 3 October 1990. Following reunification, there were incessant demands by the German public to initiate legal action against East German border guards who, before reunification, killed East Germans trying to escape to the West. Most border guards accused of these shootings sought to rely upon justifications found in the law of the former East Germany. In particular, they relied upon a defence of obedience to superior orders. This defence caused the German courts to assess the applicability of the 'Nuremberg Principle'.

12.4 In this chapter, I propose to discuss three of these border guard cases. The first case resulted in a judgment of the *Bundesgerichtshof* (BGH) on 3 November 1992.[2] The second case was resolved by a decision of the District Court of Berlin on 20 January 1992.[3] The third case is a decision of the European Court of Human Rights.[4] Relying, at least in part, on the 'minimum content' theory of natural law, these judgments held that border guards responsible for killing fleeing civilians may be prosecuted by the courts of a reunified Germany. It is not the purpose of this chapter to offer a fully developed account of the 'minimum content' theory of natural law. Instead, this chapter aims to describe the use made by three courts of this theory and to make some tentative comments regarding the appropriateness of such use. In particular, it will be argued that these judgments were unsatisfactory because they were based on West German judicial and philosophical concepts alien to East Germans.

Relevant German laws

Section 315 EGStGB

12.5 Article 8 of the Reunification Treaty (*Einigungvertrag*) provides for the application of West German law to the territory of the former East Germany from the date of reunification (3 October 1990). However, the border guard cases deal with acts committed prior to reunification. These cases thus required a determination, by the courts of a reunified Germany, of the continuing applicability of East German law to fatal shootings that occurred on East German soil prior to reunification.

12.6 In this context, section 315 EGStGB[5] of the Reunification Treaty provides for a modified application of West German law to crimes committed in East Germany prior to reunification. Specifically, section 315(1)–(3)

2. Bundesgerichtshof 5. Strafsenat Urteil 3.11.1992, Entscheidungen des Bundesgerichtshofes in Strafsachen 39, 1; *Neue juristische Wochenschrift* 1993, 141.
3. Landgericht Berlin Urteil 20.1.1992, *Neue Justiz* 1992, 269.
4. *Streletz v Germany* (no 34044/96), (2001) 33 EHRR 31 (p 751). This judgment is available at: http://www.menschenrechte.ac.at/orig/01_2/Streletz.pdf (accessed 20 September 2010).
5. Bundesgesetzblatt der Bundesrepublik Deutschland II 1990, 955.

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EGStGB implements the Criminal Code of West Germany (StGB) which provides in its s 2(3) that, when a crime is committed and there is a subsequent change in the law, the milder of the laws is to be applied.[6] Reunification involved a change in the law because West German law took the place of East German law. Thus, in the usual situation, s 315 EGStGB and s 2 StGB immunise from punishment acts committed on East German soil prior to reunification if these acts were not punishable under East German law. The application of s 315 EGStGB, in conjunction with s 2 StGB, ensures that a penalty is not imposed for acts which were not deemed to be criminal in East Germany at the time they were committed. Such application, in effect, avoids an *ex post facto* interpretation of the relevant East German laws by the courts of a reunified Germany.

Relationship between 315 EGStGB and s 7 StGB

12.7 By virtue of s 315(4), the immunity from punishment in s 315(1)–(3) does not apply where West German law was already the applicable law at the time an act was committed. Of particular importance is s 7 StGB, under which prosecutions of those responsible for fatal border shootings in East Germany could proceed in West Germany prior to reunification.[7] This section applies West German law to acts committed on foreign soil when:

(a) the acts are committed against Germans (s 7(1)); or
(b) the person who committed the act becomes a resident of West Germany or comes to its territory (s 7(2)).

12.8 Professor Erich Samson argues that as East Germany became, upon reunification, part of West German territory, s 7(2) StGB applies to all former East German citizens because they have become 'West German residents'.[8] A similar argument could be made under s 7(1) StGB: that the East Germans against whom the acts were committed were Germans. Before reunification, West German law was applied to foreigners who committed crimes against East German citizens. Under West German constitutional law, East German citizens were deemed to have West German citizenship. They were thus 'Germans' for the purposes of s 7(1).

12.9 While technically sound, this interpretation is strained because in all other contexts East Germans were regarded as foreigners under West German

6. Section 315(2) and (3) implements this rule for fines and other punishments.
7. See J Bohnert, 'Die Amnestien der DDR und das Strafrecht nach dem Beitritt', [1993] *Deutsch-deutsche Rechtszeitschrift* 167; G Küpper and H Wilms, 'Die Verfolgung von Straftaten des SED-Regimes', [1992] *Zeitschrift für Rechtspolitik* 91; J Ronzikowski, 'Zur Strafbarkeit des Schusswaffengebrauchs an der innerdeutschen Grenze', [1992] *Neue Justiz* 152; H J Scholzen and M A Gladbeck, 'Zur Bedeutung von s 7 StGB für die Verfolgung von Straftaten des SED-Regimes', [1992] *Zeitschrift für Rechtspolitik* 476.
8. E Samson, 'Die strafrechtliche Behandlung von DDR-Alttaten nach der Einigung Deutschlands', [1991] *Neue Juristische Wochenschrift* 335.

law. Furthermore, application of s 7 StGB to the border guard cases would allow the unqualified application of West German law to all acts committed against East German citizens before reunification. This would effectively exclude the protection given by the provision requiring application of the milder law since s 315(4) would mandate the application of the West German law which existed when the act was committed. For this reason, the BGH rejected the applicability of s 7 StGB to the border guard cases. Therefore, s 315 operates so that the milder law will be applied to acts committed prior to reunification, provided that West German law was not already applicable at the time the act occurred. Under the territoriality principle of ss 3 and 9 of the West German Criminal Code (StGB), an act committed in East Germany was subject to West German law if the consequences of the act occurred on West German territory. West German law also applied to acts occurring in East Germany when:

(a) the act was committed against a German whose permanent residence was in West Germany (s 7(1)), hence, not applicable to the border guard cases;
(b) when an act was carried out by a West German (s 7(2)), hence, again not applicable to the border guard cases; or
(c) when the perpetrator of a crime moved to the former West Germany before reunification, which occurred on 3 October 1990 (s 7(2)(ii)).

The 'milder' law

12.10 Murder was a criminal act in both West Germany and East Germany. Under the West German Criminal Code (StGB-BRD) murder was punishable with imprisonment for not less than five years (s 212). In less serious cases the sentence could be reduced to a period of between six months and five years (s 213). In contrast, under the East German Criminal Code (StGB-DDR) murder was punishable with imprisonment from six months to ten years (s 112).

12.11 If the possible reduction of punishment under West German law was taken into account, West German law constituted the milder law. However, if East German law provided justifications for the killings, East German law would be the 'milder' of the two competing laws. In cases where East German law provided a total justification for fatal shootings at the border, East German border guards could even be exempt from punishment altogether.

12.12 The issue thus arose as to whether justifications available under East German law could be relied upon by border guards. In its judgment of 3 November 1992, the BGH considered two possible justifications under East German law. The first involved s 27(1)–(2) of East Germany's border law (*Grenzgesetz*) of 1982, which provided:

(1) The use of firearms is the most extreme measure entailing the use of force against the person. Firearms may be used only where resort to physical force [*körperliche Einwirkung*], with or without the use of mechanical

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(2) The use of firearms is justified to prevent the imminent commission or continuation of an offence [*Straftat*] which appears in the circumstances to constitute a serious crime [*Verbrechen*]. It is also justified in order to arrest a person strongly suspected of having committed a serious crime.

12.13 In accordance with s 27(2) *Grenzgesetz* the use of firearms was justified to prevent the 'imminent commission or continuation of an offence' which appeared 'to constitute a serious crime' at the border. A definition of 'crime' was found in s 3(1) StGB-DDR. This section not only classified certain acts as 'crimes', but also provided that acts which were not listed could retrospectively become 'crimes' by the imposition by courts of a sentence of imprisonment for more than two years. Section 213 StGB-DDR provided for the imposition of terms of imprisonment of between one year and nine years in cases of 'serious crime'. A crime was a 'serious crime' if carried out with 'dangerous means' (s 213(2) StGB-DDR). East German courts invariably characterised ladders and other climbing devices used in escape attempts as 'dangerous means'. Thus, if a court imposed a penalty of more than two years' imprisonment for an unsuccessful attempt to climb the Berlin Wall with such 'dangerous' devices, then the use of firearms at the scene of the crime could be justified retrospectively. As interpreted by the East German authorities, s 27 *Grenzgesetz* obliged border guards to prevent attempted escapes by killing, if necessary.

12.14 The second justification under East German law was found in s 258(1)-(3) StGB-DDR which provided:

(1) Members of the armed forces shall not be criminally responsible for acts committed in execution of an order issued by a superior save where the execution of the order manifestly violates the recognised rules of public international law or criminal statute.

(2) Where a subordinate's execution of an order manifestly violates the recognised rules of public international law or a criminal statute, the superior who issued that order shall also be criminally responsible.

(3) Criminal responsibility shall not be incurred for refusal or failure to obey an order whose execution would violate the rules of public international law or a criminal statute.

Section 258(1) StGB-DDR thus provided that a soldier (including a border guard) who followed orders was not criminally responsible for carrying out the order unless the order constituted a blatant violation of the recognised rules of an international or a criminal statute.

12.15 In its judgment of 3 November 1992, the majority of the members of the BGH decided that the border guards could not avail themselves of these justifications under East German law. Border guards would thus not be able

to evade criminal liability altogether because the 'milder' West German law would be applied in cases where East German justifications are rejected. It is appropriate, in the next section of this chapter, to describe the facts of the two German border guard cases and to analyse the reasons given by the relevant courts in their judgment.

The judgment of 3 November 1992

The facts of the case

12.16 In late 1984 Michael S decided to escape over the border from East Berlin to West Berlin. He used his ladder to climb over a signal fence. He was observed from a watchtower by defendant W, who ordered his co-defendant H to prevent the escape. W called out to Michael S to 'stay put'. Michael S did not heed W's order, and ran to the Berlin Wall with the ladder. W fired a series of shots at him. As Michael S prepared to climb the ladder, co-defendant H realised that his escape could be prevented only by shooting. From a distance of 110 metres H shot at least 25 bullets at the calves of Michael S. From a distance of 150 metres defendant W also shot 27 bullets aimed at Michael S's legs.

12.17 A shot from W's rifle hit Michael S in the knee, and he fell to the ground. He was left without medical assistance for two and a half hours despite repeated requests to be taken to a hospital. When Michael S was finally taken to hospital he died within a short time. Had he received medical assistance sooner his death could have been avoided. Both defendants carried out the 'shoot to kill' order which they received in training and considered to be binding.

12.18 Following reunification, both defendants were found guilty of murder by the youth court of the Berlin District Court. W was sentenced to one and a half years' imprisonment. H received a jail term of one year and nine months. Both sentences were subject to probation. W appealed to Germany's highest court, the BGH.

Act of State doctrine

12.19 W argued, among other things, that the Berlin District Court had failed to consider the 'Act of State' doctrine.[9] Under this doctrine, a defendant acting in the course of duty under the auspices, and in the interests, of another state enjoys immunity from legal action and, therefore, cannot be called to account for his actions. The Act of State doctrine is based on the notion that

9. The Court's judgment is discussed in K Amelung, 'Strafbarkeit von Mauerschütze—BGH Neue Juristische Wochenschrift, 141', [1993] *Jus* 637, and F C Schroeder, 'Die Rechtswidrigkeit der Flüchtlingeerschiessungen zwischen Transzendenz und Immanenz', [1993] *Juristische Rundschau* 45, and 'Rechtfertigung von Todesschüssen an der Mauer', [1992] *Neue Zeitschrift für Strafrecht* 492.

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all nations are equally sovereign. The doctrine was described by Fuller CJ of the United States Supreme Court in *Underhill v Hernandez*, where he stated that "every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory".[10]

12.20 The BGH held that this doctrine did not command universal respect, being essentially limited to the Anglo-Saxon world. It pointed out that in Germany, as elsewhere in continental Europe, there is no binding rule that foreign acts, adopted by authorities of a sovereign state, are exempt from consideration by the courts. Moreover, the Reunification Treaty does not stipulate that actions attributable to the East German authorities are exempt from consideration in post-reunification German courts. In fact, the opposite is quite true, since the Treaty provided in Articles 18 and 19 that decisions of the courts or of the bureaucracy of East Germany remain valid but can be disregarded if they are found to be incompatible with fundamental principles of the rule of law. In any event, the BGH decided that even if the 'Act of State' doctrine did apply, it could not be used by defendant W since he cannot be treated as a representative of a foreign state that no longer exists.

Section 27 Grenzgesetz-DDR

12.21 The BGH indicated that s 27 *Grenzgesetz* could be interpreted in three ways. First, it could be seen as a total justification for border shootings resulting in the death of escapees. Second, it could be interpreted in the light of other East German legal and constitutional provisions, leading to the conclusion that the excessive and disproportionate use of firearms at the border was not justified. Third, s 27 could be challenged as contrary to natural law or internationally acknowledged human rights. The BGH mainly concentrated on this third interpretation, which involved a consideration of the 'minimum content' of natural law. It concluded that orders to shoot escapees could not be recognised as valid 'law' because they offended the 'minimum content' of natural law.[11]

The minimum content of natural law

12.22 Before the Second World War, the noted legal philosopher Gustav Radbruch was one of Germany's chief representatives of the school of jurisprudence known as 'relativism'.[12] This school accepted that a legal character can be attributed to a 'law' if it has been adopted in accordance with the state's procedural requirements; the content of the law itself was

10. 168 US 250 at 252 (1897).
11. Known in Germany as the heart of the law (*Kernbereich des Rechts*).
12. G Radbruch, 'Legal Philosophy' in *The Legal Philosophies of Lask, Radbruch, and Dabin* (trans K Wilk), Harvard University Press, Cambridge, Massachusetts, 1950, p 57.

irrelevant. The jurisprudential school of 'relativism' thus separated law and morals.[13] Radbruch also suggested that effective, yet pernicious, laws may be valuable since they promote legal certainty.[14] However, following the Second World War, Radbruch recognised that there are fundamental principles of morality which are part of the very concept of 'law' (*Recht*). He argued that no law could be valid if it contravened basic principles of morality, even if it conformed to the formal criteria of validity of the legal system. A law which completely denied human rights could not possess the quality of 'law'. A duty of obedience to the law can never be grounded on the mere factual existence of a formally valid command, irrespective of the contents of the relevant legal rule. Thus, in extreme cases of conflict between law and justice, statute law must yield to superior requirements of justice. These requirements could not be obviated by a return to an outmoded and immoral positivist system.

12.23 In Radbruch's opinion, if the 'minimum content' of natural law had been breached by the 'shoot to kill' order, East German legal justifications could not prevail and would in effect be irrelevant. However, the BGH was reluctant to apply the 'Radbruch formula' to the border guard cases, since the killing of escapees at an internal border cannot be equated to the genocide practised during the National Socialist era. Nonetheless, the principles applied in respect of Nazi atrocities could potentially have been considered in determining whether East Germany had violated the requirements of natural law and whether it had overstepped the limits which are generally accepted in civilised countries. The BGH did not decide whether the former East Germany had exceeded those limits. The BGH found that only in extreme circumstances should a justification existing at the time of the commission of the crime not be considered. Only in such circumstances would it be appropriate to rely on Radbruch's formula.

12.24 The BGH's reluctance to rely upon natural law reasoning can probably be explained by the obvious difficulties associated with any attempt to define the 'minimum content' of natural law. However, it is significant that the BGH admitted that, in principle, laws could be disregarded if they violate basic principles of justice and human rights.

International human rights

12.25 Instead of invoking natural law, the BGH based its decision on more positivistic grounds: East Germany's breach of international human rights law. Specifically, the court considered the International Covenant on Civil and Political Rights.[15] On 2 November 1973, East Germany became a signatory to the Covenant, which it ratified on 8 November 1974. However, the Covenant remained unimplemented in domestic law. State practice did not correspond to the formal written laws, which superficially appeared to

13. G Radbruch, 1950, p 113.
14. G Radbruch, 1950, p 118.
15. 999 UNTS 171.

comply with international human rights instruments. The BGH opined that the Covenant could not be interpreted by ratifying states so as to make it conform to their ideological or political systems. Indeed, the Covenant sets a minimum level of protection of civil and political rights which must be adhered to by all parties.

12.26 Article 12(2) of the Covenant protects the freedom to leave one's country. The court decided that East Germany's passport law of 28 June 1979 breached Article 12(2) of the Covenant, since restrictions on a person's right to leave his or her country should be limited to clearly specified circumstances.

12.27 According to Article 6 of the Covenant, a person cannot be arbitrarily deprived of his or her life. The border practices of East Germany contravened this Article. The BGH interpreted the prohibition upon arbitrary deprivation of life as importing a 'proportionality principle',[16] requiring a rational relationship between a 'crime' and its 'punishment'. The East German interpretation of s 27 *Grenzgesetz* violated this principle since it condoned the killing of a person simply for attempting to cross the national border. Shootings at the border could only be justified in situations of absolute necessity.

12.28 The BGH also discussed a fatal border shooting by a West German customs official. The official fired a machine gun at two people on a motorbike from a distance of around 100 metres. The BGH found the shooting justified since it appeared that the two people were smuggling hard drugs, leading to a real likelihood of a life-threatening situation. This finding left the BGH open to accusations of applying a double standard: one for West German customs officials and one for East German border guards. It also shows that in the view of the BGH, a fatal border shooting does not, of itself, constitute a breach of the Covenant. A violation only occurs if the fatal use of firearms is unnecessary for the purposes of enabling the state to achieve its objective. The BGH distinguished East German practice on the ground that there was unquestionable evidence that East German border guards were encouraged to kill fleeing people in order to prevent them from reaching the West. This practice conveniently overlooked the requirement that the means used be proportionate to the objective of preventing border crossings. On 3 May 1974, Communist Party Leader Erich Honecker had decreed that firearms were to be used, and that the shooter would be rewarded, if escape was prevented. Up until 1987 guards were instructed to capture or to annihilate [*vernichten*] escapees.

12.29 The BGH concluded that the disproportionate use of firearms at the border violated the Covenant. The shootings were not absolutely necessary for the security of the border because the execution of a fleeing person with machine guns and mines was grossly disproportionate to the aim of preventing border crossings. The BGH noted that the East German practice of keeping

16. See *Tennesee v Garner* 471 US 1 (1985) with regards to the proportionality principle in an American context.

fatal shootings secret deprived the state of its excuse for the shootings: the deterrence of future border crossings.

The defence of following orders: s 258 StGB-DDR

12.30 It will be recalled that s 258 StGB-DDR provided that a soldier (including a border guard) following orders was not criminally responsible for carrying out the order unless the order constituted a blatant violation of the recognised rules of international law or a criminal statute. Thus, if a border guard was subjectively aware that his conduct was illegal, he would not be exempt from criminal prosecution. In addition, a border guard could not avail himself of the defence in s 258 StGB-DDR if, on an objective test, it was obvious that his conduct was incompatible with recognised rules of international law.

12.31 The BGH held that border guards, in the circumstances of this case, could not rely upon the defence of carrying out orders because they could not have been unaware of the inherent immorality of the order to kill escapees. Despite the indoctrination, rearing and education in East Germany, the fatal shooting of fleeing people offends ethical norms to such a degree that the defendants could not have been unaware of the immorality of the order 'to shoot to kill'. For example, on state holidays, when international guests were in the country, guards were given strict orders only to use firearms in emergencies. Such orders would have alerted border guards to the possibility that the fatal use of firearms was immoral. Surely, border guards should have reflected on why the use of firearms was condoned and even required on some days but restricted on other days. And while it was the practice that after a border killing a guard would be decorated, most guards did not wear their medals for fear of abuse from members of the public.

12.32 Furthermore, all reports of shootings at the border were suppressed. Because of the secrecy surrounding border killings, people were not always aware about what would happen if they attempted to flee. The point is that, to the extent that the East German government kept knowledge of its ruthless prevention of border crossings from its own people, it may have been responsible for an increase in the number of attempted escapes and associated deaths. In this way, the leaders of the former East Germany may be liable for inciting people to harm themselves.

12.33 The BGH examined whether border killings came within the category of 'crimes against humanity'. Article 6 of the Charter of the International Military Tribunal[17] defined 'crimes against humanity' as:

> [M]urder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

17. 82 UNTS 284.

The killings at the German border were not deemed to fall within the category of 'crimes against humanity'. This approach certainly enabled the court to give the impression that its decision was based on East German law existing at the time of the fatal border shootings, for s 258 StGB-DDR placed an obligation on soldiers to disregard orders that were clearly incompatible with recognised rules of international law.

12.34 The BGH's decision accords with international practice. For example, although a provision similar to s 258 StGB-DDR is found in s 5 of the West German Military Code (*Wehrgesetzbuch*), the German Supreme Court, in the celebrated *Llandovery Castle* case of 1921, nevertheless convicted two lieutenants of murder for killing the defenceless passengers of a lifeboat even though they had followed the commands of a superior officer.[18] Similarly, the Australian edition of the Manual of Military Law 1941 (amended in 1944) provides: 'The fact that a rule of warfare has been violated in pursuance of an order ... does not deprive the act in question of its character as a war crime; neither does it, in principle, confer upon the perpetrator immunity from punishment' and that 'members of the armed forces are bound to obey lawful orders only and that they cannot therefore escape liability if, in obedience to a command, they commit acts which both violate unchallenged rules of warfare and outrage the general sentiment of humanity'.[19]

Judgment of 20 January 1992

Facts of the case

12.35 This widely publicised case decided by the Berlin District Court involved the border killing of Christian Gueffroy and the wounding of his friend Christian Gaudian on 6 February 1989.[20] Four former border guards were tried for murder. Defendant Ingo Heinrich was sentenced to three and a half years' imprisonment. Andreas Kühnpast was given a two-year suspended sentence for attempted murder. His sentence was suspended because he showed genuine remorse. A not-guilty verdict was returned in the case of Mike Schmidt because he had not shot at any of the escapees. A not-guilty verdict was given in the case of Peter Schmett because it had been proven that he had targeted the feet of the escapees or the ground. The court reasoned that both Schmidt's and Schmett's actions were proportionate to the problem

18. Lord Russell of Liverpool, *The Knights of Bushido*, Corgi Books, London, 1972, pp 244–248. On the status of the defence of following orders in common law jurisdictions, see P Gillies, *Criminal Law*, 3rd ed, Law Book Co, Sydney, 1993, p 212.
19. *Australian Edition of Manual of Military Law* Commonwealth Government Printer, Canberra, 1941, para 443.
20. See about this case J Hruschka, 'Die Todesschüsse an der Berliner Mauer vor Gericht', (1992) 13 *Juristen Zeitung* 667; K A Adams, 'What is Just? The Rule of Law and Natural Law in the Trials of Former East German Border Guards' (1993) 29 *Stanford Journal of International Law* 271 at 295–301.

with which they were faced on 6 February 1989, and that, therefore, they had acted in accordance with the letter of the East German law.

Different treatment of the defendants

12.36 The defence wanted a not-guilty verdict for all four defendants because the deadly shots had been fired in accordance with East German law. But the prosecution demanded suspended sentences for the four accused because they should have known that the relevant East German law was unjust. The prosecution argued that an unequal (and less severe) sentence could only be justified in the case of Schmidt, who gave the order to shoot but did not shoot himself.

12.37 In effect both the defence and the prosecution urged the court to treat the four accused equally: they should all be declared not guilty or the same suspended sentence should be imposed upon all of them. However, the court declined to follow this course, rejecting the claim that the accused be treated equally in matters of guilt and punishment. The court did not characterise the acts of 6 February 1989 as a 'common act' of the four accused against the two escapees. Instead, the court's judgment sought to identify a main culprit. The court, in differentiating the states of guilt of the accused, decided that no law had been broken by two of the border guards. In targeting the feet of the escapees, Schmett acted in accordance with East German law. No law was breached by Schmidt's order to shoot. However, East German law was violated in the cases of Kühnpast and Heinrich. Kühnpast had fired at the escapees from a great distance, thereby endangering the lives of Gueffroy and Gaudian, though he did not seriously injure them. There was incontrovertible evidence that the deadly shots had been fired by Heinrich.

12.38 In a feeble attempt to come to terms with Radbruch's 'minimum content' theory of natural law, the court affirmed that this theory limits the power of the state. Hence, not every statute is 'law'.[21] There is a right to life which no statute (*Gesetz*) may violate. In the circumstances of this case, the order to shoot did not deserve to be obeyed.

Importance of the border guard judgments

12.39 While the Berlin District Court relied more on natural law principles, the BGH chose to base its decision on international human rights codifications. Either way, in both judgments the courts of the reunified Germany insisted that its people should have had a more acute moral vision. These judgments are authority for the proposition that, under present legal developments in Germany, it is possible to prosecute the executors of 'immoral' orders given by higher authorities. As a result of the BGH finding that the East German implementation of the laws (rather than the letter of laws) breached

21. 'Statute' is translated into German as *Gesetz*; 'law' is translated as *Recht*. The Judge said (literally translated) that 'what is *Gesetz* (statute) is not always *Recht*'. Thus, *Recht* and *Gesetz* do not always overlap.

international human rights standards, former members of the East German legislature, who passed these laws, are able to avoid prosecution.[22]

12.40 The fact that the BGH did not equate fatal border shootings with crimes committed in the National Socialist era does not detract from the criminal liability of judges and prosecutors who were involved in the legal justice system. They include the judges who imposed harsh sentences on those who were unsuccessful in their attempts to cross the border; these judges themselves were involved in breaching their own East German laws.

12.41 Neither the Berlin District Court nor the BGH satisfactorily answered some of the most difficult, yet perennial, questions of jurisprudence. These questions include the following. Under what circumstances is it impossible to attribute a 'legal' character to the orders of the authorities? When should people disobey laws which have been validly adopted by the legislature? Can the acts of defendants be justified on the ground that they were following orders? The court did not adequately consider any of these questions.

The border guard cases in the European Court of Human Rights

12.42 Nevertheless, both judgments have influenced subsequent border guard cases which have been considered by various courts of the reunified Germany in the 1990's.[23] These courts tried to come to terms, to varying degrees, with the perennial questions of jurisprudence mentioned above. Although it not is the purpose of this chapter to discuss these subsequent cases, it is worthwhile to briefly mention that several border guard cases were also considered by the European Court of Human Rights in *Streletz, Kessler and Krenz v Germany*.[24]

12.43 The applicants in this case relied on s 27(2) *Grenzgesetz* to justify their acts. In particular, they denounced the *ex post facto* interpretation of the law of the DDR as a violation of Article 7§1 of the European Convention of Human Rights, which relevantly provides that '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

22. Prominent members of the former East German regime and security service have been prosecuted. Some of these prosecutions have been successful. However, Erich Honecker succeeded in avoiding prosecution on the grounds of old age and ill-health. See M J Lasky, 'The Trial of Erich Honecker—Before and After', (Winter 1993) *Australia and World Affairs* 11.

23. For a discussion of these cases, see P E Quint, 'The Border Guard Trials and the East German Past—Seven Arguments', (2000) 48 *American Journal of Comparative Law* 541; R Geiger, 'The German Border Guard Cases and International Human Rights', (1998) 9 *European Journal of International Law* 540.

24. *Streletz*, note 3 above. See also J Arnold, N Karsten and H Kreicker, 'The German Border Guard Cases before the European Court of Human Rights', (2003) 11(1) *European Journal of Crime, Criminal Law and Criminal Justice* 67.

when it was committed'. In contrast, the German Government submitted that 'anyone could have foreseen that, in the event of a change of regime ... these acts might constitute criminal offences'.

12.44 The Court, relying on *S W v United Kingdom*[25] and *C R v United Kingdom*,[26] admitted that Article 7 of the Convention is 'an essential element of the rule of law'.[27] It also acknowledged that s 27(2) *Grenzgesetz* justifies the use of firearms 'to prevent the imminent commission or continuation of an offence which appears in the circumstances to constitute a serious crime".[28] The Court indicated that s 27(2) *Grenzgesetz* must be interpreted 'in the light of the principles enshrined in the Constitution'[29] of East Germany itself. The Court concluded that, when interpreted in the light of the principles of this Constitution, 'the applicants' conviction by the German courts ... does not appear ... to have been either arbitrary or contrary to Article 7 § 1 of the Convention.'[30] In addition, the Court considered that the East German practice to protect the border at all costs 'flagrantly infringed the fundamental rights enshrined in Articles 19 and 30'[31] of the East German Constitution as well as the International Covenant of Civil and Political Rights. The applicants could, therefore, easily have foreseen that their acts constituted offences which violated these documents. The Court stated:

> The State practice in issue was to a great extent the work of the applicants themselves, who, as political leaders, knew – or should have known – that it infringed both fundamental rights and human rights, since they could not have been ignorant of the legislation of their own country ... the Court considers that at the time when they were committed the applicants' acts also constituted offences defined with sufficient accessibility and foreseeability by the rules of international law on the protection of human rights.[32]

The duty to disobey an immoral law

12.45 The attribution of criminal responsibility to border guards, who conducted themselves according to rules which they regarded as valid 'law' when the acts were committed, is highly controversial because it may be argued, with some plausibility, that it violated the principle that no person should be punished except for the breach of the law (*nulla poena sine lege*). The invalidation of a 'law' which is adopted in accordance with the state's procedural requirements is based on the ground that its provisions are too inhumane to be characterised as law. In the judgments discussed above, the

25. (1995) 21 EHRR 363, [34]-[36]; Series A no 335-B.
26. (1995) 21 EHRR 363,, [32]-[34]; Series A no 335-C.
27. *Streletz*, note 3 above, [50]. See also *Korbeley v Hungary* (no 9174/02), (2010) 50 EHRR 48.
28. *Streletz*, note 3 above, [59].
29. *Streletz*, note 3 above, [61].
30. *Streletz*, note 3 above, [64].
31. *Streletz*, note 3 above, [79].
32. *Streletz*, note 3 above, [103].

courts assumed that the 'shoot to kill' policy violated the 'minimum content' of natural law but failed to examine this issue in detail. In particular, the courts did not establish any guidelines which could be used as benchmarks against which the morality or immorality of the border guards' conduct could be tested. The reasoning of the courts rested on the assumption that people possess a critical moral and legal vision which enables them to readily recognise the 'immoral laws' that higher law requires them to disobey.

Natural law versus legal positivism

12.46 The question whether there is a duty to disobey immoral laws was debated by two influential legal philosophers, H L A Hart and Lon L Fuller, in the *Harvard Law Review* in 1958. The debate was triggered by the changed views, after the Second World War, of Radbruch, and the treatment, by German courts, of grudge informers. Professor Hart took the view that what is law and what ought to be law are two separate issues.[33] In contrast, Professor Fuller, a proponent of natural law theory, argued forcefully that law must contain a minimum moral content for it to be characterised as law. A rule which did not satisfy this minimum content could not legitimately command the obedience of citizens. For Fuller, law is 'an object of human striving',[34] and a formal description of a human institution which does not include a description of its purposes must be inadequate. He revealed his preference for natural law theory when, in his assessment of Nazi atrocities, he stated that:

> We have ... to inquire how much of a legal system survived the general debasement and perversion of all forms of social order that occurred under the Nazi rule, and what moral implications this mutilated system had for the conscientious citizen forced to live under it.[35]

12.47 In his book *The Morality of Law*,[36] Professor Fuller makes a distinction between the external and the internal morality of law. Whereas his concept of external morality relates to the extent to which laws deserve to be respected and obeyed, internal morality deals with the minimum conditions which every mature legal system must satisfy in order to achieve its purpose. These conditions, which are inherent in the concept of 'law', include the requirements that rules must be prospective, must not be constantly changing, and their implementation by officials must not be perverted. It could be argued that the relevant East German laws failed to meet these conditions since, in accordance with s 3(1) StGB-DDR, certain acts could retrospectively become 'crimes', and there was a discrepancy between the rules and the way in which they were implemented. Although Fuller's conditions do not, in themselves,

33. H L A Hart, 'Positivism and the Separation of Law and Morals', (1958) 71 *Harvard Law Review* 593.
34. L L Fuller, 'Positivism and Fidelity to Law—A Reply to Professor Hart', (1958) 71 *Harvard Law Review* 630 at 646.
35. L L Fuller, 1958, note 33 above, p 646.
36. L L Fuller, *The Morality of Law*, rev ed, Yale University Press, New Haven, Connecticut, 1969.

guarantee that legal rules will be just (a point made by Hart), their satisfaction will usually promote respect for the rule of law. Therefore, these conditions possess moral value which is worthy of preservation.

Difficulties in the application of the natural law theory

12.48 However, arguments which are based on the 'minimum content' of the law suffer from serious intellectual infirmities. The notion of a 'minimum content' of natural law must somehow be given an objective existence. That is, there must be shown to exist some objectively valid body of ethical rules with which laws must be compatible. Natural law proponents argue that these rules derive from the 'nature of humans' or come from God, as revealed in the scriptures. The problem with this line of argument is that it involves the attribution of the property of 'goodness' or 'badness' to state-imposed acts. However, 'goodness' and 'badness' cannot be treated as properties. If I were to say that this page is green, then it can easily be ascertained that it is green because 'green-ness' is a property. In contrast, ethical rules codify values that are subject to disagreement.

12.49 It is not the purpose of this chapter to consider this issue in detail. It suffices for my present purposes to point out that there are obvious complications involved in any attempt to identify those ethical rules which are part of the 'minimum content' of natural law. It may plausibly be claimed that this 'minimum content' consists of nothing else but standards set by individuals for themselves, according to their own experiences. Hans Kelsen encapsulated this view in his book *What is Justice?* He argued that the question of whether one value is superior to another cannot be resolved in the same way as the question of whether iron is heavier than water, or water heavier than wood. He continued:

> This latter question can be resolved by experience in a rational scientific way, but the question as to the highest value in the subjective sense of the term can be decided only emotionally, by the feelings or the wishes of the deciding subject. One subject may be led by his emotions to prefer personal freedom; another, social security; one, the welfare of the single individual; the other, the welfare of the whole nation. By no rational consideration can it be proved that the one is right or the other wrong.[37]

12.50 If Kelsen is right, incompatible values can claim equal validity, even though they cannot co-exist in the same value systems. Both the objective and subjective (or relativist) approaches to the 'minimum content' theory of natural law are, however, inflexible in that they are implacably opposed to compromises.

12.51 To question natural law arguments is not to reject the pursuit of high ideals, only to question whether such ideals have any inherent legal character. The pursuit of such ideals undoubtedly contributes to the betterment of society. Indeed, Eugene Kamenka reminded us that:

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37. H Kelsen, *What is Justice?*, University of California Press, Berkeley, 1957, p 141.

> A crude concept of 'value-free' social science as implying moral, cultural and even epistemological relativism, together with a levelling version of democracy, does indeed end in the desire to excise the concept of judgment from social and moral life and in giving the word 'culture' many meanings and thus no meaning at all.[38]

The German tradition versus the critical tradition

12.52 Reliance upon natural law theory by German courts also overlooks the fact that, historically and traditionally, the 'German tradition of obedience' to the law placed a heavy onus of justification on people who wanted to disobey 'unjust' laws. This tradition certainly lasted in West Germany until after the Second World War, when it was superseded gradually by what could be called a 'critical tradition' which made it feasible for West German citizens to contemplate disobeying a law which they recognise as 'immoral', or one which obviously offends supra-positive norms. In 1968 a new Article 20(4) was inserted into the West German Constitution. This Article provides that '[a]ll Germans have the right to resist any person seeking to abolish th[e] constitutional order, should no other remedy be possible.' In contrast, the German tradition of obedience to the law largely persisted in East Germany until reunification. Subject to the validity of this point, it can reasonably be argued that the judgments of the courts, discussed above, involve the imposition of the post-war West German critical tradition on East German border guards who, regardless of the morality of the relevant orders or laws, were undoubtedly imbued with the German tradition of unqualified obedience to the law.

12.53 The German tradition to obey the state's laws was a derivative of the individual's obligation to obey God. Georg G Iggers, in tracing the origins of German historicism, discussed the role which Lutheran theology played in the development of this tradition:

> In the place of a concept of a rational law of Nature, Luther substituted an irrational law of Nature. Luther argued in accordance with St Paul's admonition that 'there is no power but of God: the powers that be are ordained of God.' Every state represented the will of God, and thus required the complete obedience of the Christian in all matters temporal. Reason therefore expressed itself not in abstract moral commandments, but in historical institutions. The positive authorities were the concrete manifestations of natural law.[39]

12.54 As the state was ordained by God to govern the secular sphere, it followed that obedience to God demanded obedience to the state. Where the morality of the individual came into conflict with the morality of the state, the morality of the state prevailed. While Lutheran theology recognised the existence of the doctrine of resistance to the state, it only condoned

38. E Kamenka, 'Australia Made Me ... But Which Australia is Mine?', John Curtin Memorial Lecture, Australian National University, Canberra, 1993, p 16.
39. G G Iggers, *The German Conception of History*, Wesleyan University Press, Middletown, Connecticut, 1968, pp 33–34.

disobedience to the state in cases where the state stepped outside the secular sphere and trespassed into the spiritual sphere.

12.55 The idea that the state is the secular expression of God's will is, of course, not novel. St Thomas Aquinas argued in his great treatise *Summa Theologica* that the state is part of a divine order which is controlled by God. Consequently, humans are bound to obey human laws to the extent that they are compatible with natural law, which is discoverable through reason or revealed as divine law. But for Aquinas, the duty to disobey human rules which violate natural law or divine law is, however, not absolute. For him, the subjects of rulers may, in exceptional circumstances, be obliged to obey even immoral laws when necessary to avoid 'scandal or some particular danger'.[40] This latter point indicates that Aquinas was of the view that the consequences of disobeying immoral laws must be considered by people. If the dangers resulting from disobedience substantially outweigh its benefits, people should choose obedience.

12.56 In Germany, the religious tradition of obedience to authority was reinforced by Herder's thesis of the benevolence of history. Herder contended that history was the secular expression of a higher order.[41] The German nation, being the product of its own historical experience, was considered to be the product of a higher order of history and the secular expression of the will of God. By implication, the nation's spirit was an historical force and was, therefore, the product of a higher order.

12.57 Hegel translated this tradition of obedience into political terms. Hegelian theory rejected the existence of a universal standard of value. This precluded the construction of an ethical norm against which the moral standards of the state could be compared. In the absence of an universal norm, the morality of the state was defined by the state itself. The Hegelian state 'is not an institution for the realization of ethics but is this realisation itself'.[42] Thus, the morality of the individual came to be subordinated to the morality of the state: where the individual acted under the dictates of the state, the individual was subject to the moral standards of the state.

12.58 This German tradition of obedience to the law influenced the positivist theory of law, which arguably dominated German legal thinking until after the Second World War.[43] Although a number of competing criteria could be used to clarify the possible meanings of 'positivism', in the main, its proponents argued that the validity of law depended on the satisfaction of minimum procedural requirements and did not involve an examination

40. T Aquinas, *Summa Theologica*, 1a 2ae, Question 91, Arts 1 and 2.
41. G G Iggers, 1968, note 38 above, pp 34–37.
42. C J Friedrich, *The Philosophy of Law in Historical Perspective*, University of Chicago Press, Chicago, 1963, p 131.
43. K Loewenstein, 'Reconstruction of the Administration of Justice in American-Occupied Germany', (1948) 61 *Harvard Law Review* 419.

of its content.[44] Legal validity implied an obligation to obey the law. Such obligation was usually reinforced by the judiciary. Loewenstein observed that, traditionally, a German judge 'is unaffected by intellectual doubts as to the intrinsic justice of the legal rule he has to apply, provided it is enacted by the authority of the State, and he does not question whether the authority is legitimate or not'.[45] The formulation of the judges' obligation to obey the law was as important to German law as the formulation of due process of law was to the law of the United States.[46] This understanding of the law was also formulated by Leon Duguit when he said that, if 'the State is by nature a sovereign will, that is to say, a will which commands individuals and is not subordinated to any other will, how can it be in subjection to a rule binding upon it, since by definition there is no other will capable of imposing a rule upon it?'[47] In 1883, the German Imperial Court asserted that 'the constitutional provision that well-acquired rights must not be injured, is to be understood only as a rule for the legislative power itself to interpret, and does not signify that a command given by the legislative power should be left disregarded by the judge because it injures well-acquired rights'.[48] Positive law, by definition, is the product of the higher order and, therefore, commands unswerving loyalty.

The critical tradition: judicial review of legislation

12.59 As the German tradition combined morality and power in the state, it denied the need to restrict the state's legislative power. In West Germany, this was reflected in the absence until 1949 of a system of judicial review of legislation involving the testing of laws in the light of a higher human law, the Constitution being an example, or of higher moral principles. The German tradition had the effect of subordinating the power to review the actions of the state to the obligation to obey the state and its laws. Judicial review of legislation was seen by proponents of legal positivism as impeding the legislature. The obligation to obey the law was contained in Article 102 of the Weimar Constitution, according to which the judges, whilst independent, were subject only to the (positive) law. This obligation is also contained in virtually the same form in Article 97(1) of the Basic Law of 1949, according to which '[t]he judges shall be independent and subject only to the law'.

12.60 However, some standards of a higher moral order which had been part of the German Civil Code, for example, good faith and good morals,

44. H Rottleuthner, 'Legal Positivism and National Socialism: A Contribution to a Theory of Legal Development' in *Critical Legal Thought: An American-German Debate* (eds C Joerges and D M Trubek), Nomos, Baden-Baden, 1989, pp 88–89.
45. K Loewenstein, 1948, note 42 above, p 432.
46. H Nagel, 'Judicial Review in Germany', (1954) 3 *American Journal of Comparative Law* 236.
47. L Duguit, 'The Law and the State', (1917) 31 *Harvard Law Review* 1 at 7.
48. Decision of 17 February 1883, Entscheidungen des Reichsgerichts in Zivilsachen 9, 232 [235–236]. See D P Kommers, *Judicial Politics in West Germany. A Study of the Federal Constitutional Court*, Sage Publications, Beverly Hills, 1976, p 36.

were rehabilitated after the Second World War by courts.[49] More importantly, the Basic Law of 1949, in providing for judicial review of legislation, overcame the restriction on the power to review the content of the law. Indeed, in its Article 1(3) it provided that the 'basic rights shall bind the legislature, the executive and the judiciary as directly enforceable law'. Article 20(3) stipulates that '[l]egislation shall be subject to the constitutional order; the executive and the judiciary shall be bound by law and justice'. It could be argued that these constitutional provisions jointly recognise the right of the individual to resist an immoral law (*gesetzliches Unrecht*) that violates the basic rights of people. Thus, under present constitutional arrangements, judges have an implied power to review the content of the ordinary law in the light of the Basic Law. Since 1949, West German citizens could challenge laws which are opposed to the fundamental moral values of the community. German jurisprudence since the Second World War interpreted the rights enshrined in the Basic Law not as granted by the Constitution, but as existing before it and independently of it.[50]

The absence of the critical tradition in East Germany

12.61 However, the critical tradition adopted by the West Germans after the Second World War, as exemplified in the Basic Law, could not be extended to East Germany because any review of legislation would have involved a challenge to the ruling communist elite. In East Germany the German tradition of unquestioned obedience to the law remained a controlling influence. In their training and education, border guards were imbued with the German tradition of obedience to the law.[51] The West German critical tradition, which allows West German citizens to disobey laws offending higher moral principles, was alien to East German law. While West Germany repudiated the German tradition of obedience after the Second World War, East German law elevated it as an ideal. It is thus necessary to take into account that East German social thought and practice were inimical to the development of a critical tradition. In advocating uncritical obedience to the state, the German tradition which continued to exert an inordinate influence in East Germany precluded the development of a critical tradition which would have facilitated a decision by East German citizens to disobey an 'immoral' law. If this understanding of the border guard cases is correct, then the willingness of East German border guards to follow orders is not an historic aberration of the German tradition.

12.62 A consideration of the actions of border guards accused of fatal shootings should ideally have taken into account the strong influence that the tradition of obeying laws has had in German history. If this tradition is overlooked as it was in the two German judgments discussed in this chapter, ideas foreign to

49. See eg *Lüth's* Case 7 BVerfGE 198 (1958).
50. See the cases discussed in D P Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, Duke University Press, Durham and London, 1989.
51. See *K.-H.W. v Germany* (no 37201/97) (2003) 36 EHRR 59 (p 1081), especially the partly dissenting opinion of Judge Cabral Barreto).

the border guards are imposed upon them. The difficulties involved in the identification of the 'minimum' content of natural law by people who have not sufficiently been exposed to the critical tradition are apparent. Such imposition may result in 'unjust' decisions because it involves the application of West Germany's critical tradition to East German conditions.

12.63 The injustice lies in the fact that the apparently 'just' convictions of East German border guards do not appropriately consider the German tradition of obedience to law. This injustice relates also, among other things, to the difficulties involved in the identification of the 'minimum content' of natural law by people who have never been exposed to the critical tradition. Why should the conduct of citizens who lived in a communist dictatorship, where freedom of action was severely circumscribed, be judged in accordance with standards which apply in a liberal democracy, where freedom of action is broad? Why should an obligation to disobey an immoral law be imposed on ordinary border guards who may not have had the means to discover the extent of the alleged immorality? How is it possible for people, in general, to distinguish acts that are compatible with the 'minimum content' of natural law and actions that are not?

12.64 The failure of the courts of the reunified Germany to find justifications in East German law for the fatal shootings, under the guise of adherence to natural law, erodes the certainty of the law and the legitimate expectations of the border guards. It is worthwhile to speculate whether the erosion of these expectations leads to the unintentional development of a mobocratic society, since the 'minimum content' of natural law is not defined by any unanimously recognised set of values. It is useful, in this context, to be mindful of Kamenka's prophetic reminder that '[v]irtues pressed beyond a certain point become vices, and particular virtues need to be balanced by others that make inconsistent, even contradictory, demands.'[52] As seen before, Aquinas also alerts us to the need to balance the 'higher' moral principles which the German courts indicated should have been followed by the border guards against other principles which require obedience to laws which have been validly enacted. Kamenka's and Aquinas's message is not unimportant. It points to the societal cost which is inevitably associated with irrational and indiscriminate disregard for the legal system. As Fuller reminds us, compliance with his internal conditions satisfies the rule of law, which, itself, is a moral value worthy of protection. If this admonition is disregarded, the duty to disobey an immoral law might erode and adversely affect respect for law and result in instability within a legal system since the validity of legal rules would constantly be in doubt.

Conclusion

12.65 Since the Second World War, there has always been much speculation as to whether the development of an anti-positivist attitude would be ephemeral in character, or whether it would result in a lasting reorientation

52. E Kamenka, 1993, note 37 above, pp 13–14.

of legal philosophical thinking in Germany. The application by the post-war German courts of the 'minimum content' of natural law in the border guard cases indicates that natural law thinking reasserts itself whenever there is a need to react against the evils committed by a totalitarian regime.

12.66 The judgments of the courts discussed in this chapter suggest that the prosecution and conviction of the border guards result in injustices masquerading as justice. Although the border guard cases appear, on the surface, to have delivered substantive justice, the legal system of the reunified Germany failed to achieve a satisfactory resolution to the perennial problem of whether citizens have a duty to disobey immoral laws.